



Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2009

Sunshine in Litigation Act of 2009: Hearing Before
the Subcomm. on Commercial and Administrative
Law of the H. Comm. on the Judiciary, 111th
Cong., June 4, 2009 (Statement of Sherman L.
Cohn, Prof. of Law, Geo. U. L. Center)

Sherman L. Cohn
Georgetown University Law Center

This paper can be downloaded free of charge from:
<http://scholarship.law.georgetown.edu/cong/35>

This open-access article is brought to you by the Georgetown Law Library. Posted with permission of the author.
Follow this and additional works at: <http://scholarship.law.georgetown.edu/cong>

 Part of the [Civil Procedure Commons](#), and the [Courts Commons](#)

Testimony of Sherman L. Cohn
Professor, Georgetown University Law Center
Hearing on H.R. 1508, the Sunshine in Litigation Act of 2009
June 4, 2009
U.S. House Committee on the Judiciary
Subcommittee on Commercial and Administrative Law

REP. COHEN: Thank you Judge Kravitz. Our final witness is Sherman Cohn, without an E, a professor at the Georgetown Law Center since '65. Professor Cohn specializes in the fields of civil procedure, professional responsibility and legal issues of a complementary alternative and integrative medicine of which he also lectures at Georgetown Medical Center. Before joining the law center faculty, he served as a clerk for Judge Charles Fahey of the D.C. Circuit and in the appellate section of the civil division of the Department of Justice. He serves as the administrator of U.S. Supreme Court cases from 1976 to '79 as Director of Continuing Legal Education at the Law Center from '77 to '84. Thank you Professor Cohn. Will you proceed with your testimony and turn on your microphone.

MR. COHN: Thank you for the invitation and the opportunity. I came here with the idea that I would disagree with Judge Kravitz from his earlier testimony as I understood it. What he's talking about today I agree with, that from the standpoint of discovery matters that are not brought to the judge's attention that a judge should not have to go through the thousands and hundreds and sometimes of hundreds of thousands of pages in discovery. That's what plaintiff's counsel should be there to bring to the judge's attention. And it's up to plaintiff's counsel as Mr. Kaster pointed out to bring that to the attention of the judge.

So I'm just looking at it once it's at the judge's attention. I'm also looking at it from the standpoint of the end of the case, when there is a settlement entered and a settlement that is conditioned upon secrecy and they ask for the federal judge to put his imprimatur, the power of the federal court behind that secrecy agreement. In that situation, the defendant has interest to keep the matter secret for the reasons that this committee and the Senate committee have often heard. The defense counsel wants to keep his client. The plaintiff has a pot of gold that would not be as high or at least possibly would not be as high and that's what the plaintiff is told and plaintiff's counsel gets a contingency fee based on the size of the pot of gold. Now it may be that plaintiff's counsel is like Mr. Kaster and will let that go and be interested in the public interest. That's not been what I have seen on the occasions that I've seen it.

That quite often plaintiff's counsel is torn between the plaintiff's counsel interest in his or her own welfare and the greater welfare of society. In law school we try to say that's why you have a loyalty to your client, and yes you have to say in business, you've got to pay your rent and things like that, but you also have a loyalty to society. Where that doesn't occur and where the judge knows that there are issues of safety and health involved, then to then enter into a secrecy agreement which the judge signs so that behind it is the power

of the sovereign United States I think is wrong.

Now I want to address for just a moment the question of where this belongs. My view is that this issues belongs here in Congress. This is a question of social values. And it's not just a question of procedure. I'd like to suggest that this comes very close to or into the category of effective substantive law and under the rules enabling act, the rules committee, no matter how wise they are, do not have power in substantive law. That belongs to Congress. So that the issue, however it is resolved and here I join (Art Miller ?) in his views that this is an issue of balancing of social values and balancing of social values is a legislative matter and Congress should however you come out, is the place where this ought to be resolved.

Thank you very much for listening and I hope this is helpful to your consideration.

PREPARED STATEMENT OF SHERMAN L. COHN:

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 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], enlarg[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.

