Prepared Testimony of

United States District Judge Joseph F. Anderson, Jr.

for the hearing entitled

"The Sunshine in Litigation Act of 2008"

before the

Subcommittee on Commercial and Administrative Law

Committee on the Judiciary

United States House of Representatives

Thursday, July 31, 2008

Chairman Conyers, Ranking Member Cannon, and Members of the Subcommittee, thank you for inviting me to appear before you to discuss "Sunshine in Litigation"—a subject of particular interest to me as a trial judge with 22 years on the federal bench.

I should say at the outset that I am not here representing the Judicial Conference or any other organization. I am here simply to convey my thoughts on the need for awareness of the adverse consequences of what I prefer to call "court-ordered secrecy."

As civil litigation has mushroomed in the United States courts in the past two decades, litigants have frequently requested that judges "approve" settlements, often when court approval is not even required by law. As part of this "approval" process, judges are sometimes asked to enter orders restricting public access to the settlement information and perhaps the case history. In these instances, litigants are not content to simply agree between themselves to remain silent as to the settlement terms. Instead, the preference is to involve the trial judge in a "take it or leave it" consent order that would bring to bear contempt sanctions on anyone who breaches the court-ordered secrecy.

Unfortunately, trial judges often struggle under the crush of burgeoning case loads. Eager to achieve speedy and concrete resolutions to their cases, and ever-mindful of the need for judicial economy, many judges all too often acquiesce to the demands for court-ordered secrecy.

In late 2002, the judges of my district court in South Carolina voted unanimously to adopt a local rule for our court which restricts court-ordered secrecy associated with settlements in civil cases. We were then, and we remain, the only federal district court in the country with such a rule. In the brief time

allotted to me, I would like to relate several events which prompted me to propose the rule to our court, and also say just a word about our court's experience operating under this rule.

In 1986 when I was a 36-year-old newly-appointed federal trial judge, I was assigned a case that had been pending on another judge's docket for several years. The case was ready for trial which the lawyers predicted would take a grueling six months. The case was brought by 350 plaintiffs who lived around a large 56,000 acre freshwater lake in upstate South Carolina. The plaintiffs contended that the defendant in the case had knowingly deposited excessive amounts of PCBs into the lake, and that they had experienced severe health problems from being exposed to this toxic substance.

Much to my relief, shortly before the trial was to begin, the parties announced that they had reached an amicable settlement. The defendant would pay $3.5 million into a fund to be used to set up a medical monitoring and primary care program for all 350 plaintiff-residents and a small amount of the settlement money would be used for a per capita distribution to each plaintiff. There was one catch: The settlement was contingent upon my entry of a gag order prohibiting the parties from ever discussing the case with anyone and also requiring a return of all allegedly "smoking gun" documents. I was advised by counsel that if I did not go along with their request, the carefully crafted settlement package would disintegrate and the case would proceed to a contentious six-month trial.

As a judge with less than a year's experience on the bench, other complex cases stacking up on my docket, and believing it was in the fairest and best interest of all parties, I agreed to the request for court-ordered secrecy. When

I signed the order, everyone was content: The plaintiffs recovered a handsome sum; the lawyers for both sides were paid; the defendant received its court-ordered secrecy; there were no objections to the order; and the judge had one less case to try.

In the ensuing years, I questioned my decision to enter a secrecy order in that particular case. I also became troubled by what I viewed as a discernable trend in civil litigation: Lawyers were sometimes requesting court-ordered secrecy both at settlement and in connection with the exchange of documents during discovery. I was aware of instances in both the state and federal courts in South Carolina where judges had agreed to requests for court-ordered secrecy in cases where one could reasonably argue that public interest and public safety should have required openness.

For example, I knew of a judge who restricted access to case information where a child died while riding an allegedly defective go-cart. The settlement was $1.4 million, and the judge imposed a strict obligation of secrecy on the parties. I later learned that the model go-cart which the child had been riding was still being sold and marketed. I also learned of judges in the South Carolina state courts who entered confidentiality orders in medical malpractice cases where even the identities of the physicians who were named as defendants were shielded from public view.

Responding to this series of events, I proposed to our court that we adopt a local rule prohibiting, in most civil cases, court-sanctioned secret settlements. When our rule was released for public comment, we received heated objections from around the nation. Virtually every opponent of our rule suggested that an inevitable byproduct of such a local rule restricting court-ordered secrecy would

be the substantial increase in the number of cases going to trial which would, in turn, overwhelm our court.

The rule was adopted, nevertheless, and we now have a six-year operating perspective. The dire predictions of those who suggested that the rule would cause settlements to disappear proved to be wrong. In fact, according to statistics provided by the Clerk of Court, our court tried *fewer* cases in the six years *after* the rule's enactment than in the six years before it was adopted.

In short, our rule has worked well and our court has not been "overwhelmed" as a result. Trade secrets, proprietary information, sensitive personal identifiers, national security data, and the like remain protected. New business investments in South Carolina continue to go up. However, in those rare cases where the public interest or safety could be adversely affected by court-ordered secrecy, judges on our court have not hesitated to enforce the rule and keep the docket transparent.

The national furor created when our rule was proposed for public comment, coupled with Senator Kohl's long-standing commitment to improve transparency in the federal courts, began a vigorous debate and much-needed review of the adverse consequences associated with court-ordered secrecy.

Last December, I testified before the Senate Judiciary Committee in favor of Senator Kohl's Bill S2449, which was bipartisan and cosponsored by Senators Leahy and Graham. That Bill is virtually identical to the one now before the House subcommittee. I am confident that both Bills will assuage privacy concerns and provide further guidance to the judiciary for conducting a balancing test between confidentiality, public interest, and classified information.

While the issues have not been entirely resolved, I am of the opinion that the secrecy trend seems to be waning. More importantly, I believe that both state and federal judges have become more sensitive and enlightened to the need for "Sunshine in Litigation."

Thank you for allowing me to share my sentiments with you and I will be happy to answer any questions you may have.