GEORGETOWN UNIVERSITY LAW CENTER

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Testimony on Sunshine in Litigation Act of 2009, H.R. 1508

House of Representatives Committee on the Judiciary
Subcommittee on Commercial and Administrative Law
June 4, 2009

Thank you very much for the opportunity to testify on the subject of transparency in federal litigation, focusing on H.R. 1508, the "Sunshine in Litigation Act of 2009." I am on the faculty of Georgetown University Law Center, where for many years I have taught courses relevant to this subject, Civil Procedure and Professional Responsibility. The subject of secrecy orders comes up in each of those courses. Moreover, in the Civil Procedure course, we discuss the rule making authority of the United States Judicial Conference and the Supreme Court, under the Rules Enabling Act, the origins of which go back to 1934. I have had the honor on a few occasions to appear before the United States Judicial Conference, in the 1980s, and to serve as a consultant to the Federal Judicial Center, so I have had some acquaintance with the operation of each.

At Georgetown, we bring our first year students in early for an orientation. As a part of that orientation, we give the students an introduction to the ethics of being a lawyer. We do this because we believe that legal ethics is so important that the student should realize from day one that it pervades all that he or she will learn and later practice as an attorney. I have taught that introductory lecture for many years. I have used as my text a video created and narrated by Professor Stephen Gillers of the New York

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University School of Law. Professor Gillers for more years than either of us would like to recall has been one of the leaders in the field of the ethics of lawyers. This video, titled "Amanda Kumar's Case," concerns an allegation that a young girl, Amanda, was injured by a drug that was dangerous for children to ingest. Ms. Kumar is represented by two young lawyers who had just opened their own office and smelled a very nice contingency fee. While there are many ethical issues in the presentation, toward the end the drug company makes a very significant dollar offer, conditioned upon everyone, particularly Ms. Kumar and her attorneys, agreeing to a secrecy order. While the attorneys, of course, left it up to Ms. Kumar to accept or reject the offer, it was clear from their advice that they were eager for her to accept the offer. The last scene has Ms. Kumar agonizing. The money would be enough for her and her daughter to live quite well compared to their meager existence at that time. Yet, Ms. Kumar declined the offer. She stated that she could not live with herself, even in comparative luxury, knowing that the drug company was still able to dispense this drug for children and cause untold numbers of children to be injured and not be able to say anything to warn others of the danger.

We then lead this class of neophyte lawyers in a discussion of the interests involved: the defendant drug company who would like to continue selling the product; the defense lawyers who are interested in keeping the drug company or its insurer as a client; the plaintiff who will benefit handsomely; and plaintiff's lawyers who will receive a significant fee based on a contingency agreement. There is no one to raise the social values of the public, including the children who will be given this drug in the future, and

their physicians who will not know that this drug is inappropriate for children. To me, that is what the present hearing is all about.

This issue has been before the Congress for close to two decades. There have been several hearings before this House and the Senate. You have received a great deal of material and have heard from many compelling witnesses. There are now a number of law review articles written on the subject and I am sure that staff has collected them all for their and your benefit. Thus, there is very little that I can add.

One issue that is raised over and over is that this matter should be dealt with by the United States Judicial Conference as a part of its rule making power. I join the esteemed former member of this House and former chief judge of the District of Columbia Circuit, Abner Mikva, now teaching at the University of Chicago, in urging that the responsibility belongs with the Congress. As you are well aware, the Rules Enabling Act 28 U.S.C. § 2072(a), prohibits the Judicial Conference and the Supreme Court from "abridg[ing], englarg[ing] or modify[ing]" any substantive right. I urge that the issue before the Congress in the proposed "Sunshine in Litigation Act of 2009" is really one of social values and a choice to be made among various values and that that is a substantive matter rather than a mere matter of procedure. It is a choice among values that Congress, the legislative arm of the federal government, is charged with making and in this case should make.

On the one side is a view that urges and permits secrecy, not just upon agreement of private parties, but with the imprimatur, approval and stamp of authority of a federal judge. A violation of that court order carries with it the threat of a contempt proceeding, with all of the sanctions of the sovereign United States available to punish the person

who dared disobey a judicial order. On the other side is a view that says that there should be as much transparency in government as possible, including in its judicial branch.

Moreover, in those cases – and this committee and its Senate equivalent have heard of many of those cases – there is a social value to be considered: when government, in this case a court, through its proceedings, learns of the adulterated or otherwise inappropriate drug, of the dangerous toy, of the tire waiting to separate and cause death, should it permit – indeed, by its order, should it participate – in keeping that information secret, so that others may be injured and killed? Should it be a party to keeping that information from the regulatory arms of government, the Food & Drug Administration, the Consumer Product Safety Commission, the Federal Trade Commission, the Securities and Exchange Commission, and similar bodies created by the Congress to do a job, but a job that can be done only when they have information. Thus, when information is withheld from such a regulatory body, its ability to do the job that the Congress delegated to it, to that extent is frustrated. When that information is withheld because of an order of a federal court, the court is complicit in that frustration.

One can make many arguments in favor of secrecy, and they have been made over and over again in these hearings. One can also make many arguments in favor of a level of transparency that will help to prevent future injury and death, and that will better permit the regulatory arms of government to carry out their responsibilities. Which should it be? I suggest that that is an issue of social values, one that is peculiarly within the ambit of Congress to resolve. And, I suggest, it is an issue that crosses the line from procedure to substance, which at least arguably takes it outside of the authority delegated

to the Judicial Conference and the Supreme Court to resolve through the rule-making power.

A second point concerning the United States Judicial Conference: As prior testimony has shown, the Judicial Conference has examined this issue for years, and, if I read the testimony correctly, it has concluded that it sees no problem that it needs to deal with. Indeed, it is concerned that, by resolving this social issue in favor of preventing further injuries, sickness, and death, it will create more work for judges. I found myself amazed at that argument. In my view, judges hold office to resolve questions brought to them. If it takes more time to make the findings that the "Sunshine in Litigation Act of 2009," so be it: in my mind that is or should be the responsibility of a federal judge even without the Act. Having great respect for federal judges – even those who have ruled against me in my court cases -- I assume that a careful federal judge in fact does think the matter through, rather than act as a rubber stamp. This Act would require the judge to articulate publicly the result of that thinking process, while protecting the various legitimate interests in privacy. And it would remind those judges who may be prone to skip the thinking process that that is in fact a part of their job that should not be skipped.

I hope that these thoughts may be helpful in your deliberations. Thank you for the honor of the invitation to appear before you and the opportunity to state these views.