WELLS, ANDERSON & RACE, LLC
Attorneys
1700 Broadway, Suite 1020
Denver, CO 80290

MARY A. WELLS
(303) 812-1243 (Direct Line)

(303) 830-1212
(Facsimile) (303) 830-0898

April 9, 2012

VIA HAND DELIVERY

The Honorable John P. Morse
Colorado State Capitol
200 East Colfax Avenue
Senate Room 346
Denver, CO 80203

Re: Opposition to Senate Bill 153, the "Sunshine in Litigation Act"

Senator Morse:

We are writing on behalf of Wells, Anderson & Race, LLC, to oppose Senate Bill 153 ("SB 153"), regarding the mandatory public disclosure of information relating to "public hazards."

I. SB 153 will impede the already-liberal civil discovery process.

The rules of civil discovery allow extraordinarily broad access to information.[1] Nevertheless, the Supreme Court of the United States has been clear: pretrial discovery is "not [a] public component[] of a civil trial."[2] Indeed, "[l]iberal discovery is provided for the *sole purpose* of assisting in the preparation and trial, or the settlement, of litigated disputes."[3]

In fact, such information is gained "only by virtue of the trial court's discovery processes."[4] But because of this liberal access to otherwise unavailable information, discovery "has a significant potential for abuse."[5] Litigants may, either "incidentally or purposefully," obtain information that "seriously implicate[s] privacy interests of litigants and third parties."[6]

---

[1] *See* Fed. R. Civ. P. 26; C.R.C.P. 26.
[2] *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984) (construing state discovery rule materially identical to C.R.C.P. 26).
[3] *Id.* at 34 (emphasis added).
[4] *Id.* at 35; see also *Jessee v. Farmers Ins. Exch.*, 147 P.3d 56, 60 (Colo. 2006).
[5] *Seattle Times Co.*, 467 U.S. at 35.
[6] *Id.*

Thus, an opposing party may obtain information "that not only is irrelevant but if publicly released could be damaging to reputation and privacy."[7]

Consequently, it is necessary for the trial court to be able to limit public access to such information.[8] SB 153 significantly limits the trial court's ability to regulate such abuses. The presumption of public disclosure, subject only to a four-part test requiring clear and convincing proof, exposes litigants to a significant risk that otherwise-private and largely deleterious information will be made public.

Colorado courts explicitly recognize a right to privacy that imposes significant hurdles to prevent such harmful disclosure.[9] When a discovery request implicates the right to privacy, "[t]he party requesting the information must always prove" that the information is relevant.[10] The party asserting the privacy right then need only show "a legitimate expectation that the requested materials or information is confidential and will not be disclosed."[11] If the trial court "determines that there is a legitimate expectation of privacy in the materials or information, the requesting party must prove either that disclosure is required to serve a *compelling* state interest or that there is a *compelling* need for the information."[12] And, indeed, even if "the requesting party is successful in proving one of these two elements, it must then also show that the information is not available from other sources."[13] Finally, "if the information is available from other sources, the requesting party must prove that it is using the least intrusive means to obtain the information."[14]

These dictates do not appear in any rule or statute. Rather, they derive from the common-sense notion that a litigant should not be able to use the civil discovery process to force an opponent to reveal damaging information to the opposition, let alone the public at large. The potential consequences of this disclosure are impossible to forecast, but it seems relatively certain that it will expose disclosing litigants to a cascade of litigation after information is revealed in one case. One instance of injury will damage a company's reputation, and will make it extremely difficult for Colorado to attract new businesses or encourage small businesses to operate. There is "clearly" a "substantial interest in *preventing* this sort of abuse of [judicial] processes."[15]

Therefore, we urge the Senate to withdraw SB 153.

II. SB 153 will have a deleterious effect on settlement negotiations and further tax an already-overburdened judiciary.

The definition of "Public Hazard" in the bill is so broad that it covers virtually every product with moveable parts, like automobiles, power tools, bicycles, airplanes, machinery of

---

[7] *Id.*
[8] *Id.*
[9] *See, e.g., In re Dist. Court, City & Cnty. of Denver*, 256 P.3d 687, 691-92 (Colo. 2011).
[10] *Id.*
[11] *Id.*
[12] *Id.* (emphasis added).
[13] *Id.*
[14] *Id.*
[15] *Seattle Times Co.*, 467 U.S. at 35.

every kind, and toys, the use of which has resulted in an accident and caused injury to a person at some point in time. The list of such potential defendants is endless. Much of the information disclosed by a company defendant in litigation concerning such products is proprietary information about the product. In most cases, the parties recognize the proprietary nature of such information and an agreement is reached to restrict access to the proprietary information. SB 153 would require judges who are overworked and understaffed to review the materials for which protection is sought and conduct a hearing on the issue. A protective order could only be entered if the court makes certain findings upon clear and convincing evidence. Our judges simply do not have the time or resources to undertake such a burdensome process in civil litigation.

It is well-established that most civil cases are resolved by settlement. In fact, in tort suits such as those to which SB 153 will apply, the settlement rate exceeds 90%.[16] An important component of many of these settlements is a confidentiality agreement. This agreement is a bargained-for exchange whereby one party receives consideration for its agreement to keep certain information confidential. Such agreements have long been enforceable in Colorado and other jurisdictions.[17] Removing this incentive to settle will cause an unknown number of cases to proceed to trial. This will hamper otherwise beneficial results for both parties, who, when settling, are often "better off than if they had run through the full course of adjudication."[18]

Moreover, the breadth of section 25-5-1204(1) appears to apply to information disclosed in other jurisdictions. This will cause Colorado courts to implicitly invalidate provisions of confidentiality agreements that were enforceable when the parties entered into them. It will also cause Colorado courts to undermine any confidentiality orders of coordinate state and federal courts. It is unlikely that federal courts, at a minimum, would allow such an affront to federalism to endure.

The removal of an incentive to settle will also further tax an already-overburdened judiciary. Indeed, in fiscal year 2011 alone, 125,597 civil cases were filed in Colorado state courts.[19] If the judiciary is forced to accommodate even 10% more cases because of the disincentive to settle SB 153 provides, it will double the number of cases the judiciary handles each year. And, as the "law becomes more voluminous, more complex, and more uncertain, costs increase."[20] This will surely cripple the judiciary, especially at a time in which Colorado already faces significant budgeting issues.[21] Therefore, we urge the Senate to withdraw SB 153.

---

[16] Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. Legal Stud. 39, 40 (2002).
[17] *Pierce v. St. Vrain Valley Sch. Dist. RE-1J*, 981 P.2d 600, 604 (Colo. 1999).
[18] Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 Stan. L. Rev. 1339, 1387 (1994).
[19] Judicial Branch Fisal Year 2011: Annual Statistical Report, http://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2011/District%20Court/Table12.pdf (last visited Mar. 11, 2012).
[20] Johnston & Waldfogel, *supra* note 16, at 40.
[21] Elizabeth McNichol et al., *States Continue to Feel Recession's Impact*, CENTER ON BUDGET AND POLICY PRIORITIES (Feb. 27, 2012), http://www.cbpp.org/cms/index.cfm?fa=view&id=711.

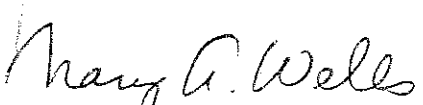
III. Conclusion.

We appreciate the Senate's goal in granting more public access to information potentially beneficial to it. However, the bill fails to achieve this objective and hampers the civil-litigation process. We note that efforts to pass such legislation in other states have failed repeatedly because it is unnecessary, costly, unwise, and contrary to the public interest. Moreover, there is no compelling need for this disclosure requirement because businesses already function under many layers of regulation, and agency records are already open to public inspection. Accordingly, we urge the Senate to withdraw SB 153.

We appreciate your consideration of our comments. Please do not hesitate to contact us should you have any questions.

Very truly yours,

WELLS, ANDERSON & RACE, LLC



Mary A. Wells

MAW:seb