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May 4, 2011

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Opposition to S. 623, Sunshine in Litigation Act of 2011

Dear Chairman Leahy and Ranking Member Grassley:

I am writing on behalf of the American Bar Association to voice our strong opposition to S. 623, the Sunshine in Litigation Act of 2011, which the Committee is scheduled to consider Thursday, May 5, 2011.

As we have expressed on prior occasions, the ABA opposes the bill for two reasons. First, the bill would impose additional, unnecessary requirements on, and restrict the discretion of, federal courts in ways that will only increase the time and expense of litigation. Second, the bill would circumvent the Rules Enabling Act, the procedure established by Congress for revising rules in the federal courts.

Substantive Concerns

The current version of Rule 26(c) and the case law applying it give judges appropriate authority to determine when to enter a protective order and what provisions should or should not be included in light of the particular facts and circumstances of each case. There are three substantive flaws in the proposed legislation:

First, there is no demonstrable deficiency in the current version of Rule 26(c) that requires a change. The Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure have studied this issue since the 1990s. In their May 2, 2011 letter to your committee, they report that they have found “no significant problem of protective orders impeding access to information that affects the public health or safety.” They also mention a May 2010 conference on civil litigation sponsored by the Civil Rules Committee, during which “no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts.”

Second, requiring independent findings of fact before any protective order could be issued “[i]n any civil action in which the pleadings state facts that are relevant to the protection of public health or safety,” as section 1660(a)(1) contemplates, would impose an enormous burden on both the courts and litigants. Requiring a court to make detailed findings at the beginning of a case, possibly on a document-by-document basis, will impose an impossible burden on the court and the litigants. As the Judicial Conference notes in its letter: “Information sought in discovery does not come with labels such as ‘impacts public health or safety’ or ‘raises specific and substantial interest in confidentiality.’” Protective orders facilitate the timely production of documents and permit challenges to particular documents after the parties have had a chance to review them and the case has evolved to the point that the parties and the court can understand their significance and context.

Third, the requirement in section 1660(c) that judges entering an order approving a sealed settlement agreement must make the same particularized findings of fact necessary for discovery protective orders is also unnecessary. Only a small number of cases involve a sealed settlement agreement, and only a portion of those cases involve a potential public health or safety hazard. In those cases that do, the complaints and other documents that are a matter of public record typically contain sufficient details about the alleged hazard or harm to apprise the public of the risk, the source of the risk, and the harm it allegedly causes. Sealing a settlement agreement in these cases would have no real impact on the public’s ability to be informed of potential health or safety hazards.

Procedural Concerns

The Rules Enabling Act reflects Congress’ determination of the most effective way to amend the Federal Rules of Civil Procedure. The process underlying the Act is based on three fundamental concepts: (1) the essential, central role of the judiciary in initiating and formulating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation by members of the legal profession, in considering changes to the rules; and (3) congressional review before changes are adopted.

S. 623 would depart from this balanced and inclusive process. The failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the Act and could harm the effective functioning of the judicial system. By disregarding the longstanding, successful process of court rules-making, S. 623 undercuts the third branch of government.

Conclusion

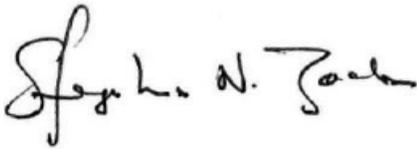
The current version of Rule 26(c) is and has been an appropriate, effective way to protect the rights of both litigants and the public, without overburdening the administration of justice in the federal courts. The ABA is deeply concerned that seeking a day in court will become a luxury item if courts and cases can not operate with greater efficiency and speed. Problems with federal judicial vacancies and court underfunding already wreak havoc with case schedules and the resulting time it takes to resolve a dispute. These expensive new rules would cost everyone, and

May 4, 2011

Page 3 of 3

make access to justice even more of a luxury item. Any proposed amendment to its provisions should be addressed through the existing Rules Enabling Act procedure.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen N. Zack". The signature is written in a cursive, flowing style.

Stephen N. Zack
President

cc: Members, Senate Committee on the Judiciary

**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544**

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CHAIR**

**PETER G. McCABE
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CRIMINAL RULES**

**SIDNEY A. FITZWATER
EVIDENCE RULES**

May 2, 2011

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

We write on behalf of the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to oppose the Sunshine in Litigation Act of 2011 (S. 623), which was introduced on March 17, 2011. The Rules Committees have consistently opposed the similar protective-order bills regularly introduced since 1991. Our letters opposing such bills are available on request. Our opposition to S. 623, like the opposition to those earlier bills, is based in part on the fact that they are inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. Our opposition is also based on the specific provisions of S. 623 and similar earlier bills.

Bills that would amend the Civil Rules to regulate the issuance of protective orders in discovery, similar to S. 623, have been introduced regularly since 1991. Like S. 623, these proposed bills would require courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to learn about the problems that these bills seek to solve and to bring the strengths of the Rules Enabling Act process to bear on any problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, and initiated and evaluated empirical research studies. The Committees' work led to the conclusions that: (1) there

was no evidence that discovery protective orders create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery will become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that adds conditions before any discovery protective order could be entered would impose significant burdens on the court system, resulting in increased delay and costs for litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

1. Proposed Legislation Amending Rule 26(c) of the Federal Rules of Civil Procedure

As part of its careful study of the issues, the Rules Committees asked the Federal Judicial Center (FJC) to undertake an empirical study on whether discovery protective orders issued in federal courts were operating to keep information about public safety or health hazards from the public. The FJC examined 38,179 civil cases filed in the District of Columbia, the Eastern District of Michigan, and the Eastern District of Pennsylvania from 1990 to 1992. The study showed that discovery protective orders were requested in about 6% of civil cases; most requests were made by motion; courts carefully reviewed such motions and denied or modified a substantial proportion of them; about one-quarter of the requests were made by party stipulations that courts usually accept; and most protective orders restricting parties from disclosing discovery material were entered in cases other than personal injury cases, in which public health and safety issues are most likely to arise.

Since the FJC study, the need for protective orders to maintain the confidentiality of highly sensitive personal and commercial information has only increased. The explosive growth in electronically stored information and the fact that most discovery is electronic, as well as the federal courts' adoption of electronic court filing systems that permit public remote electronic access to court files, have increased the risks of unduly imposing on privacy interests. Protective orders to safeguard against dissemination of highly personal and sensitive information are critical to both plaintiffs and defendants. If protective orders are restricted, litigation burdens are increased and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal information. Section 1660(d) of the proposed legislation, which provides a rebuttable presumption that the interest in protecting certain personally identifiable information of an individual outweighs the public interest in disclosure, is inadequate reassurance. The proposed legislation would impose a cumbersome and time-consuming process that is much less likely to accurately identify and protect confidential and sensitive personal or proprietary information than current protective order practices. Litigants would be required to absorb the added costs and delays of the process and bear an increased risk of disclosure of sensitive information.

The need for protective orders for effective discovery management has also increased with the explosive growth in electronically stored information. Even relatively small cases often involve huge volumes of information. Relying on the ability to designate information as confidential, parties voluntarily produce much information without the need for extensive direct judicial supervision. If obtaining an enforceable protective order required item-by-item judicial consideration to

determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, that would create discovery disputes. Requiring courts to review information—which can often amount to thousands or even millions of pages—to make such determinations, and requiring parties to litigate and courts to resolve related discovery disputes, would impose significant costs, burdens, and delays on the discovery process. Such satellite litigation would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Committees' study revealed no significant problem of protective orders impeding access to information that affects the public health or safety. Close examination of the commonly cited illustrations has shown that in these cases, information sufficient to protect public health or safety was publicly available from other sources. And the case law shows that when parties file motions for protective orders, courts review them carefully and grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts reexamine protective orders if intervenors or third parties raise public health or safety concerns about them.

The Committees' careful study led to the conclusion that no change to the present protective-order practice is warranted. The Committees' conclusion is grounded in case law, studies, and analyses developed and reviewed over the past 15 years.

The Rules Committees also asked the FJC to do an extensive empirical study on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation like S. 623. Both the discovery protective order and the settlement agreement studies have previously been provided to the Senate Judiciary Committee.¹

2. Specific Concerns about S. 623

a. Section 1660(a)(1): The Scope of S. 623

S. 623 is narrower than some earlier protective-order bills because it is limited to cases in which the pleadings “state facts that are relevant to the protection of public health or safety.” The language recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements S. 623 would impose. But the provisions defining the scope of S. 623 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether S. 623 applies. The standard of “facts that are relevant to the protection of public health or safety” is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of S. 623, or require the parties and court to spend

¹ Additional copies can be obtained at:

[http://www.fjc.gov/public/pdf.nsf/lookup/0029.pdf/\\$file/0029.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/0029.pdf/$file/0029.pdf);

<http://www.cklawreview.com/wp-content/uploads/vol81no2/Reagan.pdf>;

[http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/\\$file/sealset3.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/sealset3.pdf/$file/sealset3.pdf).

extensive time and resources litigating whether the statute applies.

b. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under S. 623, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. S. 623 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized. The information the parties exchange in discovery often includes highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. S. 623 would frustrate the role of protective orders and would make discovery even more burdensome, time-consuming, and expensive than it already is.

The language of the proposed legislation, as in similar prior bills, calls for a procedure under which no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of that information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The procedure in the proposed legislation would often require the judge's review to occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come with labels such as “impacts public health or safety”

or “raises specific and substantial interest in confidentiality.” The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are “specific and substantial” privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under the procedure set out in S. 623, a lawyer representing a client—plaintiff or defendant—could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in S. 623 would cause delays in access to the federal court system in all cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought in order to be able to make the findings required by the legislation, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under S. 623 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced. But such time-consuming and burdensome pre-discovery review is required by the language of S. 623, and will result in increased costs and delays.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include “challenge provisions” under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification are the relevance of the documents to

protecting public health or safety and the need to bring them to the appropriate regulatory agency, and the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of S. 623, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays S. 623 would impose. In contrast, the procedure established under S. 623 is ineffective to meet its purpose and would create severe problems in discovery.

c. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.

Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, S. 623 weakens the right of public access to court documents.

d. Section 1660(a)(2): Discovery Protective Orders After the Entry of Final Judgment

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge makes separate findings of fact that each of the requirements of (a)(1)(A) and (B) are met. The burden of proof provision in (a)(3) requires that the need for continuing

protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purposes of S. 623 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of “attorneys’ eyes only” provisions, which preclude a receiving attorney from sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney’s client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. S. 623 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

e. The Provisions Relating to Orders Approving Settlement Agreements

Section 1660(a)(1) would prohibit a court from entering an order approving a settlement agreement that restricts the disclosure of information obtained through discovery, in a case in which the pleadings state facts that are relevant to the protection of public health or safety, unless the court makes the specified independent findings of fact. Section 1660(c)(1) would preclude a court from enforcing any provision of a settlement agreement in a case with such pleadings that restricts a party from disclosing the fact of settlement or the terms of the settlement (other than the amount of money paid), or that restricts a party from “discussing the civil action, or evidence produced in the civil action, that involves matters relevant to public health or safety,” unless the court makes the specified independent findings of fact.

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors or absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court’s continuing jurisdiction or an independent basis for

jurisdiction applies, enforcement actions are generally brought in state courts. Because federal courts are rarely involved in approving or enforcing settlement agreements, the settlement provisions in S. 623 are an ineffective means of addressing the concerns behind the proposed legislation.

The extensive empirical study done by the FJC on court orders that limit the disclosure of settlement agreements filed in the federal courts and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of federal cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. S. 623 does not change these conclusions. Its primary effect is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes, sending more disputes to private mediation or other avenues where there is no public access to information at all.

3. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. Many studies were conducted and many papers were prepared in conjunction with the conference.² It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. A memorandum has been prepared setting out the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing

² The wide array of papers prepared for the conference are available on the conference's website at <http://civilconference.uscourts.gov>.

May 2, 2011

Page 9

orders. The case law set out in the memo shows that courts are attuned to the public interest and have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The memo on protective order case law is available online.³ The Advisory Committee continues to monitor the case law and protective order practice to ensure that rule amendments are not needed.

The Rules Committees very much appreciate the opportunity to express our views and share our concerns. If it would be useful, we are available to discuss these issues. Thank you for your consideration and for the continued dialogue on improving the system of justice in our federal courts.

Sincerely,



Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Committee on Rules
of Practice and Procedure



Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee
on Civil Rules

cc: Democratic Members, Judiciary Committee

Identical letter sent to: Honorable Charles E. Grassley

³ The memo is available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.