

Testimony of Professor John P. Freeman

John T. Campbell Professor Emeritus of Business and Professional  
Ethics, and Distinguished Professor Emeritus of Law

University of South Carolina School of Law

July 31, 2008

At the Hearing Before the Subcommittee on  
Commercial and Administrative Law of the

House Committee of the Judiciary

on

H.R. 5884, "The Sunshine in Litigation Act of 2008"

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My name is John Freeman. For 35 years I was a law professor at the University of South Carolina School of Law, where I taught courses in Professional Responsibility, Corporations, Securities Regulation, White Collar Crime, and other business related subjects. My post-retirement academic titles are: John T. Campbell Professor Emeritus of Business and Professional Ethics, and Distinguished Professor Emeritus of Law. I am a member of the Ohio and South Carolina Bars and am admitted to practice before various federal courts.

Over the years, while working as a scholar, lawyer, consultant, or expert witness I have gained first-hand insights into ethical, practical, and legal issues relating to many major business litigation matters with public policy overtones. I have been personally involved, in one way or another, in some of the most significant tort cases of the last several decades. These include lawsuits against Big Tobacco and the asbestos companies, as well as litigation over KPMG and other firms' tax shelters, toxic chemical dumping, DuPont's Benlate fungicide, the Dalkon Shield Intrauterine Device, sexual predation by Catholic priests, and defective child car seats.

Like many in the legal profession who have worked on or around big cases, I have encountered numerous instances where the truth could have come out long before it was finally exposed. Instead, the truth was shielded—at great cost to the public—by overly expansive protective orders and secret settlements, the two mechanisms H.R. 5884 seeks to curb. I come before you to speak in support of H.R. 5884. I am delighted that Congress has taken an interest in studying these abusive and pervasive practices.

I will start by briefly addressing the issue of overly expansive protective orders. I will then turn to the matter of secrecy selling, the practice by which civil litigants accept money in exchange for promising not to disclose information relevant to the civil action thus concluded.

#### **Protective Orders**

Our federal judicial system is a great natural resource. It functions as a truth screening and validating mechanism in much the same way that peer review operates for scholarly literature. In a sense, our judicial system operates as a huge information-sifting machine, generating findings about every facet of American life. With these findings, we learn about which goods are safe and which goods are dangerous, which employers share our

values of non-discrimination and which employers retain discriminatory policies, which institutions deserve our trust, and which institutions deserve our scorn.

Our civil justice system can only function, however, if parties can learn, through discovery, the relevant information needed to effectively present their side of the case. Discovery pursuant to Fed. R. Civ. P. 26 is the avenue by which the truth typically comes out in federal courts, especially since only a tiny (and declining) fraction of civil cases ever make it to trial. Yet, in my experience, Rule 26 rarely operates as the Rule drafters envisioned.

Lawyers face a double-whammy when seeking to gain access to the documents and testimony necessary to show misconduct by big companies that have abused the public. First, in my experience, in big-case litigation it is very, very hard to make the defendant produce the evidence (typically documents) needed to get the case to the jury. Delay is standard and objections are common. Motions to compel are usually needed in order to force the defendant to comply with even clear discovery obligations. Second, even if the evidence is provided to the plaintiff, it is routinely provided pursuant to a powerful protective order, granted too frequently on flimsy or illusory grounds.

Overuse of protective orders has long been a problem in federal courts. *See, e.g., Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985) (“District courts are today being bombarded by an ever increasing number of requests for protective orders.”). Indeed, in a 1981 opinion, Judge Edward Becker stated that he was “unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order has not been agreed to by the parties and approved by the court.” *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981). Once a protective order is granted, documents and testimony are routinely designated as confidential and thus off limits to the public. For example, according to the brief for the United States in opposition to the petition for certiorari in *AT&T v. MCI Comm. Corp.*, AT&T not only treated all documents produced as confidential but also designated every page of every deposition as confidential, often before the deposition had commenced. *See* Brief for the United States In Opposition to Petition for Certiorari at 4, *AT&T v. MCI Communications Corp.*, 695 F.2d 594 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

The problem has not diminished over the years. There is no sign that the frequency of protective orders has dropped off, and the overbreadth problems they pose are serious. A federal court recently observed:

Motions to approve overbroad and otherwise improper protective orders seeking to shield purportedly confidential information from the public record continue to vex this and other courts. . . . The filing of motions for protective orders seeking to keep purportedly confidential information out of the public eye has seemingly become a reflexive part of federal court practice in this district, and presumably in other districts as well.

*Brown v. Automotive Components Holdings, LLC*, 2008 WL 2477588 (S.D. Ind. June 17, 2008).

In my opinion, the system is broken and, unfortunately, judges cannot be counted on to fix it. As a federal district court judge who is a leading sunlight proponent has explained, “courts too often rubber-stamp confidentiality orders presented to them.” Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004). See also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) (“Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders.”). The eagerness of judges to sign consensual protective orders is illustrated by a judge quoted in Judge Anderson’s article who stated, “I would sign an order that stipulated that the moon was made out of cheese if the lawyers came in and asked me to sign it.” Anderson, *supra* at 729.

In big, complex cases, secrecy typically advantages the defense. Keeping claimants isolated and ignorant has long been a useful defense tactic. See, e.g., Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STANFORD L. REV. 853, 860 (1992) (noting “the tobacco company lawyers simply wore down the opposition through reliance on protective orders (isolating the plaintiffs from opportunities to collaborate or realize economies of work-product)”). As the Rabin article reveals, an ideal source of helpful information in big cases tends to be other lawyers with similar claims. When lawyers all engaged in litigation against the same defendant cannot share information with one another, each must reinvent the wheel, which increases each plaintiff’s litigation costs exponentially, while also consuming scarce judicial resources as judges are called upon to referee the same discovery battles over the same hidden evidence in jurisdictions across the country.

In my opinion, H.R. 5884(a) sets an appropriate standard for issuance of protective orders in order to safeguard public health or safety. I now discuss to the second big-case litigation problem targeted by H.R. 5884, secrecy selling.

### **Secrecy Selling**

As with the ongoing attention being given to protective orders’ scope and abuse, the debate over secrecy-selling in litigated cases is a discussion about how we view courthouses, judges, and lawyers, what we demand out of them, and what they may demand of themselves.

“A secret settlement allows the plaintiff to receive money and the defendant to retain secrecy, at the cost of perpetuating avertable public hazards.” David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2654 (1995). Many Americans would be alarmed to know that incriminating evidence of serious public health and safety hazards is for sale and is being sold as an accepted part of our judicial process. It is these types of secret settlements that H.R. 5884 commendably targets.

In my view, secrecy selling for too long has bred sleazy, anti-social joint ventures between wrongdoers, victims, and lawyers, with each profiting handsomely. A disturbing corollary to the secrecy-selling reality is that the dollar value of the secrecy sold rises in relation to the amount of harm that the payor would suffer if the public knew the truth. In other words, the bigger and more dangerous the problem the defendant has created, the more money the defendant is likely willing to pay to suppress facts concerning that problem. Those able to profit off public ignorance and unholy alliances where cash is paid for suppression of evidence have no incentive to halt secrecy selling. Furthermore, even the plaintiff's lawyer who *wants* to decline a secret settlement offer to expose the defendant's wrongdoing is hamstrung. As an experienced legal ethics professor, I can testify that the lawyer's duty of loyalty is owed to the client first and foremost—not to society at large. Thus, even plaintiffs' attorneys who would prefer to decline a financial offer larded with secrecy demands in order to expose the truth have reason to fear violating their duty of loyalty to their client if they subordinate their client's pecuniary advantage for the common good. The reality is, no party to the secrecy-selling transaction is looking out for the public interest.

Legislation aimed at curbing antisocial truth hiding by litigants reflects a public policy commitment that is both correct and entirely consistent with the ethical exhortations that guide lawyers' and judges' behavior. The legal profession's ethics codes for lawyers and judges speak in lofty terms about integrity and honor. Judges, we are told, have a duty to "enhance . . . confidence in our legal system." Model Code of Judicial Conduct, Preamble. Lawyers, it has been decreed, owe "a solemn duty to uphold the integrity and honor of [the] profession; to encourage respect for the law and for the courts . . . [and] to conduct [themselves] so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of . . . the public." Model Code of Professional Responsibility, Ethical Consideration 9-6 (1980). There is nothing in secrecy selling that is consistent with honor or conducive to building trust in lawyers, judges, or our legal system.

Consider these two hypothetical fact patterns.

#1 The sole witness to a criminal act is tracked down by the perpetrator's lawyer who arranges a \$15,000 payment to the witness to "forget it ever happened." The money is exchanged with the understanding the witness will not cooperate with law enforcement or in any way assist in the perpetrator's prosecution.

#2 After expensive and arduous civil litigation, the personal injury victim of a serious automotive design defect involving a safety hazard has finally assembled the evidence needed to establish the manufacturer's culpability. Realizing this, the manufacturer negotiates a settlement with a very large payoff to the victim and her lawyer. Part of the settlement package is a confidentiality agreement barring the victim and her lawyer from disclosing to anyone the settlement's terms or any of the disturbing facts that were unearthed during the course of discovery.

Anyone can see that hypothetical #1 violates public policy in multiple directions while implicating several criminal prohibitions, including witness tampering, obstruction of justice, conspiracy, and bribery.

But what about hypothetical #2? Is not something seriously wrong there, too? After all, like the payoff recipient in hypothetical #1, the tort victim in hypothetical #2 is a witness of wrongdoing well able to testify about the defendant's misbehavior. Did not the wrongdoer purchase the tort victim witness' silence? Does not society lose as much in the unholy civil lawsuit bargain as in the criminal transaction outlined in #1? How can the lawyers' complicity in both of these hypotheticals not be viewed as conduct "prejudicial to the administration of justice" and hence unethical under Model Rule of Professional Conduct 8.4? Yet the outcome of hypothetical #2, with minor variations, is daily grist for the mill in our nation's court systems, state and federal.

A case can also be made that allowing companies to hide material facts about their products or behavior is contrary to the efficient operation of our market economy. A useful insight into the wisdom of secrecy selling was offered in a recent law review article arguing that one of the purposes of tort litigation is to assist consumer choice by publicizing which products are harmful. See Scott Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 907-08 (2007). As Moss points out: "[W]hen a market flaw inhibits efficient decision-making, mandatory information disclosure can be a useful and quite moderate effort to remedy that flaw." *Id.* at 909. Moss's argument is that our courthouses churn out useful information that will help guide consumer choice if it is disseminated: which brand of auto tire is unsafe, which employers discriminate, which companies pollute our rivers. Confidentiality agreements reflecting payments for silence about product problems gum up the capitalistic system because they suppress material, valuable data consumers could benefit from knowing. For example, the mother of an infant could very well consider it important that a certain baby car seat manufacturer had paid many millions of dollars around the country to settle tort lawsuits involving design defect claims.

As Moss postulates, mandatory disclosure of the limited sort found in H.R. 5884 is a "useful and quite moderate effort" to remedy the consumer information shortfall caused by secret settlements. It is interesting and, I believe, more than a coincidence that two of our nation's leading federal judges who are experts in the field of economics and firm proponents of free markets, Judges Posner and Easterbrook, were on the panel in *Citizens First National Bank v. Cincinnati Ins. Co.*, 178 F. 3d 943 (7th Cir. 1999), the leading Seventh Circuit case that limited suppression of evidence through overbroad confidentiality orders.

### **Comments on Critics' Complaints**

Opponents of "Sunshine in Litigation" offer various complaints about changing the status quo. For one, we are told that the legislation will increase the cost and burdens on the parties, decrease the efficiency of the court system, and create a litigation explosion. I reject this contention. I am unaware of any proof this has happened in Florida. As the

Subcommittee members know, for over a decade Florida has featured a sunshine in litigation regime at the state level, with no noticeable drawbacks. *See Fla. Stat. Ann. § 69.081; see also* Diana Digger, *Confidential Settlements Under Fire in 13 States*, 2 Ann. 2001 ATLA-CLE 2769 (concluding that per capita litigation rates fell in Florida following enactment of a state statute restricting secret settlements). The idea that passage of H.R. 5884 will leave the federal courts clogged and litigants financially damaged is nonsense.

I note that the pro-business, pro-defense group “Lawyers for Civil Justice” has declared that it is “imperative” that H.R. 5884 be killed. The group has expressed alarm on their web site that passage of H.R. 5884 “could . . . propel similar legislation in state legislatures.” *See* Lawyers for Civil Justice Website, <http://www.lfcj.com/hotcases2.cfm?hotCasesID=137>.

This expression of concern seems to undercut the logic of the group’s opposition. To me, the group’s kill-it-before-it-multiplies fretting confirms the legislation is workable and will be sufficiently successful to deserve emulation by state legislatures. After all, if passage of the Bill really promised to tie the federal judiciary in knots, then why would anyone worry that the federal experience would “propel similar legislation” elsewhere? Why on earth would any state want to pass legislation repeating a federally-enacted logistical nightmare? Plainly, the defense advocacy group’s worry is not that the legislation will not work, it is that the legislation will help mend a broken system that currently happens to benefit the group’s supporters.

Another argument I have heard in favor of secrecy-selling is that it promotes settlements. I agree that promoting the settlement of cases is generally a good thing, but it is not a good thing when it involves hiding evidence from federal or state authorities or hiding evidence that “involves matters related to public health or safety.” I do not understand how a settlement agreement falling within the narrow and limited antisocial scope targeted by H.R. 5884 can be viewed as a good thing, much less desirable, by any sensible American. Even though it is narrowly drawn, the statute has some teeth. If nothing else, H.R. 5884’s limits on evidence hiding and settlement secrecy should have the *in terrorem* effect of discouraging litigants and their lawyers from entering into antisocial stipulations and agreements.

In any event, the claim that H.R. 5884 will chill settlements is dubious. The Florida experience supports my appraisal. *See* James E. Rooks, Jr., *Settlements and Secrets: Is the Sunshine Chilly?*, 55 S.C. L. REV. 859, 867-68 (2004) (finding no evidence that Florida’s “Sunshine in Litigation Act” worked to chill settlements); Richard A. Zitrin, *Legal Ethics: The Case Against Secret Settlements (Or, What You Don’t Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115, 118 (1999) (noting that following enactment of restrictions on secret settlements in some states, there was “no indication of a resulting court logjam, or even that settlement rates have gone down”).

One of the more humorous arguments advanced in opposition to allowing more sunlight into federal court proceedings is this one from a Sunlight legislation opponent:

“[R]egulatory agencies already have the power to obtain information from companies about matters affecting ‘public health and safety.’ These agencies do not need courts to serve as freedom of information clearing houses.” *See* Hearing Of The Subcommittee On Antitrust, Competition Policy And Consumer Rights Of The Senate Judiciary Committee on the Sunshine In Litigation Act, Dec. 11, 2007) (filed testimony of Stephen G. Morrison), *available at* [http://judiciary.senate.gov/testimony.cfm?id=3053&wit\\_id=6823](http://judiciary.senate.gov/testimony.cfm?id=3053&wit_id=6823).

If “regulatory agencies” are so proficient at protecting the public interest, then why did we witness Big Tobacco for decades selling an addictive, carcinogenic product while refusing to concede the product was either addictive or harmed health? Why aren’t cigarettes regulated by the FDA today? What brought Big Tobacco to heel were lawyers and lawsuits, not regulatory agencies. The same is true for asbestos, numerous harmful drugs, Benlate, exploding tires, faulty child car seats, and so on down the line. To a considerable extent, big-case litigation centers on matters that escaped regulatory attention. When someone speaking for corporate America tells you the best way to get a job done is to rely on government regulators, you know something is awry.

### **Summary**

Protective orders and sealed settlements have hidden the defects of products that have caused tremendous harm to the public, including Dow Corning’ silicone gel breast implants, pickup trucks made by Ford and General Motors, Upjohn’s sleeping pill Halcion, Pfizer’s Bjork-Shiley heart valves, McNeil Pharmaceutical’s painkiller, Zomax, and cigarettes. Luban, *supra* at 2650; Rabin, *supra* at 860. Countless lives have been lost because the dangers of these products were obscured. H.R. 5884 represents the right remedy arriving at the right time to address a glaring weakness in our judicial system.

Thank you for the opportunity to present my views on this important matter.