ADVISORY COMMITTEE
ON
CIVIL RULES

Atlanta, GA
March 18-19, 2010

Civil Rules Advisory Committee
Proposed Agenda
March 18-19, 2009
Emory Law School

1. **Report of the Chair and Reporter**

   * **January Standing Committee Meeting**

   * **Judicial Conference Meeting**

2. **ACTION ITEM – Approve Minutes from October 2009 Meeting**

3. **Report on the 2010 Conference**

4. **Report on Pleading Standards**

   * **Progress on FJC Research**

   * **Discussion of relevant case law**

   * **Congressional efforts**

5. **Report on Rule 45**

6. **Protective Orders**

7. **Report of the Appellate-Civil Subcommittee**

8. **Miscellaneous Items**

9. **Next meeting**

ADVISORY COMMITTEE ON CIVIL RULES

Chair:	**Reporter:**
Honorable Mark R. Kravitz United States District Judge United States District Court Richard C. Lee United States Courthouse 141 Church Street New Haven, CT 06510	Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215 Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978
Members:	
Honorable Michael M. Baylson United States District Judge United States District Court 4001 James A. Byrne U.S. Courthouse 601 Market Street Philadelphia, PA 19106	Honorable David G. Campbell United States District Judge United States District Court 623 Sandra Day O'Connor United States Courthouse 401 West Washington Street Phoenix, AZ 85003-2146
Honorable Steven M. Colloton United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044	Honorable Paul S. Diamond United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106
Professor Steven S. Gensler University of Oklahoma Law Center 300 Timberdell Road Norman, OK 73019-5081	Daniel C. Girard, Esquire Girard Gibbs LLP 601 California Street, Suite 1400 San Francisco, CA 94108
Honorable Paul W. Grimm United States District Court Edward A. Garmatz Federal Building U.S. Courthouse 101 West Lombard Street, Room 820 Baltimore, MD 21201	Ted Hirt, Esquire Office of Immigration Litigation 450 5th Street, NW – Room 5312 Washington, DC 20530

ADVISORY COMMITTEE ON CIVIL RULES (CONT'D.)

Peter D. Keisler, Esquire Sidley Austin, LLP 1501 K Street, N.W. Washington, DC 20005	Honorable John G. Koeltl United States District Court 1030 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312
Honorable Randall T. Shepard Indiana Supreme Court 200 West Washington Street State House, Room 304 Indianapolis, IN 46204	Anton R. Valukas, Esquire Jenner & Block LLP One IBM Plaza Chicago, IL 60611
Chilton D. Varner, Esquire King & Spalding LLP 1180 Peachtree Street, N.E. Atlanta, GA 30309-3521	Honorable Vaughn R. Walker United States District Court Phillip Burton United States Courthouse 450 Golden Gate Avenue, 17th Floor San Francisco, CA 94102-3434
Honorable Tony West Assistant AG, Civil Division U.S. Dept. of Justice 950 Pennsylvania Ave., NW – Room 3141 Washington, DC 20530	**Liaison Member:** Honorable Eugene R. Wedoff United States Bankruptcy Court Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604
Liaison Member: Honorable Diane P. Wood United States Court of Appeals 2688 Everett McKinley Dirksen United States Courthouse 219 South Dearborn Street Chicago, IL 60604	**Advisors and Consultants:** Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978
Representative: Laura A. Briggs United States District Court 105 Birch Bayh Federal Building and United States Courthouse 46 East Ohio Street Indianapolis, IN 46204	**Secretary:** Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544

ADVISORY COMMITTEE ON CIVIL RULES

Members	Position	District/Circuit	Start Date	End Date
Mark R. Kravitz Chair	D	Connecticut	Chair: 2007	2010
Michael M. Baylson	D	Pennsylvania (Eastern)	2005	2010
Tony West	DOJ	Washington, DC	2009	-----
David G. Campbell	D	Arizona	2005	2011
Steven M Colloton	C	Eighth Circuit	2008	2010
Steven S. Gensler	ACAD	Oklahoma	2005	2011
Daniel C. Girard	ESQ	California	2004	2010
Paul S. Diamond	D	Pennsylvania (Eastern)	2010	2013
Paul W. Grimm	M	Maryland	2010	2013
Peter D. Keisler	ESQ	District of Columbia	2008	2011
John G. Koeltl	D	New York (Southern)	2007	2010
Randall T. Shepard	CJUST	Indiana	2006	2013
Anton R. Valukas	ESQ	Illinois	2006	2013
Chilton Davis Varner	ESQ	Georgia	2004	2010
Vaughn R. Walker	D	California (Northern)	2006	2013
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open
Principal Staff:				
Peter G. McCabe		(202) 502-1800		
John K. Rabiej		(202) 502-1820		

TAB 1

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 15, 2009

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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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At its September 15, 2009 session, the Judicial Conference of the United States —

EXECUTIVE COMMITTEE

Approved a resolution in recognition of the substantial contributions made by the Judicial Conference committee chairs whose terms of service end in 2009.

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

Authorized the transfer of the official duty station for the vacant bankruptcy judgeship position in the Eastern District of California from Bakersfield to Sacramento.

COMMITTEE ON THE BUDGET

Approved the Budget Committee's budget request for fiscal year 2011, subject to amendments necessary as a result of (a) new legislation, (b) actions of the Judicial Conference, or (c) any other reason the Executive Committee considers necessary and appropriate.

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

Adopted a courtroom sharing policy for magistrate judges in new courthouse and courtroom construction, to be included in the *U.S. Courts Design Guide.*

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

Approved proposed amendments to Appellate Rules 1, 4, and 29 and Form 4 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

With regard to bankruptcy procedures:

a. Approved proposed amendments to Bankruptcy Rules 1007, 1014, 1015, 1018, 1019, 4001, 4004, 5009, 7001, and 9001, and new Rule 5012 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law; and

b. Approved proposed revisions of Exhibit D to Official Form 1 and of Official Form 23, to take effect on December 1, 2009.

Approved proposed amendments to Civil Rules 8(c), 26, and 56 and Illustrative Form 52 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Criminal Rules 12.3, 15, 21, and 32.1 and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed amendments to Evidence Rule 804(b)(3) and agreed to transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Approved proposed *Guidelines for Distinguishing Between Matters Appropriate for Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site* and agreed to transmit them, along with an explanatory report, to the courts.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 2010
Phoenix, Arizona
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Phoenix, Arizona, on Thursday and Friday, January 7 and 8, 2010. All the members were present:

Judge Lee H. Rosenthal, Chair
Dean C. Colson, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Deputy Attorney General David W. Ogden
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

In addition, the Department of Justice was represented by Karen Temple Clagget and S. Elizabeth Shapiro.

Also participating in the meeting were Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee; committee consultants Joseph F. Spaniol, Jr. and Professor Geoffrey C. Hazard, Jr.; and committee guests Professor Robert G. Bone, Dean Paul Schiff Berman, Dean Georgene M. Vairo, and Professor Todd D. Rakoff.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
John K. Rabiej	Chief, Rules Committee Support Office
James N. Ishida	Senior attorney, Administrative Office
Jeffrey N. Barr	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Tim Reagan	Research Division, Federal Judicial Center
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Laura Taylor Swain, Chair
Professor S. Elizabeth Gibson, Reporter
Advisory Committee on Civil Rules —
Judge Mark R. Kravitz, Chair
Professor Edward H. Cooper, Reporter
Advisory Committee on Criminal Rules —
Judge Richard C. Tallman, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Robert L. Hinkle, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal welcomed the committee members and guests.

Judge Scirica reported that all the rule changes recommended by the committee had been approved without discussion by the Judicial Conference at its September 2009 session. The fact that rule amendments are so well received, he said, is a sign of the great esteem that the Conference has for the thorough and thoughtful work of the rules committees.

Judge Rosenthal added that the rules approved by the Conference in September 2009 included: (1) important changes to FED. R. CIV. P. 26 (disclosure and discovery) that make draft reports of expert witnesses and conversations between lawyers and their experts generally not discoverable; (2) a major rewriting of FED. R. CIV. P. 56 (summary judgment); and (3) amendments to FED. R. CRIM. P. 15 (depositions) that would allow, under carefully limited conditions, a deposition to be taken of a witness outside the United States and outside the physical presence of the defendant. She explained that the advisory committees had reached out specially to the bar for additional input on these amendments and had crafted them very carefully.

Judge Rosenthal reported that the Judicial Conference also approved proposed guidelines giving advice to the courts on what matters are appropriate for inclusion in standing orders vis a vis local rules of court. Professor Capra, she noted, deserved a great deal of thanks for his work on the guidelines.

She noted that several new rules had taken effect by operation of law on December 1, 2009, most of them part of the comprehensive package of time-computation amendments. She thanked Judges Kravitz and Huff and Professor Struve for their extensive work in this area.

Judge Rosenthal pointed out that the agendas for the January meetings of the Standing Committee are customarily lighter than those for the June meetings because most amendments are presented for publication or final approval in June, given the cycle prescribed by the Rules Enabling Act. The January meetings, therefore, give the committee an opportunity: (1) to discuss upcoming amendments that the advisory committees believe merit additional discussion before being formally presented for publication or approval; and (2) to consider a range of other matters and issues that may impact the federal rules or the rule-making process.

Judge Rosenthal also noted that Mr. McCabe had just reached the milestone of 40 years of service with the Administrative Office, including 27 years as assistant director and 18 as secretary to the rules committees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on June 1-2, 2009.

LEGISLATIVE REPORT

Adjustment of Legislative Responsibilities

Judge Rosenthal reported that the Director of the Administrative Office had assigned Mr. Rabiej to take a more visible and extensive role in coordinating legislative matters that affect the federal rules. She explained that Congress appears to be taking greater interest in, and giving greater scrutiny to, the federal rules. She noted that most of the bills in Congress that would affect the rules involve difficult and technical issues. For that reason, it is essential that the Administrative Office coordinate its communications with Congressional staff through a lawyer who has a deep, substantive knowledge of the rules themselves, of the rule-making process, and of the agendas of the rules committees.

She noted that communications between the rules committees and Congress are different in several respects from those of other Judicial Conference committees. The rules committees, she noted, do not approach Congress to seek funding or to advance the needs of the judiciary, but to explain rule amendments that benefit the legal system as a whole. As a structural matter, she said, it is better to separate the staff who present bread and butter matters to Congress from those who explain rules matters. She pointed out that the new arrangements are working very well.

Proposed Sunshine in Litigation Act

Judge Rosenthal reported that the proposed Sunshine in Litigation Act would prohibit sealed settlements in civil cases and impose substantial restrictions on a court issuing protective orders under FED. R. CIV. P. 26(c). Under the legislation, a judge could issue a protective order only if the judge first finds that the information to be protected by the order would not affect public health or safety. That provision, she said, has been introduced in every Congress since 1991, and Judge Kravitz testified against the legislation at hearings in 2008 and 2009. But, she added, there had been little activity on the legislation for the last several months.

Judge Rosenthal explained that the Judicial Conference opposed the legislation because it would amend Rule 26 without following the Rules Enabling Act process. Moreover, the legislation: (1) lacks empirical support; (2) would be very disruptive to the

civil litigation process; and (3) is unworkable because it would require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

Judge Kravitz added that Congressional staff now appear to understand the serious problems that the bill would create. But, he noted, it is the members of Congress who vote, not the staff, and it is difficult for members to oppose any bill that carries the label "sunshine." He noted that he had presented Congress with a superb, comprehensive memorandum prepared by Ms. Kuperman detailing the case law on protective orders in each federal circuit and demonstrating that trial judges act appropriately whenever there is a question of public health or safety.

Congressional Activity on the Rules that Took Effect on December 1, 2009

Judge Rosenthal pointed out that there has been increased Congressional scrutiny of the rule-making process. The rules committees, she said, have taken pains to make sure that Congress knows what actions the committees are contemplating early in the rules process, especially on proposals that may have political overtones or affect special interest groups.

She noted that Congressional staff in late 2009 had voiced two separate sets of concerns over the rule amendments scheduled to take effect on December 1, 2009, and they had suggested that implementation of the rules be delayed until their concerns were resolved. Staff asserted, for example, that some of the bankruptcy rules in the package of time-computation amendments might create a trap for unwary bankruptcy debtors and lawyers by reducing certain deadlines from 15 days to 14 days.

Judge Swain explained that it is common for debtors to file only a skeleton petition at the commencement of a bankruptcy case. The rules currently give debtors 15 additional days to file the required financial schedules and statements. The amended rules, though, would reduce that period to 14 days. Some bankruptcy lawyers may not be aware of the shortened deadline and may fail to file their clients' documents on time.

She said that the Advisory Committee on Bankruptcy Rules had persuaded the legislative staff to allow the rules to take effect as planned on December 1, 2009, by taking two visible steps to assist attorneys who may not be aware that they will have one day less to meet certain deadlines. First, the committee wrote to all bankruptcy courts to inform them of the committee's position that, during the first six months under the revised rules, missing any of the shortened time deadlines should be considered as "excusable neglect" that justifies relief. Second, the committee recommended adding a notice to CM/ECF and asking the courts to add language to their respective web sites

warning the bar of the revised deadlines in the rules. Letters were sent to Congress documenting these steps.

Judge Rosenthal reported that the second set of concerns voiced by Congressional staff focused on proposed new Rule 11 of the Rules Governing Section 2254 Cases and a companion new Rule 11 of the Rules Governing Section 2255 Proceedings. The new rules require a district court to issue or deny a certificate of appealability at the same time that it files the final order disposing of the petition or motion on the merits. The concern expressed through staff related to two sentences of the new rules, stating that: (1) denial of a certificate of appealability by a district court is not separately appealable; and (2) motions for reconsideration of the denial of a certificate of appealability do not extend the time for the petitioner to file an appeal from the underlying judgment of conviction.

The new rules, he said, were relatively minor in scope and designed to avoid a trap for the unwary in habeas corpus cases brought by pro se plaintiffs. Perfecting a challenge to a conviction is a byzantine process, and petitioners will lose appeals if they do not understand the complicated provisions.

By statute, a petitioner may not appeal to a court of appeals from a final order of the district court denying habeas corpus relief without first filing a certificate of appealability. Even if the district court denies the certificate of appealability, the court of appeals may grant it. Separately, the petitioner must also file a notice of appeal from the final order denying habeas corpus relief within the deadlines set in FED. R. APP. P. 4(a). So, in order for an appellate court to have jurisdiction over an appeal, the petitioner must have both: (1) filed a timely notice of appeal; and (2) received a certificate of appealability from either the district court or the court of appeals.

The trap for the petitioner occurs because once a district judge denies the habeas corpus petition itself, the clock begins to run on the time to file a notice of appeal, regardless of any action on the certificate of appealability. The accompanying committee note explains to petitioners that the grant of a certificate of appealability does not eliminate their need to file a notice of appeal.

Judge Tallman pointed out that the concerns brought to Congressional staff were misplaced. He explained in a memorandum for them that the new rules do not in any way alter the current legal landscape regarding the tolling effect of motions for reconsideration or the deadlines for filing a notice of appeal challenging the underlying judgment. All that they do, he noted, is codify and explain the existing law for the benefit of petitioners in response to reports received by the advisory committee that many forfeit their right to appeal, especially pro se filers, because they unwittingly file their appeals too late.

Judge Rosenthal emphasized the importance of the advisory committees: (1) reaching out to affected groups to give them a full opportunity to provide input on proposed rules; and (2) fully documenting on the record how their concerns have been addressed. Some committee members suggested that the recent communications from Congressional staff on the 2009 rules may portend new challenges in the rules process. Last-minute communications with Hill staff, they said, may become a new strategy for parties whose views are not adopted on the merits through the rule-making process. A participant added that it is particularly difficult to predict problems of this sort in advance because staff may be hearing from their friends or from individuals in an organization, rather than the organization itself.

Civil Pleading Standards

Judge Rosenthal reported that legislation had been introduced in each house of Congress to restore pleading standards in civil cases to those in effect before the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. ___, 129 S. Ct. 1937 (2009). The Senate and House bills are phrased differently, but both attempt to legislatively supersede the two decisions and return the law on pleading to that in effect on May 12, 2007. But, she said, the drafting problems to accomplish that objective are truly daunting, and both bills have serious flaws. Both would impose an interim pleading standard that would remain in place until superseded by another statute or by a federal rule promulgated under the Rules Enabling Act process.

The short-term challenge, she suggested, was to identify the proper approach for the rules committees in light of the pending legislation, recognizing that much of the discussion in Congress is intensely political. She reported that she and Judge Kravitz had written a carefully drafted letter to Congress that avoids dragging the committees into the political fray, but accepting the committees' obligation to consider appropriate amendments to the rules. She added that the letter had provided a link to Ms. Kuperman's excellent memorandum documenting the extensive case law developed in the wake of *Twombly* and *Iqbal.* The memorandum, she said, is continually being updated, and it shows that the courts have responded very responsibly in applying the two decisions.

The letter also provided a link to Administrative Office statistical data on the number of motions to dismiss filed before and after *Twombly* and *Iqbal*, the disposition of those dismissal motions, and the breakdown of the statistics by category of civil suit. But no data were available to detail whether the motions to dismiss had been granted with prejudice or with leave to amend and whether superseding complaints were filed. That information will be gathered by staff of the Federal Judicial Center, who will read the docket sheets and case papers and prepare a report for the May 2010 civil rules conference at Duke Law School.

Judge Rosenthal noted that the Advisory Committee on Civil Rules was closely monitoring the intensive political fight taking place in Congress, the substantive debate unfolding among academics and within the courts, and the actions of practicing lawyers in response to *Twombly* and *Iqbal.* She predicted that there will be a substantial effort in Congress to get the legislation enacted in the current Congress, and a number of organizations have made it a top priority. The rules committees, she said, have two goals: (1) to protect institutional interests under the Rules Enabling Act rule-making process; and (2) to fulfill their ongoing obligation under the Act to monitor the operation and effect of the rules and recommend changes in the rules, as appropriate. She suggested that Congress is likely to leave the eventual solution to the pleading controversy up to the rules process. Therefore, the Advisory Committee on Civil Rules will have to decide whether the current pleading standard in the rules is fair and should be continued or changed.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of December 7, 2009 (Agenda Item 6). Judge Sutton reported that the advisory committee had no action items to present.

Informational Items

FED. R. APP. P. 4(a)(1) and 40(a)

Judge Sutton reported that the advisory committee had been considering proposed amendments requested by the Department of Justice to FED. R. APP. P. 4(a)(1) (time to file an appeal in a civil case) and FED. R. APP. P. 40(a) (time to file a petition for panel rehearing). Both rules provide extra time for federal government employees sued in their official capacity. The proposed amendments would make it clear that additional time is also provided when a federal employee is sued in his or her individual capacity for an act or omission occurring in connection with official duties.

The advisory committee, he said, had presented proposed amendments to the Standing Committee. But the Standing Committee returned them for further consideration in light of the Supreme Court's recent decision in *United States ex rel. Eisenstein v. City of New York,* 129 S. Ct. 988 (2009). The problem is that the time limit in FED. R. APP. P. 4(a)(1) is also fixed by statute, 28 U.S.C. § 2107, and therefore may be jurisdictional for the court of appeals under *Bowles v. Russell,* 551 U.S. 205 (2007).

The Department of Justice recommended proceeding with the proposed amendment to Rule 40, but deferring action on Rule 4 because of the *Bowles* problem. The advisory committee, however, was reluctant to seek a change in one rule without a corresponding change in the other, since both use the exact same language. Therefore, it is considering a coordinated package of amendments to the two rules and a companion statutory amendment to 28 U.S.C. § 2107. A decision on pursuing that approach has been deferred to the committee's April 2010 meeting in order to give the Department of Justice time to decide whether seeking legislation is advisable. Judge Rosenthal pointed out that the recent time-computation package of coordinated rule amendments and statutory changes provides relevant precedent for the suggested approach.

INTERLOCUTORY APPEALS FROM THE TAX COURT

Judge Sutton reported that the advisory committee was considering a proposal to amend the rules to address interlocutory appeals from decisions of the Tax Court. A 1986 statute, he explained, had authorized interlocutory appeals, but the Federal Rules of Appellate Procedure have never been amended to exercise this authority. Permissive interlocutory appeals from the Tax Court appear to be very few in number. The advisory committee, he said, will informally solicit the views of the judges of the Tax Court, the tax bar, and others regarding proposed amendments.

OTHER ITEMS

Judge Sutton reported that the advisory committee had deferred action on suggestions to eliminate the three-day rule in FED. R. APP. P. 26(c) (computing and extending time) that gives a party an additional three days to act after a paper is served on it by means other than in-hand service.

The committee had received suggestions to require that briefs be printed on both sides. But, Judge Sutton said, there are strong differences of opinion on the subject, and courts are divided on whether to allow double-sided printing of briefs. As the courts continue to move away from paper, he said, time may overtake the suggestions.

Judge Sutton reported that the advisory committee was responding to a suggestion that Indian tribes be added to the definition of a "state" in the rules, and it is researching how many relevant cases involve Indian tribes and how the courts are handling the cases.

Finally, Judge Sutton reported that the advisory committee was collaborating with the Advisory Committee on Bankruptcy Rules on the bankruptcy appellate rules project and with the Advisory Committee on Civil Rules on overlapping issues that affect both the appellate and civil rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in Judge Swain's memorandum and attachment of December 7, 2009 (Agenda Item 9). Judge Swain reported that the advisory committee had no action items to present.

Informational Items

HEARING ON PUBLISHED RULES

Professor Gibson reported that three of the rules published for comment in August 2009 had attracted substantial public interest and several requests had been received to testify at the hearing scheduled in New York in February 2010.

The proposed amendments to FED. R. BANKR. P. 3001 (proof of claim) and new FED. R. BANKR. P. 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would, among other things: (1) prescribe in greater detail the supporting documentation that must accompany certain proofs of claim; and (2) require a holder of a home mortgage claim in a chapter 13 case to provide additional notice of post-petition fees, expenses, and charges assessed against a debtor.

The proposed amendments to FED. R. BANKR. P. 2019 (disclosure) would require committees and other representatives of creditors and equity security holders to disclose additional information about their economic interests in chapter 9 and chapter 11 cases.

She added that many of the persons testifying represent organizations that purchase consumer debt in bulk and are opposed to the additional disclosures.

BANKRUPTCY APPELLATE RULES

Professor Gibson said that the advisory committee had conducted two very successful conferences with members of the bench, bar, and academia to discuss whether Part VIII of the bankruptcy rules needs comprehensive revision. (Part VIII governs appeals from a bankruptcy judge to the district court or a bankruptcy appellate panel.)

She reported that the committee had decided to move forward on the project with two principal goals in mind: (1) to make the Part VIII rules conform more closely to the Federal Rules of Appellate Procedure; and (2) to recognize more explicitly that records in bankruptcy cases are now generally filed and maintained electronically. She said that the committee would work closely on the project with the Advisory Committee on Appellate

Rules and would like to work with the other advisory committees in addressing jointly the impact of the new electronic environment on the rules.

BANKRUPTCY FORMS MODERNIZATION

Judge Swain reported that the advisory committee's other large project is to modernize the bankruptcy forms. It had created a joint working group of members and others: (1) to examine all the bankruptcy forms for their substance and effectiveness; and (2) to consider how the forms might be adapted to the highly technological environment of the bankruptcy system. She explained that, unlike the illustrative civil forms appended to the civil rules, the bankruptcy official forms are mandatory and must be used in bankruptcy cases under FED. R. BANKR. P. 9009 (forms).

She noted that the working group had started reviewing the forms in January 2008 and had retained a nationally recognized forms-design expert as a special consultant. The focus of the group's initial efforts has been on improving the petition, schedules, and statements filed by an individual debtor at the outset of a case. The consultant, she said, has substantial experience in designing forms used by the general public and has really opened up the eyes of the judges and lawyers on ways that the bankruptcy forms could be simplified, rephrased, and reordered to elicit more accurate information from the public.

Judge Swain reported that the forms working group was also examining trends in technology and how they affect the way that lawyers, debtors, creditors, trustees, judges, clerks, and others use the bankruptcy forms and the pieces of information contained in them. To that end, she said, the Federal Judicial Center had drafted a survey for the committee to send to lawyers and the courts. In addition, the working group was working closely with both the Court Administration and Case Management Committee of the Judicial Conference and the functional-requirement groups designing the "Next Generation" replacement project for CM/ECF (the courts' electronic files and case management system).

Judge Swain noted that the advisory committee had recommended that the Next Generation CM/ECF system be capable of accepting bankruptcy forms, not just as PDF images, but as a stream of data elements that can be manipulated and distributed. The new electronic system must be capable of providing different levels of access to different users in order to guard privacy and security concerns. She noted that the working group would meet again in Washington in January 2010.

FORM 240A

Professor Gibson reported that, in addition to drafting the official, mandatory bankruptcy forms, the advisory committee assists the Administrative Office in preparing optional "Director's Forms." One of the most important of these optional forms, she said, is Form 240A – which includes the reaffirmation agreement and related documents. Among other things, it sets forth the disclosures explicitly required by the Bankruptcy Code. But during the course of the forms modernization project, it was revealed through user surveys that Form 240A is the most troublesome of all the bankruptcy forms for users to complete.

Therefore, the advisory committee worked with the Administrative Office to revise Form 240A and make it more user-friendly. In December 2009, a revised form was posted on the Internet. Professor Gibson said that some lawyers have suggested that the revised form is deficient because it rewords some of the disclosures required by the statute. She said, however, that the advisory committee had recommended the revisions to improve clarity, and she noted that the statute itself permits rewording and re-ordering of most of the required disclosures as long as the meaning is not changed. She added that the advisory committee was taking the suggestions seriously, though, and it would recommend further changes if it determines that the revised form is unclear or inaccurate.

After the meeting, the advisory committee recommended some modest changes to the December 2009 version of Form 240A. It also recommended that the January 2007 version of the form be retained as an alternative version to provide statutory disclosures for those parties that elect to use their own reaffirmation agreement – a practice that the statute allows. The advisory committee concluded that an alternate version of the form was necessary because the December 2009 version was designed as an integrated set of documents that could not be used as a "wrap around" to provide all the necessary disclosures if the parties decide to use their own reaffirmation agreement.

AUTHORITATIVE VERSION OF THE BANKRUPTCY RULES

Judge Swain reported that there has never been an official version of the Federal Rules of Bankruptcy Procedure. The Administrative Office, however, had just succeeded in creating an authoritative version of the rules after months of intensive effort by interns under the leadership of Mr. Ishida. They compared the different commercial versions on the market and researched the original source documents, including rules committee minutes and reports, Supreme Court orders, and legislation to verify the accuracy of each rule. The new, authoritative rules, she said, would be posted shortly on the federal courts' Internet web site.

MASTERS

Professor Gibson noted that FED. R. BANKR. P. 9031 (masters not authorized) makes FED. R. CIV. P. 53 (masters) inapplicable in bankruptcy cases. She reported, though, that the advisory committee had recently received suggestions to abrogate Rule 9031 and allow the appointment of masters in appropriate bankruptcy cases. The committee, she said, had reviewed and rejected the same suggestion on several occasions in the past. After careful deliberation, it decided again that the case had not been made to change its policy on the matter. Among other things, the committee was concerned about adding another level of review to the bankruptcy system, which already has several levels of review.

A member asked whether bankruptcy judges use other bankruptcy judges to assist them in huge cases. Judge Swain responded that judges usually have excellent lawyers and thorough support in large cases, and other judges frequently volunteer to help in various settlement matters. Professor Gibson added that the Bankruptcy Code authorizes the appointment of examiners in appropriate cases. Unlike masters, though, examiners are not authorized to make judicial recommendations.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Kravitz and Professor Cooper presented the report of the advisory committee, as set out in Judge Kravitz's memorandum and attachment of December 8, 2009 (Agenda Item 5). Judge Kravitz reported that the advisory committee had no action items to present.

Informational Items

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz reported that after completing work on the proposed amendments to FED. R. CIV. P. 26 (disclosure and discovery) and FED. R. CIV. P. 56 (summary judgment), the advisory committee decided to step back and take a hard look at civil litigation in the federal courts generally and to ask the bench and bar how well it is working and how it might be improved. About the same time, the Supreme Court rendered its decisions in *Twombly* and *Iqbal* regarding notice pleading, and bills were introduced in Congress to overturn those decisions.

The advisory committee agreed that the most productive way to have a dialogue with the bar and other users of the system would be to conduct a major conference and invite a broad, representative range of lawyers, litigants, law professors, and judges.

Judge Kravitz noted that Judge John G. Koeltl, a member of the advisory committee, had taken charge of arranging the conference, scheduled for Duke Law School in May 2010, and he was doing a remarkable job.

Judge Kravitz reported that the conference will rely heavily on empirical data to provide an accurate picture of what is happening in the federal litigation system. In addition, the committee wants to elicit the practical insights of the bar. To that end, it had asked the Federal Judicial Center to send detailed surveys to lawyers for both plaintiffs and defendants in all federal civil cases closed in the last quarter of 2008. The response level to the survey, he said, has been high, and the information produced is very revealing. In addition, Center staff has been conducting follow-up interviews with lawyers who responded to the surveys.

Additional data will be produced for the conference by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System. RAND, Fortune 200 companies, and some bar groups, such as the National Employment Lawyers Association, may also submit data. Among other things, the data may provide insight on whether new computer applications and techniques might be able to drive down the cost of discovery.

Judge Kravitz noted that the majority opinion in *Twombly* had cited a 1989 law review article by Judge Frank H. Easterbrook, based on anecdotal evidence, arguing that discovery costs are out of line and that district judges are not attempting to rein them in. The preliminary survey results from the Federal Judicial Center, however, show that little discovery occurs in the great majority of federal civil cases, and the discovery in those cases does not appear to be excessively costly, with the exception of 5% to 10% of the cases. That result, he said, is surprising to lawyers, but not to judges. Nevertheless, the extensive discovery in a minority of federal civil cases has caused serious discovery problems. The biggest frustration for lawyers, he said, occurs when they are unable to get the attention of a judge to resolve discovery issues quickly.

Judge Kravitz noted that Judge Koeltl had gathered an impressive array of topics and panelists for the conference, and several of the panelists have already written papers for the event. He said that the conference will hear from bar associations and from groups and corporations that litigate in the federal system. It will also examine the different approaches that states such as Arizona and Oregon take in civil litigation, as well as recent reform efforts in other countries, including Australia and the United Kingdom. The conference's proceedings will be recorded and streamed live, and the Duke Law Journal will publish the papers.

He added that enormous interest had been expressed by bench and bar in participating in the conference, and more than 300 people have asked to attend. Space,

though, is limited, and the formal invitation list is still a work in progress. A web site has been created for the conference, but is not yet available to the general public because several papers are still in draft form.

Judge Kravitz predicted that the conference will elicit a number of proposals for change that will be a part of the agenda for the Advisory Committee on Civil Rules for years to come. One cross-cutting issue, for example, is whether the civil rules should continue to adhere to the fundamental principle of trans-substantivity. He noted that several participants have suggested that different rules, or variations of the rules, should apply in different categories of civil cases. In addition, he said, the advisory committee may resurrect its work on a set of simplified procedures that could be used in appropriate civil cases.

PLEADING STANDARDS FOLLOWING *TWOMBLY* AND *IQBAL*

Judge Kravitz noted that pleading standards have been on the advisory committee's study agenda for many years. The committee, however, started looking at notice pleading much more closely after *Twombly* and *Iqbal.* At its October 2009 meeting, moreover, it considered a suggestion to expedite the normal rules process and prepare appropriate rule amendments in light of pending legislative efforts. Nevertheless, the committee decided that it was essential to take the time necessary to see how the two Supreme Court decisions play out in practice before considering any rule amendments. Therefore, it has been monitoring the case law closely, reaching out to affected parties for their views, and working with the Federal Judicial Center, the Administrative Office, and others to develop needed empirical data.

He reported that the statistics gathered by the Administrative Office show that there has been no substantial increase since *Twombly* and *Iqbal* in the number of motions to dismiss filed in the district courts or in the percentage of dismissal motions granted by the courts. He added that the motions data, though relevant, are not determinative, and the Federal Judicial Center will examine the cases individually.

In addition, Judge Kravitz noted that every circuit had now weighed in with in-depth analysis on what the Supreme Court cases mean. A review of court opinions shows that the case law is nuanced. Few decisions state explicitly that a particular case would have survived a motion to dismiss under *Conley v. Gibson*, but not under *Iqbal.* What is clearly important, he said, are the context and substance of each case.

There is the possibility, he suggested, that through the normal development of the common law, the courts will retain those elements of *Twombly* that work well in practice and modify those that do not. Accordingly, decisional law, including future Supreme Court decisions, may produce a pleading system that works very well in practice. By way

of example, he noted that *Conley* by itself was not really the pleading standard before *Twombly*. It had to be read in conjunction with 50 years of later case law development.

For the short term, he said, the committee cannot presently determine, and the Federal Judicial Center's research will not be able to show, whether people who would have filed a civil case in a federal court before *Twombly* are not doing so now. For example, it would be helpful to know from the plaintiffs' bar whether they are leaving the federal courts for the state courts or adapting their federal practices to survive motions to dismiss.

Judge Kravitz said that members of Congress and others involved in the pending legislation had expressed universally favorable comments about the rules process. Moreover, several members of the academy have argued pointedly that the Supreme Court did not respect the rule-making process in *Twombly* and *Iqbal*. Nonetheless, despite their support for the rules process, they are concerned that the process is too slow and that some people will be hurt by the heightened pleading standards in the next few years while appropriate rule amendments are being considered.

A member added that even though the great body of case law demonstrates that the courts are adapting very reasonably to *Twombly* and *Iqbal* and are protecting access to the courts, it will always be possible to find language in individual decisions that can be extracted to argue that immediate change is necessary. Even one bad case, he said, in an area such as civil rights, could be used to justify immediate action.

Judge Kravitz explained that the pleading problems tend to arise in cases where there is disparity of knowledge between the parties. The plaintiff simply does not have the facts, and the defendant does not make them available before discovery. As a result, he said, he and other judges in appropriate cases permit limited discovery and allow plaintiffs to amend their complaints.

Judge Kravitz stated that drafting appropriate legislation in this area is very difficult. Legislation, moreover, is likely to inject additional uncertainty and actually do more harm than good. All the bills proposed to date, he said, have enormous flaws and are likely to create additional litigation as to what the new standard means.

Judge Scirica expressed his thanks on behalf of the Executive Committee to Judges Rosenthal and Kravitz for handling a very difficult and delicate problem for the rules process. He said that what they have been doing is institutionally important to the judiciary, and they have acted with great intelligence, tact, and foresight.

PROFESSOR BONE'S COMMENTARY ON *TWOMBLY* AND *IQBAL*

Professor Bone was invited to provide his insights on the meaning of *Twombly* and *Iqbal* and his recommendations on what the rules committees should do regarding pleading standards. His presentation consisted of three parts: (1) a review of the two cases; (2) a discussion of the broader, complex normative issues raised in the cases; and (3) a discussion of whether, when, and how the rules process should be employed.

He explained that both *Twombly* and *Iqbal* adopted a plausibility standard. Both require merits screening of cases, and both question the efficacy of case management to control discovery costs. But, he said, there are significant differences between the two cases. *Twombly's* version of plausibility, he said, is workable on a trans-substantive basis, but *Iqbal's* is not.

Twombly, he suggested, had made only a minor change in the law of pleading, requiring only a slight increase in the plaintiff's burden. The allegations in the complaint in *Twombly* had merely described normal behavior. Under the rules, however, the plaintiff must tell a story showing that the defendant deviated in some way from the accepted baseline of normal behavior.

Twombly applied a "thin" screening model that does not require a high standard of pleading and calls for a limited inquiry by the court. Essentially, the purpose of the court's review is to screen out frivolous cases by asking the judge to interpret the complaint as a whole to see whether it is plausible and may have merit. *Twombly* did not adopt a two-pronged approach to the screening process, even though the opinion in *Iqbal* states that it did. In screening under *Twombly,* judges do not have to discard legal allegations in the complaint. Rather, the conclusory nature of any allegations is taken as part of the court's larger, gestalt review of the total contents of the complaint.

Iqbal, on the other hand, adopted a more substantial, "thick" pleading standard. The allegations in the *Iqbal* complaint did in fact tell a story of behavior that deviated from the accepted baseline conduct. The context of the complaint, taken as a whole, supported that conclusion. Yet *Iqbal* turned the plausibility standard into a broader test – not just to identify objectively those suits that lack merit, but also to screen out potentially meritorious suits that are weak.

Professor Bone asserted that *Iqbal's* two-pronged approach – of excluding legal conclusions from the complaint and then looking at the plausibility of the rest of the complaint – does not make sense. The real inquiry for the court has to be whether the allegations in the complaint, taken as a whole, support a plausible inference of wrongdoing.

He added that much of the academic analysis of the cases has been shallow and polarized. Many critics, for example, have framed the normative issues as a mere test between efficiency on the one hand and fairness and access rights on the other – weighing the potential costs of litigation against the need to maintain access to the courts. This analysis, however, is too simplistic. It does not work because economists, in fact, care deeply about fairness, and rights-based or fairness advocates care about litigation costs and fairness to defendants. It is really a balance between the two in either event.

As a matter of process, plaintiffs have a right of access to the courts that is not dependent on outcome. The "thin" *Twombly* screening process can be justified on moral grounds, as it requires the court to apply a moral balance between protecting court access for plaintiffs and considering fairness to defendants in having to defend against the allegations. The approach of *Iqbal,* on the other hand, is based on outcome and whether a case is strong or weak.

Professor Bone said that a normative analysis should be grounded in explaining why plaintiffs file non-meritorious suits. In reality, he said, this occurs in large measure because of the asymmetric availability of information between the parties. That asymmetry causes the problem that the stricter *Iqbal* standard of review is trying to address.

Professor Bone suggested that the central substantive question for the rules committees will be to specify how much screening a court must apply in order to dismiss non-meritorious suits at the pleading stage. Procedurally, he said, the committees need to address three key questions: (1) whether to get involved; (2) when to do so; and (3) how to do so.

The first question, he said, had already been decided; for the rules committees are already deeply involved in the pleading dispute. Indeed, he said, they should be involved forcefully – with or without Congressional action. And they should be prepared to confront political interest groups on the merits, if necessary. On the other hand, they also have to be pragmatic in protecting the integrity of the rules process itself, and they need to take the time necessary to achieve the right results.

Professor Bone emphasized that it was important to gather as much empirical information as possible. But considerable care and insight must be given to interpretation of the data. Even if the statistics reveal no significant change in dismissal rates since *Twombly* and *Iqbal,* the numbers are not definitive if they do not show whether plaintiffs are discouraged from filing cases in the first place. The ultimate metric for judging whether a pleading standard is working well is whether case outcomes are fair and appropriate, not whether the judges and lawyers are pleased.

He added that the Advisory Committee on Civil Rules should seriously consider deviating from the traditional trans-substantive approach of the rules in drafting a revised pleading standard. A revised rule, for example, might exclude certain kinds of cases, such as civil rights cases, from any kind of "thick" screening standard. It might also focus specifically on complex cases, or enumerate facts that courts should consider, such as informational asymmetry and the stakes and costs of litigation. In addition, the committee should use the committee notes more aggressively and cite examples to explain how and why the rule is being amended. It should not, however, try to develop pleading forms.

COMMITTEE DISCUSSION OF *TWOMBLY* AND *IQBAL*

Judge Kravitz pointed out that trans-substantivity has been a basic foundation of the Federal Rules of Civil Procedure for more than 70 years. Deviating from it would upset current expectations and entail serious political complications. Interest groups that use the federal courts, he said, have polar opposite views on certain issues. Some plaintiffs believe that the rules currently favor defendants, while some defendants believe that they are forced to settle meritless suits that should be dismissed on the pleadings. He added that the whole discussion is influenced in large part by discovery costs, and he noted that some corporations have designed their computer systems to accommodate potential discovery needs, rather than to address core business needs.

A participant agreed that it would be extremely difficult to deviate from trans-substantivity and to specify different rules for different categories of cases. For one thing, it is not always clear cut what category a case falls into. A more fruitful approach, he suggested, would be for a rule to focus on the parties' relative access to information, rather than on the subject nature of a case. Fundamental differences exist, he said, between those cases where the litigants have equal access to information and those where the plaintiff does not have access to the facts necessary to plead adequately. He suggested that this asymmetry prevails in many civil rights and employment discrimination cases. It also occurs in antitrust cases where the plaintiff alleges, but does not know for sure, that the defendant has engaged in a conspiracy or agreement. The plaintiff knows only that the defendants' behavior suggests it.

In addition, he said, it is difficult to isolate pleading from other aspects of a civil case – such as discovery, summary judgment, and judicial case management. The civil rules are linked as a whole, and if the pleading rules are changed, it may affect the application of several other rules. Another approach that the committee could consider in addressing information asymmetry would be to link pleading with preliminary discovery. Thus, in appropriate cases, the court could permit the plaintiff to frame a proper pleading by allowing some sort of preliminary inquiry into information that only the defendant possesses.

A lawyer member said that one of the great strengths of the rules process is that the advisory committees rely strongly on empirical evidence. He reported that he had not detected any changes or problems in practice as a result of *Twombly* and *Iqbal,* even though many interesting intellectual issues have been raised in the ensuing debates. A reasonable judge, he said, can almost always detect a frivolous case. Therefore, before proceeding with potential rule adjustments, the committee should obtain sound empirical data to ascertain whether any real problems have in fact been created by *Twombly* and *Iqbal.* Judge Kravitz added that the advisory committee needs to hear from lawyers directly, especially plaintiffs' lawyers, about any changes in their practice. For example, it would be relevant to know whether they have declined any cases that they would have taken before *Twombly* and *Iqbal* and whether they now must devote more pre-pleading work to cases.

A judge member concurred that, despite perceptions, there did not appear to have been much change since *Twombly* and *Iqbal,* except that the civil process may well turn out to be more candid. The trans-substantive nature of the civil rules, he said, is beneficial and allows for appropriate variation from case to case. The context of each case is the key. Thus, a plaintiff may have to plead more in an antitrust case than in a prisoner case. Instead of mandating different types of pleadings for different cases, the trans-substantive rules – which now incorporate an overarching plausibility standard – can be applied effectively by the courts in different types of cases. The bottom line, he suggested, is that even though plaintiffs may be concerned about *Twombly* and *Iqbal*, they are really not going to suffer.

Another member suggested, though, that the two Supreme Court opinions had in fact changed the outcome of some civil cases and may well affect the outcome of future cases. Use of the term "plausibility," moreover, is troubling because it borders on "believability" – which lies within the province of the jury. It may be that FED. R. CIV. P. 8 will become more like FED. R. CIV. P. 56, where practice in the courts has developed so far that it bears little resemblance to the actual language of the national rule. Procedural rules, she said, are sometimes made by Congress or the Supreme Court. But the rules committees are the appropriate forum to draft rules because the committees demand a solid empirical basis for amendments, seek public comments from all sides, and give all proposals careful and objective deliberation. Therefore, the Advisory Committee on Civil Rules should proceed to gather the empirical information necessary to support any change in the pleading rules.

Mr. Ogden reported that the Department of Justice had not taken a position on the debate, but it is very interested in the matter and has unique perspectives to offer since it acts as both plaintiff and defendant. In addition, he said, important government policies may be at stake.

A judge member suggested that a number of federal civil cases, especially *pro se* cases, are clearly without merit and do not state a federal claim. But where there is a genuine imbalance of information, dismissal of the case should be addressed at the summary judgment phase. The problem is that a dismissal motion normally occurs before any discovery takes place. Accordingly, a revised rule might borrow a procedure from summary judgment practice to specify that plaintiffs who oppose a motion to dismiss be allowed to explain why they cannot supply the missing allegations in the complaint and to seek some discovery to respond to the motion.

Other participants concurred in the suggestion. One recommended that a procedure be adapted from FED. R. CIV. P. 11(b)(3), which specifies that an attorney may certify to the best of his or her knowledge that the allegations in a pleading "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." That standard might be borrowed for use in dealing with motions to dismiss. A participant added, however, that the same suggestion had been made by the court of appeals in *Iqbal* and was rejected by the Supreme Court.

A lawyer member explained that, in current practice, plaintiffs confronting a motion to dismiss use the summary judgment mechanism and submit an affidavit to the court specifying what evidence they have and what they need. For many defendants, winning the motion to dismiss is really the entire ball game – not because of the merits of the case, but because the potential costs of discovery often exceed the value of the case to them. Therefore, if a dismissal motion is denied, a quick settlement of the case usually follows. This practical reality, he said, will not appear in the statistics. He concluded that the two Supreme Court decisions have not made a change in the law. Nor, he said, will allowing plaintiffs additional discovery make a difference.

Another lawyer member concurred that the two decisions had not affected his practice. The principal danger, he warned, is that Congress has already injected itself into the dispute and will likely try to resolve the matter politically at the behest of special interest groups. He asked what the committees' strategy should be if Congress were to enact a statute in the next month or so.

Judge Rosenthal explained that the committees have been concentrating on providing factual information to Congress, including statistical information on dismissal motions. She noted that the committees and staff have been working hard in examining the case law and statistics to ascertain whether there has been an impact since *Twombly* and *Iqbal.* The research to date, she said, shows that there has been little measurable change, even in civil rights cases. In addition, the committees have been commenting informally on proposed legislation and exploring less risky legislative alternatives, without getting involved in the politics. The central message to Congress, she said, has been to seek appropriate solutions through the rules process.

Judge Kravitz added that the rules committees cannot suggest appropriate legislation, even though they have been asked to do so, because they simply do not know what problems Congress is trying to solve. Interestingly, lawyers and other proponents of legislation have professed great confidence in the rules process and are urging action in part because they assert that the Supreme Court was not sufficiently deferential to the process. At the same time, though, they do not want to wait three years or more for the rules process to play out. They want to turn the clock back immediately while the rules process unfolds in a deliberate manner. He added that the committees have been reaching out to bar groups and others for several years, and the outreach efforts have been very beneficial for the rules process.

A participant reported that when the Private Securities Litigation Reform Act was being developed a few years ago, the rules committees decided that the most important interest was to protect the Rules Enabling Act process. Therefore, they chose not to participate, at least in a public way, with any statement or position on the proposed legislation. Instead, they concluded that it was an area of substantive law that Congress was determined to address, and anything the committees would say would not be given much weight. Moreover, any statement or position taken by the judiciary would likely be used by one side or the other in the political debate to their advantage, and to the ultimate detriment of the judiciary. In fact, he said, Congress did change the pleading standard in securities cases by legislation. In retrospect, the sky did not fall. Securities cases are still being filed and won, but now they contain more information.

Mr. Cecil reported that the research being conducted by the Federal Judicial Center will provide the committees with needed empirical structure, rather than anecdotal advice, in a very complex area. He said that Center staff are examining motions to dismiss filed from September to December during each of the last five years, *i.e.,* before and after *Twombly* and *Iqbal.* They are examining the text of the docket sheets and the text of the case documents themselves. They will look at whether dismissal motions were granted with leave to amend, whether the plaintiffs in fact amended the complaints, and whether the cases were terminated soon afterwards. Unfortunately, though, it may be impossible to ascertain some types of relevant information, such as whether there was differential access to information in a particular case, whether cases have shifted to the state courts, or whether the heightened pleading standards have discouraged filings.

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee was considering several suggestions from the bar to revise FED. R. CIV. P. 45 (subpoenas). He noted that a subcommittee had been appointed to address the suggestions, chaired by Judge David G. Campbell and with Professor Richard L. Marcus as reporter.

Judge Kravitz said that the subcommittee had considered many different topics, but is focusing on four potential approaches. First, the subcommittee is considering completely reconfiguring Rule 45 to make it simpler and easier to use. It is a dense rule that is not well understood. Second, the subcommittee is examining a series of notice issues because the current notice requirements in the rule are often ignored. Third, it is exploring important issues concerning the proper allocation of jurisdiction between the court that has issued a subpoena and the court where a case is pending. Fourth, it is considering whether courts can use Rule 45 to compel parties or employees of parties to attend a trial, even though they are more than 100 miles from the courthouse.

On the other hand, there are two other issues that the committee probably will not address: (1) the cost of producing documents and sharing of production costs; and (2) whether service of the subpoena should continue to be limited to personal service or be broadened to be more like the service arrangements permitted under FED. R. CIV. P. 4 (service).

Judge Kravitz explained that if the committee decides to reconfigure the whole rule, it will not have a draft ready to be presented to the Standing Committee at the June 2010 meeting. But if it decides to address only a limited number of discrete issues, it might have a proposal ready by that time for publication.

Professor Cooper added that Rule 45 is too long and difficult to read. Moreover, it specifies that the full text of the rule be reproduced on the face of the subpoena form. The advisory committee, he said, should at least attempt to simplify the language of the rule, and in doing so it will focus on three key issues: (1) which court should issue the subpoena – the district where it is to be executed or the court having jurisdiction over the case: (2) which court should handle issues of compliance with the subpoena; and (3) where the subpoena should be enforced when there is a dispute. He suggested that the rule might also contain a better transfer mechanism, such as one that would consider the convenience of parties.

A member stated that the rule needs a good deal of attention because substantial satellite litigation arises over these issues, especially in complex cases. In addition, the advisory committee should focus on notice issues. Under the current rule, he explained, subpoenas must be noticed to the other party. In practice, though, they are generally issued without notice to the other party, and there is no notice that the documents have been produced. He concluded that the advisory committee should take all the time it needs to revise this important rule carefully and deliberately.

OTHER ITEMS

Judge Kravitz reported that the advisory committee had formed an ad hoc joint subcommittee with the Advisory Committee on Appellate Rules, chaired by Judge Steven M. Colloton, to deal with common issues affecting the two committees.

He noted that the advisory committee was looking to see whether FED. R. CIV. P. 26(c) (protective orders) needs changes. He noted that the courts appear to be handling protective orders very well. Nevertheless, the text of the rule itself might need to be amended to catch up with actual practice, as with FED. R. CIV. P. 56 (summary judgment).

He reported that the advisory committee was considering whether to eliminate the provision in FED. R. CIV. P. 6(d) that gives a party an extra three days to act after receipt of service by mail and certain other means. The committee has decided, though, to let the new time-computation rules be digested before hitting the bar with another rule change that affects timing.

Finally, he said, the advisory committee was re-examining its role in drafting illustrative forms under authority of FED. R. CIV. P. 84 (forms), especially since the illustrative forms are generally not used by the bar. It might decide to reduce the number of illustrative forms, or it might turn over the forms to the Administrative Office to issue under its own authority. He cautioned, though, that any change in the pleading forms at this juncture might send a wrong signal in light of the *Twombly-Iqbal* controversy.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Tallman and Professor Beale presented the report of the advisory committee, as set forth in Judge Tallman's memorandum and attachment of December 11, 2009 (Agenda Item 8). Judge Tallman reported that the advisory committee had no action items to present.

Informational Items

FED. R. CRIM. P. 16 – BRADY MATERIALS

Judge Tallman reported that the advisory committee had wrestled for more than 40 years with a variety of proposals to expand discovery in criminal cases. Most recently, in 2007, it had recommended, on a split vote, an amendment to FED. R. CRIM. P. 16 (discovery and inspection). The proposal, based on a suggestion from the American College of Trial Lawyers, would have codified the prosecution's obligations to disclose to the defendant all exculpatory and impeaching information in its possession.

He explained that the Department of Justice does not appear to have serious difficulty with a rule that would merely codify its obligations under *Brady v. Maryland,* 373 U.S. 83 (1963) – but only if the proposed rule were limited to exculpatory information and if it contained a materiality standard. On the other hand, the Department objects strongly to codifying disclosure of impeachment materials under *Giglio v. United States,* 405 U.S. 150 (1972). He added that a counter-proposal had been made within the advisory committee to limit disclosure under the proposed amendment to "material" information, but it failed to carry.

Judge Tallman reported that in 2007 the Standing Committee had received a lengthy letter from then-Deputy Attorney General Paul J. McNulty objecting to the rule proposed by the advisory committee. The Standing Committee, he said, recommitted the proposed amendment to the advisory committee on the explicit assurance from the Department of Justice that it would strengthen the advice it gives to prosecutors in the U.S. Attorneys' Manual regarding their *Brady-Giglio* obligations and undertake additional training of prosecutors. The Standing Committee believed that the Department would need time to assess the effectiveness of these measures, so it remanded the amendment to the advisory committee with a broad directive to continue monitoring the situation.

Not long afterwards, the celebrated case against Senator Theodore F. Stevens unfolded. It was alleged that a key prosecution witness in the case had changed his story. But the defense had not been notified of that fact, and it moved for a new trial. In early 2009, the new Attorney General, Eric H. Holder, Jr., authorized the prosecutor to move to dismiss the case because of the failure to disclose. He also directed that a working group be established within the Department of Justice to review fully what had happened in the Stevens case and whether the Department had faithfully carried out the promises made to the Standing Committee in 2007. In addition, Judge Emmet G. Sullivan, the trial judge in the Stevens case, wrote to the advisory committee and urged it to resubmit the proposed amendment to FED. R. CRIM. P. 16 that had been deferred by the Standing Committee.

Judge Tallman reported that the written results of the Department's review had just been made available. They include a comprehensive program of training and operational initiatives designed to enhance awareness and enforcement of *Brady-Giglio* obligations. He commended the Department and Deputy Attorney General Ogden for their enormous efforts on the project and the breadth of the proposed remedial measures. He emphasized that the proposed amendments to FED. R. CRIM. P. 16 would make a major change in criminal discovery, and he pointed out that criminal discovery poses very different concerns from civil discovery. Among other things, criminal discovery implicates serious issues involving on-going investigations, victims' rights, security of witnesses, and national security.

Deputy Attorney General Ogden thanked the committee for its careful and measured approach and explained that the Department continues to oppose any rule that goes beyond *Brady* and the requirements of the Constitution. He assured the committee that the Department and its leadership are very serious about disclosure and have made it a matter of high priority. He pointed out that after the Stevens violations had been uncovered, the Department moved to dismiss the case, even though that was not an easy decision for it to make. It also convened a high-level working group of senior prosecutors and members of the Attorney General's team to study the Department's practices and make recommendations to minimize *Brady* violations going forward.

The group, he said, had met frequently and surveyed the U.S. attorneys on a regular basis. It endeavored to pinpoint the scope of the problem and measure the state of compliance. In so doing, it asked the Office of Professional Responsibility to examine not only those cases brought to its attention, but also to search for potential issues of non-compliance. The results of the Department-wide study, he said, reveal that there are no rampant violations or serious problems with compliance. The Office, for example, reported that there had been findings of violations in only 15 instances out of 680,000 criminal cases filed by the Department over nine years – an average of only one or two a year out of the thousands of cases prosecuted. The findings, moreover, include both intentional misconduct and unintentional errors. The numbers, he said, put the scope of the problem in proper perspective.

Mr. Ogden said that the Department believes that the violations reflect a handful of aberrational occurrences that could not be averted by a new federal rule. Instead, a more comprehensive approach should be taken, including strict compliance with the existing rules, enhanced training of prosecutors and staff, and a number of other efforts. In addition, the Department will strive for greater uniformity in disclosure practices among the districts.

Training, he said, is extraordinarily important. Until recently, he noted, the U.S. Attorneys' Manual had not included instructions on *Brady* and *Giglio*, nor had *Brady* and *Giglio* obligations been included specifically in the Department's training. In 2006, however, the Department substantially revised the manual to address disclosure of both exculpatory and impeaching materials. In addition, a comprehensive new training program is now in place that requires all prosecutors to attend a seminar on *Brady* and *Giglio*. To date, 5,300 prosecutors have been trained in the new curriculum, and every prosecutor will be required to attend a refresher program every year.

Mr. Ogden reported that the Department had just sent detailed guidance to all prosecutors on disclosure obligations and procedures. It is also developing a central repository of information for all U.S. attorneys and a new disclosure manual that will incorporate lessons learned and inform prosecutors on what kinds of information they

must disclose, what they must not disclose, and what they should bring to the attention of the court. A single official will be appointed permanently to administer the disclosure program on a national basis. At the local level, the Department has mandated that each U.S. attorney focus personally on the importance of the issue, designate a criminal disclosure expert to answer questions and serve as a point of contact with Department headquarters, and develop a district-wide plan to implement the Department's national plan and adapt it to local circumstances. Other plans include training of paralegals and law enforcement officers and developing a case management process that incorporates disclosure. The Department is also speaking with the American Bar Association about ways to promote additional transparency.

A member suggested that the Department might also want to consider pulling some U.S. attorney files randomly for review, following the standard practice that many hospitals have in place. That step, he said, would provide a positive motivation for U.S. attorneys' offices to comply with their disclosure obligations.

Another member asked whether the Department's plan specifies the nature of the discipline that will be applied to prosecutors who violate *Brady* and *Giglio* obligations. Thus, if assistant U.S. attorneys know clearly that they could be terminated for violations, it could have a real impact on deterring inappropriate behavior.

Mr. Ogden said that in considering impeachment information under *Giglio*, it is essential to balance the value of disclosing the particular information in a case to the defense against the impact that disclosure may have on the privacy and security needs of witnesses. In many situations, he said, the information is dangerous or very embarrassing to a potential witness, and it is not central to the outcome of the case. It should not be disclosed because turning it over would chill witnesses from giving information in the future. The prosecutor, he said, is the appropriate officer to make the disclosure decision.

Judge Tallman reported that the advisory committee had met most recently in October 2009. At the meeting, Assistant Attorney General Lanny A. Breuer presented a preview of the Department's comprehensive program. The committee decided that it should also reach out and solicit the views and experiences of interested parties. To that end, it will convene an informal discussion session in Houston in February 2010 with a small group of U.S. attorneys and other Department of Justice officials, a representative of crime victims' rights groups, the president of the National Association of Criminal Defense Lawyers, a federal public defender, and other lawyers having substantial practical experience with *Brady* issues.

Judge Tallman said that one of the key questions for the participants at the session will be whether a change in the federal rules is needed, or indeed would be effective in preventing abuses. He noted that any rule change would have to be carefully drafted to be

consistent with the Jencks Act, the Crime Victims' Rights Act, and statutes protecting juvenile records and police misconduct records.

Another important issue to be discussed at the session will be whether discovery should be required at an earlier stage of the process. In addition, he reported, the advisory committee will continue to conduct empirical research by surveying practitioners and examining the procedures in those districts that have expanded disclosure practice on a local basis.

FED. R. CRIM. P. 5 - VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to make sure that the rights of victims are addressed on a regular, ongoing basis. He noted that he had reported to the Standing Committee in June 2009 that there was no need to recommend amending FED. R. CRIM. P. 5 (initial appearance) to specify that a magistrate judge take into account a victim's safety at a bail hearing because that requirement is already set forth in the governing statute and followed faithfully by judges. Nevertheless, he said, the advisory committee continues to be sensitive to the interests of the victims and will continue to reach out to them. Among other things, it has invited a victims' representative to participate in its upcoming Houston session on disclosure.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Hinkle and Professor Capra presented the report of the advisory committee, as set forth in Judge Hinkle's memorandum and attachment of December 14, 2009 (Agenda Item 7). Judge Hinkle reported that the advisory committee had no action items to present.

Informational Items

RESTYLED EVIDENCE RULES

Judge Hinkle reported that the advisory committee's major initiative was to complete work on restyling the Federal Rules of Evidence. The revised rules, he said, had been published, and the deadline for comments is in February 2010. Written comments had been received, including very helpful suggestions from the American College of Trial Lawyers. But only one witness had asked to appear at the scheduled public hearing. Therefore, the hearing will likely be cancelled and the witness heard by teleconference. He added that the Style Subcommittee has been doing an excellent job, and it has been working closely with the advisory committee on the revised rules.

The advisory committee, he explained, plans to complete the full package of style amendments at its April 2010 meeting and bring the package forward for approval at the June 2010 Standing Committee meeting. Judge Rosenthal added that the restyled evidence rules will be circulated to the Standing Committee in advance of the rest of the agenda book to give the members additional time to review the full package. Judge Hinkle recommended that if any member of the committee identifies an issue or a problem with any rule, the member should let the advisory committee know right away so the issue may be addressed and resolved before the Standing Committee meeting.

CRAWFORD V. WASHINGTON

Judge Hinkle added that the advisory committee was continuing to monitor developments in the wake of the Supreme Court's decision in *Crawford v. Washington,* 541 U.S. 36 (2004), dealing with the admissibility of out-of-court "testimonial" statements under the Confrontation Clause of the Constitution. The case law, he said, is continuing to develop, and the Supreme Court is scheduled to hear argument in another *Crawford* case later in January 2010.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the subcommittee, explained that the Federal Judicial Center had just filed its final report on sealed cases in the federal courts, written by Mr. Reagan. The report, he said, was excellent, and he recommended that all participants read it. At the subcommittee's request, the Center had examined all cases filed in the federal courts in 2006, and it identified and analyzed all cases that had been fully sealed by a court. The subcommittee members, he said, had reviewed the report carefully, and they take comfort in the fact that it reveals that there are very few instances in which a court appears to have made a questionable decision to seal a case. Nevertheless, he said, any error at all in improperly sealing a case is a concern to the judiciary.

He reported that the subcommittee was now moving quickly to have a report ready to present to the Standing Committee in June 2010. It will focus on several issues. First, he said, it will discuss whether there are cases in which sealing was improper. He noted that there appear to have been fewer than a dozen such cases nationally among hundreds of thousands of cases filed in 2006. Second, it will address whether sealing an entire case was overkill in a particular case, even though there may have been a need to seal certain documents in the case, such as a cooperation agreement with a criminal defendant. He noted, too, that in some districts juvenile cases are not sealed, but the juvenile is simply listed by initials. Third, the report will discuss cases in which sealing a case was entirely proper at an early stage of the proceedings, such as in a qui tam action or a criminal case with an outstanding warrant, but the court did not get around to unsealing the case later.

The subcommittee, he said, will not likely recommend changes in the rules, but it may use Professor Capra's recent report and guidelines on standing orders as a model to propose that the Judicial Conference provide guidance to the courts on sealing cases. For example, guidelines might specify that sealing an entire case should be a last resort. Courts should first consider lesser courses of action. Guidelines might also recommend developing technical assistance for the courts, such as prompts from the courts' electronic case management system to provide judges and courts with periodic notices of sealed cases pending on their dockets. Guidelines might also recommend a procedure for unsealing executed warrants.

In addition, he said, there should be some type of court oversight over the sealing process. For example, no case should be sealed without an order from a judge. In addition, procedures might be established for notifying the chief judge, or all the judges, of a court of all sealed cases.

Judge Rosenthal added that the sealing subcommittee and the privacy subcommittee have been working very well together. Both, she said, are deeply concerned about protecting public access to court records, while also guarding appropriate security and privacy interests. She expressed thanks, on behalf of all the rules committees, to the Federal Judicial Center for excellent research efforts across the board that have provided solid empirical support for proposed rule amendments.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the privacy subcommittee, reported that the subcommittee had been asked a year ago to review whether the 2007 privacy rules are working well, whether they are protecting the privacy concerns that they identify, and whether additional privacy concerns are being addressed by the courts on a local basis. In conducting that inquiry, she said, the subcommittee's first task had been to gather as much information as possible from the experiences of the 94 federal district courts. Therefore, it had asked the Federal Judicial Center to survey judges and clerks, and the Department of Justice to survey U.S. attorneys' offices.

She reported that the subcommittee had received superb staff assistance from Mr. Cecil and Meghan Dunn of the Federal Judicial Center in preparing and executing the surveys, Heather Williams of the Administrative Office in collecting all the local rules of the courts and comparing them to the national rules, and Mr. Rabiej of the Administrative Office in coordinating these efforts. In addition, she thanked Professor Capra for serving very effectively as the subcommittee's reporter.

Judge Raggi reported that the preliminary results obtained from the survey reveal that there have been no serious compliance problems with the new privacy rules, although there may be a need to undertake additional education efforts and to tweak some local rules and practices. But the subcommittee sees little need for major changes in the national rules.

Nevertheless, she said, two concerns have emerged. First, there are serious issues involving cooperating witnesses in criminal cases, and the courts have widely different views and practices on how to treat them. Some courts, for example, do not file cooperation agreements, which do not appear on the public records. Others make them all public, at least in redacted form. Since the courts feel so strongly about the matter, she said, it seems unlikely that the subcommittee will recommend a specific course of action. But the subcommittee may at least identify the issues and provide the courts information about what other courts are doing.

Second, there are concerns about juror privacy. For example, the current national rule requires redaction of jurors' addresses from documents filed with the courts, but not redaction of jurors' names. Therefore, their names are available widely on the Internet. She noted that the courts themselves are responsible for protecting jurors, while the Department of Justice is responsible for the safety and privacy of cooperating witnesses.

Judge Raggi pointed out that the privacy subcommittee includes three members from the Judicial Conference's Court Administration and Case Management Committee, and the joint effort has proved to be very constructive. Some of the matters being examined by the subcommittee, she said, may be directed to the rules committees, while others may be handled by the court administration committee. The subcommittee, she said, plans to write a single report and is not concerned at this point about specific committee responsibilities.

She added that the subcommittee wants to hear directly from people who have given serious thought to the privacy rules and related issues. Public hearings, she said, are not necessary, but the subcommittee will conduct a conference at Fordham Law School in April 2010 with a representative group of knowledgeable law professors, practicing lawyers, and other court users. After hearing from the participants, she said, the subcommittee will be better able to report on the issues that need to be pursued.

PANEL DISCUSSION ON LEGAL EDUCATION

Dean Levi of Duke Law School moderated a panel discussion on trends in legal education and the legal economy, how they may affect the judiciary, and how academia and the judiciary may help one another. The panel included Professor Coquillette of Boston College, Dean Berman of Arizona State, Dean Vairo of Loyola Los Angeles, and Professor Rakoff of Harvard.

Professor Coquillette stated that it is not possible to have a first-class justice system without good legal education. He pointed out that many changes have occurred in law schools over the last several years. He noted that Max Weber, the great prophet of legal education who died in 1920, had made three predictions that have come to pass. First, he proclaimed that the world of law, driven by simple economic necessity, would shift over time from a system of local law to a system of state law, then to a national system of law, and then to an even broader system of international law.

Second, he suggested that legal systems would become less formal, as people will resort more to systems of private mediation and informal dispute resolution or negotiation. Students now engage in more hands-on application of law, not only with moot court competitions, but also in negotiation and dispute resolution classes and competitions.

Third, the law would become more specialized. It would also lose its sacredness of content, as lawyers and judges will come to be seen more as political actors, rather than priests of a sacred order. In a sense, he anticipated the critical legal studies movement, as law schools today are more infused with critical legal studies and with "law and economics" approaches.

He noted that at Boston College Law School, five of the last seven faculty appointments had been given to experts in international law. Most of them, he said, have foreign law degrees and bring an international perspective to the academy. In addition, the school has established programs in London and Brussels.

Professor Berman reported that a series of new initiatives have been undertaken at Arizona State University Law School. The core of the new efforts consists of three parts.

First, the model of what counts as legal education has been expanded greatly. The law school obviously has to train lawyers to practice law, but it also deals with many students who are not going to become lawyers but want to know about the law. To that end, the school is teaching law to non-lawyers, undergraduates, and foreign students. A full B.A. program in law is being developed for undergraduates and will be administered by the law school. In the past, he said, undergraduate courses in law had generally been taught by professors in other disciplines, but they are now being taught by lawyers.

Second, he said, the school wants to focus more on public policy and what it can do to contribute to the world. The law school, he suggested, should be a major player in public policy, and it is working with other faculties on joint programs to help train students to be players in public-policy debates. It has created a campus in Washington, D.C., and is creating think-tank experiences in which ten or so students work with a faculty member and focus on some aspect of public policy. In addition, he said, lawyers will benefit in their eventual legal careers by receiving training in statistics and data analysis. The law school is looking to participate in conducting university research on public policy areas for others, and it is asking companies and other organizations for modest funds to underwrite university research for them that the companies would not undertake on their own.

Third, the school is focusing on bridging the gap from law school to law practice. The students help start-up enterprises to incorporate, and they work with other parts of the university, including social work students, to help people with their legal problems. The law school, he said, has a large number of clinics, a legal advocacy program with dispute-resolution components, and a professional development training course that includes networking, starting up a law practice, performing non-legal work, and training in a variety of other areas that may be helpful to a student's career path. The school plans to do more to connect third-year students directly with members of the legal profession, such as by giving the students writing projects and having lawyers critique them. The school has added post-graduate fellowships and gives students a stipend to serve as fellows or volunteer interns to get a foot in the door of a legal career. It is also considering developing an apprentice model, where recent graduates do specific work in internships to develop their skills.

Dean Vairo reported that the Socratic model is still very much in place and dominant, at least in the first year of law school. She emphasized that the changes taking place in the legal profession and the economy will affect law schools. Most importantly, she said, law school is very expensive, and some commentators advocate moving toward an accelerated two-year program for economic reasons. Her school, she added, has a core social justice mission and is placing graduates in public service jobs. The traditional big-firm model, she said, is starting to collapse, as many students go into solo practice and are doing well at it.

The law school curriculum, she said, is changing, and the school has three main goals – to improve the legal experience, to improve the students' job prospects, and to cope with the costs of legal education. Like other schools, it is looking at de-emphasizing traditional courses to devote more time to problem solving, legislation, and regulation. She said that the faculty sees students engage in social networking every day in the classroom and should take advantage of the practice to keep students' attention in the current, wired world.

The law school will focus more on trans-national and international matters and on cross-disciplinary courses. It has been hiring more combination J.D.-Ph.D.s as faculty and will offer more advanced courses. The students, she said, particularly like the kinds of simulations that are offered in the third-year curriculum, where they are called upon to act as lawyers and represent clients. For the future, she suggested, the schools also need to consider what role distance-learning may play as part of the law school model, and whether schools can continue to pay law professors what they are currently being paid.

Professor Rakoff reported that the atmosphere at Harvard is less uncomfortable for students than it used to be. The school also offers new required courses and workshops in international law, legislation and regulation, and problem solving. In the latter, the students deal with factual patterns that mirror what happens when a matter first comes to a lawyer's attention. The focus is not just on knowing the law, but also on appreciating the practical restraints imposed on a lawyer and the institutions that may deal with a problem.

In short, the substance and doctrines of the law, which were central to the Langdellian system, are emphasized less now. Moreover, students are now absorbed with being on line. They do not look at books, but instead conduct legal research completely on line. Word searches, though, only supply a compilation of facts and results. They do not provide the conceptual structure emphasized in the past – when treatises were consulted and legal problems researched through analysis of issues and analogy. Nevertheless, he said, much of the core curriculum remains, such as basic courses in contracts, torts, and civil procedure. About two-thirds of a student's first year experience would be about the same as in the old days.

Dean Levi suggested that the several themes mentioned by the panel keep arising in discussions on law school reform – problem solving, working in teams, knowing international law, being ready to practice on Day One, building leadership skills, having a comfort level in other disciplines, and understanding business and public policy. All have been around in one form or another for generations. Yet teaching students to be analytical thinkers and to identify issues remains the core school function, and it continues to be difficult to accomplish.

He observed that the traditional role of a trial lawyer and the courtroom experience now have far less relevance to students. Moreover, the dominance of court actions and judicial decisions in the curriculum has decreased over the years.

A member asked the panel whether the legal profession will be able to absorb all the law school graduates being produced, or whether the number of schools and graduates will shrink. A panelist suggested that some law schools may well close or merge, and there will be fewer positions available for law professors. Some schools already are receiving fewer applications and are in serious financial trouble.

Nevertheless, many people in the community continue to be under-served by lawyers, and there is more need for legal services as a whole. Therefore, more lawyers in the future may serve in small units, rather than in traditional firms. A panelist added that it is not a bad idea for law students to strike out alone or in smaller units, rather than in large firms. He said that many law-firm associates are unhappy people.

A professor added that the current business model of many law schools will have to change. There will be fewer legal jobs available, but no less need for lawyers. Students are already changing their expectations of what they will get out of law school and how they will practice. There is likely to be more emphasis on public service.

A lawyer member observed that he is not sure that the young lawyers today think the way that older lawyers do. Experienced lawyers, he said, have been ingrained with substantive law and doctrines. But the newer attorneys have grown up with computers. They are skilled at finding cases on line, but they do not necessarily know what to do with all the information they succeed in compiling. A professor added that it is getting tougher to teach legal doctrines and analysis. He agreed that students generally are great at gathering piles of information quickly, but not in putting it all together or conducting deep analysis. Another added that some students now have a different view of what constitutes relevant knowledge. They do not draw as sharp a distinction between the legal rule and the rest of the world. This is clearly a different approach, but not necessarily a worse one.

A member asked how students can be encouraged to have a passion for the law. A panelist responded that her school encourages externships with local judges. The students are really enthusiastic about these experiences, and the schools need to expand them to include similar experiences with law firms. Law schools, moreover, should decrease the emphasis placed on monetary rewards.

A professor pointed out that judges provide a huge educational service through law clerkships. Law clerks, he said, generally perform better than non-clerks when they enter the legal world. Nevertheless, there is a disturbing trend towards hiring permanent law clerks in the judiciary, thereby reducing the clerkship opportunities for law school graduates.

A judge explained that he has to rely on his law clerks to keep up with his heavy docket. He expressed concern that since many law school reforms have lessened the emphasis on doctrinal law and critical analysis, judges may not be able to obtain the quality of law clerks they need to deal effectively with the cases before them. He noted that federal judges are hiring more permanent clerks today because they are a known quantity, and they know how to apply the law to cases.

A panelist said that many judges are now hiring law clerks who have a few years of law practice, and that is a good development. Another added that judges should participate actively with law school groups to let them know how well they are doing in training new lawyers.

A professor said that the benefits to the judiciary from law clerks are enormous. Among other things, law clerks provide a large pool of talented lawyers who understand and admire judges because they have worked for them. Another added that law schools need the federal judiciary to serve this important educational function. But the judiciary also benefits greatly because the law clerks are life-long friends who understand the courts and are important, natural political allies.

A member argued that the practice of law has really changed, and students' law school expectations are not being met. There are far fewer trials than in the past, and far fewer opportunities for lawyers to develop their courtroom skills. Young lawyers, moreover, are generally not allowed by courts to practice on their own.

A member said that the changes in the law school curriculum are beneficial. But the schools should be urged to continue to teach the law with rigor and offer a wide variety of high-content classes. The law requires a good lawyer to be able to analyze across different areas of the law. Thus, students who have taken soft courses or only a particular line of courses, do not have the same ability to analogize as students who have had a more rounded, rigorous curriculum.

Other members cautioned against reducing the substantive content of law school classes, and especially opposed the suggestion to move to a two-year law school curriculum for financial reasons. They said that it is essential to have three years of critical thinking and substantive courses in law school. A panelist added that his school was creating more mini-courses of one credit each rather than full semester three-credit courses.

In addition, many very bright judges' law clerks want to teach, without first ever having practiced law. Many professors may have Ph.D. degrees and other educational achievements, but too many lack actual practice experience.

A panelist added that many of the faculty assigned to hire new law professors have an ingrained prejudice against practitioners. Interviewees with practical legal experience, he said, just do not sound like scholars to them. Many law schools, he added, are now introducing fellowships and visiting professorships for practitioners.

NEXT MEETING

The members agreed to hold the next meeting in June 2010. By e-mail exchange after the meeting, the committee fixed the dates as Monday and Tuesday, June 14-15, 2010. The meeting will be held in Washington, D.C.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 2

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

OCTOBER 8-9, 2009

The Civil Rules Advisory Committee met in Washington, D.C., at the Georgetown University Law Center on October 8 and 9, 2009. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Judge Paul S. Diamond; Professor Steven S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Peter D. Keisler, Esq.; Judge John G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Judge Vaughn R. Walker; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and Judge Diane P. Wood represented the Standing Committee, along with Professor Daniel R. Coquillette, Standing Committee Reporter. Laura A. Briggs, Esq., was the court-clerk representative. Peter G. McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office. Joe Cecil, Jill Gloekler, Emery Lee, and Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included Professor Sherman Cohn; Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation Section liaison); Ken Lazarus, Esq. (American Medical Association); Alan Morrison; and John Vail, Esq. (American Association for Justice).

Judge Kravitz opened the meeting with a general welcome to all present. He expressed deep appreciation to Georgetown for making their school available for the meeting. He observed that in the 1970s there was only one building; now there are three, "and even grass, which did not exist when I was in law school." Particular thanks went to Dean Aleinikoff and Professor Cohn. The plan to meet here was launched early in the summer when Judge Kravitz and Professor Cohn met while testifying on the Sunshine in Litigation Act.

Judge Kravitz congratulated Assistant Attorney General West on the work he has begun at the Department of Justice.

Judge Kravitz reported that Judge Wedoff, our always cheerful and unfailingly helpful liaison from the Bankruptcy Rules Committee, was badly injured while bicycling. Judge Wood added that although the injury was quite serious, Judge Wedoff is recovering well, although not as rapidly as his ambition to get back to full-time work.

Judge Kravitz noted that the Chief Justice has reappointed Chief Justice Shepard, Anton Valukas, and Judge Walker as Committee Members. He also has appointed two new members. Judge Diamond, E.D.Pa., is a Penn Law graduate, a veteran of the U.S. Attorney's Office, and was counsel to Arlen Specter's 1996 presidential campaign. Judge Grimm, D.Md., is well known for his articles and books on e-discovery, civil procedure, and trial practice. Both are warmly welcome.

John Barkett is the new liaison from the American Bar Association Litigation Section. Among other accomplishments, he is a prolific author of texts on e-discovery. It is important to have the strong liaisons from bar groups that we have enjoyed. The Committee owes a collective debt of gratitude to Jeff Greenbaum for his long and outstanding service in this role, contributing most recently to the work on discovery of expert trial witnesses.

The Committee, and particularly Subcommittee Chairs Judges Baylson and Campbell, were congratulated on the event of the Judicial Conference's consent-calendar adoption of the current Rule 56 and 26 proposals. Judge Wood added that Judge Rosenthal's fine management of the Judicial Conference submission was an important factor in movement through the consent calendar.

Judge Kravitz noted that the Time Computation Project Rules amendments are moving steadily toward taking effect on December 1, 2009. While on the Standing Committee, he chaired

the Time Computation Subcommittee, and was closely involved with the hard work of all the advisory committees. Judge Rosenthal worked hard and successfully to facilitate Congressional adoption of conforming amendments to several statutes, enacted to also take effect this December 1.

The past summer was not idle on the rulemaking front. Judge Koeltl moved with great speed to sew together the topics, presenters, and panels for the May 2010 Conference to be described more fully below. The Federal Judicial Center administered its discovery survey. Judge Campbell and Professor Marcus worked with the Discovery Subcommittee to refine the Rule 45 subpoena project. Judge Colloton convened the Appellate-Civil Rules Subcommittee to begin work on several topics that may benefit from coordinated proposals for both sets of rules. Work with Congress continues, particularly with protective-order bills. Senator Specter has introduced a bill that would restore the pleading tests adopted by federal courts before the Supreme Court opinions in the Twombly and Iqbal cases. John Rabiej has been terrific in working with the Committee Chairs and Congress. Andrea Kuperman has done spectacular work in two memoranda on case law. The first addresses entry and modification of protective orders. The second focuses on what is happening in the early days of reaction to the Iqbal decision. It is good that Judge Rosenthal has been able to make so much of Ms. Kuperman's time available for Civil Rules projects.

The work of the summer reflects the vanished hope that the summer might provide a respite from hard Civil Rules work in the wake of the recently concluded Rules 26 and 56 projects, looking forward to the 2010 Conference as the next major beginning. "But we've been hijacked by Congress and the Supreme Court."

Judge Rosenthal recognized Peter McCabe's 45 years of government service, continually since graduation from law school, including 40 years now with the Administrative Office.

Judge Hagy was thanked with great appreciation for his years of service on the Committee. He responded that it has been a great six years. The process of Committee work is wonderful. "The number of ways to see the same problem reflected by so many minds is dazzling." Expressing sadness on the completion of Judge Hagy's terms with the Committee, Judge Kravitz presented Judge Hagy a commendation for distinguished service to the Civil Rules Committee. Judge Hagy thanked Judge Kravitz and the Committee.

Minutes

The Committee approved the draft Minutes for the April 20 and 21, 2009 meeting, subject to correction of typographical and similar errors.

2010 Conference

Judge Kravitz observed that the 2010 Conference is shaping up to be a major event. It will provide a chance to look at what we have been doing, and may need to do in the future. Many judges and academics are clamoring for the opportunity to come to the conference. The empirical data being gathered by a variety of sources will be important. The Federal Judicial Center, in particular, should be thanked for its response to the Committee's requests for work.

Judge Koeltl began his summary of the plans by noting that this event has come to be known as "*The* 2010 Conference." The planning committee has enjoyed a phenomenal acceptance rate from the people asked to participate. Plaintiffs' lawyers, defense lawyers, judges — both state and federal, and academicians have been enlisted.

Topics covered will include two panels on empirical research, and panels on pleadings and dispositive motions; issues with the current state of discovery; judicial management of the litigation process; e-discovery; settlement; perspectives from users of the system; perspectives from the states; bar association proposals; observations from those involved in the rulemaking process over the years; and — briefly — summaries and conclusions that may be able to sketch some of the refinements and distillations to be accomplished in the aftermath.

The Duke Law Journal will publish the major papers. There will be an "overflow of additional information."

The conference is not a CLE enterprise. The purpose is to discover where we are, how to make the system better. There will be many points of view. Consensus will be welcome when it emerges and will help to guide future projects. Work will continue on areas of disagreement.

The Federal Judicial Center discovery research has already been noted. The American College of Trial Lawyers and The Institute for the Advancement of the American Legal System have done a major survey; they are working on proposed rules to build on the results. The IAALS is doing additional substantial work, including a survey of Arizona lawyers to gather views on the Arizona disclosure rules. They also are doing a survey of Oregon lawyers. They are doing an additional survey of in-house lawyers, reflecting the belief that their views may differ from the views of their outside lawyers. They also are doing work on the costs of litigation. The Denver Law Review will devote an issue to possible changes in the rules suggested by all this work. Nick Pace at RAND is gathering information on costs at various stages of the litigation process; he tells us that the corporate world is aware of the 2010 Conference project.

Gregory Joseph's paper on e-discovery is in hand. It looks at preservation, sanctions, rules, and searching. Judge Holderman in the Northern District of Illinois has a pilot project on e-discovery rules; we hope to have something from it as well. Elizabeth Cabraser has done a paper on the current state of discovery from the plaintiff's perspective, looking at defense failures to produce, tactics of attrition, and the need for civility. She ends up supporting the American College - IAALS proposals as a package, though not for piecemeal adoption; discovery should not be limited unless there is more up-front disclosure. Judge Higginbotham's paper questions the directions courts are taking, suggesting that district courts are acting more as administrative agencies than as the trial courts they once were. He proposes restoration of 12-person juries, but allowing 10-2 majority verdicts. He also advises early judicial intervention, with a peek at the merits to focus discovery. He strongly disagrees with Iqbal and Twombly. Justice Hurwitz's paper focuses on the Arizona rules, which require much more mandatory up-front disclosure than the federal rule requires. Professor Miller's paper is almost finished. It will be a major contribution on the direction of the federal rules process, focusing on Iqbal, Twombly, and summary judgment.

The Administrative Office is close to creating a web site for participants in the conference to have access to all the materials.

The Chief Justice "is inclined to do an introduction" to the Duke Law Journal issue on the conference. Deputy Attorney General David Ogden is considering an invitation to appear at the conference.

Papers from any of the panel participants will be welcome.

Judge Kravitz thanked Judge Koeltl for the splendid organization work. The task is like conducting an orchestra, keeping it focused and together. The empirical data will be available well in advance of the conference, at least for the most part, enabling all panelists to draw on it.

The Conference will be an open event. It is important that it be open. Physical constraints will be imposed on the number of people who can meet in a single room, but arrangements will be made to transmit the proceedings to an overflow room by video feed.

Federal Judicial Center Discovery Study

Thomas Willging introduced the FJC Discovery Study, noting that Emery Lee has done the brunt of the work.

Emery Lee then described the present state of the project. "This is a work in progress." Late in 2008 The Center was asked to explore discovery and e-discovery. The present study is similar to the Center's 1997 study, but has been reframed with help from many people. Jill Gloekler has done a lot of work on the study.

The study was framed by asking attorneys about their cost experiences in a particular case. The cases were chosen from all of the cases that closed in the federal district courts in the last quarter of 2008. Low-discovery categories of cases were excluded in selecting the cases. Cases that were actually tried, and cases that had endured on the docket for four years or longer, were oversampled — all of those cases were included. An additional 2,689 cases were chosen from the 16,810 cases that remained, giving an initial sample of 3,550 cases. E-mail addresses were obtained from CM/ECF files for 5,685 attorneys. The survey was sent to all; 2,690 responded, giving a response rate of 47.3%, although not every respondent answered every question. About as many plaintiffs' attorneys as defense attorneys responded. Over 270 solo attorneys who represent plaintiffs responded. There also were many lawyers from large firms. The respondents appear to represent a good cross-section of the federal bar.

A variety of the initial findings were described:

Of the cases in which there was some discovery, plaintiff attorneys reported there was some e-discovery in 38.9%, and defendant attorneys reported e-discovery in 33.4%. (Figure 7) Future work will break these responses down according to categories of cases. One potential complication in these numbers is that it was not feasible to draft the survey questions in a way that would ensure that respondents would describe as e-discovery documents that were retrieved from computers but produced in paper form.

There were many e-discovery cases in which plaintiffs were both requesting and producing parties, and many in which defendants were both requesting and producing parties. See Figure 8.

Disputes about e-discovery were relatively rare. 72.4% of plaintiffs and 78.3% of defense attorneys reported no disputes arose. Very few cases had four or more disputes. Sanction requests also were rare, appearing in slightly over 2% of the cases.

Litigation holds were used by parties who both requested and produced e-discovery materials in 52.6% of cases, and by parties who only produced in 47.5%. Relatively large numbers of respondents could not answer this question. But parties who only produced e-discovery materials did not use a freeze in about 28% of the cases and were unable to say whether a freeze was imposed in about 27%. Figure 9.

The survey produced much information about the costs of discovery. The median reported by all plaintiff respondents was $15,000, with a 10th percentile of $1,600 and a 95th percentile of $280,000. The $15,000 median is 12% higher, after adjusting for inflation, than the median in the 1997 survey. The median was much higher in cases with any electronic discovery, reported at $30,000; the 10th percentile for those cases was $3,000, and the 95th percentile was $500,000. The

figures for e-discovery rise higher still for a party who both requests and produces ESI: the median is $65,000, the 10th percentile $5,000, and the 95th percentile $850,000. The numbers reported by defendants are somewhat different. For all cases in which there was some discovery, the median is $20,000, the 10th percentile $5,000, and the 95th percentile $300,000. For defendants in cases with any e-discovery the median is $40,000, the 10th percentile $6,214, and the 95th percentile $600,000. When the defendant is both a producer and requester of e-discovery, the median is $60,000, the 10th percentile $10,000, and the 95th percentile $991,900.

Table 10 shows the attorneys' estimates of the relationship between discovery costs and the stakes. For plaintiff attorneys the median was 1.6%, the 10th percentile 0, and the 95th percentile 25%. For defendant attorneys the median is 3.3%, the 10th percentile 0.2%, and the 95th percentile 30.5%. The medians are rather low. The median in 1997 was 3%. It is important, however, to note that the "stakes" were defined as the spread between the best and worst outcomes the client could reasonably expect, not the absolute judgment. Subjectively, most respondents thought the relationship between discovery costs and the stakes was just about right. This result contrasts with the American College survey, which concludes that we spend far too much on discovery.

Turning to the rules in operation, Figure 22 illustrates responses to the question asking the point — if any — at which the central disputed issues were adequately narrowed and framed for resolution. Everyone thought that this point was reached earlier in the case identified by the survey than typically happens. Plaintiffs always think it happens earlier than defendants think. Convergence of plaintiff and defendant estimates occurs only late in the case — at summary judgment, or a post-discovery pretrial conference.

Figure 13 shows that a majority of both plaintiff and defendant attorneys thought discovery yielded just the right amount of information. Plaintiff attorneys were more likely to think it generated too little information, while defendant attorneys were more likely to think it generated too much information.

Figure 32 shows that approximately equal numbers of lawyers agree or disagree with the statement that litigation in federal courts is more expensive than litigation in the state courts in which they practice.

Figure 34 shows responses to the statement that discovery in federal courts leads to more reliable and predictable case outcomes than in courts with more restricted discovery. There were many neutral responses, perhaps reflecting lack of experience in courts with more restricted discovery. Of those who expressed opinions, agreement or strong agreement outstripped disagreement by wide margins. But still about 20% of the respondents disagreed.

Figure 43 summarizes responses to the statement that the outcomes of cases in the federal system are generally fair. 80.3% of the lawyers primarily representing defendants agreed or strongly agreed. For those primarily representing plaintiffs, 53.9% agreed or strongly agreed, while for those who represent plaintiffs and defendants about equally the number is 69.2%.

Figure 44 shows responses to the statement that the procedures employed in the federal courts are generally fair. 67.8% of plaintiff attorneys agreed or strongly agreed. The number for attorneys who represent plaintiffs and defendants about equally is 78.7%, and for defendant attorneys is 85.5%.

The study is still in a "very preliminary" stage. Multivariate regression analysis will be done on the cost information. And more work will be done on the volume of e-discovery in the cases that have it.

Judge Kravitz thanked Judge Rothstein and the FJC for all the work that has been done, and remains to be done. These data, and other data being gathered for the 2010 Conference — including the ABA Litigation Section version of the American College survey, and a survey by the National Employment Lawyers Association — will be very important. Judge Rosenthal added that it was heartening that more than 900 lawyers responding to the FJC survey took the time to write comments in the free-comment block.

Rule 4: Service on Government Employees and Judges

Judge Kravitz reminded the Committee of the April discussion about means of serving government employees, including judges. The question arises in actions against these defendants in their individual capacities. Concern focuses on in-hand service. But simply providing alternatives to in-hand service will not address those concerns. Only elimination of permission for in-hand service would do that. And it might seem difficult to eliminate in-hand service.

It is possible that a judge who prefers to avoid in-hand service could designate the court clerk as the agent for service, and give notice of that on the court's web site. But it does not seem likely that many judges will want to advertise an easy means of launching individual-capacity litigation.

The April discussion did not show much interest in a general rule for all government-employee defendants. But it was thought that judges might be a distinct category, in part because it is easy to rely on service on the clerk of the judge's court for service on the judge. That question has been put to other Judicial Conference Committees. Although little interest was shown, it is on the agenda of the Judicial Branch Committee. The Security Committee had no interest. If the Judicial Branch Committee concludes that there is no need to consider these questions, they are likely to be dropped from the Civil Rules agenda.

Rule 6(d) Three Days are Added

Judge Kravitz introduced the Rule 6(d) topic. Rule 6(d) adds three days to any time specified to act after service when service is made by any means other than in-hand delivery or leaving the paper at a person's home or office. These other means include mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, and delivery by any other means the person consented to in writing. In the Time Computation Project the Subcommittee and several advisory committees decided to defer the question whether the three added days are appropriate in all the circumstances now provided. It is useful to reconsider the timing question now.

The most questionable instances are those where three days are added after e-service and after service by agreed means. When e-service was first authorized, the three days seemed useful. The CM/ECF system was still in its infancy — it was not clear whether it would work well, nor whether lawyers would seize the opportunity to effect service through the court's system. Lawyers said that it might take as long as three days to accomplish effective receipt of e-messages, particularly with attachments. The attachments to Rule 56 motions may run hundreds of pages, and there were problems with system compatibilities. Service by private carrier is not instantaneous, and only the most expensive means are likely to accomplish next-day delivery.

Despite these questions, lawyers will surely see any reduction of the categories that allow three added days as taking away something they count on. This seems particularly true for e-service, which ordinarily arrives the same day as transmitted. Moreover, the Time Computation Project amendments take effect this December 1. It might be wise to see how they work before undertaking

further adjustments. The three-day addition "is a small thing; why not let the bar absorb the new rules" before looking toward further changes?

Laura Briggs has provided great help in explaining how e-service through the court's facilities works. She found that in her court approximately 5,000 notices of electronic filing are received each day. Of them, 20 to 30 are initially undeliverable. The clerks immediately investigate the undeliverable notices and are able to accomplish effective transmission of all but 2 or 3 within the next day. When delivery cannot be accomplished, notice is mailed — triggering the three extra days for mail delivery. In exploring the question with a bar group, however, she found great resistance to deletion of the three added days for e-service.

On an anecdotal level, lawyers still tell stories of as much as three days from docketing in the court to receipt of e-notice, and rather often.

On a more general level, it was observed that this question affects Appellate Rule 26(c), Bankruptcy Rule 9006(f), and Criminal Rule 45(c). Criminal Rule 45(c) is virtually identical to Rule 6(d), but the others introduce variations. Any project to revise Rule 6(d) must be coordinated with the other advisory committees, perhaps directly or perhaps through a joint subcommittee.

The three added days for service by mail seems to make sense; if it were treated the same as direct delivery or e-service, lawyers would do everything possible to serve by mail so as to reduce the effective time available to respond. And pro se litigants, particularly prisoners, are likely to use mail service. When service is made on the court clerk because the person to be served has no known address, the three added days may be more symbolic than useful, but do no apparent harm. Service by other means consented to may not be a real problem, since consent might be conditioned on the most expeditious mode of delivery, and can be withheld in any event.

The question of e-service ties to the question of e-filing. Under Rule 5(d)(3), a local rule may require e-filing, although reasonable exceptions must be allowed. Many courts effectively require e-filing by lawyers. Rule 5(b)(2)(E) requires consent of the person served for e-service, and Rule 5(b)(3) allows e-service through the court's facilities if authorized by local rule. It may prove desirable to reconsider this package in tandem with the three-added day provision. Registering for e-filing is obviously coupled with consent to receive e-notice of filing from the court. So in the Southern District of Indiana, the local rules require all cases to be e-filed, subject to exceptions. Signing in for e-filing includes consent to e-notice. That might be made mandatory for all e-filing cases, carrying forward the requirement that reasonable exceptions be allowed.

The lawyer members were asked whether the Committee should move promptly to reconsider the three-added days. One said: "Enough already. This is all some of us have left. It is too soon after the Time Computation Project to make further changes." Another agreed, and added that e-service "does not always work that smoothly." A third added that some of the "darndest things" wind up in his junk-mail box; there is a real risk that spam filters will divert an e-notice away from the in-box.

Emery Lee added that the recent discovery survey used e-mail transmission, and that a non-negligible number were bounced back and did not work. And sometimes the system has to try several times to get a good address to go through.

Laura Briggs added to the information about the success of her office in ensuring near-perfect e-transmission the results of a quick look at practices in other districts. Even a quick look showed at least two districts that explicitly refuse to monitor bouncebacks. That is cause for worry about eliminating the three added days.

Judges Kravitz and Rosenthal suggested that the other advisory committees are not likely to be disappointed if this Committee decides to postpone any reconsideration of the three added days. The Bankruptcy Rules Committee might have some regret — there is much greater pressure for fast action in many bankruptcy proceedings than in most civil proceedings. The Bankruptcy Rules Committee is working on the Part 8 appeal rules, seeking a model that approaches closer to the Appellate Rules. Their many conferences lead to questions that come back to e-filing: why is it necessary to adopt rules on the color of brief covers, when all is done electronically anyway? There is considerable pressure to make e-filing the norm. This affects service, filing, and more. E-records are upon us.

Two lawyer members observed that in the e-world they still print out copies, but limit the number and share the paper copies as different lawyers need them.

Judge Rosenthal suggested that it may be appropriate to undertake a project akin to the Style Project as a long-term reconsideration of every rule to remove vestiges of the bygone paper world. But the time has not yet come. E-filing must be allowed to become firmly settled first.

It was agreed that the question should remain on the agenda, and when it is taken up should be approached in a way that avoids any unnecessary differences among the different sets of rules.

Ashcroft v. Iqbal: Rule 8(a)(2)

Judged Kravitz began the discussion of pleading by noting that this clearly is an important topic. The successive decisions in the Twombly and Iqbal cases have generated great interest, some uncertainty, and real consternation in some quarters. The American College of Trial Lawyers is contemplating the possibility of moving to a system quite different from notice pleading. The immediate question is whether the Committee should begin the task of getting a grip on the ways in which lower courts are responding to these decisions. Some work has been done already.

The Administrative Office has begun to pull together CM/ECF statistics on the rates of filing and the rates of granting motions to dismiss.

Judge Rothstein has agreed to make the resources of the Federal Judicial Center available to help study the ways in which lower courts react to the uncertain messages in the Twombly and Iqbal opinions. It is enormously important to develop as much empirical information as possible to support the lessons that will be conveyed in lower-court opinions. The Center has provided invaluable assistance with many past Civil Rules projects, including much discovery work and some pleading work. If at all possible, the Committee should pace its own work to take maximum advantage of the Center's work. Joe Cecil will be our guide.

Andrea Kuperman has begun the running task of compiling and evaluating lower-court decisions. The purpose is to determine whether the lower courts are taking a context-specific approach, and — if so — to attempt to catalogue categories of contexts with identifiable and distinctive approaches.

If possible, it will be important to go beyond initial decisions to dismiss to determine what happens next. The frequency of amendments, and of successful amendments, is a central part of the dismissal picture.

The Committee was already looking at these questions in light of the Twombly decision. The 2010 Conference plans were well under way when the Iqbal decision was announced. The data collection and analysis, and the case collection and analysis, will help show the dimensions of any problems that may appear.

The Iqbal opinion can be read expansively, but it also can be read narrowly. Development over the near term may show outcomes similar to the aftermath of the Booker decision that converted the Sentencing Guidelines from a mandatory to an advisory role. If Congress had reacted immediately, it might have missed the mark. So it may be with respect to pleading — any hasty response in the Enabling Act process or in Congress might miss the mark. But ongoing consideration is not the same as hasty action. It seems wise to maintain constant attention.

The National Employment Lawyers Association may provide help in understanding the impact of new pleading approaches on employment cases. This is one illustration of a broader question whether there will be differential impacts on different types of cases.

Congress, however, may take the lead. S 1504 would direct courts to decide Rule 12(b)(6) and 12(e) motions to dismiss under the standards set forth in Conley v. Gibson. It is too early to know whether any legislation will be enacted, or whether anything enacted will take the same form as the first bill. Revisions are always possible.

Further presentation of the challenges raised by the Twombly and Iqbal opinions began with the observation that the Court's concerns command careful attention. The Court has the advantage of a perspective slightly above the fray in the lower courts. Lower courts are accustomed to working in the accommodations they have made with the carefully developed combination of notice pleading, expansive discovery, and summary judgment. They believe, with real justification, that they are doing it well. But in both opinions the Court expresses obvious concern with the costs and burdens imposed by discovery in some kinds of cases. Years of repeated attempts to address these concerns by revising the discovery rules have not completely solved all the problems.

Exploring revised pleading practices does not come without cost. Whatever emerges at the end, the transition period will generate greater anxiety as plaintiffs frame complaints, defendants make more frequent motions to dismiss, and judges cope with uncertainty as to what is expected and what should be done. It seems likely that some complaints will be dismissed — and in the end fail totally after exhausting opportunities to amend — that would not have been dismissed under the pleading practices that prevailed in the first months of 2007 and that would not be dismissed under the pleading practices that emerge at the end of the development period. Nothing the Committee could do would forestall much of the transition cost. Even if the Committee could know precisely what rule amendments are desirable, it would take three years to test the amendments through the regular Enabling Act process. Lower courts would continue to develop pleading practices during the interim, and might well show the need to further revise what initially seemed precisely right. For that matter, it is unlikely that pleading practices could be returned to the status quo by a simple direction to reestablish the practices established on May 20, 2007. The Supreme Court's opinions cannot be recalled, and would continue to influence lower courts. Established pleading practices were far too fluid and variable even before Twombly and Iqbal for it to be otherwise.

In these early days it is difficult to venture any guess as to the eventual need for any rule amendments. The Supreme Court construed the language of present Rule 8(a)(2). If developing case law should show desirable developments of pleading practice, it may be best to leave the language of the rule unchanged. There would be little reason to attempt to confirm whatever changes may have emerged by choosing a new and equally open-ended set of words. Many other possibilities can be identified. One — the initial concern of many academic commentators — is that pleading standards will be raised too high, either in general or for particular classes of cases. If that should happen, something might be done to move back toward earlier concepts of "notice" pleading, but attempting to capture the restoration in rule language will be difficult. Another possibility is that pleading standards are not raised high enough, either in general or for particular classes of cases.

That diagnosis would return matters to the questions that have been considered repeatedly by the Committee since the Leatherman decision in 1993. Several different paths toward heightened pleading were explored, and all were deferred or put aside for want of any confidence that they would bring significant improvements. The possibilities included revisions of Rule 8(a)(2) for all cases, perhaps establishing some form of "fact" pleading; adding specific categories to the Rule 9 enumeration of cases that require particularized pleading; and amending Rule 12(e) to establish a court-controlled process aimed at framing pleadings that will facilitate case management.

Pleading rules might be supplemented by other devices. England has initiated a "pretrial protocol" system for the most commonly encountered kinds of litigation. Prospective parties are required, under pain of significant disadvantages, to engage in exchanges of information akin to descriptive pleading and disclosure before an action is filed. Review of the first years of experience with this practice is ongoing. Other means might be found to integrate disclosure, discovery, and pleading. Judicially controlled and narrowly focused discovery might be developed to enable the parties to make pleadings amendments that would better frame the action for further pretrial proceedings.

Additional questions remain. Twombly and Iqbal focus on the complaint. Should they be extrapolated to address Rule 8(c), requiring greater detail in pleading affirmative defenses? Might they even reach out to require an explanation whenever a responsive pleading denies an allegation?

Other rules as well must be considered. Rule 15 now provides generous leave to amend. Should more exacting pleading standards be accompanied by less forgiving opportunities to amend? Or, to the contrary, should leave to amend be still more freely available on the theory that the concern is to ensure that the opportunity for discovery is properly unleashed? Repeated rounds of pleading to define what a party must allege as a basis for recovery, if willing to undertake the burden of proving it, might entail substantially lower overall burdens than simply allowing payment of a filing fee and a virtually automatic pass into discovery.

Alternatively, pleading might remain as a relatively relaxed threshold, to be supplemented by extensive initial disclosures that pave the way for either a considerably more detailed second round of pleading or something that blends into a new procedure the present practices on motions to dismiss or for summary judgment.

The package of notice pleading with discovery could be revised in other dimensions as well. The most fundamental question to be addressed is the approach framed by Rule 11(b)(3). Rule 11(b)(3) is much more than a rule about pleading practice. It permits initiation and the further conduct of litigation only when, after reasonable inquiry, a party can "certify" that specifically identified factual contentions that do not yet have evidentiary support "will likely have evidentiary support after a reasonable opportunity for further investigation or discovery." This rule says it is proper to file a complaint even though you know you do not have the evidence required to establish the claim. Discovery will be provided to enable you to determine whether you actually have a claim. One way of looking at the Twombly and Iqbal decisions is as a challenge to this rule.

Rule 27's limits present yet another practice that may require further examination. Most courts now hold that Rule 27 does not support discovery to determine whether a would-be plaintiff can frame a complaint that meets even the generous threshold of Rule 11(b)(3). If plaintiffs are required to plead greater detail, making it less plausible to assert there will likely be evidentiary support, perhaps a procedure should be created to allow discovery in aid of framing a complaint, subject to relatively strict judicial control.

This introduction was supplemented by agreeing that the Court is clearly worried about the costs and burdens of discovery. The opinions seem to reflect skepticism about the effectiveness of case management in controlling these costs. The 2010 conference will address all of these issues, and may provide important new empirical information about present practice and opportunities for improvement.

John Rabiej discussed the Administrative Office project to gather CM/ECF data. Introduction of S 1504 makes it clear that it is important to begin immediate data collection. The Administrative Office statistical system is geared to information on opening and closing cases. It is not well geared to gather information on events in between opening and closing. But the system does give a national data base of court docket information. The Office was granted access to court dockets for the number and disposition of motions to dismiss. Unfortunately the character of the motions cannot be distinguished — motions to dismiss for failure to state a claim are lumped together with motions to dismiss for lack of subject-matter jurisdiction or personal jurisdiction, improper venue, or service defects. But it is possible to break the data down by categories of actions — personal injury, prisoner petitions, civil rights-employment, other civil rights, antitrust, patent, labor law, contracts, and "all others." Disposition by grant or denial is recorded. But there is no information to tell whether leave to amend is granted; a manual search would be required to find that information.

The Administrative Office information is depicted in tables and graphs for a period of two years before the Twombly decision, the next period of two years between Twombly and Iqbal, and the months that have followed Iqbal. The numbers relate events month-by-month, but do not involve exact parallels. The number of cases filed represents the number of new cases in the month; the number of motions to dismiss granted represents actions taken that same month in cases filed earlier. This is a snapshot of docket information that does not support linking between the time of filing and the time of granting the motion to dismiss. Despite their limitations, the Administrative Office data do not show large increases in motions filed or the rate of grants.

Joe Cecil noted that the Federal Judicial Center has for many years considered looking at dispositions of motions. Data were gathered in 2000; there is a foundation for study. Further data gathering was deferred after Twombly, and "there still seems to be some churning in the cases." Recognizing that it is important to have data soon, the Center will begin working with the same data as the Administrative Office, even though the data to not differentiate different grounds for the motions to dismiss. The Center will have to look at the docket sheets, and they are messy. But it seems likely the Center study will be able to resolve the problems of gathering information about leave to amend. It is clear that there may be differential effects across case types. The study will be able to identify types of cases where Twombly and Iqbal are likely to have an effect, and other types in which they are not likely to have an effect.

Andrea Kuperman summarized her investigation of cases that cite the Iqbal decision. There are far too many cases to read. She concentrated on the cases flagged for serious consideration of Iqbal. In the first few months the decisions turn so much on the particular facts that it has been difficult to find any over-arching themes. The most general observation is that the results are context-specific. Ms. Kuperman stated that it appeared to her that the courts were not so much applying a different standards as erecting a new framework for analyzing motions to dismiss. And, although in the early days the courts of appeals are reviewing rulings made in the district courts before the Iqbal decision, the courts of appeals appear to be instructing district courts to be careful and thoughtful in applying this new framework. The pleading bar has been raised in some manner, but many cases continue to rely on a framework established by decisions rendered before the

Twombly and Iqbal decisions. Some of the current cases say that courts have always required some facts in the pleading. But other courts are worried that the bar has been raised too high. It seems clear that the context-specific approach leaves real flexibility. Pro se plaintiffs are treated more generously. Some cases seem to cast doubt on pleading on information and belief. The "plausibility" requirement may yet establish a new framework. It may come to be more a new framework than a new standard. Courts are still trying to figure it all out, although it is clear they want to enable plaintiffs to plead their claims well enough to withstand dismissal. At the same time, it appears that some cases are dismissed now that would not have been dismissed before Twombly and Iqbal. Yet it is difficult to know whether the dismissed cases would have proved meritorious had they survived the pleading stage.

Discussion began with a question whether future research would be helped by generating a "statement of reasons" form for dismissal on the pleadings that would be similar to the statement of reasons on sentencing. If courts would fill out the forms, a wealth of information would be available for assessing pleading standards. The response was that researchers would welcome the form if someone can devise one and persuade courts to fill it in.

Joe Cecil said that the FJC would look into any empirical studies that have been done to measure whether the Private Securities Litigation Reform Act gets rid of frivolous cases, and whether it defeats meritorious cases.

Another question was asked: Does the Court's failure to mention its earlier "no heightened pleading" decisions in the Iqbal opinion presage an open heightened pleading approach? The responses suggested that it is difficult to read much into this kind of opinion-drafting choices.

Another participant observed that the Seventh Circuit takes the pleading test back to context. A simple prisoner pro se case does not demand "a whole raft of details."

An oft-recurring theme was recalled by observing that before Twombly, most people pleaded with more detail than Rule 8 requires. There was as much a problem of over-pleading as barebones notice pleading. It seems likely that after Twombly and Iqbal, many lawyers will respond by larding into the pleadings still more of the information they have had all along. That will make it more difficult to measure the effect of these decisions from dismissal rates.

Another possible avenue of inquiry may be found in states that still have fact pleading.

It was suggested that the Kuperman research gives the flavor of first reactions, illustrating the kinds of questions courts are asking after Twombly and Iqbal. Further research has identified a group of cases in which leave to amend was granted; the next step will be to find out what happens when complaints drafted before Iqbal are dismissed after Iqbal and then amended.

A further caution was noted. From 1993 to 2000 the initial disclosure rule was based on disputed facts alleged with particularity. The rule was designed to encourage more detailed pleading; to whatever extent it realized that purpose, it will be more difficult to sort out the changes in pleading practice over time.

Another observation was that Twombly and Iqbal are most likely to have an effect on cases at the margin of plausibility. The question will be how wide the margins are set.

The Department of Justice has not yet resolved its evaluation of the Twombly and Iqbal decisions. It is engaged in many cases that raise questions of official immunity, as Iqbal did, and is often anxious to protect public officials against the burdens of discovery. It is difficult to separate the broader general pleading questions from that specific set of concerns raised by the substantive

law. A similar tie of pleading to substantive considerations is apparent in the antitrust conspiracy concerns reflected in Twombly.

The Court's approach to pleading purpose in the Iqbal opinion also will present difficult questions. Rule 9(b) allows general allegations of malice, intent, knowledge, and other conditions of mind. The Court said that this is not permission for mere conclusional pleading. But how much more can be alleged in a pleading than that a person acted with a specified purpose?

Discussion continued with an observation that the Iqbal opinion is a broad statement of general principles. The plausibility test will have real impact in antitrust cases, where the courts have economic theories of what is plausible and in immunity cases where special policies conduce to more demanding pleading standards. It will be harder to argue implausibility in many other contexts. Many defendants are reacting for the moment by framing motions to dismiss as if the opinion is a general invitation, but there is no general invitation here.

It was noted that because they are the Supreme Court's current explanation of pleading doctrine, Twombly and Iqbal will be cited in opinions granting or denying motions that would have been resolved the same way, citing Conley v. Gibson, in earlier days. Ms. Kuperman's research confirms this routine invocation of the new authoritative texts in many cases where the analysis and results remain unchanged.

Similar thoughts were expressed in the view that there were high hurdles to asserting plausibility both in Twombly, augmented by the fear of massive discovery, and in Iqbal, augmented by concerns for protecting public officials. "Judicial experience and common sense will not often be put to comparable tests."

These comments, focusing on identifiable specific substantive areas, led to the question whether the time has come to reconsider the general trans-substantive approach to pleading.

A somewhat different perspective was offered with the statement that "defendants are treating it as open season on complaints. Courts are not drawing inferences in favor of the pleading party, but they weren't doing that before." Are meritorious cases being dismissed? Lawyers engaged in complex securities and consumer-protection litigation think so. But many of the cases in the Kuperman memorandum look like cases that properly should be weeded out. The bar was set very high in complex and high-stakes cases. Complaints commonly run 100 pages and more. The time and resources devoted at the "front end," before filing the complaint, are enormous. Often it takes a year simply to get to disposition of the motion to dismiss. But perhaps this is right, given the costs of discovery.

A judge observed that 95% of his docket involves "small cases. Iqbal is seldom cited. Plausibility is seldom mentioned." Iqbal makes a difference only in supporting dismissal of truly fanciful complaints of a sort that courts might have felt obliged to string along under truly minimal notice-pleading standards. "We long ago moved beyond notice pleading. Often to overpleading. Iqbal is not likely to make much difference." It should not be forgotten that the Court split 5:4 on the adequacy of the Iqbal complaint.

Another committee member observed that he had been involved in several motions to dismiss since the Iqbal decision. "It doesn't seem to make much difference." That seems to be the view of many litigators.

Another judge noted that he cites Twombly and Iqbal — so far it always has been in denying motions to dismiss.

Returning to the opening question, it was asked whether the state of pleading has fallen into an emergency that requires immediate response? Or is it better to carry forward in the Committee's ordinary deliberate way?

The first response was that the Committee should move ahead to collect data. "There is a lot of consternation. The academic community is particularly interested, particularly in the process, which some see as Supreme Court amendment of Rule 8 without using the Enabling Act procedures." Some plaintiffs' lawyers fear there will be a very fine pleading sieve, straining out cases that should survive. Citations of Twombly and Iqbal do not show what effect they may have had; they simply have replaced Conley as the obligatory citations. A much finer hand will be required to determine whether they will make a difference. Individual cases will have to be examined. There may be categories of cases where there is a difference — one example may be prisoner claims against wardens or other higher-level supervisors who had no apparent involvement in the underlying events.

A similar caution was urged by noting that the outcome in Iqbal was surely heavily influenced by the positions of the defendants — an Attorney General and a Director of the FBI.

Another participant noted that the Supreme Court talks about the burden of discovery in both opinions. "We cannot look at them in isolation. If we could get discovery right, the Supreme Court might not be as much worried about pleading."

A somewhat different question asked how these problems can compete for Congress's attention in competition with the much larger issues that confront it. Should the Committee attempt to predict what Congress will do in deciding on its own best course of action?

It was suggested that "bills will move forward." It cannot be guessed whether a bill will pass. But the Committee should stick to its own careful, deliberate, data-oriented process. "We should not be stampeded into doing things out of our ordinary procedures." S 1504 invokes Conley; it should be remembered that the trial judge dismissed the Twombly complaint under Conley standards. The Committee will continue not only its own work, but also its outreach to professional groups.

This note was carried further. "The more you look at the question, the more apparent become the difficulty of the drafting task and the delicacy of the choices to be made." The Enabling Act allocation of responsibility is important. The Committee and Congress should heed this wise allocation.

Forms

The Rule 84 Forms attached to the Civil Rules have seemed troubling for reasons antedating the Twombly and Iqbal decisions, and independent of them. The Chief Judge of the Federal Circuit, for example, has called the Form 18 complaint for patent infringement an embarrassment.

The fundamental questions begin with the continuing need for illustrative forms. The Civil Rules were new in 1938, and illustration was important. It must be asked whether illustration remains as important in the maturity of the rules as it was in their infancy. Even if illustration remains useful, there are difficulties. The Rules are not static even when the text remains unchanged. Interpretations evolve. The Forms can fall into irrelevance, or worse can become misleading. If Forms are retained, the Committee has an obligation to review them periodically to ensure that they are up to date. That will require significant effort.

It might be useful to begin with an inventory of the Forms. Some may never be used. There may be no Forms for other and important topics that would benefit from having Forms.

Then it might be asked whether the Forms provide a useful service to the bar. There are all sorts of form "books," including e-forms and collections within individual firms. If the Forms are to be maintained as a service to the bar, the Committee should take pains to do the job well. The lack of attention over time is reflected in the persistence from 1938 to 2007 of forms that set out specific illustrative dates ranging from 1934 to 1936. (This observation was supplemented by a comment that Professor and Reporter Clark was a member of the Tavern Club located near Boylston Street in Boston — that was the origin of the Form 9 accident site.) Then the Style project undertook a sweeping revision that depended heavily on a consultant and that received comparatively little attention from either the Style Subcommittees or the Committee in the surge of rule-focused activity.

Although the multiple pleading forms are not the only reason for concern, they provide as many illustrations of the questions. Form 11, formerly Form 9, alleges simply that the defendant negligently drove a motor vehicle against the plaintiff. Is "negligently" a legal conclusion, a threadbare recital of an element of the claim that fails the Iqbal pleading test? Would it be useful to provide a form that calls on the plaintiff to fill in the blanks by specifying the many ways in which a driver may be negligent? Would it even satisfy Iqbal to allege that the defendant was operating at a negligently fast or slow speed, or must a specific speed be specified? For that matter, how useful is it to require specific allegations if the initial specifications can be freely amended? Attempting to frame pleading forms while pleading standards remain in flux could be difficult. But it might be useful to abrogate the current pleading forms to avoid any incorrect illustrations, while beginning the task of developing new forms in conjunction with evolving pleading practice.

Even if pleading forms are to be maintained in some form, is it possible even to attempt forms for more complex claims? And even if the Committee could contrive to draft a Form that would plead the claim in the Twombly case in a way that satisfies the Twombly and Iqbal standards, would the Form be of any use to any other plaintiff in any other antitrust conspiracy case?

Different questions are presented by Forms outside the pleading forms. There may be real value in establishing national uniformity through Forms 1 and 2 governing caption and signature lines. Forms 3 and 4 for summonses may be valuable. The Forms 5 and 6 request to waive service and waiver were developed after careful consideration in conjunction with adoption of the waiver provisions in Rule 4, and may provide valuable protection against misadventures.

Rule 84 itself might be reconsidered. If the Forms are abrogated in toto, Rule 84 would go down with them. If some Forms survive, it may be useful to reconsider the direction that they suffice under the Rules. Something will depend on the nature of the Forms that survive — if the pleading forms are abandoned, there may be less reason to fear Forms endorsed as sufficing under the rules.

A different reason might warrant reconsideration of Rule 84. If official Forms are valuable, it may be better to develop a different process for creating and maintaining them. The higher the status accorded the Forms, the greater the need for serious involvement of the Committee. If pleading Forms are continued, it likely will prove necessary to seek help through processes like those developed for major rules revisions. Miniconferences could be held. Groups of lawyers expert on all sides of litigation in a particular area could be asked to hammer out Forms that reflect shared needs. Even with such help, it might be that the Committee will have sufficient work without diverting its energies to doing a better job with the Forms. The burden could be reduced considerably, however, if pleading forms are abandoned.

If the Rule 84 direction that the Forms suffice under the rules is relaxed, it would be easier to shift the burden to groups outside the Enabling Act process. A variety of approaches could be considered, including preparation by the Administrative Office.

Discussion began by describing the recent adoption in the Eastern District of Pennsylvania of a set of forms appropriate for pro se cases. The forms are optional. They follow a direct format of who, what, when, where, and why, with a request for relief. The court expects they will be helpful.

The question whether the full Enabling Act process is necessary for the Forms was brought to the fore: Should the Committee engage in this business at all?

Peter McCabe observed that official forms play different roles in different sets of rules. The Bankruptcy Rules involve by far the most detailed forms, and include forms in great numbers. Under Bankruptcy Rule 9009 use of the forms is mandatory. The forms are approved by the Judicial Conference, but do not go on to the Supreme Court or Congress. The Director of the Administrative Office can issue additional forms; there are 150 of them. They are submitted for advisory committee review, but not officially acted on by the committee. The Appellate Rules have 6 forms; some of them are simply suggested for use. The Criminal Rules have no forms. The Administrative Office prepares forms, including such things as arrest warrants, search warrants, and bail orders. The Office asks the Criminal Rules Committee to review these forms. Different processes seem to work. Requiring the full 3-year Enabling Act process to revise a form does not make sense.

In this vein, it was asked whether assigning responsibility for the forms to the Administrative Office would be better because — assuming repeal of the Rule 84 provision that the Forms suffice under the rules — that would relieve the Committee of the responsibility that flows from present Rule 84. And the Administrative Office procedures may well be more efficient than Enabling Act procedures.

Doubt was expressed whether the Form complaints are much used. And it was suggested that a distinction might be drawn between Forms addressed to practitioners and Forms directed to judges. This doubt was supplemented by the observation that we do not know how often lawyers use the Forms. Neither do we know whether the Forms preserve models of complaints that deserve to expire. In a case that did not deserve to survive the Federal Circuit felt obliged to reverse dismissal of a complaint that tracked the Form complaint for patent infringement.

A judge observed that it would be good to streamline the process. But — although he has never seen a lawyer use a Form — the Forms are useful guides for pro se plaintiffs. Another judge agreed that pro se forms are useful. The 2010 Conference materials touch on a related question, generation of form interrogatories.

Discussion continued along the same lines. If primary responsibility were transferred to the Administrative Office, with opportunities for advice from the Committee, Rule 84 should at least be modified to say only that the Forms illustrate rules requirements. Even then it might be better to abrogate Rule 84; the rules at times provide for compliance with Judicial Conference models, as in the e-filing provisions of Rule 5(d)(3), but delegation to the Administrative Office seems different.

It was recognized that any project to develop Administrative Office Forms will take time. That may provide a collateral advantage. Immediate abrogation of the pleading Forms might seem to send a message about the Twombly and Iqbal pleading opinions, no matter how strenuously the Committee might emphasize that the project is to abrogate all the Forms without taking or implying

any position on the sufficiency of any Form. There is plenty of time to proceed deliberately. The Forms have endured from 1938, and little harm will flow from carrying them forward a while longer.

In response to a question, it was stated that the Administrative Office regularly consults with court clerks in developing and maintaining the many forms it now generates. Every year it sends out a questionnaire seeking comments on existing forms, and suggestions for new forms.

Timing questions recurred. The very length of time required even to abrogate the forms illustrates the need for a speedier, more flexible process. If the Standing Committee approved, a proposal to abrogate Rule 84 could be published in August, 2010, leading — if all went smoothly — to an effective date of December 1, 2012. But publication so soon would generate a perception that the Forms were being abrogated because the pleading forms, sufficient under notice pleading as it had been understood up to 2007, no longer suffice under Twombly and Iqbal. That is a serious reason to hold off. Nothing the Committee can say would defeat the perception. It is even possible that Congress might take proposed abrogation as a sign that legislation is needed to revivify notice pleading. Nor would there be much advantage in merely revising Rule 84 so it no longer says that the Forms suffice under the rules. If the Committee does not know whether illustrative Forms actually suffice, how should lawyers know?

Delay also would allow more time to consider a mid-range compromise. Most of the Forms could be abrogated. Rule 84 could remain as it is, covering a small number of forms that establish national uniformity. Caption, signature, summonses, requests for waiver and waiver of service, might be useful. The Form 80 Notice of a Magistrate Judge's Availability also may be useful for a different reason — it is designed to protect litigants against even slight pressure to consent to trial before a Magistrate Judge, and strict neutrality may be better served by a national Form.

It was suggested that if the Committee defers action for a while, the Administrative Office could nonetheless begin generating forms that might be put on an interactive website for easy use.

The discussion concluded with a decision to retain Rule 84 and the Forms on the active agenda. More detailed proposals may be prepared for the March 2010 agenda, or the matter may carry over to the next fall meeting for further consideration.

Rule 26(c): Protective Orders

Judge Kravitz began discussion of protective orders by noting that he testified this summer in hearings on the Sunshine in Litigation Act, H.R. 1508. Professor Cohn also testified. Judge Kravitz later responded to follow-up questions. Andrea Kuperman prepared a lengthy memorandum describing, circuit-by-circuit, practices in issuing protective orders, sealing-order standards, and the readiness of courts to modify or dissolve protective orders. Letters were sent in by the American Bar Association, the American College of Trial Lawyers Federal Civil Procedure Committee, Daniel Girard, and Professor Arthur R. Miller. This flow of information seems to have been effective in alerting Congressional staff to some of the problems that inhere in the bill. But it is difficult to make any predictions as to any eventual outcome.

Andrea Kuperman's case-law survey shows that there are no significant problems in present practice. Judges take seriously the Rule 26(c) requirement that good cause be shown for a protective order. They take care on motions to dissolve or modify. And they are very careful about sealing documents used in the litigation — the tests for sealing are much more demanding than the standards in the Sunshine bill.

Despite the apparent lack of problems, several years have passed since the Committee last actively considered protective-order practice. The rule text seems to reflect greater concern for commercial confidentiality than other interests. Courts in fact do protect personal privacy, medical records, and mental health records. But it might be useful to reflect such interests more explicitly in the rule.

Similarly, Rule 26(c) does not say anything about modifying or dissolving protective orders. Courts in fact seem to take a desirable approach, but again it might be useful to address these practices in express rule text.

A trickier question is presented by orders that allow a party to designate discovery information as confidential. Often the orders do not include provisions for challenging a designation. Courts in fact to entertain challenges. Here too it might help to adopt express rule text, although this may descend to a level of detail better left to administration in practice.

Application of the broad good-cause standard is context-specific. It might be possible to adopt more specific rule language, although here too it may be wise rely on general language alone.

With all of these potential issues, it may be sensible to take another hard look, even though there are no apparent practices that need to be improved and no indication at all that protective orders have had the feared effect of defeating public knowledge of circumstances that involve an ongoing threat to public health or safety.

The history of Committee study was reviewed. In 1992 proposed Sunshine in Litigation legislation, similar to the current bill, caused the Committee to inquire whether in fact there were significant problems with protective-order practice. The Committee, although not convinced there were any problems, published for comment a draft that addressed modification and dissolution of protective orders. The draft was revised in light of extensive public comments. The revised draft was returned by the Judicial Conference for further consideration, in part because there had not been any opportunity for public comment on the revisions. The proposal that had been submitted to the Judicial Conference was then published. As often happens, comments on the published proposals were divided. The Committee concluded that there were no problems that required immediate action, and that courts seemed to be striking proper balances between private and public interests. It voted to defer further consideration pending broader consideration of the discovery rules. In 1998 the Committee suspended active consideration, maintaining a watch on continuing practice.

With these introductions, discussion began with the suggestion that it is important to get documents produced to requesting parties as promptly as possible, a goal greatly facilitated by allowing production under a protective order that allows the producing party to designate particular documents as confidential. At the same time, it is important to ensure that the receiving party can challenge the confidentiality designation. It also is important to ensure that a protective order can be modified or dissolved. The Zyprexa litigation is a good example of releasing documents from protection.

The claims that protective orders thwart public health or safety have not been supported by persuasive examples. Nor will judges refuse to allow transmission of information to government regulators.

Fear also has been expressed that plaintiffs' lawyers are taking enhanced settlements in return for being muzzled about topics of public concern. Again, there is so much information available from other sources that this seems unlikely. Specific examples have yet to be provided.

The Committee was reminded that the FJC studied protective orders for the Committee during the last review. There are not many protective orders. Only a small fraction of the cases with protective orders involve topics that animate the public health and safety concerns. Quite a few of the protective orders are initiated by plaintiffs' lawyers who wish to protect personal information. E-filing has become universal; the privacy dynamic has shifted.

An important distinction must be recognized between information filed with the court and information that is not filed. Great care is exercised in sealing information that has been filed, particularly when it is filed in conjunction with anything that goes to the merits — summary-judgment materials are the most obvious example. In the Second Circuit, for example, it is very difficult to seal information filed with the court, but easier to maintain confidentiality for information that is not filed or used in the litigation.

Thomas Willging added that the FJC study of sealed documents showed the same cases included unsealed documents that revealed any information that might be needed to protect public health or safety.

The Committee was reminded of the general rules of professional responsibility that make it unethical for an attorney to limit future practice opportunities, and that make it permissible to disclose confidential information to avert bodily harm.

A practical observation was offered from a practitioner's experience: there are dramatic differences among judges. Some are very strict in applying Rule 26(c). Others let the parties keep everything secret. Some judges are reluctant to grant motions to unseal, fearing that "plaintiffs are trying to terrorize defendants." Beyond that, there are sensitive documents. A plaintiff's lawyer has a duty to maximize the return for the client; it would be wrong for the court to jeopardize the client's interests for the purpose of getting sensitive documents to the public. This is a philosophical question that is answered differently by different judges. There also are cases with mutual interests in confidentiality — both plaintiff and defendant have information they do not wish be made public, and cooperate. All of this works fine from the lawyers' perspective, but there may be some information that the public should know.

An observer offered environmental statutes as an example. The public interest is protected by statutory duties to report to public agencies pollutant discharges. Another observer suggested that reporting obligations extend broadly across most industries.

It was noted that the Department of Justice has not yet taken a position on these questions, but does not now think that any legislation is necessary.

Discussion concluded with a project to study the question further and to offer a report at the March 2010 meeting. The conclusion may be that there is no reason to amend Rule 26(c). But it will help to remain focused on the issues for a while. Even if there are no problems in practice, it may be possible to capture present good practices in better rule language.

Rule 45

Judge Kravitz introduced discussion of Rule 45 by observing that the FJC survey shows that third-party subpoenas are indeed a significant part of discovery practice.

Judge Campbell introduced the Discovery Subcommittee's report of Rule 45 issues. It has been a year since the Subcommittee was asked to examine Rule 45. Andrea Kuperman did a remarkable review of the literature. Comments came from other sources, and bar associations submitted suggestions. The Subcommittee identified 17 issues warranting further exploration. The

issues were discussed with bar groups, the Subcommittee held several meetings by telephone conference calls, and narrowed the list to six issues. Those six issues are presented in the report without advancing any proposals for present action. The rule drafts included in the report are designed to illuminate the issues and illustrate possible approaches. Some of the issues seem to cry out for solutions. Others present more abstract policy questions. The issues are presented for discussion, with regret that Chilton Varner is in trial and could not be present to participate.

(1) Notice of Service and Response. These issues begin with the observation of many lawyers that often they do not get the required notice that a third-party subpoena for documents is being served. Although the requirement appears clearly at the end of Rule 45(b)(1), it may be that the location is too obscure — that failures to provide notice before the subpoena is served result from ignorance or forgetfulness. A related issue is not addressed by Rule 45 — should the party who issued the subpoena provide notice when documents are produced.

Professor Marcus developed these questions. The authority to issue a subpoena solely for documents, without an attendant deposition, was added in 1991. The notice requirement was added then — a subpoena for a deposition was already covered by the Rule 30 requirement to give notice of the deposition. The purpose of the 1991 notice provision was to enable other parties to object, demand that additional materials be included in the subpoena, or to monitor discovery and seek access to the documents produced in response. The 1991 provision was ambiguous as to the time for serving the notice on other parties; the ambiguity was resolved in the 2007 Style Project by directing that notice be served before the subpoena is served.

Greater prominence could be achieved for the notice requirement by relocating it as a subparagraph within a new paragraph in Rule 45(a) — Rule 45(a)(4)(A) could carry forward the requirement that notice be served on each party before the subpoena is served. This provision could add a new requirement that a copy of the subpoena be served, ensuring that other parties can decide whether additional documents should be required and better enabling them to follow up after compliance.

The ABA Litigation Section has suggested that there also should be notice that materials have been received under the subpoena, enabling other parties to know whether and how to seek access. The illustrative draft includes this suggestion as a new Rule 45(a)(4)(B), providing that within 7 days after production the party serving the subpoena must serve notice on other parties and offer to permit inspection or copying of the produced materials.

The Sedona Conference has suggested a further wrinkle, describing it as a "best practice" to attempt to confer with the nonparty before production. This suggestion was not included in the draft because the Subcommittee concluded that it could produce complications outweighing any likely benefits.

Discussion began with agreement that it makes sense to move to a more prominent position in Rule 45 the notice-of-service requirement. And it is also a good idea to require that a copy of the subpoena be attached to the notice. That will enable other parties to seek a protective order, to seek production of additional materials, or take other useful action.

It was suggested that notice "before the subpoena is served" may not suffice. The rule might set a minimum period before service, somewhere in a range of 3 to 7 days. Very short notice may be inadequate. In employment cases, great harm can be done a plaintiff by subpoenas served on employers where the plaintiff worked before working for the defendant, and even greater harm may flow from a subpoena served on the plaintiff's new employer.

The requirement that notice also be given when materials are produced in response to the subpoena also was supported. It was asked whether this will reduce the burden on the nonparty who produces information. One possibility is that it will reduce the burden by reducing the use of multiple subpoenas. But even better protection may flow from the present requirement of advance notice, at least in the likely event that a party may seek a protective order. At any rate, the main purpose is to help other parties.

In the same vein, it was reported that many lawyers say the notice of production would be really helpful. What matters most is what documents are produced, not what documents are demanded. There may be a practical problem when documents are produced in stages — when and how often must notice be given? It was suggested that the notice is not a big burden. At times the party receiving subpoenaed documents "tends to hide the ball. The second notice prevents confusion and game playing."

It would be possible to augment the notice of production by requiring that the notice describe the type and volume of the produced materials. The Subcommittee rejected this approach for fear that it would add unnecessary burdens, and might lead to later objections that the description was inadequate. Notice of the opportunity to inspect and copy should suffice.

A further problem was noted. The party who served the subpoena may agree with the person served to withdraw the subpoena. The person served then produces documents amicably. Perhaps the idea should be reasonable access, not a second notice when things are produced in response to a subpoena. The rule should not create a risk that documents will be excluded from evidence for failure to give a notice that they were produced. Whether the party who failed to give notice should anticipate exclusion may depend on the circumstances.

The same question was asked as to the notice before serving the subpoena: What, if anything, should be the sanction for omission?

A finer distinction was suggested. Telling other parties that materials have been produced is a relatively minor burden. Should the party who received the materials also be required to offer an opportunity to inspect or copy the materials? Support for this requirement was offered by observing that a subpoena may demand many items, to be followed by negotiations between the party who served it and the person who received it. The negotiations may sharply reduce the number of items demanded and produced. All parties should know what has been produced and have access.

It was asked how the opportunity to inspect or copy would affect the allocation of costs among the parties. The Subcommittee chose not to address cost questions because these issues are rarely presented to the courts. They are worked out. As a practical matter, other parties expect to pay the costs of copying things that another party has obtained by subpoena.

The notice of production was questioned from a different direction — why do not all the parties' lawyers participate in the negotiations?

(2) Trial subpoena on party witnesses. Judge Campbell introduced this issue by describing In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D.La.2006). Rule 45(c)(3)(A)(ii) directs the court to quash or modify a subpoena that "requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person." The Vioxx decision found a negative implication that a subpoena can require a party or a party's officer to travel to testify at trial no matter whether the subpoena is served within the geographic limits prescribed by Rule 45(b)(2). There is a "pretty good split of authority" on this reading of Rule 45(c)(3), including a later contrary decision in the same court. The issue can

be approached in two ways: given the split in authority, is it important to establish a clear answer? And should the answer be that a party or a party's officer can be made to travel to testify at trial even though the subpoena cannot be served within the state where the district court sits?

Professor Marcus noted that both sides invoke the "plain language" of Rule 45. That suggests there is good reason to clarify the language. The policy question is more difficult. The Vioxx litigation provides an attractive illustration of the value of a long reach. The case involved a potential "bellwether" trial in consolidated multidistrict proceedings. The witness was the President of Human Health at Merck & Co.. There was a cogent prospect that such a high official might have important testimony. The later case in the same court, however, offers a contrast. That case was an opt-in Fair Labor Standards Act case. The trial subpoenas were directed to 9 plaintiffs who lived in other states. The need to burden such parties in such a case might seem much less.

There are three likely resolutions. The rule could provide that any party is subject to a subpoena to testify at trial, no matter where served. Or it could treat a party in the same way that nonparties are treated. Or it could confer discretion to order that a party be compelled to appear at trial in circumstances that would not support a nonparty trial subpoena.

One way to reinstate the limits imposed by the Rule 45(b)(2) service provisions, treating parties and nonparties alike, would be to add a few words at the beginning of Rule 45(c)(3)(A): "On timely motion, the issuing court must quash or modify a subpoena properly served under Rule 45(b)(2) that: * * *."

The approach that establishes court discretion could be modeled on Rule 45(c)(3)(B)(iii), which authorizes the court to quash or modify a subpoena that requires a person who is not a party or a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

The first reaction is that a plaintiff's lawyer may be strongly tempted to compel the chair or chief executive officer of a major corporation to appear for trial anywhere, even though the officer has limited knowledge of the matters in suit. "In any case you can identify some reason why the chairman should be there." It creates a pressure point. The subpoena puts pressure on the corporation because these officers "have very limited time." There are studies suggesting that video depositions are about as sound a basis for deciding a case as presence at trial. Video depositions are taken all the time.

This reaction was extended by observing that the same concerns apply to the heads of governmental agencies. Courts recognize the strong reasons for protection, and elaborate procedures are developed to limit the occasions even for depositions.

A different reaction was offered. You can sue the corporation or agency at its home base. The chair or chief executive officer is subject to a trial subpoena. But if the expected testimony serves little real purpose, protection is available. Miles should not make a difference. This observation was explored by agreeing that even within the 100-mile limit, harassment can support a motion to quash. The question is whether the 100-mile limit should make a difference. One approach would require an enhanced showing to justify going beyond 100 miles. Another would be to allow service, subject to a motion to quash.

Protective sentiment came back in the observation that the witness could be the chief executive officer of a 20-person firm who has absolutely no knowledge of the events in suit. But it was asked whether that means a trial subpoena should never reach beyond state limits? Often a court will direct that the witness be protected by taking the testimony by video deposition.

The question was framed again: up to Vioxx, the rule was that a nonparty could be made to travel to be a trial witness from any place where employed, residing, or regularly transacting business within the state, but subject to discretion to quash or modify the subpoena if the person must incur substantial expense to travel more than 100 miles. Vioxx changed that in some courts. Should the Vioxx approach be secured by revising Rule 45? Rule revision may be desirable, whichever way it goes, because these questions are not likely to arise in a context that supports appellate resolution.

It was observed that concerns about the need to protect high officials in government agencies "are overdrawn." The courts have developed "a lot of law" protecting them, including many decisions in the District of Columbia. There are rogue judges who at times go too far, for example by attempting to require that someone with settlement authority attend a Rule 16 conference, but the Department of Justice generally succeeds in persuading the judges to alter course.

One committee member asked several plaintiffs' lawyers about these questions and was told that generally the "100-mile" limit is not a big problem. A high corporate official who prefers to present testimony by way of video deposition risks offending the jury. But as a matter of policy, an extended reach may be desirable. Corporations enjoy the right to do business throughout the country. The Vioxx case illustrates circumstances in which a high corporate official has vital information about activities at the heart of what the company does. "This is not a pressure tactic." Courts allow depositions of individuals at the "apex" of a corporate or government agency hierarchy, but the law is very protective. That approach is better than setting a 100-mile limit. In appropriate circumstances, the lead figure should be subject to a trial subpoena.

A response protested that "no one thought this was necessary before 2006." Some lawyers are so good that they will be able to persuade judges to follow the Vioxx decision. The rule should be clarified to close off this possibility.

An interim summary suggested that no Committee member seemed to want an unlimited right to nationwide trial subpoenas of parties or their officers.

Another member wondered whether there is a serious problem. There are cases in which a defendant has taken the position that it intends to use an officer as part of the defense case, at the same time objecting to having the plaintiff call the same officer as part of the plaintiff's case. The courts recognize that in such circumstances it is appropriate to compel the witness to appear in the plaintiff's case. If we change the rule we may encourage situations that have led to the solutions reached without a rule.

The 100-mile limit may seem an antiquated relic, given its origins in 1793. But it may be rejuvenated by modern technology. Often technology enables testimony in a mode that is an effective substitute for live testimony. Although limited by a requirement of good cause in compelling circumstances, Rule 43(a) recognizes the use of "testimony in open court by contemporaneous transmission from a different location." The Criminal Rules Committee has proposed a rule, recently approved by the Judicial Conference, that would permit live video testimony of a witness outside the United States when it would be dangerous to bring the witness to the United States. That rule will encounter Confrontation Clause questions that do not arise in civil actions — that it is being pursued shows a high level of confidence in testimony by remote transmission. And many immigration hearings are done by contemporaneous video transmissions.

These questions will be further considered by the Subcommittee.

(3) Place of resolving enforcement disputes. Judge Campbell identified this problem as one that arises from the Rule 45 provisions for enforcing a nonparty subpoena in the court that issued the

subpoena. When the underlying action is pending in one court and the subpoena issues from another court, there may be compelling reasons to prefer that the court entertaining the action resolve objections and enforcement questions. Discovery issues may go to the heart of the dispute. The choice to allow, limit, or forbid discovery may have case-dispositive effect. And it may be hard to get the court's attention in ancillary discovery proceedings. An ancillary court, moreover, may find it difficult to integrate its efforts with the overall case-management responsibilities of the court entertaining the action. This difficulty may be extended when several ancillary courts are involved in a single underlying action — different courts may resolve the same issue differently. The nonparty, moreover, may prefer to have the dispute resolved by the court where the action is pending; it may be difficult to feel sympathy for a party who resists.

Considerations like these have led some courts to "transfer" or "remit" enforcement questions to the court where the main action is pending. But Rule 45 does not seem to allow that. And there can be good reasons to keep the enforcement decision in the ancillary discovery court. A local nonparty might encounter serious burdens if compelled to litigate the dispute in a distant court. The questions may be substantially separate from the merits and from other discovery issues. An attempt to force a local nonparty to litigate in a distant court may even raise questions similar to questions of personal jurisdiction over a defendant: should a federal court in New York be able to compel a witness in Arizona to litigate the subpoena dispute in New York? Although nationwide personal jurisdiction is authorized by several statutes, and Rule 4(k)(2) extends personal jurisdiction over defendants not subject to jurisdiction in any state, the question is not one of power alone.

The balance of advantages can readily be struck in case-specific transfer decisions. But transfer should not be made too easy. If it is easy, the issuing court will always transfer. The dispute will be docketed as a miscellaneous matter, it involves an action in which the court has no other stake, it is better to get it over with by transfer. Easy transfer, however, may impede the negotiations that usually resolve these disputes without any need for court action. The requesting party may be no more eager to show up in the issuing court than the subpoenaed nonparty is to show up in the main-action court. "If we change the dynamics, the negotiating process may be affected."

Professor Marcus pointed to a drafting choice presented in the illustration of a possible Rule 45(c)(2)(B)(iii) transfer provision. Should the standard for transfer invoke only the interests of justice, or should it also refer to the convenience of the parties and of the person subject to the subpoena? The longer formula might be useful as a caution against routine transfer.

Discussion concluded with the observation that there seemed to be consensus support for drafting rule language to authorize the issuing court to refer enforcement issues to the main-action court.

(4) More aggressive reconsideration of geographic limits. Judge Campbell introduced this issue by noting that "Rule 45 does a lot of work. It is complex. It limits service, place of performance, and enforcement. Can it be simplified"?

Professor Marcus pointed to the appendix to the Subcommittee Report. The appendix sets out the text of Rule 45 with footnotes identifying possible changes. It illustrates the proposition that it will be difficult to shorten or simplify Rule 45 without substantial reorientation of its approach. One point to begin may be with the 1991 change that authorizes a lawyer in the main action to issue subpoenas from any district court. It may be time to reconsider — to allow all subpoenas to issue from the court where the action is pending. Lawyers have asserted that it is difficult even to capture the attention of an issuing court away from the main-action court. At the same time, a nonparty may have a strong interest in local resolution and enforcement. The method of service presents related

questions. Some comments suggest that personal service should not be required, perhaps going as far as authorizing service by mail or by any means authorized in Rule 4 for service of summons and complaint.

The case for simplification was taken up by a member who observed that "Rule 45 has intricacies valuable mostly to big corporations. It requires a lot of lawyer input." Subpoenas often are served on nonparties who do not have the lawyer resources, and who encounter the text of Rules 45(c) and (d) — which must be set out in every subpoena — as gobbledygook. "We should start over." All subpoenas should issue from the main-action court. Trial, deposition, and document-production subpoenas should be distinguished. Local courts should have initial enforcing authority. Often the local court will want to act so as to reduce the burden on local nonparties. Subpoenas often are not especially complicated. The rule should be simple.

Judge Campbell agreed that the Subcommittee would consider this approach.

It was asked whether one approach might be to provide for cross-designating magistrate judges from the main-action court to act where the issuing court sits.

Another suggestion was that it might help to add a page to the Federal Judicial Center website addressing frequently asked questions about nonparty subpoenas.

Yet another suggestion was that rather than incorporate the provisions of Rules 45(c) and (d), a clearer notice could be developed. The notice could be provided either by incorporation in the subpoena or perhaps as a separate notice to be served with the subpoena.

The 100-mile limit returned to the discussion. Is it really an anachronism, or is it something that may have been an anachronism for a while but has again become synchronous with the realities of contemporary technology, including video depositions? Perhaps it is time to contract to a distance shorter than 100 miles. Complexity can be reduced by making the party go to the witness. Some nonparty witnesses really have no stake in the underlying action, and do not care about it. Present limitations are artificial. Here too, trial subpoenas might be distinguished — perhaps more sharply than now — from deposition and production subpoenas.

Further guidance will be useful. One source may be Criminal Rule 17. It authorizes service of a trial witness subpoena "at any place within the United States." A deposition subpoena may be issued in the district where the deposition is to be taken, but Rule 17(f)(2) authorizes the court to order — and the subpoena to require — "the witness to appear anywhere the court designates."

A caution was sounded by asking whether these questions are looking for a solution where there is no problem. "There is no angst in the majority of cases. People do work it out. We should be sure there really are problems. Lawyers understand the rule, and are familiar with it."

The original theme was offered in response. Yes, big firms and big companies understand Rule 45. But individuals and small businesses do not. It would be better to authorize national service from the main-action court, but to impose geographic limits on the duty to comply and to begin with a preference for resolving disputes at the nonparty witness's home.

Another judge agreed that simplification would be useful. A vast majority of the civil cases in his district involve damages less than $100,000. Nonparty subpoenas generally are addressed to local entities. Subpoenas tend to go outside the district only in very big cases. Then there can be problems — in a big case with multiple subpoenas, some of the disputes came to the judge in the main-action court while others were resolved inconsistently in ancillary courts. Technology can be

used to facilitate convenient resolution of these disputes in the main-action court, achieving consistency at little or no cost in inconvenience.

(5) Cost allocation. Judge Campbell described the kinds of issues that have been raised around two provisions added in 1991. Rule 45(c)(1) directs an attorney responsible for issuing a subpoena to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. Rule 45(c)(2)(B)(ii) provides for objections by a person subject to a document subpoena, and further provides that after objection production may be required only by order, and that the order "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." The suggestions commonly ask for greater detail. The rule might answer the question whether attorney fees are part of the expense a nonparty must be spared. The rule might confer greater protection on the nonparty. Or, looking the other way, parties responsible for issuing subpoenas complain that the responding nonparty often demands payment of excessive costs for complying.

Professor Marcus suggested that courts seem to be ruling sensibly under the present rule. It is not clear that more precise language will make anyone's task any easier.

Judge Campbell agreed that the Subcommittee has not yet come to see any need for change. Things indeed seem to be worked out reasonably in most cases.

There was no further discussion.

(6) In-hand service. The earlier discussion noted the question whether in-hand service should be required for nonparty subpoenas. Judge Campbell noted that in-hand service may serve an important purpose. The nonparty is, after all, not a party to the action. Often that nonparty will not have a lawyer. The penalty for noncompliance is contempt. "We need a dramatic event to signal the importance of the subpoena."

Professor Marcus observed that a recent decision held service by certified mail sufficient.

The analogy to service of summons and complaint on an intended defendant was questioned by observing that it would be odd to allow substituted service of a subpoena on a state official in the mode often used in long-arm statutes.

Judge Campbell concluded the Rule 45 discussion by welcoming comments on the several suggestions included in the appendix. The Subcommittee will make firm recommendations to the Committee for consideration at the March 2010 meeting.

Judge Kravitz thanked the Subcommittee for its work, commenting that "we are in good hands."

Rule 58 - Appellate Rule 4

Judge Colloton presented the Report of the Joint Civil/Appellate Subcommittee. The Subcommittee was formed to provide joint consideration of topics that overlap the Civil and Appellate Rules. The topics currently on the agenda arise from suggestions and comments made to the Appellate Rules Committee. The Subcommittee is ready to report on two of them.

The first question involves Appellate Rule 4 and Civil Rule 58. The problem is primarily a Rule 4 problem. Under Rule 4(a)(4)(B), appeal time runs "from the entry of the order disposing of the last" remaining motion that tolls appeal time. It is possible that appeal time may run out, as measured from entry of the order, even before an amended judgment is entered. An example might be an order "disposing of" a motion for new trial by conditionally granting a new trial, subject to

denial if the plaintiff accepts a remitted amount within 40 days. If the plaintiff does not act on the remittitur within 30 days from entry of the order, there may be confusion as to the proper course. The defendant might file a notice of appeal, and then withdraw it if remittitur is not accepted and the new trial order becomes absolute and defeats finality. The defendant might ask for an extension of appeal time. Or the defendant might wait, hoping that the absence of a final judgment will allow an appeal after a remitted judgment is entered. Although there seem to be ways to muddle through, the Subcommittee has submitted to the Appellate Rules Committee a revision of Rule 4(a)(4)(A) that would run appeal time from "the latest of entry of the order disposing of the last such remaining motion or, if a motion's disposition results in alteration or amendment of the judgment, entry of any altered or amended judgment: * * *." A parallel change would be made in the Rule 4(a)(4)(B)(i) and (ii) provisions for premature notices of appeal and appeals from an order disposing of a tolling motion or altering or amending the judgment.

Civil Rule 58(a) has become involved with the Appellate Rule 4 discussion because Rule 4(a)(7)(A)(i) provides that a judgment is entered for purposes of Rule 4(a): "(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a)." There is a potential for confusion in applying Rule 4 — where mistakes can lead to forfeiture of the right to appeal by filing an untimely notice of appeal — to any extent that Rule 58 is confusing. And there is a possibility that ambiguity may lurk in Rule 58(a). The rule as it now reads can be shown with one draft of possible amendments:

> Separate Document. Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required ~~for~~ when an order — without [altering or] amending the judgment — disposes of a motion * * *.

At least one court has concluded that Rule 58(a) does not mean what it says when it refers to an order that "disposes of" a motion. The theory seems to be that an order granting any of the tolling motions will always lead to an amended judgment, so the rule can only refer to orders that deny a tolling motion. But that is not accurate. The simplest illustration of an order that grants a tolling motion without leading to an amended judgment is an order that amends Rule 52 findings of fact or makes additional findings — the additional or amended findings may not lead to any change in the judgment. The intended meaning, as reflected in the 2002 Committee Note, is that a separate document is required only when the judgment is amended. A party who waits for entry of an amended judgment may inadvertently let the appeal period expire.

Present action was not requested on the Rule 58 draft. The Appellate Rules Committee will consider the same package, and the actions of both Committees can be coordinated for the spring meetings.

The Subcommittee also considered the question whether Appellate Rule 4(a)(4)(B)(ii) should be made parallel to Rule 4(b)(3)(C). Rule 4(b)(3)(C) provides that for appeals in a criminal case, a valid notice of appeal is effective, without amendment, to appeal from an order disposing of any of the tolling motions listed in Rule 4(b)(3)(A). Rule 4(a)(4)(B)(ii), in contrast, provides that for appeals in a civil action a party intending to challenge an order disposing of any of the tolling motions, or a judgment altered or amended on such a motion, must file an amended notice of appeal even though that party had already filed a timely notice of appeal. The Subcommittee concluded that the civil and criminal contexts are sufficiently different to justify the different approaches. No changes will be recommended.

The Subcommittee has a third item on the agenda, the set of problems that are referred to as "manufactured finality." Those issues will be explored in the coming months. And the Subcommittee will work to accomplish any coordination that may be useful as the Bankruptcy Rules Committee pursues its work on the Part 8 rules that govern appeals.

FJC-CAFA Assessment

Thomas Willging provided a brief interim report on the FJC study of the impact of the Class Fairness Act. "This project has a long tail." Cases filed during the years immediately before the 2005 effective date of CAFA have generally concluded. Cases filed in the years immediately after the effective date continue to linger on the docket. A full report will be put off at least to the Committee's meeting next March, and perhaps to the fall 2010 meeting.

Although it is too early to reach firm conclusions, it can be noted that CAFA appears to be having at least part of the intended effect. The rate of remands to state courts is diminishing. Thirty percent of pre-CAFA removals were remanded. The figure for post-CAFA cases is twenty percent; although it is possible there will be some remands in the cases that remain open, remand usually occurs early in the litigation so there may be little change in this figure.

Brief note was taken of ongoing studies of class actions in California state courts, and of Professor Gensler's project to study actions in Oklahoma courts.

Adjournment

Judge Kravitz thanked the Administrative Office staff, and particularly Gale Mitchell and Amaya Bassett, for their hard work in making the meeting, although away from the Judiciary Building, a great success.

Next Meeting

The next meeting is scheduled for March 18-19, 2010, at the Emory Law School in Atlanta. The 2010 Conference will be held at Duke Law School on May 10-11, 2010.

Respectfully submitted,

Edward H. Cooper
Reporter

TAB 3

Agenda

2010 Litigation Review Conference

Duke Law School

May 10-11, 2010

Monday, May 10, 2010

8:30-8:45 Welcome and Introduction: Judges Rosenthal (S.D. TX), Kravitz (D. CT), and Koeltl (S.D. NY)

8:45-10:15 The Empirical Research: Overview of Satisfaction or Dissatisfaction with the Current System, and Suggestions for Change Raised by the Data

Moderator: Judge Rothstein (FJC/W.D. WA)

A. The FJC Data: Judge Rothstein, Emery Lee (FJC), and Tom Willging (FJC)

B. The Litigation Section Data: Lorna Schofield (ABA Litigation Section), Emery Lee, and Tom Willging

C. Follow Up Lawyer Interviews: Emery Lee, Tom Willging

10:15-10:30 BREAK

10:30-11:45 The Empirical Research: Continued

Moderator: Justice Kourlis (IAALS)

D. The ACTL/IAALS Data: Justice Kourlis, Paul Saunders (Cravath, New York)

E. Rand Survey Data and Cornell Data: Nick Pace (RAND) and Prof. Ted Eisenberg (Cornell)

F. Commentary on All of the Research: Prof. Marc Galanter (Wisconsin), Prof. Ted Eisenberg, Prof. Deborah Hensler (Stanford)

11:45-1:00 Pleadings and Dispositive Motions: Fact Based Pleading, *Twombly, Iqbal*, Efforts to Decide Cases on the Papers Either at the Beginning of the Process or at the End of the Process

Moderator: Prof. Arthur Miller (NYU)

Participants: Judge Jon Newman (2nd Circuit), Prof. Adam Pritchard (Michigan), Prof. Geoffrey Hazard (Hastings), Dan Girard (Girard, California), Sheila Birnbaum (Skadden, New York), Jocelyn Larkin (Impact Fund, California)

1:00-2:30 LUNCH - Deputy Attorney General David W. Ogden

2:30-3:45 Issues With the Current State of Discovery: Is There Really Excessive Discovery, and if so, What are the Possible Solutions?

Moderator: Elizabeth Cabraser (Lieff, California)

Participants: Judge David Campbell (D. AZ), Magistrate Judge J. Paul Grimm (D. MD), Jason R. Baron (Nat'l Archives), Patrick Stueve (Stueve, Missouri), Steve Susman (Susman, New York/Houston), Prof. Cathy Struve (Pennsylvania)

3:45-5:00 Judicial Management of the Litigation Process: Is the Solution to Excessive Cost and Delay Greater Judicial Involvement?

Moderator: Judge Patrick Higginbotham (5th Circuit)

Participants: Judge Michael Baylson (E.D. PA), Magistrate Judge J. David Waxse (D. KS), Jeff Greenbaum (Sills, New Jersey), Prof. Judith Resnik (Yale), William Butterfield (Hausfeld, DC), Paul Bland (Public Justice)

6:30-9:30 Reception and dinner

Tuesday, May 11, 2010

8:30-9:45 E-Discovery: Discussion of the Cost Benefit Analysis of E-Discovery and the Degree to Which the New Rules are Working or Not

Moderator: Greg Joseph (Joseph, New York)

Participants: Judge Shira Scheindlin (S.D. NY), Magistrate Judge J. James Bredar (D. MD), John Barkett (Shook Hardy, Florida), Thomas Allman (retired GC of BASF), Joseph Garrison (Garrison, Connecticut), Dan Willoughby, Jr. (King & Spalding, Georgia)

9:45-10:30 Settlement: Is the Litigation Process Structured for Settlement Rather than Trial and Should it Be? Should the Answers Depend on the Complexity of the Case including Whether the Action is a Class Action?

Moderator: Judge Brock Hornby (D. ME)

Participants: Judge Paul Friedman (D. DC), Prof. Richard Nagareda (Vanderbilt), Prof. Robert Bone (Boston), James Batson (Liddle, New York), Peter Keisler (Sidley, DC), Loren Kieve (Kieve, California).

10:30-10:45 BREAK

10:45-11:45 Perspectives from the Users of the System: Corporate General Counsel, Outside Lawyers, Public, and Governmental Lawyers

Moderator: Judge Koeltl

Participants: Alan Morrison (AU), Amy Schulman (Pfizer), Thomas Gottschalk (Kirkland & Ellis, DC), Ariana Tadler (Milberg, New York), Anthony West (DOJ Civil Division), Joseph Sellers (Cohen, DC)

11:45-1:00 Perspectives from the States: Different Solutions for Common Problems and their Relative Effectiveness. This Panel should also consider the results of any Pilot Programs by the IAALS

Moderator: Justice Andrew Hurwitz (Arizona)

Participants: Judge Kourlis, Paula Hannaford-Agar (National Conf. for State Courts), Prof. Seymour Moskowitz (Valparaiso), William Maledon (Osborn, Arizona), Judge Henry Kantor (Oregon)

1:00-2:00 LUNCH

2:00- 3:15 The Bar Association Proposals: ACTL, ABA Litigation Section, NYCBA, AAJ, LCJ, DRI

Moderator: Lorna Schofield

Participants: Lorna Schofield, David Beck (ACTL), Pat Hynes and Wendy Schwartz (NYCBA), Bruce Parker (DRI, LCJ), John Vail (AAJ)

3:15-4:30 Observations from Those Involved in the Rule Making Process over the Years

Moderator: Dean Levi (Duke)

Participants: Judge Scirica (3rd Circuit), Judge Higginbotham, Prof. Paul Carrington (Duke), Prof. Dan Coquillette (Harvard/Boston College), Prof. Arthur Miller

4:30-5:00 Summary and Conclusions: Judge Rosenthal, Judge Kravitz, Prof. Edward Cooper (Michigan), and Prof. Rick Marcus (Hastings)

Litigation Costs in Civil Cases: Multivariate Analysis

Report to the Judicial Conference Advisory Committee on Civil Rules

Emery G. Lee III
&
Thomas E. Willging

Federal Judicial Center
March 2010

Contents

Executive Summary

This report presents the results of multivariate analysis of factors associated with litigation costs reported in a national, case-based survey of attorneys of record in federal civil cases terminated in the fourth quarter of 2008. Separate models were estimated for plaintiff and defendant attorney respondents. Both models explain a large proportion of the variation in litigation costs. Factors associated with *higher* litigation costs, even after controlling for other factors, for both plaintiff and defendant attorneys, included:

- higher monetary stakes in the underlying litigation;
- longer processing times (time from filing to disposition);
- trial dispositions (bench and jury);
- electronic discovery requests from both sides of the case;
- disputes over electronic discovery;
- greater case complexity;
- summary judgment practice;
- concern over the nonmonetary stakes in the underlying litigation; and
- representation by larger law firms.

A few factors explained variation in the plaintiff attorney model but not in the defendant attorney model, including the number of expert depositions conducted and hourly billing. Similarly, some factors, including the number of types of discovery reported and contentiousness between the parties, explained variation in the defendant attorney model but not in the plaintiff attorney model.

Background[1]

At the request of the Honorable Mark R. Kravitz, chair of the Judicial Conference's Advisory Committee on Civil Rules ("Committee"), the Federal Judicial Center ("FJC") conducted a national, case-based survey of attorneys' experiences in federal civil cases terminated in the last quarter of 2008 ("the closed cases"). This report, prepared for the Committee's March 2010 meeting, presents multivariate analysis of litigation costs in the closed cases.[2]

The point is obvious, but we state it for clarity's sake: the model estimates presented in this section are only as good as the respondents' reports of costs in the closed cases. Because there is reason to think that parties' costs in a given case will differ depending on whether they are plaintiff or defendant, we estimate separate models for plaintiff attorneys' and defendant attorneys' reported costs. A large sample size permits us to estimate two models with a large number of explanatory variables, even after accounting for respondents not able to report costs in the closed cases. The analysis was limited to the reported costs of respondents working in private law firms; a relatively small number of government and in-house cost reports have been excluded. More information about the analysis is provided in the Methods section, *infra*.

The following hypotheses were tested:

H_1: The higher the stakes, the higher the costs will be, all else equal.

H_2: The longer a case takes to reach termination, the higher the costs will be, all else equal.

H_3: Cases terminated by trial will have higher costs than other dispositions, all else equal.

H_4: Cases in which a request is made for electronically stored information ("ESI") will have higher costs than cases in which no such request is made, all else equal. In the following models, parties are identified by their role with respect to ESI; the baseline for comparison is a case without a request for production of ESI.

H_{4a}: Producing parties will have higher costs than parties in non-ESI cases, all else equal.

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1. We acknowledge the valuable assistance of a number of FJC staff members in various stages of preparing this report, especially Jill Gloekler and Margaret Williams.

2. For background, a description of the research and sampling design, and preliminary findings, see Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center 2009) [hereinafter *Preliminary Report*].

H_{4b}: Requesting parties will have higher costs than parties in non-ESI cases, all else equal.

H_{4c}: Parties both producing and requesting ESI will have higher costs than parties in non-ESI cases, all else equal.

H_5: Disputes over ESI will increase overall costs, all else equal.

H_6: Cases with more reported types of discovery will have higher costs than cases with fewer reported types of discovery, all else equal.

H_7: Each expert deposition conducted will be associated with higher costs, all else equal.

H_8: Each non-expert deposition conducted will be associated with higher costs, all else equal.

H_9: Each third-party subpoena issued in the case will be associated with higher costs, all else equal.

H_{10}: The more factually complex the case, as reported by respondents on a seven-point scale, the higher the litigation costs, all else equal.

H_{11}: The more contentious the relationship among the parties, as reported by respondents on a seven-point scale, the higher the litigation costs, all else equal.

H_{12}: Cases in which the court ruled on any summary judgment motion will have higher costs, all else equal.

H_{13}: Cases in which the attorney respondent reported that nonmonetary stakes were of primary or dominant concern to the client will have higher costs, all else equal, than cases where nonmonetary stakes were less important.

H_{14}: Cases in which the plaintiff makes class allegations will have higher costs, all else equal.

H_{15}: The larger the firm of the attorney representing the client, the higher the costs, all else equal.

H_{16}: Attorneys billing by the hour will report higher costs than attorneys using other billing methods (the most common other method being contingency), all else equal.

Several control variables were also included in the analysis. Because different types of cases may have different costs, the models include controls for the most common nature-of-suit categories in the sampled cases: Contracts, Torts, Civil

Rights, Consumer Credit, Labor, and Intellectual Property. The baseline estimates for the models are for the approximately 10% of sampled cases that do not fall into these six categories ("Other").

The models also include a variable to capture each district's judicial workload (weighted case filings per judge in fiscal year 2008) and circuit control variables. The former variable was included after discussion at the October 2009 meeting of the Committee. The latter variables are best understood as controls for any circuit-level differences in cost. The baseline circuit-for-cost estimates (i.e., the circuit without a dummy variable in the models) is the Eleventh Circuit. Because so few respondents (16 total) in the D.C. Circuit (in effect, in the District Court for the District of Columbia) were able to report cost and/or stakes information, it was impractical to include those respondents with the circuit control variables. The following analyses are thus limited to respondents in closed cases in district courts other than that for the District of Columbia.

Plaintiff Attorney Model

Table 1 displays the results of the multivariate analysis of plaintiff attorneys' estimates of costs in the closed cases. Fully 828 law-firm attorneys' responses to the survey are included in the analysis. The overall model is statistically significant at the 0.001 level and explains approximately 62% of the variation in the dependent variable.

Most of the hypotheses outlined above are supported by the results. The next two sections will discuss the hypotheses in the order they are listed in the previous section. Unless otherwise stated, the following results are statistically significant at the 0.05 level or better.

Higher stakes cases (H_1) and cases with longer processing times (H_2) were associated with higher reported costs for plaintiffs, even after controlling for other factors. A 1% increase in stakes was associated with a 0.25% increase in total costs, and a 1% increase in case duration is associated with a 0.32% increase in costs, all else equal. Cases terminated by trial (H_3) also had higher costs, approximately 53% higher, than cases that did not terminate by trial, all else equal.

The electronic discovery explanatory variables (H_4) show an interesting pattern. The coefficients for parties who were requesting parties only (H_{4b}) and were both requesting and producing parties (H_{4c}) in the closed cases are statistically significant. Thus, all else equal, plaintiffs who only requested ESI reported approximately 37% higher costs, and those who both requested and produced ESI reported approximately 48% higher costs. But plaintiffs who only produced ESI (H_{4a}) did not report statistically significant higher costs than respondents in cases without ESI, once other factors were accounted for. As discussed in the October 2009 report to the Committee, however, only 4% of plaintiff attorney respondents indicated that their client was a producing-only party with respect to ESI.[3] Only 2.3% of plaintiff attorneys in the multivariate regression were producing-only parties. The key point, however, is that for plaintiffs, electronic discovery was associated with higher costs for all parties requesting ESI, even after controlling for other factors, and parties who both requested and produced ESI had higher relative costs than those who requested only.

As expected, disputes over ESI (H_5) were associated with higher costs. For each dispute over ESI reported by respondents, the party had approximately 10% higher costs, all else equal.

Higher levels of discovery in the closed cases (H_6) were not associated with higher costs for plaintiff attorney respondents. But each expert deposition conducted in the closed case (H_7) was associated with approximately 11% higher

3. *See id.* at 20–21, Fig. 8.

costs, all else equal, and each non-expert deposition (H_8) was associated with approximately 5% higher costs, all else equal. The number of third-party subpoenas reported (H_9) was not associated with higher costs.

Factual complexity, as reported by respondents, was associated with higher costs (H_{10}). For each one-unit increase in reported case complexity (measured on a seven-point scale), plaintiff costs increased by about 11%. For plaintiffs, however, contentiousness between the parties (H_{11}) was not associated with higher costs.

Any ruling on a summary judgment motion (H_{12}) was associated with plaintiffs' reported costs increasing by approximately 24%, controlling for other factors, including case duration.

The importance of nonmonetary stakes to the client (H_{13}) increased plaintiff costs by approximately 42%, all else equal. However, plaintiff costs were not higher in cases in which the plaintiff raised class allegations (H_{14}).

Firm size also mattered for plaintiff costs (H_{15}). In general, larger firms had higher costs, all else equal. In the results displayed in Table 1, firm size is represented by seven dummy variables for the following firm sizes: 2–10 attorneys; 11–25 attorneys; 26–50 attorneys; 51–100 attorneys; 101–250 attorneys; 251–500 attorneys; and more than 500 attorneys. The baseline category for comparison is the costs for a sole practitioner. For example, a plaintiff attorney in a firm of more than 500 attorneys had costs more than double (109% larger) those of a sole practitioner, all else equal. The one exception was for firms of between 251 and 500 attorneys—although that finding was likely the result of the small number of plaintiff attorneys from firms of that size included in the multivariate regression ($n = 12$).

Hourly billing was associated with higher reported costs for plaintiff attorneys (H_{16}). Plaintiff attorneys charging by the hour reported costs almost 25% higher than those using other billing methods (primarily contingency fee), all else equal. Almost one in three plaintiff attorneys reporting usable cost information reported using hourly billing.

With respect to the control variables, judicial workloads were unrelated to reported costs, and only one circuit had costs higher than the baseline circuit, all else equal. Tort cases had lower reported costs than the "Other" baseline, controlling for other factors, but none of the other nature-of-suit controls were associated with higher costs for plaintiff attorneys.

Defendant Attorney Model

Table 2 displays the results of the multivariate analysis of defendant attorneys' costs in the closed cases. Fully 715 defendant attorneys' responses to the survey are included in the analysis. The overall model is statistically significant at the 0.001 level and explains approximately 76% of the variation in the dependent variable.

Again, higher stakes (H_1) and longer processing times (H_2) were associated with higher costs, even after controlling for other factors. A 1% increase in stakes is associated with a 0.25% increase in reported costs, and a 1% increase in case duration is associated with a 0.26% increase in costs, all else equal. Cases terminated by trial (H_3) had costs about 24% higher than cases not terminating by trial, all else equal.

The electronic discovery explanatory variables (H_4) for defendant attorneys show a different pattern than for plaintiff attorneys. The coefficients for defendants who were requesting-only (H_{4b}) or producing-only parties (H_{4a}) in the closed case are not statistically significant. Thus, one cannot conclude that these parties had higher costs than parties in non-ESI cases, once factors such as case complexity, firm size, and stakes, among others, are controlled for. Once again, however, parties both requesting and producing ESI (H_{4c}) in the closed case had higher costs, by approximately 17%, than defendants in cases without ESI, even after controlling for other factors.

As with the plaintiff attorney model, disputes over ESI (H_5) in the defendant attorney model were associated with higher costs. For each dispute over ESI reported by respondent, the defendant had approximately 10% higher costs, all else equal.

Higher levels of discovery in the closed cases (H_6) were associated with higher costs for defendant attorney respondents. Each additional reported type of discovery was associated with approximately 5% higher costs, all else equal. Moreover, the number of non-expert depositions conducted in the closed case (H_8) was associated with approximately 5% higher costs, all else equal. However, the number of expert depositions conducted in the closed case (H_7) was not associated with higher costs for defendants, once other factors were accounted for. The number of third-party subpoenas reported (H_9) was also not associated with higher costs.

Factual complexity, as reported by respondents, was associated with higher costs (H_{10}) for defendants. For each one-unit increase in reported case complexity (measured on a seven-point scale), defendant costs increased by approximately 13%, all else equal. For defendants, in addition, contentiousness between the parties (H_{11}) was associated with higher costs. For each reported one-unit increase in contentiousness (measured on a seven-point scale), costs increased by 8%, all else equal.

Any ruling on summary judgment (H_{12}) increased defendant attorney respondents' reported costs by approximately 22%, controlling for other factors, including case duration.

The importance of nonmonetary stakes to the client (H_{13}) increased defendant costs by about 25%, all else equal. However, defendant costs were not higher in cases in which the plaintiff raised class allegations (H_{14}).

Firm size also mattered for defendant costs (H_{15}). In general, again, larger firms had higher costs than smaller firms, all else equal. The baseline category for comparison is the cost for a sole practitioner. Thus, for example, a defendant represented by an attorney in a firm of more than 500 attorneys had costs more than double (156% larger) those of a sole practitioner, all else equal.

For defendant attorneys, hourly billing was not associated with higher costs (H_{16}). This finding makes sense once one considers that fewer than 5% of defendant attorneys reporting usable cost information reported using a billing method other than hourly billing.

With respect to the control variables, judicial workload was not associated with higher costs. Only two circuits had higher costs than the baseline circuit, all else equal. In terms of nature-of-suit categories, Intellectual Property cases had costs almost 62% higher, all else equal, than the baseline "Other" category. None of the other nature of suit controls was associated with higher costs.

Methods

Given the survey's sampling design, an unweighted, ordinary-least-squares regression was performed,[4] using robust standard errors, with STATA 11 software. The dependent variable in the ordinary-least-squares regression models is the natural logarithm of the attorney respondents' estimate of costs (sometimes called a log-linear model). Log transformation of a cost (or time) dependent variable is relatively common for at least two reasons. First, the multivariate regression model enables one to predict the cost of a case based on the explanatory variables in the model, but without log transformation of the dependent variable, the model may predict *negative* cost estimates for some cases. Log transformation of the dependent variable precludes negative cost estimates.[5] Second, log transformation of the dependent variable is preferable because it does not treat incremental increases in absolute cost the same. Without log transformation, the model would treat any increase in costs of, for example, $5,000, as the same—whether that increase was from $5,000 to $10,000 (a 100% increase) or from $1,000,000 to $1,005,000 (a 0.5% increase). The log transformation instead treats cost increases in percentage terms.[6]

This advantage of using the log-linear model carries over to the interpretation of the regression coefficients. For explanatory variables that are not log transformed (in these models, only case duration in days and stakes in dollars were log transformed), multiplying the unstandardized regression coefficients (included in the tables) by 100 yields the effect of a unit increase in the explanatory variable on costs as a percentage. Thus, if the coefficient for the trial variable (whether the case was terminated by trial) is .373 (assuming that it is statistically significant), then the effect on the costs of the closed case of a trial disposition, compared to all other dispositions, is an increase in costs of 37.3%, all else equal. For explanatory variables that have been log transformed (case duration in days, the stakes in dollars), the unstandardized regression coefficients can be understood as elasticities, i.e., as the percentage increase in the dependent variable of a 1% increase in the explanatory variable. For example, if the unstandardized regression coefficient for the log of case duration is .24, then a 1% increase in case duration is associated with a .24% increase in cost, all else equal.

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4. *See* Christopher Winship & Larry Radbill, *Sampling Weights and Regression Analysis*, 23 Soc. Methods & Res. 230, 242 (1994) ("When sampling weights are only a function of [explanatory] variables included in the model to be estimated, unweighted OLS will be the appropriate course to take."). In the present study, attorneys in cases that terminated by trial and in cases that lasted more than four years were oversampled. Both case duration and trial termination were included in the regression models as explanatory variables. For an explanation of the sampling design, see *Preliminary Report*, *supra* note 2, at 77–78.
5. Paul David Allison, Multiple Regression: A Primer 154 (Sage 1999).
6. *Id.*

Many of the explanatory variables included in the models were dichotomous ("dummy") variables, which take the value of one in specified circumstances (e.g., whether the case was terminated by trial) and zero in all other circumstances. The following variables were modeled as dummy variables: the ESI variables (producing only, requesting only, or both producing and requesting); the summary judgment variable (whether the court made any ruling on summary judgment); the class allegation variable (whether the plaintiff made class allegations); the size-of-firm variables; the hourly billing variable; the nature-of-suit category variables; and the circuit-level control variables. The following variables were modeled as ordinal-level variables: the discovery level variable; the case complexity variable; and the contentiousness variable. Finally, the following were modeled as continuous-level variables: case duration in days (log transformed); stakes in dollars (log transformed); the number of ESI disputes reported; the number of expert and non-expert depositions and third-party subpoenas reported; and weighted case filings per judge.[7]

7. Weighted case filings per judge as reported, on a district-by-district basis, in *2008 Federal Court Management Statistics*, compiled by our colleagues in the Statistics Division at the Administrative Office of the U.S. Courts.

Table 1: Regression Results, Dependent Variable Logged Costs Reported by Plaintiff Attorneys in Closed Cases

Variable	Coefficient	Robust S.E.	P-Value
Stakes (logged)	0.251	0.032	0.000
Duration (logged)	0.318	0.069	0.000
Trial termination	0.527	0.109	0.000
ESI			
Producing only	0.342	0.231	0.140
Requesting only	0.372	0.106	0.000
Both producing and requesting	0.484	0.123	0.000
Disputes	0.104	0.035	0.003
Discovery level	0.008	0.020	0.694
Number of expert depositions	0.113	0.026	0.000
Number of non-expert depositions	0.052	0.009	0.000
Number of third-party subpoenas	-0.010	0.009	0.253
Factual complexity	0.107	0.027	0.000
Contentiousness	0.027	0.024	0.263
Summary judgment ruling	0.236	0.102	0.021
Nonmonetary stakes dominant concern	0.424	0.128	0.001
Class allegations	0.445	0.231	0.055
Firm size			
2–10 attorneys	0.379	0.097	0.000
11–25 attorneys	0.647	0.142	0.000
26–50 attorneys	0.762	0.181	0.000
51–100 attorneys	1.020	0.193	0.000
101–250 attorneys	1.031	0.267	0.000
251–500 attorneys	0.253	0.489	0.606
> 500 attorneys	1.087	0.284	0.000
Hourly billing	0.248	0.106	0.019

Table 1 (continued)

Variable	Coefficient	Robust S.E.	P-Value
Nature of suit			
Torts	-0.362	0.183	0.048
Contracts	-0.230	0.161	0.154
Consumer	-0.277	0.200	0.165
Civil Rights	-0.155	0.172	0.369
Labor	-0.233	0.205	0.257
Intellectual Prop.	0.371	0.239	0.121
Weighted case filings (FY2008)	0.000	0.000	0.640
Circuit			
1st	0.302	0.273	0.269
2d	0.222	0.180	0.217
3d	0.172	0.184	0.349
4th	0.070	0.180	0.698
5th	0.111	0.165	0.501
6th	-0.212	0.211	0.313
7th	0.223	0.192	0.244
8th	0.143	0.208	0.491
9th	0.596	0.170	0.000
10th	0.259	0.189	0.172
Constant	3.209	0.540	0.000

$N = 828$; F (df = 41, 786) = 43.50 ($p = 0.000$)
$R^2 = 0.623$

Table 2: Regression Results, Dependent Variable Logged Costs Reported by Defendant Attorneys in Closed Cases

Variable	Coefficient	Robust S.E.	P-Value
Stakes (logged)	0.251	0.025	0.000
Duration (logged)	0.260	0.058	0.000
Trial termination	0.243	0.088	0.006
ESI			
Producing only	0.076	0.096	0.428
Requesting only	0.213	0.137	0.123
Both producing and requesting	0.169	0.084	0.044
Disputes	0.102	0.035	0.004
Discovery level	0.051	0.017	0.003
Number of expert depositions	-0.023	0.026	0.377
Number of non-expert depositions	0.048	0.005	0.000
Number of third-party subpoenas	0.002	0.007	0.740
Factual complexity	0.135	0.025	0.000
Contentiousness	0.075	0.020	0.000
Summary judgment ruling	0.223	0.073	0.002
Nonmonetary stakes dominant concern	0.252	0.092	0.006
Class allegations	0.227	0.139	0.104
Firm size			
2–10 attorneys	0.608	0.155	0.000
11–25 attorneys	0.846	0.162	0.000
26–50 attorneys	0.858	0.168	0.000
51–100 attorneys	1.155	0.181	0.000
101–250 attorneys	1.136	0.172	0.000
251–500 attorneys	1.411	0.175	0.000
> 500 attorneys	1.560	0.185	0.000
Hourly billing	0.407	0.213	0.056

Table 2 (continued)

Nature of suit			
Torts	0.038	0.153	0.806
Contracts	-0.049	0.150	0.742
Consumer	-0.238	0.202	0.239
Civil Rights	-0.017	0.144	0.936
Labor	-0.121	0.161	0.452
Intellectual Prop.	0.623	0.217	0.004
Weighted case filings (FY2008)	-0.000	0.000	0.968
Circuit			
1st	0.173	0.171	0.313
2d	0.389	0.141	0.006
3d	-0.006	0.141	0.968
4th	0.167	0.139	0.231
5th	0.056	0.113	0.617
6th	-0.164	0.136	0.227
7th	-0.120	0.148	0.420
8th	0.145	0.160	0.366
9th	0.436	0.135	0.001
10th	-0.175	0.151	0.248
Constant	3.096	0.471	0.000

$N = 715$; F (df = 41, 673) = 58.31 ($p = 0.000$)
$R^2 = 0.757$

In Their Words: Attorney Views About Costs and Procedures in Federal Civil Litigation

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Federal Judicial Center
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Introduction

The Advisory Committee on Civil Rules ("Committee") of the Judicial Conference of the United States asked the Federal Judicial Center to study the costs of federal civil litigation. In the spring of 2009, the Center conducted a survey of a random sample of attorneys who had represented the plaintiff or defendant in a set of federal cases that had been terminated in the last quarter of 2008. The Center presented the results of that survey to the Committee in October 2009.[1]

The Center also performed a multivariate analysis of the case-based survey results, identifying the variables that explain variations in attorney estimates of the costs of civil litigation in their cases. To supplement the multivariate analysis, District Judge John Koeltl, chair of the Planning Committee for the May 2010 Litigation Review Conference at Duke Law School, and the Center agreed that it would be useful for the Center to interview a number of the attorneys who responded to the case-based survey. The purpose is to present attorneys' general experiences and thoughts about the factors found to be associated with the costs of litigation. Interviews help explain and illuminate the quantitative findings presented in the other two reports. This report documents those interviews, organizing them where possible to track the results of the multivariate analyses of the Center's case-based survey, which the Center is also presenting to the Committee at this time.[2]

We should be clear at the outset that the comments made in the interviews do not represent a random cross-section of the views of respondents to the case-based survey. Nonetheless, we think these attorneys' views offer valuable insights into the costs of civil litigation and the operation of the Federal Rules of Civil Procedure ("the Rules") in a broad spectrum of litigation.

In December 2009 and January 2010, we sent email invitations to 75 attorneys who had responded to the Center's case-based survey, asking them to volunteer to discuss questions relating to federal civil litigation. Of the 75 attorneys, 28 had, in their response to the case-based survey, spontaneously offered to be available for further discussion. The remaining 47 attorneys were selected to span the distribution of costs reported by attorneys representing a plaintiff or defendant in the closed case identified in the case-based survey. In the end, 36 of the 75 attorneys responded positively to the invitation. Telephone interviews lasting 20–30 minutes

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1. Emery G. Lee III & Thomas E. Willging, Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules (Federal Judicial Center, Oct. 2009), available at http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf [hereinafter "Preliminary Report"].

2. Emery G. Lee III & Thomas E. Willging, Litigation Costs in Civil Cases: Multivariate Analysis (Federal Judicial Center 2010) [hereinafter *Multivariate Analysis*].

were conducted with 35 attorneys. Of the interviewees, 16 primarily represent plaintiffs; 12 primarily represent defendants; and 7 represent plaintiffs and defendants about equally. We promised interviewees that their communications with us would be treated as confidential. We did not record the interviews. Based on detailed notes, the responses presented in quotes below represent our best efforts to capture the words used by each interviewee.

Executive Summary

Costs of Litigation

For the most part the interviewees corroborated and clarified the results of the case-based survey on the costs of civil litigation as follows:

- Stakes in the litigation guided their investment of resources.
- Factual and procedural complexity increased costs.
- Aside from intellectual property, the nature of suit had little value in explaining differences in costs.
- Law firm size has a significant impact on costs, but some attorneys argued that the driving force was the size and resources of corporate clients, not the size of the law firm.
- Characteristics of counsel, including experience and competence in a specialty area, are significant factors affecting costs (factors not studied in the case-based survey and probably not quantifiable).
- Volume of discovery is a primary force driving the costs of litigation.
- Most attorneys had little experience with electronically stored information ("ESI") beyond the exchange of some documents in electronic form.
- Problems with ESI were related primarily to the volume of ESI held by large companies.
- Most attorneys on both sides of the litigation described ways to limit the cost of discovery and keep it commensurate with the stakes.

Pleading

- Most attorneys have seen no impact of the *Twombly/Iqbal* cases in their own practice. Some reported an increase in the number of motions filed without an increase in the likelihood that a motion would be granted. This activity has increased the costs of litigating their cases.
- Almost all of the attorneys report that they do not use notice pleading and that they prefer to plead enough facts to tell a coherent story to the judge.

Summary Judgment

- The plaintiff attorneys we interviewed find summary judgment to be overused. Defendant attorneys find it to be underused and not always granted when warranted. Both sides agree that summary judgment motions are filed routinely in employment discrimination cases but disagree about how appropriate summary judgment is for resolving the issues in those cases.

- Summary judgment is closely related to settlement, particularly in employment discrimination cases.
- Summary judgment has the effect of postponing settlement discussions until after most costs have been incurred.

Rule Changes

Many of the attorneys' suggestions focused on rule changes designed to promote early case evaluation and settlement discussion.

Results

Stakes in the Litigation

In the multivariate model, a 1% increase in monetary stakes was associated with a 0.25% increase in a plaintiff's reported costs and a 0.24% increase in a defendant's reported costs, all other factors being equal.[3] So, a case with monetary stakes of $100,000 for a plaintiff would have 25% higher litigation costs than a case with monetary stakes of $50,000. In addition, nonmonetary stakes (such as a concern about future litigation or about reputation) have a substantial impact, increasing plaintiff costs by about 42% and defendant costs by about 25%, all else equal.[4]

Focusing on the component of costs represented by discovery, in the case-based survey more than half of the attorneys indicated that the costs of discovery were "just right" relative to their clients' stakes, while about a quarter of the attorneys indicated that the costs of discovery were too much relative to the stakes.[5] This finding raises the question of how attorneys keep discovery costs proportional to the stakes. This issue will be discussed further below under the heading "How much discovery is enough?"

In the interviews, attorneys explained how the stakes in the litigation influenced their activity. A fair summary of the attorney comments is that the stakes in the litigation serve as a guide for attorneys and clients to make decisions about how much discovery to conduct and how much time to invest in the litigation.

In the words of an attorney who represents both plaintiffs and defendants, "one always tailors the amount of discovery to the stakes. The difference between a $50,000 case and a $500,000 case is always on one's mind." Many others expressed similar sentiments:

- "Companies are willing to invest more in cases where the stakes are . . . high."
- "Even the client expects an attorney to invest more time in high stakes cases."
- "One has to take into account the possibility of being enjoined from selling a product, which increases the stakes."
- "If there's a lot of money involved, parties dig in their heels and litigate every little thing."

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3. *Id.* at 5, 7.
4. *Id.* at 6, 8.
5. Lee & Willging, *Preliminary Report*, *supra* note 1, at 27–28.

- "Stakes make a difference in that clients are willing to pay and more likely to dig deeper into discovery."

Other attorneys echoed the theme that the stakes affect the level of discovery. In the words of one plaintiff attorney: "Stakes particularly affect how much discovery one does." And a defense attorney put it this way: "Our guide on costs is the amount at stake. I cannot justify to a client spending more than a fraction of the amount at stake in the litigation."

In turn, the guidance found in the responses above regarding stakes may be what courts implicitly apply in deciding whether to limit discovery. One defendant attorney told us: "Stakes definitely matter. Stakes provide the court with a reference point in deciding whether to limit discovery. If we claim that spending $1 million on discovery is a burden and the stakes are $100 million, the court will allow the discovery."

Not only do stakes guide attorneys in deciding how much discovery to undertake, they also provide a benchmark in deciding how much time the attorney should spend on the litigation: "Stakes are the measure of time we spend on a fraud case. We put in a lot of time because the stakes are high and we represent the plaintiff."

In some cases, though, fee-shifting alters the calculus by converting the plaintiff attorney into the equivalent of an attorney billing by the hour. An employment lawyer provided an example of that effect, saying: "We will expend enormous resources in a good case. We want to pursue cases vigorously and we have to show defendants we will go to the nth degree. We will chase discovery to the limits and defendants will attempt to thwart us."

Two plaintiff employment lawyers said the stakes in their cases do not vary by much. One said: "We have to take the same measures regardless of the amount at stake. There is one exception: for cases in which a tangential witness is out-of-state, we might not pursue that witness in a case with less at stake."

But several attorneys told us stakes are not the primary factor affecting costs. In the words of one: "Stakes are not the main driving force; the competence of the opposing lawyer is primary." Another added a twist to the competence factor: "Paradoxically, stakes involving higher dollar amounts are sometimes handled by more experienced lawyers who try to keep the costs down and resolve a matter."

Another form of nonmonetary stakes may arise in the form of the reputation of the client or the precedent that a case might set. One plaintiff attorney said:

> Another costly type of case is when a manager feels personally attacked. The allegations may be career-ending for some managers and they will take every step to prolong the case and sometimes they will try to cover

> up unfavorable facts and keep them from counsel. I understand why they fight.

Another plaintiff attorney talked about another set of cases in which the defendant's stakes may have included nonmonetary components: "Stakes to my client are about the same in employment cases, roughly $25,000 to $100,000, but it seems like defendants fight harder against disability claims and it may be because their stakes are higher in those cases."

Stakes may also take a back seat to the complexity of the litigation. One defendant attorney said: "A client will look under every rock if the potential loss is $20 million. But [assuming defendant is liable] if it's a death case for $20 million [as opposed to a case with complicated, catastrophic injuries for the same amount], there may be fewer rocks to turn over."

Factual Complexity

In the multivariate analysis, factual complexity, as reported by the responding attorneys on a seven-point scale, was associated with higher costs. For plaintiffs, each one-point increase on the seven-point scale was associated with an 11% increase in costs, and for defendants, a 13% increase, all else equal.[6]

A number of attorneys mentioned that factual complexity added to the costs of litigation and offered some insights into how complexity might relate to increases in discovery and in costs. The most direct indicator of complexity is the number of parties in the litigation, and one can readily see how that might affect the costs of discovery, motions practice, and, indeed, all aspects of civil litigation. Other attorneys pointed to the number of transactions underlying the claims in the litigation as a marker for increased costs. One attorney expressed the relationship this way:

> Cases with multiple transactions can affect costs greatly. In the mortgage fraud area, a single case by a lender against a title company will have relatively modest costs. But in a similar case in which the alleged fraud took place in forty transactions—the costs will be much higher because of the additional discovery needed.

In other cases, procedural complexity may influence the process, as in the patent area described in the next section. Adding evidentiary hearings on motions for preliminary injunction and *Markman* hearings to the ordinary litigation process inevitably adds complexity and cost. Disputes about science methods call for additional expert witness costs and *Daubert* hearings.

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6. Lee & Willging, *Multivariate Analysis*, *supra* note 2, at 6–7.

Types of Cases and Issues

In the multivariate analysis, for defendants, intellectual property cases had costs almost 58% higher than the baseline, all else equal.[7] Some interviewees elaborated on the high cost of intellectual property litigation, while others reported varying experiences in employment discrimination litigation, some finding it costly and others not.

One attorney cited figures from the American Intellectual Property Association that for a case with a $25 million recovery, the cost averages over $4 million. The attorney explained that "companies are willing to invest more in cases where the stakes are that high, especially in B2B [business v. business] cases where what is at stake is a virtual monopoly—the right to exclude others from selling a product." In pharmaceutical patent cases, that attorney continued, companies reportedly "are willing to put down up to $20 million for the right to sell a drug for $1 billion."

In patent cases, attorneys noted that the cases are costly to litigate because they are very document-intensive and involve complex questions of science and technology. In addition, patent cases have a level of procedural complexity not found in ordinary civil litigation. As one attorney observed, as noted above, "in patent cases there is often a motion for a preliminary injunction as well as a *Markman* hearing on claims construction." This is not to mention the possibility of a jury trial.

A number of interviewees specialized in employment litigation, particularly employment discrimination. Discussions about employment discrimination cases illustrated that interviewees' perceptions of which cases are costly may differ. Some plaintiff attorneys specializing in employment discrimination cases indicated that they are not very expensive to litigate and pointed to routine document discovery and depositions as the major components of costs.

Other plaintiff attorneys specializing in employment discrimination cases reported different experiences. In the words of one:

> All of our cases are costly to litigate because we are suing . . . large corporations or public entities and these defendants have basically unlimited resources. . . . Corporations use outside counsel who bill by the hour and have little incentive to do things efficiently. We have to fight to obtain discovery.

Several plaintiff attorneys pointed to factors that can add costs to employment discrimination claims. One attorney reported that he spent more time on employment cases that involved the Federal Arbitration Act than on other employ-

7. *Id.* at 8.

ment cases. In those cases, the attorney sometimes has to challenge the client's alleged waiver of the right to sue in addition to litigating the discrimination claims. In arbitration, "the discovery fights are much worse than in ordinary litigation because defendants think they can get away with not turning things over." In that attorney's experience, "arbitrators never grant summary judgment because they have an economic interest in proceeding to a hearing."

Another attorney said: "Years ago, when we had disparate impact cases, costs were higher because of the need for statistical analysis and expert witnesses." Several others noted that cases that stretch out over time and involve multiple incidents or analysis of multiple records, such as those of similarly situated employees, may be more costly. Another element of costs in employment litigation—the routine filing of motions for summary judgment—is discussed below under the subhead "Summary judgment."

At the low end of the cost spectrum, a specialist in employment cases remarked that she had potential clients who could not afford to pay the fee for filing a case in federal court. She could not represent such clients because they would not be able to pay for other discovery expenses and this sole practitioner did not have the resources to front such expenses. A number of other specialists reported the difficulty plaintiffs have in paying for deposition transcripts. Several employment lawyers indicated their clients generally agreed to pay these and other litigation expenses.

An attorney defending Fair Labor Standards Act and Americans with Disabilities Act claims pointed to high costs in such cases resulting from excessive plaintiff attorney demands for electronically stored information. This attorney asserted that plaintiff attorneys "ask for things like all of the 'swipe' records showing entry to a defendant's building." This factor will also be discussed below under the subhead "Electronically stored information."

Economics of Law Practice

Our multivariate analysis found that firm size affects costs for both plaintiffs and defendants. For example, a plaintiff attorney in a firm of more than 500 attorneys had costs more than double (109% larger) those of a sole practitioner, all else equal. And a defendant represented by an attorney in a firm of more than 500 attorneys had costs more than double (156% larger) those of a sole practitioner, all else equal.[8]

We also found that hourly billing was associated with higher costs for plaintiffs, and that compared to other billing methods (primarily contingency fee),

8. *Id.* at 6, 8.

plaintiff attorneys charging by the hour reported costs almost 25% higher.[9] Because almost all defendant attorneys reported billing by the hour, there was little basis for comparison with other defendant attorney billing methods.

In sum, some interviewees reported, in line with the multivariate analyses, that the costs are affected by the size of the law firm and by hourly billing. The case-based survey, however, did not inquire into the resources of the party or, aside from a question on contentiousness, into the character and specialized experience of the attorneys involved in the closed cases. Our interviews suggest that part of the variation in cost might be explained by the resources or size of the party and the character and specialized experience of the attorneys. The observations of the attorneys in these interviews might be useful in shaping questions for future research.

Below we discuss the size of the law firm, the size and resources of the client, and the character of the individual attorney in that order.

Size of law firm. A defendant attorney who left a large firm to create a small firm said "the tendency to run up costs is part of the internal dynamic of large law-firm practice on two levels: generating revenue and avoiding the increasingly real concern about malpractice litigation. . . . The main drivers are the size of the company and the size of the law firm representing the company." Another defendant attorney said "some firms—often huge firms with huge overhead—increase the amount of work needed to resolve a case and settle later, after fees have been billed to the client."

Yet another defendant attorney expressed this sentiment:

> Yes, the size of the law firm matters. Large firms are the worst. There's an element of the lawyers not having enough work to do and they do more than necessary. They staff up a case beyond its needs, for example, sending two or more lawyers to attend a deposition or any other proceeding.

A plaintiff attorney expressed a similar sentiment more colorfully and tersely: "We have a saying in the plaintiffs' bar that 'You have to feed the tiger first'" before defendant attorneys will settle a case. Another simply said: "That's how they get paid. They do not want to talk settlement until they get their hours in. That's the system."

Yet another plaintiff attorney described his experience and offered a counter-example that highlights the lost opportunities for early settlement:

> There is an economic bind for defense counsel. They need to generate income from their caseload and so discovery is obligatory and summary judgment motions are filed in every case. In an unusual case, though, I

9. *Id.* at 6.

> had a defendant attorney with a client who wanted to manage costs in a case. This attorney arranged to bring his client [from another city] to my office to go over claims of Fair Labor Standards Act violations and we found a way to settle the case early without discovery. He made my client whole and avoided the possibility of having a collective action certified that would have drawn in other employees and cost more money. In 95% of my cases—the percent that settle after discovery—most could settle before discovery. But, I don't suggest this because it would be taken as a sign of weakness. I do, though, look for overtures to move in that direction.

An attorney who represents both plaintiffs and defendants boiled down his similar experiences: "Lawyers in firms produce in the form of billable hours rather than focusing on client needs."

Specific effects of these practices span the full spectrum of litigation short of trial. None of the interviewees suggested that the alleged churning of cases included taking cases to trial simply to rack up billable hours. Nonetheless, attorneys complained that "large firms will drive up the costs of discovery and will have no hesitation to shell out big bucks for expert witnesses and we have to match those experts." Another complained about a large firm objecting to "all 25 of my interrogatories, using the same language to object to each." Another asserted that in a recent case involving a big law firm, "we faced four motions to dismiss, but once we got through discovery the case settled because we discovered what we needed and the firm knew that we had enough to prove our case." And, as we will discuss further below under "Summary judgment," filing a motion for summary judgment in some types of cases, especially employment discrimination, has become a standard practice.

An experienced defendant attorney who represents insurers described his observations about the economics of law practice:

> In contingency cases, lawyers learn quickly that they are spending their own money when they do discovery and they learn not to uncover every stone. Hourly lawyers may have to uncover those stones. When there are hourly lawyers at both ends of the litigation, that litigation is likely to be the most expensive.

Another defendant attorney reported experience in defending cases in which the lawyers were

> completely delusional about their case. Often this occurs when defense attorneys are representing a plaintiff. They are being paid by the hour and are incentivized to spend time on a case. They then approach the case with a ridiculous lack of reason about how much to spend. It always happens that such cases are brought by defense attorneys.

These last two comments suggest that having hourly attorneys on both sides of the litigation is a particularly costly venture.

Size or resources of client. Implicit in the last two comments above is a suggestion that a plaintiff who can afford to pay an attorney on an hourly basis is likely to have resources to finance costly litigation. A substantial number of attorneys interviewed rejected the possibility that the size of the law firm might influence costs and countered that the size and resources of the party or the character of the attorney is more important.

An attorney who represents both plaintiffs and defendants said: "It's not the size of the firm; it's the size of the client. Large firms wear down smaller firms and force settlement of cases in which the smaller firm and their lawyer continue to think they are in the right but cannot afford to contest."

Similarly, a plaintiff attorney said that lawyers from large firms make cases more costly, "but not necessarily because of the size of the law firm, but rather because of the resources of the defendant." Another said: "Lawyers, not always in large firms, often get instructions from the client to conduct scorched-earth litigation." Yet another said "It's not necessarily the size of the law firm but the size of the client."

A plaintiff attorney specializing in product liability and personal injury litigation found that the client drives a process in which the interests of the client and the law firm are aligned:

> The opposing party seems to call the shots and seems to have a strategy of making the plaintiff spend a lot of money. Both insurers and the product manufacturers take that approach. The client drives the process, not the law firm. Law firms have no incentive to broach settlement or to cooperate in discovery. Defendant attorneys litigate contentiously to keep their billing hours up.

Apropos of client size, two plaintiff attorneys pointed to policies and practices of state and municipal governments. One said "the state government . . . will spend whatever it wants on a case" and another pointed to a city's express policy of refusing to settle specific types of civil rights actions.

In a variation on the effect of hourly billing, one defendant attorney pointed to the effect of fee-shifting statutes on costs:

> It's not the size of the firm, but the fee-shifting statutes that encourage some plaintiff attorneys to spend more time on discovery. The tactic is to push for excessive discovery and build up the fees they have to be paid under the fee-shifting statute. Some lawyers on the other hand rely heavily on the administrative record in the case and ask for relatively little discovery.

A plaintiff attorney expressed another perspective:

> Fee-shifting should serve as a damper on costs, but some opponents act irrationally. I screen cases for clear evidence of liability and I let people know that I'm bringing a claim but I am often surprised by the irrational behavior of defense counsel. For example, in a recent case . . . I proposed a settlement at an early stage. We spent nine months doing discovery and defendant even brought in an expert. The settlement then had to be much higher because my fees were included.

That experience, of course, may be the flip side of the large law firm's interest in being paid for a sufficient number of hours before settling a case, as discussed in the section "Size of law firm."

One attorney articulated the purpose of fee-shifting statutes as follows:

> Damages are not expected to be huge in civil rights cases and that was a good part of the reason that Congress found it important to enact fee-shifting—so that plaintiffs could bring such cases even though the damage awards would not by themselves support fees necessary to litigate the cases. . . . Much of our time is spent in prefiling investigation so that we can screen the cases and determine that we can meet our burden of proof. At the early stages at least our fees will generally exceed those of defense counsel.

Characteristics of attorney. In our interviews, attorneys reported instances and local patterns of contentiousness among the attorneys. One plaintiff attorney observed:

> It's not the size of the law firm but its character. Some attorneys and law firms simply adopt a more contentious posture; others are more client-centered and keep the costs down. These differences can result in a two-fold or threefold increase in the costs of an employment discrimination case.

Another attorney indicated the costs are more affected by the "personality of the attorney than the size of the firm." Similarly, another attorney said:

> Not necessarily large firms but aggressive lawyers, "scorched-earth lawyers," make it costly and unpleasant to litigate a case. Some are more subtle than others. Lawyers and clients know who they are. There are four firms in [this city] who practice that way and the client who wants such a defense hires one of those firms.

Another attorney reported almost the same observations: "My experience is that it's the individual hyper-aggressive lawyer who is the primary driving force behind costs. We know who they are. Their clients may also know their character and select them because they know."

Other attorneys focused more on the lack of experience and lack of skills of opposing attorneys as a primary force driving costs. One attorney said:

> The size of the firm does not seem to have an impact. I would much rather deal with an employment law specialist from a large firm than with a generalist lawyer from a small law firm. The generalist may do things we don't expect, might not understand Rule 26 or Rule 56 procedures, and might also have difficulty evaluating the case.

Another put it even more succinctly: "The better and more experienced opposing counsel is, the less the litigation costs. It's easier to cut to the chase. Some lawyers litigate everything."

A defendant attorney had this to say: "There are some dedicated lawyers who handle employment cases and they live and breathe the cases and do a fine job and we handle those cases efficiently. Then there are a group of outliers and some dabblers. Some scorch the earth."

Volume of Discovery

In the multivariate analysis, discovery had different effects on costs for plaintiffs and defendants. Higher levels of discovery, as measured by the number of types of discovery used in the closed case, were not associated with higher costs for plaintiffs, once other factors were controlled for. But for defendants, each additional reported type of discovery was associated with approximately 5% higher costs, all else equal.[10] For plaintiffs, each expert deposition was associated with approximately 11% higher costs while for defendants the number of expert depositions was not associated with higher costs, once other factors were controlled for.[11] For both plaintiffs and defendants, each non-expert deposition was associated with approximately 5% higher costs, all else equal.[12]

With few exceptions, attorneys in our interviews said that in their practice the volume of discovery is a primary factor driving the cost of litigation, and many said it was the most important factor:

- "Discovery is the number one cost-driver and there isn't a close second."
- "Discovery is the single most important factor and e-discovery is the most important element of discovery."
- "It's all about discovery."
- "Discovery is the major factor."

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10. *Id.* at 5, 7.
11. *Id.* at 5–7.
12. *Id.* at 6, 7.

- "Discovery and associated paperwork related to motions to compel are major factors."
- "The volume of discovery is the main factor affecting costs in our cases."

More specifically, many plaintiff attorneys reported that depositions are the leading component of discovery costs. One said:

> Depositions are the most costly form of discovery because they involve preparation, reviewing the transcript, and paying the court reporter. I generally start with interrogatories and requests for documents. Responding to deposition requests is also costly in terms of time to prepare and review depositions of my clients.

Another plaintiff attorney remarked that "court reporter fees are huge—$1,500 to $2,000 for a one-day deposition." Another simply said: "Deposition transcripts are a killer."

Other plaintiff attorneys pointed to the need to obtain documents as a source of unnecessary costs. In the words of one:

> It is difficult to prevent document dumping, either with paper or electronic documents. In most cases, we have to go through a standard set of steps before we get discovery. Defendant will deny that certain documents exist. Because courts have neither the time nor the inclination to get involved in discovery disputes, I have to prove the existence of the documents, perhaps by deposing defendant's IT department, and then move to compel. Then we have to deal with privileges and then with objections that compliance will be unduly burdensome. Plus there are no true sanctions for failure to produce.

Yet another plaintiff attorney pointed to an example of discovery costs:

> Stonewalling makes discovery a factor. In addition, defendants often used scorched-earth tactics. For example, in a recent case in which my client alleged emotional distress, the defendant sought all medical and prescription records going back forever. This costs us because we have to pay per-page copy costs to the medical records servicing company. In addition, we generally have about ten depositions in each case—everyone from management, human resources, and comparable co-workers.

Defendant attorneys pointed to production of documents and discovery of electronically stored information (ESI) as major components of their discovery costs. ESI will also be discussed in the next section. One defendant attorney simply said: "Cases with a large number of documents are particularly costly." Another described the costs in these terms:

> Searching and retrieval of such records is a huge burden. Email is also a problem, especially where there are multiple employees and multiple

> electronic storage devices. In one case we had to take the mirror image of 40 hard drives before even beginning to search for relevant information. Most businesses are not set up for that. Plaintiffs also seek iPhones and cell phones, including phones used for personal matters. It's a nightmare.

Another said: "The volume of discovery is the main factor affecting costs in our cases. We have clients with lots of employees and millions of documents spread around the world and we have to collect, review, and produce all relevant documents."

Another attorney ventured an explanation for the excessive use of discovery and motions practice:

> Part of the reason is that young lawyers look at scheduling orders and decide that they have to do all of the things listed on the order. So, if depositions are mentioned, they have to do them. We used to do one or two depositions and go into a two- or three-day jury trial. Now, the scheduling order suggests that complete discovery, including expert discovery, and summary judgment have to take place in every case. This has increased the costs four and fivefold.

Electronic Discovery

Multivariate analyses found that plaintiffs who requested ESI had 37% higher costs and plaintiffs who requested *and* produced ESI had 48% higher costs. Plaintiffs who only produced ESI had no statistically significant increase in costs.[13] Defendants exhibited a different pattern. Defendants who requested *and* produced ESI had a 17% increase in costs, but where the defendants only requested or only produced ESI, there was no statistically significant change to costs.[14] For both plaintiffs and defendants, however, each dispute about ESI was associated with a 10–11% increase in costs.[15]

Experience. Before delving into the problems with and benefits of using ESI, as reported by the attorneys, it is important to note that the majority of interviewees reported having little experience with electronic discovery. One plaintiff attorney articulated a response that appears to describe the experience of many:

> Mostly we avoid dealing with electronic documents. In large volume cases, it is imperative that we identify electronic documents but we almost never exchange documents in electronic form. At Rule 26(f) conferences, I have never met an attorney who wants to get into the electronic issues. Neither of us brings it up.

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13. *Id.* at 5.
14. *Id.* at 7.
15. *Id.* at 5, 7.

A defendant attorney presented the other side of the above experience:

> There hasn't been much difference in e-discovery since the 2006 rules. I thought it would be a nightmare and have been telling clients about the changes, but plaintiffs have not been pushing to get archived documents and such. I expected plaintiffs to hammer away. We have clients who have multiple offices and computer systems, but very few problems have arisen.

Other attorneys reported that they were beginning to have experience with requesting and receiving electronic documents, but many of those experiences seem to be at the basic level of exchanging documents in electronic formats—or sometimes in both electronic and paper formats—without confronting more complex issues involved in searching multiple electronic media or in providing ESI in native format. For example, one plaintiff attorney said: "I am just starting to have some experience with electronic discovery. I have always exchanged printed copies of e-mails and I have received copies of computer logs, but always in hard copy." But a substantial number of interviewees indicated that they still exchanged discovery documents exclusively in paper form.

Attorneys also talked about providing or receiving documents on a compact disk rather than as hard copy and, in general, seemed to be aware of the benefits in searching and managing electronic documents. For example, one attorney said:

> I don't usually get electronic materials. But recently I have been getting some documents as email attachments, followed by a hard copy. The government provides disks. Between hard copy and pdf attachments, I prefer the latter. I go through them quickly and store them electronically. Then I go through the paper copy at my leisure, maybe on a Saturday, and then I scan the electronic version and search for key words and use that search as the basis for a second request for documents.

Another attorney reported a substantial benefit to email, regardless of the form of production:

> We always get documents in paper format. It's not a big deal to review them and usually I can go through it all. Emails, though, are more likely to contain revelations. Loose lips happen more on email than in more formal communications.

Yet another reported a benefit in organizing files: "Electronic documents make my practice easier. The custom is not to exchange all documents electronically. I also scan all documents from my client, assign Bates numbers, and include everything in the same file."

Other attorneys found that turning over documents electronically saves the costs of printing and delivering hard copies and that receiving electronic documents allowed them to be selective in printing documents.

In sum, most attorneys reported that their experiences in using electronic documents have been quite limited. But a substantial number of attorneys appeared to suggest that their familiarity and comfort level with electronic documents is growing.

Problems in using ESI. As attorney comments in the section on "Volume of discovery" indicated, electronic discovery can involve identification and review for privilege of perhaps millions of electronic documents stored on the computers of multiple employees in multiple locations around the world. We asked those attorneys with some experience with electronic discovery to describe how the cost of reviewing and producing ESI differs from the cost of reviewing and producing paper documents. Responses varied considerably, typically according to whether the attorney primarily represented plaintiffs or defendants. As might be expected, defendants expressed far more problems with reviewing and producing ESI. Plaintiffs, though, reported benefits in the form of making the review process easier.

In sum, the interviews suggest that electronic discovery poses serious problems for a number of defendants with huge volumes of ESI stored in multiple locations and on multiple computers of a number of employees.

One defendant attorney simply and clearly summarized the difference in reviewing ESI:

> The main difference is that the volume of material to collect and review is so much larger with e-discovery. There are so many forms of electronic documents—instant messaging, emails, voicemail, etc.—that the volume has expanded immensely. Now, when we gather paper documents, we scan them into an electronic form for reviewing, numbering, redaction, and the like.

Another defendant attorney expressed similar observations:

> It's the increased volume of information that is capable of being stored in a permanent form that is the major difference from prior practice. There are no limits. Prior forms of documents are retained, plus there are e-mails, PDAs, blackberries, voicemail and much more. So the same question might demand looking at a vastly increased number of sources.

Another added the cost of hiring outside consultants to the equation:

> E-discovery is substantially more expensive than production of paper documents, largely because the production is not under the control of the lawyers. A company has to hire consultants and they are expensive. In the end, the lawyers still have at least the same number of documents to review.

Yet another defendant attorney presented a variation on the review costs and on the need for outside expertise:

> E-discovery becomes more expensive even for the same volume of material because at some point I need paper to study. I always review documents in paper form. Another cost is document management. We typically use an outside service to collect, organize, cut disks, and otherwise manage e-discovery.

One defendant attorney, though, said:

> In fact, it's easier to review electronic documents. And it's easier to share and store the documents. I no longer produce paper documents if the other side agrees. Most of our documents are on CDs. Paralegals in other offices can have access to the same documents.

An attorney representing the government both as plaintiff and defendant spoke in terms of being the producing party and described the advantages and disadvantages of electronic review:

> The volume of documents that the producing party has to review before producing is much higher, in some cases impossible to review on a paper basis. We organize the data by creating a searchable database of all documents and then using concept searches, based on key words such as a person's name, and including words developed during the investigation. Then we have attorneys or case agents or both review the documents turned up by the search. Mostly we do this work in-house and are learning to do more and more of it. We hire outside experts when we need to retrieve forensic evidence from back-up sources.

Plaintiff attorneys on the receiving end of electronic documents typically found that electronic document review is easier than review of paper documents. One said:

> My cases involve a lot of electronic data and files. I find that the electronic documents and files are much easier to use than paper documents, which are much more cumbersome. With electronic documents, I can have a paralegal search through them, identify what is important, and make copies of the documents we need.

Another found review of ESI to be less costly: "If I get documents in a form in which I can use a key word search, the cost to me in reviewing the documents is less." Another plaintiff attorney said simply that there was "no difference" in the cost of reviewing documents in electronic or paper formats.

In addition to direct costs of document review, plaintiff attorneys occasionally pointed to the need for expert assistance in analyzing the documents. One said: "On e-mails we might do some forensic work." Another pointed to the need for

"expert assistance in learning how to read data without having the software used to create it."

One plaintiff attorney found the benefits and costs of e-discovery to be intertwined:

> E-discovery in one way is less expensive because you can put everything on a disk and it costs far less to review and store the contents. . . . It may be that the ability to track deletions in documents is a defendant's worst nightmare. The actual increase in costs consist mainly of two things: (1) the barriers that defendants put up to prevent discovery of ESI, forcing the plaintiffs to narrow requests and arguing that full discovery is too costly; and (2) the increased volume of material to review. But it is far easier to review 20,000 documents electronically than it is to review the same number of documents in a dusty warehouse or in boxes.

As the latter comment suggests, the cost of electronic discovery encompasses the cost of disputes over the scope and magnitude of the discovery. Another plaintiff attorney said: "E-discovery can be more costly for us because there is often more resistance."

An attorney representing the government in large document cases offered a broader perspective on the problems of the volume of ESI and offered an example of a practical, cooperative solution used by a colleague:

> Our problems are not much different from those of corporations. The standards may be somewhat higher for a corporation, which has to put a pair of eyes on every page. But this has to change. To review all of the documents on a standard 60-gig hard drive would take one person full-time for a year. Even four hard drives in a small employment case would exhaust resources. We need to find ways to limit the amount of material produced. In one recent case, a colleague negotiated with the plaintiff to produce a reasonable but limited volume of electronic documents. The term "any and all documents relating to X" no longer has meaning because no one can review or use any and all documents.

The colleague's experience suggests that some attorneys have developed informal means of limiting the production of ESI.

Use of vendors. A few attorneys responded to a question regarding the use of vendors. One said: "We use vendors. They will go long and hard unless one puts controls on what they do." Another reported using in-house services primarily and using vendors only for special needs:

> We use vendors, which are very high-priced, to collect documents from out-of-state and especially overseas employees and sources. There is always the risk of a problem with metadata. We also have problems with restoring lost data: say, for example, a hard drive is dropped and becomes

> unreadable. We may spend a lot of money trying to restore the data, but often it's a waste of money because nothing can be retrieved. We also sometimes have large collections by vendors of data that are not used because the claims wash out or the case settles.

Along similar lines, another said: "Generally, we have been able to use the corporate IT people. Once or twice we had to bring in outside people, and they are expensive, not in terms of hourly rate, but in terms of the overall time spent."

Judges and rules. Two attorneys reported problems with judges and rules that failed to take into account differences in practice that might arise from electronic discovery. One defendant attorney reported two experiences with standing judicial practices that were problematic:

> In one case there were over a million documents and we agreed that the Case Management Order (CMO) require that all documents be produced electronically, preferably in TIFF files, but otherwise in PDF. In related litigation . . . there was a case in [another federal court] in which both sides tried to agree to the electronic exchange of all pretrial disclosures. The judge would not sign our stipulation. We decided to ignore the disclosure rules until there was a CMO in place that would require electronic exchange.
>
> We had a similar problem with a judge regarding numbering of exhibits. We numbered the exhibits sequentially as we produced them. The judge wanted to use the system of using numbers for the plaintiff and letters for the defendant. We finally got him to agree to have numbers on both sides, P-1 and D-1 for example, but we had to change all the numbers to conform to his system.

Another attorney reported a snag in using e-mail to facilitate discovery. He reported "a serious dispute about whether e-mail service of interrogatories was adequate service under the rules." To avoid such disputes, he said "I generally work around that rule, sometimes end up using snail mail."

Another attorney described a more fundamental problem for attorneys and judges this way: "Even going to court to explain the burden is burdensome. Nobody has a clue about the technical issues, not even the judge."

How Much Discovery Is Enough?

As discussed above under "Stakes in the litigation," the case-based survey found that more than half of the attorneys indicated that the costs of discovery were "just right" relative to their clients' stakes; 16–18% found the costs to be "too little"; and about a quarter of the attorneys indicated that the costs of discovery were too

high relative to the stakes.[16] This finding raises the question of how approximately three-fourths of the attorneys reached outcomes where discovery costs appeared to be proportional to the stakes. We asked interviewees how they know when they have enough discovery.

In sum, it appears that some attorneys have developed plans and practices to control discovery costs in the wide range of litigation that takes place in federal courts. Interviewee reports seem generally consistent with the findings in our multivariate analysis that the stakes in the litigation represent an important factor in determining costs. The reports also appear to be consistent with the finding in the case-based survey that about three out of four attorneys found the costs in the closed case to be either "just right" or "too little."

Recall that in the stakes discussion we reported the general conclusion that the monetary and nonmonetary stakes in the litigation served as a guide for the interviewees in making decisions about how much discovery to conduct. In this section we explore attorney responses that show how that guide works in everyday practice.

Not surprisingly, a handful of interviewees, primarily plaintiff attorneys, responded with a variation of: "I never know that I have gotten enough information from discovery and usually think I have not gotten enough" or "A test is whether I anticipate waking up in a cold sweat just before trial thinking about someone I should have deposed." To cope with such occupational anxieties, these attorneys referred to professional formulas for guiding their discovery plans. The mechanisms they employ include:

- going as far as the law, or at least the scheduling order, allows;
- pressing as far as necessary to obtain all important known documents;
- following the elements of each claim or defense and checking to be sure they have strong, persuasive evidence for each element;
- employing well-established protocols or rules of thumb within their specialty area; and
- scaling discovery to the stakes of the litigation, in consultation with the client or in anticipation of the client's wishes and resources.

Scheduling orders provide an outer boundary for discovery efforts. As one attorney expressed it: "I go as far as the law will allow. There are time constraints, usually about six months, and I generally do not have enough time to do all the discovery I want. I can get extensions, but often the additional discovery would

16. Lee & Willging, *Preliminary Report*, *supra* note 1, at 27–28.

not be cost-effective." Another said: "I prefer to practice in federal court because there is a pretrial order with a schedule or limits."

Within those parameters, plaintiff attorneys expressed different approaches. One said that "generally all I can get is what the defendant is willing to turn over voluntarily. It would not be cost effective to file and litigate motions to compel, which courts discourage." But another said: "Sometimes I know the documents exist because of my years of practice on the defense side, and in those cases I pursue it to the end." And another said: "We generally have to file a motion to compel before we get the good stuff. We will mine a privilege log. In a recent case, in camera review of privilege claims ended up with us receiving three-fourths of the documents we requested."

Most attorneys implemented the guidance they may have learned in law school: they looked at the elements of their claims and defenses and measured the completeness of their discovery by whether they had solid evidence to support each element of each claim or defense. One summarized the thought process succinctly: "You have to measure the sufficiency of discovery by matching up the elements of the cause of action. When you have strong evidence on each element, you feel comfortable." Another elaborated on the process:

> The only way to know is to sit down and figure out what you need to prove at trial. Lawyers who delay making that analysis ask for too much discovery. Sometimes they are worried about malpractice claims. . . . Lawyers are generally afraid to narrow the issues. They should know within the first months of a case what exactly will be in dispute. I advise lawyers to outline their jury instructions at the outset of a case. If they know what they want in the jury instructions, they will know what their claims are and what they have to prove at trial.

Other interviewees pointed to well-established processes they developed over years of practicing within a specialty area. One plaintiff specializing in a type of civil rights litigation said:

> We have well-developed protocols about what we need to discover and what we have to prove. There are a fairly routinized set of procedures, with some variations. We know what we're entitled to get. If we do not get it, we have no hesitation in filing a motion to compel. Our cases are covered by fee-shifting statutes, and we will usually be reimbursed for those hours.

Another plaintiff attorney said:

> One has to go through the same steps for all cases. The three steps are (1) interrogatories and production of documents; (2) depositions of key witnesses; and (3) supplemental requests and additional discovery to fill

> in the gaps. For the most part we keep our eye on the third element and may decide to forego such costs in less complex cases with lower stakes.

Others talked of using rules of thumb like "I always do depositions of all the trial witnesses and any expert for whom I do not have a decent report," and "By experience I tend to know whether a potential witness will in fact be used and I take the deposition."

Another plaintiff attorney reported a sophisticated technique, using forensic techniques to test electronic documents:

> I focus discovery on a few documents. Sometimes I find that documents have been fabricated—a document that looks too perfect for a note to the file or a document that is internally inconsistent or that contradicts other evidence. When that happens I bring in an expert and seek a forensic analysis. The [federal district court] is conservative in granting such an analysis, so I have to be selective. But I have gotten such analyses in one out of four or five of my employment discrimination cases and I have never been wrong. I pay an expert about $500 and we examine the defendant's main computer and extract the metadata for the document. That always settles the case.

Finally, a number of lawyers expressed again their concern for keeping discovery commensurate with the stakes in the litigation. One defendant attorney had this to say:

> I constantly assess how much information we have and how much we need. I tell my clients we don't need perfect information, just enough to defend successfully. I need the basic facts about the incident and about the damages. I always need to have a deposition of the plaintiff because it's important to see the person face-to-face. After that, I don't need much. I need to be sure I have a handle on medical costs and damages. Some firms will bill more for discovery in cases, but our clients review our billing to be sure it's in line with the stakes—unless it's a matter of principle.

Another attorney who represents plaintiffs and defendants said: "Counsel and the client decide whether to turn over every rock. I do not go that far. I advise the client when the cost of obtaining marginal information will exceed its benefit. I work almost always on an hourly basis."

Several plaintiff attorneys expressed similar sentiments. One said: "I try to keep discovery costs down because the client pays." Another said: "In some of these cases, though, the client's budget will tell you when you've done enough. Often our arrangement with a client is that the client pays the expenses. If the client cannot or will not pay for a given deposition, we face a limit."

Pleadings

We asked the attorneys to describe, based on their experience, the impact on their practice of the Supreme Court decisions in *Bell Atlantic v. Twombly*[17] and *Ashcroft v. Iqbal.*[18] We also asked how frequently they encountered notice pleadings, and whether they used notice pleading in their practices.

Impact of Twombly/Iqbal. Most interviewees indicated that they had not seen any impact of the two cases in their practice. While some pointed to individual decisions granting a motion to dismiss for failure to state a claim under Rule 12(b)(6) ("12(b)(6) motion") none of the attorneys identified an increase in the likelihood that such a motion would be granted. Many attorneys also pointed to the increases in the costs of litigation entailed in the increased frequency of litigating 12(b)(6) motions.

In sum, attorneys identified few concrete effects from the two decisions. For the most part, they reported no effect. The few effects identified seem more likely, at least in the short run, to increase than decrease the costs of litigation in the broad spectrum of cases by providing incentives to file unproductive 12(b)(6) motions to dismiss. In addition, most found notice pleading to be rare. Almost all indicated that their practice is to plead enough facts to tell a coherent and persuasive story.

Most plaintiff attorneys indicated that there had been no impact on their practice, explaining that for a variety of reasons to be discussed below, they do not use notice pleading in their practice and have always satisfied the standards laid out in the *Twombly/Iqbal* line of cases. A typical response from an attorney specializing in employment discrimination cases was:

> No effect [from *Twombly/Iqbal*]. I fact plead and [the state where I practice] is a fact pleading state. I have never faced a serious challenge to a complaint in 20 years of practice and only have had 2–3 motions to dismiss for failure to state a claim filed (but always face summary judgment motions).

Another plaintiff attorney, specializing in consumer credit cases, said that the absence of dismissals did not tell the whole story: "They have not yet had an impact on my cases. The decisions, though, . . .will force people to spend more time and money on litigation."

Interestingly, a number of defendant attorneys echoed the sentiment about the costs of litigating 12(b)(6) motions. One said: "I have not seen any impact yet. I generally view Rule 12 motions as a waste of time. Many judges seem to want to

17. 550 U.S. 544 (2007).
18. 129 S.Ct. 1937 (2009).

use them only if a case stinks. Well, most of the high-stakes cases I deal with don't meet that criterion." Another attorney, who represents plaintiffs and defendants, discussed the additional costs in these terms:

> More motions to dismiss are being filed, but there are not more dismissals. These motions add another layer to the litigation. The Third Circuit recently rebuked a judge for dismissing a case with prejudice. The practice adds delay to the litigation, generally about 3 months and more than a year if a dismissal is appealed. And cases that take more time cost more.

Yet another attorney who represents both plaintiffs and defendants reported no impact on his practice and said "I thought about using the cases to support a motion to dismiss in an employment matter I was defending but I could not justify charging my client for my time to do so." Another seemed more ambivalent, weighing potential costs and benefits:

> No impact [from *Twombly/Iqbal*] as of yet. It seems more likely that a motion to dismiss will be filed, but this doesn't cost us much. I'm not sure district judges will implement the ruling fully. For example, some may be inclined to allow discovery pending a ruling. I haven't filed other motions. It does involve some time and costs.

A defendant attorney discussed having success in recent class action litigation involving insurance claims: "We filed a 12(b)(6) motion to dismiss, which the court granted. Plaintiff attempted to amend twice without success and the court turned down a third request to amend. The case is now on appeal." That case, of course, also illustrates the cost of even a successful motion.

Another defendant attorney reported some success in securities litigation: "We used *Twombly* in 12(b)(6) motions to dismiss in Section 11 and state-law claims. We've had a few partial dismissals that have cited the two cases and we view them very favorably. In at least one case, all the claims were dismissed under either *Twombly* or Rule 9(b)."

One defendant attorney, though, faced a motion based on the two cases:

> Recently, plaintiffs in one of my cases cited *Twombly* and *Iqbal* in support of a motion to strike affirmative defenses because of the alleged lack of factual premises for those defenses. We spent thousands of dollars researching and briefing the issue. The court denied the motion and found that our pleadings were adequate.

Another attorney, representing both plaintiffs and defendants, predicted an impact on patent litigation:

> The cases have not had much of an effect yet on the type of cases I handle, but they will in the future, in the form of requiring the pleading of particulars. I expect more defense motions to dismiss and they will

> change pleading practices greatly. I see cases in which plaintiffs plead that a defendant's product violates patents 1 through 6. The cases will require more detailed analyses in the pleadings. On the defense side the cases should affect all affirmative defenses, especially the "delay" defense like laches, estoppel, acquiescence, which are always pled in a general form.

How much notice pleading? Ten attorneys reported that they sometimes see notice pleading in their practice. Most indicated that notice pleading is rare; some pointed to specific types of cases in which notice pleading is particularly problematic. One intellectual property attorney contrasted the utility of notice pleading in trademark cases with its disutility in patent cases:

> In trademark cases notice pleading works. Plaintiff has to attach a copy of the registered trademark to the complaint so that the Trademark Office can be notified. But in patent cases a party might allege 30 patents with 10 claims each that are applicable to multiple products—and not attach the patents. With a general allegation that defendant has infringed plaintiff's patent, it becomes impossible to know from the complaint what the issue is and how to answer the complaint. . . . The lack of detail in those pleadings is a problem. I don't want fact pleading like we have here in . . . state courts, and I recognize the need for notice pleading in personal injury cases, but in patent litigation the lack of specific facts imposes delays that add to the cost of litigation. The longer a case is open, the more it costs.

Several defendant attorneys gave examples of notice pleading in their practice. One government attorney said: "We see a lot in *Bivens* cases." Others said:

- "Occasionally I get pure notice pleadings in cases that are pled solely on state law grounds in a field that has been totally preempted for more than a century by a federal statute. In one case, the judge held that the state law claims gave sufficient notice of what the federal claims would be."
- "I do see notice pleadings. For example a vexatious litigant included allegations of slander against about a dozen defendants without any specification about where or when or by whom the statements were made."
- "I am defending three debt collections cases in which the plaintiff has used notice pleading in state court, with few details about how the debts were incurred."
- "Some commercial cases add a lot of general theories, ranging from fraud to conspiracy, to a basic breach of contract claim without supporting facts."

One plaintiff attorney reported his experience in dealing with notice pleading by defendants:

> I routinely get back answers with laughable responses, disputing everything, even the indisputable, and including 15–30 affirmative defenses, all boilerplate legal conclusions without any factual link to the case. This is especially true if punitive damages are alleged in the complaint. Another example is the pleading of laches in response to a federal statutory complaint. Where is the equitable claim? I tried to take this type of pleading on one time, moving to strike the defense of "bona fide error" in a debt collection case. There were absolutely no factual allegations to support the defense. But I was slammed down on that motion and have given up trying to hold defendants to the *Twombly/Iqbal* standard. Most judges shrug it off.

Except for the last comment above, attorneys either stated or implied that in their experience notice pleading is relatively infrequent and limited to the cases described.

Do you file notice pleadings? Most interviewees said they avoided notice pleading. These attorneys offered reasons for what they typically asserted to be a long-standing personal practice of pleading specific facts. In their words:

- "My complaints are detailed, for tactical reasons. I want to have the complaint tell the client's story clearly, and hopefully quickly as well. I want the reader, including the judge or more likely his clerk, to say to himself 'Well, if he can prove this, he wins.'"
- "I have always thought it is a good idea to put as much detail as possible into a complaint so as to make a good first impression on the judge."
- "In trademark and copyright cases, which I specialize in, the pleadings are straightforward and will not be affected because there are a limited number of particular details. I plead the trademark itself and the ad or statement that allegedly infringes. That's the whole story."
- "I use more than bare bones pleading but do not plead evidence. I try to tell the story and present facts to support each element of the statutory claim."
- "We have always included more than is necessary for notice pleadings, and we are generally very specific about the facts."
- "I always draw up a case with more rather than fewer facts. In commercial litigation it's rare that there are not enough facts to plead at the start of a case. There are contracts, accounts, and other documents."
- "I never did notice pleading, always much more. I tried to plead who is involved . . . and enough facts to apply all of the elements of a statute."

- "I have always done very fact-intensive pleading and could always add more facts if needed. I have one client and one story to tell."
- "I always plead enough facts in a complaint. I plead to influence the court, assuming that the judge reads the complaint."
- "I tend to put in too many facts and then regret that I have to attempt to prove them. I have never had a case dismissed for failure to state a claim."
- "I plead facts based on the prescreening I do before filing a case. My work is done up front and I plead with specificity."
- "I have a tendency to do fact pleading. State rules require it. I load up the complaint with facts."

As did the last attorney quoted above, several attorneys noted that their primary state courts require fact pleading and that federal practice tended to follow state practice.

Only two attorneys said that they routinely used notice pleading. One of those two, though, also mentioned the need to tell the story of the case:

> Yes, I use notice pleading. I only plead what I need to plead. As a plaintiff I plead enough to tell the story but avoid pleading facts that might come back to haunt me. On the defense side I do about the same. But I plead affirmative defenses in broad general terms, often without pinning them down to any facts in the case.

The other said: "I used to file complaints that amounted to a 'press release' with complete details included, maybe to get attention and clients. Now I try to make a complaint as spare as possible."

Summary Judgment

We asked attorneys whether summary judgment is used when appropriate. We also asked the attorneys to discuss any relationship they found between summary judgment and settlement. As might be expected, the comments varied considerably by whether the attorneys primarily represented plaintiffs, defendants, or both.

In sum, plaintiff and defendant attorneys disagreed sharply about whether summary judgment is used appropriately, particularly in employment discrimination litigation. Interviewees also reported that summary judgment often serves as a catalyst for settlement but also apparently as a limit on early, pre-summary judgment settlement discussions, at least in employment cases. Because discovery generally precedes summary judgment, in most cases interviewees say they have already invested most of the cost of litigating the case before a motion for summary judgment is filed.

According to plaintiff and defendant attorneys, motions for summary judgment are filed routinely in employment discrimination cases.[19] Plaintiff attorneys complain that the process is overused; defendant attorneys assert that the process is underused in the sense that some judges are reluctant to issue summary judgment even when warranted.

Plaintiff attorneys' comments. One plaintiff attorney who specializes in employment discrimination cases stated an opinion expressed by many employment discrimination attorneys in our interviews:

> Summary judgment is overused. It's used in almost every employment discrimination case. In my 20 years of practice I have faced over 50 summary judgment motions and only 2 of those were granted. Summary judgment often varies by who the judge is. Some judges grant far more summary judgment motions than other judges.

Another plaintiff employment attorney went into more depth:

> Summary judgment is overused. It's a knee-jerk reaction by defense counsel, and filing a motion for summary judgment has become the standard of practice. If a defendant loses a trial without having filed for summary judgment, there might be a malpractice case. . . . Judges grant far too many. Circuit judges talk about plaintiff's duty to present evidence, but Rule 56 does not contain that language. In reality the district judge and the circuit judges are saying "What does plaintiff have?" That's the real question and how the rule is being used, not to identify a genuine issue of material fact.
>
> Another problem is with judges' case-management plans. By closing discovery before summary judgment motions are filed, judges allow defendants to lie without fear that their lie will be uncovered and tested in the open. Defendants manage information so that they reveal some arguments only at the summary judgment stage. Allowing or requiring that summary judgment motions be filed earlier would allow those arguments to be tested. State courts leave discovery open until just before trial and thus prevent defendants from managing information this way. The federal system interferes with the ability to find the truth and is not rational.

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19. *See generally* Joe Cecil & George Cort, Report on Summary Judgment Practice Across Districts with Variations in Local Rules, Memorandum to Judge Michael Baylson at 3, Aug. 13, 2008 (Federal Judicial Center) (stating "the expansive role of summary judgment in [employment discrimination] cases is striking"), available at http://www.fjc.gov/public/pdf.nsf/lookup/sujulrs2.pdf/$file/sujulrs2.pdf.

Similarly, a plaintiff attorney argued that courts sometimes apply the wrong standard in ruling on summary judgment motions:

> There is too much getting into whether the plaintiff has a perfect case. For example, I had a . . . case involving a claim of . . . sexual abuse. I had an expert witness who was not excluded under *Daubert* but I still lost on summary judgment. This should never happen when plaintiff has a legitimate expert. Courts are not just looking for whether there is a material fact in dispute. I don't lose summary judgment that often, though.

Another presented an example of alleged misuse:

> Summary judgment is used in every single case. In my cases, it's not often successful because I screen my cases carefully and only take cases I think will survive summary judgment. It's granted in less than half of my cases but still more often than it should be. In one case, the Fifth Circuit affirmed a grant of summary judgment in which the district judge declined on credibility grounds to give any weight to the declarations of coworkers.

Yet another concluded: "Summary judgment is overused and it results in litigant's loss of faith in the legal system. Because cases often cannot get to a jury, clients feel they have not been treated fairly, that their case has been decided at the whim of a judge."

Defendant attorneys' comments. Defendant attorneys maintain that summary judgment is being used appropriately. Some say it is used too infrequently.

Defendant attorneys confirm the routine use of summary judgment in employment discrimination cases and defend the use of summary judgment in that sphere and promote the utility of summary judgment in other types of cases as well. As to employment cases, one said: "I use summary judgment virtually all the time in employment discrimination cases because typically the complaints are not material to the adverse action. Management officials generally have legitimate reasons for their actions and plaintiffs typically have no evidence of a pretext."

That same attorney uses summary judgment more selectively in tort cases: "less than 50% of the time." Other defendant attorneys find summary judgment apt for other types of litigation. One said:

> Defendants think summary judgment is underused. My commercial cases are most susceptible to summary judgment and I am a frequent user. I appreciate federal court on that issue. A state court judge might deny a motion by noting in the margin that there is a genuine issue of material fact. In federal court, you get a reasoned opinion.

Another said: "Summary judgment is my favorite thing. My cases often lend themselves to it, so I use it in about half of my cases, often in conjunction with requests to admit."

A number of defendant attorneys reported using summary judgment selectively. One attorney who does not handle employment discrimination cases had clear guidelines and, literally, a rule of thumb:

> I don't like to file for summary judgment unless I feel solid about the issue. . . . I have about a 70% success rate. For me to file, the issue has to be simple and easy to digest. I follow a "one inch rule": If the appendix is thicker than an inch there is a genuine issue of material fact. Typically, summary judgment is needed only on a single issue, not the entire case.

Another articulated similar reluctance to file for summary judgment outside of the employment discrimination context:

> We use summary judgment only when it's warranted and we have had success with it. We only file for summary judgment in 10%, maybe 20%, of our cases. We always file for summary judgment in employment cases because those are often legal cases. Filing for summary judgment is the norm in employment cases.

Another said: "I try to wait for a strong case before seeking summary judgment," in part because "judges complain about the volume of summary judgment motions."

Plaintiff attorney use. Some plaintiff attorneys use summary judgment as part of their practice. A plaintiff civil rights attorney said:

> Some plaintiffs seem to be victimized by summary judgment. We do not have that experience. Motions are infrequent, maybe because our statutes raise issues of intent. Sometimes we use summary judgment to our advantage, seeking summary adjudication of liability where we have written evidence of discriminatory action.

Another civil rights attorney found value in successfully opposing summary judgment motions: "I like summary judgment. It's a good rule because it makes you be sure that you have enough evidence to proceed. Overcoming a summary judgment motion gives me confidence that I have something."

A consumer attorney said: "Summary judgment plays an extremely important role. By that stage of the case, motions are almost always filed. I file motions and they provide a powerful push toward settlement."

Settlement and costs of summary judgment. The last two comments suggest that summary judgment plays an important role in promoting settlement. Almost all interviewees stated that summary judgment either serves as a catalyst for settlement or that the decision on summary judgment acts to polarize the parties and inhibit settlement. One defendant attorney summarized both the positive and negative aspects of summary judgment:

> Summary judgment has both positive and negative impacts on settlement. The prospect of losing a motion focuses one's attention on a case's weaknesses, which is a good thing, forcing the attorney to evaluate a case more realistically. On the negative side, parties tend not to look at cases realistically until the summary judgment stage. In that way, parties use summary judgment as an excuse to avoid evaluating a case. Summary judgment may increase costs because people wait for it before they evaluate the case and discuss settlement. Until summary judgment they are preoccupied with deadlines, motions to dismiss, and completing discovery.

Another defendant attorney referred to the costs that are sunk into the case before a summary judgment ruling:

> When a party files for summary judgment it forces both sides to evaluate their cases carefully and identify any weaknesses. Clients sometimes put too much stock in summary judgment and on losing a motion—they become very nervous about going to trial and then want to settle. In either case, though, most of the costs have been incurred by that time, including the cost of preparing for trial.

Another defendant identified the hidden cost of delaying the outcome of a patent case by waiting for a summary judgment ruling:

> I save clients millions of dollars if I win, but it adds significantly to the hidden cost of litigation if I lose: that is the cost associated with tying up a client and the business. The process generally takes about eight months, with the possibility of an appeal. This can be an additional year during which the client is being damaged by a competitor's use of the patented process.

A plaintiff attorney put the cost of summary judgment this way:

> In my cases it is being used to wear me down and delay settlement. It takes a long time to resolve a summary judgment motion. In one case, we argued the motion a year ago. The magistrate judge issued a report and recommendation to which defendant objected and the case is still pending before the district judge.

Another plaintiff attorney said:

> Generally there is no discussion of settlement until after summary judgment has been denied. All defendants expect their lawyers to file for summary judgment and some defense counsel say it borders on malpractice not to file such a motion. Summary judgment motions are filed even when there are clearly disputed issues of fact. They are always denied in the police misconduct cases and usually but not always denied in the employment cases. In some cases, judges are deciding motive questions on summary judgment. We generally appeal those decisions and I am working on several right now.

Rule Changes

We asked some of the attorneys whether past rule changes have affected costs and whether they had any suggestions for future rule changes. These questions came toward the end of interviews that were planned to span 20–25 minutes and in many instances the previous questions and answers had consumed all of the available time.

Past rule changes that have affected costs. Attorneys on both sides identified a number of past rule changes that have affected costs in a favorable way. Two sets of changes, both dealing with electronic materials, received the most attention.

First, several attorneys mentioned the 2006 amendments dealing with ESI. One said specifically that the "clawback rules have had an effect." Another pointed to rules governing restoration of backup tapes that are not reasonably accessible. A third said, in a positive way: "We would not be doing all of this electronic discovery without those changes."

Second, a couple of attorneys pointed to rules creating electronic filing and the CM/ECF system. One specifically mentioned that these rules "make it enormously easier to communicate with parties and attorneys" and gave an example of a voting rights case in which 20 attorneys had to be sent a certified letter. What otherwise would be administratively costly was all accomplished electronically and inexpensively. Those changes, of course, were the result of technological changes that were then implemented through rules changes.

Other examples of past rules changes that reduced the costs of litigation were

- Rule 11 (but see the next section for suggestions for changes);
- case-management orders in general (Rule 16); and
- limits on the number of interrogatories.

Suggestions for future rules changes. Interviewees suggested a number of areas where rule changes would be welcomed. Following the cost-focused theme of these interviews, more than half of the suggestions clustered on procedures to increase opportunities for case evaluation and settlement during the early stages of civil litigation. Several suggestions dealt with procedures such as phased or tiered discovery that would enable the parties to exchange information needed to evaluate cases soon after filing.

One attorney simply referred to a system of "tiered discovery," with the purpose of gathering information to evaluate a case early in the litigation. Another referred to a system employed by some judges in the Middle District of Florida that would require plaintiff to answer a set of court interrogatories soon after filing a complaint. The plaintiff would "have to specify the amount of their claim, indicate whether they have issued a prefiling demand to the defendant, and how

much." If they had not presented a demand to the defendant before filing the complaint, they would be ordered into mediation before proceeding further with the action.

Along similar lines, a plaintiff attorney called for

> early, real settlement conferences that focus on identifying issues central to the litigation and putting together a short-term plan for identifying the information necessary to give counsel 70–80% certitude about the value of the case. Make the lawyers sit down and attempt to solve the problems posed in the case.

Another plaintiff attorney called for "a court-sponsored early settlement conference, before discovery costs have been incurred." Yet another plaintiff attorney articulated a variation on the early case evaluation theme:

> Find a way to circumvent discovery by following up disclosure of documents with a meeting of counsel, under the auspices of the court, to discuss the documents and allow counsel to ask questions about the documents. That would increase the chances of an early settlement on the merits.

One of the more elaborate proposals came from a defendant attorney specializing in insurance litigation:

> This may not be amenable to a defined rule, but it would be interesting to see district judges experiment with phased discovery in which the initial phase is directed at evaluating the case and then have a freeze for a period of time during which the parties would evaluate the case and discuss settlement. Then, if no settlement, the parties would continue discovery and prepare for summary judgment and trial. It might be hard though to differentiate evaluation evidence from other merits evidence. Or the courts might open up a "time to think" period in a case's schedule so that parties can evaluate cases at an earlier stage.

Two interviewees, both of whom represented plaintiffs and defendants, called for adding teeth to the offer-of-judgment rule by explicitly adding attorney fees to the costs.

A patent attorney called for changes in Rule 11 to make it more applicable to motions filed during civil litigation:

> The new Rule 11 rules are not right in requiring notice before filing a motion for sanctions. Lawyers should feel that sanctions might be imposed on them at any time. The time limits for notifying lawyers of intent to file a sanctions motion do not work in the context of a frivolous summary judgment motion. There is not enough time to pursue sanctions while the litigation process is ongoing. Now I would have to prepare a sanctions motion before responding to a summary judgment motion.

> In patent cases we sometimes send a letter at the outset laying out the various provisions that allow for fee-shifting, but those only apply to the party, not the attorney. Lawyers would pay more attention if they had to be exposed to paying the other side's fees. Trollers who threaten patent infringement cases would be intimidated. Lawyers have to know they will suffer personally if they pursue unsupported claims.

Another attorney described a Rule 11 encounter that had a chilling effect and offered a suggestion for fixing an imbalance:

> I filed a challenge to the constitutionality of a state rule of procedure and thought I had a good-faith argument to support the challenge. An attorney sent a Rule 11 warning letter and I talked with my partners and we decided it was not worth the risk. We didn't want to guess the wrong way. One way to remedy that problem might be to make the unsuccessful Rule 11 filer pay the fees of the person opposing Rule 11 sanctions. Fortune 500 companies can afford to absorb Rule 11 sanctions but our firm and our clients cannot. That's an imbalance.

Attorneys provided a number of miscellaneous suggestions, including

- allow document requests after depositions have closed to blunt a strategy of postponing depositions until the end of discovery and cutting off any opportunity to obtain documents identified in a deposition;
- clarify that discovery requests and documents can be served by electronic means;
- eliminate the Rule 26(f) conference;
- limit document production; and
- create an expedited, simplified procedure for small cases.

Attorney Satisfaction with the Federal Rules of Civil Procedure

Report to the Judicial Conference Advisory Committee on Civil Rules

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&
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Federal Judicial Center
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Contents

Executive Summary

This report provides a brief comparison of the results of three surveys on the current operation of the Federal Rules of Civil Procedure ("Rules"). These surveys asked attorneys in the American College of Trial Lawyers ("ACTL"), the American Bar Association Section of Litigation ("ABA Section"), and the National Employment Lawyers Association ("NELA") to respond to a series of statements regarding the Rules. The Federal Judicial Center ("FJC") did not administer the ACTL survey, but it did administer the ABA Section and NELA surveys. Respondents in the ACTL survey had many more years of practice, on average, than respondents in the other surveys. The following findings are discussed in this report:

- Members of the ABA Section tended to agree that the Rules are conducive to the goals stated in Rule 1 ("to secure the just, speedy, and inexpensive determination of every action and proceeding"), but ACTL fellows and NELA members tended to disagree.
- The statement, "The Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants," elicited more disagreement than agreement in each of the surveys and among all groups (plaintiff attorneys, defendant attorneys, and attorneys representing both plaintiffs and defendants about equally).
- The statement, "One set of Rules cannot accommodate every type of case," elicited more disagreement than agreement from ABA Section and NELA members, and more agreement than disagreement from the ACTL fellows.
- The statement, "Trial dates should be set early in the case," elicited more agreement than disagreement with every group except ABA Section defendant attorneys.
- The statement, "Discovery is abused in almost every case," elicited more disagreement than agreement from the ACTL fellows and ABA Section plaintiff attorneys, and more agreement than disagreement from NELA members and other ABA Section members.
- The statement, "Economic models in many law firms result in more discovery and thus more expense than is necessary," elicited more agreement than disagreement in each of the surveys and among all groups.
- The statement, "The cumulative effect of the changes [enacted since the Pound Conference in 1976] has significantly reduced discovery abuse," elicited more disagreement than agreement in every survey and among every group except ABA Section plaintiff attorneys.

- The statement, "Intervention by judges or magistrate judges early in the case helps to limit discovery," elicited more agreement than disagreement in each of the surveys and among every group.
- The statement, "Judges do not enforce Rule 26(b)(2)(C) to limit discovery," elicited more agreement than disagreement in each of the surveys and among every group, although ABA Section plaintiff attorneys were almost evenly divided.
- The statement, "Summary judgment practice increases cost and delay without proportionate benefit," elicited more agreement than disagreement from plaintiff attorneys in each of the surveys and more disagreement than agreement from defendant attorneys and those representing both plaintiffs and defendants about equally.
- Attorneys in all three surveys reported that costs were disproportionate to the value of some cases, although respondents in the ABA Section and NELA surveys tended to answer that costs are not disproportionate to the value of large cases.
- In all three surveys, the most common response to the question asking about "the primary cause of delay in the litigation process" was "time to complete discovery."

Respondents to the NELA survey were also asked a series of questions about the impact of the Supreme Court's recent pleadings decisions on employment discrimination cases. The most commonly reported impact was the inclusion of additional facts in the complaint, followed by an increase in the number of motions to dismiss filed by defendants. Few respondents, however, reported that any of their employment discrimination cases had been dismissed under the new standard.

Background[1]

The Advisory Committee on Civil Rules ("Committee") requested that the Federal Judicial Center study, among other things, whether attorneys are generally satisfied with the present operation of the Federal Rules of Civil Procedure. This request followed a joint report issued by the American College of Trial Lawyers and the Institute for the Advancement of the American Legal System ("IAALS"), based on a survey of ACTL fellows.[2] In summarizing the survey results, the ACTL-IAALS joint report stated: "In short, the survey revealed widely-held opinions that there are serious problems in the civil justice system generally."[3] Most of the report, however, focused specifically on the ACTL fellows' views on the operation of the federal Rules.

The FJC made a preliminary report to the Committee in October 2009, based on a national, case-based survey of attorneys of record in federal civil cases terminating in the last quarter of 2008.[4] That report included analysis of respondents' views both on potential reforms (fact pleading and simplified procedures) and on the operation of the Rules more generally. In addition to the case-based survey, in 2009 the FJC (at the request of the Committee's chair, the Honorable Mark R. Kravitz) administered two additional surveys. Using a modified form of the ACTL-IAALS survey instrument,[5] the FJC surveyed members of the Section of Litigation of the American Bar Association and members of the National Employment Lawyers Association to provide the Committee with a wider range of views than that provided by the ACTL survey.[6] This report will focus on the origi-

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1. We acknowledge the valuable assistance of a number of FJC staff members in various stages of preparing this report, especially Meghan Dunn and Jill Gloekler. The staff of the organizations involved in the surveys provided invaluable assistance in the preparation and distribution of the surveys.

2. *See* Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System (Mar. 11, 2009) [hereinafter *Joint Report*], available to Committee members at http://civilconference.uscourts.gov/.

3. *Id.* at 2.

4. Emery G. Lee III & Thomas E. Willging, *Federal Judicial Center National, Case-Based Civil Rules Survey: Preliminary Report to the Judicial Conference Advisory Committee on Civil Rules* (Federal Judicial Center, Oct. 2009).

5. The IAALS and ACTL agreed to permit reuse of the survey instrument by the FJC. The IAALS also generously shared the raw data from the ACTL survey with the FJC; the percentages from the ACTL survey reported in this report are unweighted and thus may be slightly different from percentages reported by the IAALS.

6. ABA Section and NELA expressed to the Committee an interest in participating and cooperated in administration of the surveys. Moreover, the FJC has shared the underlying data with both organizations for their own use.

nal ACTL survey and the ABA Section and NELA surveys administered by the FJC, making reference to the FJC national, case-based survey where appropriate.

Because of the length of the survey instrument itself, a question-by-question comparison of the responses given by respondents to all three surveys would do little more than exhaust the Committee's patience. For this reason, we have selected about a dozen questions to provide a sense of the range of views elicited by the surveys. For interested members of the Committee, a more complete set of responses to the ABA Section survey is available on the website for the 2010 Conference on Civil Litigation.[7] It is unclear at the time of this writing when NELA will provide a similar report.

Despite the efforts of the Committee, the FJC, and the organizations involved, the response rates for the ABA Section and NELA surveys were relatively low. Moreover, based on their internal policies, neither organization was willing to share its membership emails with the FJC. This meant, in turn, that the FJC could not construct its own sampling design for either organization. Instead, an email invitation to respond to the survey was sent by the organizations to every member with an email address on file. Taken together, these factors make it difficult to extrapolate from the responses received the underlying views of either organization's members as a whole. In short, the survey responses summarized in this report should only be taken as the views of the members who voluntarily took the time to respond.

This report is divided into four sections. The first section very briefly compares the survey respondents in the ACTL, ABA Section, NELA, and FJC case-based surveys. The second section examines attorney views on the operation of the Rules in general. The third section examines attorney views on discovery and the cost of litigation. The fourth section examines responses to a set of questions (asked only of the NELA respondents) on the impact of the Supreme Court's recent decisions on pleadings. Figures are included at the end of this report.

Survey Respondents Compared

Fellowship in the ACTL is limited to experienced litigators invited to join; moreover, the number of fellows in any given state cannot exceed 1% of the attorney population.[8] Thus, one would expect that its respondents would differ from the other attorneys surveyed. And they do. The ACTL fellows had, on average, been practicing law for 37.9 years (n = 1,474). The respondents in the other surveys were much less seasoned, on average. ABA Section respondents had, on average,

7. *See* ABA Section of Litigation, Member Survey on Civil Practice: Detailed Report (2009), available to Committee members at http://civilconference.uscourts.gov/.

8. *See Joint Report*, *supra* note 2, at i.

22.9 years of practice (n = 3,261), and the NELA respondents had, on average, 21.4 years of practice (n = 294). Respondents in the FJC case-based survey had, on average, 20.9 years of practice (n = 2,621). For purposes of comparison, in 2000 the median age of an American attorney was 45 years old.[9] The average age would likely be slightly higher. The respondents in the ABA Section, NELA, and FJC case-based surveys are much closer to the median (or mean) age than are the ACTL fellows.

Overall, ABA Section respondents were much more likely than ACTL or NELA respondents to prefer federal court over state court, when given a choice. Fully 60.4% of ABA Section respondents preferred federal court, 21.7% preferred state court, and 13% had no preference (n = 3,294). The other two organizations were more evenly divided. On the same question, 42.9% of all ACTL respondents preferred state court versus 39.8% preferring federal court (n = 1,472). Similarly, 41.6% of all NELA respondents preferred state court versus 43.9% preferring federal court (n = 295). But ABA Section plaintiff attorneys closely resembled NELA respondents, splitting 42% for federal court and 41.5% for state court (n = 834). ACTL plaintiff attorneys overwhelmingly preferred state court, with 66.5% preferring state court, compared to 19.4% preferring federal court (n = 361).

The Rules

The ACTL, ABA Section, and NELA surveys asked respondents whether the Rules are conducive to meeting the three goals stated in Rule 1—"to secure the just, speedy, and inexpensive determination of every action and proceeding."[10] Figure 1 displays the percentage of respondents in each survey responding "yes" to this question, grouped into party groupings: plaintiff attorneys, defendant attorneys, and attorneys representing both plaintiffs and defendants about equally. The ACTL survey did not permit respondents to identify themselves as a member of the third group. In addition, because NELA is primarily a plaintiff attorneys' organization, we grouped all respondents in that survey accordingly.

ACTL plaintiff and defendant attorneys answered "yes" only 35 and 35.5% of the time, respectively. ABA Section plaintiff attorneys answered "yes" 61%; ABA Section defendant attorneys answered "yes" 64.2%; and ABA Section attorneys representing plaintiffs and defendants about equally answered "yes" 62.3%. NELA respondents answered "yes" 40.1%.

It is obvious in Figure 1 that the differences between the organizations seem greater than the differences within organizations. ACTL plaintiff and defendant

9. Clara N. Carson, The Lawyer Statistical Report: The U.S. Legal Profession in 2000, at 3 (American Bar Foundation, 2004).

10. Fed. R. Civ. P. 1.

attorney respondents were very similar in answering about 35% of the time that the Rules are conducive to the goals stated in Rule 1. Although this percentage is roughly similar to the percentage of NELA plaintiff attorneys giving the same response, the ABA Section respondents cluster at a much higher level—agreeing more than 60% of the time, despite party grouping. The members of the Section who responded to the survey, in short, appear much more satisfied with the operation of the Rules in general than do the members of the ACTL and NELA who responded to the surveys. This is true even among the Section plaintiff attorneys.

Starting with Figure 2, responses to questions asking whether respondents strongly agree, agree, disagree, or strongly disagree with a given statement are analyzed. Because each of these questions generates as many as five response categories (including "no opinion") for each party grouping, and there are six groupings across the three surveys, there is a great deal of information for every question. To simplify the presentation, we have summarized the data for the Committee by deriving the "net agreement" for each party grouping in each survey by subtracting the percentage of respondents disagreeing or strongly disagreeing with each statement from the percentage of respondents agreeing or strongly agreeing. A positive net agreement score indicates that more respondents in a given party grouping agreed (or strongly agreed) than disagreed (or strongly disagreed).[11] A negative net agreement score indicates that more respondents in a given party grouping disagreed than agreed with the given statement.

The net agreement score ranges, at least theoretically, from 100% (all respondents agreeing or strongly agreeing) to -100% (all respondents disagreeing or strongly disagreeing). A score of zero indicates that the same percentage of respondents agreed (or strongly agreed) as disagreed (or strongly disagreed). The vertical axis in Figures 2–11 range from 100 to -100 so that the figures will be directly comparable to one another. (The percentages used were calculated with "no opinion" answers included; i.e., the sum of the percentages of respondents agreeing and disagreeing will rarely equal 100.)

Figure 2 summarizes respondents' net agreement with the statement "The Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants." This question arguably provides respondents' views on whether a complete overhaul of the Rules is needed at the present time. No party group in any of the three surveys had a positive net agreement score on this question. In other words, the percentage of respondents in every party group in each of the three surveys disagreeing was greater than the percentage of respondents agreeing. ACTL plaintiff attorneys tended to disagree, -15.1%, as did ACTL defendant at-

11. From this point forward, unless otherwise stated, "agree" includes the response category "strongly agree" and "disagree" includes "strongly disagree."

torneys, -22.5%. ABA Section respondents, as in Figure 1, appear even more supportive of the current Rules. Section plaintiff attorneys registered a net agreement score of -41.3%, Section defendant attorneys -45.6%, and Section respondents representing both about equally -36.5%. NELA respondents also tended to disagree, -23.6.

Figure 3 summarizes respondents' net agreement with the statement, "One set of Rules cannot accommodate every type of case." This question arguably provides a measure of the attorneys' attitudes toward trans-substantive rules of civil procedure. ACTL plaintiff attorneys tended to agree, 6.1%. ACTL defendant attorneys also tended to agree, 6.6%. ABA Section respondents tended to disagree, across party groupings. Thus, ABA Section plaintiffs registered a net agreement score of -18.2%, Section defendants a net agreement score of -12.2%, and Section respondents representing both about equally a net agreement score of -14%. NELA respondents also registered a negative net agreement score, -7.9%. In short, members of the ABA Section and NELA who responded to the survey were more supportive of trans-substantive Rules than were the ACTL fellows.

Survey respondents' reactions to the first three statements are something of a mixed bag. Clearly, the NELA and ACTL respondents are expressing dissatisfaction with the Rules in general, to the extent that they think that the Rules are not conducive to the three goals stated in Rule 1. It is likely, however, that the dissatisfaction of the two groups stems from differing sets of concerns. ABA Section respondents, on the other hand, generally think that the Rules are conducive to Rule 1's goals. No group from the surveys supports, in the broadest sense, a complete overhaul of the Rules, however, and only the ACTL fellows tended to reject the general idea of trans-substantive Rules.

Although the issue of trial dates is more a matter of case management than the Rules, in selecting questions for inclusion in this report, we thought it might be useful to address what respondents thought about the practice of setting trial dates early in the case. Figure 4 summarizes respondents' net agreement with the statement, "Trial dates should be set early in the case." This question tended to elicit agreement, except among ABA Section defendant attorneys. The ACTL plaintiff attorneys tended to agree, 69.9%, and ACTL defendant attorneys tended to agree, 39.8%. The ABA Section plaintiff attorneys, at 17.1%, and attorneys representing both plaintiffs and defendants, 17.4%, also tended to agree. Section defendant attorneys tended to disagree, -13.7%. NELA respondents tended to agree, 14.4%. In short, the practice of setting an early trial date appears to have support among most groups, with the exception of some defendant attorneys.

Discovery and Litigation Costs

This section compares responses to questions on discovery and the cost of litigation, beginning with discovery abuse. Figure 5 summarizes respondents' net agreement with the statement, "Discovery is abused in almost every case." ACTL fellows tended to disagree: plaintiff attorneys, -9.2%; and defendant attorneys, -13.2%. ABA Section respondents differed depending on party grouping. Section plaintiff attorneys tended to disagree, -6.6%. But Section defendant attorneys and attorneys representing both plaintiffs and defendants about equally tended to agree, 7.2 and 10.9%, respectively. NELA respondents tended to agree, 31.5%.

This question was almost certainly interpreted in multiple ways by respondents. There are many possible meanings of discovery abuse,[12] and thus the question will mean different things to different groups of attorneys. NELA respondents, primarily representing plaintiffs in employment cases, are probably complaining that defendants in their cases are "refusing to supply information."[13] But that is probably not how ABA Section defendant attorneys—who also agreed, but at a lower net level—tended to read the question.[14]

The FJC national, case-based survey asked respondents to respond to a similar statement: "Discovery is abused in almost every case *in federal court.*" (The italics indicate the difference in wording.) The FJC respondents in all three groups registered disagreement: plaintiff attorneys, -33.6%; defendant attorneys, -44.3%; and respondents representing both about equally, -27%.[15]

Figure 6 summarizes respondents' net agreement with the statement, "Economic models in many law firms result in more discovery and thus more expense than is necessary." As we read it, this question gets at another sense of the term "discovery abuse," namely, lawyers may pursue or resist discovery "because it increases the number of billable hours."[16] This question elicited agreement among

12. *See* Jack B. Weinstein, *What Discovery Abuse? A Comment on John Setear's* The Barrister and the Bomb, 69 B.U. L. Rev. 649, 654–55 (1989) (cataloguing five forms of discovery abuse).

13. *Id.* at 655. One NELA respondent, for example, commented, "Discovery abuse is rampant—parties (usually defendants) stonewall routinely and then negotiate over how many of their legal obligations they can avoid." Another commented that costs would be reduced if judges would "[e]nforce sanctions for discovery abuses. Much of the costs we deal with relate to trying to get sufficient discovery—the delay and the costs of filing motions to compel, etc., increase costs significantly."

14. One ABA Section defendant attorney commented, for example, "Demands for e-discovery are being used as a lever to force settlement in cases that have little merit. Most e-discovery is useless and should not be requested in the first instance. Requiring plaintiffs to bear the cost of producing what they request would help curb the abuse."

15. *See* Lee & Willging, Preliminary Report, *supra* note 4, at 70–71, Fig. 45.

16. Weinstein, *supra* note 12, at 654.

all the party groupings, but especially among plaintiff attorneys. ACTL plaintiff attorneys tended to agree, 69.9%, and ACTL defendant attorneys also tended to agree, 39.8%. Among ABA Section respondents, plaintiff attorneys, 42.3%, and attorneys representing both plaintiffs and defendants about equally, 41.7%, tended to agree at similar levels, and defendant attorneys tended to agree, 14.8%. NELA respondents also tended to agree, 62.6%. In short, respondents tended to view business models in many law firms as one source of unnecessary expense in discovery.

Figure 7 summarizes respondents' net agreement with the statement, "The cumulative effect of the changes [enacted since the Pound Conference in 1976] has significantly reduced discovery abuse." This statement tended to elicit disagreement, with the exception of the ABA Section plaintiff attorneys. ACTL plaintiff attorneys registered a net agreement score of -12.4%, and ACTL defendant attorneys -22%. ABA Section plaintiff attorneys agreed slightly more than they disagreed—by 0.4%, i.e., they were almost evenly divided—but Section defendant attorneys, -17.9%, and attorneys representing both plaintiffs and defendants about equally, -11.6%, tended to disagree. NELA respondents disagreed most strongly, -39.5%. No matter how respondents interpret "discovery abuse," in other words, they tend to think that it has not been reduced by Rules amendments, considered as a whole, since 1976.

Figure 8 summarizes respondents' net agreement with the statement, "Intervention by judges or magistrate judges early in the case helps to limit discovery." This statement tended to elicit agreement in all three surveys among all party groupings, the highest levels of support coming from ABA Section defendant attorneys and attorneys representing both plaintiffs and defendants about equally. ACTL plaintiff attorneys registered a net agreement score of 35.3%, and ACTL defendant attorneys 36.7%. ABA Section plaintiff attorneys agreed 29.5% more than they disagreed; the ABA Section defendant attorneys' net agreement score was 56.6%; and for attorneys representing both plaintiffs and defendants about equally, 57.9%. NELA respondents registered a 26.2% net agreement score. The responses to this question suggest that many attorneys think that active management of discovery by district and magistrate judges serves a useful purpose.[17]

The surveys asked questions about the proportionality of discovery and Rule 26(b)(2)(C). Figure 9 summarizes respondents' agreement with the statement, "Judges do not enforce Rule 26(b)(2)(C) to limit discovery." This statement

17. There is an ambiguity in the question, namely, that "limit[ing] discovery" can be interpreted either as limiting abusive, frivolous, and/or unnecessary discovery, or as arbitrarily limiting necessary or useful discovery. The same point holds for the next question to be discussed. Given the distribution of responses, it appears that many, if not most, respondents read the questions in the former rather than the latter sense.

tended to elicit agreement, with the exception of the ABA Section plaintiff attorneys. ACTL plaintiff attorneys registered a net agreement of 24.6%; ACTL defendant attorneys, 39.3%. ABA Section plaintiff attorneys agreed 1.1% more often than they disagreed (i.e., respondents were almost evenly split between agreement and disagreement), but Section defendant attorneys and attorneys representing both plaintiffs and defendants about equally expressed much greater levels of agreement: 51.1% and 41.6%, respectively. NELA respondents agreed 19.8% more than they disagreed.

A more controversial statement about costs addressed the net benefits of summary judgment practice. Figure 10 summarizes respondents' net agreement with the statement, "Summary judgment practice increases cost and delay without proportionate benefit." As one might expect, this statement tended to elicit agreement from plaintiff attorneys—plaintiff attorneys agreed with the statement in all three surveys, most strongly in the NELA survey—and disagreement from defendant attorneys. ACTL plaintiff attorneys tended to agree, 26.2%, and ACTL defendant attorneys tended to disagree, -59.6%. ABA Section plaintiff attorneys agreed more than they disagreed, 26.9%, while Section defendant attorneys, -77.2%, and attorneys representing both plaintiffs and defendants about equally, -45.1%, tended to disagree. NELA respondents agreed 76.9% more than they disagreed.

Figure 11 is a little more complex than the previous figures. The ACTL survey asked respondents to agree or disagree with the statement, "Litigation costs are not proportional to the value of a case." In the ABA Section and NELA surveys, this question was split into two questions: The first question asked respondents whether litigation costs were proportional to the value of a large case, and the second asked the same for small value cases. The terms "large" and "small" were not defined. Figure 11 summarizes respondents' net agreement with these statements.

In general, ACTL respondents agreed that litigation costs are not proportional to the value of a case—ACTL plaintiff attorneys agreed 36.5% more than they disagreed, and defendant attorneys agreed 45.5% more than they disagreed.

With respect to small cases, both ABA Section and NELA respondents also tended to agree. ABA Section plaintiff attorneys' net agreement with the statement that litigation costs are not proportional to the value of a small case was 63.2%; defendant attorneys' net agreement was 85.3%, a number that was eclipsed by ABA Section respondents representing both plaintiffs and defendants about equally—89% net agreement. NELA respondents agreed at a level slightly higher than the ABA Section plaintiff attorneys, 69.8%.

With respect to large cases, however, both ABA Section and NELA respondents tended to disagree with the statement—in other words, to reject that litigation costs are not proportional to the value of a large case. ABA Section plaintiff

attorneys registered net agreement of -25.1%; defendant attorneys, -6.4%; and attorneys representing both plaintiffs and defendants about equally, -11.2%. NELA respondents registered a net agreement score of -5.9%. Given the similarity to the "small case" responses in the other surveys, it appears likely that many ACTL respondents were reading "small case" into the wording of the question.

Figure 12 summarizes the percentage of respondents in each survey selecting "time to complete discovery" as the "primary cause of delay in the litigation process."[18] (The other response options were delayed rulings on pending motions, court continuances of scheduled events, attorney requests for extensions of time and continuances, and other/fill in the blank.) In each survey, among all party groupings, "time to complete discovery" was the most common response. In the ACTL survey, 50.5% of plaintiff attorneys and 56.2% of defendant attorneys selected "time to complete discovery." In the ABA Section survey, 37.9% of plaintiff attorneys, 54.9% of defendant attorneys, and 45.5% of attorneys representing both plaintiffs and defendants about equally selected "time to complete discovery." In the NELA survey, 35.1% of respondents gave that answer.

Twombly/Iqbal Questions

In the NELA survey, the pleadings questions in the other surveys were replaced with questions specifically about the impact of *Bell Atlantic v. Twombly*[19] and *Ashcroft v. Iqbal*[20] on the practice of employment lawyers. This substitution was made for a number of reasons, not the least of which was the substance of the comments received in response to the notice pleading questions in the ABA Section survey. Plaintiff attorney respondents to that survey wrote, for example, "We haven't used notice pleadings since *Twombly*!" and "What notice pleading? The Supreme Court's recent *Iqbal* decision wipes out notice pleading." Given such responses, as well as the Committee's interest in the subject, we thought it would be better to focus on the impact of *Twombly* and *Iqbal* in the NELA survey than to ask questions that some respondents perceived as out of date.

NELA respondents were first asked whether they had "filed an employment discrimination case in federal court since the Supreme Court issued its decision in *Bell Atlantic v. Twombly* in 2007." Fully 67.1% of respondents answered "yes." Those respondents were then asked, "Has *Twombly*—or the more recent Supreme

18. Just to be clear: This question posits that "time to complete discovery" is a form of "delay," clearly implying that cases take longer to reach their conclusions than they should take. To the extent that completion of discovery is necessary for the resolution of the "litigation process," however, it arguably cannot be considered as delay in this sense. In short, we would have worded the question differently.

19. 550 U.S. 544 (2007).

20. 556 U.S. __, 129 S. Ct. 1937 (2009).

Court decision in *Ashcroft v. Iqbal* (2009)—affected how you structure complaints in employment discrimination cases?" Fully 70.1% of respondents indicated that *Twombly* and/or *Iqbal* had affected their practices (29.9% answered "no").

Respondents indicating that their practices had been affected by *Twombly/Iqbal* were then asked about the nature of those effects. The most common response was, "I include more factual allegations in the complaint than I did prior to *Twombly/Iqbal*," which was selected by 94.2% of the respondents. The second most common response was, "I have to respond to motions to dismiss that might not have been filed prior to *Twombly/Iqbal*," selected by 74.6%. Fewer than 15% of respondents selected any one of the following: "I conduct more factual investigation prior to filing the complaint than I would have prior to *Twombly/Iqbal*"; "I screen cases more carefully for a claim that will survive a motion to dismiss than I did prior to *Twombly/Iqbal*"; or "I raise different claims than I did prior to *Twombly/Iqbal*."

Finally, respondents were asked whether "any of your employment discrimination cases have been dismissed for failure to state a claim under the standard announced in *Twombly/Iqbal*." This question was asked of respondents who had filed an employment discrimination case post-*Twombly*. Only 7.2% of those respondents answered in the affirmative (14 total respondents). Although the survey asked a series of questions about such dismissals, the small number of respondents answering those questions precludes meaningful analysis.

Figures

Figure 1: Percentage of respondents answering "Yes" to whether the Rules are conducive to meeting the goals stated in Rule 1 ("to secure the just, speedy, and inexpensive determination of every action and proceeding").

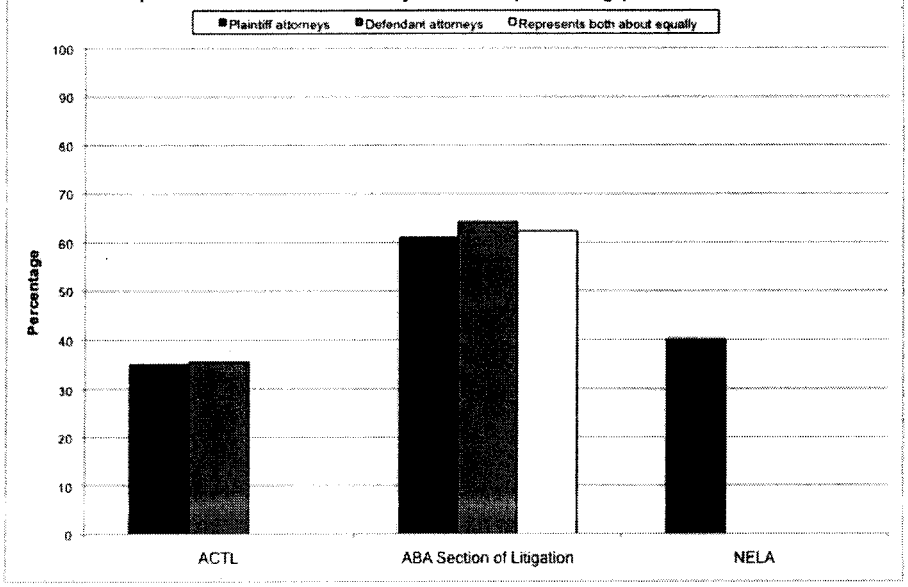


Figure 2: Respondents' net agreement with statement, "The Rules must be reviewed in their entirety and rewritten to address the needs of today's litigants."

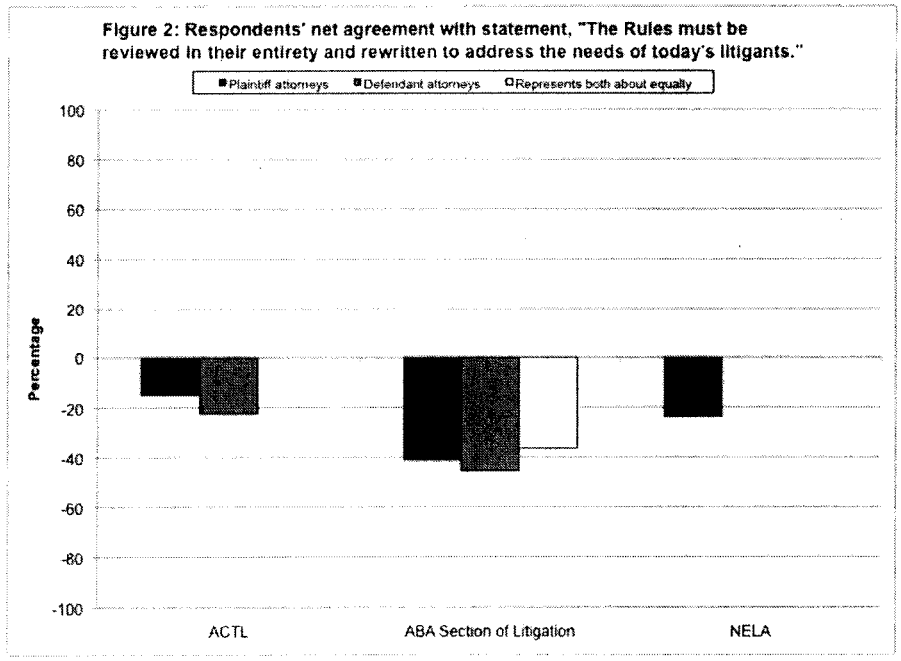
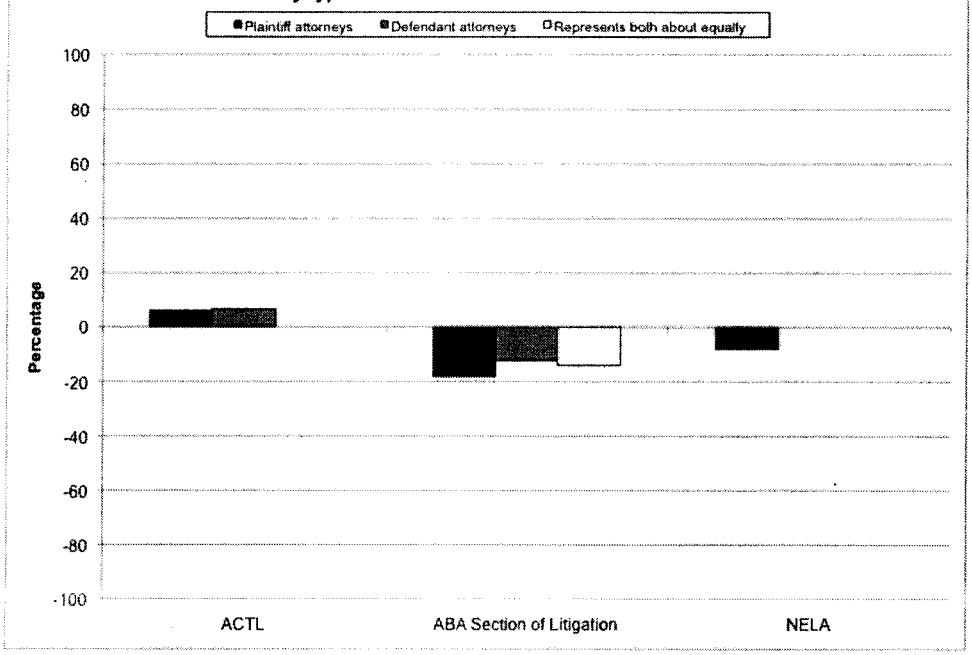


Figure 3: Respondents' net agreement with statement, "One set of Rules cannot accommodate every type of case."



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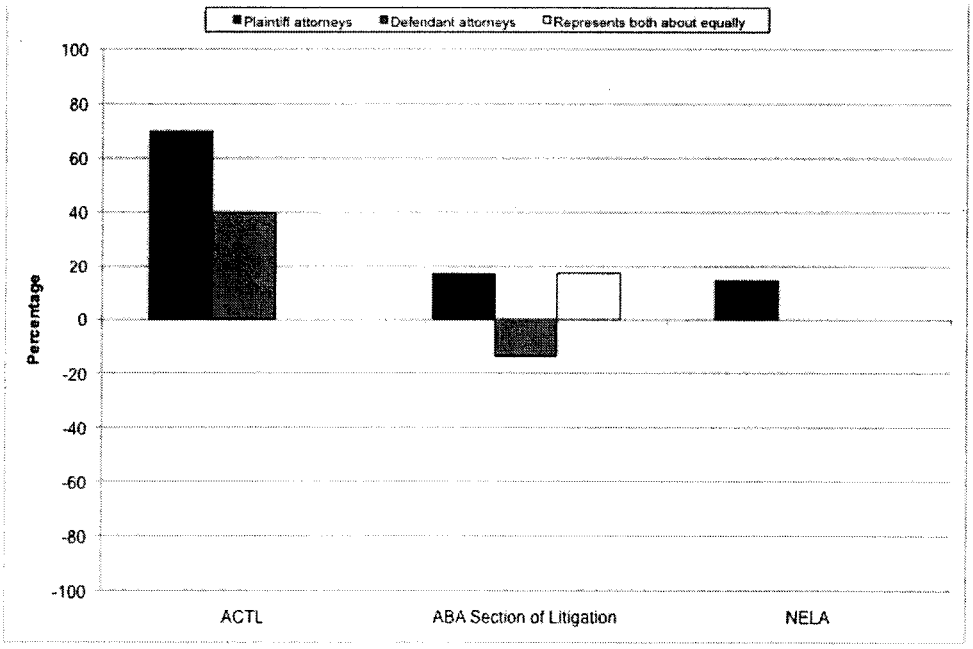

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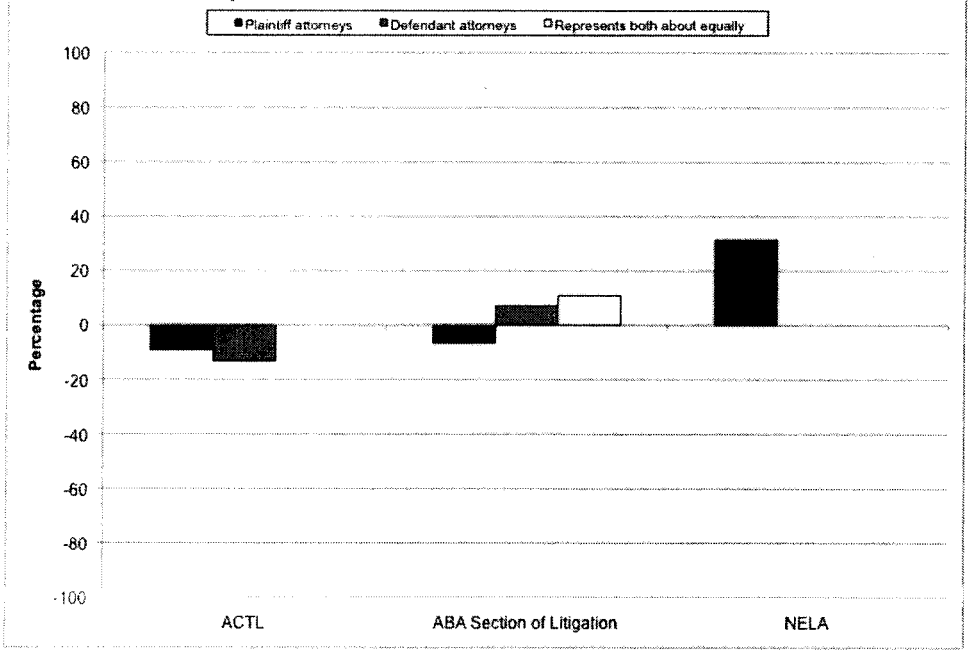

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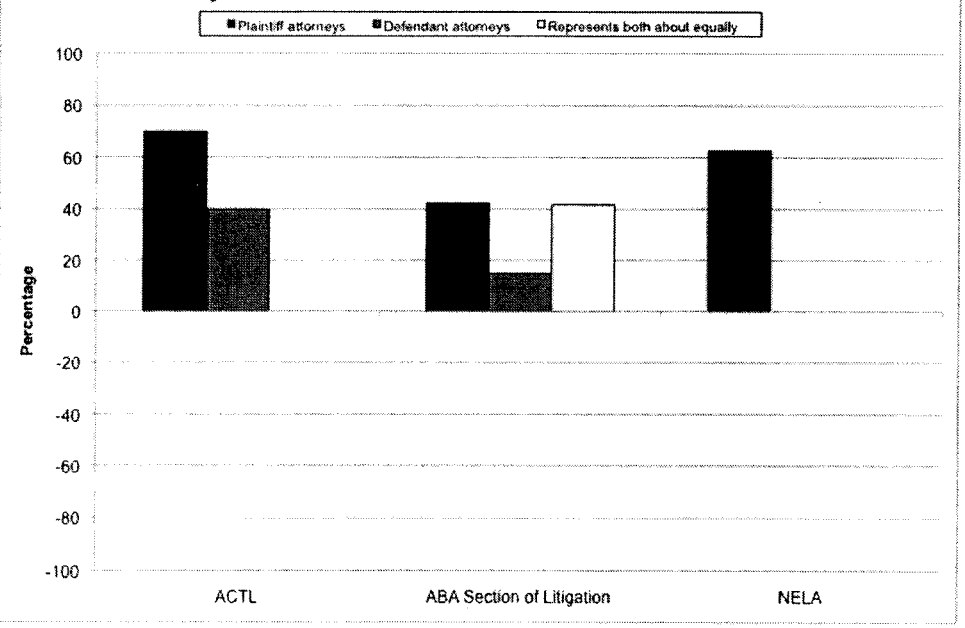

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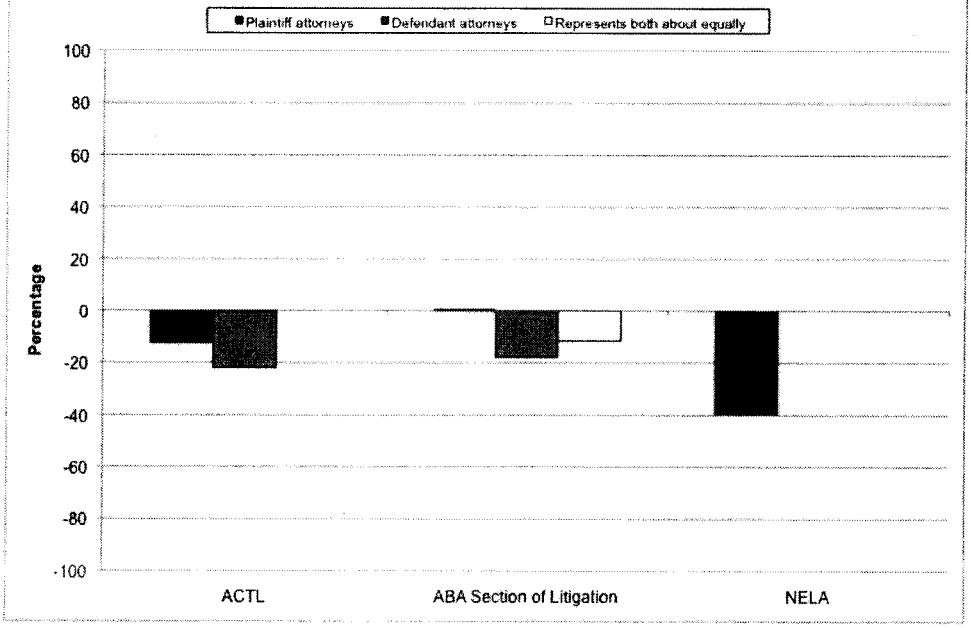

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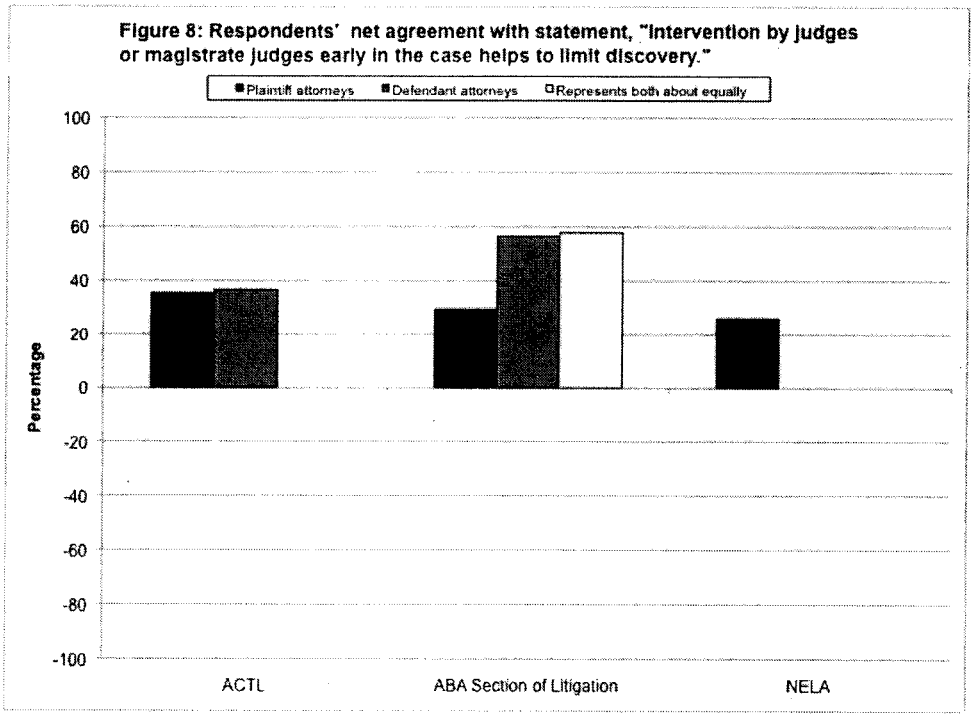

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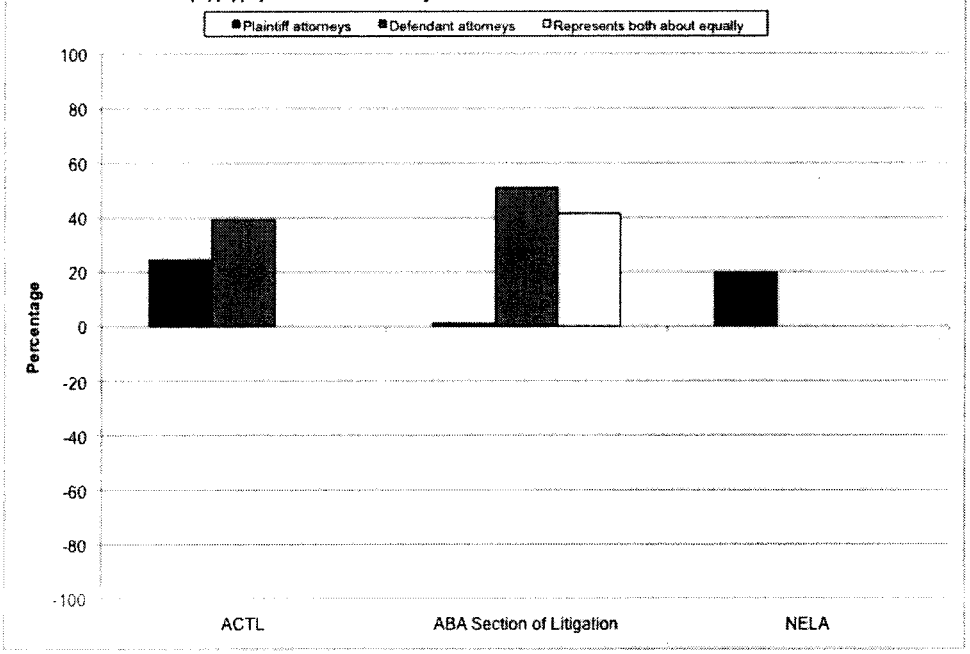

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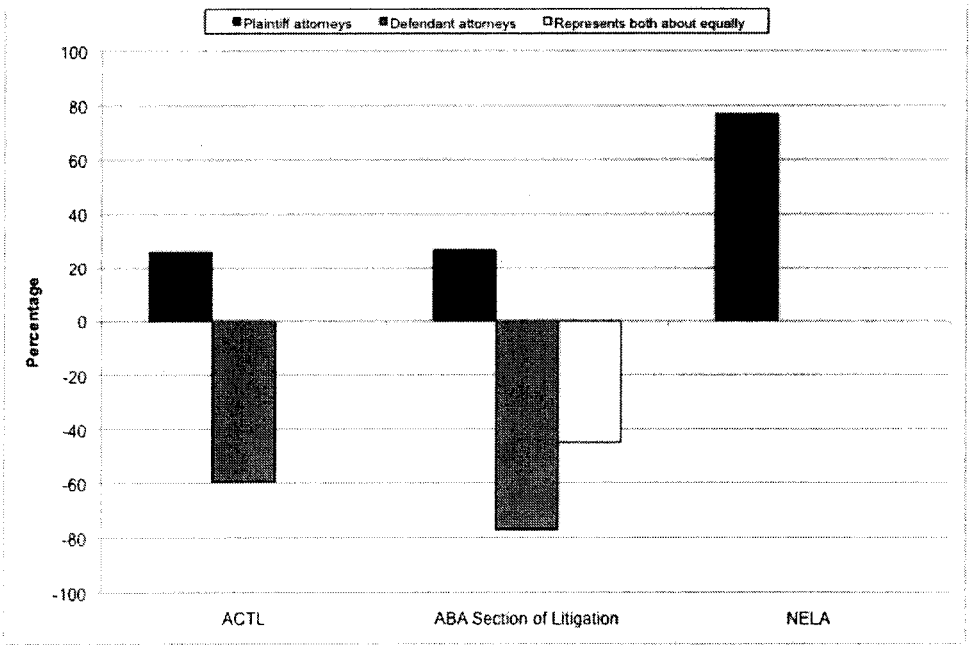


Figure 11: Respondents' net agreement with statements about whether litigation costs are not proportionate to the value of a case (asked of ACTL) or to the value of small and large cases (asked of ABA and NELA).

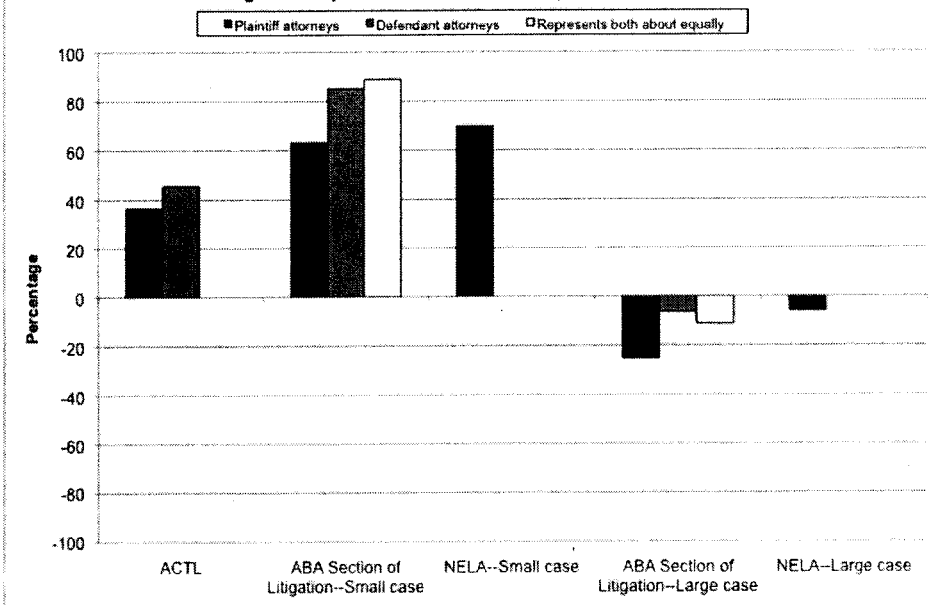
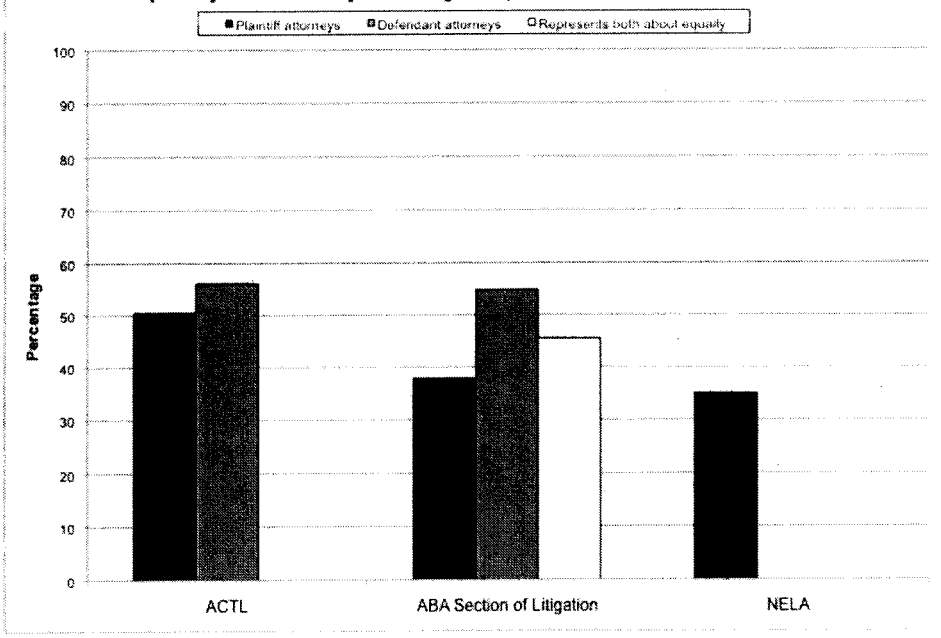


Figure 12: Percentage of respondents selecting "time to complete discovery" as the "primary cause of delay in the litigation process."



TAB 4

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

LEE H. ROSENTHAL
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

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APPELLATE RULES

LAURA TAYLOR SWAIN
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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

December 9, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

This letter briefly comments on the "Notice Pleading Restoration Act of 2009" (S. 1504) and the "Open Access to Courts Act of 2009" (H.R. 4115) on behalf of the Judicial Conference Standing Committee on Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure. Both S. 1504 and H.R. 4115 would effectively amend the Rules of Civil Procedure that set the standard for pleading a cause of action and for dismissing a complaint because it fails to do so. The bills would affect Rule 12(b)(6), Rule 12(c), Rule 12(e), and Rule 8, other related rules, and statutes. We ask that this letter be made a part of the record of the hearing entitled "Has the Supreme Court Limited Americans' Access to Courts?" held by the Senate Committee on the Judiciary on December 2, 2009.

Both S. 1504 and H.R. 4115 recognize the important role of the Rules Committees of the Judicial Conference under the Rules Enabling Act (28 U.S.C. §§ 2071-2077) in drafting the procedural rules that apply in the federal courts, including the rules for pleadings and motions to dismiss. Seventy-five years ago, Congress enacted the Rules Enabling Act. The Act charged the judiciary with the task of neutral, independent, and thorough analysis of the rules and their operation. Congress designed the Rules Enabling Act rulemaking process in 1934 and reformed it in 1988 to produce the best rules possible by ensuring broad public participation and thorough review by the bench, the bar, and the academy. The internet has made this process truly transparent and inclusive. As recent experience with Civil Rules 26 and 56 has demonstrated, the Rules Committees are dedicated to obtaining the type of reliable empirical information

needed to enact rules that will serve the American justice system well and will not produce unintended harmful consequences. The different House and Senate bills demonstrate some of the difficulties in an area as fundamental and delicate as articulating the pleading standard for the many different kinds of cases filed in the federal courts.

The Civil Rules Committee and the Standing Committee are at this moment deeply involved in precisely the type of work Congress required in the Rules Enabling Act. The Committees, working with the Federal Judicial Center, are gathering and studying the information needed both to understand how Rule 8, Rule 12, and other affected rules -- which have not been changed substantively since 1938 – have in fact worked since the Supreme Court decided *Twombly* and *Iqbal* and to consider changes to the text of these rules and other related rules.

At the request of the Civil Rules Committee, the law clerk for the Chair of the Standing Committee wrote a memorandum describing the case law since *Iqbal* was decided. That memorandum sets out circuit court opinions issued to date that examine *Iqbal* or discuss how district courts are to apply *Iqbal* to different kinds of cases, and sets out many district court opinions discussing *Iqbal*. The memorandum is available on the Rules Committees' website.[1] The memorandum will be regularly updated as additional cases are decided, and the updates will be posted on the Rules Committees' website as well.

Charts and graphs setting out preliminary data from the federal courts' dockets on the filing, granting, and denying of motions to dismiss after *Twombly* and *Iqbal* are also on the Rules Committees' website.[2] This data will be updated periodically, and those updates will be posted on that website. The Federal Judicial Center is gathering more detailed data on motions to dismiss, which will also be made available. In addition, even before *Iqbal*, the Rules Committees had begun a thorough reexamination of how pleading and discovery are actually working in federal cases and what changes should be considered. Major empirical work on discovery costs and burdens – which are inextricably linked to pleading standards – is underway in preparation for a May 2010 conference at the Duke Law School hosted by the Civil Rules Committee. The Rules Committees will of course make the results of this work available to all.

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[1] http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20by%20circuit.pdf

[2] http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf

Thank you for considering these comments and the information the Committees' work will produce.

We look forward to continuing to work with you on these issues, which are vital to the federal civil justice system that we are all dedicated to preserving and improving.

Sincerely,

Lee H. Rosenthal
Chair
Standing Committee on
Rules of Practice and Procedure

Mark R. Kravitz
Chair
Advisory Committee on Civil Rules

cc: Honorable Sheldon Whitehouse
Honorable Arlen Specter

Identical letter sent to: Honorable Jeff Sessions

MOTIONS TO DISMISS
INFORMATION ON COLLECTION OF DATA

The following tables and graphs on motions to dismiss before and after *Twombly* and *Iqbal* are based on data collected electronically from the 94 district courts' docket entries. This information is not routinely included in the Administrative Office statistical reports for the courts. Though the data was reviewed for accuracy, some quality control steps that are part of the Administrative Office's reports were not applied. The electronically collected information is from the courts' docket entries, and the underlying docketed motions and orders were not read. As a result, if there are errors in the docket entry, those errors are in the data. The Federal Judicial Center is engaged in a study that will include reviewing underlying motions to dismiss and orders in a large number of randomly sampled cases, providing more information and an additional check on accuracy.

Certain information could not be collected electronically from the docket entries and is not reflected in the data. The data does not distinguish among the different types of motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. Though most motions to dismiss are filed under Rule 12(b)(6) for failure to state a claim on which relief can be granted, motions to dismiss filed under Rule 12(b)(1-5) and (7) are included in the data. The assumption is that the rate of motions to dismiss under Rule 12(b)(1-5) and (7) has remained stable during the period. The Federal Judicial Center study will include this information.

The data does not reveal whether motions to dismiss were granted with or without leave to amend, and, if with leave to amend, whether the case continued with an amended complaint. The Federal Judicial Center study will also include this information.

The courts do not rule on a significant number of motions to dismiss, often because the case settles without court intervention. Although the data includes the filing of these motions, the data does not include the disposition of these motions.

Finally, the data excludes Multi-District Litigation (MDL) cases.

Cases and Motions to Dismiss Filed From January 2007 through December 2009

	2007												2008												2009											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
CASES FILED	18,103	16,385	19,171	18,240	19,441	18,592	18,297	20,721	17,666	21,100	19,073	16,098	19,084	21,945	17,829	19,900	18,752	19,935	19,010	17,470	18,246	18,960	15,774	18,733	19,727	17,101	19,883	19,480	18,169	20,982	22,546	20,490	20,496	20,525	18,356	18,896
Category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Personal Injury	1,936	1,931	2,089	1,669	2,672	1,732	1,786	2,465	1,675	2,177	2,295	1,539	2,005	6,096	1,636	1,715	2,237	3,765	2,139	1,706	2,003	1,663	1,515	2,348	1,482	1,599	2,218	1,984	1,843	3,053	4,163	3,145	3,418	3,310	3,186	2,565
Prisoner Petitions	4,665	3,928	4,734	4,576	4,593	4,787	4,877	4,746	4,191	5,020	4,293	3,969	5,188	4,531	4,796	4,964	4,308	4,430	4,664	4,230	4,185	4,470	3,599	4,421	4,298	4,072	4,602	4,603	4,172	4,661	4,695	4,283	4,216	4,212	3,693	4,192
Civil Rights Employment	1,114	967	1,049	974	1,132	1,177	1,098	1,181	1,146	1,185	1,047	1,083	1,041	999	957	1,088	1,108	1,183	1,196	1,107	1,245	1,250	1,014	1,220	966	1,014	1,135	1,243	1,094	1,299	1,261	1,224	1,312	1,201	1,101	1,263
Civil Rights Other	1,211	1,187	1,456	1,309	1,483	1,337	1,318	1,483	1,274	1,517	1,240	1,275	1,403	1,334	1,303	1,342	1,339	1,320	1,384	1,378	1,399	1,488	1,217	1,385	1,177	1,349	1,433	1,364	1,269	1,459	1,595	1,311	1,439	1,419	1,275	1,321
Civil Rights ADA	148	164	205	183	188	214	184	214	228	209	202	180	220	219	232	197	202	250	294	222	252	295	203	308	245	251	292	232	246	275	323	281	295	275	259	283
Antitrust	38	63	82	40	28	39	26	31	57	42	29	34	58	76	115	70	126	43	48	48	53	37	52	30	36	59	75	49	41	60	63	48	47	58	50	29
Patent	212	192	266	218	274	285	214	230	221	302	247	201	225	250	236	265	237	244	233	213	196	237	174	246	217	214	285	267	234	213	249	221	233	222	213	228
Labor Laws	1,374	1,284	1,490	1,295	1,397	1,390	1,403	1,449	1,174	1,475	1,250	1,235	1,425	1,400	1,406	1,505	1,370	1,426	1,517	1,274	1,397	1,473	1,236	1,323	1,549	1,338	1,687	1,530	1,346	1,458	1,566	1,695	1,476	1,585	1,354	1,430
Contracts	2,538	2,143	2,654	3,338	2,602	2,614	2,541	3,366	2,728	3,672	3,654	2,470	2,751	2,360	2,368	3,725	2,683	2,524	2,506	2,594	2,786	2,962	2,374	2,802	5,182	2,679	2,939	2,846	2,674	2,852	2,878	2,728	2,677	2,811	2,339	2,474
All Others	4,867	4,526	5,146	4,638	5,072	5,017	4,850	5,556	4,972	5,501	4,816	4,112	4,768	4,680	4,780	5,029	5,142	4,750	5,029	4,698	4,730	5,085	4,390	4,650	4,575	4,526	5,217	5,362	5,250	5,653	5,753	5,554	5,383	5,432	4,886	5,113
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MOT. DISMISS	6,103	5,529	6,564	6,508	6,688	6,413	6,240	6,879	5,781	6,759	6,295	5,663	6,663	6,736	6,636	6,827	6,623	7,062	6,831	6,399	6,322	7,029	6,144	6,648	6,631	6,200	7,121	7,118	7,689	7,620	8,105	7,344	7,378	7,539	7,016	7,274
Category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Personal Injury	571	510	738	630	667	731	609	694	523	631	625	466	615	653	560	707	557	648	678	571	598	621	647	623	554	545	621	631	1,484	699	973	749	727	694	693	650
Prisoner Petitions	963	884	1,032	1,214	1,163	1,018	1,021	1,058	883	1,043	918	939	1,028	916	956	963	961	974	984	997	971	1,097	808	902	929	846	919	940	945	985	1,027	968	955	945	862	920
Civil Rights Employment	582	474	528	517	503	482	500	544	410	521	496	415	502	455	493	479	478	483	482	468	484	541	462	535	470	471	515	534	493	581	573	524	579	542	465	532
Civil Rights Other	839	809	941	909	925	895	834	845	866	854	911	745	948	862	954	1,002	964	904	1,011	932	984	956	809	879	909	845	962	901	892	976	1,028	897	921	910	831	1,000
Civil Rights ADA	79	69	67	64	76	77	62	82	72	78	63	60	81	71	59	89	101	102	89	66	92	95	74	98	82	78	93	88	72	85	105	106	109	99	92	102
Antitrust/Patent	141	126	154	128	114	187	170	162	155	160	146	173	164	150	153	164	185	158	172	187	193	164	168	167	169	181	186	206	173	192	210	182	168	175	169	195
Labor Laws	351	297	311	319	317	380	326	364	315	360	343	281	363	302	367	358	372	325	363	372	320	352	314	349	315	345	351	337	329	365	402	374	378	479	342	429
Contracts	1,128	912	1,222	1,183	1,210	1,101	1,153	1,249	1,069	1,394	1,217	1,146	1,358	1,194	1,265	1,303	1,309	1,374	1,291	1,138	1,140	1,338	1,144	1,188	1,167	1,144	1,443	1,452	1,383	1,489	1,692	1,379	1,412	1,494	1,549	1,326
All Others	1,449	1,348	1,571	1,544	1,713	1,542	1,565	1,881	1,488	1,718	1,576	1,438	1,606	2,133	1,829	1,762	1,696	2,094	1,761	1,668	1,540	1,865	1,718	1,907	2,036	1,745	2,031	2,029	1,918	2,248	2,095	2,165	2,129	2,201	2,013	2,120
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
GRANTED	2,316	2,132	2,871	2,122	2,341	2,301	2,295	2,405	2,194	2,392	2,224	1,891	2,496	2,415	3,049	2,530	2,315	2,461	2,732	2,531	2,535	2,380	1,976	2,265	2,422	2,290	3,309	2,520	2,363	2,871	2,926	2,824	3,054	2,788	2,444	2,585
Category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Personal Injury	330	281	334	267	284	309	282	269	257	293	256	219	274	259	258	307	249	276	290	249	266	327	233	250	287	253	327	298	225	333	282	257	298	277	313	314
Prisoner Petitions	299	367	475	271	325	258	329	354	411	297	265	243	319	355	529	273	289	289	344	364	406	287	242	248	345	346	499	265	275	287	322	379	497	267	256	300
Civil Rights Employment	207	167	251	208	200	155	183	184	161	180	154	129	160	164	188	160	162	187	183	164	177	161	144	177	161	160	195	166	163	230	199	198	195	204	153	151
Civil Rights Other	294	303	426	308	354	358	274	310	333	265	293	202	331	282	420	289	300	347	332	342	402	296	281	307	318	335	443	287	301	336	358	382	373	316	323	281
Civil Rights ADA	30	20	33	30	36	26	24	26	28	36	16	16	29	28	22	28	37	39	30	26	27	35	23	29	29	24	39	39	35	38	51	29	30	37	38	43
Antitrust	8	9	7	14	11	8	18	17	17	14	3	5	5	6	3	5	9	7	15	5	4	9	2	9	8	2	21	6	6	5	13	16	9	15	6	7
Patent	45	55	28	52	39	46	72	52	42	61	44	46	61	44	44	58	43	57	57	141	61	49	59	64	63	70	87	96	78	74	74	79	67	77	69	70
Labor Laws	118	89	120	107	112	104	91	97	114	122	105	88	128	113	139	139	101	124	126	121	121	113	87	124	118	123	137	101	102	112	119	99	118	126	125	183
Contracts	394	330	545	385	452	414	436	478	401	483	457	401	549	523	581	534	518	530	671	504	438	497	426	497	502	413	668	528	481	605	673	587	524	632	428	501
All Others	591	511	652	480	528	623	586	618	631	641	631	542	640	641	864	737	607	605	684	615	633	606	479	560	591	564	893	734	697	851	835	798	943	837	733	735
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
DENIED	853	819	1,229	746	914	800	844	952	1,071	784	753	701	952	888	1,680	844	807	811	959	919	1,148	821	653	823	890	920	1,276	889	856	1,011	1,033	1,019	1,310	882	914	927
Category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Personal Injury	64	71	107	85	79	75	56	76	70	43	58	58	79	81	116	77	68	73	84	73	103	79	46	61	70	79	94	85	88	73	81	74	97	86	69	65
Prisoner Petitions	108	128	177	83	105	101	118	120	170	94	76	79	131	115	188	81	62	95	144	132	160	92	80	96	111	107	183	99	115	127	135	114	258	88	96	100
Civil Rights Employment	99	73	95	60	96	73	89	91	95	68	65	54	77	72	75	83	74	71	87	73	86	66	62	70	73	72	93	71	71	89	90	75	86	76	97	72
Civil Rights Other	119	101	190	119	113	109	93	112	134	115	78	112	128	132	155	128	129	104	122	123	135	83	62	120	141	122	169	95	103	130	134	113	124	123	88	74
Civil Rights ADA	8	10	10	10	8	10	9	9	8	4	8	7	7	5	11	6	10	13	14	12	17	20	8	6	7	21	12	17	18	9	12	5	19	14	14	21
Antitrust	6	4	6	1	10	3	1	7	4	5	3	-	-	4	7	11	3	8	2	5	4	-	4	1	5	3	28	2	6	5	13	6	5	4	4	2
Patent	20	18	31	10	19	13	16	23	44	27	18	16	27	20	29	20	19	14	17	20	34	18	7	28	20	20	29	11	10	17	23	28	40	12	10	12
Labor Laws	40	53	68	57	66	54	42	46	42	62	38	41	66	53	73	47	53	57	55	61	73	57	48	40	56	52	73	53	46	55	59	66	57	62	61	72
Contracts	167	166	227	142	218	165	217	210	226	167	188	142	200	171	255	167	183	158	215	195	224	198	148	172	199	194	244	182	171	227	238	219	273	190	221	237
All Others	222	195	318	179	200	197	203	258	278	199	221	192	237	235	771	224	206	220	219	225	312	208	188	229	208	250	351	274	228	279	248	319	351	227	263	272

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Revised: February 12, 2010

Prepared by Statistics Division, Administrative Office of the U.S. Courts.

Cases and Motions to Dismiss Filed From January 2007 through December 2009

	2007												2008												2009											
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
MOOT	252	236	349	249	266	218	260	333	259	260	214	204	314	285	298	368	315	267	293	257	334	268	213	278	275	306	390	333	322	357	410	356	467	347	309	328
Category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Personal Injury	15	17	24	21	21	37	33	28	15	19	27	12	38	23	19	33	29	32	31	21	27	27	13	24	32	29	36	23	39	38	21	27	19	15	33	17
Prisoner Petitions	24	36	29	22	16	15	23	35	33	35	23	14	36	35	41	26	32	37	32	28	35	26	18	21	27	19	32	32	38	28	40	28	49	37	24	29
Civil Rights Employment	27	28	38	27	33	21	21	20	22	23	21	20	39	23	27	35	14	21	25	17	23	23	17	26	32	35	39	23	36	26	32	37	43	29	30	31
Civil Rights Other	43	33	62	41	44	35	47	46	47	43	36	43	56	47	64	51	61	48	49	53	67	58	33	57	50	51	72	55	64	71	67	53	81	56	38	68
Civil Rights ADA	3	3	10	2	2	2	7	6	4	2	3	1	1	3	4	2	7	4	1	6	3	3	3	2	7	4	1	8	1	2	3	2	6	9	8	5
Antitrust	2	-	-	-	-	-	8	8	3	2	1	-	1	-	-	-	-	-	-	1	20	2	3	2	-	-	-	2	2	2	-	-	6	10	4	6
Patent	13	6	2	1	4	5	14	4	3	3	4	2	2	2	4	7	1	2	7	1	11	5	5	6	6	11	4	3	2	3	14	16	3	8	8	1
Labor Laws	12	11	23	17	21	13	9	17	18	11	9	12	9	21	16	18	17	11	14	18	13	22	27	16	23	20	17	31	14	20	25	29	29	20	11	23
Contracts	47	45	62	48	40	50	39	68	34	53	36	45	60	55	48	121	66	42	63	39	47	42	33	52	48	45	84	62	59	72	81	52	95	69	60	55
All Others	56	57	99	70	85	45	68	91	79	69	55	53	72	76	75	75	88	70	71	73	88	60	61	72	50	92	105	94	67	95	127	112	136	94	93	93
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
GRANTED IN PART AND DENIED IN PART	371	263	586	250	319	295	299	356	390	285	286	226	298	335	545	296	325	315	342	390	470	330	271	358	303	371	586	287	377	428	435	438	563	405	400	346
Category	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Personal Injury	22	26	30	17	18	9	19	23	15	21	11	22	16	21	28	20	16	29	19	32	30	25	10	19	16	20	28	9	13	18	22	20	22	24	24	21
Prisoner Petitions	42	32	65	14	21	27	27	31	64	20	22	17	42	32	73	20	45	29	33	64	58	17	28	17	27	50	81	24	34	36	51	39	103	36	35	21
Civil Rights Employment	58	46	71	49	40	43	39	44	38	48	26	28	45	52	69	44	43	44	49	48	50	35	29	40	43	44	63	46	32	56	40	56	51	36	44	40
Civil Rights Other	73	50	153	55	97	74	65	72	77	60	74	52	54	69	122	58	52	65	58	63	91	72	55	59	70	77	152	58	62	100	84	77	91	89	64	67
Civil Rights ADA	6	6	6	1	2	5	2	8	5	3	3	4	9	3	12	7	5	3	6	2	7	9	5	5	9	3	20	9	7	3	8	5	8	4	7	4
Antitrust	3	3	3	2	3	3	-	5	3	1	3	-	-	1	3	-	1	1	2	11	2	2	3	-	5	3	4	3	2	3	-	3	1	1	5	-
Patent	5	3	2	5	-	3	3	4	6	5	6	1	3	5	5	3	5	4	6	20	7	9	5	11	5	6	5	6	3	5	3	8	10	5	4	10
Labor Laws	25	11	26	15	21	7	19	15	21	20	19	12	14	19	20	12	17	19	19	13	18	14	17	17	17	16	30	16	11	15	31	25	32	16	22	16
Contracts	69	45	103	37	51	53	54	68	60	49	51	47	44	67	74	54	50	57	80	52	74	76	44	49	45	52	87	58	103	86	79	73	88	83	64	68
All Others	68	41	127	55	66	71	71	88	101	58	71	43	72	66	139	78	91	64	70	85	133	71	75	141	66	100	116	58	110	106	117	132	157	111	131	99
	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec

1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed from January 2007 through December 2009. Rule 12(b)(6) motions to dismiss cannot be broken out in this data.
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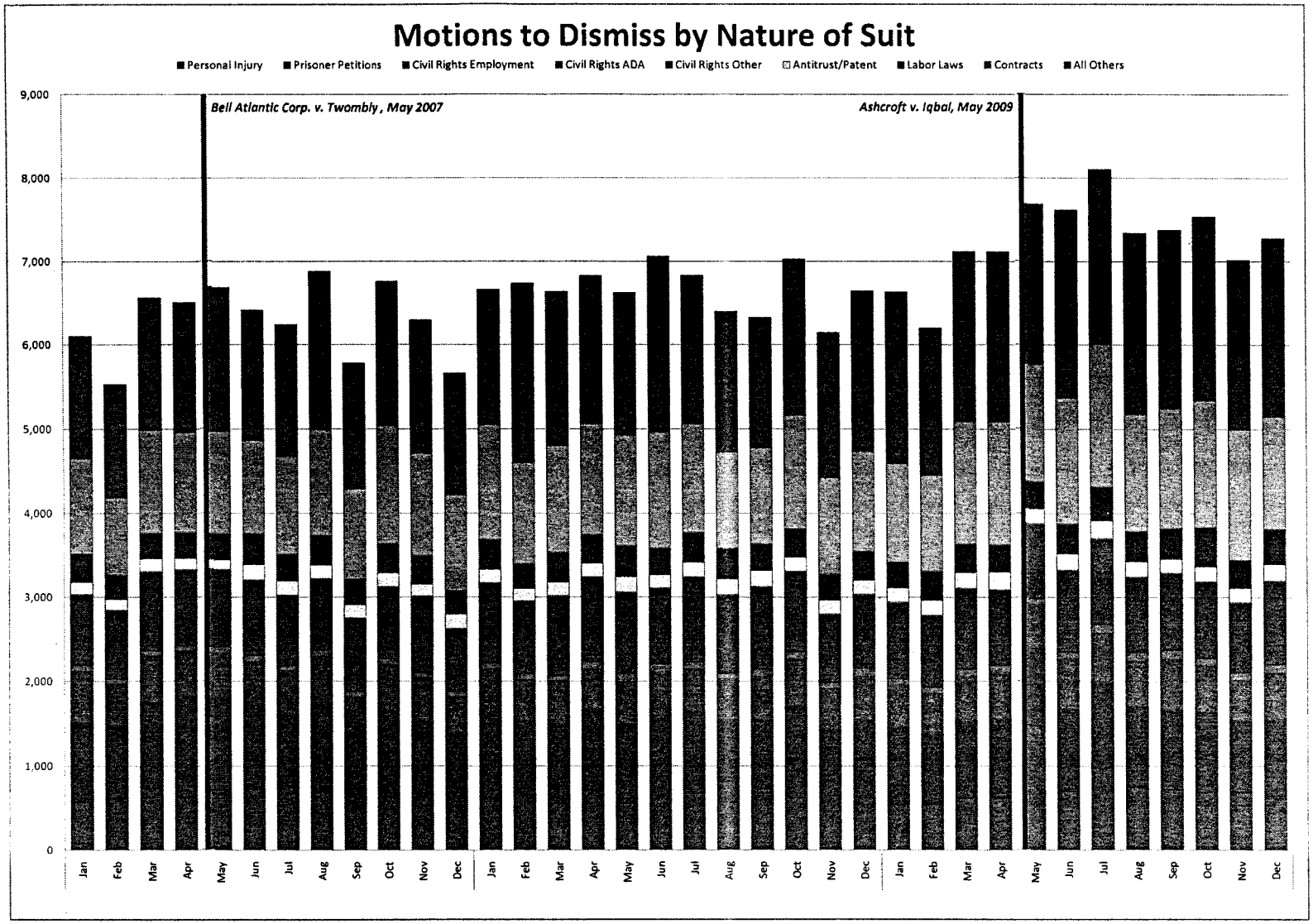

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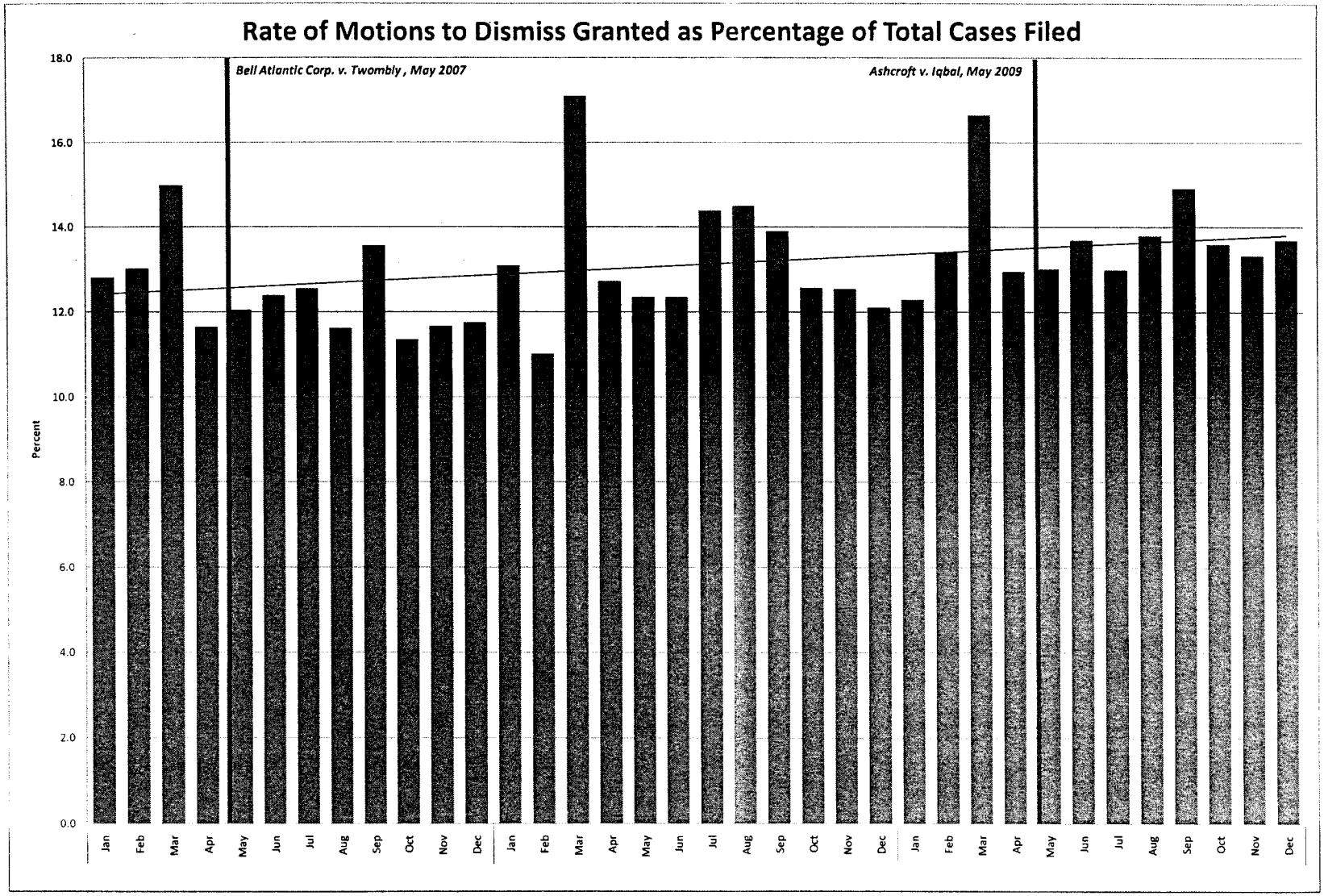

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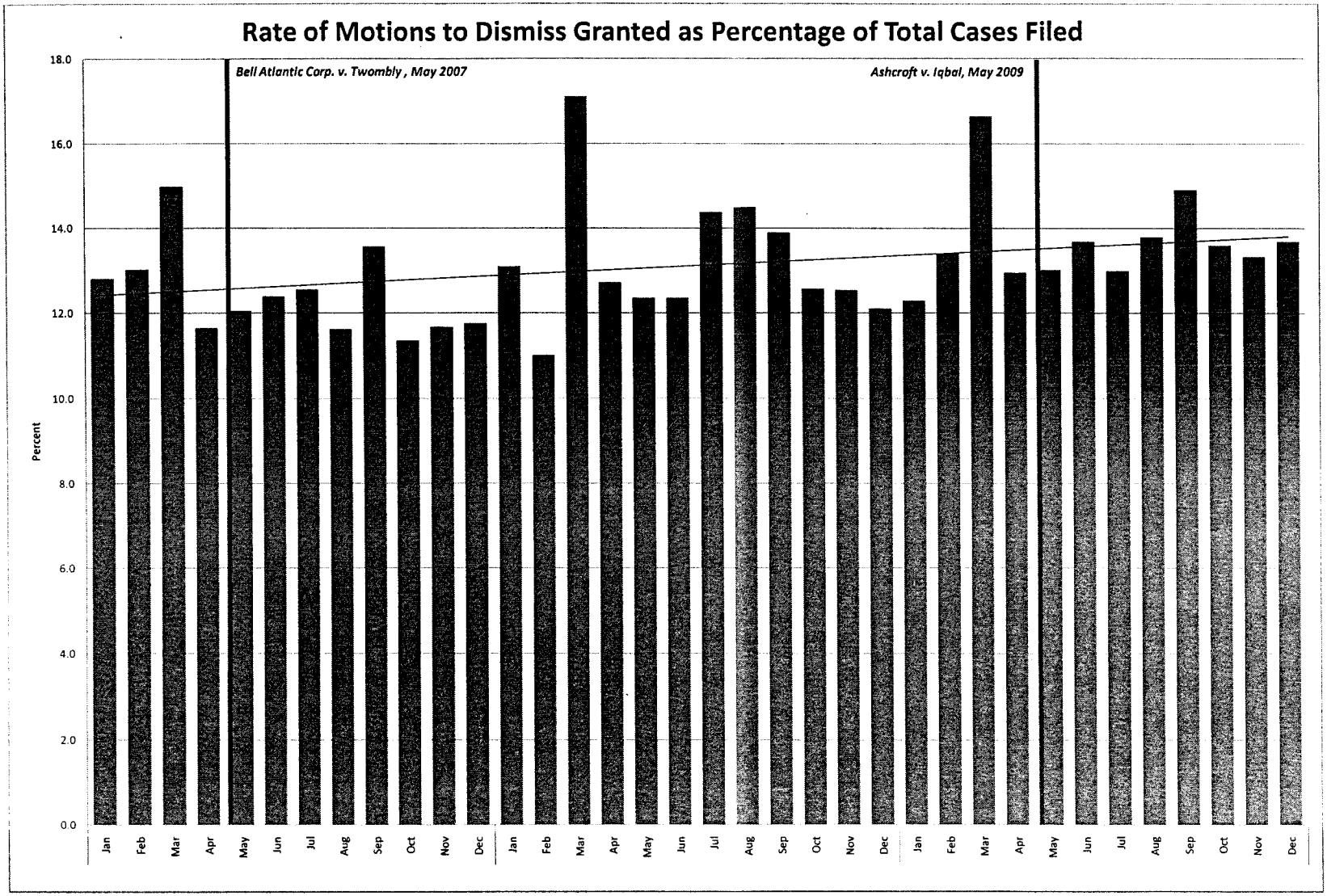

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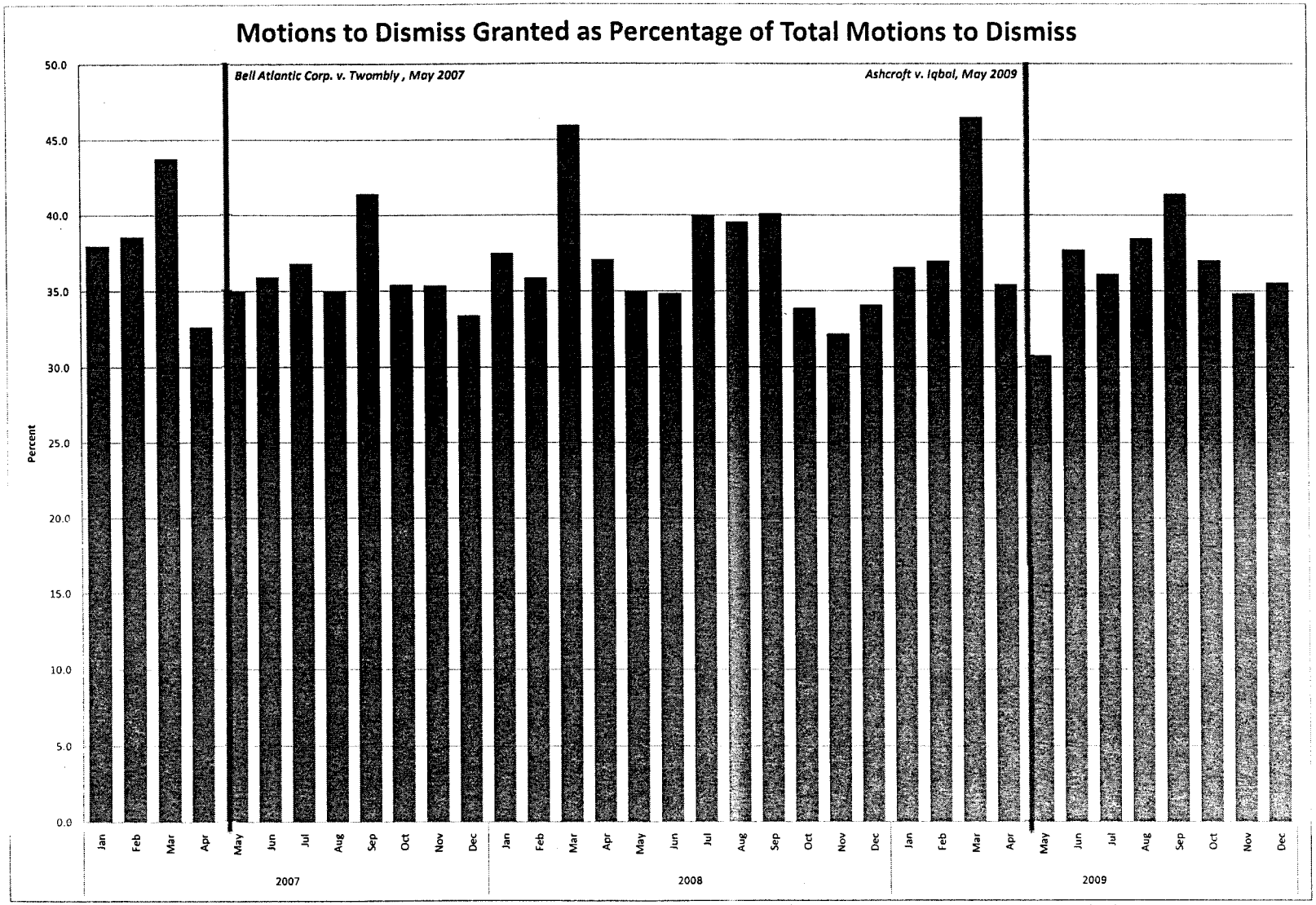

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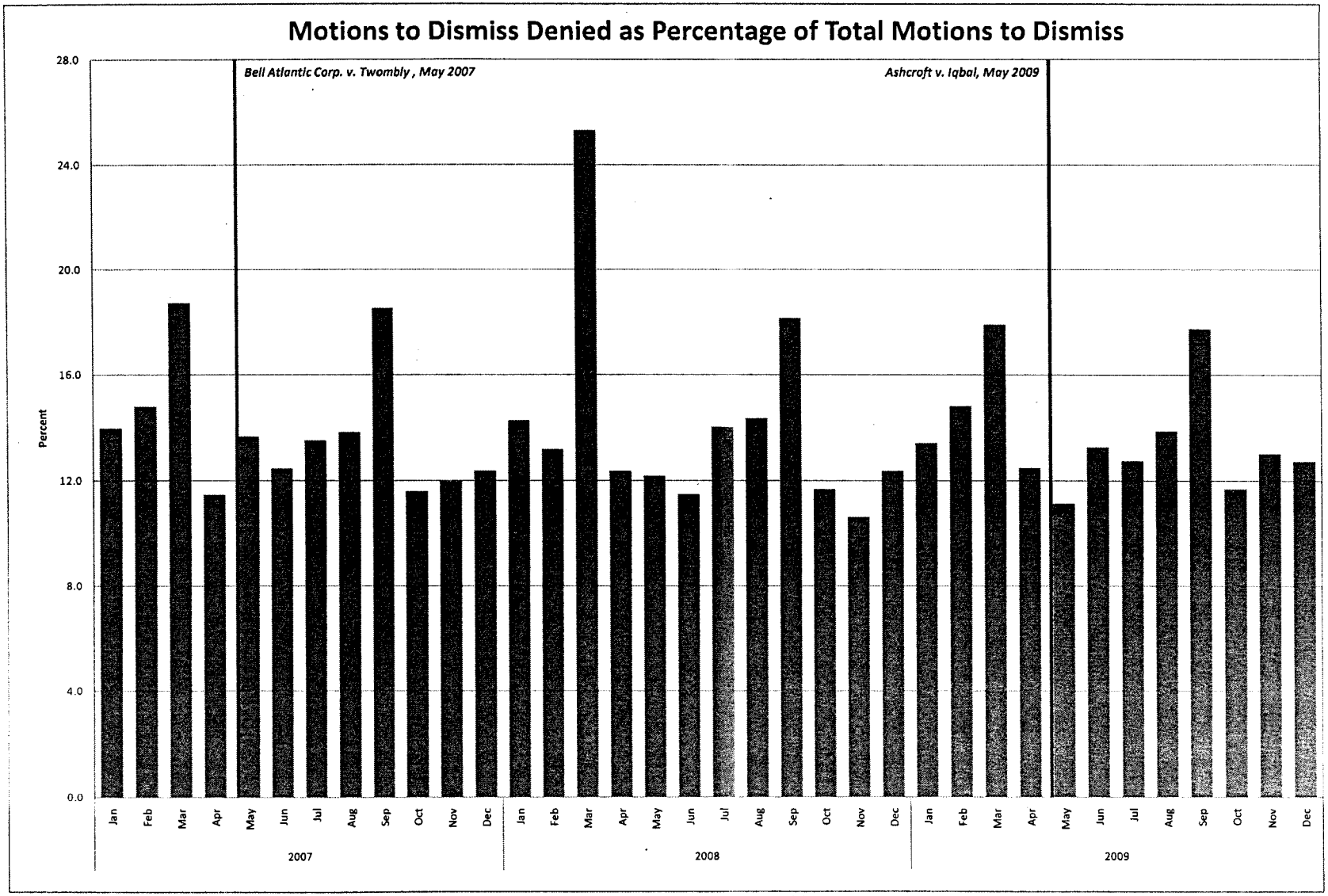

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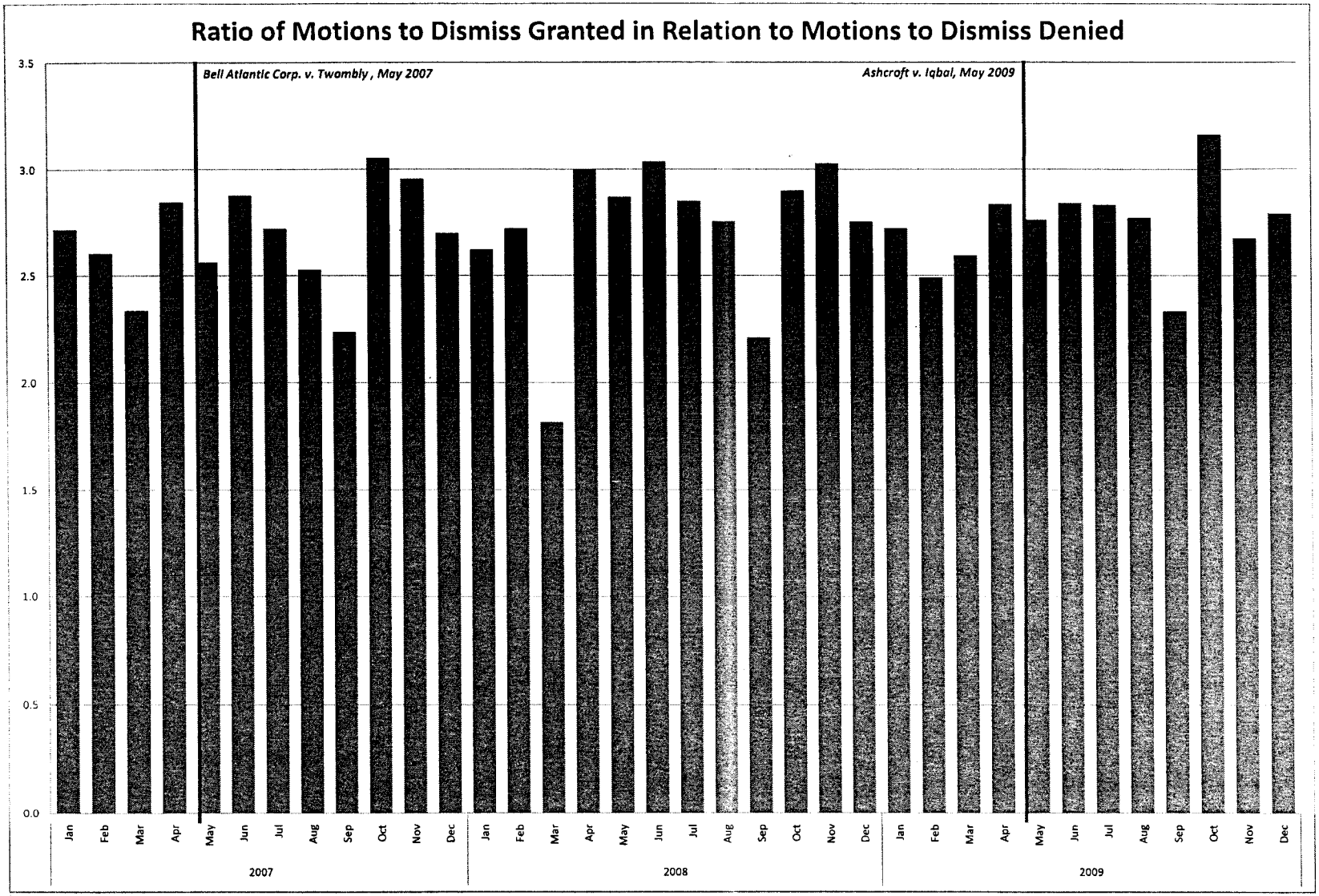
Prepared by Statistics Division, Administrative Office of the U.S. Courts



1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed from January 2007 through December 2009. Rule 12(b)(6) motions to dismiss cannot be broken out in this data.
2. Data does not include motions to dismiss that were granted in part and denied in part.
3. Does not include data on whether motions to dismiss were granted with or without leave to amend.
4. Data does not include MDL cases in the number of motions to dismiss.
5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistics system, and they did not pass through all the quality controls of the statistics system.

Revised: February 12, 2010

Prepared by Statistics Division, Administrative Office of the U.S. Courts

MOTIONS TO DISMISS IN "CIVIL RIGHTS EMPLOYMENT CASES" AND "CIVIL RIGHTS OTHER CASES" PRE-*TWOMBLY* (OCTOBER 2006 - APRIL 2007) AND POST-*IQBAL* (JUNE - DECEMBER 2009)*

Civil Rights Employment Cases

Monthly Average for Seven Months before *Twombly*

1,101 cases
523 motions to dismiss (48% of cases)
190 motions granted (17% of cases)
77 motions denied (7% of cases)

Monthly Average for Seven Months after *Iqbal*

1,237 cases
542 motions to dismiss (44% of cases)
190 motions granted (15% of cases)
83 motions denied (7% of cases)

Civil Rights Other Cases

Monthly Average for Seven Months before *Twombly*

1,314 cases
878 motions to dismiss (67% of cases)
304 motions granted (23% of cases)
131 motions denied (10% of cases)

Monthly Average for Seven Months after *Iqbal*

1,403 cases
938 motions to dismiss (67% of cases)
338 motions granted (24% of cases)
112 motions denied (8% of cases)

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* 1. Data includes motions to dismiss filed under Rule 12(b)(1)-(7) in cases filed seven months before *Twombly* and seven months after *Iqbal*.

2. Does not include data on whether motions to dismiss were granted with or without leave to amend.

3. Data does not include motions to dismiss that were granted in part and denied in part.

4. Data does not include MDL cases in the number of motions to dismiss.

5. The data were extracted directly from the text of 94 district court docket entries, rather than the official statistical system, and they did not pass through all the quality controls of the statistics system.

TAB 5

Rule 45 Issues

For the October 2009 Committee meeting, the Discovery Subcommittee brought forward a variety of issues that had emerged from a literature review on Rule 45 and from informal inquiries to experienced lawyers about issues of concern. Building on the full Committee's discussion of the rule in October, the Subcommittee has continued its work. Included with this memorandum should be notes on Discovery Subcommittee conference calls on Nov. 5, 2009, Dec. 4, 2009, Jan. 22, 2010, and Feb. 3, 2010. In addition, the Discovery Subcommittee obtained a thorough research memorandum from Andrea Kuperman on the divergent rulings of courts on whether Rule 45 empowered them to compel corporate officers to attend and testify at hearings or trials even though they lived and worked in another state and would have to travel more than 100 miles to attend proceedings in court.

The Discovery Subcommittee's further review of Rule 45 issues has considerably narrowed the topics for discussion at the current Committee meeting. The Subcommittee has decided that there is no reason for further consideration of rule changes regarding cost allocation or the current provisions on manner of service of subpoenas. It has also completed initial drafting work on possible rule changes to address two of the concerns raised during the October, 2009, meeting -- relocating and slightly revising the notice provision regarding "documents only" subpoenas, and providing for the discretionary transfer of motions regarding enforcement of subpoenas to the judge presiding over the main action when another court is the "issuing court" for the subpoena.

The Discovery Subcommittee has also spent considerable time discussing how to deal with the district court split in interpretation of Rule 45 regarding compelling corporate officers to travel more than 100 miles and from another state to testify at a trial or hearing. The Subcommittee has referred to this issue as the *Vioxx* issue, after In re Vioxx Products Liab. Litig., 438 F.Supp.2d 664 (E.D.La.2006), a leading case in support of such broad subpoena power. The Subcommittee has concluded that *Vioxx* and other cases holding that party witnesses can be required to attend trial without regard to distance misread Rule 45. The Subcommittee also has concluded that the Rule should be amended to clarify and restore the original meaning — that party witnesses, like other witnesses, are subject to the distance limitations of the rule. The Subcommittee recognizes, however, that this is an issue subject to considerable debate and therefore will recommend, as discussed below, that it be one of the topics addressed at a mini-conference the Subcommittee proposes to hold this Fall.

The Subcommittee circulated in the materials for the October 2009 meeting a brief amendment idea that would reject the *Vioxx* interpretation of the rule, and that amendment language is included in this memorandum. The Subcommittee also has developed an initial version of a possible approach to granting discretionary authority for the court to order party witnesses to attend to testify, which is also included in this memorandum.

Finally, the Subcommittee has spent considerable effort discussing ways to simplify Rule 45. This effort received a great boost from Judge Baylson, who shared his ideas for aggressive streamlining of the rule and participated in some of the Subcommittee's conference calls. The simplification effort has yielded three possible ways to simplify Rule 45. One important focus of the discussion in Atlanta will be on whether one or another of these approaches looks promising.

Because significant simplification of Rule 45 would require a major re-write of the rule that could have far-reaching effects, the Subcommittee has concluded that a mini-conference should be convened to elicit the views of practitioners, academics, and others with interests in the operation of the rule. If the Committee agrees, such a mini-conference could be convened this Fall, perhaps in conjunction with the Committee's Fall meeting, and could address possible

revisions to Rule 45 like the three simplification proposals contained in these materials. Because the *Vioxx* issue has been vigorously debated, the mini-conference could also address the advisability of an amendment to Rule 45 that either rejects or partially adopts the *Vioxx* approach. Following the mini-conference, the Subcommittee would make concrete proposals for the Committee's consideration.

Accordingly, this memorandum sets forth essentially three sets of discussion topics:

(1) Notice and transfer provisions: The Subcommittee has completed initial drafting of possible rule-amendment provisions that (a) would relocate and slightly revise the notice provision regarding "documents only" subpoenas installed in 1991 and (b) create authority for a judge in the issuing court to transfer a motion regarding a subpoena to the court in which the action is pending. A draft Committee Note is also included. Although substantial progress has been made on these issues since last October's meeting, the Subcommittee is not recommending that these rule changes be forwarded to the Standing Committee immediately because the other issues it is bringing before the Committee remain unresolved and immediate action on these issues does not seem urgent. Thus, the Subcommittee hopes to learn the full Committee's views on the drafts that have been developed, but it is not asking for a final approval at this meeting of these amendments.

(2) The *Vioxx* issue -- distance limitations on hearing or trial testimony by party witnesses: There is a clear split of authority on whether officers of a party may be forced to attend trial without regard to the distance limitations of Rule 45. *Vioxx* and other cases read Rule 45 to permit such a result, while other cases hold that such a reading is contrary to the clear meaning of Rule 45. Since the 1991 amendments seem to have created this division (with both sides invoking the "plain language" of the present rule), some rule change appears warranted. Moreover, even among those courts who read the current language to prohibit subpoenas on distant party witnesses, it seems that some regard having such power as desirable. After considerable discussion, all members of the Subcommittee believe that the original intent of the rule should be restored -- subpoenas for party officers should be subject to the same distance limitations as other witnesses. This memorandum includes the possible amendment initially circulated last October to close the gap that was relied upon by courts finding they had the power to compel attendance at trial, and also a sketch of a provision that could grant judges discretionary power to order such attendance by party witnesses. Andrea's memorandum contains a thorough discussion of the case law on this issue. We would appreciate the Committee's view.

(3) Simplifying and shortening the rule: Considerable discussion of the question of simplifying and shortening the rule produced some added insights and three different possible approaches. An important focus of the discussion in Atlanta would be on whether significant simplification of Rule 45 is desirable and, if so, whether one of these three approaches is more appropriate. They are:

(a) Eliminating the three-ring circus: One view is that the complexity of Rule 45 arises primarily from a "three-ring circus" resulting from the overlapping and somewhat discrepant provisions in the current rule about what should be the "issuing court" (Rule 45(a)(2)), how the place of service is handled (Rule 45(b)(2)), and where performance can be required (Rule 45(c)(3)), leading to a large variety of alternative outcomes. One way of simplifying the rule, therefore, would be to eliminate the three-ring circus by providing (a) that all subpoenas are issued by the court presiding over the action, (b) they may be served nationwide (as in the criminal rules), and (c) the subpoenaed party may be

required to perform only within the geographical limits now contained in the Rule 45. This approach would not markedly shorten the rule.

(b) Aggressively streamlining the rule: A more aggressive approach would not stop with revisions to eliminate the three-ring circus but also try to trim the details regarding many other matters currently addressed in great detail in Rule 45. The idea would be to rely on the judge to implement the discovery rules to resolve parallel disputes in the subpoena context. This approach could markedly shorten the rule, but might remove current provisions that are important.

(c) Creating a new discovery subpoena rule and shortening Rule 45 so it deals only with subpoenas for hearings or trials: Another way to simplify Rule 45 would be to remove from it provisions that deal only with discovery subpoenas and put them in a new rule (perhaps Rule 36.1) housed with the other discovery rules. That would entail creating a new rule, but also putting the discovery subpoena provisions in the same place in the rules as the other discovery provisions. If most of what is currently in Rule 45 does not apply to subpoenas for hearings or trials, it would also permit a considerable shortening of Rule 45 as the material that is no longer necessary is removed.

For topic (3), this memorandum provides sketches of starting points for each of the three approaches. None of these sketches is intended as a current proposal for serious discussion of amendment language; instead, they are intended to spark and inform discussion. So while input about the specifics provided in the sketches would be very valuable, the main objective will be to evaluate whether each of these approaches has general advantages or drawbacks, and whether serious efforts should be made to simplify or shorten the rule. Input on the advisability of a mini-conference would also be helpful.

(1) Notice and transfer

During the October 2009 meeting these topics were discussed separately, but because the Subcommittee has agreed tentatively on the appropriate treatment they are combined here. A draft Committee Note is also included. The draft Committee Note has not been extensively discussed by the Discovery Subcommittee. It includes some bracketed portions and footnotes about possible discussion issues. A brief introduction may be useful:

Notice: The relocation of the notice provision to Rule 45(a) is designed to make it more visible, and prompted by reports that a significant number of lawyers are not giving the required notice. It has been augmented to call for provision of a copy of the subpoena.

Additional possible ideas discussed last October were not included in this draft, however. Although the provision might state that the notice must be given a specific number of days before service of the subpoena, this idea was viewed as adding too much complication to the rule. Another idea was requiring a further notice after service about the actual production, perhaps also specifying that the notice must describe the materials and prescribing the duties of the party that obtained the materials to provide them to the other parties. Although finding out when materials have been produced and what they are is usually desirable, it was thought that this could be the responsibility of counsel once they were notified that the subpoena was to be served. Adding another requirement in the rule would raise more questions about what to do when that additional requirement was not satisfied. Nonetheless, because there was considerable sentiment in the bar for a second notice, it may be that if this change is published for public comment the invitation for comment should focus attention on the fact that a second notice was not included so that any

who strongly favor adding such a requirement would be prompted to offer their views. Finally, it was decided not to include any rule provisions about sanctions for failure to comply with the notice requirement. The decision how to deal with such failures is inherently case-specific, and putting sanctions provisions into the rule may invite more efforts to obtain sanctions.

Transfer: During last October's discussion, it seemed that all favored some provision for transfer of subpoena motions under appropriate circumstances. The standard selected -- "in the interests of justice" -- was found most useful. Other transfer provisions (e.g., 28 U.S.C. §§ 1404(a) and 1407) also invoke the convenience of the parties and the witnesses, but they are about transferring whole cases. And the Committee Note could elaborate substantially about how the court should approach the question whether to transfer the motion. The goal is to provide flexibility for the court, but also to recognize that with nonparty witnesses there are important reasons for respecting their desire to have subpoena matters resolved close to home. The appropriate verb seemed to be "transfer" rather than "remit." Transfer is the word used in §§ 1404(a) and 1407, and recognizes the authority of the transferee judge to order further briefing, etc.

The Subcommittee also discussed the question of "jurisdiction" of the transferee judge. At least one D.C. Circuit case suggested that under the existing rules the distant court presiding over the main action would not have jurisdiction. But a rule change seemed sufficient to address this question; already Rule 45 provides that a subpoena can reach across state lines, so authorizing transfer of a motion seems something that a rule should be able to do.

The Subcommittee is not recommending that these possible amendments be forwarded to the Standing Committee at present. As detailed in Topics (2) and (3) below, it is also considering further changes to Rule 45, and it seems undesirable to proceed piecemeal. Moreover, some possible changes under discussion (such as changing what is the "issuing court") would affect content of these possible amendments. There surely is no reason to change something now only to have to change it again in a year or two.

With that background, the following is the current draft:

Rule 45. Subpoena

(a) In General.

* * * * *

(4) Notice to other parties. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, before the subpoena is served, a notice including a copy of the subpoena must be served on each party.

(b) Service.

(1) ***By Whom; Tendering Fees; ~~Serving a Copy of Certain Subpoenas.~~*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

* * * * *

(c) Protecting a Person Subject to a Subpoena.

* * * * *

(2) ***Command to Produce Materials or Permit Inspection.***

* * * * *

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written

objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(iii) If the action is pending in a court different from the issuing court, the issuing court may, in the interests of justice, transfer the motion to the court in which the action is pending.

* * * * *

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(D) *Transferring Motion to Court in Which Action Pending.* If the action is pending in a court different from the issuing court, the issuing court may, in the interests of justice,

transfer the motion to the court in which the action is pending.

DRAFT COMMITTEE NOTE

Rule 45 is a workhorse in civil litigation; nonparty discovery based on a subpoena is a frequent event in the federal courts. In 1991, the rule was extensively amended. Some issues have emerged since the 1991 revision, and the current amendments respond to those issues.

Subdivision (a). Rule 41(a)(4) is added to highlight and slightly modify a notice provision first included in the rule in 1991.

The 1991 amendments for the first time authorized use of a subpoena to obtain discovery from a nonparty similar to Rule 34 discovery from a party, and without any need for a simultaneous deposition. Because such discovery would not require notice to the other parties (as a deposition would), the 1991 amendments added a requirement to Rule 45(b)(1) that prior notice of the service of a "documents only" subpoena be given to the other parties. The Committee Note accompanying that amendment explained that "[t]he purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things." In the restyling of the rule in 2007, Rule 45(b)(1) was clarified to specify that the notice to the other parties must be served before the subpoena was served on the witness.

The Committee has been informed that, despite the added notice requirement, parties serving subpoenas frequently fail to give notice to the other parties, and that this failure can significantly interfere with the trial preparation of other parties. This amendment responds to that concern by moving the notice requirement to a new provision in Rule 45(a), where it is hoped that it will be more visible. In addition, new Rule 45(a)(4) requires that the notice include a copy of the subpoena. This requirement is added to achieve the original purpose of enabling the other parties to determine whether they want to serve a demand for additional materials.

The 1991 Committee Note also observed that "other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced." Rule 45(a)(4)'s added requirement that the notice include a copy of the subpoena should enable the other parties to address these concerns. Parties desiring access to information produced in response to the subpoena will need to follow up with the party serving the

subpoena to obtain such access; when access is requested, it should be possible to arrange reasonable provisions for access.[1]

[The rule does not address the appropriate response if a party fails to give the notice required by Rule 45(a)(4). It is expected that courts will deal appropriately with such problems should they arise. As noted above, the Committee has been informed that failure to comply with the current notice provision has on occasion interfered significantly with the trial preparation of other parties. Courts have ample remedies to deal with such problems should they arise.][2]

Subdivision (b). The former notice requirement in Rule 45(b)(1) has been deleted because it has been moved to new Rule 45(a)(4).

Subdivision (c). Subdivision (c) is amended to authorize an issuing court to transfer a motion to quash or enforce a subpoena to the court presiding over the main action if that transfer would be "in the interests of justice."

Subpoenas are essential to obtain discovery from nonparties; for discovery occurring outside the district in which the action is pending, they must be issued by the court for the district in which the discovery is to occur. Rule 45(c) therefore provides that motions to quash or enforce subpoenas must in the first instance be directed to the issuing court.[3] In some instances, that requirement can constitute an important protection for local nonparties subpoenaed to provide discovery for use in litigation in a distant district.

Often the issues raised in relation to enforcement of a subpoena implicate only the local nonparty served with the subpoena. Objections based on medical issues, for example, are likely to be confined to local matters. Questions of burden of compliance -- an important concern recognized in Rule 45(c) -- often focus mainly on

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[1] As a reminder, in our discussions we have considered flagging the question (in the Request for Comment) whether there should be a rule provision requiring a further notice after receipt of material pursuant to the subpoena. Our conclusion has been that this additional requirement would be more likely to produce problems than to solve them, and that Committee Note language saying parties are obliged to protect their own interests after they receive the required notice should be sufficient.

[2] This bracketed paragraph is included to give an idea of what might be said about the possibility of sanctions. The Subcommittee's initial conclusion was that addressing sanctions -- at least in the rule -- could produce more harm than good. Some mention of sanctions in the Note might nonetheless be worthwhile, and the draft paragraph is meant to be very general.

[3] The Note could mention that there seems no barrier to prevent the nonparty served with the subpoena from bringing a motion for a protective order before the court presiding over the main action, but saying so seems unnecessary.

the local circumstances of the nonparty subject to the subpoena. In such situations, the issuing court is often best equipped to resolve the dispute.

On occasion, however, resolving disputes about subpoenas may risk interfering with the management of the underlying case by the judge presiding over that case, and also may be a substantial burden for the issuing court, which is called upon to address issues already or also to be addressed by the court presiding over the main action. Such problems may arise in a wide variety of circumstances. Rulings already made by the judge presiding over the main action may have resolved identical or closely analogous issues. Subpoenas presenting identical issues may be served or expected in many districts, making consistent resolution of these recurrent issues urgent. Sometimes the local nonparty may indeed prefer to submit the issue to the court presiding over the main action, whose views may already be known, and it could be the party to the main action that seeks instead to proceed before the local issuing court. Proceeding before the issuing court could result in an inappropriate burden for the issuing court and create a risk of handling a discovery matter in a way inconsistent with rulings of the court presiding over the main action.

A rule cannot capture all these varying circumstances. This amendment instead directs the court to look to the interests of justice in making a decision whether to transfer. This standard borrows from the transfer standard in 28 U.S.C. §§ 1404(a) and 1407. It also carries forward a comment in the Committee Note to the 1970 amendment of Rule 26(c): "The court in the district where the deposition is being taken may, and frequently will, remit the deponent or party to the court where the action is pending."

The starting point in applying this standard should be to recognize the important interest a local nonparty often has in obtaining a ruling on its subpoena obligations close to home. The burden is therefore on the party seeking a transfer of the motion to demonstrate that transfer is justified. If the issues raised are essentially "local," such as medical concerns or burden on the nonparty, the burden to justify a transfer may be heavy. But the interests in local resolution may sometimes not be strong. For example, if the local nonparty is actually closely linked to one of the parties to the litigation, or engages in substantial relevant activities in the district where the action is pending, those factors may reduce the importance of resolving the matter in the issuing court. If the nonparty actually favors a transfer, and the objection to transfer comes from the party who served the subpoena, the possibility that the party who served the subpoena may be seeking to avoid resolution by the judge presiding over the main action may support transfer. If there are concerns about consistency in resolving discovery matters, either because they have already been addressed by the court presiding over the main action or because they are likely to recur in

a number of districts in which subpoenas have been served or are anticipated, those considerations may weigh in support of transfer.

In considering transfer, the issuing court may also refer to the distance between it and the court in which the main action is pending. Rule 45 itself recognizes that parties may sometimes be required to travel from one state to another to attend court proceedings, and may sometimes be required to travel great distances within a state to attend court proceedings. Even if the court presiding over the main action is distant, resolution of subpoena disputes would ordinarily be more easily handled through telecommunications that would minimize the burdens on the local nonparty served with the subpoena.

[Whatever the resolution of the discovery dispute, this transfer authority does not change Rule 45's direction that the discovery itself occur in the district in which the issuing court sits. There should be no question about the authority of the issuing court to transfer the decision of the discovery dispute, or about the authority of the court presiding over the main action to resolve the discovery dispute. Indeed, the rules could require that the discovery itself occur in the district in which the main action is pending. Compare Fed. R. Crim. P. 17(e) (authorizing nationwide service of subpoenas for testimony in trials or hearings in criminal cases). Rule 45 itself recognizes that subpoenas may require witnesses to cross state lines to testify in trials or hearings. And other civil rules (e.g., Rules 4(k)(1)(B) and 4(k)(2)) extend the summons power well beyond state lines. Given that the initial decision to transfer the motion must be made by the local issuing court, that telecommunications may often make actual travel to a distant court unnecessary, and that the actual discovery will occur in the issuing district, there should be no "jurisdictional" issue when transfers do occur.][4]

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[4] This bracketed paragraph is included as a possible method of addressing something that may be on the minds of some. On the one hand, a statement in a Committee Note does not create authority to expand federal courts' "jurisdiction." Either that authority exists or it does not, and it may or may not be expanded by a rule. Fed. R. Crim. P. 17(e) is much more aggressive in using the jurisdictional reach of the rules than Rule 45. On the other hand, there may be a value in addressing the jurisdiction question in the Committee Note.

(2) Attendance of party witnesses to testify at a hearing or trial

This issue was introduced and discussed in some detail at the October 2009 meeting. As introduced then, it came to prominence in part due to the decision in In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D. La. 2006), holding that a high officer of defendant Merck could be required to come from New Jersey to New Orleans to testify in a potentially bellwether trial being held in connection with MDL proceedings. As noted last October, there appeared to be a considerable split of opinion on whether the 1991 amendments to Rule 45 authorized such a requirement to testify in the absence of service of a subpoena in compliance with Rule 45(b)(2). The problem arose because Rule 45(c)(3)(A)((ii) only requires that a subpoena be quashed if it requires the witness to travel too far when the witness is neither a party nor the officer of a party.

Courts on both sides of the question say that the current rule supports their view and rely on the "plain language" of the current rule. As a result, there is a strong argument for clarifying the rule, but that does not answer the question what the rule should say. At the request of the Subcommittee, Andrea Kuperman prepared a memorandum on the divergent approaches to this question in the current case law. That memorandum should be included in the agenda book. Among the things it shows is a genuine split in the cases and an apparent desire among some judges for more flexibility in ordering party witnesses to testify at trial.

Since the October meeting, the Subcommittee has spent considerable additional time discussing these issues, and it eventually reached consensus in favor of making clear that party witnesses may not be compelled to travel more than 100 miles from another state to testify at trial. It now returns with two alternative approaches, seeking the Committee's views. On one point, the Subcommittee readily agreed -- the rule should not be that a party has an unlimited ability to subpoena and compel attendance at trial of a party's officer. But the question whether there should be some authority for the court to command the attendance of important party witnesses at trial engendered extended discussion in the Subcommittee and deserves the attention of the full Committee.

Some additional background may be useful. The treatment of travel requirements for witnesses is not entirely consistent as between the discovery rules and Rule 45. For a deposition, the conventional notion is that the deposition of any party witness can be noticed in the forum district, and a subpoena is not necessary to compel attendance of the witness. Rule 37(d)(1)(A) says further that if a party or an officer, director, managing agent, or person designated under Rule 30(b)(6) fails to appear the court may impose sanctions under Rule 37(b). Thus, as to those party witnesses a simple Rule 30 notice can require (subject to a protective-order motion) that they attend and testify in the forum. It may seem odd that although the court can enter default or dismiss the case for failure to produce such witnesses in the forum for depositions, it may not insist that they testify at trial (unless served with trial subpoenas while present in the forum for their depositions or for some other reason).

On the other hand, the *Vioxx* interpretation of current Rule 45(c) regarding corporate parties is not likely frequently to provide live testimony at trial from witnesses who have important evidence because it is limited to officers of the party. Rule 37(d)(1)(A) adds directors and managing agents as people who can, in essence, be compelled to show up for a local deposition whether or not they live or work in the area, but it may often be the case -- particularly with large organizational parties -- that the individuals with actual personal knowledge of the matters in dispute do not hold such lofty positions. Thus, there is a mismatch between the aggressive interpretation of Rule 45 and what would normally be the party employees whose testimony would matter most.

A distinction could be drawn, however, between deposition testimony and trial testimony in terms of its intrusiveness. A deposition can often be handled in a way that suits the schedule of the witness, particularly if the witness is an important person. The "one day of seven hours" limit applies to deposition testimony, but a deposition could instead be scheduled to be (for example) from 4:00 p.m. to 6:00 p.m. at the witness's office. A trial, on the other hand, may not be similarly choreographed in a way that suits the witness's schedule or convenience. It could happen that a witness subject to a subpoena has to wait around the courthouse for a considerable period before being called to testify, and then be required to come back another day to complete testimony. All in all, then, it could be that having to testify at a deposition is less likely to be intrusive than having to testify at trial. Put differently, the seemingly greater travel and disruption burden for deposition testimony may be illusory.

There is a considerable body of law on protecting important people like corporate CEOs and high government officials against pointless depositions. It would seem that this body of law could be adapted to the potentially more intrusive trial testimony situation. Unless the 100-mile rule precludes a trial subpoena, that body of law would have to be used to determine whether to quash a subpoena for trial testimony; it may be argued that it suffices for handling situations outside the 100 mile boundary.

But the need for trial testimony itself may be seriously debated. Videotaped depositions are used with great frequency and to good effect. It would seem difficult for a lawyer to justify insisting on testimony at trial from a corporate officer whom the lawyer did not bother to depose. And if the lawyer did depose the officer, an obvious question when the issue of live testimony at trial arises is why a videotaped deposition was not taken. Even if there is a good reason, remote live testimony as authorized by Rule 43(a) would seem worthy of consideration. And if we were truly interested in testimony that would be important at trial, it would be odd to restrict attention to corporate officers and leave out all other employees, even "managing agents" (a term that has some uncertainties of its own).

The whole question whether live testimony at trial is important may be viewed very differently by different judges. It may be that the "old school" attitude is more likely to emphasize the great importance of face-to-face live testimony than a more "modern" attitude.

In any event, the following provides a discussion draft of a rule change that would seem to foreclose the argument upon which the *Vioxx* decision was based (with a possible additional change mentioned in a footnote) and, as an alternative, a sketch of a provision conferring discretionary power on judges to order live testimony from needed party witnesses. The Subcommittee has discussed these issues at length, and eventually reached a consensus that the rule should be revised to make clear that party witnesses are also protected against having to travel more than 100 miles from another state to testify at trial. The notes of the Subcommittee's various conference calls provide more details on the issues discussed. But this change would be contrary to the rulings of a number of courts, and the Subcommittee brings the issues forward for discussion in Atlanta.

Rule change to cut off authority to compel testimony

Rule 45. Subpoena

* * * * *

(c) Protecting a Person Subject to a Subpoena.

* * * * *

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena <u>properly served under Rule 45(b)(2)</u> that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a

trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.[5]

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[5] This change might be accompanied by the following additional change:

Rule 45. Subpoena

* * * * *

(b) Service.

(2) ***Service in the United States.*** ~~Subject to Rule 45(c)(3)(A)(ii), a~~A subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

Sketch of rule provision to provide discretionary power to order live testimony

Rule 45. Subpoena

* * * * *

(b) Service.

* * * * *

(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Order to party to testify at trial or hearing or to produce person to testify at trial or hearing.*** If a party shows a substantial need that cannot otherwise be met without undue hardship for the testimony at a trial or hearing of another party -- or of a person employed by a party [who is subject to the legal control of a party] {who is an officer, director, or managing agent of a party} -- the court may order the party to attend and testify at the trial or hearing or to produce the person to testify at the trial or hearing.

(i) In determining whether to order the attendance at the trial or hearing of a person, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a).

(ii) The court may order that the party or person be reasonably compensated for attending the trial or hearing.

(iii) The court may impose the sanctions authorized by Rule 37(b) on the party ordered to appear and testify or to produce a person to appear and testify if the order is not obeyed.

(54) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

Introductory Reporter's Note

The foregoing attempts to address concerns that we have been discussing under the heading the "*Vioxx* issue." The goal is to develop a flexible method of empowering the court to order attendance at trial of witnesses genuinely needed for live testimony, while protecting against imposition on parties whose officers, etc. may be "subpoenaed" in the manner used in the *Vioxx* litigation. Without trying to address all issues raised by the discussion, the foregoing draft attempts to address some:

(1) Need for testimony: The draft borrows from current Rule 45(c)(3)(C), which says that a court can order disclosure of trade secrets or an expert's opinion not developed for or about this case only if the party seeking to obtain the information by subpoena "shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship." This is a relatively demanding standard. Perhaps "good cause" is all that should be required.

(2) Person affiliated with party: The draft offers several alternative ideas about who can be directed to show up and testify. Arguably, the goal of the foregoing is to authorize the court to command the attendance of people really needed. That's what the "need for testimony" provision addresses. If that's satisfied in the demanding way set forth above, it would seem that organizational litigants should be called upon to produce human beings who will do what the organizational litigants tell them to do. If the corporation or governmental agency tells the Regional Manager to show up and testify, it will probably be able to insist that be done. The problem then becomes defining who fits into this.

One end of the spectrum is the officer, director, or managing agent locution in Rule 37(d)(1)(A)(i). With those people, we don't make a subpoena necessary to require them to show up for a deposition. But the reality in my (very old) experience is that organizational litigants don't want their people subpoenaed (no matter what their rank may be) and do produce them without a subpoena being served. So who is included in that? How about every employee? (Admittedly, that does not include all directors, who are sometimes not employees.) Alternatively, we do have Rule 35(a)(1)'s "legal control" criterion, which is probably too strong. An employer may be able to insist that an employee show up and testify, but not to require the employee to submit to painful and dangerous testing, which is what Rule 35 could be about. Caselaw offers other analogies, such as the idea that documents possessed by retirees still dependent on the company for a pension may be thought within the "control" if not the "custody" of the corporation for Rule 34 purposes. The goal presently is not to identify the right standard to use so much as to suggest that there are various ways of getting at this.

Another way of addressing this set of concerns might be to build on the Rule 30(b)(6) approach of having the party wanting testimony specify the subjects and leave it to the organizational litigant to select and prepare a specific person to testify. At present, that approach

does not seem terribly promising. For one thing, in a case like Vioxx it is likely that a specific person will the one needed; indeed, the showing on "need for testimony" probably depends in many instances on showing that a specific person is needed. For another thing, the experience under Rule 30(b)(6) has been that some parties have not selected the "best" person to testify, and have not prepared their witnesses. Whether that would be a pressing problem at trial could be debated. Given that great disruption of the trial could result from a dispute about whether the right person was selected, or whether the person selected was adequately prepared, it may be that the 30(b)(6) approach simply is not useful here.

(3) Alternatives to live testimony: The required consideration of a videotaped deposition or testimony by remote means is designed to emphasize that the court should consider whether the live attendance of the witness is really needed. This consideration might be regarded as subsumed within item (1) -- the need for the testimony -- since that says "without undue hardship" (presumably to the party seeking to present the testimony) the testimony can't be presented. Still, it seemed worth emphasizing these alternatives.

(4) Direction to party, not witness: Unless we have a natural person who is a party, the focus of this provision is on the actions of a human being but the direction is to the party to the case. In this sense, it's quite different from a subpoena, which is directed to the testifying person. And for the same reason, the sanction for failure to comply falls on the party, not the person (who may suffer in employment terms, but is not the direct object of the court's order). It might be that contempt (Rule 37(b)(2)(A)(vii)) should not be available, but the array of other Rule 37(b) sanctions would seem sufficient to do the job.

(5) Changing Rule 32: As Subcommittee discussions have mentioned, another way of getting at some of these issues would be to change Rule 32, making it easier to use the deposition of a person who does not appear at trial. If that rule is the source of a problem, this might be one way to go. Rule 32(a)(4) permits use of deposition only if the witness is "unavailable." That seems to cover such a variety of problems that it's hard to see why more should be added. A pertinent example is Rule 32(a)(4)(D) -- "that the party offering the deposition could not procure the witness's attendance by subpoena." Further change to Rule 32 seems not to be needed. In addition, since Rule 32 in some senses trespasses on the area of the Evidence Rules Committees, and particularly may seem to overlap with Fed. R. Evid. 801(d)(2) and 804 (since Rule 32 is, in effect, a freestanding exception to the hearsay rule), there may be institutional reasons for resisting this avenue.

(3) Simplifying and shortening Rule 45

From the beginning of its examination of Rule 45, the Subcommittee has been considering whether the rule could be significantly shortened or simplified. The two previous topics largely relate to adding provisions to the rule, and not to shortening or simplifying it.

Various approaches to simplification have been tried and discarded. In the Appendix to the agenda materials for the October 2009 meeting was a first cut effort to identify ways to simplify the rule that did not produce significant shortening or simplification, although it identified slight clarifications that might be included in a more comprehensive rewriting of the rule if one is attempted.

After the October 2009 meeting, an effort was made to shorten the rule by relying on cross-references to the discovery rules as a method for avoiding the need to set forth detailed parallels to those discovery rules (particularly Rule 45(d)) in the subpoena rule. But that effort did not cut the length of the rule very much, and it also meant that users could not rely on "one-stop shopping" and would instead have to hunt through the discovery rules to find provisions governing subpoena practice. So that method was discarded as creating potential complications for those who had to hunt through the discovery rules without producing advantages.

One may question whether it is very important to shorten and simplify Rule 45. For lawyers who have experience using the rule, at least, it is not in general difficult to use. For nonlawyers served with subpoenas, the rule may be incomprehensible, and it could be said that one relying on cross-references to the discovery rules would be more mysterious still. At least some (including the input from the Magistrate Judges Association) have indicated that the length and intricacy of the current rule are not reasons for change. But others decry the length and complexity of the rule. Even members of the Subcommittee have found themselves sometimes pressed to explain how the various pieces fit together.

A basic question before the Committee, therefore, is whether further work should be done on simplification of Rule 45. It could be that addressing the issues covered above (and recognizing that none of the many additional issues initially examined and later discarded on the ground that they do not warrant rule changes) suffices. Rule 45 is not the only long rule in the book, and nobody is presently proposing to try to shorten or simplify Rule 26.

This question seemingly should be addressed with some concrete alternative ideas in mind, rather than as an abstract proposition. These materials offer initial sketches of three different alternatives. Each would have to be examined further if that approach is to be followed. So they are not presented here as proposals for rule changes but rather as exemplars of possible future starting points for possible rule amendment. It should be possible to adapt each of them to include the resolution of the matters discussed in items (1) and (2) of this memorandum.

Accordingly, the purpose of this section is to introduce the three alternative approaches. In general, one could say that they proceed from the less to the more aggressive. The first is designed only to eliminate the complications that result from the overlapping and possibly discrepant provisions of the rule on which court is the "issuing court," how service is handled, and where performance in response to a subpoena is required. That approach would largely leave the remainder of the rule alone. The second is more aggressive, and relies on the discovery rules instead of Rule 45 to provide guidance for the lawyers and the judge. The third, finally, offers a vision of a new discovery subpoena rule included in the 26-37 package that might permit much that is in present Rule 45 to be removed if it would be unnecessary to handle subpoenas for hearings and trials.

An important background thought in relation to each of these approaches is that the 1991 rule was the product of a very careful and thorough analysis of subpoena practice and concerns as they existed two decades ago. We have already done some examination of the development and evolution of that rule, and can report that the work done before the 1991 revisions was thorough and meticulous. Rulemakers cannot tell the future, of course, and problems that have developed since 1991 (like the *Vioxx* issue) may provide strong reason for making changes in the rules. More generally, however, it will be important to proceed with caution if any of these approaches is pursued, and to make sure that careful evaluation attends the discarding of any provision of the current rule.

(a) Addressing the "three-ring circus" but not otherwise changing the rule

In the agenda materials for the October 2009 meeting, there was considerable discussion of the residue of "localism" that results from insisting that a subpoena be obtained from an "issuing court" for discovery occurring in the district where that court sits. From this perspective, there are at least three major sources of complexity in Rule 45:

> (1) The issuing court: There could be three different issuing courts under current Rule 45(a)(2) -- (a) the court holding a hearing or trial, if the subpoena commands attendance at a hearing or trial; (b) the court for the district where a deposition would be taken if the subpoena calls for testifying at a deposition; and (c) the court for the district where production or inspection is to occur if the subpoena calls for that separately from a deposition.
>
> (2) Service: Current Rule 45(b)(2) creates four permutations on service of a subpoena: (a) within the district of the "issuing court"; (b) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; (c) within the state if a state court rule permits a subpoena to command attendance to testify at a trial, hearing, or deposition anywhere within the state; or (d) that the court authorizes on motion if a federal statute so provides.
>
> (3) Where performance can be required: (a) for a party or officer of a party, within the state or 100 miles [45(b)(2) and the absence of any limitation in 45(c)(3)]; (b) for a person who is not a party or officer of a party, within 100 miles of where the person resides, is employed, or regularly transacts business [45(c)(3)(A)(ii)]; and (c) for trial, a person who is not a party or officer of a party may be required to attend anywhere within the state if substantial expense would not be incurred [45(c)(3)(A)(ii) and (B)(iii)].

Together, these provisions permit 36 possible outcomes. Together, they are a major source of complexity. Indeed, this could be described as a three-ring circus. Simplifying the rule depends significantly on simplifying these complexities.

Simplifying this complexity could significantly simplify the application of the rule, even though it would not necessarily shorten it very much. The following is an effort (initially drafted by Judge Campbell) to reduce this source of complexity. It would need to be adapted in other ways to the new regime, and to accommodate the handling of the topics discussed in items (1) and (2) of this memorandum.

For the present, those permutations have not been included, although some may be noted by footnotes. The purpose of this sketch is to provide an idea of how this approach might work.

A key point, compared to the other two approaches in section (b) and (c) of this Topic, is that it would not attempt to modify much else that is in the rule.

Rule 45. Subpoena

(a) In General.

(1) *Form and Contents.*

(A) *Requirements – In General.* Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

(iv) set out the text of Rule 45(c) and (d).[6]

(B) *Command to Attend a Deposition – Notice of the Recording Method.* A subpoena

[6] It could be argued that these rule provisions will not really be useful to nonlawyer recipients of subpoenas, and that lawyers will be able to find them without receiving the text in the subpoena. The idea of the requirement that these rule provisions be included, of course, was to emphasize the protections that the 1991 amendments put into the rule to guard against overburdening nonparty witnesses. But it could be that a better way would be with an "information sheet," perhaps in question and answer format, developed by the A.O.

commanding attendance at a deposition must state the method for recording the testimony.

(C) *Combining or Separating a Command to Produce or to Permit Inspection; Specifying the Form for Electronically Stored Information.* A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing, or trial, or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) *Command to Produce; Included Obligations.* A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party[7] to permit inspection, copying, testing, or sampling of the materials.

(2) *Issuing* ~~*Issued from Which Court*~~ *Court.* A subpoena must issue from the court in which the action is pending. ~~as follows~~:

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[7] This should probably be "person."

~~(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;~~

~~(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and~~

~~(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.~~

(3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena if the attorney is authorized to practice in the court where the action is pending. ~~as an officer of:~~

~~(A) a court in which the attorney is authorized to practice; or~~

~~(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.~~

(b) Service.

(1) *By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.* Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tender the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

(2) *Service in the United States.* A subpoena may be served any place within the United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:~~

~~(A) within the district of the issuing court;~~

~~(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;~~

~~(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of~~

~~general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or~~

~~(D) that the court authorizes on motion and for good cause, if a federal statute so provides;~~

(3) *Service in a Foreign Country.* 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) *Proof of Service.* Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Place of compliance.

(1) *For a trial, hearing, or deposition.* A subpoena may require a person to appear at a trial, hearing, or deposition as follows:

(A) For a party or the officer of a party, within the state where the party or officer resides, is employed, or regularly transacts business, or within 100 miles of where the party or officer resides, is employed, or regularly transacts business;

(B) For a person who is not a party or officer of a party, within 100 miles of where the person resides, is employed, or regularly transacts business; except that such a person may be required to attend trial within the state where the person resides, is employed, or regularly transacts business if substantial expense would not be incurred.

(2) *For other discovery.*

(A) For production of documents or tangible things, where the documents or tangible things are located, or, in the case of electronically stored information, at any location reasonably convenient for the producing person;

(B) For inspection of premises, at the premises to be inspected.

(d)~~(c)~~ Protecting a Person Subject to a Subpoena.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction – which may include lost earnings and

reasonable attorney's fees – on a party or attorney who fails to comply.

(2) *Command to Produce Materials or Permit Inspection.*

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court[8] must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

~~(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person – except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a~~

[8] The reference to "issuing court" would have to be revised, as provision would need to be made for application ordinarily to the local district court where discovery is to occur. The idea would be to establish an initial but not absolute preference for that court in accord with the analysis in Topic (1) in this memorandum regarding "transfer" of motions.

~~trial by traveling from any such place within the state where the trial is held;~~

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies;[9] or

(iiiv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court[10] may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

~~(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.~~

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[9] One might argue that this provision is not needed, or no longer needed. For one thing, Rule 26(b)(1) says that discovery does not extend to privileged materials. For another, Rule 45(d)(2) rather elaborately addresses the way to claim privilege. It may nonetheless be worthwhile to retain this recognition that a motion to quash must be granted on this ground when a privilege applies.

[10] Again, the "issuing court" provision would need to be revised.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

~~(e)~~(d) Duties of Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information.* Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person

responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Production.*

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it

is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information

must preserve the information until the claim is resolved.

(e) Contempt.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. ~~A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).~~

(b) More aggressive streamlining of Rule 45

The approach outlined in (a) above might simplify Rule 45 practice considerably, but it would not shorten or simplify the rule dramatically. Both shortening and simplifying the rule more could be pursued. It may be that they go hand in hand; as it is shortened, it will necessarily become simpler.

Judge Baylson has given thought to these issues and shared a sketch of his simplified approach with the Subcommittee. This approach was examined in several conference calls in which Judge Baylson participated, and he revised it in a number of ways in response to comments made. In a general sense, the theme is to downplay specific particulars in the rule (which at least lengthen the rule and make it more complicated, and might even be viewed as clutter). Instead, the goal would be to simplify the process of obtaining information from nonparties. Ideally, there would be few disputes. When disputes arise, the expectation would be that judges would draw on Rules 26-37 in resolving disputes about subpoenas. Much reliance would be placed on judges' discretion. If one begins with a fresh tablet, it is not necessary to include nearly as much detail as has accumulated over the years.

With that introduction, here is the streamlined "aggressive" rewrite of the rule:

RULE 45

A. In General – Form and Contents.

Every subpoena must:

1. State the court from which it issued;

2. State the title of the action, the court in which it is pending, and its civil-action number;

3. Command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises; and

4. Set forth the text of this Rule.

B. Issuing Court.

1. A subpoena must issue from the court for the district where the action is pending.

2. The clerk must issue a subpoena, signed but otherwise blank, to a party who requests it, or the attorney for that party.

C. Service.

1. Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for a day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies.

2. A subpoena may be served at any place within the United States.

3. 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

[4. Proof of Service?]

D. Place of Compliance.

1. A subpoena for trial requires appearance or production at trial, subject to Rule 43.

2. Compliance with any other subpoena shall be performed, at the premises to be inspected, or within ____ miles of where the witness resides or has a regular place of business, or where documents or things are located.

E. Objections.

1. The person served with a subpoena may serve an objection before the time required for compliance or within 14 days of service, whichever is shorter, and, if an objection is timely served, need not comply with the subpoena unless a court so orders.

F. Proceedings If Objection Is Made or If There Is Non-Compliance.

1. Rules 26(c), and 37(a)(1) and (5), shall govern any person or party seeking court action concerning a subpoena. A hearing may be held by telephone.

2. The issuing court must rule on any dispute concerning a trial subpoena and may rule on a dispute concerning any other subpoena.

3. As to a dispute concerning any other subpoena, a party must seek relief from the issuing court; a non-party may request relief under Rule 26(c) from the issuing court or the court in the district where the subpoena is served or is to be performed, and that court may refer this dispute to the issuing court.

4. After considering the costs and burdens on the person or entity served with a subpoena, and the issues in the case, the court may refer to applicable provisions in Rules 26 to 37 in adjudicating a

dispute, and may require advancement or allocation of costs and expenses, including attorney's fees.

5. The court ruling on a dispute must quash or modify a subpoena that:

   a. Fails to allow a reasonable time to comply;

   b. Requires disclosure of privileged or other protected matter, if no exception or waiver applies;

   c. Requires disclosing a trade secret or other confidential research, development or commercial information; or

   d. Requires disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

5. The court ruling on a dispute concerning a subpoena must act promptly and state the reasons for any order.

G. Notification of Other Parties.

The party serving a subpoena must provide, to all other parties, a copy of the subpoena, objections served, motions filed, and timely notification of compliance.

H. General.

A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense.

Possible issues

A reaction to this approach might be that much of the detail served useful purposes. One analogy raised during the Subcommittee's conference calls was to the striping on a freeway. If one took that away, people would probably still drive in the "lanes" for a while, but they might forget about where they were after a time. Indeed, some of the specifics were included because in their absence practices developed that they were designed to stop. Removing specifics might also generate more disputes that judges would have to resolve, generating a common law (possibly with inconsistencies) regarding subpoenas.

But adding specifics also adds length and complexity. Thus the sketch above is still a relatively barebones rule. In reviewing it, one might have in mind some things that are in the current rule that do not appear to be in the sketch:

A requirement that the subpoena specify the method of recording a deposition, if one is commanded. See Rule 45(a)(1)(B)

A provision authorizing that the subpoena specify the form or forms for production of electronically stored information. See Rule 45(a)(1)(C)

A directive that one commanded to produce documents, electronically stored information, or tangible things permit inspection, copying, testing, or sampling. See Rule 45(a)(1)(D)

A directive that the court not enforce a subpoena that imposes "substantial costs" on the person served. See Rule 45(c)(2)(B)(ii)

Authorization to order production in the situations described in Rule 45(c)(3)(B) when special need is shown. See Rule 45(c)(3)(C) and note (as pointed out below) that the sketch seems to command quashing the subpoena in the circumstances described in Rule 45(c)(2)(B)

Directives about the manner of production. See Rule 45(d)(1)

Directives about claiming privilege. See Rule 45(d)(2)

A provision about contempt. See Rule 45(e)

In addition, the sketch appears to shift (in F.5.) to mandate quashing a subpoena in situations in which current Rule 45(c)(3)(B) says the court "may" quash the subpoena. It also appears (in E.1.) to provide that an objection halts any duty to comply with a subpoena even with a "testimony only" subpoena. Compare Rule 45(c)(2)(B) (referring to an objection by a person "commanded to produce documents or tangible things or to permit inspection").

Another feature perhaps worthy of note is that proposed F.4. says that the court, in ruling on objections, "may refer to applicable provisions in Rules 26 to 37." The goal is to afford the court and the parties flexibility, relying ultimately on the court's discretion, as informed by party discovery practice governed by Rules 26-37. Some might raise questions about whether more guidance for lawyers and courts would be desirable.

This brief listing suggests the care with which more vigorous streamlining of the rule must be undertaken. Most of the specifics listed above could probably be handled very effectively by an experienced judge drawing on the discovery rules for guidance. Whether they serve a purpose when they are repeated in Rule 45 is certainly debatable, and the sort of thing that would need careful evaluation if this course were pursued.

(c) Creating a new rule to deal with discovery subpoenas and removing from Rule 45 the provisions not needed for hearing/trial subpoenas

During discussions of revising Rule 45 to shorten it, Prof. Cooper reminded us that another approach would be to attempt to slice off the parts of the current rule that relate to discovery and install them in a new rule located with the other discovery rules, leaving Rule 45 responsible only for addressing subpoenas for testimony at a hearing in court or at trial. Initially, one way to do that would be to develop specialized rules for deposition subpoenas (perhaps a new Rule 30.1) and for document subpoenas (perhaps a new Rule 34.1). But further reflection suggested that the most productive approach to the present discussion might be to formulate a rule that would create a combined discovery subpoena, initially numbered 36.1. The following sets out some thoughts from Prof. Cooper on what that new rule might look like and also a number of issues that could arise if this approach were used, including some issues that might merit consideration whether or not this approach is used.

A starting point, of course, is to focus on whether (and to what extent) discovery subpoenas are different from trial or hearing subpoenas. That topic addresses in part a question touched on in the agenda materials for the October 2009 meeting, and worth recalling here. The question there was whether there were significant problems with parties using Rule 45 to obtain discovery after the cutoff date for discovery has passed.

There are cases addressing that question. For example,in Mortgage Information Services, Inc., v. Kitchens, 210 F.R.D. 562 (W.D.N.C. 2002), the court noted that Rule 45 document subpoenas may sometimes not constitute discovery. Examples include a subpoena to ensure the production at trial of originals of documents previously obtained in copy form during discovery, or to secure production at trial of documents to be used to refresh the memory of witnesses expected to be called during trial. It then held that the Rule 45 subpoena served by plaintiff in that case five days before trial constituted "discovery," and therefore was not enforceable due to the discovery cutoff:

> After a careful review of the document request submitted in conjunction with Plaintiff's subpoena duces tecum in this case, the Court finds that the documents requested are unquestionably sought for discovery purposes and therefore do not fall within any of the exceptions described above. In reaching this conclusion, the Court notes the broad language used in the document request, which seeks the production of entire categories of documents rather than itemizing specific documents necessary for use as exhibits at trial. Furthermore, the Court also notes as significant the fact that the documents sought in the subpoena were requested -- but not produced -- during the course of discovery. Plaintiff nevertheless failed to seek to compel the production of these documents prior to the close of discovery. It therefore waived its right to obtain access to them. Finally, Plaintiff, through its submission with respect to this issue, conceded that it seeks these documents "because it believes the documents will corroborate its damages evidence," thereby indicating that the documents are clearly sought for discovery rather than for any of the legitimate trial preparation purposes outlined above.

See also, e.g., Williamson v. Horizon Lines, LLC, 248 F.R.D. 79 (D.Me. 2008) (use of a Rule 45 subpoena to obtain production of documents that could and should have been obtained during discovery constituted discovery and was improper); Alper v. U.S., 190 F.R.D. 281 (D. Mass. 2000) (court quashed Rule 45 subpoena requiring doctor to appear as a witness at trial to the extent it required him to bring documents with him because to that extent it constituted discovery after the discovery cutoff); 9A Fed. Prac. & Pro. § 2452 at 393 (3d ed. 2008) (asserting that "parties should not be allowed to employ a subpoena after a discovery deadline to obtain materials from third parties that could have been produced before [during] discovery").

Transposed to the current discussion, the issue is whether Rule 45 must continue to include provisions that are important for discovery but might be thought unimportant for trial. By the time trial rolls around, Rule 26(a)(3) disclosure is supposed to have been completed, including "an identification of each document or other exhibit, including summaries of other evidence -- separately identifying those items the party expects to offer and those it may offer if the need arises." Although it would seem that such disclosure would be difficult to do for one who does not yet have in hand the item to be offered, it could be that a subpoena is needed to ensure that it is produced at trial. But as to things not thus disclosed, it would seem there would be a strong argument for exclusion at trial under Rule 37(c)(1).

That may not be true in all places, however. To the extent there are places (or cases) in which subpoenas are really used to obtain production for the first time at trial of material that will be used at trial, it may be difficult or impossible to strip from Rule 45 the provisions that would be needed to deal with such situations.

A different question has to do with "hearings." Besides trials, how often are subpoenas used to obtain attendance and production at "hearings" in court? Preliminary injunction hearings are one obvious example. Class certification hearings might be another, particularly as courts may become more demanding in scrutinizing the showing supporting class certification. Do courts ever permit testimony on summary judgment motions? Rule 56(e) is entitled "Affidavits; Further Testimony," but it does not seem to invite live testimony. And in any event, it seems unlikely that testimony regarding summary judgment, if allowed, would depend on a subpoena to obtain the witness's attendance, and also depend on bringing subpoenaed papers or the like to the hearing. Are there other occasions when the pretrial requirements of Rule 26(a)(3), etc., have not come into play but a "hearing" subpoena has been issued?

With that introduction, here are Prof. Cooper's ideas:

Introduction

Some participants in discussions of Rule 45 complain that, apart from its substance, the rule is too long and too difficult to sort out. Simplification would be welcome. The question is whether simplification is feasible. The draft Rule "36.1" set out here illustrates one of many possible approaches to simplification. It seeks to separate deposition subpoenas from subpoenas for a hearing or trial.

For good measure, it adds a few new provisions that address questions not now addressed by Rule 45.

Preparing this draft does not represent a judgment that it is in any way an idea worth pursuing to actual adoption. The purpose instead is to ask how quickly these questions can be put to rest. A conclusion that only a few modest changes should be proposed for the substance of Rule 45 should be the end of it. But if it is concluded that substantial changes should be proposed — for example, providing that all discovery subpoenas are issued by the court where the action is pending — it is appropriate to ask whether still more changes are proper.

The caution deserves repeating. Proposing preliminary review of many possible changes is not to propose that any of them be pursued very far. Any substantial revision of Rule 45 should rule out further revisions for several years. Courts and lawyers should not be harassed by a sequence of successive important changes. It is important to consider as many possibilities as can be conjured up, even if the result is to reject them all.

As always, it is important to filter abstract ideas through the sieve of reality. Several elements in this draft pick up on apparent gaps in Rule 45. Some of the gaps have been suggested in earlier discussions. The suggestions, however, have tended to be in the form of identifying possible problems that are worked out in practice. It may seem lax to leave known gaps in a rule, trusting on lawyers to work out sensible solutions in practice. Common sense and reasonable accommodation may not always work in complex or particularly contentious litigation. But it often proves better to leave the gaps unfilled. Specific rule provisions may have unintended consequences. At worst, a general answer will prove wrong for many circumstances. Even a generally right answer will provide a starting point for negotiations, perhaps skewing the results in undesirable ways. And if nothing else, adding specific gap-filling provisions makes for a longer rule.

Addressing Discovery Subpoenas Separately

It may be that discovery subpoenas were included in Rule 45 with subpoenas for hearing and trial because trial subpoenas fit naturally in Title VI, the rules dealing with trial, and because the innocent thought of 1938 was that trial subpoenas would be routine. One of the questions considered at the beginning of the Style Project was whether the rules should be reordered — it seemed more natural to put summary judgment in the pretrial sequence, to place provisions governing the place of nonparty depositions in the discovery sequence, and so on. Conservatism prevailed — lawyers know where to look for the rules now, and anyway we must guard against the literalism of computer searches. But it may not be too late to relocate discovery subpoenas. If conservatism again carries the day, the same drafting result can be achieved by separating the subpoena provisions between Rule 45 and a new Rule 45.1, or even by keeping them as better-separated subdivisions of a single Rule 45. The more radical approach is illustrated as Rule 36.1, but the illustration should not confine imagination.

Perhaps the greatest challenge to separating out the provisions for deposition subpoenas asks whether there is any real difference from subpoenas for a hearing or trial. The most obvious difference is that discovery subpoenas reach

throughout the country. However it is conceived, we mean to compel nonparties to submit to deposition and production wherever in the country they may be. A person in Alaska or Hawaii can be compelled to testify or produce in support of an action pending in Maine. We may come to the day when we are sufficiently comfortable with communication technology to make routine similar duties to testify at trial, albeit from "home" rather than in person. That would argue in favor of a single rule. Until then, the question persists.

The question whether there is any difference takes on a more puzzling tone in this era of disclosure, Rule 26(f) discovery-planning conferences, scheduling orders, and pretrial conferences. Discovery cut-off deadlines are routine. It has become common to encounter attempts to avoid discovery deadlines by serving what purport to be trial subpoenas. A distinction could be drawn by enforcing the subpoena only as to testimony in court, and only for first-time production of documents in court. Short of that potentially drastic step, the blurring of lines is apparent. And the blurring can respond to more fundamental problems when there is a good reason for not completing discovery before the hearing or trial. A common example is a hearing on a temporary restraining order or preliminary injunction. It can be important to combine discovery and evidence functions — the witness, for example, could be deposed immediately before the hearing, documents could be produced in the same fashion, and so on. The same needs may arise during trial. Testimony or inspiration suggest a new theory. Leave is sought to amend the pleadings, and to present additional testimony that makes new discovery relevant and perhaps imperative. It remains possible to continue to separate the functions. The Maine trial, for example, might suddenly discover the need for testimony of an Alaska witness. The deposition could be taken in Alaska; the parties and court could then decide whether to present the testimony by the deposition, by transmission from Alaska during trial, or — if it can be arranged — by testimony in the Maine courtroom.

All of that confusion may obscure another, more old-fashioned phenomenon. There is no pretrial discovery at all in many federal cases. There is only limited discovery in many others. Several categories of cases are exempted from initial disclosure. Even when parties dutifully disclose the names of witnesses and documents they may use at trial, and later disclose those they may present at trial, it may be that no one resorts to depositions or Rule 34 requests. There may be occasions, however rare, when trial subpoenas serve the functions they served when trial was the focus of litigation.

The most important test of separating the rules for discovery subpoenas from the rules for trial subpoenas will come in drafting the trial rule. If it proves necessary to carry forward for trial subpoenas all of the provisions that were added to Rule 45 during the course of amending the discovery rules, separation will lead to moderately embarrassing verbatim, or near-verbatim, repetition of the same provisions. The value of reducing the total word count of the rules need not be pursued at the expense of clarity, if greater clarity can be achieved by separation. But there are many paths to clarity, and the number of words remains an important concern, both functional and aesthetic.

New Provisions

This draft includes a number of changes beyond simple redistribution. Some address issues not addressed by present Rule 45. Each of these provisions may be met with the response described in the introduction: We work these things out in practice, and it is better not to risk the unintended consequences that are likely to flow from explicit rules. Other changes are just that — illustrations of present provisions that might deserve revision. These are subject to a similar response: We are used to doing it this way, no one is complaining, and the cost of even considering change exceeds the benefit of addressing things that merely seem "curious." Footnotes are used to flag all of these changes.

Consolidated Rule 36.1: Discovery Subpoenas

36.1 Discovery Subpoenas.

(a) *Issuing Court.* The court where an action is pending[11] may issue a subpoena:

(1) for attendance at a deposition,[12] or

(2) for a nonparty[13] to produce documents, electronically stored information, and tangible things, or to permit an inspection, as provided by Rule 34(a) and (b),[14] and subject

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[11] This provision picks up the proposal to eliminate the part of Rule 45 that ties the place of performing subpoena obligations to service.

[12] Unlike the subpoena to produce, this provision recognizes that a deposition subpoena may be addressed to a party. Although Rule 37(d)(1)(A) provides sanctions when a party fails to appear after being served with notice of the deposition, it is useful to allow resort to a subpoena.

[13] This provision is limited to nonparties. Rule 34 should be the sole basis for requesting documents from a party.

[14] This is intended to expand the nonparty's opportunity to object beyond what Rule 45(c) now provides. The premise is that it is strange to impose greater burdens on a nonparty — requiring an objection within 14 days, not 30; forfeiting the right to be protected against the costs of complying if an objection is not made within 30 days; saying nothing about the time allowed to comply — Rule 45 clearly contemplates less than 14 days. The Rule 45 time provisions seem to make more sense for trial subpoenas than for discovery subpoenas. And given the confusion about the distinction between trial or hearing subpoenas and discovery subpoenas, the Rule 45 time provisions may not make sense in any setting.

This approach makes it possible to discard Rule 45(c)(3)(A)(i), which requires the court to quash or modify a subpoena that fails to allow a reasonable time to comply.

to Rule 26(b).[15] The nonparty must be protected from significant expense resulting from compliance.[16]

(b) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as the court's officer.

(c) *Form and Contents.*

(1) The subpoena must state the court that issued it, the title and civil number of the action, the name of each person to whom it is directed, and the text of this rule.

(2) A subpoena for a deposition must also state the command to attend and testify at a specified time and place, and the method for recording the testimony.

(3) A subpoena to produce under Rule 36.1(a)(2) must also include a request as specified in Rule 34(b)(1).

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[15] The cross-references to Rules 34 and 26(b) shorten this rule considerably. As compared to present Rule 45, it has the additional advantage of making explicit what now is often only implicit — that all the trappings of the discovery rules apply to nonparty document subpoenas.

[16] This is one of the "curiosity" provisions. Present Rule 45(c)(2)(B)(ii) protects a nonparty against significant compliance costs, but only if the nonparty manages to make an objection within 14 days or an earlier time designated for compliance. That may make some sense. There may be little cost in complying with some subpoenas, and often enough the cost of complying may be less than the cost of objecting. But it still is curious that a nonparty who does not manage to move with great speed loses the protection, unless it can persuade the court to extend the time under Rule 6(b).

(d) *Service.*

(1) Notice of a subpoena to produce under Rule 36.1(a)(2), together with a copy of the subpoena, must be served on each party before the subpoena is served.

(2) A subpoena must be served, and when necessary service proved,[17] under Rule 45(b).

(e) *Protecting a Person Subject to a Subpoena.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. the issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(f) *Testify and Produce.* A command to produce or permit inspection under Rule 36.1(a)(2) may be included in a deposition subpoena or may be set out in a separate subpoena.[18]

(g) *Place of deposition.*

(1) *Individual.* An individual deponent may be compelled to appear for a deposition at any place within 100 miles from where that

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[17] The need to file a proof of service has been questioned. This is a placeholder.

[18] This carries forward Rule 45(a)(1)(C). The need for it seems uncertain.

person resides, is employed, or regularly transacts business in person.[19]

(2) *Organization.* An organization named as deponent under Rule 30(b)(6) may be compelled to produce a person designated to testify on its behalf at any [reasonable place].[20]

(h) *Place of Producing or Inspection.*[21] The place of production or inspection under Rule 36.1(a)(2) is as follows:

(1) for inspection and copying of documents or tangible things,

(A) where they are ordinarily maintained or at another convenient place chosen by the person producing them,[22] or

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[19] It seems fair to apply this limit to a subpoena addressed to a party; Rule 37(d)(1)(A) will persist unchanged.

[20] Nothing in Rule 45 addresses this question, unless it seems possible to treat an organization as a "person," and to assign to it not only a residence but also a place of employment and some meaningful concept of where it regularly transacts business in person. On the face of things, the gap seems a source of uncertainty and dispute. But early advice is that it is not a problem in practice. "We work it out." And it will be truly difficult to work out any limit more helpful than "at any reasonable place." Ill-advised limits are no improvement. Even a mushy reference to a reasonable place may prove an irritant and bargaining ploy that stimulate requests for judicial management.

[21] This subdivision is subject to the same challenge as other gap-filling provisions. Parties work it out, commonly on reciprocal "your place and my place" terms. Intruding an explicit rule provision can only make matters worse.

[22] A narrow question has been raised. The nonparty may prefer to produce at its attorney's office, or some other place than where it keeps the records. The opportunity to produce there should not be a command.

(B) at a place reasonably designated by the subpoena if the requesting party pays all reasonable added expenses of producing there;[23]

(2) for entry onto land or other designated property, where the land or property is located;

(3) for inspection and copying of electronically stored information, by transmission to an electronic address stated in the request, unless by agreement of the parties or court order the requesting party is to participate in searching, inspection, or copying through the nonparty's storage system.

(i) *Protective Orders and Enforcement.*

(1) A motion for a protective order [under Rule 26(c)] made by a party or a motion to enforce a [deposition] subpoena against a party must be made in the court where the action is pending.

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[23] The Committee Note might comment on the reasonable expenses issue. Ordinarily the expenses would be the costs of delivery, and also the costs of copying — or assuring security — if the party is unwilling to risk losing the originals. A requesting party may well be reluctant to cover these costs when the subpoena is not clearly focused, given the price of copying mountains of useless stuff.

(2) A nonparty may move for a protective order under Rule 26(c) [or Rule 45(c)(3)(B)],[24] either in the court where the action is pending or in the court for the district where the deposition, production, or inspection is to take place. The court where discovery is to take place may:

(A) make any order that could be made by the court where the action is pending, or

(B) in the interests of justice, refer the motion to the court where the action is pending.

(3) A motion to enforce a subpoena against a nonparty must be made under Rule 37(a)[25] in

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[24] See note 26; this is a problem that may be better addressed by incorporating the full text of present Rule 45(c)(3)(B) as an independent subdivision.

[25] This provision responds to a "curiosity" about the present rules. There are substantial differences between enforcement between the parties and enforcement against a nonparty. The central differences respect document production. A nonparty is subject to an open-ended contempt procedure under Rule 45(e). Rule 45(c)(2)(B) requires a nonparty to object "before the earlier of the time specified for compliance or 14 days after the subpoena is served." A party, on the other hand, has 30 days to object. Once an objection is made, nothing happens unless the requesting party moves to compel discovery — and the motion must be preceded by an attempt to confer in an effort to obtain discovery without court action. Why is a nonparty put in a less protected position, particularly when the subpoena may be the nonparty's first inkling of the litigation?

These questions may answered in part by Rule 45(c)(2)(B). Once a nonparty makes a timely objection, the serving party may move for an order compelling production or inspection. "These acts may be required only as directed in the order * * *." That seems to imply that the nonparty is protected against contempt for failing to comply after serving the objection, although Rule 45(e) is not as explicit as might be wished. But that leaves the question whether the rule should be more explicit, and should require the requesting party to attempt to negotiate a resolution.

If there is such a thing as a true hearing or trial subpoena, the time provisions in Rule 45

the court for the district where the deposition, production, or inspection is to take place. The court may hold the party in contempt or may, in the interests of justice, refer the motion to the court where the action is pending.

(j) *Unretained Expert.*[26] The court may quash or modify a subpoena that requires disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party. But the court may order appearance or production under specified conditions if the serving party

(1) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(2) ensures that the subpoenaed person will be reasonably compensated.

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may be more sensible — time is likely to be much more pressing than it is with discovery subpoenas.

A different objection may be that contempt procedure is more direct than the request-move-order-order-enforcement routine of Rules 34 and 37. But the contempt procedure will be initiated by a motion, most likely a motion to show cause. If the result is a contempt order, the order is most likely to be "comply or else," and often will be "comply with this modified obligation or else." It does not seem likely that much is sacrificed by giving up the direct contempt procedure.

[26] Although cross-reference to Rule 45 may do it, there may be an advantage in setting this out as part of Rule 36.1.

Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Feb. 3, 2010

The Discovery Subcommittee of the Advisory Committee on Civil Rules had a conference call on Feb. 3, 2010. Participating were Judge David Campbell (Chair of the Subcommittee), Judge Mark Kravitz (Chair of the Advisory Committee), Judge Michael Baylson (member of the Advisory Committee), Subcommittee members Chilton Varner, Daniel Girard and Anton Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee) and Prof. Richard Marcus (Assoc. Reporter of the Advisory Committee).

Judge Campbell began the call by suggesting that a major focus should be on what would profitably be presented to the full Committee at the meeting in Atlanta in March. In prior conference calls since the full Committee meeting in October, the Subcommittee had agreed (1) to change the location of the notice provision regarding service of a subpoena for documents by moving it to a new Rule 45(a)(4), as reflected in the materials for the conference call on p. 28; (2) that there was no need for changing the rules on in-hand personal service of a subpoena; and (3) that the existing provisions on cost-shifting do not need to be altered.

The last topic -- cost shifting -- was discussed briefly. There had been some concern on the Subcommittee about what might be called predatory cost run-ups. Thus, a nonparty might incur huge costs of compliance without alerting the party serving the subpoena until the bill was presented. There is one "outlier case" in which something of the sort seems to have happened, although it may be that it was really treated as a sanction matter. Beyond that, however, on investigation it seems that substantial costs have not been imposed in instances where fair warning was not given. So the norm is that those who serve subpoenas have been adequately alerted to the likely cost, and those that press forward are directed to pay those costs. This situation is not cause for discomfort. The recommendation should therefore be no change in the current rule provisions.

The Vioxx issue

The Subcommittee turned to the Vioxx issue, which it had discussed in detail previously. By way of introduction, it was agreed that the Subcommittee regards the reading of Rule 45 in the Vioxx decision (requiring testimony from the corporate officer who was not served within the district) as contrary to the actual rule provisions. And it now recognizes that there is a significant split in authority in the reported cases (as outlined in the Kuperman memo). Both sides of the split invoke the language of the rule -- even the "plain language" -- to support their views. Given this divergence on what the rule means on an important issue, a change in the rule should be made to cure the problem.

The Subcommittee has approved language to solve the problem:

Rule 45. Subpoena

* * * * *

(c) Protecting a Person Subject to a Subpoena.

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(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena properly served under Rule 45(b)(2) that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

The question, however, is whether to take the cure. The Kuperman memo thoroughly reviews that various decisions on this point, and shows that many judges regard it as important to be able to require live testimony from party witnesses on occasion. Even those judges who read the rule to forbid such a requirement seem, sometimes, wistful about having authority to do so. Altogether, then, there is a policy question about whether to change the rule to authorize such commands. This policy debate is what has engaged the Subcommittee so long.

For present purposes, the goal was not to revisit that discussion but to lay the groundwork for presenting it to the larger audience of the full Committee. Indeed, it appears that the differences within the Subcommittee have disappeared, and all members now favor restoring the

rule that party officers are not treated differently with regard to trial subpoenas from distant courts. Nonetheless, it was suggested, it is important to carry the issue forward. Making this change would implicitly reject the decision reached by quite a few judges. If that decision is made, it would best be made after a full airing of the policy issues.

During a prior conference call, there was discussion of finding a middle ground that empowered a judge to order attendance while stopping short of empowering litigants to subpoena such witnesses unilaterally. A first attempt at such a provision was included in the conference call materials:

Rule 45. Subpoena

* * * * *

(b) Service.

* * * * *

(2) ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:

(A) within the district of the issuing court;

(B) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;

(C) within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Order to party to testify at trial or hearing or to produce person to testify at trial or hearing.*** If a party shows a substantial need that cannot otherwise be met without undue hardship for the testimony at a trial or hearing of another party -- or of a person employed by a party [who is subject to the legal control of a party] {who is an officer, director, or managing agent of a party} -- the court may order the party attend and testify at the trial or hearing or to produce the person to testify at the trial or hearing.

(i) In determining whether to order the attendance at the trial or hearing of a person, the court must consider the alternative of an audiovisual deposition under Rule 30 or testimony by contemporaneous transmission under Rule 43(a).

(ii) The court may order that the party or person be reasonably compensated for travel costs for attending the trial or hearing.

(iii) The court may impose the sanctions authorized by Rule 37(b) on the party ordered to

appear and testify or to produce a person to appear and testify if the order is not obeyed.

(54) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

This discussion provision was introduced as designed to provide a limited and focused judicial authority that might be suitable in some cases. It invokes a demanding standard for requiring testimony -- "substantial need that cannot otherwise be met without undue hardship." This standard itself partly invokes the considerations in (i) -- whether a deposition or testimony from a remote location would suffice. Indeed, under the Vioxx approach to the current rule one question might be why the deposition of this important witness was not taken and videotaped. That calls into question whether there really is a need for the testimony of this witness.

This draft also offers many alternatives on which people might be subject to such an order. Rule 45's current language refers only to an "officer" of a party. But it would seem unlikely that officers would often be the ones with useful personal knowledge. The draft language therefore offers not only "officer, director, or managing agent" (the persons whose deposition testimony can be required by a notice to the party without the need for a subpoena, and therefore people who will show up when commanded to do so by the party) and the much broader provision for any person "employed by" the party. That may be too broad, but presumably a party resisting such an order could show that it is unable to produce the person to testify. The reality is likely to be, however that with many parties (at least corporate parties) most or all employees would obey a directive from the employer to testify in person. Another alternative is the "under the control" language from Rule 35.

The draft is not really a "subpoena" provision, in the sense that the order runs against the party, not the individual witness, and the sanction for disobedience is against the party under Rule 37(b).

In sum, if a middle ground were desired, something along these lines might fit the bill. It would be relatively difficult to satisfy the showing requirement to justify even considering such an order, and the need to consider alternatives would also introduce flexibility. Of course, the individual judge's attitude toward the importance of live testimony could affect the conclusion about the sufficiency of those alternatives. But this would stop far short of what is implied by the rule in the Vioxx case -- that unilateral party action is all that is required to compel attendance by corporate officers.

One reaction to this draft was that it pointed up some of the difficulties of managing this issue. There is a range of organizational litigants; corporations are not the only ones who are parties in federal court. The potential application of such a provision to unions or nonprofit

organizations is reason for pause. Defining who can be required to attend under such a provision is a very challenging matter. Nonetheless, this issue should be brought forward for further discussion. The Subcommittee now has a relatively full appreciation of its take on the various policy issues, but those are suitable for a full Committee discussion and, should there be a mini-conference after the Atlanta meeting, probably also for inclusion in the discussion at that mini-conference. The background and the current ideas should be presented in the agenda materials for Atlanta.

Transferring issues

There was brief discussion of the draft on transferring issues raised on Rule 45 motions. The proposal is that the guidance for the judge making a decision whether to transfer should be the "interests of justice." Support was expressed for this standard. Some issues might best be for the judge presiding over the main action, such as whether the discovery should be had at all. But others -- such as the volume of discovery sought from this nonparty or health issues pertinent only to this nonparty -- would seem localized and not suitable for transfer. The Committee Note addresses such concerns. The draft that has been developed should be presented to the full Committee in Atlanta.

Restructuring/shortening Rule 45

A variety of possible methods for shortening/simplifying Rule 45 have been discussed and circulated during the conference calls the Subcommittee has had since the October full Committee meeting. In essence, these various approaches seem to have been distilled into three distinguishable ways of approaching the situation. All three discard the current rule's insistence that subpoenas for discovery be issued by the court where the discovery take place, calling instead for issuance from the court where the action is pending no matter where the discovery is to occur. At the same time, the each seek to limit and focus the location for discovery in a way that mimics or approaches what is currently in the rule. The provisions on transferring issues to the court presiding over the main action and giving notice have not been worked into any of these three approaches, but should be compatible. Indeed, the handling of place of compliance may address the Vioxx issue.

Much discussion is needed to decide which approach to take. For present purposes, that was not the objective. Instead, it seemed best to convey these three approaches to the full Committee for consideration in Atlanta. The discussion therefore was introductory:

(1) Aggressive streamlining: This approach was introduced initially by Judge Baylson shortly after the October full committee meeting. Since then, additional provisions from current Rule 45 that were not initially included in the most streamlined version have been added back in. Still, the reworking is much shorter than current Rule 45, and relies largely on the discretion of the judge. The goal on place of compliance is to direct that the witness must comply where the witness is located. Using the 100 mile limit in the current rule is probably desirable because it is familiar. The goal of the objection provision is to relieve the party of the obligation to comply in any way if there is an objection. It was asked whether that is appropriate with a subpoena that seeks only attendance to testify, and the answer that it is debatable but the draft does so. Subdivision (f) has been revised to incorporate more of the protections for witnesses added to Rule 45 in 1991.

(2) Relocation of discovery subpoena provisions into the discovery rules: This package of possible amendments was initially drafted by Ed Cooper. It proceeds from an assumption that there is a basic difference between a discovery subpoena and a trial subpoena, and that putting

the discovery subpoena provisions among the discovery rules would be beneficial and permit the trial subpoena (remaining Rule 45) to be dramatically simplified.

One serious question is whether there is really a dividing line between trial and discovery subpoenas. For example, do some courts permit a party to subpoena a witness or documents for trial in a manner that might suggest "discovery" is going on because these pieces of evidence have not been sought in connection with the case before? That would blur the distinction.

Another area of uncertainty has to do with "hearings" that occur well before trial, such as TRO or preliminary injunction hearings. Then one might well be doing "discovery" with a subpoena but not under Rule 30 or 34.

Yet another set of questions has to do with whether specifics in the draft sketches accord with the way things are handled for party discovery, or try to make rules for matters that are not disputed now in party discovery. For example, saying that documents should be produced where they are "ordinarily maintained" does not seem to be a directive in Rule 45, and many lawyers might balk at a rule that said other lawyers had a right to access materials in the client's offices instead of the lawyer's offices. But the goal is not to try to get into issues that don't need such specifics, so the sketches could surely be modified to take out unneeded (and perhaps unwelcome) details.

Others on the call supported the view that some specifics may be about things that have not proven to be problems under rules that now lack such provisions.

Discussion returned to whether creating "discovery subpoena" provisions in Rules 26-37 would permit us to remove large amounts of material from Rule 45. Putting aside the problem of TRO, preliminary injunction, and other "hearings," are there still judges who allow parties to subpoena witnesses and materials for trial that have not been presented already in discovery? In many courts that would ordinarily be impossible because of extensive pretrial requirements.

The answer was "Yes, there are judges who allow that." Rule 45 subpoenas are used to bring witnesses and documents to trial that are new to the case; the other side is just expected to "deal with it." It may be that this entails a deposition of the new witnesses the day before they take the stand at trial, but it does happen. A reaction was that this seems contrary to Rule 26(a)(3) and Rule 16(e), because those should ensure that everything is on the table well in advance of trial. Perhaps leaving specifics out of Rule 45 could be justified on the idea that the rules now preclude use of "trial" subpoenas to bring in new witnesses or material.

Whether or not Rule 45 could be drastically shortened if new subpoena provisions were added to Rules 26-37, it might be desirable to do so to make the provisions easier to find for lawyers. They would no be located where the discovery rules are generally located. A caution on this score, however, was that there might be arguable differences between the "discovery" subpoenas and the Rule 45 subpoena provisions that lawyers might try to exploit. And it was also pointed out that experienced lawyers now know how to find things; they would not be benefitted by this change.

These issues should be discussed in Atlanta.

(3) Ending the three-ring circus but leaving the rule otherwise alone: A third approach would be less aggressive than either of the other two. It would retain all the provisions now in the rule except to direct that all subpoenas issue from the court in which the main action is pending and specify where compliance must occur. The draft for this initially was prepared by

Judge Campbell. To date, efforts had not been made to conform the rest of the rule to these changes, but it is expected that doing so would not prove difficult were this course adopted.

In conclusion, the goal for Atlanta will be a discussion of the relative benefits and possible costs of adopting approach (1), (2), or (3).

Notes of Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Jan. 22, 2010

The Discovery Subcommittee of the Advisory Committee on Civil Rules had a conference call on Jan. 22, 2010. Participating were Judge David Campbell (Chair of the Subcommittee), Judge Mark Kravitz (Chair of the Advisory Committee), Judge Michael Baylson (member of the Advisory Committee), Subcommittee members Chilton Varner, Daniel Girard and Anton Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee) and Prof. Richard Marcus (Assoc. Reporter of the Advisory Committee).

Judge Campbell began the call by explaining that it was intended to discuss aggressive methods to shorten and simplify Rule 45. In particular, it would focus on the thoughtful effort at streamlining the rule sketched by Judge Baylson. Another conference call was scheduled about ten days later to pursue other Rule 45 topics the Subcommittee had been discussing.

The conference call materials were introduced as including three variations on this simplification theme. The first was a rendition of features of Judge Baylson's sketch as a revision of the current rule. This rendition of the revised rule took some liberties with Judge Baylson's sketch, but emphasized both the dramatic simplification of the rule that would result from pursuit of this course and the large number of specific provisions of the current rule that would be deleted were this approach pursued most vigorously.

The third rendition in the conference call materials showed the shortening of the rule that seemed possible with incorporation by reference as a method to avoid repeating in Rule 45 provisions that also appear in Rules 26-37. Although this method did cut out a considerable portion of Rule 45(d), it did not accomplish substantial shortening of the rule in the way that Judge Baylson's proposal did. It raised the possibility, however, that one might create a situation in which Rule 45 would require a "treasure hunt" through Rule 26-37 to find pertinent provisions, and might indicate that including all pertinent provisions in Rule 45 is preferable.

Finally, the second rendition of the rule in the conference call materials built on Judge Baylson's sketch but restored a large number of specific provisions that had not initially been included in that sketch. It also relied on incorporation by reference to avoid burdening Rule 45 with provisions already in the discovery rules, but therefore created a similar possible "treasure hunt" concern. It did cut out about 15% of the length of Rule 45, but did not shorten the rule nearly as much as Judge Baylson's sketch.

In short, the third rendition showed that cross-references would not greatly shorten or simplify the rule, the first one showed how much detail might disappear with the most aggressive simplification, and the second offered something of a middle ground.

The first reaction was that there were three major sources of complexity in current Rule 45:

(1) The issuing court: There could be three different issuing courts under current Rule 45(a)(2) -- (a) the court holding a hearing or trial, if the subpoena commands attendance at a hearing or trial; (b) the court for the district where a deposition would be taken if the subpoena calls for testifying at a deposition; and (c) the court for the district where production or inspection is to occur if the subpoena calls for that separately from a deposition.

(2) Service: Current Rule 45(b)(2) creates four permutations on service of a subpoena: (a) within the district of the "issuing court"; (b) outside that district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection; (c) within the state if a state court rule permits a subpoena to command attendance to testify at a trial, hearing, or deposition anywhere within the state; or (d) that the court authorizes on motion if a federal statute so provides.

(3) Where performance can be required: (a) for a party or officer of a party, within the state or 100 miles [45(b)(2) and the absence of any limitation in 45(c)(3)]; (b) for a person who is not a party or officer of a party, within 100 miles of where the person resides, is employed, or regularly transacts business [45(c)(3)(A)(ii)]; and (c) for trial, a person who is not a party or officer of a party may be required to attend anywhere within the state if substantial expense would not be incurred [45(c)(3)(A)(ii) and (B)(iii)].

Together, these provisions permit 36 possible outcomes. Together, they are a major source of complexity. Indeed, this could be described as a three-ring circus. Simplifying the rule depends significantly on simplifying these complexities.

One way to simplify would be to separate the place of service from the question where performance is required. Service should be a notice provision, and the location of service should not be critical to where the person served is required to respond. Somewhat similarly, retaining the "issuing court" provisions introduces unneeded complexity. The reality is that subpoenas are issued by lawyers conducting litigation before the court in which the action in pending. The current rule says that, by virtue of that status, they can issue subpoenas for the "issuing court" where the performance is required. But that court is not really involved in "issuing" the subpoena; it becomes involved only if a dispute arises that results in an effort to enforce the subpoena there.

A revised rule could remove many of these complexities by recognizing "nationwide" service from the court where the action is pending while regulating the place where performance can be commanded and also providing usually for "local" enforcement of discovery subpoenas. That could include the "transfer" idea that the Subcommittee has previously discussed, and also the resolution of the "Vioxx issue" that is a matter of continuing discussion.

The aggressively shortened rule portrayed in the first version in the conference call materials addresses and simplifies these complexities. But merely removing these complexities would not effect as much shortening of the rule as is done by that version of the rule, for it would also remove a large number of specific provisions from Rule 45 without replacing them with rule provisions. A quick review of that version suggested that as many as 21 separate provisions of the current rule would be removed in the streamlined version. That raised a concern that such an aggressive change would be like removing the striping from a freeway. For a while most people would probably continue to drive where the lanes used to be, but after a while some chaos might result. Is it essential to simplification to be this aggressive in removing detail from Rule 45?

A response was that this is a good question. One way of looking at it was to start with a fresh tablet, and appreciate that we already have very detailed rules regarding discovery so that a subpoena rule need not be similarly detailed. Instead, the goal should be to make it simple to get information from nonparties, and for nonparties to determine what they are required to do. At present, the rule is unwieldy. The best result would be to give the judge a lot of discretion; having a large number of specific rules is not superior to that. The judge, in turn, could use the discovery rules as a frame of reference to resolve issues that arise; that is much simpler than loading up Rule 45 with myriad details.

Discussion returned to the three-ring circus complexity of the current rule. How should the rule deal with a recurrent concern -- a subpoena from the District of Arizona for a witness in Pennsylvania to testify at trial?

A response to this was to ask why it is crucial to have this person from Pennsylvania before the Arizona jury. Technology gives us many alternatives. One is a videotaped deposition. Another is remote live testimony via videoconference or the like. The nationwide service permitted under the Criminal Rules provides a precedent for believing that these issues can be resolved for civil trials as well.

Discussion turned to the details in the rule. For example, in both the first and second examples of simplification in the conference call materials the revised language says only that the judge asked to enforce the subpoena to refer to "applicable provisions in Rules 26-37." It does not say more specifically what discovery rules the judge is to enforce, or which ones the parties should obey. Is that sufficiently informative? Won't that leave lawyers uncertain what rules they have to obey, and uncertain how judges will resolve questions about enforcing subpoenas?

Another reaction to the general concern with removing many details from Rule 45 was to agree that there is complexity and to favor simplification. Nonetheless, somebody who has graduated from law school should be able to deal with these specifics in Rule 45. The three-ring circus may introduce too much variability and confusion, but the other specifics do not necessarily do so. "I have not seen the problems that this detail might produce." Perhaps taking all these specifics out of the rule would be too aggressive.

Another participant focused on the "applicable provisions in Rules 26-37" language. That should not be a problem for the practitioner or for the court. It provides sufficient direction under the circumstances. But that does not address the larger question of having too clean a slate. Although starting from the clean slate view, this participant had moved away from that. The law of unintended consequences looms too large over such a drastic change in specifics. Retaining most of the specifics seems the safer course.

Discussion shifted, however, to the question of "nationwide" service. Some participants were very worried that introducing that would invite game-playing. True, this is the Vioxx issue that will be a main focus of a later conference call, but it is pertinent here as well to the extent one has to adopt some form of "nationwide" subpoena power to simplify the rule. That need not be done, so long as a simplified rule could be straightforward about the scope of obligations to respond. And on that point, empowering litigants to compel attendance at trial of certain party witnesses would not improve matters and would cause severe problems in a significant number of cases. Even if most judges would sensibly curtail or forbid such misuse of subpoenas, sometimes judges would not and injustice would result.

Another participant reflected on the removal of specifics and suggested that, for reasons of predictability, a review of the 21 specifics that would be removed by the most aggressive streamlining indicated that removing them would undermine predictability, which also matters in the rules. For lawyers, it is important to be able to forecast how disputes will be resolved, and including specifics in rules removes undesirable room for uncertainty and litigation about such things. So this participant believes that the simplified rule would have to look more like the second version in the materials, which retains the 21 specifics that seem to be removed in the first version. The third version (relying on some incorporation by reference to the discovery rules) might achieve some small improvements, but not enough to justify amendments that could also raise concerns about unintended consequences.

This discussion prompted the question whether it would make sense on the call to go through all 21 specifics that would be removed, or instead to focus on example no. 2, which seemed to be the version prompting the most potential support, and consider what specifics could safely be left out of that.

One example that might be considered is the provision of specifics about who can serve and how. It specifies that the person serving the subpoena be 18 years old, tender fees and mileage, and also provides the means of proving service. It uses up about 12 to 15 lines of rule text. Is that really needed? Is that a reason for invoking Rule 4 service provisions instead? The Subcommittee has already discussed changing the service provisions to remove the in-hand service requirement, and concluded initially that this change would not be desirable, in part because the consequences of failure to comply with a subpoena can be contempt of court. Should the shortening and simplification wrought by invoking Rule 4's service provisions be a reason for making such a change?

Another example appears in current Rule 45(c)(3), which contains a number of specific provisions about trade secrets and the like, including the treatment of the opinions of unretained experts who may be subpoenaed. One reaction on that subject was this level of detail is not needed. "Leave it out. Judges apply these rules all the time with discovery issues. We don't need to set forth something so detailed in Rule 45." A reaction to that view was that the unretained expert provision was added to the rule to deal with actual problems of that sort that had emerged in the cases, with different judges reaching seemingly contradictory results. Perhaps the reason the problem has disappeared is that the rule now provides the specifics it formerly lacked. There could be consequences to removing such specifics now, and practices that vanished when explicitly forbidden might return even though an amendment said that judges were expected to continue to exercise their discretion by applying the specific prohibitions or directives that had been removed. One might say we tried discretion on these specific points, and found that it didn't work.

A different attitude toward specifics in the current rule would ask whether things that the current rule leaves uncertain should be clarified. For example, a subpoena can be used to take the deposition of a nonparty corporation or organization in the same way that Rule 30(b)(6) authorizes such a deposition for a party. But where is that deposition to occur? The idea that it must occur within 100 miles of where the witness "is regularly employed, resides, or transacts business in person" does not do much to answer that question. Surely a rule change could be more specific on how to handle this question, and judges now must operate by analogy and common sense. On the other hand, if judges have to date been able to navigate dispute about this 30(b)(6) situation by analogy to the discovery rules and without specific direction from Rule 45, maybe the other specifics could be removed without creating much confusion. In short, we could improve the specifics of the current rule as well as reallocating them.

The possibility of taking out specifics prompted the reaction that judges would then get ten times as many disputes as presently. One judge described a situation in which a pro se litigant served a number of subpoenas himself. The rule now clearly resolves this question; a party cannot serve a subpoena. "We will have to arbitrate subpoena disputes." Moreover, this "arbitration" activity would mean that a common law of subpoenas would have to arise, and that it could well differ from judge to judge or from place to place. "Should we abandon decades of procedural rules that have been worked out and put into the rule?"

A response was that the complexities of the current rule now produce a lot of problems that befuddle the lawyers and often burden the judges. It need not happen that, on balance, the number of disputed issues rises if a much simpler rule is substituted.

A reaction was that one could start with a barebones approach to get rid of the three-ring circus and then selectively build back in provisions. For example (c)(1) and (c)(3)(B) of the current rule could be put back in. This would make the rule slightly longer but still much briefer. Nationwide service, for example, would be an essential feature.

The reference to nationwide service prompted the comment that it would primarily be a notice device -- not a power mechanism by which the "issuing court" commands activity within its geographical area. The appropriate handling of where compliance must occur could be dealt with separately depending on what compliance is in issue. Depositions could be subject to one directive, document production to another (perhaps -- in this age of electronically stored information delivered electronically -- detached from significant geographic limitations), and trial or a hearing tied to the place of the trial or hearing.

Another participant agreed. One approach would be (1) the subpoena is issued by the court presiding over the case, (2) it can be served anywhere, and (3) the limitations on where performance is required could be preserved or modified, but separated from the other two. That would preserve the operating reality of the current rule, while eliminating much of the complexity resulting from its retention of the fiction of an "issuing court" and authorization for performance keyed to where the subpoena happens to be served.

Another participant agreed with this approach. It would take out the "artificial step" of arranging for a subpoena to "issue" for a court that has no awareness or involvement in the matter. The key question is where performance is required, and neither place of service or identity of "issuing court" markedly assists in devising sensible rules to answer that question.

A concern was raised, however, about whether there could be difficulties given that the enforcement technique is contempt. Would there be problems with an issuing court on one coast holding a person served on the opposite coast in contempt? Would it have jurisdiction to do so?

A response to the contempt question from a judge was to suggest that as a practical matter -- at least for discovery activities -- there would be an order from the "local" court or an order from the issuing court after submission by the person served with the subpoena. Then failure to comply with that order would provide a sufficient basis for a finding of contempt. For testimony at a trial or hearing, the issue would be no different from a subpoena for testimony in a criminal case, which is now subject to nationwide service. This response prompted agreement from another judge: This could eliminate two rings of the circus, and preserve the routine opportunity for resolution locally of any disputes about enforcement of the subpoena. The alternative of insisting on "issuance" of a subpoena from the court where a deposition is to occur makes no sense. "It is goofy to have to go to Iowa to get a subpoena for a deposition in Iowa." Another judge agreed that the "issuing court" format of current Rule 45 is a fiction; we now have nationwide service in fact.

This discussion prompted the question whether this group has sufficient experience to make confident decisions about how these issues should be resolved, and whether a miniconference or other such effort would be important to resolving them. A quick response was that we don't have sufficient resources ourselves to reach confident conclusions. Instead, we should try to make our best effort to simplify and then use that effort as a starting point for commentary from others who could offer seasoned advice. Others agreed that it would be important to try to get a wide array of practicing lawyers to assess these questions.

The first occasion for wider discussion would probably be the full Committee's meeting in Atlanta in March. At that time, the goal would be to present a limited number of options and

get feedback on which to build toward an improved product. A conference could occur some time after the March meeting -- utilizing the insights that it provided. Various times were discussed for a possible mini-conference, including holding one as an adjunct to the Fall Advisory Committee meeting.

Discussion turned to immediate tasks. The due date for agenda materials for the Atlanta meeting is approaching in mid-February. The Subcommittee has another conference call on Feb. 3 to wrestle with other issues. The theme would seem to be to devise a rule that would remove the three-ring circus and identify additional Rule 45 specifics that are "expendable." On the question what is "expendable," it was cautioned that it will be important to recognize throughout this review of Rule 45 that a number of specific provisions currently in the rule responded to problems in administration of prior Rule 45 that were solved by adding specifics to the rule. We must be wary about disinterring the problems by removing the specifics.

Given the large variety of issues on the table, it was also suggested that it will be important in Atlanta to focus the full Committee on a series of questions that should be considered. That will enable other members of the full Committee to give those questions thought in advance, and perhaps even to invite reactions from others, and to offer considered views in Atlanta.

For the present, the focus will be on something like the second option in the conference call materials. Holding another conference call about these matters after Feb. 3 may be unworkable. The Reporter should try to devise and circulate a draft for reactions from Subcommittee members in sufficient time to permit adjustments in the agenda materials for the Atlanta meeting. It would be reassuring if there were consensus in the Subcommittee on what to take out or leave in, but at the same time that sort of question must remain contingent as the discussion moves into a wider circle. That wider discussion is, after all, the goal of the entire notion of a mini-conference some time after the Atlanta meeting. As much as possible, reactions can be offered by email. It is possible that some reference to these issues can be made during the Feb. 3 conference call, but several other issues are likely to occupy the Subcommittee's attention that day.

Draft Notes of Conference Call
Dec. 4, 2009
Discovery Subcommittee
Advisory Committee on Civil Rules

On Dec. 4, 2009, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Mark Kravitz (Chair of the Advisory Committee), Hon. Michael Baylson, Chilton Varner, Daniel Girard, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Associate Reporter to the Advisory Committee). Anton Valukas was unable to participate.

Simplifying and shortening Rule 45

Judge Baylson sketched out ideas for a simplified and shortened Rule 45 and circulated those ideas before the conference call. The sketch is attached to these notes as an Appendix.

Judge Baylson was able to join the call only for a short time as he had to return to presiding over a jury trial. He offered some overall ideas about his objectives in redrafting, in hopes that they could be pursued in greater detail at a later time when he had more time to participate. The basic goal is to take this opportunity to simplify and shorten Rule 45.

A starting point is that Rule 45 is often used by experienced counsel like the lawyers involved in Advisory Committee work, but that it is often important to others as well. Some lawyers called on to respond to subpoenas are not experienced with litigation, or at least have limited experience with federal-court litigation. And some who try to comply with Rule 45's requirements are not lawyers at all, but nonparty lay persons served with subpoenas. For these people, the current rule is too long and ornate to be of real use.

Accordingly, it is important -- now that attention has focused on Rule 45 -- to think about simplifying the rule to make it more accessible and usable for people who are not experienced federal-court practitioners. For them, the current rule is very difficult to wade through. A revised rule should make it clear to the reader how to comply with a subpoena. It should also provide for enforcement with regard to discovery in the district court where the discovery is to occur. The judge there should have discretion to shape the discovery with appropriate consideration of the needs of the nonparty. That judge should also have authority to transfer the decision on the discovery dispute to the judge presiding over the main action. Ideally, this simplified alternative could be considered in parallel with the amendments to the current language already being evaluated by the Subcommittee. Perhaps both could be presented during the full Committee's Spring meeting for consideration then. The initial draft circulated before the conference call was intended as a sketch to convey in broad outlines what might be done in place of the current, overlong rule.

Discussion followed during the remaining time Judge Baylson was able to participate. One question was whether the initial draft reflected a conscious abandonment of a variety of features presently in Rule 45 such as tendering fees to the witness, the obligation in Rule 45(c)(1) to avoid burdening the nonparty, etc. The response was that tendering fees in particular should be handled in conjunction with the provisions regarding service of the subpoena. For others, in general there was no intention to abandon them. But a major purpose would be plain language. For that purpose, it might well be that a informational sheet on subpoena practice could be developed that would more effectively inform the recipient about how subpoenas work in place of the current requirement that the text of Rules 45(c) and (d) be included with the subpoena.

Another example is the provision in the current rule that an attorney may issue a subpoena; the sketch seems to say only the clerk may do so. That was not left out to change the rule, but initially not included in an effort to emphasize simplicity.

There was also discussion of the invocation of Rule 26-37 in the sketch of a revised Rule 45. Whether it is sufficient to say that the judge "may refer" to Rules 26-37 in resolving disputes about enforcement is not certain. One goal, of course, is to avoid overburdening Rule 45. But the goal is not to require a treasure hunt through Rules 26-37 for provisions that might be relied upon in the Rule 45 context.

At the same time, one change seems more important to the simplification -- abandoning the antiquated notion that there are "issuing courts" across the land. All subpoenas should issue from the court where the action is pending. That does not mean that any disputes about enforcement must be handled by the court presiding over the main action. To the contrary, the initial responsibility for such disputes should be in the court where the discovery is to take place. It was noted, however, that even though retaining the "issuing court" framework would require some additional complexities it would probably be possible to embrace many other features of the sketch to simplify and shorten the current rule.

After this discussion, Judge Baylson had to leave to return to his jury trial. He indicated an interest in participating in a future conference call to discuss these issues further.

As a summary of the possibilities of the sketch, it was suggested that there are three basic aspects that might be considered separately: (1) The assumption is nationwide service of process, the abandonment of the "issuing court" setup; (2) Quite a few details now contained in Rule 45 and unique to it (i.e., not contained in Rules 26-37) were not initially included in the sketch; and (3) The sketch relied on cross-references to Rules 26-37 rather than reproducing in Rule 45 provisions that were often identical to the parallel provisions in the discovery rules.

Beginning with the cross-reference method, it was observed that -- at least in relation to the E-Discovery amendments in 2006 -- the Rule 45 drafting built on and essentially reproduced the provisions developed for the discovery rules. The goal was to invoke those in Rule 45 practice, not to adapt them or provide different rules for subpoena practice. So in that sense, incorporating by reference from Rules 26-37 might work just as well as reproducing significant portions of those rules in Rule 45. But that incorporation would probably need to be more specific than the current sketch suggested. Otherwise, there might be some considerable risks. For one thing, it might seem that Rule 45 told users to "find it yourself" in Rule 26-37, giving an advantage to those already very familiar with federal discovery provisions. For another, there seem to be a number of provisions in Rules 26-37 that clearly are not pertinent to subpoena practice.

Another reaction to the incorporation idea noted that Rule 45 is separated by quite a distance from Rules 26-37; there are a lot of rules in between. That may make referring back a more dubious method. Some clearly seem irrelevant -- Rules 33, 35, and 36 immediately come to mind. Some clearly apply even if Rule 45 does not currently say so -- Rule 26(b)(1) on scope of discovery comes to mind. Others that must apply to a considerable extent are Rules 30 and 34, and possibly Rule 31 (although the frequency of deposition by written interrogatories is uncertain). As an enforcement matter, it is not clear exactly how Rule 37 corresponds to the enforcement provisions of Rule 45. The particular protective features of Rule 45(c) -- designed to guard nonparties in a way not done for parties subjected to discovery -- may not have exact correlatives in Rules 26-37. There will be a good deal of sorting out to be done if we go down this path.

These observations prompted the reaction that in at least some places it looks initially like considerable shortening could be done. Consider, for example, Rule 45(d). There we currently have 31 lines of text that appear to be virtual repeats of provisions from the discovery rules. If the goal is to shorten Rule 45, isn't there a way simply to say that those discovery rules control practice under Rule 45?

Another reaction was that it might be desirable to search out materials developed by the Committee in connection with the 1991 rewriting of Rule 45. In Andrea Kuperman's memo on the VIOXX issue, there is some reference to a submission from the Assoc. of the Bar of the City of New York in 1989, which seems to have been part of that process. Particularly if we are going to consider discarding some of the things added in 1991, it would be good to know what was said about changing the rule then.

A further observation was that Rule 45(c) in a way overlaps with Rule 26(g). Maybe that overlap could be avoided. At the same time, it might be appropriate to address some seeming deficiencies in Rule 45 itself.

At this point, it was noted that much of the time for the call had elapsed. The suggestion was made that an effort be made to refine and develop the sketch to get a better feel for what would be involved in proceeding in this manner. Then, in a further conference call, the Subcommittee would have a more definite focus for discussion of whether to pursue this alternative. One thing to be kept in mind is that it will be important if we do pursue this approach to be very careful to make sure that all features of current Rule 45 are included in the revised rule, or to make a conscious choice not to include them.

(2) The VIOXX Issue

Since the last conference call, Andrea Kuperman has produced a wonderful memorandum explicating the courts' handling of the issue we have been calling the VIOXX issue -- whether, as to officers of corporate parties, judges may compel attendance at trial under the current rule. It shows that there are many cases following the view adopted in VIOXX. It also shows that even judges who do not follow that view seem to some extent to adopt the contrary view because the rule leads them to it, and perhaps somewhat ruefully at that.

Against that background, a starting point is to ask whether any on the call think that the VIOXX view reads the current rule correctly. Nobody thought so. That being the case, the next question is whether to amend the rule to make it clear that it means that only witnesses served as required by Rule 45(b)(2) may be required to testify at trial. Alternatively, we could try to develop an amendment to the rule that would move toward the VIOXX result. That would not necessarily adopt a unlimited subpoena power for all witnesses, but could calibrate appropriate authority for a judge to insist that a party witness attend trial.

A follow-up reaction to introduce the discussion was the recognition from the Kuperman analysis that a considerable number of judges appear to want the authority to insist on live testimony at trial. Indeed, it might be said that they are engaging in a "deliberate misreading" of the current rule to achieve this objective.

Another view was offered: Judges may well often be using the subpoena power to ensure that important witnesses testify live before the jury where issues of credibility are important. But at least some may have other ideas in mind as well. Promoting settlement, for example, probably occurs to some judges asked to require the attendance at trial of high corporate officers. One way of looking at this is to regard attendance at trial as a way of impressing on the officer the stakes

and issues involved in the case. But it is possible that some judges might also take account of the inconvenience that attending trial would produce in the expectation that this prospect would make the corporate party more receptive to settlement.

Two sorts of questions were prompted by this discussion. First, should depositions and trials be regarded differently? Current practice under Rule 30 is much more open-ended on place of deposition than Rule 45 is on place of testimony. For example, the starting point is usually that defendant may notice the deposition of plaintiff in the place where the suit was filed. In that circumstance, many cases say that plaintiff, having sued in the forum, must show up there to be deposed. And defendants, having been found susceptible to jurisdiction in the forum, are hardly immune then to having their depositions noticed in the forum. In either instance, the onus is on the party seeking to change the place of the deposition to try to negotiate a change or make a motion for a protective order. No rule then limits the power of the court to insist on local testimony. It may seem odd for the court to lack similar authority when it is testimony at trial that is at issue.

The second question was whether we should focus on a larger number of employees of a party. The reality will often be that the categories identified in Rule 45(c)(3)(ii) -- officers -- or the ones identified in Rule 37(d)(1)(A)(i) -- officers, directors or "managing agents" -- don't include enough people. It would seem that the reality is that the organizational party could readily arrange for lower-level employees to attend a deposition or a trial, and that they often do so. If there is to be an expanded authority for a judge to compel attendance by those who are associated with an organizational party, should we try to expand the list to include a more realistic collection? Indeed, it could almost be said that the current provision in Rule 45 invites abuse without often affording useful commands to attend trial. Subpoenaing the corporate officers would be most likely to impose unjustified pressure on the organizational party, but usually not be calculated to produce a witness who has significant information because ordinarily lower level employees are the ones actually involved in the transactions leading to the suit.

A reaction to this set of questions was that the solution to all these sorts of problems is to take and videotape the deposition of the witness. Indeed, for plaintiff lawyers this option is almost always better than the power to compel attendance at trial. During the deposition there is no judge present to control the action, and the lawyer can choreograph the affair and extract the most useful and allegedly damning portions.

The deposition possibility drew the observation that it would apply equally to a witness across town. Should we simply recognize that depositions are a valid substitute for testimony at trial and move toward using them even for the witness across town? One example of that sort of thing might be testimony by doctors; even though they are located nearby, courts regularly permit them to testify by videotaped deposition rather than intrude on their busy schedules. Indeed, perhaps the time has come to reconsider the restrictive elements of Rule 43 on live testimony from a remote location.

It was cautioned, however, that these Rule 45 issues are slightly different from Rule 43 issues. A major concern under Rule 43 was that an off-screen person might be signaling the witness or otherwise influencing the testimony if it is delivered to the court from a remote location. Those concerns are largely or completely absent in the deposition setting. Perhaps the proper focus should instead be on Rule 32, which allows use of the deposition (absent stipulation) only if the witness is "unavailable." That limitation could be relaxed, perhaps.

Another reaction was to take a broader view. The Kuperman memo had examples that moved beyond the prototypical corporate officer situation. For example, in at least one case it

was the plaintiff who refused to attend trial. In another, defendant had moved to transfer the case and then was able -- due to the transfer -- to refuse to show up for trial. So this is not just about corporate party witnesses. It may show that there is a considerable desire among judges to have more latitude to ensure needed witnesses show up for trial. Ought we give serious thought to building in authority for them to do that?

This prompted the observation that it's rather odd that the court can readily insist that plaintiff come to the forum for her deposition, but not to testify for trial. Indeed, the *Big Lots* case even suggested that defendant could serve plaintiff with a subpoena for trial during the deposition unless there is some immunity to such service.

Another view, however, was that there is a big difference between deposition and trial. "After the deposition, you can always change your mind about whether you want that witness at trial." Moreover, it was reiterated, there is certainly no indication that plaintiff lawyers often find depositions an inadequate alternative, for in a deposition they don't have a referee to limit what the interrogator can do.

Another consideration was whether deposition practice regarding high corporate executives --sometimes called the Apex cases -- contains sufficient protective provisions to deal with concerns about overreaching. A response was that the Apex cases are mixed; there may be individual judges who, for one reason or another, do not provide needed protections for high corporate officers.

This observation prompted the question whether judges might sometimes insist on attendance at trial by high corporate officers to coerce settlement. Given how good technology is, it would not seem that live testimony is nearly as important as it once was. Expanding the power to require attendance at trial may actually foster more settlement promotion than testimony enhancement.

This observation prompted the further observation that depositions could be compared to trials in a different way -- the disruption capacity. Even judges who do not forbid a deposition of a high corporate executive probably see to it that the deposition happens in a way that is minimally intrusive on the executive. For example, it might be from 4:00 to 6:00 p.m. in the CEO's office. Depositions are often largely witness-centered. Trials often are not. Maybe it could be said that they are jury centered. In any event, it may well be that the witnesses will not only have to travel to the courthouse, but also to wait around until the time is ripe for them to testify. From the perspective of a corporate executive, these two experiences may be worlds apart in terms of disruption.

This observation drew agreement. Requiring attendance at trial could result in a settlement. Even with the unfettered questioning that goes on in depositions, they are usually significantly less intrusive on the executive.

Discussion shifted to whether it would be desirable to proceed for a time on parallel tracks: (1) prepare a rule change to "overrule" the VIOXX interpretation, and (2) prepare possible rule language that would provide some authority for courts to require attendance at trial by party witnesses. If the Subcommittee is certain that it wants to adopt option (1), there is no reason to spend the time to develop option (2). But otherwise it may be best to have both for the full Committee.

The possibility of giving serious consideration to the second option drew the further observation that it would be useful to get feedback on the implications of that sort of provision if

it appears potentially desirable. It is not likely that this group can think of all possible issues such a course might make important. That drew agreement. Although we have been focusing on corporate executives, it may be that the consequences would also be significant for individual plaintiffs who could be required to travel great distances to testify, as in the *Big Lots* case.

One possibility would be to try to reach out to lawyer groups for further feedback on these issues. Corporate counsel and plaintiff groups come to mind as likely sources of useful information. But it may be difficult to get sustained attention from these groups. Another observation was that if such a proposal were published for comment a number of judges would make their views known, as did happen with the recent Rule 56 proposals.

The bottom line was that some drafting on alternative (2) should be done before the next conference call. With that in hand, it may be possible to discuss these issues in a more concrete way.

Cost allocation

Discussion turned to the current Rule 45 provisions regarding cost allocation. In general, there had not seemed to be much concern about those provisions. During the full Committee's meeting in October, little enthusiasm was expressed for trying to change these provisions. Should we drop this issue?

One reservation was expressed -- it would be desirable to build in something about the risk that some nonparties would run up very large costs for complying with a subpoena and then present a huge bill with no forewarning. This concern does not question the general propriety of the view that the party served with the subpoena should not have to bear significant compliance costs. But it has happened that nonparties -- particularly those allied with a party to the current case -- have presented crippling bills for complying with subpoena. Trying to resolve those bills has resembled a mini-litigation. Such a bill could be disastrous for a public interest group involved in litigation, for example.

The concern prompted a comparison to the provision in Rule 34(b)(2)(D) requiring a party producing electronically stored information to specify the form or forms it will use before undertaking production. That requirement is designed to identify disputes about form before preparations to respond to discovery drive up the costs of modifications designed to make the discovery useful. The provision was included due to reports that fairly often producing parties would deliver electronically stored information in a form that the other side could not use and then object that it had spent a lot of money putting the information in that form. Similarly here, the goal is to alert the party that the nonparty will be delivering a bill for compliance at a time when that outcome can be avoided by modification of the compliance.

Looking within Rule 45, however, it was also asked why this would arise under the current rule. Rule 45(c)(2)(B) seems to say that if the nonparty objects, it need not comply with the subpoena and discovery will go forward by court order. It also says that the order must protect the nonparty against "significant expense from compliance." How can nonparties claim to be entitled to such payment if not provided for in a court order? Is the claim that payment is due because of an explicit or implicit agreement resulting from negotiations about the subpoena?

The response was that there are almost always formulaic objections to subpoenas. Indeed, some people have begun foreseeing this cost issue in their subpoenas by including instructions like "Do not begin any compliance activities until after consulting with our counsel."

In court, the objector will say "We will produce subject to document production costs." But that does not include any meaningful disclosure about what those costs may be.

A reaction to this information was that it sounds like what's going on in practice doesn't really fit with what's in Rule 45. Another reaction was that this seems to come up very rarely. Judges are not often asked to rule on cost issues related to subpoena enforcement. And it might be that encouraging more applications for orders would result in motion proceedings in many cases even though this sort of problem is very rare.

The resolution for the present was an invitation to "get more examples," and also to suggest how this might be dealt with by a brief rule change.

In-hand service

Another issue that was raised by some comments received in the Committee's in box was to change the current requirement on in-hand service. One set of comments urged that service be made the same as for a summons under Rule 4. Another was that the rule be revised to specify that in-hand service is required, on the notion that the rule is not clear that in-hand service is required now, and that such service is desirable and should be mandated clearly.

The consensus was that no change was needed. It seemed here, as with Rule 30(b)(6), that the various complaints suggested that although the current rule might sometimes be burdensome for some it has the balance set in about the right place. Unless there is a reason to change this conclusion, this issue will be dropped.

Further conference calls

It was resolved that the Subcommittee should try to arrange two conference calls during January. Having two seemed necessary to deal with pending issues about Judge Baylson's suggested revisions, and about the VIOXX issue. In addition, no discussion has yet been had on the revised rule change proposals and draft Committee Note language circulated before this conference call based on the Nov. 5 conference call's resolution of other issues. It is not anticipated that those matters will occupy a great deal of Subcommittee time, but before the meeting in Atlanta the Subcommittee will need to return to them.

APPENDIX A

Baylson Proposal For Rule 45 - "Short and Sweet" - #2
December 1, 2009
[revisions based on Marcus comments dated November 3, 2009]

RULE 45

A. In general – Form and Contents.

Every subpoena must:

1. State the court from which it issued;

2. State the title of the action, the court in which it is pending, and the civil-action number; and

3. Command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises.

4. Set forth the text of this Rule.

B. Issuing Court.

1. A subpoena must issue from the court in the district where the action is pending.

2. The clerk must issue a subpoena, signed but otherwise blank, to a party who requests it, or the attorney for that party.

C. Service.

[I recommend nationwide service, as the Criminal Rules allow. Although it may be convenient in some ways to cross-reference to Rule 4, that involves greater complications. The provisions for service in a foreign country and proof of service should remain.]

D. Place of Compliance.

1. A subpoena for trial requires appearance or production at trial, subject to Rule 43.

2. Compliance with any other subpoena shall be performed within ____ miles of where the witness resides or has a regular place of business where documents or things are located, or at the premises to be inspected.

E. Objections.

1. The person or entity served with a subpoena may serve an objection before the time required for compliance or within 14 days of service, whichever is shorter, and, if an objection is served, need not comply with the subpoena pending court order.

F. Proceedings If Objection Is Made or If There Is Non-Compliance.

1. Rules 26(c) and 37(a)(1) and (5) shall govern any person or party seeking court action concerning a subpoena. A hearing may be held by telephone, or by use of any technology in which the court may hear any party or the party's attorney, and the person or entity subpoenaed, to ensure substantial fairness. [add cross reference to Rule 43] (?)

2. The issuing court must rule on any dispute concerning a trial subpoena. The court in the district where any other subpoena is served or is to be performed, may rule on any dispute concerning the subpoena, or may refer the dispute to the issuing court.

3. After considering the costs and burdens on the person or entity served with a subpoena, and the issues in the case, the court may refer to applicable provisions in Rules 26 to 37 in adjudicating a dispute, and may require advancement or allocation of costs and expenses, including attorney's fees.

[4. The court ruling on a dispute concerning a subpoena must act promptly and state the reasons for any order.]

G. Notification of Other Parties.

The party serving a subpoena must provide, to all other parties, a copy of the subpoena, objections served, motions filed, and timely notification of compliance.

Draft Notes of Conference Call
Nov. 5, 2009
Discovery Subcommittee
Advisory Committee on Civil Rules

On Nov. 5, 200, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Chilton Varner, Daniel Girard, Anton Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Associate Reporter to the Advisory Committee).

Judge Campbell introduced the call as intended to go through the six issues addressed during the full Committee's October meeting and resolve the Subcommittee's position on those issues. In addition, the Subcommittee could consider the rule rewrite concepts developed by Judge Baylson as an alternative or additional aspect of the consideration of Rule 45.

(1) Notice of Service of Subpoena

The initial topic was whether moving the notice requirement from its current spot in Rule 45(b)(1) to Rule 45(a) was a good idea. During the D.C. meeting, nobody seemed uneasy with this change, which is intended to make the notice requirement more apparent. There was no objection to moving the requirement, and it was resolved to propose the move. And the relocation as a new Rule 45(a)(4) (as proposed in the agenda materials for the D.C. meeting) met with approval.

A second issue that came up during the October meeting of the full Committee was whether to specify that the notice had to be given a set number of days before service of the subpoena. Presently the rule says only that it must be given "before [the subpoena] is served."

The concern raised relates to employment cases in particular. In those cases, service of a subpoena on the employee's current employer can cause serious problems for the employee. Sufficient advance notice -- three or seven days notice was suggested -- could guard against untoward prejudice to the employee.

This issue had not previously been discussed by the Subcommittee. An initial reaction was that a member would prefer not to add in such specifics. "A number of days is more red tape than we would need." Another member agreed. "This would be an open invitation for more litigation. Don't make the rule more cumbersome." Another member agreed. The consensus was not to include specifics about how many days' notice must be given.

Another question was whether it was desirable to include a requirement that the notice include a copy of the subpoena to be served. That requirement is not in current Rule 45(b)(1). The consensus was that adding this requirement was worthwhile.

Accordingly, the language in proposed Rule 45(a)(4)(i) was approved.

Notice of Receipt of Subpoenaed Materials

The agenda materials for the D.C. meeting also included a proposed Rule 45(a)(4)(ii). This idea originated with various bar groups and lawyers who offered comments on the operation of Rule 45.

During the discussion in D.C., various questions were raised about the wisdom of including a requirement for a second notice. It may be that requiring two notices in Rule 45 is too burdensome. The notice of service of the subpoena (particularly when supplemented with a copy of the subpoena itself) should suffice to alert the other parties to take action to protect themselves. There was also concern about whether the rule provision might imply that the party who obtained the materials must provide copies free of charge to the other parties. There was also the question about how detailed a notice of receipt of materials should be if such a notice must be given.

The starting point, however, is whether the second notice is a good idea at all. Should the first notice suffice without any requirement in the rules for an additional notice?

One reaction was that every lawyer has a duty to look out for her clients. A lawyer receiving notice that a subpoena will be served can write back and ask for notice of or copies of anything that is provided in response to the subpoena. Another member agreed that this is how it's done.

A question was asked about whether it would be desirable for the rule to say that a party obtaining documents pursuant to a subpoena must cooperate with the other parties in providing access. This prompted the reaction that it would be an attempt at "writing rules of behavior into the rules." That is not a promising activity. "I know that if I play games, I'll end up before the court and worse off for it."

A concern was raised about whether other lawyers are not as sophisticated as the lawyers on this call. This prompted the reaction that "that's not our problem." The client selects the lawyer.

Another potential problem was that documents received after the first delivery pursuant to the subpoena might not be provided. Would that require a third or fourth notice? One reaction was that the letter in response to the notice of impending service of the subpoena should say something like "any and all documents received in response to the subpoena" should be provided, so that later deliveries are included. Another was that this failure to update has not been a problem in practice.

The emerging consensus was that the proposed amendment should not include a requirement for a second notice after production had occurred. But the Committee Note might profitably say that the pre-service notice puts the other parties under a burden to do follow up if they want to obtain copies of whatever's produced.

It was noted that many attorneys had favored something like this second notice. We should expect to hear a number of arguments in favor of such a provision if we go forward with a proposed amendment that does not include one. Indeed, it might be a good idea to flag the issue in the Request for Comments.

This prompted the reaction that if there is overwhelming support for adding the second notice that reaction would be a ground for giving the subject a second look.

Sanctions for failure to give notice

Another topic that came up during the October Committee meeting was sanctions. What is the consequence of failure to give the notice? The rule says nothing about sanctions and the agenda materials did not address this question directly.

A reaction was that this is inherently case specific and that rule provisions would do little to assist. That drew agreement. Another reaction was that "If you put a sanction in, lawyers will try to use it." Saying something about sanctions actually might have harmful consequences.

Accordingly, for the present the intention is to bring forward part of the proposal before the full Committee at the October meeting:

Rule 45. Subpoena

(a) In General.

* * * * *

(4) Notice to other parties. If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, before the subpoena is served, a notice including a copy of the subpoena must be served on each party.

(b) Service.

(1) ***By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things~~

~~or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

Nationwide subpoena for trial --
The VIOXX problem

The question of nationwide subpoenas for trial testimony of officers of corporate parties was introduced with the idea that, during the October meeting of the full Committee, none seemed to endorse a full power to subpoena party witnesses nationwide. The other alternatives appeared to be to attempt to restore the rule that many thought had applied -- that nonparty witnesses are required to testify only subject to the limitations in Rule 45(b)(2) -- or adopting a rule that would permit a court to order testimony beyond those limits based on an unusual showing.

The initial view offered was that some amendment should be made because the current disagreement consists of courts on both sides who say that they are basing their interpretations on the language of the rule. This is not likely to be resolved by appellate decisions, and the current standoff in the district-court decisions could persist for some time.

One member stated a strong view in favor of restoring the distance limits for all witnesses and questioned the importance of live testimony. Video depositions are now done very well; the attendance of the witness at trial is therefore not crucial. This drew the reaction that if the CEO is not really needed, it would seem that the 100-mile rule is not the critical one; within 100 miles of the CEO's office the power to subpoena the CEO still operates as a lever, but the courts have developed a protective gloss and will often quash a subpoena (or forbid a deposition) when there is no real value to the testimony of the CEO.

The response was that this is not the issue for the CEO when there are 1,500 cases against the company. Another member emphasized that large corporations may have this number of cases, and aggressive counsel on the other side will not pass up this pressure point if it is possibly available. A video deposition is not significantly different from trial testimony.

Another member said that taking the CEO's deposition was a rare event; VIOXX seems like the exceptional case. Perhaps it is not worthwhile changing the rule for such an extraordinary case. This drew the response that even though sophisticated counsel may not try to use this tactic, many others will, and it can put great pressure on the company. That drew agreement: "I've had to fight this issue several times." Moreover, it is peculiar to treat only corporate officers differently. If one is really interested in important testimony, the CEO is much less likely to have pertinent personal information than many lower level employees of the company, and they are not within even the VIOXX rule.

Had anyone really said that trials were not fair without the VIOXX rule, it was asked. Indeed, even in VIOXX, if the officer's testimony was so important why wasn't his deposition taken? That sounds like an effort to put pressure on the company.

Leaving things rest as they are may not be an option any more; the VIOXX decision is out there and counsel will try to exploit it. It's a very big club to give the corporation's opponent, and the value of the CEO's testimony is likely to be minimal. "I can't remember a case in which

a CEO gave critical testimony."

"This is a hard issue." There are arguments on both sides. One way to look at it is to ask whether the interpretation adopted by Judge Fallon has been followed. If not, it may be that this decision is not a reason to change the rule. But it was noted that in her later decision disagreeing with Judge Fallon, Judge Vance described the Fallon interpretation as the majority rule.

For the present, the best thing seems to retain this as a live issue on the Subcommittee's agenda. Meanwhile, the members can reread the VIOXX decision and Judge Vance's decision. In addition, we should try to get a better fix on whether other courts are adopting the same view the Judge Fallon articulate.

That suggestion drew agreement; it does not seem warranted to react to one decision. But if we are going to make proposals to change Rule 45 anyway, this should be included. At least, perhaps, some corrective guidance on this subject could be included in the Committee Note. That idea drew the response that ordinarily a Note should only be about rule changes; it is normally not considered appropriate to use a Committee Note to "amend" a rule.

The consensus was that the issue would be brought up again during the Subcommittee's next conference call. Between now and then the members could give it more thought and some research can be done to determine how widespread the VIOXX interpretation has become.

Transferring to the court
presiding over the main action

This topic was introduced with the observation that during the full Committee meeting it seemed that all thought it appropriate to provide some authority by rule to transfer motions. The uncertainty was about the standard to use. If one makes it too easy, issuing courts will always or almost always transfer the motions.

Initially, it was asked whether any on the call disagreed with providing by rule that the motion could be transferred. None did.

Discussion turned to the standard to guide the court's decision whether to transfer. One standard would be simply "in the interests of justice." Then the Committee Note could flesh out the considerations that should be evaluated. This drew support. It is important to preserve the work product and decisions of the court presiding over the underlying case. It is not in the interests of justice for other judges to be second-guessing that judge's decisions about what is relevant and discoverable.

A reaction was that 28 U.S.C. §1404(a) and §1407 both treat the interests of the parties and the witnesses as important as well. Particularly where we are dealing with nonparty witness's interests, it would seem odd not to acknowledge in the rule itself that they matter. Looking only at rule and statute language, one could conclude that under revised Rule 45 only judicial efficiency matters, while under the transfer statutes party interests matter as well.

After further discussion, the consensus was to go forward with the "interests of justice" standard alone.

There was also discussion whether to use "transfer" or "remit" as the verb. Transfer is the verb in §§1404(a) and 1407. Remit seems to mean that the parties have to do something further to bring the matter before the judge presiding over the main action, and perhaps that there should

be further briefing, etc. It would seem preferable to have the moving papers sent to the judge presiding over the main action and ready for disposition unless that judge feels more input is needed. So "transfer" would be the better choice.

Accordingly, for the next conference call the discussion draft should be as follows:

Rule 45. Subpoena

* * * * *

(c) Protecting a Person Subject to a Subpoena.

* * * * *

(2) ***Command to Produce Materials or Permit Inspection.***

* * * * *

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the

issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(iii) If the action is pending in a court different from the issuing court, the issuing court may, in the interests of justice, transfer the motion to the court in which the action is pending.

* * * * *

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(D) *Transferring Motion to Court in Which Action Pending.* If the action is pending in a court different from the issuing court, the issuing court may, in the interests of justice, transfer the motion to the court in which the action is pending.

In addition, an initial draft of a Committee Note should be prepared. In part, that will permit reflection on whether the phrase "in the interests of justice" will -- in conjunction with the Note -- suffice to focus on the pertinent criteria.

Another question was raised: Are we certain that a rule can empower a court in New York to pass on the objections to a subpoena by a nonparty served with the subpoena in New Mexico?

An easy answer to this question was that someone could raise the issue. The D.C. Circuit has said, under current law, that there is no authority to transfer a Rule 45 motion over the objections of the subpoenaed nonparty, in part referring to jurisdictional limitations. But the proposal here is to consider adopting a rule, which was not before the D.C. Circuit.

There certainly are indications that a rule could satisfy the problem. Rule 45 already reaches across state lines in some instances -- when the person commanded to testify at trial lives or works within 100 miles of the courthouse. So current Rule 45 would justify a subpoena requiring the New Mexico nonparty to attend and testify in another state provided it is within 100 miles of where she lives or works. Indeed, there is probably nothing in the Constitution that required Congress to limit districts to a single state, so a single district could encompass more than one state, as circuits do. And as presently written, Rule 45 expands subpoena power to the entire state in multi-district states only if the subpoena power in state courts extends that far. Presumably that provision only matters when the point within the state is more than 100 miles from where the court sits.

Rules and statutes have gone further. Fed. R. Crim. P. 17(e) authorizes nationwide service of subpoenas for criminal trials. That follows from the 1793 statute that originally set up the 100 mile limitation for subpoenas in civil cases, but appears to be a rule provision extending subpoena power much more than 100 miles beyond the state line. Rule 4 has various service

provisions that have expanded the summons power, partly by invoking the provisions of state law of the state in which the federal court sits. Rule 4(k)(1)(B) goes beyond state law and authorizes a summons within 100 miles of the courthouse for a party to be joined under Rule 14 or 19. Rule 4(k)(2) extends the summons power virtually world wide when a federal claim is asserted and the defendant has minimum contacts with this country but there is no basis for jurisdiction in any specific district.

Statutory provisions relied upon by analogy in connection with this proposed transfer power provide some additional support. 28 U.S.C. § 1404(a) only permits transfer to a district "where the action might have been brought," which has been taken to require that the transferee district be one in which the plaintiff could originally have sued and therefore that jurisdictional limitations are satisfied in that district. But 28 U.S.C. § 1407 contains no such limitation; transfer for consolidated or coordinated pretrial treatment can be to any district. In part, that liberality of transfer may reflect a judgment that the § 1407 transfer is only for purposes of pretrial development of the case, and that remand is required for trial. Indeed, that remand is required even if the transferee district is one to which § 1404(a) transfer is possible.

This transfer proposal would seem to raise less pressing jurisdictional issues. As an amendment of current Rule 45, it would matter only for discovery depositions where the actual commanded activity was to occur within the geographical limitations of the issuing court. The only question is whether a dispute about complying with the subpoena would be resolved locally or in the court where the action is proceeding, and technology now permits participation from a distance in motion proceedings in that court. Depending on what that court rules, the compliance still would occur locally. And the decision whether to transfer the matter to the judge presiding over the main action is made locally as well.

So although there can be no guarantees that "jurisdictional" challenges will not be made against this new transfer power, there seem to be many other situations in which similar rulemaking or statutory provisions produce very similar results without encountering insurmountable jurisdictional obstacles.

More aggressive rewrite of the rule

Before the conference call, a model of a more aggressive rewriting of the rule provided by Judge Baylson was circulated to the Subcommittee. Unfortunately, Judge Baylson was unable to join the conference call.

The Baylson proposal was introduced as a very creative effort at simplification. In place of wholesale reproduction in Rule 45 of provisions analogous to those in Rules 26-37, it seeks to invoke the provisions of 26-37 by reference. But those references may need to be sharpened because it could otherwise be unclear which exact provisions of Rules 26-37 are to apply to Rule 45 practice. More generally, one might present the question whether to proceed by reference to other rules as depending in part on whether we want Rule 45 to inform the reader by itself of all procedures that apply to subpoenas. That might be deemed desirable, rather than assuming that nonparty recipients of a subpoena are familiar with the discovery rules. But it seems likely that the current requirement that the subpoena reproduce Rules 45(c) and (d) illustrates the difficulty with this "all in one place" idea. Unless the person reading Rule 45 is a lawyer, it is likely that the present rule provisions will be incomprehensible. So considerable space could be saved by minimizing reproduction in Rule 45 of provisions parallel to those in Rules 26-37.

Another point about the redraft is that it does not include quite a few provisions unique to Rule 45 that are presently in the rule. For example, it does not say anything about providing

information like that contained in Rules 45(c) and (d) to the recipient. It says nothing about the duty to avoid overburdening the nonparty, or the idea that the court should not enforce a subpoena that would impose "significant expense" on the recipient. It says nothing about tendering fees to the witness, or the duties of an unretained expert. Many of these provisions were added in 1991, and some were already in Rule 45 before then. Some or many of them may not have been useful, or may have outlived their usefulness. But some consideration probably should be given to whether they should be retained. A rewrite of the rule could discard provisions of the current rule that are not useful, but discussion would be necessary before that happens.

A more basic question is whether the effort of redrafting Rule 45 is worth undertaking. The need to make sure that every provision of the current rule is accounted for -- either included in the rewritten rule or discarded knowingly -- resembles the task of restyling. It will take considerable effort. One thing the rewrite could do is discard the "issuing court" fiction that is embedded in the current rule. Beyond that, however, it is not clear that -- except for discarding provisions of the current rule that are not regarded as useful -- the rewrite would much change the operative provisions of the rule. Yet the rewritten rule would look very different from the current rule, and that difference in appearance itself might alarm the bar. Of course, one of the goals is to make the rule more accessible. But wholesale change always involves transition costs and risks of unintended consequences.

So an enduring question is whether this effort should be begun. For the present, it seems that it is important to involve Judge Baylson in this discussion. The discussion was therefore tabled pending reconvening at time when Judge Baylson can participate. The target will be return to discussions at the end of November or the beginning of December.

MEMORANDUM

DATE: November 16, 2009

TO: Discovery Subcommittee

FROM: Andrea Kuperman

CC: Judge Lee H. Rosenthal

SUBJECT: Case Law Regarding Compelling Party Officers to Attend Trial in Distant Fora

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This memorandum addresses an issue that has been raised in connection with the Discovery Subcommittee's consideration of possible amendments to Federal Rule of Civil Procedure 45. There is a split of authority as to whether Rule 45 permits a court to issue a subpoena requiring a party or a party's officers to travel more than 100 miles to testify at trial. Two judges within the same federal district have recently reached opposite conclusions, both stating that their decisions are based on the text of the rule. In *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664 (E.D. La. 2006), the court held that Rule 45 permits requiring a party's officer to attend trial in a distant forum. In *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) ("*Big Lots Stores*"), the court held that Rule 45 does not permit requiring a party's officer to attend trial at a distant courthouse if the officer was not served within 100 miles of that courthouse. The *Big Lots Stores* court rejected the view expressed in *Vioxx*, but noted that *Vioxx* adhered to the majority rule.

In considering whether to amend Rule 45 to resolve the split of authority, the Subcommittee is interested in determining whether the *Vioxx* interpretation is in fact the majority rule or whether it is a unique holding. The Subcommittee requested that I review the case law on this issue. I have focused largely on cases after the most recent substantive amendments to Rule 45 in 1991 because many of the cases finding that Rule 45 allows compelling a party's officer to travel to trial from a

distant location support this construction by relying on the 1991 amendments. The case law reveals that the *Vioxx* holding is not unique and that a number of courts have referred to it as the majority view of Rule 45, but that there are also a number of cases that have disapproved of this view. *Cf.* Don Zupanec, *Subpoena – Attendance at Trial – Geographical Limitation – Parties and Officers*, FED. LITIGATOR, Sept. 2008, at 13 ("[W]hile [the *Vioxx* view] remains the predominant view, several courts have recently rejected it, concluding instead that Rule 45(b)(2) specifies requirements for proper service of a subpoena to compel attendance while Rule 45(c)(3)(A)(ii) sets forth circumstances under which a subpoena must be quashed, but does not alter the requirements for proper service.") (citing *Lyman v. St. Jude Med. S.C., Inc.*, No. 05-C-122, 2008 WL 2224352 (E.D. Wis. May 27, 2008); *Mazloum v. Dist. of Columbia Metro. Police Dep't*, 248 F.R.D. 725 (D.D.C. 2008)). The *Vioxx* view seems difficult to reconcile with the current language in the rule, but the fact that many courts have taken a similar view may indicate that many courts believe that they should be able to compel a party's officer to attend trial, at least as a matter of policy.

I. Relevant Language in Rule 45

In resolving this issue, two interrelated provisions of Rule 45 are relevant. The first provision focuses on service:

> **(2)** ***Service in the United States.*** Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any place:
>
> **(A)** within the district of the issuing court;
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> **(B)** outside the district but within 100 miles of the place specified for the deposition, hearing, trial, production, or inspection;
>
> **(C)** within the state of the issuing court if a state statute or court rule allows service at that place of a subpoena issued

by a state court of general jurisdiction sitting in the place specified for the deposition, hearing, trial, production, or inspection; or

(D) that the court authorizes on motion and for good cause, if a federal statute so provides.

FED. R. CIV. P. 45(b)(2). The second provision focuses on quashing or modifying a subpoena:

(3) ***Quashing or Modifying a Subpoena***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

. . . .

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

. . . .

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

. . . .

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

FED. R. CIV. P. 45(c)(3)(A)(ii), 45(c)(3)(B)(iii).

II. The View that Rule 45 Permits Compelling a Party's Officer to Attend Trial More than 100 Miles Away

The *Vioxx* case purportedly describes the majority view of the interplay between subsections

(b)(2) and (c)(3)(A)(ii) of Rule 45. *Vioxx* was a multidistrict litigation case in which the court considered a motion to compel the appearance of a Merck & Co., Inc. ("Merck") representative at one of the trials. The representative requested was Mr. Anstice, who was President of Human Health for Canada, Latin America, Japan, Australia and New Zealand, and who had previously served as Merck's President of Human Health for the United States. *Vioxx*, 438 F. Supp. 2d at 664. In his prior position, "Mr. Anstice was responsible for the marketing activities and commercial operations of Merck during the time Vioxx was being developed and marketed." *Id.* The court had previously ruled that the plaintiff could compel Mr. Anstice to appear and testify at the trial, compel Mr. Anstice to testify at the trial from a remote location via video transmission, or present Mr. Anstice's former testimony from a state court trial involving Vioxx. *Id.* at 665. Merck's counsel agreed to accept service on Mr. Anstice's behalf and received the subpoena via email in Chicago; the parties agreed that service would be considered effectuated on Mr. Anstice at his home in Pennsylvania. *Id.* The subpoena's caption listed both the Eastern District of Louisiana and the District of New Jersey, and sought to compel Mr. Anstice to testify live at the trial in New Orleans. *Id.* Merck and Mr. Anstice moved to quash the subpoena, arguing that Mr. Anstice was beyond the court's subpoena power. *Id.* Merck based its argument on the fact that Rule 45(b)(2) requires service within 100 miles from the place of trial, and that New Orleans is more than 100 miles from Pennsylvania. *Vioxx*, 438 F. Supp. 2d at 665. The plaintiff argued that "the interplay between Rule 45(b)(2) and Rule 45[(c)](3)(A)(ii) grants district courts authority to subpoena parties or officers of parties—such as Mr. Anstice—to testify at trial regardless of where they might be served." *Id.* Merck responded that "Rule 45(b)(2) defines the Court's subpoena power; whereas, Rule 45(c)(3)(A)(ii) allows a Court to quash a subpoena within its subpoena power," and the plaintiff countered that "the 'person who is

not a party or an officer of a party' language of Rule 45(c)(3)(A)(ii) permits the inverse inference that parties and their officers are subject to compulsion to attend trials that occur outside the 100 mile limit otherwise available to non-parties." *Id.* at 666.

The court agreed with the plaintiff:

> The plain, unambiguous language of Rule 45 supports the PSC's position. Rule 45(b)(2), which imposes the 100 mile rule, is expressly limited by Rule 45(c)(3)(A)(ii). Rule 45(c)(3)(A)(ii) mandates that a district court must quash a subpoena if it requires "a person who is *not a party or an officer of a party*" to travel more than 100 miles from his residence or place of employment. (emphasis added). In this case, Mr. Anstice is a Merck officer. Accordingly, Rule 45(c)(3)(A)(ii) does not require the Court to quash the subpoena. Instead, Rule 45(c)(3)(A)(ii) supports the inverse inference that Rule 45(b)(2) empowers the Court with the authority to subpoena Mr. Anstice, an officer of a party, to attend a trial beyond the 100 mile limit.

Id. at 667. The court "acknowledge[d] that nothing in the history or adoption of current Rule 45(b)(2), the substance of which was located in Rule 45(e) prior to December 1, 1991, or Rule 45(c)(3)(A)(ii), the substance of which was newly adopted in 1991, conveys any intention to alter the 100 mile rule," and that "the 1991 advisory committee's notes to Rule 45(b) and 45(c) reinforce[d] Merck's argument." *Id.* (citations omitted). But the court concluded that it could not "consider the history or intent behind the 1991 amendment to Rule 45 as the rule [wa]s plain and unambiguous on its face." *Id.* (citation omitted). The court held that looking solely at the language in the rule compelled the finding that "the interaction between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii) vest[ed] the Court with the authority to subpoena Mr. Anstice to testify at trial in New Orleans." *Vioxx*, 438 F. Supp. 2d at 667.

The *Vioxx* court noted that while the text of the rule resolved the issue, its understanding was "bolstered by the realities of modern life and multi-district litigation." *Id.* The court found the 100-

mile rule to be antiquated:

> Realistically, the purposes behind the 100 mile rule no longer justify its existence. While a cross-country trip may have been deemed impossible in 1793 [when Congress enacted a statute allowing courts to issue trial subpoenas if the witness did not live more than 100 miles from the issuing court] or harassing and economically burdensome in 1964 [when the Supreme Court found the justifications for the 100 mile rule to be to protect witnesses from long trips and to minimize costs], it is now commonplace and a necessary incident to multi-district litigation. Additionally, the current costs borne by a witness traveling cross-country to testify at trial are generally much less than the costs incurred by an army of attorneys and their respective entourages traveling cross-country to depose the very same witness. Moreover, in the present case, the PSC will bear Mr. Anstice's travel expenses[,] eliminating any case-specific value to the rule's second goal. While these twin rationales were laudable in 1793, the[y] are now questionable, if not anachronistic. Modern day litigation should not be restrained by antiquated relics of a bygone era.
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> Certainly, our founding fathers could not have envisioned a world of superhighways, commercial jet airlines, or high speed commuter trains, just as they most likely could not have envisioned a single, consolidated lawsuit consisting of thousands of parties seeking billions of dollars in damages allegedly caused by an allegedly defective prescription drug prescribed to millions of patients across the country and world. *See Cathaleen A. Roach, It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81, 83–84 (1990). Yet, while superhighways, jet airliners, and commuter trains have provided access to the vast expanses of our nation and beyond and allowed the United States to flourish socially and economically, our federal court system's subpoena power is still bound by a 100 mile colonial leash.

Id. at 668. The court also found that the 100-mile rule "actually inhibits the truth seeking purpose of litigation" because without live testimony, the jury must rely on deposition testimony, "'a second-best.'" *Id.* (quoting *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939) (Learned Hand, J.)). The court described a deposition as "a sedative prone to slowly erode the jury's consciousness until truth takes a back seat to apathy and boredom," and found that "[t]he 100 mile rule forces this predicament

upon the jury." *Id.* The court noted that "[w]hatever minimal benefits the 100 mile rule provides witnesses, it is severely outweighed by its detrimental effect upon the trial process." *Id.* The court "believe[d] that the 100 mile rule as it currently exists has little utility," and "suggest[ed] that an amendment to [Rule 45] would be wise." *Vioxx*, 438 F. Supp. 2d at 668 (citing James B. Sloan & William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 40–44 (1992); Roach, *supra*, at 109–117). The court took "comfort in knowing that its ruling [was] supported by the realities of our present world . . . [and] in knowing that the majority of courts that have been faced with the same issues have ruled likewise." *Id.* at 669. Finally, the court noted that its conclusion was consistent with the objectives of 28 U.S.C. § 1407, the statute governing multidistrict litigation, explaining that "[i]f one court is going to be legislatively mandated to handle thousands of cases from throughout the nation, it needs some national reach at least as to the parties." *Id.* But, "[h]aving found that Rule 45 alone g[ave] [the court] authority to subpoena Mr. Anstice, the Court f[ound] that it [did not] need . . . [to] reach the issue of whether 28 U.S.C. § 1407 expand[ed] the Court's trial subpoena power." *Id.* at 669 n.2.

Many courts considering this issue have concluded that a court has the power to subpoena parties or parties' officers who live or work more than 100 miles from the courthouse. *See, e.g.*, *Seiter v. Yokohama Tire Corp.*, No. C08-5578 FDB, 2009 WL 3663399, at *1 (W.D. Wash. Nov. 3, 2009) ("The Court agrees with the majority position that corporate officers of a party may be subpoenaed and required to travel more than 100 miles from where they reside, are employed, or regularly transact business."); *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, --- F.R.D. ---, 2009 WL 2972518, at *9 (S.D.N.Y. Sept. 16, 2009) (same); *In re Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig.*, MDL No. 1358 (SAS), 2009 WL 1840882, at *1 (S.D.N.Y.

Jun. 24, 2009) ("The majority of courts to reach the issue have determined that this rule, by reverse inference, permits the service of a subpoena on a party or a party's officer who is beyond the 100 mile radius, provided no undue prejudice results. This Court agrees."); *Clark v. Wilkin*, No. 2:06 cv 693 TS DN, 2008 WL 648542, at *1 (D. Utah Mar. 10, 2008) ("The express application of [Rule 45(c)(3)(A)(ii)] to persons who are not parties suggests that parties do not fall under the 100 mile rule."); *Scottsdale Ins. Co. v. Educ. Mgmt., Inc.*, No. 04-1053, 2007 WL 2127798, at *3 (E.D. La. Jul. 25, 2007) (concluding that "requiring an appearance by a corporate representative of Scottsdale [who was located more than 100 miles from the courthouse] [wa]s not a violation of Rule 45(b)(2)" because "the provisions of Rule 45(c)(3)(A)(ii) specify that the 100 mile restriction applies only to persons who are not a party or an officer of a party"); *Creative Sci. Sys., Inc. v. Forex Capital Markets, LLC*, No. C 04-3746 JF (RS), 2006 WL 3826730, at *2 (N.D. Cal. Dec. 27, 2006) ("The majority view and more persuasive analysis, however, is found in *Vioxx*. Although there is tension between the two portions of the rule, the better reading of the rule as a whole is to give effect and meaning to the phrase 'who is not a party or an officer of a party' in paragraph (c)(3)(A)(ii)."); *Williams v. Asplundh Tree Expert Co.*, No. 3:05-cv-479-J-33MCR, 2006 WL 2598758, at *2 (M.D. Fla. Sept. 11, 2006) (rejecting the argument that a court "cannot expand its subpoena power to reach corporate officers outside the 100 mile limit" and noting that "a majority of cases have found a distinction between ordinary employees and high-level representatives of a corporation"); *Ferrell v. IBP, Inc.*, No. C98-4047-MJM, 2000 WL 34032907, at *1–2 (N.D. Iowa Apr. 28, 2000) (disapproving of *Johnson v. Land O' Lakes, Inc.*, 181 F.R.D. 388 (N.D. Iowa 1998) ("*Land O' Lakes*"), because it "does not follow the majority of courts which have addressed the issue," and concluding that the equities favored requiring the party's officers to travel to trial); *NWL Holdings,*

Inc. v. Eden Ctr., Inc. (*In re Ames Dep't Stores, Inc.*), No 01-42217 (REG), 2004 WL 1661983, at *1 (Bankr. S.D.N.Y. Jun. 25, 2004) ("Though the case[ ]law and commentary are not uniform—in no small part by reason of reliance by courts and commentary on case[ ]law preceding 1991 amendments to the Federal Rules—this Court believes that the correct view is that limitations on subpoenas on non-parties are not applicable when the subpoenaed person is a party, or an officer of one."); *cf. Am. Fed'n of Gov't Employees Local 922 v. Ashcroft*, 354 F. Supp. 2d 909, 915 (E.D. Ark. 2003) ("*American Federation*") (concluding that the court would have the authority to compel a party's officer or high-level employee to appear to testify at an arbitration hearing, even if the employee lived outside the district and beyond the 100-mile limit in Rule 45); Michael B. Brennan & Todd M. Krieg, *Amendments to the Federal Rules of Civil Procedure*, WIS. LAW, Mar. 1992, at 20 (1992) (discussing the 1991 amendments and noting that "a party wanting to serve a subpoena on a nonparty who lives outside the district and more than 100 miles from the court in a state that has no law permitting service, can argue that the express reference in Rule 45(b)(2) to subparagraph (c)(3)(A)(ii) incorporates the latter provision into the service provision").[1]

In reaching the view that courts have the power to compel parties and their officers to attend trial in distant fora, the cases have focused on a variety of considerations. For example, in *Creative Science Systems*, the court concluded that the *Vioxx* view was correct because "[f]ollowing [*Land O' Lakes*], and refusing to see that phrase ['who is not a party or an officer of a party' in Rule 45(c)(3)(A)(ii)] as affecting the analysis, would result in the phrase being pure surplusage, without

[1] The authors argued that their construction "is supported by the [Advisory Committee's] Notes which indicate that the change in subparagraph (c)(3)(A)(ii) permits a court to order trial attendance from anywhere in-state regardless of the local state law." Brennan & Krieg, *supra*, at 20. The authors predicted that "[t]he ambiguity regarding service in Rule 45(b) will no doubt result in litigation concerning this issue." *Id.*

effect under any circumstances," and concluded that "[s]uch constructions are to be avoided, when possible."[2] 2006 WL 3826730, at *2 (citation omitted). The court noted that in *Land O' Lakes*, the court had concluded that "'[t]here simply is no 'negative implication,'' arising from paragraph (c)(3)(A)(ii) that parties and officers of parties are subject to a different rule," but the *Creative Science Systems* court "respectfully disagree[d], both in light of the words of the statute and the hoary principle that '*expressio unius est exclusio alterius.*'"[3] *Creative Sci. Sys.*, 2006 WL 3826730, at *2 n.2 (first alteration in original).

In *Ferrell*, the court noted that the majority of courts considering the issue had found that subpoenas could be issued to distant parties and their officers, and concluded that the specific equities of its case required that result. *See Ferrell*, 2000 WL 34032907, at *1–2. The court explained that the case was originally scheduled at a location well within the 100-mile range for subpoena service

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[2] Arguably, it is possible to read Rule 45(b)(2) and (c)(3)(A)(ii) without creating surplusage by viewing Rule 45(b)(2) as setting out the requirements for proper service of a subpoena and Rule 45(c)(3)(A)(ii) as creating a limit on properly served subpoenas. Under this construction, the limits on service would apply to all subpoenas, whereas the limits on travel would apply only to persons not parties or officers of a party. An example is given in *Big Lots Stores*. In *Big Lots Stores*, the court explained that "if both a nonparty witness and a party, both residents of Texas, in a case before this Court [in New Orleans] were served with trial subpoenas at their depositions in New Orleans, the Court would have to grant the nonparty witness's motion to quash under Rule 45(c)(3)(A)(ii), but under that same rule, the party could be compelled to appear at trial." 251 F.R.D. at 219. In that example, both witnesses would have been properly served under Rule 45(b)(2) because they were served within the district of the trial court, but the subpoena to the nonparty witness would have to be quashed under Rule 45(c)(3)(A)(ii) as requiring a nonparty to travel more than 100 miles. The subpoena issued to the party's officer would not have to be quashed under that section. This construction gives effect to the phrase "a person who is neither a party nor a party's officer" in Rule 45(c)(3)(A)(ii).

[3] The *Creative Science* court focused on the fact that paragraph (c)(3)(A)(ii) expressly applies to witnesses who are not parties or a party's officer, but did not expressly resolve the difference between proper service under paragraph (b)(2) and the requirement to quash certain subpoenas under paragraph (c)(3)(A)(ii). Those courts holding the minority view of the rule do not seem to disagree with the proposition that paragraph (c)(3)(A)(ii) excludes parties and their officers from the requirement to quash subpoenas requiring travel of more than 100 miles, but instead focus on the fact that despite this exception, paragraph (b)(2) requires proper service on all subpoenaed persons.

under Rule 45(b)(2), but that the judge and the parties had agreed to hold the trial in a different location. *Id.* at *2. The court concluded that "[i]t would seem inequitable, at best, to allow the defendant to stipulate to transfer of the trial, and then to rely on the trial location in an attempt to avoid the presence of its key officers at trial." *Id.*

In *Aristocrat Leisure*, the court also seemed to focus on equitable factors. The court "agree[d] with the majority position that corporate officers of a party may be subpoenaed and required to travel more than 100 miles from where they reside, are employed, or regularly transact business," and concluded that "[h]aving chosen to avail themselves of the many benefits of th[e] forum, it [wa]s disingenuous for the Bondholders and their corporate officers to reverse course . . . and contend that they [we]re beyond the reach of this Court's subpoena power." 2009 WL 2972518, at *9. The court explained that its "view f[ound] support in the purpose behind the Rule's geographic limitation, which 'gives nonparty deponents protection from expending time and money to comply with a subpoena' and is intended to 'protect [nonparty] witnesses from being subjected to excessive discovery burdens in litigation in which they have little or no interest.'" *Id.* (quoting *Edelman v. Taittinger* (*In re Edelman*), 295 F.3d 171, 178 (2d Cir. 2002)).[4] With respect to

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[4] In *Edelman*, the Second Circuit considered "whether a foreign national temporarily in the United States is subject to being subpoenaed and deposed here as an aid to ongoing litigation in France," pursuant to 28 U.S.C. § 1782(a). 295 F.3d at 173. The court considered Rule 45 because section 1782(a) provides: "'The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . . . To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, *in accordance with the Federal Rules of Civil Procedure.*'" *Id.* at 175 (quoting 28 U.S.C. § 1782(a)) (*Edelman* alteration omitted) (emphasis added). The court noted that Rule 45(b)(2) provides for a subpoena to "'be served at any place within the district of the court by which it is issued,'" *id.* at 178 (quoting FED. R. CIV. P. 45(b)(2)), and that Rule 45(c)(3)(A)(ii) "states that unless a person is a party to the litigation or an officer of a party, he cannot be compelled to travel more than 100 miles from where he resides or works to be deposed," *id.* (citing FED. R. CIV. P. 45(c)(3)(A)(ii)). The court then explained: "*That particular subdivision* of Rule 45 gives nonparty deponents protection from expending time and money to comply with a subpoena. The purpose of the 100 mile exception is to protect such witnesses from being

subpoenas served on non-officer employees of parties who resided more than 100 miles from the courthouse, the *Aristocrat Leisure* court found that such subpoenas had to be quashed, "declin[ing] to classify non-officer employees as 'parties' for purposes of evading the clear language of Rule 45(c)(3)(A)(ii)." *Id.* at *10 (citation omitted). The court explained that Rule 45 provides an exception to the 100-mile rule only for parties and their officers. *Id.* (citation omitted). With respect to subpoenas served on the corporate parties themselves, the court concluded that "there [wa]s no basis under the 100-mile rule to quash the subpoenas seeking testimony of the Bondholders' corporate representatives," and found that "[t]he Bondholders, as parties to this action, affirmatively have taken advantage of the benefits of this forum, and the Court has the power to require these parties to produce corporate representatives to testify on their behalf at trial." *Id.* (citation omitted). The court noted that "[i]f the Bondholders' position [that corporate representative subpoenas require non-corporate-officers to travel more than 100 miles to attend trial] were correct, parties responding to trial subpoenas would have an incentive to avoid the subpoena simply by producing employees that are not corporate officers as their party representatives." *Id.* The court concluded that "[t]his type of evasive behavior by parties that have affirmatively chosen to pursue their claims in this forum is clearly not what Rule 45 was intended to promote." *Aristocrat Leisure*, 2009 WL 2972518, at *10.

In *Ames Department Stores*, the court found that the language of the rule required finding that

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subjected to excessive discovery burdens in litigation in which they have little or no interest." *Id.* (internal citation omitted) (emphasis added). In context, the court's discussion of the 100-mile limitation appears to refer to paragraph 45(c)(3)(A)(ii)'s requirement to quash certain subpoenas served on persons who are not parties or officers of a party, but does not address whether that provision expands the court's ability to serve subpoenas on persons outside of Rule 45(b)'s limits. The Second Circuit directed the district court on remand to consider whether Rule 45(c)(3)(A)(ii) would require quashing the subpoena based on the argument that the witness qualified as an officer of a party in the French litigation and therefore could be compelled to travel more than 100 miles. *Id.* at 181. The Second Circuit held that if the witness was found to be an officer, the subpoena may be sustained, *id.*, but the court did not need to address the interplay between Rule 45(c)(3)(A)(ii) and Rule 45(b) because it appears that the witness was served within the district of the issuing court.

a subpoena could extend further for parties and officers of parties:

> Rule 45(c)(3)(A)(ii) grants the ability to quash, based on a travel obligation of more than 100 miles, where the subpoenaed person "is not a party or an officer of a party." Since that provision easily could have been drafted, if it had been the rulemaking intent, to simply omit the italicized language and make its provisions applicable to "a person" generally, the compelling interpretation is that its application is limited to those persons who are particularly described—*i.e.*, to non-parties or their officers.
>
> Then, the ability to serve a subpoena in the first place—granted under Rule 45(b)—is expressly made subject to the provisions of subparagraph (c)(3)(A). The Court notes that FED. R. CIV. P. 45 was amended in 1991, at which time the present paragraph (c) was added, as was the qualifying condition in paragraph (b) that refers to subparagraph (c)(3)(A). Eden Center properly observes, in its letter reply, that the Committee Notes to the 1991 amendments say that subparagraph (c)(3)(A) "restates the former provisions with respect to the limits of mandatory travel that are set forth in the former paragraphs (d)(2) and (e)(1) with one important change," and that the change the Advisory Committee referred to was a different one, unrelated to this controversy. But it is noteworthy, in this Court's view, that the pre-1991 Rule did not by its terms make distinctions between parties and non-parties, and thereafter it did.
>
> That suggests to this Court either that the Rule always contemplated such a distinction (and that the 1991 amendments confirmed or codified it), or that it was an additional change not mentioned. In any event, it seems clear to this Court that the addition of the words "who is not a party or an officer of a party," as part of the 1991 amendments, to language that did not previously include it, was not inadvertent, and is significant.

2004 WL 1661983, at *1–2 (footnotes omitted). The court acknowledged the contrary authority, but found that most of the contrary cases relied on pre-1991 authority:

> As noted, the case[ ]law and commentary is mixed, and there is some that does indeed support Eden Center's position. But only one of Eden Center's cases or secondary authority sources even addresses the "who is not a party or an officer of a party" language. The others either predated the 1991 amendments, and thus had no opportunity to address the significance of the "who is not a party or an officer of a

> party" language, or failed to address it for unknown reasons. *In re Vienna Park Properties*, [120 B.R. 320 (Bankr. S.D.N.Y. 1990), *vacated on other grounds*, 125 B.R. 84 (S.D.N.Y. 1991),] relied on by Eden Center in its motion, is in the former category. As that decision (which quoted the relevant portion of Rule 45 at the time) makes clear, the key language was not then in the Rule. Another case upon which Eden Center relies, *Smith v. Chason*, [No. Civ. A. 96-10788-PBS, 1997 WL 298254 (D. Mass. Apr. 10, 1997),] while decided after the 1991 amendments, did not discuss the "who is not a party or an officer of a party" language, and relied only on pre-1991 authority. Similarly, while Wright & Miller, relied on by Eden Center in its motion, does indeed say that the 100-mile limit "applies to a party as well as to an ordinary witness," it cites only a single 1967 case for that view,[5] and inexplicably fails to address either the "who is not a party or an officer of a party" language, or the later contrary case[ ]law, discussed above. Its observations in this respect cannot be regarded as persuasive for that reason.

Id. at *2 (footnotes omitted). The *Ames Department Stores* court found the contrary authority in *Land O' Lakes* unpersuasive for several reasons:

> This Court initially disagrees with the *Land O' Lakes* court's conclusion, reached without reference to authority, that section (b) did indeed have the purpose or effect of defining a kind of jurisdictional reach, in a section captioned "Service," and in each of whose subsections mechanical aspects of the service of process are discussed. But even assuming, *arguendo*, that section (b) did have the additional purpose or effect of defining jurisdictional reach, the asserted jurisdictional reach was made expressly conditional on a separate subsection (c)(3)(A)(ii), which had the very different subject matter, much more relevant here, of "Protection of Persons Subject to Subpoena," so that protective provisions, which granted substantive (or at least procedural) rights to some—but less than all—of those required to travel more than 100 miles to testify, were incorporated into Rule 45(b). And the *Land O' Lakes* court found no "negative implication" in subsection (c)(3)(A)(ii)'s drafting; this Court cannot

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[5] The 1967 case is *Steel, Inc. v. Atchison, Topeka & Santa Fe Ry. Co.*, 41 F.R.D. 337 (D. Kan. 1967). In *Steel*, the court held that a plaintiff can be required to attend a deposition in the district in which it chose to sue, but cannot be compelled to attend trial beyond the limits set out in Rule 45. *Id.* at 339. The court stated that "[w]ith respect to [a party plaintiff's] attendance at trial, his status is that of any other witness," and "[i]f he resides outside the district and more than 100 miles from the place of trial, his attendance cannot be required." *Id.*

> agree. The drafting scheme, in this Court's view, is a classic example of what judges and lawyers think of under "*expressio unius*." Finally, as noted, *Land O' Lakes* has been subsequently criticized and rejected, in its own court, by later authority, which, with lengthy citations, has observed that *Land O' Lakes* "does not follow the majority of courts which have addressed the issue."

Id. at *3 (footnotes omitted). The *Ames Department Stores* court noted that many other cases have reached a conclusion contrary to that reached by the *Land O' Lakes* court, some expressly addressing the language of Rule 45 and others not expressly relying on the rule. *See id.* & n.17. Finally, the court noted that commentary on Rule 45 suggests that courts have the ability to compel a party's officer to travel from a distant location:

> Among the parties themselves, there is the general assumption that each will appear at the trial, which relieves Rule 45 of any special concern about that. If it should for any reason become necessary to have a party appear at the trial who it turns out will not appear voluntarily—including a person who is in the control of a party, which sweeps the corporation under this category as well—the court has all the leverage it needs to compel the party's appearance. If the court directs the attendance of the party, disobedience can be compelled with something the seeking party would enjoy even more than the invoking of the contempt penalty: a default judgment against the recalcitrant party. Hence Rule 45 shows little tension when a party is involved.
>
> It more than compensates for that relaxation by working hard, and often, on the nonparty witness, addressing at several points the protections erected for the convenience of nonparties and then adding a provision that allows even the nonparty to be directed to travel far to the courthouse, apparently even across the country if need be, but only on a very strong showing.

Id. at *3–4 (quoting David D. Siegel, Commentary on Rule 45 at C45-16, in 28 U.S.C.A. (quotation marks omitted)). The court rejected the argument that it should quash the subpoena because the officer's videotaped deposition could be taken, noting that credibility was at issue. *Id.* at *4.

In *Clark*, the court found that the majority view was "supported by the Second Circuit's

observation that '[t]he purpose of the 100 mile exception is to protect such witnesses from being subjected to excessive discovery burdens in litigation *in which they have little or no interest*,'" 2008 WL 648542, at *1 (quoting *Edelman*, 295 F.3d at 178) (footnote omitted) (alteration and emphasis added by *Clark* court), and explained that "[p]arties to a suit have great interest in its outcome; therefore, the purpose behind the 100 mile rule does not apply to them," *id.* The court further explained that "other parties and the Court have an interest in the appearance of parties at trial, which is a further reason the 100 mile limitation should not apply to parties." *Id.* The court rejected the argument that "the majority rule would provide 'unfettered discretion' for counsel to 'impose undue burdens and expenses on opposing parties for improper purposes,'" noting that "[t]his concern . . . has not been shared by the majority of federal courts because Rule 26(c) authorizes a district court to modify or quash a subpoena in order to 'protect *a party* or person from annoyance, embarrassment, oppression, or undue burden or expense.'" *Id.* at *2 (footnotes omitted). The court concluded that special fairness considerations required compelling the defendant's attendance at trial because the defendant was alleged to be the sole witness to the accident at issue, the defendant was the only witness with knowledge of the condition of his trailer at the time of the accident, and the defendant's live testimony was needed because certain evidence was provided to the plaintiffs only after the defendant's deposition. *Id.* The court held that "[b]ecause Wilkin [wa]s a party to the action, Rule 45(b)(2) d[id] not protect him from being served with a trial subpoena even though he live[d] outside the district and further than 100 miles [from] th[e] Court," and that the court had inherent power to order the defendant's appearance. *Id.*

In *American Federation*, the court considered the issue of whether an arbitrator had authority to subpoena the director of the agency involved in the arbitration to appear and testify in an

arbitration hearing held in Forrest City, Arkansas, when the director lived in Dallas, Texas, more than 100 miles from Forrest City. *See Am. Fed'n of Gov't Employees Local 922*, 354 F. Supp. 2d at 911. The subpoena was served on the record keeper in Forrest City, rather than the party whose attendance was sought, but the court concluded that the subpoenaed party at least tacitly agreed to service in this manner. *See id.* at 916. The court found, assuming the arbitrator's subpoenas had to comply with Rule 45, that it had authority to compel a high-level representative of a party to the arbitration to attend the arbitration hearing, relying on the fact that the majority of courts have allowed compelling trial testimony of a party's high-level employees even when the person lives more than 100 miles from the courthouse. *Id.* at 915–16. Although the court found that compelling the party's director to attend the arbitration hearing did not violate the 100-mile rule in Rule 45, it is noteworthy that the court separately found service on a record keeper in the same city where the arbitration hearing was to be held to be proper. Because service was effected within the area permitted under Rule 45(b)(2), the situation arguably fell within the exception in Rule 45(c)(3)(A)(ii) for a party's officers. However, because the court found that the subpoena was properly served, the court did not need to resolve whether Rule 45(c)(3)(A)(ii) allowed for nationwide service on party officers.

In *Scottsdale*, the court considered a motion to quash a subpoena issued to the plaintiff corporation where all representatives of the corporation were located more than 100 miles from the courthouse. The issuing party argued that "because Scottsdale filed suit in the Eastern District of Louisiana[,] it ha[d] consented to th[e] Court's jurisdiction and should be required to appear at trial." 2007 WL 2127798, at *3. The court concluded that "[b]ecause the subpoena was directed to [plaintiff] Scottsdale and not the former corporate representative . . . , and because the provisions of

Rule 45(c)(3)(A)(ii) specify that the 100 mile restriction applies only to persons who are not a party or an officer of a party, there is no problem with issuing a subpoena to a party in the litigation who is outside of the geographic area." *Id.* Although the court found that the subpoena complied with Rule 45(b)(2), it found that lack of personal service on Scottsdale violated Rule 45(b)(1), and concluded that because a corporate representative would not be able to offer testimony on the remaining issue in the case, it was unnecessary to require a corporate representative to travel 1,500 miles, particularly since deposition testimony on the issue for which the representative was requested was available. *See id.*

In *Seiter*, the defendant moved to quash a trial subpoena served on a *former* corporate officer who had been designated as a corporate representative and who lived outside the district and more than 100 miles from the courthouse. 2009 WL 3663399, at *1. The court noted that a majority of courts have found that Rule 45(b)(2)(B) and Rule 45(c)(3)(A)(ii) permit service of a subpoena on a party's officer beyond the 100-mile limit. *Id.* The court agreed with the majority and concluded that the subpoena to the former officer, who was not a current officer and who resided outside the geographic area permitted in Rule 45, had to be quashed. *Id.* (citing *Aristocrat Leisure*, 2009 WL 2972518). Because the court concluded that the subpoenaed person was not a corporate officer, it arguably did not need to decide whether Rule 45 permitted service on party officers residing outside Rule 45's geographic scope.

Many of the cases stating that they are applying the majority rule with respect to subpoenas issued to parties or officers of parties rely on cases that indirectly support the conclusion that Rule 45 permits compelling officers to attend trial more than 100 miles away, but that do not directly

address the interplay between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii).[6] For example, in *National Property Investors*, the court considered Rule 45 in the context of analyzing a motion to transfer venue under 28 U.S.C. § 1404(a), and found that "the number of potential non-party North Carolina witnesses, and the fact that, unlike party witnesses, FED. R. CIV. P. 45(c)(3)(A)(ii), non-party witnesses cannot be compelled to testify before this Court [in New Jersey], weigh in favor of transferring venue in this case." *Nat'l Prop. Investors*, 917 F. Supp. at 329. The court did not address whether paragraph (c)(3)(A)(ii) places a limit on subpoenas that are properly served under

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[6] For example, *Vioxx* cites *American Federation*; *Mason v. Texaco, Inc.*, 741 F. Supp. 1472, 1504 (D. Kan. 1990); *Ferrell*; *Archer Daniels Midland Co. v. Aon Risk Servs., Inc.*, 187 F.R.D. 578, 587 (D. Minn. 1999); *Younis v. American University in Cairo*, 30 F. Supp. 2d 390, 395 n.44 (S.D.N.Y. 1998); *Prudential Securities, Inc. v. Norcom Development., Inc.*, 1998 WL 397889, at *5 (S.D.N.Y. Jul. 16, 1998); *Stone v. Morton International, Inc.*, 170 F.R.D. 498, 500–01 (D. Utah 1997); *Venzor v. Chavez Gonzalez*, 968 F. Supp. 1258, 1267 (N.D. Ill. 1997); *Nat'l Property Investors VIII v. Shell Oil Co.*, 917 F. Supp. 324, 329 (D.N.J. 1995); and *M.F. Bank Restoration Co. v. Elliott, Bray & Riley*, No. Civ. A. 92-0049, 1994 WL 719731, at *8 (E.D. Pa. Dec. 22, 1994). *See Vioxx*, 438 F. Supp. 2d at 666. *Aristocrat Leisure* cites *MTBE Prods. Liab. Litig.*, *Younis*, *Ames Department Stores*, and *American Federation*. *See Aristocrat Leisure*, 2009 WL 2972518, at *9. *Seiter* cites *American Federation*, *Younis*, and *Creative Science*. *See Seiter*, 2009 WL 3663399, at *1. *American Federation* cites *Archer Daniels Midland*, *Younis*, *Venzor*, and *National Property Investors*. *See Am. Fed'n of Gov't Employees Local 922*, 354 F. Supp. 2d at 915–16. *Williams* cites *Ferrell*. *See Williams*, 2006 WL 2598758, at *2. *Clark* cites *American Federation*, *Ames Department Stores*, *Mason*, *Ferrell*, *Archer Daniels Midland*, *Younis*, *Prudential Securities*, *Stone*, *Venzor*, *National Property Investors*, and *M.F. Bank Restoration*. *See Clark*, 2008 WL 648542, at *1 n.10. *Ames Department Stores* relies on *Ferrell*; *Younis*; *Prudential Securities*; *Stone*; *Venzor*; *National Property Investors*; *Exxon Shipping Co. v. U.S. Dep't of Interior*, 34 F.3d 774, 779 (9th Cir. 1994); and *M.F. Bank Restoration*. *See Ames Dep't Stores*, 2004 WL 1661983, at *3 n.17. *Ferrell* relies on *Archer Daniels Midland*, *Younis*, *Prudential Securities*, *Stone*, *Venzor*, *National Property Investors*, *Exxon Shipping*, and *M.F. Bank Restoration*. *See Ferrell*, 2000 WL 34032907, at *1. *MTBE Products Liability Litigation* notes that the majority of courts follow the *Vioxx* rule and cites *Vioxx* for its collection of cases reaching the same conclusion. *See MTBE Prods. Liab. Litig.*, 2009 WL 1840882, at *1 & n.2. However, many of the cases cited by courts as expressing the majority view of Rule 45 do not actually examine the correlation between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii). For example, in *Exxon Shipping*, the court examined whether a federal housekeeping statute permitted a federal agency to withhold government information or prevent employees from complying with valid subpoenas, and noted that the Federal Rules of Civil Procedure provide adequate limits on discovery. *See Exxon Shipping*, 34 F.3d at 779. The court noted that "[t]he Federal Rules . . . afford nonparties special protection against the time and expense of complying with subpoenas," *id.* (citing FED. R. CIV. P. 45(c)(3)(A)(ii)), but did not discuss the service requirements in Rule 45 or the rule's application to party officers.

paragraph (b)(2). As a result, it is just as consistent with the minority view, which does not appear to disagree with the construction that paragraph (c)(3)(A)(ii) excludes parties and party officers, but instead concludes that despite the fact that (c)(3)(A)(ii) excludes parties and their officers, paragraph (b)(2) requires proper service.

In *Venzor*, the court refused to admit hearsay statements in connection with a motion for summary judgment under the exception for statements against penal interest, rejecting the argument that "Rule 804's requirement that the declarant be unavailable is met because [defendant] Houk lives and works outside the 100-mile range of a civil subpoena." *Venzor*, 968 F. Supp. at 1267. The court explained that the "limitation on a trial subpoena applies only to 'a person who is *not* a party,'" *id.* (quoting FED. R. CIV. P. 45(c)(3)(A)(ii) (emphasis added by *Venzor* court)), and found that there was "no reason to believe that Houk will be unavailable to testify at trial, and thus Rule 804(b)(3) is not a basis to admit Houk's statements," *id.* Although this statement supports the conclusion that parties can be compelled to travel more than 100 miles for trial, the court did not analyze the interplay between paragraph (b)(2) and paragraph (c)(3)(A)(ii) and did not address service or party officers.

In *Archer Daniels Midland*, the court considered the appropriate location for depositions of the plaintiff's officers, directors, representatives, and employees. The defendant sought to compel these witnesses to travel for their depositions to Minnesota because the plaintiff had chosen to file suit there. *Archer Daniels Midland*, 187 F.R.D. at 587. The court noted that there is a distinction between a party's ordinary employees, who "are subject to the general rule that a deponent should be deposed near his or her residence, or principal place of work," *id.* at 587 (citing *Metrex Research Corp. v. United States*, 151 F.R.D. 122, 125 (D. Colo. 1993); FED. R. CIV. P. 45(c)(3)(A)(ii)), and a party's officers, directors, managing agents, and Rule 30(b)(6) designees, *id.* at 588. The court

noted that as to the latter category, "there is a well-recognized, general rule that a plaintiff is required to make itself available for a deposition in the District in which the suit was commenced, because the plaintiff has chosen the forum voluntarily, and should expect to appear there for any legal proceedings, whereas the defendant, ordinarily, has had no choice in selecting the action's venue." *Id.* (citations omitted). Despite this general rule, the court held that the plaintiff had demonstrated that "the equities require[d] that the exception, and not the general rule, govern the place where its corporate directors, officers, and Rule 30(b)(6) designees, should be taken," and concluded that "Decatur, Illinois, where the bulk of these corporate representatives work and reside" was the proper location. *Id.* Although the court found that officers of a plaintiff can be required to travel to the trial forum for depositions and relied on Rule 45(c)(3)(A)(ii) to conclude that ordinary employees should be deposed near their residence or place of employment, the court did not directly address whether officers of a party can be compelled to travel more than 100 miles even if they are served outside the limits in Rule 45(b)(2).

In *Younis*, the court concluded, in the context of considering a motion to dismiss based on forum non conveniens, that the majority of witnesses were located in Egypt and that "[t]heir testimony, like that of the few who reside elsewhere in the United States, cannot be compelled by this Court." 30 F. Supp. 2d at 395. The court noted that "[o]nly officers of [defendant] AUC could be compelled to appear here." *Id.* at 395 n.44 (citing FED. R. CIV. P. 45(c)(3)(A)(ii)). Although this statement supports the inference that officers could be served outside the limits in Rule 45(b)(2), the court did not directly address the service issue.

In *Prudential Securities*, the court considered a motion to transfer under section 1404(a). In that context, the court noted that the only nonparty witness whose testimony had been identified

as being needed at trial was located in Florida, which was far enough to make the witness outside the subpoena power of either of the potential venues—New York and North Carolina. 1998 WL 397889, at *5 (citing FED. R. CIV. P. 45(b)(2); FED. R. CIV. P. 45(c)(3)(A)(ii)). The court did not specifically address compelling a party's officer to attend trial.

In *Stone*, the plaintiff sought to compel the defendant to produce a particular officer for a deposition in Utah. 170 F.R.D. at 499. The officer had been the plaintiff's supervisor in Utah at the time of the events at issue in the lawsuit, but was located in Germany at the time of the lawsuit. *See id.* The court considered its subpoena power under Rule 45:

> Rule 45, F.R.C.P. is the usual rule for compelling a non-party witness to appear for deposition or trial. *Rule 45(b)(2)* provides for service of a subpoena for a deposition and *provides for a 100 mile limitation as to the place of appearance*, subject to Rule 45(c)(3)(A) F.R.C.P. Rule 45[(c)](3)(A) allows a court, on motion, to quash or modify the subpoena. Subsection (c)(3)(A)(ii) provides the subpoena may be quashed or modified if it requires "a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed, or regularly transacts business in person." *Rule 45 F.R.C.P. allows a corporate officer of a party to be subpoenaed to appear beyond the 100 mile limitation.* . . . Rule 45, F.R.C.P. does extend the subpoena power more broadly to a corporate officer than to a non-party because the corporate officer of a party may be considered the corporate alter ego. However, the question of the application of Rule 45, F.R.C.P. to corporate officers is particularly important in light of the fact that many corporations have a variety of officers and business locations in various places with many outside the United States. *Rule 45 would seem to answer the issue as to requiring a corporate officer of a party to appear in a remote location.* However, the rule does not expressly state that a subpoena is the method to obtain the presence of a nonparty corporate officer of a party for deposition.

Id. at 500–01 (footnote omitted) (emphasis added). Although the court concluded that Rule 45 permits requiring a party's officer to travel more than 100 miles to a deposition, it did not address the issue of whether a party's officer may be served outside the 100-mile limit. The court noted that Rule

45(b)(2) provides a 100-mile limitation as to the place of appearance, subject to Rule 45(c)(3)(A)(ii), *id.* at 500, but Rule 45(b)(2) addresses the proper place for service rather than the place of appearance. The court found the rules confusing as to whether a corporation is required to produce a director, officer, or managing agent pursuant to notice under Rule 30(b)(1), and stated that "[b]ecause of the ambiguity in the Rules, and the possible confusion, as well as the need for clear guidance for the courts, the Judicial Conference of the United States should clarify the Rules of Civil Procedure on this issue." *Id.* at 503–04, 503 n.3. With respect to the place of the deposition, the court noted that "the deposition of a corporate officer 'should ordinarily be taken at its principal place of business,' or at the deponent's residence or place of business as a matter of convenience," and found that the defendant's principal place of business in Chicago was an appropriate place for the deposition of the corporate officer from Germany. *See id.* at 504 (internal citation omitted).

In *M.F. Bank Restoration*, the plaintiff moved to quash trial subpoenas served by the defendant on the plaintiff's employees who lived more than 100 miles from Philadelphia, the location for trial. 1994 WL 719731, at *8. The plaintiff relied on Rule 45(c)(3)(A)(ii). *Id.* The court held that "[b]ecause *none of these six employees is represented to be an officer* of [the plaintiff], and because [the defendant] has not supported the subpoenas on an independent basis, the motion will be granted." *Id.* The court concluded that non-officer employees could not be compelled to travel more than 100 miles for trial, but did not address whether a party's officer could be served outside the 100-mile limit or compelled to travel more than 100 miles.

In *Mason*, a pre-1991 amendments case, the court concluded that there was no error in requiring one of the defendant's employees to attend trial for the plaintiff's case in chief. 741 F. Supp. at 1504. The court concluded that although the employee "reside[d] more than 100 miles from

th[e] district, he [wa]s Texaco for purposes of th[e] lawsuit, and thus a party to the action." The court did "not believe that the limitation of FED. R. CIV. P. 45(e)[7] applie[d] to this situation, particularly considering defendant's stated intention to call this key witness in any event." *Id.* Because it was before the 1991 amendments, *Mason* did not analyze the rule text that existed after the 1991 amendments that seems to permit a party or a party's officer to travel more than 100 miles for trial, at least if properly served. In addition, *Mason* focused on the equitable factor that the defendant already planned to call the witness itself. *See id.*

III. The View that Rule 45 Does Not Authorize Nationwide Service on a Party's Officers

The view contrary to the *Vioxx* court's view regarding the interplay between Rules 45(b)(2) and 45(c)(3)(A)(ii) is expressed in *Big Lots Stores*. In that case, the plaintiffs moved to quash subpoenas the defendants had served on nine opt-in plaintiffs who lived outside the state and more than 100 miles from the courthouse. 251 F.R.D. at 214. The plaintiffs argued that the court's power to issue subpoenas was limited to those places listed in Rule 45(b)(2). *Id.* The defendant argued that Rule 45(c)(3)(A)(ii), particularly as interpreted by *Vioxx*, "effectively provides for nationwide service of subpoenas on parties and party officers." *Id.* There court observed that "[t]here is disagreement among courts about whether Rule 45(c)(3)(A)(ii) authorizes courts of the United States to issue subpoenas to parties and party officers in places outside the territorial limits defined in Rule 45(b)(2)," but noted that a majority of courts have held that it does. *Id.* at 215 (citing *Vioxx*, 438 F. Supp. 2d at 666 (citing cases)). The court explained that "[a] minority of courts have ruled the other way, essentially holding that Rule 45(b)(2) defines the scope of a court's subpoena power and the places where a trial subpoena may be properly served," and that "Rule 45(c)(3)(A)(ii) imposes a

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[7] Before the 1991 amendments, subsection (e) contained the 100-mile limit on service for any witness at trial.

limitation on that power but does nothing to expand the scope of the power beyond the parameters set forth in 45(b)(2)." *Id.* at 215–16. The court noted that there was no circuit court authority on this issue and concluded that the minority position is the better view. *Id.* at 216. The court stated that "[o]ddly, both the *Vioxx* court and courts adopting the minority position hinged their decisions on the 'plain meaning' of the words in the rules, yet they came out very different ways." *Big Lots Stores*, 251 F.R.D. at 216.

The court explained that its construction was based on the text of Rule 45:

> Nothing in the language of Rule 45(b)(2) itself provides for service at any place other than those locations specified in the rule itself. As the authors of an authoritative treatise on federal practice and procedure explain, Rule 45(b)(2) "states only that a subpoena may be served at any place listed in subdivisions (b)(2)(A)–(D). The provisions concerning the possibilities for proper service" are listed in 45(b)(2). WRIGHT AND MILLER, 9A FEDERAL PRACTICE AND PROCEDURE § 2451 at 387 (emphasis added). The terms of Rule 45(b)(2) themselves do not provide for nationwide service of a subpoena. The Rule provides only that a subpoena may be served (A) within the judicial district of the issuing court; (B) in areas outside the district but within the 100-mile "bulge" from the location of the district court; (C) within the state of the issuing court consistent with state rules governing the power of state courts of general jurisdiction to issue trial subpoenas; or (D) under circumstances specifically provided for in a federal statute.
>
> To read the "subject to Rule 45(c)(3)(A)(ii)" clause as *expanding* the territorial reach of where a party or party officer may be served with a trial subpoena ignores the ordinary meaning of the phrase "subject to." The phrase "subject to" ordinarily operates to limit a power or right, not expand it. Webster's defines "subject to" as meaning "dependent upon something," as in "His consent is subject to your approval." When a rule or statute defining a judicial power or a legal right is "subject to" a cross-referenced rule or statute, the ordinary sense of that construction is that the power or right is limited by the cross-referenced provision. Another familiar example is a cause of action that is "subject to" a statute of limitations. Courts also frequently use the phrase "subject to" in judicial decisions to explain a limitation or subordinating effect.

Id. at 216–17 (internal citations omitted). The court concluded that "[n]othing in the text [of Rule 45(c)(3)(A)(ii)] affirmatively expands the geographic scope of where the Court may issue subpoenas," and that this section "spells out only the conditions under which a court *must* quash a subpoena." *Id.* at 217.

The court disagreed with the result reached in *Vioxx*:

> To reach that result the Court would have to turn a clause intended as a limiting clause on its head and ignore the territorial restrictions on where a trial subpoena may be properly served. The position of Big Lots would essentially require the Court to read the limiting ("subject to") clause of Rule 45(b)(2) as stating "In addition to the provisions of Rule 45(c)(3)(A)(ii), a subpoena may be served at any place[.]" The Court would then have to impute, when Rule 45(b)(2) does not so provide, that a subpoena for a party or its officer may be properly served anywhere in the country. Reading Rule 45(c)(A)(3)(ii) as creating a scheme of nationwide subpoena service, if only on parties, would have the effect of rendering Rule 45(b)(2) pointless with respect to parties and party officers. Under the majority view, it does not matter whether a subpoena is served on a party or party officer in any of the places listed in 45(b)(2). In other words, there is no requirement that service must be made in accordance with those territorial limitations in order for it to be proper. But as Wright and Miller explain, Rule 45(c) establishes permissible limits on a properly served subpoena. *See* WRIGHT AND MILLER, 9A FEDERAL PRACTICE § 246[3] at 476 (explaining that Rule 45(c)[(3)(A)](ii) "authorizes the district court to limit the use of subpoenas even when they comply with Rule 45(a) and (b)"). Thus, *in order for a subpoena to be properly served and have force, it must be served in accordance with the terms set forth in Rule 45(b)(2). Rule 45(c)(3)(A)(ii) spells out circumstances when a court must quash a subpoena, but it does not alter the requirements for proper service of a subpoena.*

Id. at 217–18 (emphasis added) (additional internal citations omitted). The court found that its construction was supported by the intent behind the rule:

> It strikes the Court as exceedingly odd that Congress would create a system of nationwide subpoena service in the backhanded manner that Big Lots suggests. It is even odder that Congress would do so in a subsection with the heading "Protecting a Person Subject

> to a Subpoena." FED. R. CIV. P. 45(c). Although a subsection heading or title is not necessarily determinative of a statute's meaning, it may be considered to clarify ambiguities. The Court's perspective is further informed by the observation that when Congress has sought to provide for service of subpoenas in places other than those listed in Rule 45(b)(2), it has done so with unmistakable clarity.

Id. at 218 (internal citation omitted). The court held:

> The better reading of subdivisions (b)(2) and (c)(3)(A)(ii) of Rule 45 is that the territorial scope of a court's subpoena power is defined by subdivision (b)(2), subject to the limitations spelled out in subdivision (c)(3)(A)(ii). Thus, to compel a person to attend trial, the person must be served with a subpoena in one of the places listed in Rule 45(b)(2) *and* not be subject to the protection in Rule 45(c)(3)(A)(ii), which protects nonparty witnesses who work or reside more than 100 miles from the courthouse, but not parties or party officers. Thus, for example, if both a nonparty witness and a party, both residents of Texas, in a case before this Court were served with trial subpoenas at their depositions in New Orleans, the Court would have to grant the nonparty witness's motion to quash under Rule 45(c)(3)(A)(ii), but under that same rule, the party could be compelled to appear at trial. A similar situation presented itself in this case. A number of opt-in plaintiffs traveled to New Orleans to give videotaped depositions for perpetuation purposes. Even though Big Lots could have issued subpoenas to those individuals at their depositions to compel their attendance at trial, it did not. Had it done so, the Court would have no trouble in denying plaintiffs' motion to quash. But the Court will not acrobatically interpret Rule 45 to give force to Big Lots' procedurally improper subpoenas.

Id. at 218–19.

The court also concluded that "[t]he broader context of the Federal Rules . . . militate[d] in favor of quashing Big Lots' subpoenas," noting that the defendant could present the video depositions and transcripts of the plaintiffs it sought to subpoena, as provided in the Federal Rules. *Big Lots Stores*, 251 F.R.D. at 219. The court explained: "That the rules provide procedures for presenting testimony in situations like the one that exists here further counsels against reading Rule 45(b)(2)'s cross-reference to Rule 45(c)(3)(A)(ii) as creating nationwide subpoena service for parties and party

officers." *Id.*

The court noted that while it did not need to examine Rule 45's history to reach its conclusion, the history "support[ed] the Court's reading that Rule 45(b)(2) limits the places in which proper subpoena service may be made and that Rule 45(c)(3)(A)(ii) functions to limit a court's subpoena power once the subpoena is properly served within the court's assigned territorial boundaries." *Id.* The court further noted that "courts' powers to issue subpoenas have long been geographically restricted." *Id.* The court found that while the majority view is in part derived from the addition of paragraph (c)(3)(A)(ii) in the 1991 amendments, "there is no substantive difference in the territorial limits for proper subpoena service between the pre-1991 version of Rule 45, Rule 45 as amended in 1991, and the current version amended as of December 1, 2007." *Id.* at 220. The court "discern[ed] nothing in the 1991 textual revision of Rule 45 that created nationwide subpoena service." *Id.* In addition, the court found that the advisory committee notes associated with the 1991 amendments did not "signal that the 1991 amendments created a system of nationwide subpoena service for parties and party officers." *Big Lots Stores*, 251 F.R.D. at 221. In reviewing the committee notes, the court stated that "[t]he committee explained that the revision of subdivision (c) enlarged and clarified the protections afforded to persons subject to subpoena that had emerged in court decisions[,] . . . [b]ut it said nothing about expanding the scope of the places where proper subpoena service might be made." *Id.* Moreover, the court found that "before the 1991 amendments, courts recognized not only that they did not have the power to compel the presence of witnesses who lived beyond the 100-mile bulge or outside of the state in which they sat, but also that *service* of a subpoena had to be made in accordance with the terms of Rule 45(e) in order to be valid." *Id.* The court concluded that "[i]n light of the widespread recognition among courts that their subpoena

powers were limited to the places listed in old Rule 45(e), if the 1991 amendments created a system of nationwide subpoena service, it would be reasonable to expect that the rule itself would unambiguously say so, as Federal Rule of Criminal Procedure 17(e)(1) does, and that the committee would have so stated." *Id.* at 221.

The *Big Lots Stores* court emphasized that while the 1991 amendments expanded the reach of properly served subpoenas with respect to parties and party officers, it did not expand the scope of permissible service:

> Before the 1991 amendments to Rule 45, several commentators drew attention to the shortcomings of the 100-mile rule of Rule 45(e) with respect to parties and party officers in the context of complex and multidistrict litigation. *See generally* Cathaleen A. Roach, *It's Time to Change the Rule Compelling Witness Appearance at Trial: Proposed Revisions to Federal Rule of Civil Procedure 45(e)*, 79 GEO. L.J. 81 (1990);[8] Richard J. Oparil, *Procuring Trial Testimony from Corporate Officers and Employees: Alternative Methods and Suggestions for Reform*, 25 AKRON L. REV. 571 (1991); Rhonda Wasserman, *The Subpoena Power: Pennoyer's Last Vestige*, 74 MINN. L. REV. 37 (1989) (criticizing state court systems for holding onto 100-mile rule); Carolyn Hertzberg, Note, *Clever Tool or Dirty Pool? WPPS Closed Circuit Testimony and the Rule 45(e) Subpoena Power*, 21 ARIZ. ST. L.J. 275 (1989). As the rule stood before the 1991 amendments, parties and party officers could avoid appearing at trial simply because they lived more than 100 miles from the courthouse. To be sure, the 1991 amendments addressed that problem with the addition of subdivision (c)(3)(A)(ii): parties and party officers can no longer escape the force of a trial subpoena merely because they live far away from the site of trial. But as discussed *supra*, *the 1991 amendments did not change the well-recognized requirement that the subpoena itself must still be served within the territorial boundaries demarcated in the rule in order to be valid.* Indeed, less than a year after the 1991 amendments to Rule 45 became effective, commentators were decrying the

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[8] Professor Roach proposed, prior to the 1991 amendments, that Rule 45 be amended to differentiate between party and nonparty witnesses and between multidistrict litigation and single-district litigation. *See generally* Roach, *supra*.

> inadequacies of the amendments, noting that under the 1991 amendments the "archaic 100 mile Rule itself remains untouched and unimproved." James B. Sloan and William T. Gotfryd, *Eliminating the 100 Mile Limit for Civil Trial Witnesses: A Proposal to Modernize Civil Trial Practice*, 140 F.R.D. 33, 34 (1992) (emphasis added). To eliminate the 100-mile rule, those commentators proposed that Rule 45(b)(2) be amended to read: "A subpoena requiring the attendance of a witness at a hearing or trial . . . may be served at any place within the United States." *Id.* at 40. That language, which closely resembles Federal Rule of Criminal Procedure 17(e)(1), would appear to provide for nationwide subpoena service. But it is not part of the Federal Rules, and *the 1991 amendments retained the well-established limitations on the territorial scope of courts' subpoena powers*. Moreover, courts considering the effect of the 1991 amendments—even courts adopting the majority view—have acknowledged that "nothing in the history or adoption of current Rule 45(b)(2) . . . conveys any intention to alter the 100 mile rule." *Vioxx*, 438 F. Supp. 2d at 667. *See also JamSports* [*& Entm't, LLC v. Paradama Prods., Inc.*], [No. 02 C 2298,] 2005 WL 14917, at *1 [(N.D. Ill. Jan. 3, 2005)]. *The "realities of modern life and multi-district litigation," Vioxx*, 438 F. Supp. 2d at 667, *may present compelling reasons for nationwide subpoena service, but until the Rules provide for such a scheme, the Court is bound to apply the Rules as they are written.*

Id. at 221–22 (emphasis added).

Several courts, including a number of recent decisions, have reached a similar conclusion to that expressed in *Big Lots Stores*. *See, e.g.*, *Iorio v. Allianz Life Ins. Co. of N. Am.*, No. 05cv633 JLS (CAB), 2009 WL 3415689, at *4 (S.D. Cal. Oct. 21, 2009) ("Rule 45 does not give the Court the power to serve subpoenas to appear at trial on party officers outside the 100-mile radius, absent any other state or federal law providing otherwise . . . ."); *Dolezal v. Fritch*, No. 08-1362-PHX-DGC, 2009 WL 764542, at *2 (D. Ariz. Mar. 24, 2009) ("The Court has read *Vioxx*, [*Big Lots Stores*], and related cases, and finds [*Big Lots Stores*] to be persuasive."); *Chao v. Tyson Foods, Inc.*, 255 F.R.D. 556, 559 (N.D. Ala. 2009) ("The Court finds that the minority interpretation of Rule 45 described in *Big Lots* and other similar cases is correct."); *Maryland Marine Inc. v. United States*,

No. H-07-3030, 2008 WL 2944877, at *5 (S.D. Tex. Jul. 23, 2008) (in considering a motion to transfer under section 1404(a), concluding that "[w]hile Rule 45(c)(3)(A)(ii) provides specific circumstances under which a court must quash a subpoena, 'it does not alter the requirements for proper service of a subpoena'") (quoting *Big Lots Stores*, 2008 WL 1977507, at *5) (additional citation omitted); *Lyman v. St. Jude Med. S.C., Inc.*, 580 F. Supp. 2d 719, 734 (E.D. Wis. 2008) ("The Court agrees with the reasoning in *Big Lots Stores* and the other courts that adhere to the purported minority interpretation of the interplay between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii)."); *Mazloum v. Dist. of Columbia Metro. Police Dep't*, 248 F.R.D 725, 728 (D.D.C. 2008) ("[T]here does not appear to be a basis in the text of Rule 45(c)(3)(A)(ii) to authorize valid service of a subpoena upon a party witness beyond the normal 100-mile range of a federal court's subpoena power."); *JamSports*, 2005 WL 14917, at *1 ("Read in context, the cross-reference of Rule 45(c)(3)(A)(ii) in Rule 45(b)(2) is meant to reflect that even if service of a subpoena is otherwise proper under Rule 45(b)(2), the subpoena is to be quashed if it imposes a requirement identified in Rule 45(c)(3)(A)(ii)."); *Land O' Lakes*, 181 F.R.D. at 397 ("Rule 45(c)(3)(A)(ii) simply does not extend the range of this court's subpoena power, although it does provide that the court may quash a subpoena, *otherwise within its power*, for a non-party witness, under certain circumstances.") (emphasis added); *see also* David T. Maloof & Barbara Sheridan, *Taking Evidence at the Flood Tide: How to Obtain the Testimony of Departing, Departed and Unavailable Admiralty Witnesses*, 34 J. MAR. L. & COM. 55, 69 n.69 (2003) ("With respect to deposing witnesses visiting the U.S., keep in mind that, pursuant to Rule 45, a court may issue a subpoena compelling a party or an officer of a party to travel more than 100 miles from their place of residence, employment or place from which they regularly conduct business in person in order to comply with that subpoena, *providing the*

subpoena was served pursuant to the requirements of Rule 45(b).") (emphasis added); *cf. Guidance Endodontics, LLC v. Dentsply Int'l, Inc.*, No. CIV 08-1101 JB/RLP, 2009 WL 3672499, at *2 (D.N.M. Sept. 29, 2009) (noting that Rule 45(b)(2) did not "appear to permit Guidance to serve a subpoena upon the Defendants' employees" because they were located "outside of the district, in excess of 100 miles from the courthouse, outside the boundaries of the state of New Mexico," and Guidance had "not provided the Court with good cause nor a federal statute providing for subpoena beyond those limitations," but concluding that "[e]ven if the . . . employees could be subpoenaed, rule 45 provides that the Court would be required to quash that subpoena on motion by the Defendants" because the employees were not officers of the defendants);[9] *Square D Co. v. Breakers Unlimited, Inc.*, No. 1:07-cv-806-WTL-JMS, 2009 WL 1702078, at *1 (S.D. Ind. Jun. 11, 2009) ("In that sense, then, the relevant question essentially is whether a party may be compelled to attend trial and testify if that party is not subject to being subpoenaed under Rule 45. While the Court recognizes the cases cited by Square D that suggest the contrary, the Court does not believe that Rule 45—or any other Federal Rule of Civil Procedure—provides the last word regarding the situation here."); Paul D. Friedland & Lucy Martinez, *Arbitral Subpoenas Under U.S. Law and Practice*, 14 AM. REV. INT'L ARB. 197, 226 (2003) (discussing Rule 45(b)(2) and noting that "a federal district court has no jurisdiction to compel compliance with an arbitral order or subpoena served on a person (*party or non-party*) who resides outside of the forum of the arbitration, or at least more than 100 miles from

[9] The *Guidance Endodontics* case arguably supports the minority position because it considered service of the subpoena separately from whether it had to be quashed. The court concluded that service was improper without regard to whether the employees were officers of a party, implying that service would have been improper for both non-officer employees and officers. The court only considered the employees' non-officer status in concluding that even if service had been proper, it would be necessary to quash the subpoenas.

the place of the hearing")[10] (footnote omitted) (emphasis added); Richard J. Oparil, *Procuring Trial Testimony from Corporate Officers and Employees: Alternative Methods and Suggestions for Reform*, 25 AKRON L. REV. 571, 573 (1992) (noting that the 1991 amendments to Rule 45 "do not directly address the problem of obtaining subpoena power over officers of a corporate party who are outside of the judicial district" and that the "rule changes essentially left the geographic limitations on trial subpoenas intact").[11]

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[10] This article does not discuss Rule 45(c)(3)(A)(ii).

[11] Mr. Oparil argues that "the court has power to compel the corporate party to testify through particular officers, directors, and managing agents, by means of a subpoena served on the corporation to testify through the designated officials," but notes that "[w]hile logical and persuasive, most courts have not adopted this argument." Oparil, *supra*, at 576 (footnote omitted). The article further notes that some courts have concluded that "federal courts have 'inherent power' to compel testimony by party representatives," but that "[o]ther courts reject this approach." *Id.* at 578–79. Mr. Oparil suggests several possible reforms for having party officers testify at trial, arguing that "[t]he most straightforward amendment would be a blanket rule requiring corporate parties to produce key officials at trial or risk entry of an adverse judgment," noting that Washington and California have adopted similar approaches. *Id.* at 587. He advocates modifying Rule 45 to track the Washington rule, which provides:

> A party, or anyone who at the time of the notice is an officer, director, or other managing agent (herein collectively referred to as "managing agent") of a public or private corporation, partnership or association which is a party to an action or proceeding may be examined at the instance of any adverse party. Attendance of such deponent or witness may be compelled solely by notice (in lieu of a subpoena) given in the manner prescribed in Rule 30(a) to opposing counsel of record. Notices for the attendance of a party or of a managing agent at the trial shall be given not less than 10 days before . . . . [F]or good cause . . . the court may make orders for the protection of the party or managing agent to be examined.

Id. at 587–88 (quoting WASH. CIV. R. 43(f)(3)) (quotation marks and footnote omitted) (alterations made by Oparil). However, Mr. Oparil notes that "a majority of the Federal Courts Committee of the Association of the Bar of the City of New York rejected such an approach," finding that "'[t]he disadvantage of being compelled to rely on deposition testimony at trial, particularly given the availability of video-taped depositions, does not justify the increased inconvenience to witnesses, and increased expense and complexity of litigation, that would be entailed by authorizing nationwide service on a case by case basis.'" *Id.* at 589–90 (quoting REPORT ON PROPOSED CHANGES TO RULE 45(e)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE (Feb. 17, 1989)) (additional internal quotation marks omitted). Mr. Oparil argues that the Federal Courts Committee "did not adequately consider that videotaped depositions are more expensive and may be more time consuming

The cases arriving at the same conclusion as *Big Lots Stores* have largely focused on the text of the rule. In *Land O' Lakes*, the plaintiffs sought to compel one of the defendant's officers to testify at trial even though he lived and worked more than 100 miles from the trial court's location. 181 F.R.D. at 396. The court rejected the argument that Rule 45(c)(3)(A)(ii) created nationwide service for subpoenas addressed to parties and party officers:

> Rule 45(c)(3)(A)(ii) simply does not extend the range of this court's subpoena power, although it does provide that the court may quash a subpoena, otherwise within its power, for a *non-party* witness, under certain circumstances. There simply is no "negative implication," upon which the Johnsons appear to rely, that Rule 45(c)(3)(A)(ii) subjects to subpoena officers of parties who are more than 100 miles from the place of trial whether or not they are within the range of the subpoena power defined in Rule 45(b)(2).

Id. at 397. The court explained:

> In short, Rule 45(b)(2) defines the court's subpoena power, and David Seehusen is beyond it, while Rule 45(c)(3)(A)(ii) allows for quashing a subpoena *otherwise within the court's subpoena power*, but in circumstances not applicable here. This is what is meant in Rule 45(b)(2) by the statement that the court's subpoena power as defined in that subsection of the rule is "subject to" the provisions of Rule 45(c)(3)(A).

Id. (emphasis added). The court noted that the rules provide an alternative in situations where a party's officer is outside the court's subpoena power, noting that the officer's "unavailability to testify in person falls precisely within Rule 32(a)(3), which provides that '[t]he deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds . . . that the

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for the court in having to rule on objections," and that "[a] systematic, easy to apply, general rule seems far preferable." *Id.* at 590 (footnote omitted). The second possible approach suggested by Mr. Oparil was to amend Rule 45 "to apply Rule 30(b)(6) deposition procedures to trials." Oparil, *supra*, at 591. The third suggested approach "would be to give trial courts discretion to require corporate parties to make their officers, directors and managing agents (who as individuals are outside the subpoena power) available for examination at trial upon a showing of need." *Id.* at 592.

witness is at a greater distance than 100 miles from the place of trial or hearing[.]'" *Id.* (quoting FED. R. CIV. P. 32(a)(3)(B)) (alteration added by *Land O' Lakes* court).

Similarly, in *JamSports*, the court considered a motion to quash a trial subpoena seeking the attendance of the defendant's executive vice president and chief financial officer, who lived and worked in Texas, at a trial in Illinois. 2005 WL 14917, at *1. The officer "was not served within [the court's] district, the 100-mile 'bulge,' or the state of Illinois." *Id.* The court rejected the argument that the cross-reference in Rule 45(b)(2) to Rule 45(c)(3)(A)(ii) "expands the geographic reach of a court's subpoena power with regard to a person who *is* 'a party or an officer of a party.'" *Id.* The court explained:

> Nothing in the history of the adoption of Rule 45(c)(3)(A) suggests that it was intended to alter the longstanding geographic limitations on the reach of a district court's subpoena power. Nor does the text of the Rule support the reading proposed by JamSports or in the cases upon which it relies. Rule 45(c)(3)(A) does not confer authority for service of a subpoena; it confers authority to quash or modify a subpoena. It provides an exception to Rule 45(b)(2), not an addition to that Rule. *See Johnson v. Land O' Lakes, Inc.*, 181 F.R.D. 388, 396–97 (N.D. Iowa 1998).
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> Read in context, *the cross-reference of Rule 45(c)(3)(A)(ii) in Rule 45(b)(2) is meant to reflect that even if service of a subpoena is otherwise proper under Rule 45(b)(2), the subpoena is to be quashed if it imposes a requirement identified in Rule 45(c)(3)(A)(ii).* Specifically, even if a subpoena is served within the geographic boundaries of a district, outside the district but within 100 miles of the place of trial, or outside the state in which the district lies, it must be quashed if it requires a non-party witness to travel more than 100 miles from where he or she resides, employs, or regularly transacts business. To provide a concrete example, a witness who lives and works in Galena, Illinois can properly be served with a subpoena under Rule 45(b)(2) to appear at a trial in Chicago, because Galena is within the Northern District of Illinois. But if the witness is not a party or officer of a party, she is entitled under Rule 45(c)(3)(A)(ii) to have the subpoena quashed, because it would require her to travel more than 100 miles.

Id.

In *Mazloum*, the court considered a motion in limine to preclude the defendants from using portions of a nominal defendant's deposition testimony at trial in lieu of his live appearance. 248 F.R.D. at 725–26. The defendants argued that using the deposition testimony was permitted because the witness was an "unavailable witness" under Rule 32(a)(4)(B) since he resided in Florida, more than 100 miles from the place of trial. *Id.* at 726. The plaintiff argued that because the witness was still a party to the litigation, was designated as a Rule 30(b)(6) witness, and was a "managing agent" of one of the defendants, he was "'by definition *available* even if he happen[ed] to be literally outside the 100-mile limit set forth in Rule 32.'" *Id.* at 726–27 (record citation omitted) (emphasis in original). The court concluded that the witness was unavailable and that his deposition testimony could be used under Rule 32. *Id.* at 727. Even though it found that sufficient to resolve the pending issue because the plaintiff had not attempted to serve a trial subpoena on the witness, the court analyzed Rule 45 because it seemed likely that the plaintiff might attempt to serve a trial subpoena and that a motion to quash would follow. *Id.* The court noted that "the majority of federal district courts that have addressed the interaction between Rule 45(b)(2)(B) and Rule 45(c)(3)(A)(ii) have held that the latter authorizes a federal court to issue a trial subpoena upon a party witness outside of the 100-mile radius limitation contained in Rule 45(b)(2)(B)." *Id.* (citing *Clark,* 2008 WL 648542, at *1 ("collecting cases from ten different federal courts that reflect the 'majority' position"). But the court stated that "there are reasons to question that majority position." *Mazloum*, 248 F.R.D. at 727.

The *Mazloum* court explained:

> To begin with, based simply on the text of Rule 45(b)(2) it would seem that Rule 45(c)(3)(A)(ii) functions as a *limitation* on the scope

> of Rule 45(b)(2)(B) rather than an expansion of authority. In relevant part, Rule 45(b)(2) states: "*Subject to* Rule 45(c)(3)(A)(ii), a subpoena may be served at any place . . . " *See* FED. R. CIV. P. 45(b)(2) (emphasis added). The phrase "subject to," of course, commonly refers to a constraint, and there is no reason to believe that it does not do so here. The majority position, however, appears to interpret that phrase as if it read: "*In addition to the provisions* of Rule 45(c)(3)(A)(ii), a subpoena may be served at any place . . . " *That is an odd construction.*
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> But even if one were to accept the apparent majority reading—that Rule 45(c)(3)(A)(ii) could somehow be an expansion of the reach of Rule 45(b)(2)—the terms of Rule 45(c)(3)(A)(ii) do not appear to support the conclusion that the majority of courts have reached. The logical jump that those decisions make, as this Court understands it, begins with Rule 45(c)(3)(A)(ii), which mandates that a court quash any subpoena served upon a non-party (or an employee of a party who is not an officer) that would require that witness to travel more than 100 miles "from where that person resides, is employed, or regularly transacts business in person." *See* FED. R. CIV. P. 45(c)(3)(A)(ii). From that proposition, those courts have concluded that a party witness may be served with a subpoena beyond 100 miles from the place of trial pursuant to Rule 45(b)(2)(B).
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> *But that may not logically follow from the text of the Rule.* Indeed, the upshot of Rule 45(c)(3)(A)(ii) with respect to party witnesses is, as this Court sees it, that a court is not required to quash a properly served subpoena even if it required a party witness to travel more than 100 miles. If, for instance, Mazloum had served Fiorito with a trial subpoena while he was present in the District for his 30(b)(6) deposition, Rule 45(c)(3)(A)(ii) would not compel this Court to quash that subpoena (assuming Fiorito is in fact a party) even if he had to travel from Florida to attend the trial. *But there does not appear to be a basis in the text of Rule 45(c)(3)(A)(ii) to authorize valid service of a subpoena upon a party witness beyond the normal 100-mile range of a federal court's subpoena power.* Two other federal courts, which evidently comprise the "minority" position, have reached this conclusion. *See Jamsport & Entm't, LLC v. Paradama Prods., Inc.*, 2005 WL 14917 at *1 (N.D. Ill. Jan. 3, 2005); *Johnson v. Land O' Lakes*, 181 F.R.D. 388, 397 (D. Iowa 1998).

Id. at 728 (fourth, fifth, and sixth emphasis added). The court expressed concern about reading extensive deposition transcripts into the trial record, noting that "it is unusual to present such an

important witness's testimony through lengthy deposition excerpts," and urged the parties to agree to videotape the witnesses' testimony or otherwise present it in a "live" manner. *Id.* Finally, the court noted that "[a]t least one other federal court has suggested that 'the court's inherent power enables the court to order' that a party witness appear at trial notwithstanding the fact that the witness resides outside of the 100-mile service radius authorized by Rule 45(b)(2)," *id.* at 728 n.4 (citing *Clark*, 2008 WL 648542, at *2), but the court was "not inclined to exercise its inherent power in a manner that would conflict with the structure and terms of the Federal Rules of Civil Procedure," *id.*

In *Lyman*, the court noted that "[t]he majority of courts interpret these provisions [in Rule 45(b)(2)(B) and Rule 45(c)(3)(A)(ii)] together to mean . . . that a court may compel the trial testimony of a party or a party's officer even when the person to be compelled resides beyond the 100-mile range for subpoenas." 580 F. Supp. 2d at 733 (citations omitted). The court disagreed with the majority view, explaining:

> Rule 45(b)(2) sets forth certain requirements for a subpoena to be properly served and to have the force to compel attendance. Rule 45(c)(3)(A)(ii) provides specific circumstances under which a court must quash a subpoena, "but it does not alter the requirements for proper service of a subpoena." *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213, 217–18 (E.D. La. 2008). Therefore, to compel attendance at trial, the person "must be served with a subpoena in one of the places listed in Rule 45(b)(2) *and* not be subject to the protection in Rule 45(c)(3)(A)(ii), which protects nonparty witnesses who work or reside more than 100 miles from the courthouse, but not parties or party officers." *Id.* at 218 (emphasis in original).
>
> The Court agrees with the reasoning in *Big Lots Stores* and the other courts that adhere to the purported minority interpretation of the interplay between Rule 45(b)(2) and Rule 45(c)(3)(A)(ii). As one court noted, the majority position makes a "jump" that "may not logically follow from the text of the Rule." *Mazloum v. District of Columbia Metropolitan Police Dep't*, 248 F.R.D. 725, 727–28

> (D.D.C. 2008). "There is simply no 'negative implication' . . . that Rule 45(c)(3)(A)(ii) subjects to subpoena officers of parties who are more than 100 miles from the place of trial whether or not they are within the range of the subpoena power defined in Rule 45(b)(2)." *Johnson v. Land O' Lakes, Inc.*, 181 F.R.D. 388, 397 (N.D. Iowa 1998).
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> Ultimately, the "upshot of Rule 45(c)(3)(A)(ii) with respect to *party* witnesses is . . . that a court is not *required* to quash a *properly* served subpoena even if it required a party witness to travel more than 100 miles." *Id.* at 728 (emphasis in original); *see also JamSports and Entertainment, LLC v. Paradama Prods., Inc.*, No. 02 C 2298, 2005 WL 14917 (N.D. Ill. 2005) ("Read in context, the cross-reference of Rule 45(c)(3)(A)(ii) in Rule 45(b)(2) is meant to reflect that even if service of a subpoena is otherwise proper under Rule 45(b)(2), the subpoena is to be quashed if it imposes a requirement identified in Rule 45(c)(3)(A)(ii)").

Id. at 733–34. The court explained that because service of the subpoena was not proper under Rule 45(b)(2), the subpoena had to be quashed, but noted that Rule 32(a)(4)(D) allows the introduction of videotaped deposition testimony when a witness is outside the scope of a subpoena. *Id.* at 734 (citation omitted).

In *Iorio*, the court found the *Big Lots Stores* reasoning persuasive and concluded that "Rule 45 does not expand the Court's subpoena power beyond the 100-mile radius for party officers." 2009 WL 3415689, at *3. The court explained that "[t]he use of the phrase 'subject to' has routinely been used by Congress to limit the scope of legislation, not expand it" and "[t]here [wa]s no persuasive rationale for why 'subject to' would be used differently in this context and inversely serve to expand the court's subpoena power." *Id.* The court noted that the legislative history supported its view because the 1991 advisory committee's notes "clarified the amendments in subdivision (c) and stated that the only expansion of subpoena power was that the court may now subpoena a witness outside the 100 mile radius so long as the witness was located within the State of the district." *Id.* at *4

(footnote omitted). The court held: "Rule 45 does not give the Court the power to serve subpoenas to appear at trial on party officers outside the 100-mile radius, absent any other state or federal law providing otherwise . . . ." *Id.* The court also quashed subpoenas issued to former employees because the subpoenas required the witnesses to travel more than 100 miles to attend trial and none were traveling from within the state. *Id.* at *5. To resolve the inequity that would result if the defendant produced any of the subpoenaed witnesses for its own case, the court held that "if Plaintiffs are forced to show the videotaped depositions or read the transcript into the record of any of the movants in this action because Defendants have failed to produce them, Defendants will thereafter be precluded from producing the same witnesses in person." *Id.* at *6.

In *Chao*, the court recognized that the "majority of courts have held that Rule 45(b)(2)'s 100-mile rule does not apply to a party," but concluded that the language of the rule supported the minority position. 255 F.R.D. at 558, 559 (citations omitted). The court explained

> Rule 45(b)(2)'s use of the phrase "subject to" in cross-referencing Rule 45(c)(3)(A)(ii) indicates that it is only intended to limit the court's power, not expand it. It is also too tenuous an inference to conclude that because a court is not required to quash a subpoena issued to a party or a party's officer under Rule 45(c)(3)(A)(ii), it therefore has the power to compel the attendance of a party witness who was served beyond the explicit geographical limitations of Rule 45(b)(2) and that service of a subpoena is valid on a nationwide basis whenever the person served is a party or the officer of a party. Thus, the Court rejects the position accepted by a majority of district courts holding that Rule 45(c)(3)(A)(ii) supports the "inverse inference that parties and their officers are subject to compulsion to attend trials that occur outside the 100 mile limit otherwise available to non-parties." *In re Vioxx Products Liability Litigation*, 438 F. Supp. 2d 664, 666 (E.D. La. 2006). The Court cannot compel persons, whether or not "parties" or officers of Tyson, to appear in court when they have not been properly served with a trial subpoena.

Id. at 559.

In *Dolezal*, the court considered a subpoena issued by the District of Arizona and served on the defendants in Colorado that required the defendants to appear for depositions and document production in Phoenix. 2009 WL 764542, at *1. The plaintiff argued that service was proper because the defendants were parties to the litigation and the *Vioxx* case allowed service on parties outside the district and more than 100 miles from the place for appearance and production. *Id.* The court cited *Big Lots Stores*, and noted that "[o]ther courts have disagreed with *Vioxx*, holding that Rule 45(b)(2) specifies where subpoenas may be served and Rule 45(c)(3)(A)(ii) merely makes clear that nonparties cannot be required to travel more than 100 miles except for trial within the district where they are served." *Id.* The court agreed with the analysis in *Big Lots Stores*:

> The Court has read *Vioxx*, [*Big Lots Stores*], and related cases, and finds [*Big Lots Stores*] to be persuasive. The clear language of Rule 45(b)(2) states that a subpoena issued by this Court may be served only within this district or outside of the district but within 100 miles of where the event for which the subpoena is issued will occur, unless state or federal law provide otherwise (they do not in this case). Rule 45(c)(3)(A)(ii) creates a limitation on this scope of service, stating that nonparties may not be required to travel more than 100 miles for a nontrial event, and not even for trial if undue expense would be incurred. Thus, for example, even though the scope of service in Rule 45(b)(2) would permit a party before this Court to serve a subpoena for a deposition or document production on a nonparty witness in Page, Arizona, which is within this district but more than 100 miles from Phoenix, the limitation in Rule 45(c)(3)(A)(ii) would make clear that the witness could not be required to travel to Phoenix for the deposition or production. The witness could be compelled by the subpoena to appear in Page, or within 100 miles of Page, but not in areas of the district beyond a 100-mile radius. Rule 45(c)(3)(A)(ii) also makes clear that the nonparty could be required to attend trial in Phoenix only if undue expense would not be incurred. A party residing in Page, by contrast, is not protected by Rule 45(c)(3)(A)(ii) and could be required by subpoena to travel to Phoenix for a deposition, production, or trial.

Id. at *2. The court noted that its construction was supported by another provision in Rule 45:

> That Rule 45(c)(3)(A)(ii) seeks to protect nonparties from inconvenience that might arise from the Rule 45(b)(2) scope-of-service provision—rather than to expand that scope of service—is supported by the contempt provision of the rule. Rule 45(e) provides that a person who fails to comply with a properly served subpoena may be held in contempt, and then contains this exception: "[a] nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii)." This provision makes clear that the intent of Rule 45(c)(3)(A)(ii) is to protect[] nonparties, even if the subpoena otherwise complies with the scope-of-service provision in Rule 45(b)(2). Rule 45(c)(3)(A)(ii) constitutes a limitation on the scope-of-service provision for the benefit of nonparties, not a negatively implied expansion of that provision for parties. As [*Big Lots Stores*] notes, this interpretation comports with the 1991 amendments to Rule 45 (which added Rule 45(c)(3)(A)(ii)) and the advisory committee notes that accompanied those amendments. 251 F.R.D. at 220–21.

Id.

In *Square D*, the defendant had served trial subpoenas on two employees of the plaintiff, and the plaintiff sought to quash the subpoenas because the employees lived and worked more than 100 miles from the trial location. 2009 WL 1702078, at *1. The court found that the plaintiff had no standing to challenge the subpoenas, and denied the motion to quash on that basis, but noted that if the subpoenaed employees moved to quash, "their motions would be well-taken and, in fact, the granting of those motions would be mandatory under Federal Rule of Civil Procedure 45(c)(3)(A)(ii)." *Id.* The court explained that because the employees had been designated by the plaintiff as Rule 30(b)(6) witnesses, the defendant was "seeking to call Square D itself to testify through the two individuals that Square D has designated to speak for it on the witness stand in this case." *Id.* The court defined the issue as "whether a party may be compelled to attend trial and testify if that party is not subject to being subpoenaed under Rule 45." *Id.* The court acknowledged "the split among courts with regard to the interplay between Rule 45(b)(2)(B), which limits service

of a subpoena to within 100 miles of the place of trial, and Rule 45(c)(3)(A)(ii), which requires the quashing of a subpoena that requires a 'person who is neither a party nor a party's officer to travel more than 100 miles,'" but did "not believe that Rule 45—or any other Federal Rule of Civil Procedure—provide[d] the last word regarding the situation . . . ." *Id.* The court relied on the commentary by David Siegel (quoted earlier in this memorandum in connection with the *Ames Department Stores* case), and concluded that while the witnesses were not subject to the court's subpoena power under Rule 45, and the court had no jurisdiction over them, the court did have jurisdiction over the plaintiff. *Id.* at *1–2. The court found that it had "inherent authority that extends beyond the authority provided by the Federal Rules of Civil Procedure." *Square D*, 2009 WL 1702078, at *2. The court held: "In this case, the rules do not expressly provide that attendance at trial can be secured only by a subpoena, and the notion that the Court has the inherent authority to order a party to appear and testify—or, in the case of a corporation, to order it to produce a witness on its behalf—seems rather uncontroversial." *Id.* The court noted that an order compelling a corporate witness would sometimes be inappropriate, such as if the Rule 30(b)(6) designee is no longer employed by the party, if it would impose an undue burden on the witness beyond the imposition of travel, or if live testimony would not add anything to the proceedings. *See id.* The court ordered the defendant to file a notice explaining what testimony it sought from the witnesses and its relevance to the case. *Id.* at *3.

In *Maryland Marine*, the court considered a transfer under section 1404(a). The plaintiff opposed transfer and argued that two of its former employees could be compelled to attend a trial in the original district—the Southern District of Texas—under Rule 45(c)(3)(A)(ii) because they lived in Texas. 2008 WL 2944877, at *4. The court held that "[w]hile Rule 45(c)(3)(A)(ii) provides

specific circumstances under which a court must quash a subpoena, 'it does not alter the requirements for proper service of a subpoena.'" *Id.* at *5 (citing *Big Lots Stores*, 2008 WL 1977507, at *5; *JamSports*, 2005 WL 14917, at *1). The court explained that "[t]o compel a person to attend trial, the person must be served with a subpoena in one of the places listed in Rule 45(b)(2) *and* not be subject to the protection in Rule 45(c)(3)(A)(ii), which protects nonparty witnesses who work or reside more than 100 miles from the courthouse, but not parties or party officers." *Id.* at *6. The court found it unclear whether the nonparty witnesses could be compelled to attend trial in the Southern District of Texas because each lived in Texas but outside the district and more than 100 miles from the courthouse. *Id.* But the court concluded that "the fact that many of the nonparty witnesses knowledgeable about the [relevant issues] [we]re subject to compulsory process in the Northern District of Alabama, while the few witnesses in Texas could challenge any trial subpoena requiring them to attend trial in the Southern District of Texas, weigh[ed] in favor of transfer." *Id.*

IV. Conclusion

Many courts have concluded that Rule 45 permits nationwide service of trial subpoenas to parties and party officers, as the *Vioxx* court held, and the cases describe the *Vioxx* view as the majority rule. However, the *Big Lots Stores* court is far from being alone in its holding that Rule 45 does not permit nationwide service of trial subpoenas on parties and party officers. A number of cases, including some recent decisions, have agreed with the interpretation in *Big Lots Stores* of the interplay between Rule 45(c)(3)(A)(ii) and Rule 45(b)(2). In addition, many of the cases noting that a majority of courts have found that Rule 45 permits compelling parties or officers of parties to travel more than 100 miles for trial cite cases that do not specifically address the issue of whether service must be made within the limits of Rule 45(b)(2). In sum, while the *Vioxx* interpretation of Rule 45

has been described by many courts as the "majority" rule, many cases that have closely examined the language in Rule 45(b)(2) and Rule 45(c)(3)(A)(ii) have disagreed with the *Vioxx* court's interpretation.

TAB 6

RULE 26(c)

BACKGROUND

In 1992 proposed "sunshine in discovery" provisions in H.R. 2017 prompted the Advisory Committee to explore the advisability of amending the discovery protective-order provisions of Rule 26(c). The effort produced a published proposal; a recommendation for adoption of a somewhat revised proposal that was rejected by the Judicial Conference; publication for comment of the proposal that was submitted to the Judicial Conference; a decision to postpone further consideration pending broader consideration of the discovery rules; and finally, in 1998, a decision to suspend active consideration while maintaining watch on continuing practice. The work was aided by a Federal Judicial Center study.

Comments on the published proposals were divided. One side emphasized the view that discovery should be limited to what is needed to resolve a particular lawsuit. Discovery permits a party to force production of information that is private for all other purposes. That privacy should be protected against all other inroads. Facilitating protection by way of orders limiting the subjects or use of discovery information also facilitates production of the information in discovery without burdensome collateral litigation. The other side took a "public interest" view, emphasizing the belief that once government power has been exerted to dissipate privacy there should be broad access to the disclosed information.

The decision to defer action rested in large part on the conclusion that courts seemed to be striking proper balances between private and public interests. Years of study, prompted by concern that the proponents of successive bills in Congress might be pointing to serious problems, concluded there were no serious problems. Rather than risk disrupting satisfactory practice under Rule 26(c) as it has been, the Committee chose to defer.

CURRENT INTEREST

There still are no signs that federal judges or most practicing lawyers believe that Rule 26(c) needs to be revised. But Congress continues to study bills that would drastically change protective-order practice. H.R. 1508, the "Sunshine in Litigation Act of 2009," is a current model. Congressional concern continues to command respectful attention from the Rules Committees. It is time to consider whether to reopen the Rule 26(c) inquiry. If there are problems that deserve attention, it is important that the Rules Committees lead the way through the Enabling Act process to craft the best possible rule.

These topics were considered at the October 2009 meeting. It was agreed then that the Chair and Reporter would collaborate in drafting a revised Rule 26(c) model. The attached draft has been shaped by Andrea Kuperman's research. Her memorandum is set out after the draft.

This draft is presented to support further discussion of the question whether to pursue the work further. It has not received the attention required to present a proposal for possible publication. If it is found appropriate to pursue further work now, a reworked model can be prepared in time for the meeting next fall.

Rule 26(c) Revisions

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

(1) ***Motion.***

(A) A party or any person from whom discovery is sought [or from whom disclosure is due][1] may move for a protective order. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.

(B) The motion may be made in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken.[2]

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[1] Present Rule 26(c) wobbles. (1) begins by addressing only "discovery." The idea may be that as diluted in 2000, disclosure carries few risks and initial disclosure is subject to the Rule 26(a)(1)(C) opportunity to seek protection at the outset. On the other hand, there may be good reasons to limit access to liability insurance disclosures or damages calculations. In some circumstances there may be good reasons to protect even the identity of witnesses or documents that may be used to support claims or defenses. Overlining is adopted in paragraph (2) only as the easier mode of illustration. One way or the other, the rule should be internally consistent.

[2] It seems useful to carry forward the opportunity to move for a protective order in the court where the action is pending even with respect to a deposition. The deponent may be a party; it is fair to subject a party to this burden even if the deposition is conducted in a different district. If the deponent is not a party, it may seem unfair to drag the deponent to the court where the action is pending. It is possible that one party may move for a protective order involving a nonparty deponent — one party, for example, may want to protect trade secrets or a privilege. There has been no sign of distress on this score; need it be raised now?

(2) ***Order.*** The court may, for good cause,[3] issue an order to protect a party or person from invasion of privacy, unnecessary delay, ~~annoyance,~~ harassment, embarrassment, oppression, or undue burden or expense,[4] including one or more of the following:[5]

Is there any reason to add rule text that identifies a motion to quash as one species of request for a protective order?

[3] Two perennial questions arise with respect to the simple "good cause" expression. The rule text could be elaborated to address either.

One question is familiar from the Committee's past work. The rule text could say: "for good cause or on stipulation of the parties." That reference provoked vigorous opposition. Or the rule text could explicitly require good cause to justify entering a stipulated order, in line with what courts generally say when confronted with the question: "for good cause shown by a party or by parties who submit a stipulated order, issue an order * * *." The Committee Note could observe that agreement of the parties is an important sign that a protective order is appropriate to protect private information and to facilitate conflict-free discovery. But it may be asked whether even the protection of a Committee Note is enough to justify the risk of unintended disruption of present practice. One good reason to make the change would be a fear that courts do not always take sufficient care in reviewing stipulated orders.

The other question is provoked by the perennial efforts to legislate an explicit requirement that "public health and safety" be considered in deciding on protection and in setting the terms of any protection. Rule text on this question would elaborate the "good cause" requirement, in effect pointing to one of many reasons for deciding that the proffered cause is not good enough. At least two concerns weigh against adding to rule text. One is that there is no need — courts consider public health and safety now, and there has not been any persuasive showing that even one protective order has impeded dissemination of information useful to protect public health and safety. Another is the familiar problem of starting down a road by offering only one illustration of the many concerns that may weigh against entering a protective order.

[4] A Committee-based effort to revise Rule 26(c) should reconsider this sequence of antique-seeming words. The changes in text draw in part from Rule 26(g)(1)(B)(ii); the analogy could be extended by substituting like this: "or ~~undue burden and expense~~ needless increase in the cost of litigation,* * *." But it may suffice to add "privacy" to the list, as illustrated.

[5] It would be possible to work in something about providing information to government agencies. Protection for government agencies can be accomplished without any additional provision — a party may ask that the protective order not apply, or an agency can seek modification as provided later in the rule. But it would be possible to do something like this:

(2) ***Order.*** The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, invasion of privacy, oppression, or undue burden or expense. The order may not prohibit disclosing information to a Federal or State agency with regulatory or enforcement authority related to the information. The order may~~;~~ includ~~e~~ing one or more of the following:

(A) forbidding the ~~disclosure or~~[6] discovery;

(B) specifying terms, including time and place, for the ~~disclosure or~~ discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of ~~disclosure or~~ discovery to certain matters;

It is important to guard against a reflex reaction that a government agency, as representative of the public interest, always asserts a higher claim to overcome private interests. Dealing with a request to modify a protective order, the Seventh Circuit devoted some time to explaining that because the government often has access to other investigative tools, and because the government as investigator poses "a unique danger of oppression," the government may present less persuasive reasons to relax protection. Wilk v. American Medical Assn., 635 F.2d 1295, 1300 (7th Cir.1980), Kuperman memorandum p. 52.

It also is important to worry that a public agency may not be able to protect against dissemination of confidential private information, including trade secrets. Agency regulations, freedom-of-information and kindred statutes, and agency practice may create legal or practical impediments to honoring confidentiality obligations. Simple agency laxity also may be cause for concern. Drafting rule text that accounts for these concerns may be difficult. Any provision is likely to be sufficiently complex to require statement in a separate paragraph or subparagraph:

> A protective order may not prohibit disclosing information to a Federal or State agency with regulatory or enforcement authority related to the protected information if it is shown that the agency is legally and factually able to shield the information from improper disclosure.

This sketch suggests the problems. "[I]f it is shown." The passive was chosen to avoid deciding whether the agency must make the showing, or whether a party may do so. "[L]egally able * * * to shield * * *." Surely some such phrase would contemplate general disclosure requirements, not the possibility that the agency might be forced to respond to specific disclosure orders. Consider the prospect of a legislative subpoena, a trial subpoena in different litigation, and the like. "[F]actually able * * * to shield * * *." This appears nearly insulting, but is important.

In all, this possible addition seems to generate more problems than it might solve. It seems better to leave these issues to the general "good cause" determination initially, and to a more specific determination whether to dissolve or modify a protective order in the context of possible disclosure to an identified agency for identified reasons.

[6] See note 1. "disclosure or" should be retained if disclosure is added to the text of subdivision (1).

(E) limiting the scope of discovery under Rule 26(b);[7]

(~~E~~F) designating the persons who may be present while the discovery is conducted, or who may have access to discovery responses;[8]

(~~F~~G) requiring that a deposition be sealed and opened only on court order;

(H) requiring that information be produced or filed in redacted form, with or without an unredacted copy filed under seal;

(~~G~~I) requiring that a trade secret or other confidential research, development, or commercial information or private personal information not be revealed or be revealed only in a specified way; or

(~~H~~J) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.[9]

(~~2~~3) ***Ordering Discovery.*** If a motion for a protective order is wholly or partly denied, the court may, on

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[7] The incorporation of all of Rule 26(b) is provisional. The court may want to define a scope of discovery short of that relevant to any party's claim or defense — this would, for example, emphasize the authority to order limited discovery in the early stages of an action. Rule 26(b)(2) is the most obvious paragraph to include, including the e-discovery provisions. (b)(3) includes the direction to protect core work-product in any order to discover work-product. It is more difficult to imagine reasons to include (b)(4) and (b)(5) — each seems to include all appropriate flexibility.

[8] The Committee Note could refer to things like access by expert witnesses. Although it is more sensitive, reference also could be made to such terms as "attorney-only" access.

[9] Would this be better: "~~simultaneously~~ file * * * under seal[, subject to further order] ~~in sealed envelopes, to be opened as the court directs~~."? There is no reason to limit these orders to simultaneous filing. Sealed envelopes seem quaint, particularly in the era of e-filing.

just terms, order that any party or person provide or permit discovery.

(4) When an order permits a party to designate discovery information as confidential, another party may challenge the designation. The burden of justifying protection is on the party seeking protection.[10]

(5) *Filing Protected Information.* Discovery materials covered by a protective order used to address a motion on the merits or offered as evidence at trial may be filed under seal only if the order directs filing under seal or if the court grants a motion to file under seal.[11]

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[10] If this subject is to be covered in rule text, how complicated should the provision be?

The draft is intended to treat the issue more nearly like an initial motion for protection than like a motion to modify or dissolve. The question is not whether the original protective order was proper, but whether the specific information falls within the terms and purpose of the original order. A party's unilateral designation carries little or no intrinsic weight in making this determination. But questions of reliance may be similar to those raised in opposing a motion to modify or dissolve.

The question can be framed differently: If information is properly identified as confidential under the initial protective order, should this provision incorporate the grounds for modifying or dissolving the initial order? One relatively simple method would be a new sentence at the end: "A party challenging the designation may join a motion to modify or dissolve the order under Rule 26(c)(6)." Or: "If protection is justified under the order, any person may move to modify or dissolve the order under Rule 26(c)(6)."

[11] This is rough drafting. There are many qualifications to be sorted out: information covered by a protective order, used for specified purposes, filing under seal, scope of the existing order, and occasion for a new order. If the idea is not omitted, better drafting will emerge when the substance is sorted out. The reference to a motion on the merits is designed to exclude information filed for in camera review — for example, on a motion to modify a protective order, to review a claim of privilege, to resolve a dispute as to the scope of discovery, and so on.

More direct drafting might be attempted: "A party may file under seal information protected by an order under Rule 26(c) and offered to support or oppose a motion or offered in evidence at a hearing or trial only if * * *."

It may be important to find some way to emphasize the difference between the standard for sealing discovery information and the higher standard for sealing information filed to support

(6) (A) The court may modify or dissolve a protective order on motion made by any person [Any person may move to modify or dissolve a protective order.][12]

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decision on the merits. This question will become important if there are grounds to fear that protective orders too often incorporate provisions that allow or even command filing under seal. It does not seem desirable to complicate the "good cause" standard in paragraph (2) by adding rule text that attempts to define the standard for an order that anticipates filing under seal. An attempt to define the standard might fit better in this paragraph (4). But attempts to define the standard for sealing filed materials have shown how difficult the task is. It may be better to rely on Committee Note language.

Several of the cases described in the Kuperman memorandum refer to "judicial documents." One, SmithKline Beecham Corp. v. Sunthon Pharms. Ltd., 210 F.R.D. 163, 167 (M.D.N.C.2002), pp. 27-29, suggests that status as a judicial document "does not arise from the mere filing of papers or documents, but only those used, submitted and relied upon by the court in making its decision." That sounds good, but is fraught with traps: "decision" of what? A motion for a protective order, asserting privilege? "Used" by whom: does a document fail to become a judicial document if the court decides not to rely on it, even though a party has argued it as the proper basis for decision? Capturing a useful concept may prove difficult.

The Ninth Circuit distinguishes discovery attached to "nondispositive motions," recognizing a diminished public interest in matters unrelated, or only tangentially related, to the underlying cause of action. Pintos v. Pacific Creditors Assn., 2009 WL 1151800, * 5-6 (9th Cir.2009), Kuperman memorandum pp. 58-59. The Eleventh Circuit says that "material filed with discovery motions is not subject to the common-law right of access," unlike material filed with a motion that requires judicial resolution of the merits. Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1312 (11th Cir.2001), Kuperman memorandum p. 75.

The basic problem is a classic illustration of intersecting ideas. Often there are strong reasons for shielding discovery information from public scrutiny. Always there are strong reasons for allowing public access to court records. Discovery information, however, may be filed with the court for reasons that have little to do with the central values served by public access. At the same time, discovery information may implicate public values even when it is not used to affect decision on the merits. For example, a court might conclude that discovery information is protected by a national security privilege and cannot be used for any purpose. The effect on the public interest stems more from the privilege ruling than from a protective discovery order, but the issues are intertwined.

[12] This is a direct provision, recognizing that many nonparties may have grounds to seek modification. Public media are a familiar example. So are parties to parallel litigation. But less familiar examples can be found. A nonparty, for example, may seek tighter protection of information that is more important to the nonparty than to any party. The 1996 version took a narrower approach, recognizing motions by a party, any person bound by the order, or a person allowed to intervene. The Committee Note suggested that the standard for intervention should not be the full Rule 24 standard. This approach could be expressed like this: "The court may modify or dissolve a protective order on motion made by a party, a person bound by the order, or a person who has been [allowed to intervene]{granted leave} to seek modification or dissolution."

(B) In ruling on a motion to dissolve or modify a protective order, the court must consider[, among other matters, the following[{these among other matters}(all relevant matters, including):

(i) the extent of reliance on the order;

(ii) the public and private interests affected by the order;

(iii) the movant's consent to submit to the terms of the order;

(iv) the reasons for entering the order, and any new information that bears on the order;[13] and

(v) the burden that the order imposes on persons seeking information relevant to other litigation.

(37) ***Awarding Expenses.*** Rule 37(a)(5) applies to the award of expenses.

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[13] The rule text could be more specific. If the protective order was entered on stipulation, modification or dissolution could be easier to get — it would be possible to go to the point of assigning the burden of justification to any party asserting the need for continued protection. This prospect could instead be left to the Committee Note, or omitted.

A related question: it may be that some courts enter a stipulated protective order to confirm a Rule 29(b) stipulation of the parties modifying discovery procedures to make discovery confidential, without undertaking a Rule 26(c) "good cause" inquiry. Is that something we need explore?

The cases described in the Kuperman memorandum often suggest that a distinction should be drawn between a protective order entered without a good-cause showing and one entered after a good-cause showing. But it is not clear how the distinction is viewed. It may be seen to require a party seeking protection to show good cause — if the showing is made when the order enters, the burden is on a party seeking modification; if the showing is not made when the order enters, the burden is on the party seeking to continue the protection. On the other hand, it may be asserted that a party who stipulated to a protective order should be bound by it; this view may rest in part on concerns about reliance.

Committee Note

Present Rule 26(c)(1) refers at the beginning to protection for a party from whom discovery is sought. Later provisions at times refer to disclosure as well as discovery. [*alt. 1:* There may be occasions when relief should be available from disclosure obligations. Often protection can be provided by order under Rule 16. But to ensure that Rule 26(c) is available, "disclosure" is added to the rule text. Similarly, it may be important to limit access to disclosed information — details about liability insurance coverage are an example.] {*alt. 2* Subtle reasons may be found to explain the seeming inconsistent usages. Rather than invite confusion, references to disclosure are deleted. Relief from disclosure obligations remains available under Rule 26(a).]

Paragraph (2) is amended by adding "invasion of privacy" to the illustrations of the considerations that may establish good cause for a protective order. Protective orders often enter to protect privacy interests in personal, medical, financial, or other information. Adding this common illustration is not intended to imply that protection may not rest on other considerations difficult to describe in the references to "annoyance, embarrassment, [or] oppression."

New paragraph (2)(E) is added to recognize the important role of protective orders in limiting the scope of discovery. It may be important to direct discovery in limited stages, paving the way to a better understanding of the issues or to early disposition of parts or even all of the case. Rule 26(b)(2), and other parts of Rule 26(b), provide other examples of the need for protective orders.

Paragraph (2)(F) is amended to recognize orders that limit the persons who may have access to discovery responses. Access may be limited to attorneys, or to attorneys and parties, or to attorneys and expert witnesses, or to still other groups of identified persons.

New paragraph (2)(H) is added to recognize orders that information be produced or filed in redacted form. The order may also direct that an unredacted copy be filed under seal.

Paragraph (2)(I) is amended by adding "private personal information" to the enumerated categories of commercial information that may be protected.

New paragraph (4) reflects a common form of protective order that allows a party to designate discovery information as confidential. When another party challenges the designation the burden of justifying production is on the party seeking protection.

New paragraph (5) addresses one aspect of filing under seal information covered by a protective discovery order. When the information is used to support a motion on the merits — for example, a motion for summary judgment — or is offered as evidence at trial, filing under seal is permitted only if the protective order directs filing under seal or if the court grants a motion to file under seal. [The

determination whether a filing addresses a motion on the merits should be made under the general law that governs public access to court files. For example, material submitted for in camera review of a privilege claim is treated differently from material submitted on a motion for summary judgment.]

Paragraph (6) is added to the rule to dispel any doubt whether the power to enter a protective order includes power to modify or vacate the order. The power is made explicit, and includes orders entered by stipulation of the parties as well as orders entered after adversary contest. The power to modify or dissolve should be exercised after careful consideration of the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

Modification of a protective order may be sought to increase the level of protection afforded as well as to reduce it. Among the grounds for increasing protection might be violation of the order, enhanced appreciation of the extent to which discovery threatens important interests in privacy, or the need of a nonparty to protect interests that the parties have not adequately protected.

Modification or dissolution of a protective order does not, without more, ensure access to the once-protected information. If unfiled discovery responses have been filed with the court, access follows from a change of the protective order that permits access. If discovery responses remain in the possession of the parties, however, the absence of a protective order does not without more require that any party share the information with others.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests that also are important. Two interests have drawn special attention. One is the interest in public access to information that involves matters of public concern. The two most common examples of the interest in public access include information about the conduct of government officials and information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, enabling adversaries of a common party to avoid costly duplication of discovery efforts.

Paragraph (6)(A) recognizes that a motion to modify or dissolve a protective order may be made by any person. An alternative might be to require a motion to intervene, recognizing that intervention for

this purpose is governed by standards different from those that apply to intervention on the merits. There might be some value in a preliminary screening. But the question of "standing" to seek relief is governed by the cogency of the reasons advanced. The court can deny a poorly supported motion as quickly as it can deny intervention.

Paragraph (6)(B) lists some of the matters that must be considered on a motion to dissolve or modify a protective order. The list is not all-inclusive; the factors that may enter the decision are too varied even to be foreseen.

The most important form of reliance on a protective order is the production of information that the court would not have ordered produced without the protective order. Often this reliance will take the form of producing information under a "blanket" or "umbrella" protective order without raising the objection that the information is not subject to disclosure or discovery. The information may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other rules. Reliance also may take other forms, including the court's own reliance on a protective order less sweeping than an order that flatly prohibits discovery. If the court would not have ordered discovery over proper objection, it should not later defeat protection of information that need not have been produced at all. Reliance also deserves consideration in other settings, but a finding that information is properly discoverable directs attention to the question of the terms — if any — on which protection should continue.

The public and private interests affected by a protective order include all of the myriad interests that weigh both for and against discovery. The question whether to modify or dissolve a protective order is, apart from the question of reliance, much the same as the initial determination whether there is good cause to enter the order. An almost infinite variety of interests must be weighed. The public and private interests in defeating protection may be great or small, as may be the interests in preserving protection. Special attention must be paid to a claim that protection creates a risk to public health or safety. If a protective order actually thwarts publication of information that might help protect against injury to person or property, only the most compelling reasons, if any, could justify protection. Claims of commercial disadvantage should be examined with particular care, and mere commercial embarrassment deserves little concern. On the other hand, it is proper to demand a realistic showing that there is a need for disclosure of protected information. Often there is full opportunity to publicize a risk without access to protected discovery information. Paradoxically, the cases that pose the most realistic public risk also may be the cases that involve the greatest interests in privacy, such as a yet-to-be-proved claim that a party is infected with a communicable disease.

Consent to submit to the terms of a protective order may provide strong reason to modify the order. Submission to the terms of the order should include submission to the jurisdiction of the court to enforce the order. This factor will often overlap the fifth enumerated factor that considers the interests of persons seeking information

relevant to other litigation. Submission to the protective order, however, does not establish an automatic right to modification. It may be better to leave to the court entertaining related litigation the question whether information is discoverable at all, the balance between the needs for discovery and for privacy, and the terms of protection that may reconcile these competing needs. These issues often are highly case-specific, and the court that entered the protective order may not be in a good position to address them.

Submission to the protective order and the court's enforcement jurisdiction also may justify disclosure to a state or federal agency when, without submission, the court would not modify the order for this purpose. A public agency that has regulatory or enforcement jurisdiction often can compel production of the protected information by other means. The test of modification, however, does not turn on a determination whether the agency could compel production. Rather than provoke satellite litigation of this question, protection is provided by requiring the agency to submit to the protective order and the court's enforcement jurisdiction. If there is substantial doubt whether the agency's submission is binding, the court may deny disclosure. One obvious source of doubt would be a freedom of information act that does not clearly exempt information uncovered by this process.

The role of the court in considering the reasons for entering the protective order is affected by the distinction between contested and stipulated orders. If the order was entered on stipulation of the parties, the motion to modify or dissolve requires the court to consider the reasons for protection for the first time. All of the information that bears on the order is new to the court and must be considered. [The person seeking protection has the burden of justifying the extent and terms of protection.] If the order was entered after argument, however, the court may justifiably focus attention on information that was not considered in entering the order initially. [If there is little new information, the burden of justifying modification or dissolution may well be assigned to the person seeking modification or dissolution.]

A protective order does not of itself defeat discovery of the protected information by independent discovery demands made in independent litigation on the person who produced the information. The question of protection must be resolved independently in each action. At the same time, it may be more efficient to reap the fruits of discovery already under way or completed without undertaking duplicating discovery. The closer the factual relationships between separate actions or potential actions, the greater the reasons for modifying a protective order to allow disclosure by the most efficient means.

Assessment of the need for disclosure in support of related litigation may require joint action by two courts. The court that entered the protective order can determine most easily the circumstances that justified the order and the extent of justifiable reliance on the order. The court where related litigation is pending can determine most easily the importance of the information in that

litigation, and often can determine most accurately the balance between the interest in disclosure and the interest in nondisclosure or further protection. The rule does not attempt to prescribe procedures for cooperative action.

Special questions arise from the prospect of multiple related actions brought at different times and in different courts. Great inefficiencies can be avoided by establishing means of sharing information. Informal means are frequently found by counsel, and occasional efforts are made at establishing more formal means even outside the framework of consolidated proceedings. There is not yet sufficient experience to support adoption of formal rules establishing — and regulating the terms of access to — litigation support libraries, document depositories, depositions taken once for many actions, or similar devices. To the extent that consolidation devices may not prove equal to the task, however, courts will continue to develop suitable practices that may find imaginative uses for protective orders.

Rule 26(c)(6) applies only to the dissolution or modification of protective orders entered by the court under paragraph (c)(2). It does not address private agreements entered into by litigants that are not submitted to the court for its approval. Nor does Rule 26(c)(6) apply to motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information. Rules 59 and 60 govern such motions.

ADDITIONAL QUESTIONS

Grounds for Protection: It would be possible to elaborate the grounds for denying or limiting protection. The primary grounds for granting protection are described in (b)(2): "good cause" to "protect * * * from annoyance, embarrassment, invasion of privacy, oppression, or undue burden or expense." Another ground is implied in (b)(2)(H), protecting trade secrets and other confidential business or personal information. Only the "good cause" limit impliedly invokes the policies against granting protection. The rule text might refer to public and private interests in allowing access to information sought or obtained by discovery. It might be more elaborate still.

Little need appears to invoke the policies that limit protection. Courts seem to consider these policies now.

Party Agreements: Parties may agree to modify discovery procedures without seeking to adopt the agreement by court order. Rule 29(b) provides that the parties may stipulate that "procedures governing or limiting discovery be modified." With or without relying on Rule 29, the parties may make agreements limiting discovery or governing the use of discovered information. "Return or destroy" agreements are a common example. (Rules 16(c)(2)(F), 26(f)(3)(D), and Evidence Rule 502(e) also contemplate party agreements about privilege and work-product material, recognizing the parties may not submit the agreements for adoption by order.)

Should Rule 26(c) address protective procedures adopted by the parties without benefit of court order? The parties may disagree about the terms of their initial agreement, about compliance, or about the need to modify the order. One obvious possibility is to direct that the court should enforce the agreement only if there is good cause for protection, placing the burden on the party who seeks protection.

A closely related question may be more common. A court may adopt an agreed protective order with only a perfunctory good-cause finding, or perhaps without any explicit good-cause finding if the agreed order does not include one. Should rule text recognize stipulated order practice? Should it distinguish stipulated orders from contested orders for purposes of enforcement, modification, or dissolution? Views may differ. One view may be that absent a good-cause finding, any request for present protection should require a good-cause showing. A contrary view may be that a party who has agreed to an order should be bound by it, lest parties become unwilling to rely on stipulated orders.

Filing: Rule 5(d)(1) directs that specified discovery materials "must not be filed until they are used in the proceeding or the court orders filing."

At least several courts believe there is no common-law right of public access to discovery materials not filed with the court. See the Kuperman memorandum, e.g., pp. 2, 71. Should this view be adopted somewhere in Rule 26, or possibly elsewhere?

Proposed Rule 26(c)(5) directs that discovery materials produced under a protective order may be filed under seal only if the order provides for filing under seal or if a new sealing order is entered. Should this provision be extended to materials produced under a protective agreement not adopted by an order?

Protection Before Request: The Kuperman memorandum p. 65, quotes P.S. v. Farm, Inc., 2009 WL 483236, *3 (D.Kan.2009), saying that questions of breadth, relevance, or calculation of discovery to lead to the discovery of admissible evidence must be raised by objection and a motion to compel, not directly by motion for a protective order. That seems questionable. Need the rule provide expressly for a motion that anticipates and seeks to forestall discovery requests that go beyond the proper scope of discovery? Privilege is an obvious example. So of work product, and limits on expert-witness discovery. And see Rule 26(b)(2)(B), which expressly contemplates using a motion for a protective order to avoid discovery of electronically stored information that is not reasonably accessible. So for more general standards of discovery's scope.

Executive Summary of the Case Law on Entering and Modifying Protective Orders in Discovery

There is an extensive body of case law on the good-cause standard in Rule 26 of the Federal Rules of Civil Procedure for issuing protective orders for materials to be produced in pretrial discovery. Federal courts have explained that showing good cause for entry of a protective order requires a clearly defined and serious need, not satisfied by generalized or conclusory allegations. The case law shows that the public interest is considered under the standards used throughout the circuits for entering and modifying protective orders.

In evaluating whether good cause exists for entering a protective order, courts have considered many factors, including: the importance of a protective order to the fair and efficient conduct of discovery; the confidentiality interests of the parties or nonparties; whether the information is being sought for a legitimate or improper purpose; whether the information at issue is important to public health and safety; whether the party seeking confidentiality is a public entity or official; and whether the litigation involves issues important to the public. The case law stresses the importance of maintaining flexibility in evaluating requests for protective orders because each case involves different circumstances.

Courts carefully distinguish between the standard for entering a protective order in the pretrial discovery stage for documents that are not filed with the court, and the standard applied to sealing documents filed with the court. They require a much more exacting standard when parties seek to keep the public from obtaining documents filed with a court, emphasizing the presumption of public access to court records and requiring compelling reasons to seal such documents. In contrast, the public usually does not have a right of access to discovery material, and the courts recognize that protective orders restricting dissemination of discovery documents are often essential to the efficient and fair conduct of that discovery. The extensive discovery that takes place in federal litigation can turn up huge amounts of material. Allowing a party to freely disseminate the discovery material may result in the spreading of private, irrelevant, and even false information.

The case law recognizes that a protective order governing discovery may need to be modified or even vacated. It is routine to allow parties, or third parties, including the press or other intervenors, to challenge the application of the protective order to particular documents or categories of documents or to move to modify the order. As with requests for entry of protective orders, cases throughout the circuits have developed standards for evaluating requests to modify protective orders. Among the factors that courts have considered are: whether the protected information is important to public health and safety; whether there is a continuing need for protection; whether those who produced discovery pursuant to a protective order reasonably relied on the order; whether alternative means exist for obtaining the information; and the relevance of protected materials to related litigation. Courts considering modification requests recognize the need for flexibility to consider appropriate factors that vary depending on the case.

CASE LAW ON ENTERING AND MODIFYING PROTECTIVE ORDERS IN DISCOVERY

Committee on Rules of Practice and Procedure
(Prepared by Andrea Kuperman)
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Federal courts have extensive experience in evaluating requests for protective orders. Through the development of the case law, federal courts have grappled with competing interests involved in determining whether a protective order is warranted in various circumstances, and if so, the proper limits of the order. In evaluating requests for protective orders governing discovery, courts have considered various factors, including, for example, the confidentiality interests at issue, the need to protect public health and safety interests, the fairness and efficiency of entering a protective order, and the importance of the litigation to the public. The cases do not set out exhaustive factors and often emphasize that courts must maintain flexibility in analyzing requests for protective orders, explaining that the proper factors to consider will vary depending on the circumstances of each individual case.

Courts differentiate the standard for sealing documents filed with the court, which usually is much more exacting than the showing required for entering a protective order limiting the dissemination of discovery materials. In analyzing requests to seal court documents, courts emphasize the presumption of public access to judicial records and often require compelling reasons in order to seal court documents.

The case law also emphasizes that courts maintain discretion to modify protective orders, which can often act as a mechanism for protecting the interests of the public, the press, and collateral litigants. As with requests to grant protective orders, courts have developed standards for analyzing requests to modify protective orders. Although the circuits take various approaches to dealing with requests for modification, they have developed factors and standards that take into consideration the competing interests involved. Courts examining requests to modify protective orders often balance a variety of factors, including, for example, the continuing need for protection, the reliance interests

of those who produced discovery pursuant to a protective order, efficiency and fairness concerns, and the needs of the public, collateral litigants, and news organizations for the protected information.

In sum, the case law has developed flexible standards that have worked well for years in balancing the competing public and private interests implicated at various stages of litigation. Courts within each of the circuits have described the standards for evaluating requests to grant protective orders, requests to seal court documents, and requests to modify protective orders, as follows:

FIRST CIRCUIT

Standard for Entering a Protective Order

- The First Circuit has explained that protective orders can be used to promote the public interest by facilitating discovery:

> Nor does public access to the discovery process play a significant role in the administration of justice. Indeed, if such access were to be mandated, the civil discovery process might actually be made more complicated and burdensome than it already is. In discovery, the parties are given broad range to explore "any matter, not privileged, which is relevant to the subject matter involved in the pending action" so that they may narrow and clarify the issues and obtain evidence or information leading to the discovery of evidence for future use in the trial. *See* FED. R. CIV. P. 26(b)(1); *Hickman v. Taylor*, 329 U.S. [495,] 501, 67 S. Ct. [385,] 388 [(1947)]. The public's interest is in seeing that the process works and the parties are able to explore the issues fully without excessive waste or delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals, just as it did in this case. The Supreme Court declined to apply heightened first amendment scrutiny to requests for protective orders at least in part because of these concerns. *See Seattle Times Co.* [*v. Rhinehart*], 467 U.S. [20,] 36 n. 23, 104 S. Ct. [2199,] 2209 n. 23 [(1984)].

Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986).

- In another case, the First Circuit recognized that courts need discretion in order to

appropriately handle requests for protective orders in various contexts:

> District judges need wide latitude in designing protective orders, and the Federal Rules of Civil Procedure reflect that approach. Rule 26(c) generously permits "for good cause shown" the making of "any order which justice requires" to protect against annoyance, embarrassment or undue burden occasioned by discovery. The district court has "broad discretion" to decide "when a protective order is appropriate and what degree of protection is required," *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 2209, 81 L. Ed. 2d 17 (1984), and great deference is shown to the district judge in framing and administering such orders. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989); 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2036 (1970).

Poliquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st Cir. 1993).

The court further recognized that while allowing the issuance of broad protective orders in discovery may have some costs, those costs are outweighed by the benefits of allowing litigation to proceed more efficiently:

> The argument [that disclosure of discovery is warranted to avoid wasteful duplication of discovery in other cases] has a surface appeal in a time of swollen litigation cost and crowded dockets, but it looks at only one element in the equation. Absent an immediate threat to public health or safety, the first concern of the court is with the resolution of the case at hand. Judges have found in many cases that effective discovery, with a minimum of disputes, is achieved by affording relatively generous protection to discovery material. Impairing this process has immediate costs, including the delay of discovery and the cost to the parties and the court of resolving objections that would not be made if a protective order were allowed.

Id. at 535. The First Circuit explained that public interests could still be protected, even with the issuance of broad protective orders:

> Nevertheless, a protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment.
>
> This retained power in the court to alter its own ongoing directives provides a safety valve for public interest concerns,

> changed circumstances or any other basis that may reasonably be offered for later adjustment.

Id. (internal citation omitted).

- In another case, the First Circuit recognized that although parties may usually disclose materials obtained in discovery in the absence of a protective order, the public ordinarily has no right to compel private litigants to disclose materials gained in discovery:

> Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants. [Local] Rule 16(g) does not in any way limit the use or dissemination of discovery materials by *parties*. Indeed, the Supreme Court has noted that parties have general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are entitled to disseminate the information as they see fit. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31–36, 104 S. Ct. 2199, 2206–09, 81 L. Ed. 2d 17 (1984); *see also Oklahoma Hospital Ass'n v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905, 105 S. Ct. 3528, 87 L. Ed. 2d 652 (1985).

Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 780 (1st Cir. 1988).

Standard for Entering a Sealing Order

- The *Poliquin* court emphasized that once discovery material becomes part of the trial record, it can no longer be kept private without the party seeking confidentiality making a very high showing:

> One generalization, however, is safe: the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot alone justify protecting such material after it has been introduced at trial. This dividing line may in some measure be an arbitrary one, but it accords with long-settled practice in this country separating the presumptively private phase of litigation from the presumptively public. *See Cowley v. Pulsifer*, 137 Mass. 392 (1884) (Holmes, J.). Open trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal. *See Seattle Times Co.*, 467 U.S. at 33, 104 S. Ct. at 2207–08 (distinguishing discovery material, traditionally not available to the public, from trial evidence which normally is available).

> There is thus an abiding presumption of access to trial records and ample reason to "distinguish materials submitted into evidence from the raw fruits of discovery." *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678, 684 & n.28 (3d Cir. 1988). As we have said elsewhere, "'[o]nly the most compelling reasons can justify the non-disclosure of judicial records.'" *FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (quoting *In re Knoxville News-Sentinal Co.*, 723 F.2d 470, 476 (6th Cir. 1983)). *Accord, Joy v. North*, 692 F.2d 880, 893–94 (2d Cir. 1982).

Poliquin, 989 F.2d at 533.

- In another case, the First Circuit emphasized the presumption of public access to court documents. *See Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 9–10 (1st Cir. 1998) (noting that "[t]he common law presumes a right of public access to judicial records" and that "[t]he presumption extends to records of civil proceedings") (citations omitted). The court explained: "Though the public's right of access to such materials is vibrant, it is not unfettered. Important countervailing interests can, in given instances, overwhelm the usual presumption and defeat access. It follows that when a party requests a seal order, or, as in this case, objects to an unsealing order, a court must carefully balance the competing interests that are at stake in the particular case." *Id.* at 10 (internal citation omitted). The court explained that "[t]he mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access," *id.*, but concluded that the interest in preserving attorney-client privilege "is precisely the kind of countervailing concern that is capable of overriding the general preference for public access to judicial records," *id.* at 11 (citations omitted). The court cautioned that even though sealing was appropriate to maintain attorney-client privilege under the facts of the case, the materials did not necessarily need to remain permanently sealed, and the seal could be lifted at a later time, if it turned out that claims of privilege were unsupported or that an exception applied. *See id.* at 12.

Standard for Modifying a Protective Order

- The First Circuit has questioned whether "extraordinary circumstances" are necessary to modify a protective order, distinguishing a Second Circuit case that applied that standard. *See Public Citizen*, 858 F.2d at 791 (stating that it was "not convinced that the extraordinary circumstances standard" proffered by the appellants was applicable because the decision relied upon, *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979), had focused on "the fact that the party seeking access . . . was the federal government, which . . . had at its disposal investigatory powers not available to private litigants . . . .")

(internal quotation marks and citation omitted).[1] Instead, the court held that a more lenient standard for modification would apply:

> Outside the area of government intervention, courts have applied much more lenient standards for modification. *See e.g.*, *Wilk* [*v. Am. Med. Ass'n*], 635 F.2d [1295,] 1300 [(7th Cir. 1980)] (holding that the court's prior invocation of the extraordinary circumstances test "was an unfortunate choice of words"); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984) (suggesting that the good cause standard of Rule 26(c) governs modifications of protective orders). While we need not decide the matter definitively, we reject the "extraordinary circumstances" standard. In a case such as this, where the party seeking modification has pointed to some relevant change in the circumstances under which the protective order was entered, we think that a standard less restrictive than "extraordinary circumstances" is appropriate.

Id. at 791. The court concluded that it did not need to define the contours of the standard because the relevant facts of the case showed that the district court had power to modify its prior protective order. The court relied on the fact that the reasons underlying the initial order no longer existed and the fact that public interest considerations favored allowing counsel to make certain documents public. *Id.* at 791–92.

- A district court in the First Circuit recently explained that the exact standard for modifying a protective order is not clearly defined in the First Circuit: "While the First Circuit has not definitively resolved the matter of the standard applicable to modification of a protective order, it has expressed the view that 'a standard less restrictive than 'extraordinary circumstances' is appropriate[,]' noting that other courts have applied 'much more lenient standards for modification[,]' including the standard of 'good cause.'" *Fairchild Semiconductor Corp. v. Third Dimension Semiconductor, Inc.*, No. 08-158-P-H, 2009 WL 1210638, at *1 (D. Me. Apr. 30, 2009) (quoting *Public Citizen*, 858 F.2d at 791). The court held that the party seeking modification bears the burden of showing good cause for the modification. *Id.* The court also noted that "'[w]hen a party to a *stipulated* protective order seeks to modify that order, that party must demonstrate particular good cause to obtain relief.'" *Id.* at *1 n.5 (quoting *Guzhagin v. State Farm Mut. Auto Ins. Co.*, Civil No. 07-4650 (JRT/FLN), 2009 WL 294305, at *2 (D. Minn. Feb. 5, 2009) (citation and internal quotation marks omitted) (emphasis in original)).

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[1] The Second Circuit has more recently emphasized that its opinion in *Martindell* was not limited to requests by the government to modify a protective order. *See S.E.C. v. TheStreet.com*, 273 F.3d 222, 229 n.7 (2001) ("Some district courts in our Circuit have incorrectly concluded that the *Martindell* rule only applies when the Government seeks modification of a protective order. Though *Martindell* did involve a Government request to modify a protective order, its logic is not restricted to Government requests, nor did our opinion in *Martindell* suggest otherwise.") (internal citation omitted).

SECOND CIRCUIT

Standard for Entering a Protective Order

- In discussing public access to discovery documents, the Second Circuit has stated:

> [I]t must be recognized that an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power. The relevance or reliability of a statement or document generally cannot be determined until heard or read by counsel, and, if necessary, by the court or other judicial officer. As a result, the temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material.

United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995). As a result of the fact that many documents unearthed in discovery are not relevant to judicial actions, the Second Circuit explained: "Unlimited access to every item turned up in the course of litigation would be unthinkable. Reputations would be impaired, personal relationships ruined, and businesses destroyed on the basis of misleading or downright false information." *Id.* at 1048–49. The *Amodeo* court set out the following standard: "We believe that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* at 1049. The court recognized a presumption of public access to documents involved in litigation, but explained that "[d]ocuments that play no role in the performance of Article III functions, *such as those passed between the parties in discovery*, lie entirely beyond the presumption's reach, and 'stand[ ] on a different footing than . . . a motion filed by a party seeking action by the court,' or, indeed, than any other document which is presented to the court to invoke its powers or affect its decisions." *Id.* at 1050 (internal citations omitted) (emphasis added).

- In another case, the Second Circuit explained the standard for entering a protective order: "The district court has broad discretion to determine whether an order should be entered protecting a party from disclosure of information claimed to be privileged or confidential. *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973). Where, as here, the documents are relevant, the burden is upon the party seeking non-disclosure or a protective order to show good cause." *Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 391 (2d Cir. 1981) (citations omitted).

- A court within the Second Circuit has explained that public interest also must factor into the

determination of whether to grant a protective order:

> The test for entering a protective order under FED. R. CIV. P. 26(c) is "good cause." *See, e.g., Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 18–19 (2d Cir. 1992); *Bank of New York v. Meridien Biao Bank Tanzania*, 171 F.R.D. 135, 143 (S.D.N.Y. 1997). In assessing a party's application for such relief, the court must balance the demonstrated interest of the applicant in the secrecy of the information in question against not only the prejudice, if any, to the opposing party, but also the recognized federal common-law interest of the public in access to court proceedings. *See, e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–99 (1978); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998); *United States v. Amodeo*, 71 F.3d 1044, 1053 (2d Cir. 1995).

Byrnes v. Empire Blue Cross Blue Shield, No. 98 Civ. 8520 BSJ MHD, 2000 WL 60221, at *1 (S.D.N.Y. Jan. 25, 2000) (footnote omitted). The court recognized that the public's interest in litigation materials depends on the stage of the litigation:

> Since the articulated public interest is in court proceedings, the weight of the interest varies depending upon the role the information in question plays in the adjudicative process. At one end of the spectrum is information produced to a litigant in discovery. Most discovery, including document production, typically takes place privately. Moreover, given the liberal standards that govern discovery, it is often the case that much of the information actually turned over has little or no significance for the resolution of the claims and defenses or other issues presented to the court in the course of the litigation. For these reasons, the public interest in access to discovery materials is recognized as generally of a limited order, although most courts have held that the producing party still has the burden of demonstrating good cause for preventing public access to discovery materials. In contrast, the public interest in access to the proceedings of the court is a central and compelling policy consideration, and that policy dictates that the party seeking a protective order must satisfy a more demanding standard to justify sealing portions of trials, other court hearings or papers filed with the court, including motion papers.

Id. (internal citations omitted).

Standard for Entering a Sealing Order

- The Second Circuit has emphasized that sealing documents associated with dispositive motions requires making a very high showing. In *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 113 (2d Cir. 2006), the Second Circuit concluded that the district court had erred by holding in abeyance a motion by the press to intervene to access sealed documents filed in connection with a summary judgment motion because "the contested documents are judicial documents to which a presumption of immediate access applies under both the common law and the First Amendment." The court explained that "[t]he common law right of access to judicial documents is firmly rooted in our nation's history," and stated:

> The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

Id. at 119 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*")) (quotation marks omitted). The *Lugosch* court explained that "in order to be designated a judicial document, 'the item filed must be relevant to the performance of the judicial function and useful in the judicial process.'" *Id.* (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*")). The court noted that once a "court has determined that the documents are judicial documents and that therefore a common law presumption of access attaches, it must determine the weight of that presumption," which is "'governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts,'" *id.* (quoting *Amodeo II*, 71 F.3d at 1049). Then, "after determining the weight of the presumption of access, the court must 'balance competing considerations against it,'" which "include but are not limited to 'the danger of impairing law enforcement or judicial efficiency' and 'the privacy interests of those resisting disclosure.'" *Id.* at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

The *Lugosch* court also explained that "[i]n addition to the common law right of access, it is well established that the public and the press have a 'qualified First Amendment right to

attend judicial proceedings and to access certain judicial documents.'" *Id.* (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). The court elaborated:

> We have articulated two different approaches for determining whether "the public and the press should receive First Amendment protection in their attempts to access certain judicial documents." [*Hartford Courant*, 435 F.3d] at 92. The so-called "experience and logic" approach requires the court to consider both whether the documents "have historically been open to the press and general public" and whether "public access plays a significant positive role in the functioning of the particular process in question." *Id.* (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). "The courts that have undertaken this type of inquiry have generally invoked the common law right of access to judicial documents in support of finding a history of openness." *Id.* The second approach considers the extent to which the judicial documents are "derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings." *Id.* at 93.

Lugosch, 435 F.3d at 120 (footnote omitted). However, even if a court determines that documents are entitled to a qualified First Amendment right of access, "'[d]ocuments may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* (quoting *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (internal quotation marks omitted)). "'Broad and general findings by the trial court, however, are not sufficient to justify closure.'" *Id.* (quoting *In re New York Times*, 828 F.2d at 116).

The court noted that Second Circuit "precedents indicate that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment." *Id.* at 121. As a result, the court concluded that "'documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.'" *Id.* (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). The court continued: "The justification offered in *Joy v. North* for this conclusion is that summary judgment is an adjudication, and '[a]n adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.'" *Id.* (quoting *Joy*, 692 F.2d at 893).

In addition, the *Lugosch* court emphasized that in evaluating whether court documents may be sealed from the press, the court should not consider the press's motive in seeking access:

> Although the presumption of access is based on the need for the public monitoring of federal courts, those who seek access to

> particular information may want it for entirely different reasons. However, we believe motive generally to be irrelevant to defining the weight accorded the presumption of access. It is true that journalists may seek access to judicial documents for reasons unrelated to the monitoring of Article III functions. Nevertheless, assessing the motives of journalists risks self-serving judicial decisions tipping in favor of secrecy. Where access is for the purpose of reporting news, moreover, those interested in monitoring the courts may well learn of, and use, the information whatever the motive of the reporting journalist.

435 F.3d at 123 (quoting *Amodeo II*, 71 F.3d at 1050) (quotation marks omitted).

The *Lugosch* court noted that even where both a common law and First Amendment right of access attaches, documents can be sealed in some circumstances:

> Notwithstanding the presumption of access under both the common law and the First Amendment, the documents may be kept under seal if "countervailing factors" in the common law framework or "higher values" in the First Amendment framework so demand. Since we have concluded that the more stringent First Amendment framework applies, continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim.

Id. at 124 (citing *In re New York Times*, 828 F.2d at 116).

Finally, the court emphasized that documents may not remain sealed simply because parties relied on a discovery protective order in producing documents:

> [T]he argument that the defendants' reliance on [the confidentiality order] during years of discovery shields them now from the burden of justifying protection of the documents ignores the fact that civil litigants have a legal obligation to produce all information "which is relevant to the subject matter involved in the pending action," FED. R. CIV. P. 26(b)(1), subject to exceptions not involved here. Thus, defendants cannot be heard to complain that their reliance on the protective order was the primary cause of their cooperation during years of discovery: even without [the confidentiality order], I would eventually have ordered that each discoverable item be turned over to the plaintiffs. Umbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella protection should not substantively expand the protection provided by Rule 26(c)(7) or

> countenanced by the common law of access. To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right.

Id. at 125–26 (quoting *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43–44 (C.D. Cal. 1984)) (quotation marks omitted).

- The Second Circuit has also noted that "several 'competing interests [have been weighed] in a variety of contexts in determining whether to grant access to judicial documents . . . ." *S.E.C. v. TheStreet.com*, 273 F.3d 222, 231 n.10 (2d Cir. 2001) (quoting *Amodeo I*, 44 F.3d at 147 (citations omitted)). The court also noted:

> [T]he public has in the past been excluded, temporarily or permanently from . . . the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity.
>
> We have [elsewhere] recognized the law enforcement privilege as an interest worthy of protection.

Id. (quoting *Amodeo I*, 44 F.3d at 147 (citations omitted)) (quotation marks omitted). *TheStreet.com* court explained that in *Amodeo II*, the court had found that once the document at issue had been deemed a judicial document, the next step was to "determine the weight of the presumption of public access by evaluating 'the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.'" *Id.* at 232 (quoting *Amodeo II*, 71 F. 3d at 1049). The court explained that once the weight of the presumption of public access is determined, a court should "'balance [the] competing considerations against [that presumption],'" *id.* (quoting *Amodeo II*, 71 F.3d at 1050), including at least two countervailing factors: "(1) the danger of impairing law enforcement or judicial efficiency; and (2) the privacy interests of those who resist disclosure," *id.* With respect to the latter countervailing factor, the court stated that "'the privacy interests of innocent third parties . . . should weigh heavily in a court's balancing equation,'" and that "the weight of the privacy interest should depend on 'the degree to which the subject matter is traditionally considered private rather than public.'" *Id.* (quoting *Amodeo II*, 71 F.3d at 1050, 1051). The court also stated that "a court should consider 'the nature and degree of injury' as well as whether 'there is a fair opportunity for the subject to respond to any accusations contained therein.'" *TheStreet.Com*, 273 F.3d at 232 (quoting *Amodeo II*, 71 F.3d at 1051).

Standard for Modifying a Protective Order

- The Second Circuit has set forth a restrictive standard for modifying a protective order:

"Where there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) 'absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.'" *TheStreet.com*, 273 F.3d at 229 (quoting *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979)). The Second Circuit emphasized the importance of parties being able to rely on protective orders:

> [P]rotective orders issued under Rule 26(c) serve "the vital function . . . of 'secur[ing] the just, speedy, and inexpensive determination' of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice." Without an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless "annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c). And if previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future.

Id. at 229–30 (footnote and internal citation omitted). The Second Circuit warned against the effects of granting requests to modify protective orders without a compelling reason:

> If protective orders were easily modified, moreover, parties would be less forthcoming in giving testimony and less willing to settle their disputes: "Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation . . . ." *Martindell*, 594 F.2d at 295. Indeed, we have observed that protective orders can provide a powerful incentive to deponents who would not otherwise testify. *Id.* at 296 (finding that "the deponents testified in reliance upon the Rule 26(c) protective order, absent which they may have refused to testify").

Id. at 230. The court concluded that "another compelling reason to discourage modification of protective orders in civil cases is to encourage testimony in pre-trial discovery proceedings and to promote the settlement of disputes." *Id.* In addition to focusing on the parties' reliance on protective orders, the Second Circuit noted the unfairness of modifying protective orders. *Id.* ("It is . . . presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied."). However, the Second Circuit emphasized that to avoid modification, the parties' reliance must be reasonable, explaining that "protective orders that are on their face temporary or limited may not justify reliance by the parties." *Id.* at 231.

- Another court in the Second Circuit recently discussed the standard for modifying a protective order: "In the Second Circuit, where there has been reasonable reliance by a party or deponent on the confidentiality order in giving testimony or producing materials, a district court should not modify an order granted under 26(c) ''absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.''" *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 317 (D. Conn. 2009) (citing *TheStreet.com*, 273 F.3d at 229). The *EPDM* court recognized that the Second Circuit approach is stricter than other circuits:

> This presumption [in the Second Circuit] against modification differs from the standard in other circuits, which have a presumption in favor of access in cases where an intervening party involved in bona fide collateral litigation seeks access to protected discovery materials. *See, e.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980). *See also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 789–90 (3rd Cir. 1994) (rejecting Second Circuit approach); *Beckman Industries, Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir. 1992) (same); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988) (same). In those circuits, modification is favored when it will "place private litigants in a position they would otherwise reach only after repetition of another's discovery." *Wilk*, 635 F.2d at 1299. A trial court should deny modification only where it would "tangibly prejudice substantial rights of the party opposing modification." *Id.* The desire to make litigation more burdensome to pursue in the collateral jurisdiction "is not legitimate prejudice." *United Nuclear Corp.*, 905 F.2d at 1428. Any legitimate interest the defendants have in keeping the materials filed under the protective order out of public hands can be accommodated by placing the intervening party under the same use and disclosure restrictions contained in the original order. *Id. See also Linerboard*, 333 F. Supp. 2d at 339–40 (allowing modification on the condition that the Canadian third-party intervenor be bound by the protective order's use and disclosure requirements and submit to the personal jurisdiction of the court for purposes of enforcing the agreement); *Neurontin*, MDL Docket No. 1629 (D. Mass. Oct. 13, 2006) (order granting motion to intervene) (same).

Id. at 317–18 (footnote omitted).

The court emphasized that the strict Second Circuit standard for modifying a protective order only applies where the parties *reasonably* relied on the order:

> [T]hough the *Martindell* standard is admittedly a stringent one, it

> does not apply uniformly to *all* protective orders. *Id.* Rather, the application of the strong presumption against modification is dependent upon a protective order's particular characteristics and whether it invites reasonable reliance on the permanence of the order. *Id.* "Even the Second Circuit recognizes that there must be a plausible showing of reliance on the order to narrow the grounds for modification." 8 WRIGHT & MILLER § 2044.1. For example, where the deponent or party could not have reasonably relied on the protective order to continue indefinitely, "a court may properly permit modification of the order." *TheStreet.com*, 273 F.3d at 231. In *TheStreet.com*, the Court concluded that the *Martindell* presumption against access did not apply to the protective order at issue because the deponents, unlike in *Martindell*, had not provided their depositions in reasonable reliance on the protective order. *Id.* at 233. Absent such reliance, the *Martindell* standard "never came into play," and therefore the lower court's decision to modify the order after balancing the parties' interests was within the scope of its discretion. *Id.* at 234.

Id. at 318. The *EPDM* court described the factors used to consider whether the parties have reasonably relied on a protective order:

> Application of the *Martindell* presumption against modification depends on the nature of the protective order and whether it invited reasonable reliance by a party or deponent. An examination of Second Circuit case law reveals the following factors are relevant when determining whether a party has reasonably relied on the protective order: (1) the scope of the protective order; (2) the language of the order itself; (3) the level of inquiry the court undertook before granting the order; and (4) the nature of reliance on the order. Additional considerations that may influence a court's decision to grant modification include: the type of discovery materials the collateral litigant seeks and the party's purpose in seeking a modification. Given the wide variety of protective orders in operation, the more flexible approach to modification emphasized by *TheStreet.com* is sensible.

Id. at 318–19.

Under Second Circuit law, the type of protective order under consideration affects the determination of whether the parties reasonably relied upon it:

> When considering a motion to modify, it is relevant whether the order is a blanket protective order, covering all documents and

> testimony produced in a lawsuit, or whether it is specifically focused on protecting certain documents or certain deponents for a particular reason. A blanket protective order is more likely to be subject to modification than a more specific, targeted order because it is more difficult to show a party reasonably relied on a blanket order in producing documents or submitting to a deposition. "Although such blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification." Stipulated blanket orders are even less resistant to a reasonable request for modification.

Id. at 319. (internal citations omitted).

Parties also may not reasonably rely on a protective order that expressly limits its applicability: "Where a protective order contains express language that limits the time period for enforcement, anticipates the potential for modification, or contains specific procedures for disclosing confidential materials to non-parties, it is not reasonable for a party to rely on an assumption that it will never be modified." *Id.* at 320 (citing *TheStreet.com*, 273 F.3d at 231). Further, "[e]xpress provisions of an order permitting non-parties to seek access to the protected materials will diminish the reasonableness of reliance a party claims to place on the order's permanent secrecy." *EPDM*, 255 F.R.D. at 320. "Courts evaluating the language of stipulated agreements between the parties must interpret the order 'as its plain language dictates.'" *Id.* (citation omitted).

In addition, the modification analysis in the Second Circuit considers the extent to which the district court examined the protective order initially:

> Whether a protective order is entitled to *Martindell's* strong presumption against modification is also dependent upon the circumstances surrounding its grant, i.e., how much consideration the court gave to the request for a protective order before granting it. A protective order granted on the basis of a stipulation by the parties carries less weight than a protective order granted after a hearing to show good cause.
>
> The heightened *Martindell* "extraordinary circumstances" standard applies where a court has already "considered each document in the first instance according to a 'good cause' standard" and is not appropriate in cases with stipulated protective orders that grant parties "open-ended and unilateral deference" to protect whichever discovery materials they choose.

Id. at 321 (internal citations omitted).

Further, the modification analysis considers the degree of reliance, such as whether a party produced documents it was not required to produce in reliance on the provisions of a protective order:

> Where a party or deponent, in reliance on the protective order, gives up its right to refuse to testify, or to produce documents it would not otherwise be compelled to produce, the heightened *Martindell* presumption against modification naturally applies. "The extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case."

Id. at 322 (citation omitted). The court further explained:

> Conversely, where the parties have not given up any rights and indeed would have been compelled to produce the discovery materials even in the absence of a protective order, the presumption against modification is not as strong. In such cases, the protective order has been granted to parties concerned about disclosing non-public information and as a convenience to avoid time-consuming discovery disputes and document-by-document good cause showings.

Id. at 323.

Finally, the *EPDM* court discussed several other factors relevant to the modification analysis:

> Although the type of materials sought by an intervenor does not affect the nature of reliance on the protective order by the existing parties, it is another important factor for a court to consider when deciding a motion to modify. Whether the collateral litigant could retrieve the same materials in question through its own discovery requests or whether it is attempting to subvert a limitation on discovery, such as the close of the factual record, should be taken into account. Certainly if the litigant could access the same materials and deposition testimony by conducting its own discovery, it is in the interest of judicial efficiency to avoid such duplicative discovery. *See* 8 WRIGHT & MILLER § 2044.1 (noting that modification in these situations prevents litigants from having to "reinvent the wheel"). However, if the intervenor is seeking to circumvent limitations on its ability to conduct discovery in its own case or to gain access to materials it would otherwise have no right to access, a court should refuse to modify the protective order.

Id. at 324 (citation omitted). The court also concluded that the purpose for which modification is sought is a factor to be considered:

> A litigant's *purpose* in seeking modification of an existing protective order is also relevant for determining whether to grant a modification. Requests to modify protective orders so that the public may access discovery materials is arguably subject to a more stringent presumption against modification because there is no public right of access to discovery materials. *TheStreet.com*, 273 F.3d at 233. In the absence of a compelling need for the public to access sealed documents, courts have generally been reluctant to disturb discovery protective orders for public dissemination.

EPDM, 255 F.R.D. at 324.

THIRD CIRCUIT

Standard for Entering a Protective Order

- The Third Circuit has stated:

> A party seeking a protective order over discovery materials must demonstrate that "good cause" exists for the protection of that material. FED. R. CIV. P. 26(c); *Pansy* [*v. Borough of Stroudsburg*,] 23 F.3d [772,] 786 [(3d Cir. 1994)]. "Good cause" is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. *Id.* Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice. *Id.*

Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995). The *Glenmede* court set forth factors that it described as "neither mandatory nor exhaustive," that could be considered in determining whether "good cause" exists for granting a protective order. *Id.* These factors include:

> 1) whether disclosure will violate any privacy interests;
>
> 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
>
> 3) whether disclosure of the information will cause a party embarrassment;
>
> 4) whether confidentiality is being sought over *information important to public health and safety*;

> 5) whether the sharing of information among litigants will promote fairness and efficiency;
>
> 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
>
> 7) whether the case involves issues important to the public.

Id. (citing *Pansy*, 23 F.3d at 787–91) (internal quotation marks omitted) (emphasis added).

The *Glenmede* court "recognized that the district court is best suited to determine what factors are relevant to the dispute," but "cautioned that the analysis should always reflect a balancing of private versus public interests." *Id.*; *see also Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005) ("*Pansy* emphasized that a court always must consider the public interest when deciding whether to impose a protective order.") (citation omitted).

The *Glenmede* court also recognized the importance of open court proceedings, particularly to allow those who may have related claims to observe the proceedings, stating:

> Federal courts should not provide a shield to potential claims by entering broad protective orders that prevent public disclosure of relevant information. The sharing of information among current and potential litigants is furthered by open proceedings. . . . Absent a showing that a defined and serious injury will result from open proceedings, a protective order should not issue.

Glenmede, 56 F.3d at 485 (footnote omitted).

Glenmede emphasized the importance of judicial oversight to ensure that information that is appropriately in the public domain remains accessible, rejecting a rule that would require the issuance of protective orders to protect privileged materials sought in discovery until all avenues of appeal are exhausted because "[s]uch a rule would be tantamount to permitting the parties to control the use of protective orders." *Id.* (footnote omitted).

- Another Third Circuit case has explained:

> In the context of discovery, it is well-established that a party wishing to obtain an order of protection over discovery material must demonstrate that "good cause" exists for the order of protection. FED. R. CIV. P. 26(c); *Smith v. Bic Corp.*, 869 F.2d 194, 199 (3d Cir. 1989). . . . Protective orders over discovery materials and orders of confidentiality over matters relating to other stages of litigation have comparable features and raise similar public policy concerns. All such orders are intended to offer litigants a measure of privacy, while

> balancing against this privacy interest the public's right to obtain information concerning judicial proceedings. Also, protective orders over discovery and confidentiality orders over matters concerning other stages of litigation are often used by courts as a means to aid the progression of litigation and facilitate settlements. Protective orders and orders of confidentiality are functionally similar, and require similar balancing between public and private concerns. We therefore exercise our inherent supervisory power to conclude that whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order. *Cf. City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991) ("We do not . . . give parties *carte blanche* either to seal documents related to a settlement agreement or to withhold documents they deem so 'related.' Rather, the trial court—not the parties themselves—should scrutinize every such agreement involving the sealing of court papers and [determine] what, if any, of them are to be sealed, and it is only after very careful, particularized review by the court that a Confidentiality Order may be executed.").

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994) (footnote omitted). The court continued:

> "Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a good cause showing. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976, 108 S. Ct. 487, 98 L. Ed. 2d 485 (1987). The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order. *Id.* at 1122.

Id. at 786–87. The court elaborated:

> In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 432–33 (1991). The balancing conducted in the discovery context should be applied by courts when considering whether to grant confidentiality orders at any stage of litigation, including settlement:

> [T]he court . . . must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.
>
> Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should "be disclosed only in a designated way," as authorized by the last clause of Rule 26(c)(7) . . . . Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.

Id. at 787 (quoting Miller, *supra*, 105 HARV. L. REV. at 433–35 (footnotes omitted)).

The court noted the need for flexibility in analyzing requests for protective orders:

> The factors discussed above are unavoidably vague and are of course not exhaustive. Although the balancing test discussed above may be criticized as being ambiguous and likely to lead to unpredictable results, we believe that such a balancing test is necessary to provide the district courts the flexibility needed to justly and properly consider the factors of each case.
>
> Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of [confidentiality] orders and the unnecessary denial of confidentiality for information that deserves it . . . .

Id. at 789 (quoting Miller, *supra*, 105 HARV. L. REV. at 492).

Standard for Entering a Sealing Order

- The Third Circuit has recognized a right of public access to judicial proceedings, *see, e.g.*, *In re Cendant Corp. v. Forbes*, 260 F.3d 183, 192 (3d Cir. 2001), and has explained that "[t]he status of a document as a 'judicial record,' . . . depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings," *id.* The *Cendant* court explained that sealing parts of the judicial record requires a particularized showing:

> In order to override the common law right of access, the party seeking the closure of a hearing or the sealing of part of the judicial record "bears the burden of showing that the material is the kind of information that courts will protect" and that "disclosure will work a clearly defined and serious injury to the party seeking closure." In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient. As is often the case when there are conflicting interests, a balancing process is contemplated. "[T]he strong common law presumption of access must be balanced against the factors militating against access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption."

Id. at 194 (internal citations omitted). The *Cendant* court emphasized that in the limited circumstances in which sealing is warranted, the seal should be lifted as soon as practicable: "Even if a sealing order was proper at the time when it was initially imposed, the sealing order must be lifted at the earliest possible moment when the reasons for sealing no longer obtain." *Id.* at 196.

Standard for Modifying a Protective Order

- In *Pansy*, the Third Circuit explained that in considering whether to modify a protective order, the court must evaluate the degree of reliance by the parties on the order. *Pansy*, 23 F.3d at 789 ("In determining whether to *modify* an already-existing confidentiality order, the parties' reliance on the order is a relevant factor."). The court recognized that the various circuits accord different weight to the parties' reliance as a factor in determining whether modification of a protective order is appropriate. *See id.* The court noted that the Second Circuit had "announced a stringent standard for modification, holding that a confidentiality order can only be modified if an extraordinary circumstance or compelling need warrants the requested modification." *Id.* (citations omitted). The court also noted that "[o]ther courts of appeals have rejected this stringent standard, [and] have held that a more lenient test for modification applies, but have failed to articulate precisely what that standard is." *Id.* (citations omitted). The Third Circuit determined that a standard less stringent than the Second Circuit's approach was appropriate:

> We agree with these courts that the standard of the Court of Appeals for the Second Circuit for modification is too stringent. The appropriate approach in considering motions to modify confidentiality orders is to use the same balancing test that is used in determining whether to grant such orders in the first instance, with one difference: one of the factors the court should consider in determining whether to modify the order is the reliance by the original parties on the confidentiality order. The parties' reliance on an order, however, should not be outcome determinative, and should only be one factor that a court considers when determining whether to modify an order of confidentiality.

Id. at 790 (footnote omitted). The court continued:

> The extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case. For instance, reliance would be greater where a trade secret was involved, or where witnesses had testified pursuant to a protective order without invoking their Fifth Amendment privilege . . . .
>
> . . . Reliance will be less with a blanket order, because it is by nature overinclusive.

Id. at 790 (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir. 1992)) (internal quotation marks omitted). The court also emphasized that parties could not rely on a protective order that was not properly granted in the first place:

> "[R]eliance on [confidentiality] orders [will] not insulate those orders from subsequent modification or vacating if the orders were improvidently granted *ab initio* . . . . [N]o amount of official encouragement and reliance thereon could substantiate an unquestioning adherence to an order improvidently granted." "Improvidence in the granting of a protective order is [a] justification for lifting or modifying the order." It would be improper and unfair to afford an order presumptive correctness if it is apparent that the court did not engage in the proper balancing to initially determine whether the order should have been granted.

Id. (internal citations omitted).

The court set out the following procedure for determining whether to modify a protective order:

> The party seeking to modify the order of confidentiality must come forward with a reason to modify the order. Once that is done, the court should then balance the interests, including the reliance by the original parties to the order, to determine whether good cause still exists for the order.
>
> If access to protected [material] can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted. Even then, however, the movant should not be saddled with a burden more onerous than explaining why his need for the materials outweighs existing privacy concerns.

Pansy, 23 F.3d at 790.

Finally, the *Pansy* court explained that an additional factor was relevant to the facts of that case:

> [W]here [a governmental entity] is a party to litigation, no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of [government] records to the public under [state and federal freedom of information laws]. An order binding [governmental entities] shall be narrowly drawn to avoid interference with the rights of the public to obtain disclosure of [government] records and shall provide an explanation of the extent to which the order is intended to alter those rights.

Id. at 791 (quoting Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121, 182 (1992)) (quotation marks omitted). The court held that "where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to the relevant freedom of information law. In the good cause balancing test, this strong presumption tilts the scales heavily against entering or maintaining an order of confidentiality. To avoid complicated inquiries as to whether certain information would in fact be available under a freedom of information law, courts may choose to grant conditional orders." *Id.* The court explained that "[n]either the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws." *Id.* at 792.

- In *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005), the Third Circuit explained that after a court enters a protective order, "there must be good cause to maintain the order in the face of a motion to vacate it, particularly when, as here, the moving party did not have an opportunity to oppose the entry of the protective order in the first instance."

- One district court in the Third Circuit, in considering a request for modification of a protective order to provide more protection than originally granted, explained that the Third Circuit requires good cause to modify a protective order, rather than the more stringent "extraordinary circumstances" or "compelling need" required by the Second and Sixth Circuits. *See Green, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, L.L.C.*, No. Civ. A. 00-3058, 2002 WL 32349383, at *2 (E.D. Pa. Feb. 6, 2002). In addition to the factors considered for granting a protective order, the court considered "the interests of fairness and efficiency and the parties' reliance on the protective order." *See id.* at *4.

- Another district court discussed the various factors from *Pansy* in considering a request to modify a protective order. The court explained:

> Two factors to consider are (i) whether the information sought is important to the public's health and safety, and (ii) whether it involves any legitimate public concern. If the parties or issues are of a public nature, and are matters of legitimate public concern, that should be a factor weighing in favor of disclosure. On the other hand, "[w]here the parties are private, the right to rely on confidentiality in their dealings is more compelling than where a government agency is involved[.]"

Damiano v. Sony Music Entm't, Inc., 168 F.R.D. 485, 491 (D.N.J. 1996) (internal citations omitted). The court also considered whether the party benefitting from the confidentiality order was a public entity or official and whether sharing the information would promote fairness and efficiency among the litigants. *Id.* at 491–92. The court also considered the purpose for which confidentiality was sought, and concluded that seeking to use "raw discovery materials for financial profit is not what this court considers to be a legitimate purpose for disclosure." *Id.* at 492. Finally, the court considered whether the parties had reasonably relied upon the protective order. *Id.* at 492–93.

- Another court explained that the standard used by the Seventh Circuit in *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980), is the appropriate standard for evaluating a request to modify a protective order:

> [W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the

> party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order. (citations omitted).

Koprowski v. Wistar Inst. of Anatomy and Biology, No. Civ. A. 92-CV-1182, 1993 WL 332061, at *2 (E.D. Pa. Aug. 19, 1993) (quoting *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 630 (S.D. Iowa 1993) (quoting *Wilk*, 635 F.2d at 1299)) (quotation marks omitted). The court concluded:

> This standard is consistent with the purpose of the federal rules to "secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Courts have favored promotion of full disclosure through discovery to meet the needs of parties in pending litigation.
>
> Accordingly, in applying the *Wilk* standard, a court must weigh potential prejudice, if any, against the benefits of modification of the confidentiality agreement.

Id. (internal citations omitted). The court also pointed out that "[t]he extent to which a party can rely on a protective order or confidentiality agreement should depend on the extent to which the order induced the party to allow discovery or to settle the case." *Id.* The court found it relevant that the intervenors seeking modification had agreed to use the information in accordance with the protective order provisions, disposing of the threat of dissemination, and disposing of the argument that modification would undermine the plaintiffs' reliance. *Id.* The court found that modification was appropriate, concluding that "[t]he potential benefits to intervenors from modification of the confidentiality agreement—against which must be weighed plaintiff's potential prejudice—is the saving of time and expense which may be achieved by avoiding duplicative discovery." *Id.* at *3 (citations omitted).

FOURTH CIRCUIT

Standard for Entering a Protective Order

- A district court in the Fourth Circuit has explained:

> Under Rule 26(c) of the Federal Rules of Civil Procedure, a court may enter a protective order upon motion of a party or persons from whom discovery is sought. In order to obtain a protective order, the party requesting the protective order must show good cause. *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991). The request for a protective order must be based on a specific demonstration of facts rather than speculative statements about the

> need for a protective order and generalized claims of harm. *Gulf Oil v. Bernard*, 452 U.S. 89, 102 n.16 (1981). "This requirement furthers the goal that the court grant as narrow a protective order as is necessary under the facts." *Brittain*, 136 F.R.D. at 412.

Vallejo v. Alan Vester Auto Group, Inc., No. 5:07-CV-343-BO, 2008 WL 4610233, at *2 (E.D.N.C. Oct. 16, 2008).

Standard for Entering a Sealing Order

- In determining whether to seal court documents, the Fourth Circuit has differentiated between a common law presumption in favor of access, which "attaches to all 'judicial records and documents,'" and a First Amendment guarantee of access, which "has been extended only to particular judicial records and documents." *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (citations omitted). "The common law presumption of access may be overcome if competing interests outweigh the interest in access . . . ." *Id.* (citations omitted). "Where the First Amendment guarantees access, on the other hand, access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Id.* The court explained that the procedure for weighing competing interests in entering an order to seal judicial documents was set forth in *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984):

> Under *Knight*, a court must first give the public notice of a request to seal and a reasonable opportunity to challenge it. While individual notice is unwarranted, the court must notify persons present in the courtroom of the request, or docket it "reasonably in advance of deciding the issue." The court must consider less drastic alternatives to sealing and, if it decides to seal documents, must "state the reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review."

Stone, 855 F.2d at 181 (internal citations omitted).

Standard for Modifying a Protective Order

- A court within the Fourth Circuit has explained the factors to consider in evaluating a request for a protective order:

> A number of factors may be employed to help guide a court in exercising its discretion as to whether to modify a protective order. These factors include: the reason and purpose for a modification, whether a party has alternative means available to acquire the information, the type of protective order which is at issue, and the

type of materials or documents which are sought.

SmithKline Beecham Corp. v. Sunthon Pharms. Ltd., 210 F.R.D. 163, 166 (M.D.N.C. 2002). The court found that "[t]he party seeking to modify a protective order bears the burden of showing good cause for the modification."[2] *Id.* (citing *TheStreet.com*, 273 F.3d at 229); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 342 (S.D. Iowa 1993)). The court also noted that some courts have applied a stringent standard to modification. *See id.* ("Some courts even require a showing of compelling need, improvidence in consenting to the order, or some extraordinary circumstance.") (citations omitted). The court added that many courts have found sufficient need for modification where modification would avoid duplicative discovery, focusing on "the considerable efficiency and savings of time and effort in avoiding duplicative discovery." *Id.* (citing *Beckman Indus.*, 966 F.2d 470; *United Nuclear*, 905 F.2d 1424; *Jochims*, 148 F.R.D. 624, *as modified*, 151 F.R.D. 338).

The court noted that even when a collateral litigant needs documents to avoid duplicative discovery, that litigant would need to show an inability to obtain the information by alternative means. *Id.* The court explained:

> A court should be hesitant to modify protective orders for matters unrelated to the litigation in front of it because otherwise, in the long run, parties may begin to distrust protective orders. Discovery, in turn, will become more complicated and expensive and settlements will be more difficult. *S.E.C.*, 273 F.3d at 230. A natural feeling of unfairness arises when the rules are modified during the middle of the game, especially without very good cause. *Id.* Second, modifying protective orders for other litigation involves re-litigation over issues that have nothing to do with the lawsuit in front of the court. *Jochims*, 151 F.R.D. at 343. This burdens both the court and the parties. *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 334 (M.D.N.C. 1999) (modification for ulterior purpose); *Jochims*, 151 F.R.D. at 343 (allowing modification but setting cut-off date for continued litigation). Such modifications involve the court in a controversy with which it is not familiar and over which it lacks control. *United Nuclear*, 905 F.2d at 1428 ("district court must refrain from issuing discovery orders applicable only to collateral litigation."). The court in which the matter is pending will be in a better position to make rulings and the third party will have greater control when it is directly involved in that controversy. For these reasons, alternative means of obtaining the information should be

[2] The court was considering a request by the plaintiffs to modify a stipulated, blanket protective order. It is unclear if the court would require the party seeking modification to show good cause for modification if modification of a stipulated order were requested by a party who had not agreed to a stipulated protective order.

sought prior to attempting to modify a protective order entered in another case.

Id. at 166–67. The court described additional factors relevant to the analysis:

> In addition to the good cause and alternative means factors, the type of protective order sought to be modified has a direct bearing on the decision to modify. If the protective order has been entered upon an actual finding that the information falls within Rule 26(c) protection, great care should be exercised before modifying a protective order for use outside of the litigation and the court's control. A blanket protective order, on the other hand, often is nothing more than a FED. R. CIV. P. 29 stipulation between the parties to keep discovery confidential. A party's claimed reliance on such orders to protect confidentiality is, consequently, less than if the party had to make an actual or particular showing of confidentiality in order to obtain the protective order. Therefore, when the modification involves a blanket protective order, the nature of the document which is sought assumes even greater importance.
>
> The type of documents or information which will be revealed by the modification to the protective order directly bears on the decision to modify. To the extent that the documents are so-called "judicial documents," any presumption in favor of maintaining confidentiality must now contend with a presumption in favor of public access. While the parameters for defining a judicial document may not be entirely set, there appears to be agreement that it does not arise from the mere filing of papers or documents, but only those used, submitted and relied upon by the court in making its decision. And, even as to judicial documents, the court must balance the confidentiality concerns of law enforcement, the private interests of innocent third parties, and the parties themselves.

SmithKline Beecham, 210 F.R.D. at 167 (internal citations and footnote omitted). The court added: "When the document or information does not fall under the judicial document category, the court may look to the reasonableness of a party's reliance on maintaining confidentiality under a protective order." *Id.* The court noted that "nothing else appearing, a court may presume that any production of documents or information under a protective order has been in reasonable reliance on that order," but that "[f]acts, of course, may dispel this presumption." *Id.* The court further explained:

> For example, greater credence may be given to reliance on the confidentiality of settlement protective orders as opposed to more temporary pretrial ones. On the other hand, when the documents at

> issue do not likely involve highly confidential information, and/or the reason opposing disclosure is mainly the desire to make litigation more difficult, opposition to modification carries less weight. And, the wholesale release of documents creates problems when doing so impinges on a wide variety of confidentiality, from trade secrets to less confidential business information. The burden of reviewing such a wholesale request constitutes grounds for denying the same.

Id. at 167–68 (internal citations omitted). The court concluded by noting that while avoiding duplicative discovery can be a proper ground for modifying a protective order, it "should, in most cases, be the last resort of a party, not the first." *Id.* at 169.

- Another case noted that a court must be careful to protect the parties' reliance on a protective order, stating:

> [U]nless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding. The reality seems obvious: for protective orders to be effective, litigants must be able to rely on them.

State Auto Mutual Ins. Co. v. Davis, No. 2:06-cv-00630, 2007 WL 2670262, at *2 (S.D. W. Va. Sept. 7, 2007) (quoting *SRS Techs., Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 529 (N.D. Ala. 2003) (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 499–501 (1991))).

- In another case, the court assumed that only good cause was required to modify a protective order, and explained that whether the burden of showing good cause rested with the party seeking modification or with the party seeking confidentiality depends on the showing made when the order was entered. *See Factory Mut. Ins. Co. v. Insteel Indus., Inc.*, 212 F.R.D. 301, 303 (M.D.N.C. 2002) ("'The standard for modifying a protective order depends on whether the parties were required to demonstrate good cause for the issuance of the order, whether the parties relied on the order, and whether the parties stipulated to the terms of the order.'") (quoting *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 333 (M.D.N.C. 1999)). The court stated: "If good cause were not required to be shown when the order was initially entered, the party who later seeks to prevent disclosure of the information bears the burden of showing good cause. If good cause were shown initially, however, the party seeking to modify the order must show good cause." *Id.* (internal citation omitted). The *Factory Mutual Insurance* court found that because the parties and a nonparty had entered into a stipulated protective order, they had "'implicitly acknowledged' that there was good cause for protecting" the information at issue, and the court held that the party seeking to lift the

protective order therefore bore the burden of showing good cause to modify the order. *Id.* at 304. The court also noted that "when the party seeking modification stipulated to the terms of the order, courts have treated the issue of showing good cause differently." *Id.* at 304 n.2 (citations omitted); *see also Longman*, 186 F.R.D. at 334 ("It is not appropriate to allow a party to agree to a protective order, only to attempt to undo their agreement at the last possible moment."); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987) ("When, however, the proposed modification affects a protective order stipulated to by the parties, as opposed to one imposed by the court, it is clear that the shared and explicit assumption that discovery was for the purposes of one case alone goes a long way toward denying the movant's request without more."). The *Factory Mutual Insurance* court also noted that it was "even more apparent" that the party seeking modification was required to show good cause because "this issue is treated differently when modification is sought for purely investigative purposes in which no actual litigation is involved." 212 F.R.D. at 305. The court explained that "[i]n such a case, modification of the protective order is less likely to be granted, in part because the absence of any pending litigation diminishes the likelihood that costly and time-consuming discovery will be avoided." *Id.* (footnote and citation omitted). The court noted that the situation would be different if it were clear that modification of the protective order would avoid duplicative discovery in another case, relying on the standard set out by the Seventh Circuit. *See id.* at 305 n.4 ("Modification of protective orders may be appropriate if repetition of discovery could be avoided without tangibly prejudicing the substantial rights of another party.") (citing *Wilk*, 635 F.2d at 1299). The court found that good cause for modification was lacking and that "[r]epetition of discovery is simply unavoidable when a party . . . seeks to modify or to vacate a protective order solely to investigate possible collateral litigation." *Id.* at 306.

FIFTH CIRCUIT

Standard for Entering a Protective Order

- The Fifth Circuit has explained:

> Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that "[t]he burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2035, at 483–86 (2d ed. 1994).

In re Terra Int'l Inc., 134 F.3d 302, 306 (5th Cir. 1998) (per curiam).

- A court within the Fifth Circuit has also stated:

> "Good cause" exists when disclosure will result in a clearly defined and serious injury to the party seeking the protective order. *Pansy*, 23 F.3d at 786. The litigant seeking a protective order must articulate the injury with specificity. "Broad allegations of harm, unsubstantiated by specific examples," do not support a showing of good cause. The burden of justifying a protective order remains on the litigant seeking the order. In determining good cause, the court must balance the risk of injury without the protective order and the requesting party's need for information. The court has wide discretion in determining the scope of a protective order.

Blanchard & Co., Inc. v. Barrick Gold Corp., No. 02-3721, 2004 WL 737485, at *5 (E.D. La. Apr. 5, 2004).

Standard for Entering a Sealing Order

- The Fifth Circuit has described the following standard for sealing court documents:

> Courts have recognized that the public has a common law right to inspect and copy judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981). However, the public's common law right is not absolute. *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312; *see Belo*, 654 F.2d at 430. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312. Thus, the common law merely establishes a presumption of public access to judicial records. *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988). Although the common law right of access to judicial records is not absolute, "the district court's discretion to seal the record of judicial proceedings is to be exercised charily." *Federal Savings & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987).
>
> In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure. *See Nixon*, 435 U.S. at 599, 602, 98 S. Ct. at 1312, 1314 (court must consider "relevant facts and circumstances of the particular case"); *Belo*, 654 F.2d at 434; *see also Bank of America Nat'l Trust v. Hotel Rittenhouse*, 800 F.2d 339, 344 (3d Cir. 1986) (court had duty to "balance the factors favoring secrecy against the common law presumption of access"); *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) ("The historic

> presumption of access to judicial records must be considered in the balance of competing interests." (citing *Belo*)).

S.E.C. v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993) (footnote omitted). The *Van Waeyenberghe* court found that the district court had abused its discretion in sealing court documents because there was no evidence that the district court balanced the competing interests prior to entering the sealing order, noting that the district court had not mentioned the presumption in favor of public access to judicial records and had not articulated any reasons that would support sealing the document at issue. *See id.* at 848–49.

The *Van Waeyenberghe* court also found a distinction between the public's right to information and the public's right to access judicial records:

> Although the public may have a right to the *information* that Schwartz was enjoined, that right cannot be equated with the public's right of access to *judicial records*. The public's right to information does not protect the same interests that the right of access is designed to protect. "Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness."

Id. at 849 (citations omitted).

- The Fifth Circuit has also explained that the right of public access to judicial records applies even in cases where the information may not be of particular interest to the public. In *Macias v. Aaron Rents, Inc.*, 288 F. App'x 913, 915 (5th Cir. 2008) (unpublished), the Fifth Circuit found that the district court had not abused its discretion by refusing to seal court documents because the concerns the party requesting sealing raised—"the lack of importance to the public and the potential for employer retaliation against litigious employees—could apply to nearly all cases filed in the federal courts, especially those involving title VII." The court continued: "If we were to decide that the court's determination here was an abuse of discretion, then the same argument could successfully be made by countless plaintiffs. Such a result, however, would be contrary to our statement that 'the district court's discretion to seal the record of judicial proceedings is to be exercised *charily*.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 848 (internal citations and quotations omitted)) (emphasis added by *Macias* court).

- A district court within the Fifth Circuit has explained the standard for sealing as follows:

> To determine whether to disclose or seal a judicial record, the Court must balance the public's common law right of access against interests favoring non-disclosure. *See S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993). "Courts have recognized that the

> public has a common law right to access judicial records and proceedings, although the right is not absolute." *Bahwell v. Stanley-Bostitch, Inc.*, No. Civ.A. 00-0541, 2002 WL 1298777, at *1 (E.D. La. June 10, 2002). "Public access serves important interests, such as 'to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of fairness.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 849). "Accordingly, 'the district court's discretion to seal the record of judicial proceedings is to be exercised charily.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 848). Although countervailing interests may outweigh the right of public access, the party seeking to overcome the presumption of access bears the burden of showing that the interest in secrecy outweighs the presumption. *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir. 1993). The decision as to access is left to the discretion of the trial court, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978), but any doubt must be construed in favor of disclosure. *Marcus v. St. Tammany Parish Sch. Bd.*, No. Civ.A. 95-3140, 1997 WL 313418, at *5 (E.D. La. June 9, 1997) (citing *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). Finally, that no third party objects to the sealing of the records here is "inconsequential," because the presumption of openness does not depend on such an objection. *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003); *see also Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it) . . .[.] [She] may not rubber stamp a stipulation to seal the record.") (internal citations omitted).

Jaufre ex rel. Jaufre v. Taylor, 351 F. Supp. 2d 514, 516 (E.D. La. 2005). In discussing possible interests that might outweigh the right to public access, the court stated that "[c]ourts have recognized that the privacy of children may constitute a compelling interest that outweighs the presumption in favor of public access." *Id.* (citations omitted). The court also noted that "[c]ourts have also recognized, however, that the public's interest in access to court records 'is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official.'" *Id.* at 517 (citations omitted). The court emphasized that "[w]hen courts find that a privacy interest justifies restricting the public's access, they restrict access in a way that will minimize the burden on the public's right, such as by sealing or redacting only those records that contain sensitive information," *id.* at 517–18 (citations omitted), and that "'[a] blanket sealing order . . . would rarely, if ever, be appropriate,'" *id.* at 518 (quoting *T.K. and R.K. v. Waterbury Bd. of Ed.*, No. Civ.

303CV1747, 2003 WL 2290433, at *1 (D. Conn. Oct. 19, 2003)) (additional citation omitted). The court also recognized that where the public has already had access to documents, that is a factor weighing "in favor of continued public access." *Id.* (citation omitted); *see also Weiss v. Allstate Ins. Co.*, No. 06-3774, 2007 WL 2377119, at *5 (E.D. La. Aug. 16, 2007) ("[T]his Court has consistently refused to seal judicial records to which the public has already had access.") (citations omitted).

Standard for Modifying a Protective Order

- The Fifth Circuit has recognized that modification of a protective order to avoid duplicative discovery in collateral litigation should generally be permitted, but has emphasized that requests for modification should not be used simply to obtain documents that were not produced in discovery in another case because the more efficient course would be to obtain the discovery in the collateral case. *See Stack v. Gamill*, 796 F.2d 65, 68 (5th Cir. 1986) ("Discovery has already taken place in [the collateral litigation] and the [collateral] plaintiffs seek only to obtain documents which Tenneco allegedly failed to produce in that case. As the district court noted, requiring the [collateral] plaintiffs to move to compel discovery in their own case would not cause undue wastefulness; indeed, such a motion would be the most efficient way to obtain the desired discovery.").

- In a recent district court case, the court considered a party's request to modify a stipulated protective order to allow discovery for collateral litigation, and recognized several factors a court should consider in deciding whether to grant a request for modification:

> Parties may seek modification of a protective order to gain access to previously deemed confidential materials. The Fifth Circuit has "recognize[d] that protective order[s] should generally be modified to allow discovery in other actions . . . ." *Stack v. Gamill*, 796 F.2d 65, 68 (5th Cir. 1986). . . . .
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> . . . The following factors should be considered in deciding whether to modify a protective order: "(1) the nature of the protective order, (2) the foreseeability, at the time of issuance of the order, of the modification requested, (3) the parties' reliance on the order[,] and most significantly[,] (4) whether good cause exists for the modification."

Schafer v. State Farm & Fire Cas. Co., No. 06-8262, 2009 WL 650263, at *2 (E.D. La. Mar. 11, 2009) (citations omitted); *accord Raytheon Co. v. Indigo Sys. Corp.*, No. 4:07-cv-109, 2008 WL 4371679, at *2 (E.D. Tex. Sept. 18, 2008) (listing same four factors for consideration in deciding whether to modify a protective order at the request of a party who originally agreed to the order); *Peoples v. Aldine Indep. Sch. Dist.*, No. 06-2818, 2008 WL

2571900, at *2 (S.D. Tex. June 19, 2008) (same); *Holland v. Summit Tech., Inc.*, No. Civ. A. 00-2313, 2001 WL 1132030, at *2 (E.D. La. Sept. 21, 2001) (same).

- In considering the same four factors listed in *Schafer*, another court elaborated:

> First, the court considers the nature of the protective order. Protective orders generally may be ascribed one of three labels. Specific protective orders are the narrowest type and cover specifically identified information. Umbrella protective orders are at the other end of the spectrum and provide for the designation of all discovery as protected without any screening by either the parties or the court. Blanket protective orders, which require the parties to designate as protected that information that each side reasonably believes to be particularly sensitive are common in litigation between direct competitors. Specific protective orders are the least susceptible to modification, umbrella protective orders are the most susceptible to modification, and blanket protective orders fall somewhere in between.

Raytheon, 2008 WL 4371679, at *2 (internal citations omitted). The court noted that although "blanket orders are moderately susceptible to modification," the fact that the parties had stipulated to the protective order weighed against modification. *Id.* The court continued:

> Foreseeability in this context consists of inquiry into "whether the need for modification was foreseeable at the time the parties negotiated the original stipulated protective order." . . . .
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> . . . .
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> The reliance factor focuses on the extent to which the party opposing the modification relied on the protective order in deciding the manner in which documents would be produced in discovery. It is important that litigants can place their confidence in the integrity of protective orders so that sufficient information passes between the parties "to secure the just, speedy, and inexpensive determination," FED. R. CIV. P. 1, of lawsuits while protecting from excess dissemination that which rightly should be.

Id. at *2–3 (internal citations omitted). The court explained that if the protective order is initially entered on a showing of good cause, the party seeking modification has the burden to establish good cause for modification. *See id.* at *3. The good cause inquiry involves balancing the need of the party requesting modification with the opposing party's need for protection, and requires taking into account available alternatives to modification. *Id.* Another court explained that "'[g]ood cause' in this context requires 'changed circumstances

or new situations' warranting modification of a protective order," and that "[g]ood cause includes the need to make information available for use in subsequent proceedings." *Peoples*, 2008 WL 2571900, at *3.

- In the context of a nonparty seeking to obtain documents subject to a protective order, another district court has explained that the Fifth Circuit has rejected the strict standard applied in the Second Circuit for modifying protective orders to provide access to discovery for collateral litigation. *See In re United States' Motion to Modify Sealing Orders*, No. 5:03-MC-2, 2004 WL 5584146, at *3 (E.D. Tex. June 8, 2004) (explaining that the "extraordinary circumstances" test for modification used by the Second Circuit in *Martindell* "has not prevailed in the arena of ideas," and stating that "'[w]hatever the status of the Second Circuit view, the prevailing approach is more flexible, calling for a balancing test that accords substantial importance to avoiding repetitive discovery.'") (quoting 8 CHARLES A. WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2044.1 (2d ed. 1994)). The court found that determining which party or nonparty bears the burden of showing good cause depends on the public interest in the case: "The criterion for modification of a protective order by a nonparty seeking to obtain access to information of public interest is a 'good cause' standard. When the case is of great interest to the public and media, the courts refuse to shift the burden to the party seeking to modify the protective order. Instead, the party seeking to maintain confidentiality must show good cause for continued protection." *Id.* at *2.

The court explained the more flexible approach adopted by the Fifth Circuit, *see id.* at *3 ("[T]he Fifth Circuit embraces a flexible approach towards the modification of protective orders."), and noted that the Fifth Circuit has relied on the approach stated in *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980). The court stated:

> [W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.

Motion to Modify Sealing Orders, 2004 WL 5584146, at *4 (quoting *Wilk*, 635 F.2d at 1299 (certain citations omitted)) (quotation marks omitted); *accord Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 WL 172643, at *2 (N.D. Tex. Feb. 1, 2002). Another court elaborated that "[t]he clear majority of courts utilizing the test for modification of protective orders set out in *Wilk* have allowed liberal modification. However, in most instances where modification is allowed there has been no discovery in the collateral action and the court is thus reluctant to require wasteful and needlessly repetitive discovery." *Forest Oil Corp v. Tenneco*, 109 F.R.D. 321, 322 n.2 (S.D. Miss. 1985) (citing *Phillips Petroleum Co. v.*

Pickens, 105 F.R.D. 545, 551 (N.D. Tex. 1985)), *appeal dismissed for lack of jurisdiction*, *Stack v. Gamill*, 796 F.2d 65 (5th Cir. 1986).

- Another court has explained that in cases involving a large amount of discovery, courts can enter umbrella protective orders and delay findings of good cause as to particular documents until confidentiality designations are challenged: "'[B]ecause of the benefits of umbrella protective orders in cases involving large-scale discovery, the court may construct a broad umbrella protective order upon a threshold showing by the movant of good cause. After delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be confidential, and the party seeking to maintain the seal would have the burden of proof with respect to those documents.'" *Holland v. Summit Tech., Inc.*, No. Civ. A. 00-2313, 2001 WL 1132030, at *2 (E.D. La. Sept. 21, 2001) (quoting *Pansy*, 23 F.3d at 787 n.17).

SIXTH CIRCUIT

Standard for Entering a Protective Order

- The Sixth Circuit has emphasized that public access to pretrial discovery documents is limited:

> The Supreme Court has directly addressed the constitutionality of orders limiting access to the fruits of discovery in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). . . . The Supreme Court observed that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny," 467 U.S. at 33, 104 S. Ct. at 2208, because "such a protective order prevents a party from disseminating only that information obtained through use of the discovery process." *Id.* at 34, 104 S. Ct. [at] 2208. Pretrial discovery, the Court stated, is traditionally subject to the control and discretion of the trial judge, and ordinarily proceeds as a private interchange between the parties, the fruits of which are not presumptively public. Accordingly, any judicial review of protective orders entered in the discovery context must take into account "the unique position that such orders occupy in relation to the First Amendment." *Id.* Concluding that "[t]he unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders," *id.* at 36, 104 S. Ct. at 2209, the *Seattle Times* Court held:
>
> > [W]here, as in this case, a protective order is entered on a showing of good cause, . . . is limited to the context of pretrial civil discovery, and does not

> restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

In re Courier-Journal v. Marshall, 828 F.2d 361, 364 (6th Cir. 1987) (quoting *Seattle Times*, 467 U.S. at 37).

The *Courier-Journal* court rejected a news organization's "claim of a first amendment right of access to the fruits of discovery" as "unavailing." *Id.* at 366. The court approved of the protective orders at issue because they were "'limited to the context of pretrial civil discovery,' and they did not 'restrict the dissemination of the information if gained from other sources,'" *id.* at 367 (quoting *Seattle Times*, 467 U.S. at 37), and because the orders were entered on a showing of "good cause," "after fairly balancing the very limited right of access the press has to the presumptively nonpublic fruits of civil discovery against the right of civil rights plaintiffs to obtain discovery . . . over a claimed privilege based on first amendment associational rights." *Id.*

- The Sixth Circuit has also stated the standard as follows:

> Rule 26 of the Federal Rules of Civil Procedure permits courts to issue a protective order, if justice requires and to protect individuals from "annoyance, embarrassment, oppression, or undue burden or expense" (FED. R. CIV. P. 26(c)). The burden of establishing good cause for a protective order rests with the movant. *See General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). "To show good cause, a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987) (citations omitted).

Nix v. Sword, 11 F. App'x 498, 500 (6th Cir. 2001) (unpublished) (per curiam).

Standard for Entering a Sealing Order

- The Sixth Circuit has explained that while a court may have some discretion to seal court documents, that discretion is limited by "long-established legal tradition." *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1177 (6th Cir. 1983). The court explained that "[t]he English common law, the American constitutional system, and the concept of the 'consent of the governed' stress the 'public' nature of legal principles and decisions." *Id.* (footnote omitted). The court analyzed the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which discussed the history behind the right of access to legal proceedings. *See Brown & Williamson*, 710 F.2d at 1178. The *Brown & Williamson* court described the policies emphasized by the Supreme Court in

Richmond Newspapers:

> The Supreme Court's historical argument is based on policy considerations developed in the past that remain valid today. First, public trials play an important role as outlets for "community concern, hostility, and emotions." *Richmond Newspapers*, *supra*, 448 U.S. at 571, 100 S. Ct. at 2824. When judicial decisions are known to be just and when the legal system is moving to vindicate societal wrongs, members of the community are less likely to act as self-appointed law enforcers or vigilantes. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571, 100 S. Ct. at 2824.
>
> Second, public access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court. The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court. In his concurrence, Justice Brennan emphasized this link between access to the courtroom and the popular control necessary in our representative form of government. *Id.* at 592, 100 S. Ct. at 2835. Although the federal judiciary is not a majoritarian institution, public access provides an element of accountability. One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion.
>
> Finally, Justice Brennan points out that open trials promote "true and accurate fact finding." *Id.* at 596, 100 S. Ct. at 2838. When information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence. Witnesses in an open trial may be less inclined to perjure themselves. Public access creates a critical audience and hence encourages truthful exposition of facts, an essential function of a trial.

Id. (some internal citations omitted). *Brown & Williamson* concluded that "[t]he Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial." *Id.*

However, the court noted that "[t]he right of access is not absolute . . . , despite these justifications for the open courtroom." *Id.* at 1179. The court explained courts have made several exceptions to the strong presumption of access, which it stated fall into the categories of "those based on the need to keep order and dignity in the courtroom and those which

center on the content of the information to be disclosed to the public." *Id.* With respect to the first category, the court stated that regulations on access "must pass the following three-part test: that the regulation serve an important governmental interest; that this interest be unrelated to the content of the information to be disclosed in the proceeding; and that there be no less restrictive way to meet that goal." *Brown & Williamson*, 710 F.2d at 1179 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). With respect to the second category, the court found that "content-based exceptions to the right of access have been developed to protect competing interests," and that "[i]n addition to the defendant's right to a fair trial, these interests include certain privacy rights of participants or third parties, trade secrets and national security." *Id.* (citations omitted). The court concluded that harm to a company's reputation is not sufficient to warrant sealing. *Id.*

The court held that sealing was not appropriate and focused on the fact that the subject of the litigation—the accuracy of testing the "tar" and nicotine content of cigarettes—was one in which the public had a strong interest and that potentially involved the public's health. *See id.* at 1180–81.

- In another case, the Sixth Circuit noted the long history of the presumption of public access to the courts, but explained that there are several "important exceptions which limit the public's right of access to judicial records." *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474 (6th Cir. 1983). The court explained:

> [T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.

Id. (quoting *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978) (citations omitted)) (quotation marks omitted). The court stated that "trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public's right to know," and that "the decision as to when judicial records should be sealed is left to the sound discretion of the district court, subject to appellate review for abuse." *Id.* (citations omitted). The Sixth Circuit emphasized that the district court should have afforded the press a reasonable opportunity to object to the protective order sealing the court record, *id.* at 474–75, and explained that "the district court had an obligation to consider the rights of the public and the press," *id.* at 475. The court formulated a procedure for ensuring the press and the public's right to object to sealing:

> In order to protect this right to be heard, the most reasonable approach would be to require that motions to seal be docketed with the clerk of the district court. The records maintained by the clerk are public records. If a party moves to seal a document, or the entire court record, such a motion should be made "sufficiently in advance of any hearing on or disposition of the [motion to seal] to afford interested members of the public an opportunity to intervene and present their views to the court." The district court should then allow interested members of the public a reasonable opportunity to present their claims, without causing unnecessary or material delay in the underlying proceeding.

Id. at 475–76 (internal citations omitted). The court explained that "[o]nly the most compelling reasons can justify non-disclosure of judicial records." *Knoxville News*, 723 F.2d at 476 (citing *Brown & Williamson*, 710 F.2d at 1179–80; *United States v. Myers* (*In re Nat'l Broadcasting Co.*), 635 F.2d 945, 952 (2d Cir. 1980)).

- A district court in the Sixth Circuit recently emphasized that compelling reasons are necessary to seal court documents. *See Pucci v. 19th Dist. Court*, No. 07-10631, 2009 WL 596196, at *9 (E.D. Mich. Mar. 6, 2009). The court recognized the long history of the presumption of public access to judicial records, and stated that "[i]n exercising its discretion to seal judicial records, the Court must balance the public's common law right of access against the interests favoring nondisclosure." *Id.* at *8 (citations omitted). The court explained that "'[o]nly the most compelling reasons can justify non-disclosure of judicial records,'" *id.* at *9 (quoting *Knoxville News*, 723 F.2d at 476), and that "'[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records,'" *id.* (quoting *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)).

- In the context of considering a request to seal a doctor's report evaluating the competency of a habeas petitioner, another case discussed the competing interests weighed in connection with a request to seal judicial documents. The court explained:

> Historically, there has been a presumption of openness and public access to judicial proceedings and documents. *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise II)*, 478 U.S. 1, 10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986); *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise I)*, 464 U.S. 501, 507, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). Addressing the presumption of access to judicial proceedings, in *Press-Enterprise II*, the Supreme Court held that there is a qualified right of public access to judicial proceedings, rooted in the First Amendment, if there is "a tradition of

accessibility" to the nature of the proceedings involved and if public access "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8–9, 106 S. Ct. 2735.

Beyond the First Amendment analysis, there exists a common law right of access to judicial proceedings and documents that does not rise to a constitutional dimension and is left to the sound discretion of the trial court. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–99, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). Distinguishing between access to judicial proceedings and access to judicial documents, the Sixth Circuit has addressed whether there is a First Amendment right to inspect and copy judicial documents, or only a common law right of access. *Compare United States v. Beckham*, 789 F.2d 401, 406–409, 412–15 (6th Cir. 1986) (holding that media members had no constitutional right of access to tapes), *with Application of National Broadcasting Company, Inc.*, 828 F.2d 340, 345 (6th Cir. 1987) (holding that there is a qualified First Amendment right of access to proceedings and documents relating to disqualification of a judge in a criminal case and to conflicts of interest between attorneys in a criminal case).

With respect to the common law right of access, a trial court's discretion is not unfettered and typically involves a fact-intensive and context-specific balancing of the competing interests of those who seek access and those who seek to deny it. The interests to be weighed include (1) the Court's supervisory powers over its own documents; (2) the benefit to the public from the incremental gain in knowledge that would result from access to the materials in question; (3) the degree of danger to the petitioner or other persons mentioned in the materials; (4) the possibility of improper motives on the part of the media; and (5) any special circumstances in the case. That said, there is a strong presumption in favor of access, and any balancing of interests begins with that presumption in favor of access. In light of the presumption in favor of access, merely articulating rational justifications for denying access will not suffice; rather, a district court must set forth "substantial reasons" for denying access.

Ashworth v. Bagley, 351 F. Supp. 2d 786, 788–89 (S.D. Ohio 2005) (some internal citations

omitted).[3]

- Another district court case emphasized the difference in proof between a discovery protective order and an order to seal documents. *See White v. GC Servs. Ltd. P'ship*, No. 08-11532, 2009 WL 174503, at *1 (E.D. Mich. Jan. 23, 2009) (recognizing "the differing standards of proof that apply to Rule 26(c) discovery-phase orders vis-a-vis orders to seal documents that are submitted to the court for filing"). The court explained that a party must show "good cause" to obtain a protective order governing discovery material, but that "[o]nce documents are filed with the court, there is a strong presumption, grounded in both the First Amendment and the common law, that they should be open to the public." *Id.* (citations omitted). The court stated that "[w]hile protective orders and sealing orders for court documents are permissible under the First Amendment, the 'good cause' standard of Rule 26(c) does not suffice. Rather, the party seeking to seal documents must show 'compelling reasons.'" *Id.* (internal citation omitted).

Standard for Modifying a Protective Order

- The Sixth Circuit appears to leave the determination of whether to modify a protective order to the discretion of the district court, rather than mandate a particular standard to be used in every case. *See United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (noting that when a collateral litigant requests modification of a protective order to access protected discovery, the circuits have adopted various approaches to balancing the interests at stake, and that some, including the Sixth Circuit, "have simply left the balancing to the discretion of the trial court") (citing *Stavro v. Upjohn Co. (In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.)*, 664 F.2d 114, 120 (6th Cir. 1981)).

- In one case, the Sixth Circuit has favorably cited the relatively less stringent standard used in *Wilk*:

> We therefore agree with the results reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.

Upjohn, 664 F.2d at 118 (quoting *Wilk*, 635 F.2d at 1299) (quotation marks omitted).

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[3] The court noted that "[b]ecause the Court is persuaded that a common law right of access exists with respect to the competency evaluation reports that have and will be submitted in this case, the Court need not reach the question of whether, or to what extent, there also exists a First Amendment right of access." *Ashworth*, 351 F. Supp. 2d at 789.

- Another Sixth Circuit case also recognized discretion to modify protective orders, but focused on the parties' reliance on a protective order and discussed the need for the party requesting continued sealing of documents subject to a protective order to show compelling reasons. *See Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 161, 164 (6th Cir. 1987). The court described the applicable standard for considering a request for modification of a protective order:

> Given that proceedings should normally take place in public, imposing a good cause requirement on the party seeking modification of a protective order is unwarranted. If access to protected fruits can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted. Even then, however, the movant should not be saddled with a burden more onerous than explaining why his need for the materials outweighs existing privacy concerns.
>
> *Nonparty Access to Discovery Materials in Federal Courts*, 94 HARV. L. REV. 1085, 1092 (1981) (footnotes omitted).

Id. at 163 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 570 (E.D.N.Y. 1985))[4] (quotation marks omitted); *accord Haworth, Inc. v. Steelcase, Inc.*, No. 4:85:CV:526, 1993 WL 195116, at *1 (W.D. Mich. 1993), *aff'd*, 12 F.3d 1090 (Fed. Cir. 1993); *Kerasotes Mich. Theatres, Inc. v. Nat'l Amusements, Inc.*, 139 F.R.D 102, 104 (E.D. Mich. 1991). The *Meyer Goldberg* court found that "[p]rotective orders may be subject to modification 'to meet the reasonable requirements of parties in other litigation,'" 823 F.2d at 164 (quoting *United States v. GAF Corp.*, 596 F.2d 10, 16 (2d Cir. 1979); citing *Wilk*, 635 F.2d at 1299), but remanded and implied that "compelling reasons" had to be present to allow denial of access to discovery material filed with the court. *See id.* ("We direct a remand, because the record does not reflect the district court's consideration of the strong underlying tradition of open records, and that only compelling reasons justify denial or continued denial of access to records of the type sought . . . .").

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[4] The district court's decision in *Agent Orange* was affirmed by the Second Circuit, *see In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), but portions of the Second Circuit's *Agent Orange* opinion discussing a presumption of public access to discovery materials have subsequently been questioned in light of an amendment to Federal Rule of Civil Procedure 5 that instructed parties not to file discovery materials with the court in most instances. *See, e.g.*, *TheStreet.com*, 273 F.3d at 233 n.11 ("[T]o the extent that *Agent Orange* relied upon Federal Rule of Civil Procedure 5(d) to find a statutory right of access to discovery materials, we observe that the recent amendment to this rule provides no presumption of filing all discovery materials, let alone public access to them. Indeed, the rule now *prohibits* the filing of certain discovery materials unless they are used in the proceeding or the court orders filing.") (citing FED. R. CIV. P. 5(d)).

- One district court found *Stavro v. Upjohn Co.* (*In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*), 664 F.2d 114 (6th Cir. 1981), to be distinguishable, and applied the more stringent standard from *Meyer Goldberg*. *See In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 130 F.R.D. 634, 640 (E.D. Mich. 1989). The court explained that "'[i]n considering motions to modify protective orders, courts are split as to whether the burden of showing good cause for continued protection lies with the protected party or with the party seeking modification.'" *Id.* at 638 (citation omitted). But the court cited the language in *Meyer Goldberg* regarding the standard in the Sixth Circuit. *Id.* The court recognized that *Upjohn* puts less of a burden on the party requesting modification of a protective order, but found the *Upjohn* analysis inapplicable, stating:

> The *Upjohn* Court instructs that the party, who opposes a modification of a protective order, must assume the burden of proof when a party in a pending case seeks to use discovery information that had been obtained pursuant to a protective order in a parallel case. In contrast, the Sixth Circuit Court of Appeals stated in a case, which was factually distinct from *Upjohn*, that when "legitimate secrecy interests" are involved, the party requesting a modification . . . must "show why [its] needs for the materials outweighs existing privacy concerns." *Fisher Foods*, 823 F.2d at 163. Therefore, this Court concludes that neither the reasoning, the holding, nor the requisite burden of proof in *Upjohn* supports [the] instant request [for modification].

Id. at 640.[5]

- In another case, the court relied on the standard discussed in *Meyer Goldberg*, and found that a sealed transcript should remain sealed in the face of a request to modify a protective order because there was no pending related litigation and the deponent objected to releasing the seal. *See In re Bell & Beckwith*, 198 B.R. 265, 269 (Bankr. N.D. Ohio 1996). The court quoted the Second Circuit opinion in *Martindell*, which emphasized the importance of the parties' reliance on protective orders and which stated that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some other extraordinary circumstance or compelling need, . . . a witness should be entitled to rely upon the enforceability of a protective order against third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's

[5] The court explained that the *Upjohn* court had focused on the following issues in deciding to lift the protective order: "(1) whether diversity of citizenship should serve as the basis for determining which plaintiffs may share in discovery material, (2) the 'similar interests and motives' of the entities requesting to share the information, and (3) a desire to allow the plaintiffs to develop their cases more fully." *In re Air Crash Disaster*, 130 F.R.D. at 639–40. The court found that those considerations were not applicable to the request to modify in its own case because in its own case, a party sought modification to allow it to provide discovery to the National Transportation Safety Board, which was not a party to a pending lawsuit. *Id.* at 640.

desire to inspect protected testimony for possible use in a criminal investigation . . . ." *Id.* at 167–68. The *Bell & Beckwith* court noted that in *Meyer Goldberg*, the Sixth Circuit had cited *Martindell* as well as the standard in *Agent Orange*. *Id.* at 168. The court held that unsealing was not warranted because "there is no related litigation or even anyone who specifically requests these documents for particular purposes,"[6] and because the deponent had relied on the protective order and opposed unsealing. *Id.* at 269.

- A district court in the Sixth Circuit has explained that in determining where to place the burden of showing good cause upon a request for modification of a protective order, it is relevant whether good cause was shown when the order was entered: "If a protective order was initially issued based upon good cause shown, the party seeking to modify the order has the burden of proof. However, if good cause was not shown when the protective order was issued, the party seeking to maintain the order has the burden of proof." *Playa Marel, P.M., S.A. v. LKS Acquisitions, Inc.*, No. C-3-06-366, 2007 WL 756697, at *3 (S.D. Ohio Mar. 8, 2007) (internal citation omitted). The court recognized four factors to be considered in determining whether a protective order should be modified:

> Several factors may be used to assist a court in exercising its discretion as to whether to modify a protective order. They include (1) whether good cause exists for the modification, (2) the nature of the protective order, (3) the foreseeability of the modification requested at the time of issuance of the order, and (4) the parties' reliance on the order.

Id. at *4 (citations omitted).

SEVENTH CIRCUIT

Standard for Entering a Protective Order

- The Seventh Circuit has emphasized the court's duty to examine proposed protective orders to prevent the parties from having complete control over the degree of public access. *See Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999). In *Citizens First National Bank*, the Seventh Circuit noted that the judge is required to make a determination of good cause to seal any part of the record of a case,[7] and explained

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[6] The bankruptcy trustee had requested that all documents be released from seal "to further the bankruptcy policy of open disclosure . . . ." *Bell & Beckwith*, 198 B.R. at 266.

[7] The protective order at issue in *Citizens First National Bank* had been issued by the district judge in accordance with a stipulation by the parties, and "authoriz[ed] either party to designate as confidential, and thus keep out of the public record of the litigation, any document 'believed to contain trade secrets or other confidential or governmental information, including information held in a fiduciary capacity.'" 178 F.3d at 944. On appeal, one of the parties sought permission to file an appendix under seal, based on the district court's protective order. *See id.* The

that "[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding." *Id.* The court recognized that "pretrial discovery, unlike the trial itself, is usually conducted in private," but noted that "the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding." *Id.* at 944–45. The court explained that the public's interest "does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case." *Id.* at 945 (citations omitted). The court emphasized:

> The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record.

Id. (internal citation omitted).

The *Citizens First National Bank* court recognized that some courts may find that blanket protective orders entered by stipulation, without judicial review, that allow litigants to seal all documents produced in discovery, are useful aids to expediting the discovery process and not problematic because there is no tradition of public access to discovery materials, but pointed out that the weight of authority is to the contrary. *Id.* at 945–46. The court stated that "[m]ost cases endorse a presumption of public access to discovery materials, and therefore require the district court to make a determination of good cause before he may enter the order."[8] *Id.* at 946 (internal citations omitted).

Seventh Circuit expressed concern because the protective order was not limited to the pretrial stage and because the public has an interest in what occurs at all stages of a judicial proceeding. *Id.* at 945.

[8] The *Citizens First National Bank* decision was issued before the 2000 amendment to Federal Rule of Civil Procedure 5, which removed the requirement of filing discovery materials with the court. To the extent the court's decision was based on Rule 5's previous requirement of filing discovery materials, its discussion of public access to discovery materials may have less relevance to current protective order standards. *Cf. In re Thow*, 392 B.R. 860, 868 (Bankr. W.D. Wash. 2007) (questioning the "continued viability" of a statement in a Ninth Circuit case that "the fruits of pretrial discovery are 'presumptively public,'" and noting that "when *Agent Orange* and *Public Citizen* were decided, FRCP 5(d) required the filing of discovery materials with the court (subject to local rule or court order to the contrary)"). Another court explained that while "in *Citizens First National Bank*, 178 F.3d at 946, the Seventh Circuit summarized that '[m]ost cases endorse a presumption of access to discovery materials,' . . . it does not follow . . . that courts can therefore order parties to make available all discovery items exchanged amongst themselves." *In re Bridgestone/Firestone, Inc.*, 198 F.R.D. 654, 657 (S.D. Ind. 2001). The court continued: "In . . . *Citizens First National Bank* . . . , the court[] discussed access to discovery materials in the context of items that *had been filed with the court.* Access to discovery materials when those materials have been presented to the court is one issue and quite another issue [is presented] when the parties are exchanging the materials amongst themselves." *Id.* The court explained that "[a]bsent

The court emphasized that good cause must be found, but need not be determined for each individual document, stating:

> We do not suggest that all determinations of good cause must be made on a document-by-document basis. In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge. There is no objection to an order that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record, provided the judge (1) satisfies himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets and (2) makes explicit that either party and any interested member of the public can challenge the secreting of particular documents.

Id.

- Another case also emphasized that courts have an independent duty to find good cause before entering a protective order, even if the parties stipulate to the terms. The court stated:

> Stipulated protective orders place the district court in an unusual position. Normally, the court is quick to ratify (and rightly so) any areas of agreement between opposing parties. However, under Fed. R. Civ. Pro. 26(c), the district court has the power to issue a protective order only upon a showing of "good cause." Even if the parties agree that a protective order should be entered, they still have "the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse is also true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection . . . ."

Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994) (quoting *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988)).

Standard for Entering a Sealing Order

- Another Seventh Circuit court has explained:

> Secrecy is fine at the discovery stage, before the material enters the

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a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit," and that "if they do not see fit to disseminate discovery information, the parties need not do so." *Id.* (quotation marks and citations omitted).

> judicial record. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). But those documents, usually a small subset of all discovery, that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality. *See, e.g., Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). Information transmitted to the court of appeals is presumptively public because the appellate record normally is vital to the case's outcome. Agreements that were appropriate at the discovery stage are no longer appropriate for the few documents that determine the resolution of an appeal, so any claim of secrecy must be reviewed independently in [the appellate] court.

Baxter Int'l Inc. v. Abbott Labs., 297 F.3d 544, 545–46 (7th Cir. 2002); *see also Containment Techs. Group, Inc. v. Am. Society of Health Sys. Pharmacists*, No. 1:07-cv-997-DFH-TAB, 2008 WL 4545310, at *4 (S.D. Ind. Oct. 10, 2008) ("[M]ost documents designated as confidential will never be filed with the Court or used in any Court proceeding. As a result, heightened attention to confidentiality designations is more appropriate at the time the document is filed with the Court or used in a Court proceeding (if ever), as opposed to the time such a document is produced as part of what may often be a massive discovery response.").

The *Baxter* court recognized that while confidentiality may be appropriate in early stages in the litigation, it is rarely appropriate when the materials relate to judicial decision making, stating:

> Yet the sort of agreement that governs discovery (or arbitration) is even weaker as a reason for appellate secrecy than is a contemporaneous agreement limited to the record on appeal. Allowing such an agreement to hold sway would be like saying that any document deemed provisionally confidential to simplify discovery is confidential forever. That would contradict *Grove Fresh* and its predecessors, which hold that the dispositive documents in any litigation enter the public record notwithstanding any earlier agreement. How else are observers to know what the suit is about or assess the judges' disposition of it? Not only the legislature but also students of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing. These are among the reasons why very few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed. In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information

> required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret on appeal. . . . [M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.

Baxter, 297 F.3d at 546–47 (internal citations omitted).

- The Seventh Circuit has also used a balancing approach to determine whether sealing court documents is warranted, recognizing the presumption that the public has a right of access to documents relied on in making dispositive decisions. *See Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994). The court stated:

> [T]he right of the press to obtain timely access to judicial decisions and the documents which comprise the bases of those decisions is essential. We conclude, therefore, that once the press has adequately demonstrated that its access has been unjustifiably limited, but where there are legitimate concerns of confidentiality, the burden should shift to the litigants to itemize for the court's approval which documents have been introduced into the public domain. We believe that such an approach provides a legitimate means of reconciling the press's rights with the time constraints facing the trial courts.

Id.

The *Grove Fresh* court also recognized that although "the media's right of access does not extend to information gathered through discovery that is not part of the public record, the press does have standing to challenge a protective order for abuse or impropriety." *Id.* (citations omitted). The court concluded that "where the rights of the litigants come into conflict with the rights of the media and public at large, the trial judge's responsibilities are heightened. In such instances, the litigants' purported interest in confidentiality must be scrutinized heavily." *Id.* at 899.

Standard for Modifying a Protective Order

- The Seventh Circuit has used the following standard for considering requests for modification to allow for use of protected documents in collateral litigation:

> [W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated,

> however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.

Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980) (internal citation omitted); *accord Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 661 (7th Cir. 2001) (quoting *Wilk*, 635 F.2d at 1299); *Jepson*, 30 F.3d at 861 ("*Wilk* has been followed by this and other circuits.") (citations omitted). *Wilk* distinguished *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), and *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976), which applied a more stringent standard to requests for modification:

> These cases are distinguishable in that the party seeking access in them was the federal government, which in each case had at its disposal special investigatory powers not available to private litigants. Thus, the government could have employed a grand jury in aid of its perjury investigation in *Martindell*, and since the antitrust investigation it conducted in *Eastman Kodak* could have led to criminal or civil proceedings, it might have used either a grand jury or the special "civil investigative demand" created by 15 U.S.C. [§] 1312. As the opinions in both cases suggest, the explicit grant of such extensive investigatory powers should be construed to preclude the implication of supplemental powers, absent unusual circumstances. When the investigator is the government, there is also a unique danger of oppression. This case involves neither circumstance.

Wilk, 635 F.2d at 1300 (footnotes omitted). The court described the Seventh Circuit's reference to "exceptional considerations" in *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979), as "an unfortunate choice of words." *Wilk*, 635 F.2d at 1300. The court recognized that "[a] collateral litigant should not be permitted to exploit another's discovery in the sense of instituting the collateral litigation simply as a device to obtain access to the sealed information," that "federal discovery may not be used merely to subvert limitations on discovery in another proceeding," and that "a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation." *Id.* (citations omitted).

EIGHTH CIRCUIT

Standard for Entering a Protective Order

- A court in the Eighth Circuit has explained: "Under Rule 26(c), a court may grant a protective order only upon a showing of good cause by the moving party. The movant must articulate 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Pochat v. State Farm Mutual Auto. Ins. Co.*, No. 08-5015-

KES, 2008 WL 5192427, at *3 (D.S.D. Dec. 11, 2008) (internal citation omitted) (quoting *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)). "Such determination must also include a consideration of the relative hardship to the non-moving party should the protective order be granted." *Gen. Dynamics Corp.*, 481 F.2d at 1212 (citation omitted). The *Pochat* court noted that protective orders over discovery require "'balancing between public and private concerns.'" *Pochat*, 2008 WL 5192427, at *3 (quoting *Pansy*, 23 F.3d at 786). The court explained:

> In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process . . . . [T]he court . . . must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.
>
> Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should "be disclosed only in a designated way," as authorized by the last clause of Rule 26(c)(7) . . . . Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.

Id. at *4 (quoting *Pansy*, 23 F.3d at 787) (internal quotation marks omitted). The court described various factors listed in *Pansy* that might be considered in determining whether to enter a protective order. *See id.* The court emphasized that "[t]hese factors . . . 'are unavoidably vague and are of course not exhaustive' so as to provide courts with 'the flexibility needed to justly and properly' resolve discovery disputes." *Id.* (citing *Pansy*, 23 F.3d at 787). The court rejected a proposed protective order that would allow the parties to designate material they believed contained trade secrets or other confidential material because the court was "concerned that this broad language will serve to give each party 'carte blanche to decide what portions of the record shall be kept secret.'" *Id.* at *10 (quoting *Citizens First Nat'l Bank*, 178 F.3d at 945).

Standard for Entering a Sealing Order

- In the context of reviewing a sealing order made by a bankruptcy judge, the Eighth Circuit has recognized the public's right to inspect judicial records and stated that compelling reasons are necessary to infringe on that right. *See In re Neal*, 461 F.3d 1048, 1053 (8th Cir.

2006) (noting that courts recognize a general right to inspect judicial records, that courts have supervisory power over their records and may deny access where the records may be used for improper purposes, but that while "the court is given this supervisory power [to deny access], 'only the most compelling reasons can justify non-disclosure of judicial records'") (quoting *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005) (internal brackets and quotations omitted)).

- In another case, the Eighth Circuit explained that whether to seal a court record is a decision within the district court's discretion. *See Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 340 (S.D. Iowa 1993) ("[T]he decision of whether court records should be sealed is one committed to the sound discretion of the trial court.") (citing *Webster Groves Sch. Dist. v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1374 (8th Cir. 1990)). The court explained that "[w]hile recognizing a common law right of access to court records, the Eighth Circuit has expressly declined to adopt a 'strong presumption' of common law access." *Id.* The court noted that there is a "need to balance the competing interests involved, and to make this determination in light of the facts and circumstances of this particular case." *Id.* at 341 (citations omitted). The court concluded that "the public good would be substantially disserved if the introduction of a document in a civil trial deprived it of its otherwise confidential status." *Id.* at 342. The court continued: "Discovery, often a contentious and difficult process in complex cases, would become even more contentious and expensive, if there was no assurance of continued protection for confidential business information." *Id.* (citing *Seattle Times*, 467 U.S. at 34); *State ex rel. Butterworth v. Jones Chems., Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993)). The court explained that "[c]oncern with the 'efficient administration of justice' is also a valid interest to be considered in making this determination [of whether to grant access]." *Id.* (citation omitted). The court noted that "[n]either the Supreme Court nor the Eighth Circuit has recognized a constitutional right of access in a civil case," but concluded that even if a constitutional right exists, the order at issue only sealed a small number of exhibits in comparison to the number entered at trial and did so to protect a legitimate interest in confidentiality. *See Jochims*, 151 F.R.D. at 342 n.8.

- In a district court case, the court noted that the Eighth Circuit had recognized a general right to inspect judicial records, and that "[a] party seeking closure or sealing of court documents must show that a restriction of the right of public access is necessitated by a compelling government interest." *S.E.C. v. Shanahan*, No. 4:06-MC-546 CAS, 2006 WL 3330972, at *3 (E.D. Mo. Nov. 15, 2006) (citing *Goff v. Graves*, 362 F.3d 543, 550 (8th Cir. 2004)). The court emphasized that "[i]f a district court decides to close a proceeding or seal certain documents, it must explain why closure or sealing was necessary and why less restrictive alternatives were not appropriate." *Id.* at *4 (citing *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F. 2d 569, 574 (8th Cir. 1988) (citation omitted)). The court noted that "Eighth Circuit precedent indicates that in order to seal records or documents, there must be a compelling *governmental* interest." *Id.* (citation omitted). The court distinguished private interests, which it deemed insufficient to warrant sealing:

> In the absence of evidence that court files might be used for improper

> purposes such as to "gratify private spite" or "promote public scandal," the respondents' interest in keeping their names out of the public record is not a governmental interest at all, but rather a private interest. "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records."

Id. (internal citation omitted).

- Another district court described the following standard for sealing court documents:

> There is a common-law right of access to judicial records. *See Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990). The Eighth Circuit has held that this right of access "is not absolute, but requires a weighing of competing interests." *Id.* A court has supervisory power over its own records, and the decision to seal a file is within the court's discretion. *Id.* The Court finds that Guidant and Duron have a heightened burden to overcome the presumptive right of the public to access of the briefs and supporting documents at issue because they were filed in support of and in opposition to motions for summary judgment. *See Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("[D]ocuments used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.").

Duron v. Guidant Corp. (*In re Guidant Corp. Implantable Defibrilators Prods. Liab. Litig.*), 245 F.R.D. 632, 636 (D. Minn. 2007). After the parties objected to unsealing certain documents, the court reviewed the documents *in camera* "for good cause under FED. R. CIV. P. 26[,] and weighed the competing interests regarding the common-law right of access to judicial records." *Id.* (footnote omitted).

- Another court concluded that "there is no established right of public access to prejudgment records in civil cases." *Simon v. G.D. Searle & Co.*, 119 F.R.D. 683, 684 (D. Minn. 1987) (citation omitted). The court concluded that it had "discretion to deny access to documents filed, but not admitted into evidence or relied upon by the Court." *Id.* (citing *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653 (D.D.C. 1986)). The court also found that "[a]t best, the presumption of public access to judicial records has force only when the Court relies on particular documents to determine the litigants' substantive rights," *id.* (citing *Anderson*, 805 F.2d at 13), and explained that "even in cases which do not involve confidential documents, this Court, as a matter of course, has never sanctioned wholesale filing of discovery materials, depositions or exhibits until it is clear said materials will be relied on and considered by the Court," *id.*

Standard for Modifying a Protective Order

- The Eighth Circuit has at least implied that a party requesting modification of a protective order must show intervening circumstances warranting modification. In *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 952 (8th Cir. 1979), a defendant requested that the court dissolve a protective order to allow him to comply with subpoenas issued by a congressional subcommittee investigating pricing practices in the meat industry. The district court partially lifted the protective order to allow the defendant to respond to the subpoena. *Id.* The Eighth Circuit vacated the order modifying the protective order, noting that the district court had made the modification "without any showing that *intervening circumstances* had in any way obviated the potential prejudice to [the protected party] . . . ."[9] *Id.* at 954 (emphasis added).

- A district court has explained that "'[t]he party seeking to modify the protective order bears the burden of showing good cause for the modification,'" *Guzhagin v. State Farm Mut. Auto. Ins. Co.*, No. 07-4650 (JRT/FLN), 2009 WL 294305, at *2 (D. Minn. Feb. 5, 2009) (quoting *Medtronic, Inc. v. Boston Sci. Corp.*, No. Civ. 99-1035, 2003 WL 352467, at *1 (D. Minn. Feb. 14, 2003)), and that "[w]hen a party to a stipulated protective order seeks to modify that order, 'that party must demonstrate particular good cause to obtain relief,'" *id.* (quoting *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 501 (S.D. Iowa 1992)). The court recognized that "[c]ourts outside [the Eighth] Circuit have noted a 'sufficient need for modification . . . to avoid duplicative discovery when parties in other litigation seek to obtain discovery in concluded litigation,'" *id.* (quoting *SmithKline Beecham Corp. v. Synthon Pharms., Ltd.*, 210 F.R.D. 163, 166 (M.D.N.C. 2002)), but that "*SmithKline* cautions . . . against modifying protective orders 'in a controversy with which [the Court] is not familiar and over which it lacks control,'" *id.* (quoting *SmithKline*, 210 F.R.D. at 166). The court implied that "compelling need" was required in order for modification of a protective order to be warranted. *See id.* ("State Farm has therefore satisfied its burden by demonstrating *compelling need* for modification.") (emphasis added).

- Another district court explained the standard as follows:

> "When a party seeks modification of a confidentiality order, they must 'come forward with a reason to modify the order.'" *Arnold v. Pennsylvania, Dep't of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994)). Specifically, "[t]he party seeking the modification must explain why its need for the materials outweighs existing privacy

[9] On reconsideration, the Eighth Circuit "adhere[d] in general to the views expressed" in its original opinion, but found that formal issuance of mandamus had been improvident because compelling reinstatement of the protective order would not alter the status quo, as there was no basis for requiring the Subcommittee to return the documents it obtained and the order lifting the protective order had only pertained to the documents provided in response to the subpoena, meaning that any further disclosures would violate even the modified protective order. 601 F.2d at 956.

> concerns." *MSC.Software Corp. v. Altair Eng'[]g, Inc.*, No. 07-CV-12807, 2008 WL 2478313, at *1 (E.D. Mich. June 17, 2008) (Slip Copy). Some courts hold the burden is not easily met as there is a "stringent standard for modification," . . . "a confidentiality order can only be modified if an extraordinary circumstance or compelling need warrants the requested modification." *Pansy*, 23 F.3d at 789 (citing cases). In contrast, other courts hold the movant to a more lenient standard by incorporating a balancing test. *Id.* at 789–90 (citing cases). The *Pansy* court identified a number of factors for the good cause balancing test used to issue or modify a protective order including: (1) the interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; and (3) the parties' reliance on the protective order. *Id.* at 787–89.

Streck, Inc. v. Research & Diagnostic Sys., Inc., No. 8:06CV458, 2008 WL 2813081, at *3 (D. Neb. July 18, 2008). The court indicated that compelling need and extraordinary circumstances were sufficient (and perhaps necessary) for modification. *See id.* at *4 ("The plaintiff has presented a legitimate and not improper purpose for use of the documents outside this litigation. The plaintiff's need is *compelling* and presents an *extraordinary circumstance*.") (emphasis added).

- Another case found that the magistrate judge had erred by relying on the standard for modification set out in *Wilk* when the "controlling standard is found in *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert denied*, 441 U.S. 907, 99 S. Ct. 1997, 60 L. Ed. 2d 376 (1979)." *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 342 (S.D. Iowa 1993). The court explained that *Iowa Beef Processors* set out the following standard:

> [T]he Eighth Circuit recognized that the initial showing of good cause for entry of a protective order under FED. R. CIV. P. 26(c) is on the party seeking protection. However, when an attempt is made to amend or lift that protection, there must be a showing that intervening circumstances have obviated or eliminated any potential prejudice to the protected party. I believe that *Bagley*'s requirement of a showing of intervening circumstances implicitly places the burden of making the showing on the party seeking to amend or lift the protective order. This standard is fully applicable to a petition by plaintiffs in other litigation, such as intervenors.

Id. (internal citations omitted).

NINTH CIRCUIT

Standard for Entering a Protective Order

- In *Pintos v. Pacific Creditors Association*, Nos. 04-17485, 04-17558, 2009 WL 1151800, at *5–6 (9th Cir. Apr. 30, 2009), the Ninth Circuit recently explained the differences between the standard for entering a protective order and the standard for entering a sealing order:

> Two standards generally govern motions to seal documents like the one at issue here. First, a "compelling reasons" standard applies to most judicial records. *See Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (holding that "[a] party seeking to seal a judicial record . . . bears the burden of . . . meeting the 'compelling reasons' standard"); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003). This standard derives from the common law right "to inspect and copy public records and documents, including judicial records and documents." *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). To limit this common law right of access, a party seeking to seal judicial records must show that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." *Id.* at 1178–79 (internal quotation marks and citations omitted).
>
> Second, a different standard applies to "private materials unearthed during discovery," as such documents are not part of the judicial record. *Id.* at 1180. Rule 26(c) of the Federal Rules of Civil Procedure governs here, providing that a trial court may grant a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."
>
> The relevant standard for purposes of Rule 26(c) is whether "'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). This "good cause" standard presents a lower burden for the party wishing to seal documents than the "compelling reasons" standard. The cognizable public interest in judicial records that underlies the "compelling reasons" standard does not exist for documents produced between private litigants. *See Kamakana*, 447 F.3d at 1180 (holding that "[d]ifferent interests are at stake with the right of access than with Rule 26(c)"); *Foltz*, 331 F.3d at 1134 ("When discovery material is filed with the court . . . its status changes.").

> The "good cause" standard is not limited to discovery. In *Phillips*, we held that "good cause" is also the proper standard when a party seeks access to previously sealed discovery attached to a nondispositive motion. 307 F.3d at 1213 ("when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted"). Nondispositive motions "are often 'unrelated', or only tangentially related, to the underlying cause of action," and, as a result, the public's interest in accessing dispositive materials does "not apply with equal force" to nondispositive materials. *Kamakana*, 447 F.3d at 1179. In light of the weaker public interest in nondispositive materials, we apply the "good cause" standard when parties wish to keep them under seal. Applying the "compelling interest" standard under these circumstances would needlessly "undermine a district court's power to fashion effective protective orders." *Foltz*, 331 F.3d at 1135.

Id. at *5–6 (footnote omitted).

- Another court has explained: "'It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public. Rule 26(c) authorizes a district court to override this presumption where 'good cause' is shown.'" *AGA Shareholders, LLC v. CSK Auto, Inc.*, No. CV-07-62-PHX-DGC, 2007 WL 4225450, at *1 (D. Ariz. Nov. 28, 2007) (quoting *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999)). The court stated:

> For good cause to exist under Rule 26(c), "the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." *Phillips v. G.M. Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002). "'Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.'" *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (citation omitted). Rather, the party seeking protection must make a "particularized showing of good cause with respect to [each] individual document." *San Jose Mercury News*, 187 F.3d at 1102.

Id.

Standard for Entering a Sealing Order

- The Ninth Circuit has also explained that with respect to court documents, the showing that must be made to seal the documents depends on whether the documents are associated with a dispositive motion. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36

(9th Cir. 2003). The court explained that the Ninth Circuit has "a strong presumption in favor of access to court records," but that "[t]he common law right of access . . . is not absolute and can be overridden given sufficiently compelling reasons for doing so." *Id.* at 1135 (citing *San Jose Mercury News, Inc. v. U.S. Dist. Court—Northern District (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999)). The court explained that in determining whether the common law right of access can be overridden, a court should consider all relevant factors, including:

> the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets . . . . After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.

Id. (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). The court explained that with respect to sealed discovery attached to nondispositive motions, "'the usual presumption of the public's right of access is rebutted,'" and "'good cause' suffices to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions." *Id.* (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)). The court held that "the presumption of access is not rebutted where . . . documents subject to a protective order are filed under seal as attachments to a dispositive motion," and that in that scenario, "[t]he *Hagestad* 'compelling reasons' standard continues to apply." *Id.* at 1136. The court explained that "[t]here are good reasons to distinguish between dispositive and nondispositive motions" because "[i]n *Seattle Times*, the Supreme Court noted that '[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action,'" but "[t]he same cannot be said for materials attached to a summary judgment motion because 'summary judgment adjudicates substantive rights and serves as a substitute for trial.'" *Id.* (citations omitted).

Standard for Modifying a Protective Order

- The Ninth Circuit has explained that where the court enters a blanket protective order without requiring the party seeking confidentiality to show good cause for specific documents, upon a challenge by intervenors to the asserted confidentiality, the district court should require a showing of good cause for continued protection of the documents under Rule 26(c). *See Foltz*, 331 F.3d at 1131. The court explained that it "strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation" because "[a]llowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery." *Id.* (citations omitted). The court quoted the Seventh Circuit standard described in *Wilk*, and stated: "Where reasonable restrictions on collateral disclosure will continue to protect an

affected party's legitimate interests in privacy, a collateral litigant's request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted." *Id.* at 1132 (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265–66 (9th Cir. 1964)). But the court cautioned:

> [A] court should not grant a collateral litigant's request for such modification automatically. As an initial matter, the collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein. Requiring a showing of relevance prevents collateral litigants from gaining access to discovery materials merely to subvert limitations on discovery in another proceeding. *See Wilk*, 635 F.2d at 1300. Such relevance hinges "on the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings." Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 366–67 (1999).

Id.

The court elaborated on the standard for considering the relevance of the documents sought to the collateral litigation:

> The case law suggests that the court that entered the protective order should satisfy itself that the protected discovery is sufficiently relevant to the collateral litigation that a substantial amount of duplicative discovery will be avoided by modifying the protective order. *See Wilk*, 635 F.2d at 1300 (comparing complaints to conclude that "much, if not most," of the protected discovery would be eventually discoverable in the collateral suit); *United Nuclear*, 905 F.2d at 1428 (upholding the modification of a protective order but admonishing the district court to leave the specific "[q]uestions of the discoverability in the [collateral] litigation of the materials discovered in [this] litigation" to the collateral courts (quoting *Superior Oil Co. v. Am. Petrofina Co.*, 785 F.2d 130, 130 (5th Cir. 1986) (internal quotation marks omitted))). No circuits require the collateral litigant to obtain a relevance determination from the court overseeing the collateral litigation prior to requesting the modification of a protective order from the court that issued the order. The court that issued the order is in the best position to make the relevance assessment for it presumably is the only court familiar with the contents of the protected discovery.

Id. (footnote omitted). But the court explained that the court's relevance inquiry is limited to whether a modification of the protective order is appropriate, and does not extend into determining whether the collateral litigant will actually obtain the documents:

> Because the district court that issued the order makes only a rough estimate of relevance, however, the only issue it determines is whether the protective order will bar the collateral litigants from gaining access to the discovery already conducted. Even if the issuing court modifies the protective order, it does not decide whether the collateral litigants will ultimately obtain the discovery materials. As the Fifth and Tenth Circuits have noted, once the district court has modified its protective order, it must refrain from embroiling itself in the specific discovery disputes applicable only to the collateral suits.

Id. at 1132–33 (citation omitted).

The court also explained that in addition to considering the relevance of the materials sought through modification of the protective order, the court should consider other factors:

> Of course, before deciding to modify the protective order, the court that issued it must consider other factors in addition to the relevance of the protected discovery to the collateral litigation. In particular, it must weigh the countervailing reliance interest of the party opposing modification against the policy of avoiding duplicative discovery. *See Beckman*, 966 F.2d at 475. However, we have observed that "[r]eliance will be less with a blanket [protective] order, because it is by nature overinclusive." *Id.* at 476. As noted above, a party seeking the protection of the court via a blanket protective order typically does not make the "good cause" showing required by Rule 26(c) with respect to any particular document. Thus, reliance on a blanket protective order in granting discovery and settling a case, without more, will not justify a refusal to modify. "[A]ny legitimate interest . . . in continued secrecy as against the public at large can be accommodated by placing [the collateral litigants] under the same restrictions on use and disclosure contained in the original protective order." *United Nuclear*, 905 F.2d at 1428; *see also Beckman*, 966 F.2d at 476.

Id. at 1133. The court stated that "the extent to which a party can rely on a protective order depends on the extent to which the order did reasonably induce the party to allow discovery as opposed to settling the case." *Id.* at 1137–38 (citations omitted).

- The Ninth Circuit has rejected application of the Second Circuit's "extraordinary circumstances" test for modification. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d

470, 475 (9th Cir. 1992) ("The 'extraordinary circumstances' test is incompatible with our circuit's law. Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation."). The *Beckman* court recognized the countervailing concern that modification would result in slowing down discovery in the initial litigation, but found that "legitimate interests in privacy can be protected by putting the intervenors under the same restrictions as those contained in the original protective order." *Id.* (citing *United Nuclear*, 905 F.2d at 1428). The court also recognized the importance of protecting the parties' reliance interests, but explained that "[t]he extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case." *Id.* The court noted that "reliance would be greater where a trade secret was involved, or where witnesses had testified pursuant to a protective order without invoking their Fifth Amendment privilege," *id.* (citing *Public Citizen*, 858 F.2d at 791), and that "[r]eliance will be less with a blanket order, because it is by nature overinclusive," *id.* at 476 (citing *Public Citizen*, 858 F.2d at 790).

- In the context of a party seeking modification of a stipulated protective order, one court explained that "district courts have inherent authority to grant a motion to modify a protective order where 'good cause' is shown." *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 201 (N.D. Cal. 2009) (citation omitted). "A party asserting good cause bears the burden to show that specific prejudice or harm will result if the motion is not granted." *Id.* (citation omitted). The court explained that "[i]n the Ninth Circuit, issues concerning the scope of protective orders for confidential information entail[] a balancing test of the conflicting interests between the protection of Rule 26(c) and the broad mandate of the admissibility of information in discovery conferred by Rule 26(b)(1) of the Federal Rules of Civil Procedure." *Id.* at 204–05 (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992), *cert. denied*, 506 U.S. 869 (1992)). The court found that the party seeking modification, who had agreed to a stipulated protective order, bore the burden of showing good cause for modification to use documents in potential collateral litigation alleging misappropriation of trade secrets. *See id.* at 205. The court concluded that because there was questionable use of proprietary information, good cause was shown for modification to allow the plaintiff to protect itself by using documents for separate trade secret litigation. *See id.* The court stated: "A good cause analysis under Federal Rule of Civil Procedure 26(c) entails a balancing of the needs for discovery against the need for confidentiality. The typical analysis considers whether sufficient cause exists to protect such information from being disclosed to the public." *Id.* The court noted that "[i]n the Ninth Circuit, there is a strong policy 'favor[ing] access to discovery materials to meet the needs of parties engaged in collateral litigation,'" and that "Ninth Circuit precedent also looks to the needs of parties engaged in pending litigation and, in particular, the reliance interests on the protective order of the party opposing its modification." *CBS Interactive*, 257 F.R.D. at 206 (citations omitted). The court concluded that "[m]ere reliance on a blanket protective order does not justify a refusal to modify it when a reasonable request for disclosure has been made." *Id.* (citation omitted). The court explained that "[n]ormally, the court must also weigh the countervailing reliance interest of the party opposing modification against the likelihood that the collateral action is sufficiently related to the instant action, such that a

significant amount of duplicative discovery may be avoided by granting the modification request." *Id.* (citing *Foltz*, 331 F.3d at 1133).

- Another court explained that while the Ninth Circuit favors providing access to documents for collateral litigation, "adoption of such a policy in no way gives those seeking intervention carte blanche to obtain all discovery produced as part of an underlying action, as a matter of course." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2008 WL 4191780, at *1 (N.D. Cal. Sept. 10, 2008). The court discussed the considerations used by the court in *Foltz*, but also considered the additional factor of whether the underlying litigation in which the protective order was entered is still pending. *See id.* at *2. The court explained that where the underlying action is still pending, "the court must pay careful consideration . . . before granting movants' request [to intervene to modify the protective order], so as not to prejudice any of the existing parties or ongoing litigation in the case." *Id.* In addition, the court explained that it is important to consider whether collateral litigants are seeking modification "merely to subvert limitations on discovery in collateral litigation." *Id.*

TENTH CIRCUIT

Standard for Entering a Protective Order

- The Tenth Circuit has stated:

> Under Federal Rule of Civil Procedure 26(c), for "good cause" a court may issue a protective order regarding discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Such an order may forbid the disclosure of discovery, *see* FED. R. CIV. P. 26(c)(1)(A), and require that depositions be sealed and opened only upon court order, *see id.* Rule 26(c)(1)(F). The "good cause" standard of Rule 26(c) is "highly flexible, having been designed to accommodate all relevant interests as they arise." *United States v. Microsoft Corp.*, 165 F.3d 952, 959 (D.C. Cir. 1999).

Rohrbough v. Harris, 549 F.3d 1313, 1321 (10th Cir. 2008).

- The Tenth Circuit has recognized that blanket protective orders may be necessary in complex cases to allow discovery to proceed:

> These stipulated "blanket" protective orders are becoming standard practice in complex cases. *See* MANUAL FOR COMPLEX LITIGATION, SECOND, § 21.431 (1985). They allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes

> over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, "to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1; *see generally In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356–57 (11th Cir. 1987); Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 9–11 (1983).

United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990).

- A court in the Tenth Circuit has stated: "The party seeking a protective order has the burden to show good cause for it. To establish good cause, that party must submit 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Wilson v. Olathe Bank*, 184 F.R.D. 395, 397 (D. Kan. 1999) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981)) (internal citation omitted).

- In another case, the court elaborated:

> The decision to enter a protective order lies within the sound discretion of the court. Despite this broad discretion, the court may only issue a protective order if the moving "party demonstrates that the basis for the protective order falls within one of the categories enumerated in FED. R. CIV. P. 26(c)[,]" *i.e.*, that the requested order is necessary to protect the party "from annoyance, embarrassment, oppression, or undue burden or expense." "Rule 26(c) does not provide for any type of order to protect a party from having to provide discovery on topics merely because those topics are overly broad or irrelevant, or because the requested discovery is not reasonably calculated to lead to the discovery of admissible evidence." "Although a party may object to providing discovery on the basis that the request is overly broad, irrelevant or not calculated to lead to the discovery of admissible evidence, the court may only rule on the validity of such an objection in the context of a motion to compel." "Such an objection is not a basis upon which the court may enter a Rule 26(c) protective order."

P.S. v. Farm, Inc., No. 07-CV-2210-JWL, 2009 WL 483236, at *3 (D. Kan. Feb. 24, 2009) (footnotes omitted).

Standard for Entering a Sealing Order

- The Tenth Circuit has discussed the following standard for sealing court documents:

> Courts have long recognized a common-law right of access to judicial records. This right, however, is not absolute. The

> "presumption of access . . . can be rebutted if countervailing interests heavily outweigh the public interests in access." *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). "The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption." *Id.*

Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007) (some internal citations omitted). In *Mann*, the Tenth Circuit also found it important that much of the information contained in the complaint sought to be sealed had been previously disclosed in other public court proceedings, undermining the asserted privacy concerns. *See id.*

- In a district court case, the court explained that it had previously discussed the standard for sealing the record of a case in a non-discovery context:

> Federal courts recognize a common-law right of access to judicial records, although that right is not absolute. Whether to allow access at the district court level is left to the discretion of the district court, which has supervisory control over its own records and files. In exercising that discretion, the district court must consider the relevant facts and circumstances of the case and balance the public's right of access, which is presumed paramount, with the parties' interests in sealing the record. The public has an interest "in understanding disputes that are presented to a public forum for resolution" and "in assuring that the courts are fairly run and judges are honest." Courts have denied access in cases in which the court files have been sought for improper purposes such as promoting public scandal or harming a business litigant's competitive standing.

Bryan v. Eichenwald, 191 F.R.D. 650, 652 (D. Kan. 2000) (quoting *Ramirez v. Bravo's Holding Co.*, No. Civ. A. 94-2396-GTV, 1996 WL 507238, at *1 (D. Kan. Aug. 22, 1996)) (quotation marks omitted). The court explained that "[u]nless a party establishes a 'public or private harm sufficient to overcome the public's right of access to judicial records,' the court declines to seal any part of the record in the case." *Id.* (quoting *Ramirez*, 1996 WL 507238, at *1). The court emphasized that even if the parties agree to sealing, the court must independently determine whether sealing is appropriate. *See id.* ("'The fact that all litigants favor sealing the record is of interest, but not determinative.'") (quoting *Ramirez*, 1996 WL 507238, at *1).

The *Bryan* court explained that balancing public and private interests is necessary regardless of the stage of the litigation:

> Although cognizant of the inapplicability of FED. R. CIV. P. 26(c) in non-discovery contexts . . . , the court, nevertheless, views the standards for permitting documents to be filed under seal to be the

> same regardless of the stage of litigation [in which] the issue arises. At the discovery stage, the court may speak in terms of "good cause." At other stages, the court may simply refer to its discretion to supervise its own records and files. At whatever stage of the litigation, however, the movant must demonstrate a public or private harm sufficient to overcome the public's right of access to judicial records.

Id. at 652–53; *see also Allen v. Kline*, No. 07-2037-KHV, 2007 WL 3396470, at *2 (D. Kan. Nov. 13, 2007) (noting the same standard and explaining that "political consequences do not amount to a public harm that would be suffered if the underlying motion were filed on an unsealed basis").

- Another court stated the standard as follows:

> It is well settled that federal courts recognize a common-law right of access to judicial records.[] This right derives from the public's interest "in understanding disputes that are presented to a public forum for resolution" and is intended to "assure that the courts are fairly run and judges are honest." This public right of access, however, is not absolute. As federal district courts have supervisory control over their own records and files, the decision whether to allow access to those records is left to the court's sound discretion. In exercising that discretion, the court must consider the relevant facts and circumstances of the case and balance the public's right of access, which is presumed paramount, with the parties' interests in sealing the record or a portion thereof. Documents should be sealed "only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture."

Hatfield v. Price Mgmt. Co., No. 04-2563-JWL-DJW, 2005 WL 375665, at *1 (D. Kan. Feb. 16, 2005) (footnotes omitted).

- In another case, the court recognized that a party seeking sealing must demonstrate a public or private harm that overcomes the public's right of access, regardless of the stage of the litigation, but noted that "[o]ther courts in [its] district have distinguished somewhat between the broad latitude the court has to accord confidentiality to the parties' discovery and other preliminary proceedings, and the narrower discretion the court has in issuing orders resolving litigation." *Snyder-Gibson v. Cessna Aircraft Co.*, No. 06-1177-JTM, 2007 WL 527835, at *5 & n.6 (D. Kan. Feb. 14, 2007) (citing *Vulcan Materials Co. v. Atofina Chems. Inc.*, 355 F. Supp. 2d 1214, 1216–18 (D. Kan. 2005)).

Standard for Modifying a Protective Order

- The Tenth Circuit has explained that a district court has discretion to modify a protective order and discussed the competing interests to be considered in deciding whether modification is appropriate:

> Allowing modification of protective orders for the benefit of collateral litigants tends to undermine the order's potential for more efficient discovery. But when a collateral litigant seeks access to discovery produced under a protective order, there is a counterv[a]iling efficiency consideration—saving time and effort in the collateral case by avoiding duplicative discovery. In striking this balance, some circuits have adopted a presumption in favor of the continued integrity of the protective order, *see, e.g.*, *Agent Orange*, 821 F.2d at 147–48 (protective orders modifiable only under extraordinary circumstances), others have tipped the balance in favor of avoiding duplicative discovery, *see, e.g.*, *Wilk*, 635 F.2d at 1299; *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264–66 (9th Cir.), *cert. denied*, 379 U.S. 900, 85 S. Ct. 186, 13 L. Ed. 2d 175 (1964), and still others have simply left the balancing to the discretion of the trial court, *see, e.g.*, *Stavro v. Upjohn Co.* (*In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*), 664 F.2d 114, 120 (6th Cir. 1981).

United Nuclear, 905 F.2d at 1427–28 (footnote omitted). The Tenth Circuit concluded that the Seventh Circuit's approach in *Wilk* was the most appropriate:

> "[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order."

Id. at 1428 (quoting *Wilk*, 635 F.2d at 1299); *see also Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 464 (D. Utah 1991) (noting that "[w]here . . . the case involves materials and information which are restricted from public access, such as materials produced under a protective order and lodged with the court under seal, it is necessary to weigh the rights of the private party litigants who produced such materials and the reasons and policies for such restrictions against the interests of collateral and other litigants in disclosure of such materials," and stating that the Tenth Circuit has adopted the standard for modification set out in *Wilk*). The *United Nuclear* court explained that allowing collateral litigants to have access to protected discovery often is not problematic because "any legitimate interest the defendants have in continued secrecy as against the public at large can be accommodated by

placing [i]ntervenors under the restrictions on use and disclosure contained in the original protective order." 905 F.2d at 1428 (citations omitted). The court noted that "the district court must refrain from issuing discovery orders applicable only to collateral litigation," that "'[f]ederal civil discovery may not be used merely to subvert limitations on discovery in another proceeding . . . ,'" and that "'a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation.'" *Id.* (quoting *Wilk*, 635 F.2d at 1300). But the court cautioned that "'[q]uestions of the discoverability in the [collateral] litigation of the materials discovered in [this] litigation are, of course, for the [collateral] courts.'" *Id.* (quoting *Superior Oil Co. v. Am. Petrofina Co.*, 785 F.2d 130, 130 (5th Cir. 1986)).

- In a district court case, the court entered a stipulated, blanket protective order "upon a threshold showing of good cause under FED. R. CIV. P. 26(c) that the discovery [would] involve confidential, proprietary, or trade secret information . . . ," and explained that the order's terms were consistent with cases in its district that "place the burden of proving confidentiality on the party asserting the claim of confidentiality." *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, No. 05-md-1721-KHV, 2009 WL 951532, at *2, *3 (D. Kan. Apr. 7, 2009). The court explained that "the burden of proving confidentiality under a blanket protective confidentiality order 'never shifts from the party asserting that claim [of confidentiality], only the burden of raising that issue.'" *Id.* at *3 (footnote omitted). The court noted that the retained power to modify protective orders acts as a "safety valve" and "assumes particular importance in the context of blanket protective orders, which are generally entered without extensive, if any, balancing of affected interests." *Id.* (footnote omitted). The court continued: "The uncontested nature of blanket protective orders and the absence of any judicial determination of good cause with respect to specific documents arguably make such confidentiality orders particularly vulnerable to subsequent modification." *Id.* (footnote omitted). The court noted that "[a] protective order is always subject to modification or termination for good cause." *Id.* at *4 (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004)). The court relied on another case for the proposition that "the 'party seeking dissolution [of a longstanding protective order] bears the burden of showing that intervening circumstances have removed potential prejudice from disclosure that the protective order was initially intended to protect.'" *Id.* (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 894 (E.D. Penn. 1981)). The court held that when a party to an agreed protective order seeks to modify the order, the moving party "should have the burden of persuasion" because the party "agreed to the protective order . . . and the Court [initially] found sufficient good cause to enter the parties' joint protective order." *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 2009 WL 951532, at *4. The court described the following standard:

> In assessing requests to modify, courts balance the potential harm to the party seeking protection against the requesting party's need for the information and the public interest served by its release. If good cause for the protective order existed when entered, only a change in circumstances by which the good cause is either removed

> or outweighed by other interests would justify modification. . . .
>
> > Good cause requires balancing the harm to the party seeking the protective order and the importance of disclosure to the public. Some factors the court may consider in making this determination, include "privacy interests, whether the information is important to public health and safety and whether the party benefitting from the confidentiality of the protective order is a public official."

Id. at *5 (footnotes omitted).

- In the context of a defendant's request to modify a protective order to allow the defendant's experts to publish their findings, one court concluded that the lenient standard in *United Nuclear* and *Wilk* did not apply. *See Taylor v. Solvay Pharms., Inc.*, 223 F.R.D. 544, 548–49 (D. Colo. 2004). The protective orders at issue were entered upon a finding of good cause, based on concern for the privacy and safety of the families of the victims and perpetrators of a school shooting, as well as the safety of the general public. *Id.* at 547. The court found that "[t]he standard to be used in deciding whether to modify the [protective orders] is not obvious." *Id.* at 548. The court distinguished *United Nuclear* because the movant "had not suggested that the materials at issue . . . would assist it in another lawsuit or that continued protection of the materials would force it to engage in repetitive discovery in any other case." *Id.* at 548–49. The court also found that *United Nuclear*, and its requirement that parties opposing modification of a protective order demonstrate prejudice to avoid modification, was inapplicable because "[m]any of the families interested in the materials [were] not parties to [the] case and no one appears to advocate on their behalf or on behalf of the public at-large." *Id.* at 549. The court also examined the more stringent Second Circuit standard described in *TheStreet.com*, and concluded that "[t]hough that standard might have application here, where the non-party families relied upon the protective order by producing material and testifying in depositions, this case does not require such a sweeping rule." *Id.* The court settled on the following standard: "Because good cause for the [protective orders] existed when the Magistrate Judge issued them, only a change in circumstances by which the good cause is either removed or outweighed by other interests would justify modification." *Id.* The court determined that the First Circuit's decision in *Public Citizen* set out an appropriate standard under the facts, where the court upheld modification because "the party seeking modification had met its burden of showing that 'the reasons underlying the initial promulgation of the order in respect to the particular document sought no longer exist[ed]; and the district court made a reasoned determination that public interest considerations favored allowing counsel to make those particular documents public.'" *Id.* (quoting *Public Citizen*, 858 F.2d at 791–92).

ELEVENTH CIRCUIT

Standard for Entering a Protective Order

- The Eleventh Circuit has recognized that there is no common-law right of access to discovery materials not filed with the court, *see In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (per curiam) (holding that the news organizations' "common-law right of access does not extend to information collected through discovery which is not a matter of public record"), and that news organizations "possess no First Amendment rights to the protected [discovery] information which override the provisions of FED. R. CIV. P. 26(c)," *id.* The court explained that a protective order could be issued under Rule 26(c) upon a showing of good cause, and elaborated:

> "Good cause" is a well established legal phrase. Although difficult to define in absolute terms, it generally signifies a sound basis or legitimate need to take judicial action. In a different context, this court has identified four factors for ascertaining the existence of good cause which include: "[1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order." *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir. 1985). In addition, this circuit has superimposed a "balancing of interests" approach to Rule 26(c). *See Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).

Id. at 356.

The court explained that agreed protective orders can be necessary to facilitate discovery, but that even when such orders are entered, the burden remains on the party seeking confidentiality to show good cause for protecting individual documents upon a later challenge:

> Because parties often resist the exchange of confidential information, "parties regularly agree, and courts often order, that discovery information will remain private." The *Manual for Complex Litigation, Second*, prepared by the Federal Judicial Center, suggests that in complicated cases where document-by-document review of discovery materials would be unfeasible, an "umbrella" protective order, similar to the one issued in this case, should be used to protect documents designated in good faith by the producing party as confidential. Under the provisions of umbrella orders, the burden of proof justifying the need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party. Protective

> measures requested by the parties incorporating umbrella orders have been approved by other courts pursuant to Rule 26(c).

Id. (internal citations omitted); *see also Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1362 (N.D. Ga. 2002) ("[C]alling a document confidential does not make it so in the eyes of the court; these consensual protective orders merely delay the inevitable moment when the court will be called upon to determine whether Rule 26(c) protection is deserved, a decision ultimately rooted in whether the proponent demonstrates 'good cause.'") (citation omitted). The *Alexander Grant* court also articulated the reasons that umbrella protective orders may be necessary:

> The realities of today's world have shown that discovery and the exchange of information can become extremely difficult. Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document. The order issued in this case, as in others, is designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure. After this sifting, material can be "filed" for whatever purpose consistent with the issues being litigated whether by pretrial hearing or an actual trial. Judicial review will then be limited to those materials relevant to the legal issues raised. History has confirmed the tremendous saving of time effected by such an approach. The objective is to speed up discovery. Efficiency should never be allowed to deny public access to court files or material of record unless there has been an appropriate predicate established. The procedures utilized here allow the litigation to proceed expeditiously without compromising the rights of anyone. . . . We conclude that in complex litigation where document-by-document review of discovery materials would be unpracticable, and when the parties consent to an umbrella order restricting access to sensitive information in order to encourage maximum participation in the discovery process, conserve judicial resources and prevent the abuses of annoyance, oppression and embarrassment, a district court may find good cause and issue a protective order pursuant to Rule 26(c).

820 F.2d at 356–57.

- The Eleventh Circuit has also set out the following standard:

> Public disclosure of discovery material is subject to the discretion of the trial court and the federal rules that circumscribe that discretion. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 2208, 81 L. Ed. 2d 17[] (1984). Where discovery

> materials are concerned, the constitutional right of access standard is identical to that of Rule 26(c) of the Federal Rules of Civil Procedure. *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989) (citations omitted). Accordingly, where a third party seeks access to material disclosed during discovery and covered by a protective order, the constitutional right of access, like Rule 26, requires a showing of good cause by the party seeking protection. *Id.*

Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001) (per curiam).

With respect to the common-law right of access to judicial documents, the court explained that "[n]ot unlike the Rule 26 standard, the common-law right of access requires a balancing of competing interests." *Id.* at 1311 (citation omitted). But the court cautioned that there is no common-law right of access to discovery materials:

> Although there is some disagreement about where precisely the line should be drawn, when applying the common-law right of access federal courts traditionally distinguish between those items which may properly be considered public or judicial records and those that may not; the media and public presumptively have access to the former, but not to the latter. An illustrative example is the treatment of discovery material, for which there is no common-law right of access, as these materials are neither public documents nor judicial records.

Id. (footnote and citation omitted).

With respect to the balancing required under Rule 26(c), the court stated:

> Rule 26(c) permits a court upon motion of a party to make a protective order requiring "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." FED. R. CIV. P. 26(c)(7). The prerequisite is a showing of "good cause" made by the party seeking protection. *See id.* Federal courts have superimposed a balancing of interests approach for Rule 26's good cause requirement. *Farnsworth v. Procter & Gamble, Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) (citations omitted). This standard requires the district court to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential. *Id.*

Id. at 1313.

In her concurring opinion, Judge Black pointed out that discovery is necessarily a presumptively private endeavor:

> If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge.

Id. at 1316 (Black, J., concurring) (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986)) (quotation marks omitted). Judge Black explained that "the purpose of discovery is to resolve legal disputes between parties, not to provide newsworthy material." *Id.* (Black, J., concurring). Judge Black further explained that the press could intervene to challenge a protective order as overly broad, but that the courts do not have the resources to deal with document-by-document challenges:

> To facilitate prompt discovery and the timely resolution of disputes, this Court has upheld the use of umbrella protective orders similar to the one used in this case. *See, e.g.*, *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987). In these cases, we did not permit the media to challenge each and every document protected by the umbrella order. *See McCarthy*, 876 F.2d at 92; *Alexander Grant*, 820 F.2d at 356. Instead, the media was permitted only to challenge the umbrella order as being too broad, based on a variety of factors. *See id.* (listing four factors). We have restricted the scope of the media's challenge because a document-by-document approach would not only burden the trial court, but, more importantly, it would interfere with the free flow of information during discovery. *See id.* at 355–56. Such interference by parties who have no interest in the underlying litigation could seriously impair an Article III court from carrying out its core function—resolving cases and controversies. *See Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1017 (11th Cir. 1992) (Edmondson, J., dissenting).

Id. at 1316–17 (Black, J., concurring) (footnotes omitted).

- A court in the Eleventh Circuit has stated:

> Rule 26(c) authorizes the Court "for good cause shown" to protect parties from "undue burden or expense" in discovery by

> ordering "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way . . . ." FED. R. CIV. P. 26(c)(7). The party moving for a protective order has the burden of demonstrating "good cause." *Williams v. Taser Int'l, Inc.*, No. 1:06-CV-0051, 2006 WL 1835437, at *1 (N.D. Ga. June 30, 2006) (Story, J.). In demonstrating good cause, the movant must "make a 'particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements' supporting the need for a protective order." *Id.* (citations omitted); *see also United States v. Dentsply Int'l, Inc.*, 187 F.R.D. 152, 158 (D. Del. 1999) ("'Broad allegations of harm, unsubstantiated by specific examples,' do not support a showing for good cause.") (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)).

Estate of Manship v. United States, 240 F.R.D. 700, 702 (N.D. Ga. 2006).

Standard for Entering a Sealing Order

- The *Chicago Tribune* court recognized a heightened standard under the common-law right of access analysis where a court seals an entire case:

> In certain narrow circumstances, the common-law right of access demands heightened scrutiny of a court's decision to conceal records from the public and the media. Where the trial court conceals the record of an entire case, making no distinction between those documents that are sensitive or privileged and those that are not, it must be shown that "the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to that interest." This heightened scrutiny is necessitated by the fact that entire civil cases otherwise open to the public are erased as if they never occurred.

263 F.3d at 1311 (internal citations omitted). In contrast, the court stated that "[t]he common law right of access standard as it applies to particular documents requires the court to balance the competing interests of the parties." *Id.* at 1312. The court concluded that the degree of public access to court documents depends on the documents' involvement in judicial decisionmaking on the merits of a case: "The better rule is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and we so hold." *Id.* (footnote omitted).

- In connection with sealing documents filed with the court, the Eleventh Circuit has also recognized that the court has an independent duty to scrutinize requests for sealing:

> [E]ven where no third party challenges a protective order, "[t]he judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (citations omitted). Otherwise, "the interest in publicity will go unprotected unless the media are interested in the case and move to unseal." *Id.*

Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1363 (N.D. Ga. 2002).

The *Martin Luther King* court discussed the common-law right of access to judicial records:

> Because the "operations of the courts and the judicial conduct of judges are matters of the utmost public concern," courts have long recognized the public's right to inspect and copy judicial records. Nevertheless, this common-law right of access to the courts is not absolute. For example, the public has no common-law right of access to discovery materials, exchanged during a process that is typically conducted in private with minimal judicial supervision. Further, even where litigants file discovery materials with a court in connection with pretrial discovery motions, such as motions to compel, the supporting discovery documents are not subject to the common-law right of access. However, discovery materials filed with the court "in conjunction with pretrial motions that require judicial resolution of the merits [are] subject to the common-law right . . . ." This is because, unlike privately exchanged discovery materials, "documents filed as part of a dispositive motion, such as a summary judgment motion," assist the court in determining the parties' substantive rights, serve as a substitute for trial, and render those discovery documents "judicial."
>
> Nevertheless, even where the common-law right of access attaches, only in extraordinary circumstances need the denial of such access be justified by a compelling interest. Instead, the common-law right of access merely necessitates a "good cause" analysis under Rule 26(c). This analysis requires the court to (1) determine whether valid grounds for the issuance of a protective order have been presented; and (2) balance the public's interest in access against the litigant's interest in confidentiality. Where the proponent of the protective order contends that the materials at issue contain trade secrets, for example, the court must first determine whether such

> assertion is true. To present a *prima facie* case for trade secret protection, the proponent of the protective order must prove that it consistently treated the information as a secret and took steps to guard it, the information is of substantial value to the proponent, the information would be valuable to the proponent's competitors, and the information "derives its value by virtue of the effort of its creation and lack of dissemination." If the proponent fails to satisfy this first inquiry, then no "good cause" exists for the protective order. If satisfied, however, the court must then weigh the proponent's interest in confidentiality against the public's interest in access before ultimately deciding whether to issue the order.

Id. at 1365–66 (internal citations omitted).

With respect to the First Amendment right of access, the court stated that "'[m]aterials merely gathered as a result of the civil discovery process . . . do not fall within the scope of the constitutional right of access's compelling interest standard,'" and that "for purposes of determining whether to unseal such discovery materials, the First Amendment right of access standard is 'identical to the Rule 26 good cause standard.'" *Id.* at 1366 (citations omitted). The court also explained that "[w]ith respect to discovery documents submitted to a court in connection with a dispositive motion, rather than '[m]aterials merely gathered as a result of the civil discovery process,' the Eleventh Circuit has presented a somewhat muddled First Amendment analysis," and stated that "[e]ven though documents filed in support of dispositive motions are used to facilitate a resolution of the action on the merits, and are likely considered by courts in lieu of a trial to adjudicate the parties' substantive rights, the Eleventh Circuit has declared that the good cause standard, rather than the compelling interest test, satisfies any First Amendment concerns." *Id.* (citing *Chicago Tribune*, 263 F.3d at 1316; *Citizens First Nat'l Bank*, 178 F.3d at 946).

Standard for Modifying a Protective Order

- The Eleventh Circuit has not firmly set out a specific standard for modifying a protective order. *See SRS Techs., Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 526 (N.D. Ala. 2003). The *SRS Technologies* court noted that there is "no consensus among the circuits as to the proper standard to apply" to modification. *Id.* at 527. The court distinguished the First Circuit's *Public Citizen* case, explaining that in the case at bar, the parties mutually agreed to the terms of the protective order and the plaintiff was not a public citizen group seeking to obtain documents for public benefit, but a party seeking to use confidential documents in lawsuits against third parties. *Id.* After surveying the approaches in different circuits, the *SRS Technologies* court settled on the following approach:

> While this review of authority reveals no majority rule or consensus among the circuits, and no dispositive case in the Eleventh Circuit, one undisputed point does emerge: the trial court retains the

> power and the discretion to modify a prior protective order. *See, e.g.*, *Public Citizen*, 858 F.2d at 782; *United Nuclear*, 905 F.2d at 1427. Exactly what standard should guide a trial court in deciding whether to modify a protective order is less clear. The Second Circuit test, urged by defendants, applies a stringent standard that requires the moving party to show extraordinary circumstance or a compelling need to modify a protective order. *In re Agent Orange*, 821 F.2d at 147. As noted, the Eleventh Circuit rejected this strict standard in favor of grand jury access to material produced in civil litigation and covered by a protective order. *In re Grand Jury Proceedings*, 995 F.2d [1013,] 1020 [(11th Cir. 1993)]. The court assumes that the Eleventh Circuit would not follow that rejected standard in a case involving access to protected material for use in a future civil case, even though the circumstances of these two cases vary widely. The court concludes, however, that the Eleventh Circuit would not adopt the per se rule of disclosure employed in *In re Grand Jury Proceedings*, 995 F.2d at 1015, in situations like this case that do not involve the special concerns of a grand jury subpoena.
>
> This court finds that the better-reasoned standard applies a balancing test to determine whether any justification exists for lifting or modifying the protective order, similar to that employed by the Third Circuit. *See Pansy*, 23 F.3d at 790. As the Third Circuit noted, one factor the court should consider is the reliance placed by the parties on the protective order. *Id.* Another important factor should be the integrity of court orders and the purpose of confidentiality orders in streamlining the discovery process. *See* Miller, *supra*, 105 HARV. L. REV. at 499–501.

Id. at 529–30. In considering modification, the court found it important that one of the parties sought to undo the protective order after the parties had agreed to it, that the defendant had relied on the protective order, that it was important to promote reliance interests for future cases, that the plaintiff had waited until after the lawsuit settled to seek changes, and that the parties had settled the lawsuit without either party admitting liability. *See id.* at 530.

- In the context of a nonparty seeking modification of a stipulated protective order, a court in the Eleventh Circuit has explained that the party seeking confidentiality bears the burden of showing good cause for protection. *See McCarty v. Bankers Ins. Co.*, 195 F.R.D. 39, 42 (N.D. Fla. 1998) ("[W]here good cause was not shown for the initial issuance of the protective order, parties seeking to maintain the protective order must establish the need for continued protection (i.e. good cause).") (citation omitted). The court stated that although "some jurisdictions have held that general concerns of case management and efficiency have been held not to establish the requisite good-cause required for the initial issuance of a

protective order," *id.* (footnote omitted), where there has been reliance on the protective order, "the good-cause analysis for maintaining the protective order differs from the good-cause analysis which would normally accompany an initial request for a protective order," *id.* The court held that "additional factors such as reliance on the protective order, the status and needs of the person or entity seeking modification, and the pendency of other litigation brought by the person or entity seeking modification, will factor into the court's determination of the propriety of maintaining the protective order." *Id.*

The court found reliance to be an important factor in considering modification, noting that "'[f]ailure to protect Defendants' reliance on the Protective Order would not only prejudice the confidentiality interests of Defendants, it would undermine the effectiveness of protective orders in facilitating discovery.'" *Id.* at 43 (quoting *State of Florida v. Jones Chems., Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993) (internal citations omitted)) (footnote omitted). The court also focused on whether other litigation is pending against the party opposing modification, noting that "[c]ourts have reasoned that the absence of any pending litigation makes it less likely that modification will avoid repetitious or duplicative discovery, and that allowing modification may result in harassment." *Id.* (citation omitted). The court pointed out that another court had focused on the status of the nonparty as an investigator, rather than a litigant, and found that this fact required the party seeking modification to demonstrate adequate grounds for granting the request. *Id.* (citing *H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc.*, 106 F.R.D. 551 (S.D.N.Y. 1985)).

D.C. CIRCUIT

Standard for Entering a Protective Order

- The D.C. Circuit has recognized the need for flexibility in considering protective orders:

> Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise. *See, e.g.*, Adv. Comm. Note, 28 U.S.C. App., p. 715 ("The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure"); *Burka v. HHS*, 87 F.3d 508, 517 (D.C. Cir. 1996) (factors considered include "the requester's need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material, and the harm which disclosure would cause to the party seeking to protect the information"); *Hines v. Wilkinson*, 163 F.R.D. 262, 266 (S.D. Ohio 1995) ("the Rule's incorporation of the concept of 'good cause' implies that a flexible approach to protective orders may be taken, depending upon the nature of the interests sought to be protected and the interests that a protective order would infringe"); *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 106 F.R.D. 551, 556

> (S.D.N.Y. 1985) (assessing interests of third party state governments that had subpoenaed from plaintiff documents plaintiff had obtained from defendant in discovery subject to protective order); WRIGHT, 8 FEDERAL PRACTICE AND PROCEDURE 2D § 2036, at 484–86 ("the existence of good cause for a protective order is a factual matter to be determined from the nature and character of the information sought . . . weighed in the balance of the factual issues involved in each action").

United States v. Microsoft Corp., 165 F.3d 952, 959 (D.C. Cir. 1999). The court noted that Rule 26 incorporates the flexibility necessary to accommodate the interests at issue in different cases: "[A]lthough 'the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.'" *Id.* (quoting *Seattle Times*, 467 U.S. at 35 n.21). The court explained: "[T]he good cause standard of Rule 26(c) comports with the first amendment not fortuitously but precisely because it takes into account all relevant interests, including those protected by the first amendment." *Id.* at 959–60. The court concluded that "the 'good cause' standard in the Rule is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case." *Id.* at 960.

- A court in the D.C. Circuit has explained that the party seeking the protective order "must make a specific demonstration of facts to support her request for the protective order quashing the deposition." *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 71, 75 (D.D.C. 1998). The court stated:

> Specifically, good cause exists under Rule 26(c) when justice requires the protection of a party or a person from any annoyance, embarrassment, oppression, or undue burden or expense. The party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one. Indeed, "[t]he moving party has a heavy burden of showing 'extraordinary circumstances' based on 'specific facts' that would justify such an order." *Prozina Shipping Co., Ltd. v. Thirty-Four Automobiles*, 179 F.R.D. 41, [48] (D. Mass. 1988). *See also Bucher v. Richardson Hospital Auth.*, 160 F.R.D. 88, 92 (N.D. Tex. 1994) (stating that protective orders prohibiting depositions are 'rarely granted' and then only if the movant shows a "particular and compelling need" for such an order). Moreover, the showing required under Rule 26(c) must be sufficient to overcome plaintiffs' legitimate and important interests in trial preparation. *See Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) ("[T]rial preparation and defense . . . are important interests, and great care must be taken to avoid their unnecessary

infringement.").

Id.

- Another court has stated:

> Note that plaintiff argues that there is a presumption under Rule 26(c) that "discovery should be open." I see no basis for such a presumption in that Rule. *See* Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) That the Federal Rules Do Not Declare That Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV[.]331 (2006). To the contrary, in my view, determining whether there should be public access to materials disclosed in discovery requires a nuanced balancing of various factors, including "(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced."

Huthnance v. Dist. of Columbia, 255 F.R.D. 285, 288 n.3 (D.D.C. 2008) (quoting *Anderson v. Ramsey*, No. 04-CV-56, 2005 WL 475141, at *2 (D.D.C. Mar. 1, 2005) (citing *United States v. Hubbard*, 650 F.2d 293, 324–25 (D.C. Cir. 1980))) (internal record citation omitted). The court also explained:

> "[G]ood cause exists under Rule 26(c) when justice requires the protection of a party or a person from any annoyance, embarrassment, oppression, or undue burden or expense." *Fonville v. District of Columbia*, 230 F.R.D. 38, 40 (D.D.C. 2005), but "[t]he party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one." *Id.* "Accordingly, courts apply a balancing test, weighing the movant's proffer of harm against the adversary's 'significant interest' in preparing for trial." *Doe* [*v. Dist. of Columbia*], 230 F.R.D. [47,] 50 [(D.D.C. 2005)].

Id. at 296.

Standard for Entering a Sealing Order

- In *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), the D.C. Circuit discussed

factors to be considered in sealing court documents in the context of a criminal suppression hearing. The court recognized the "important presumption in favor of public access to all facets of criminal court proceedings." *Id.* at 317. The court recognized the following factors in considering whether the sealing of the documents at issue was appropriate: (1) the need for public access to the documents at issue; (2) previous public use of the documents; (3) whether objections to unsealing are raised and the identity of those objecting; (4) the strength of the generalized property and privacy interests asserted; (5) the possibility of prejudice by disclosure; and (6) the purposes for which the documents were introduced to the court. *See id.* at 317–22.

With respect to the first factor, the court considered the fact that the public had access to the courtroom proceedings on the relevant motion, the memoranda filed by the parties, the trial judge's decisions on the motion, the stipulated record, and the trial of the criminal charges. *Id.* at 317–18. The court also considered the fact that none of the documents at issue were used in the examination of witnesses, referred to in the judge's decision, or included as part of the stipulated public record. *Id.* at 318.

With respect to the second factor, the court explained:

> Previous access is a factor which may weigh in favor of subsequent access. Determining whether, when and under what conditions the public has already had access to court records in a given case cannot of course guide decision concerning whether, when and under what conditions the public should have access as an original matter. However, previous access has been considered relevant to a determination whether more liberal access should be granted to materials formerly properly accessible on a limited basis through legitimate public channels and to a determination whether further dissemination of already accessible materials can be restrained.

Id. (footnotes omitted).

With respect to the third factor, the court noted: "The kinds of property and privacy interests asserted by [a nonparty] to require retention of the documents under seal can be waived by failure to assert them in timely fashion, and the strength with which a party asserts its interests is a significant indication of the importance of those rights to that party." *Hubbard*, 650 F.2d at 319 (footnote omitted). The court elaborated that "where a third party's property and privacy rights are at issue[,] the need for minimizing intrusion is especially great and the public interest in access to materials which have never been judicially determined to be relevant to the crimes charged is especially small." *Id.* (footnote omitted).

With respect to the fourth factor, the court considered it important that the nonparty's property and privacy interests would be infringed by making the documents public. *See id.* at 320.

With respect to the fifth factor, the court stated: "[T]he possibility of prejudice to the defendants by sensational disclosure is a factor which may weigh in favor of denying immediate public access. The likelihood of prejudice will in turn depend on a number of factors, including, most importantly, the nature of the materials disclosed. Until such an examination is undertaken, the weight of this factor cannot be determined." *Id.* at 320–21 (footnote omitted).

With respect to the sixth factor, the court considered it important that the documents at issue were not relevant to the crimes charged, were not used in the trial, and were not relied upon by the judge in issuing a decision on the motion to suppress. *Id.* at 321. The fact that the connection to the proceedings was minimal weighed against public access. *See id.*

- Another case examined the propriety of granting public access to tapes used in a criminal trial, and discussed the public's general right of access to judicial documents, but also recognized that exceptions to public access exist:

> [T]he tradition of access is not without its time-honored exceptions:
>
> > Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.
>
> [*Nixon v. Warner Communications*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978)] (citations omitted). The public has in the past been excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity.

In re Nat'l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981) (quoting *Hubbard*, 650 F.2d at 315–16 (footnotes omitted)) (quotation marks omitted). The court explained that "[b]ecause of the difficulties inherent in formulating a broad yet clear rule to govern the

variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court." *Id.* (footnote and citations omitted). The court continued:

> This discretion, however, is not open-ended. Rather, access may be denied only if the district court, after considering "the relevant facts and circumstances of the particular case", and after "weighing the interests advanced by the parties in light of the public interest and the duty of the courts", concludes that "justice so requires". The court's discretion must "clearly be informed by this country's strong tradition of access to judicial proceedings". In balancing the competing interests, the court must also give appropriate weight and consideration to the "presumption—however gauged—in favor of public access to judicial records." Any denial or infringement of this "precious" and "fundamental" common law right remains subject to appellate review for abuse.

Id. (footnotes and citations omitted).

- In *DBI Architects, P.C. v. American Express Travel Related Services Co.*, 462 F. Supp. 2d 1 (D.D.C. 2006), the court applied the six factors from *Hubbard* in the context of determining whether to seal a settlement agreement in a civil case. The court stated:

> The following six factors are to be considered when determining "whether and to what extent a party's interest in privacy or confidentiality of its processes outweighs this strong presumption in favor of public access to judicial proceedings"[:]
>
> > [ ](1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

Id. at 7–8 (quoting *Johnson v. Greater Southeast Cmty. Hosp. Corp.*, 951 F. 2d 1268, 1277, 1277 n.14 (D.C. Cir. 1991)). The court noted that "[w]hile the sealing of court records barring public access may be justified when a litigant's privacy interest outweighs the public's right to know, the balancing of these important interests is a matter committed to

the trial court's sound discretion."[10] *Id.* at 8 (citing *Johnson*, 951 F.2d at 1277).

Standard for Modifying a Protective Order

- The D.C. Circuit has explained that "[g]enerally, '[t]he decision to lift or modify a protective order is proper where changed circumstances eliminate 'a continued need for protection.'" *In re Vitamins Antitrust Litig.*, No. Misc. 99-197(TFH), MDL 1285, 2001 WL 34088808, at *6 (D.D.C. Mar. 19, 2001) (citation omitted). The court also noted that "[p]rotective orders may also be modified to meet the need[s] of parties in other litigation." *Id.* (citation omitted). The court stated:

> Courts have used various formulae in determining whether to modify a protective order. In balancing competing interests, courts have weighed, *inter alia*, efficiency concerns, reliance interests upon the continued integrity of the protective order, and the public interest in open access to records and documents. A significant factor for many courts is whether the discovery sought will obviate the need for that party to engage in duplicative discovery. Implicit in this consideration is a determination of the discoverability of the materials sought.

Id. (internal citations and footnotes omitted). The court also stated that "[c]ourts have considered factors such as: whether the movant is a party to the original litigation or non-party intervenor, whether the protective order was agreed upon by the parties, whether the party seeking intervention is the government or a private party, and whether modification is sought for purely private reasons or for public reasons." *Id.* at *6 n.16.

The court noted that courts have taken various approaches to modification of a protective order:

> One line of authorities . . . place[s] the burden on the intervening party moving for modification. The rationale for this line of cases is that a party to a protective order is entitled to rely upon it. A second line of cases, however, hold[s] that the party seeking to continue a protective order bears the burden of demonstrating good cause. The rationale underscoring this line of cases is that to place the burden on the party seeking discovery of documents covered by a protective order would place an undue burden on the public's right of access and generally ignores the fact that civil litigants have an obligation to produce all relevant information.

[10] The court denied the motion to seal, noting that the settlement agreement had not been filed with the court and there was no need for its terms to be entered in the record of the case. *See DBI Architects*, 462 F. Supp. 2d at 8.

Id. at *6 n.18 (quoting *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 502 n.7 (S.D. Iowa 1992)) (quotation marks omitted).

- A court in the D.C. Circuit has explained that protective orders "may be modified to serve important efficiency or fairness goals in the court's discretion." *Infineon Techs. AG v. Green Power Techs. Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005) (citing *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998); *Alexander*, 186 F.R.D. at 100). The court noted that "[m]odification of a protective order requires a showing of good cause," that "'[g]ood cause' implies changed circumstances or new situations," that "a continuing objection to the terms of an order does not constitute good cause to modify or withdraw a protective order," and that "[t]he party seeking modification of a protective order bears the burden of showing that good cause exists." *Id.* (citations omitted); *accord United States v. Diabetes Treatment Ctrs. of Am.*, No. Civ. 99-3298, 01-MS-50 (MDL)(RCL), 2004 WL 2009414, at *2 (D.D.C. May 17, 2004).

  The *Infineon* court listed relevant factors, including: "(1) the nature of the protective order; (2) the foreseeability of the modification; (3) the parties' reliance on the protective order; and (4) the presence of good cause for modification." 247 F.R.D. at 2 (citations omitted). In addition to considering these factors, the court also considered important the fact that the party seeking confidentiality had not shown how it would be prejudiced by modification, and noted that "confidentiality concerns can be allayed by the limited modification, and by putting . . . counsel [in the related proceeding] under the terms of the Protective Order." *Id.* (citing *In re Jenoptik AG*, 109 F.3d 721, 723 (Fed. Cir. 1997)).[11]

[11] The court also considered the factors identified in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466 (2004), to be used in assessing a discovery request under 28 U.S.C. § 1782(a), which governs proceedings in a foreign tribunal. *See Infineon*, 247 F.R.D. at 4–5. The court recognized that the statute did not control the outcome in its case, but found that the factors were helpful in assessing the motion for modification of a protective order, which was made by a party for the purpose of providing documents to its counsel in Germany for use in proceedings there. The *Intel* factors include: "(a) whether the person from whom discovery is sought is a participant in the foreign proceeding; (b) the nature of the foreign tribunal, the character of the proceedings underway, and the receptivity of the tribunal to U.S. federal judicial assistance; (c) whether the request is an attempt to circumvent foreign proof gather restrictions; and (d) the intrusiveness or burden imposed by the discovery." *Id.* at 4 (quoting *Intel*, 124 S. Ct. at 1483). These factors would not seem relevant in most motions for modification of a protective order.

FEDERAL CIRCUIT[12]

Standard for Entering a Protective Order

- In analyzing Court of Federal Claims Rule 26(c), the counterpart to Federal Rule of Civil Procedure 26(c), the Federal Circuit explained that "[a] movant for a protective order . . . must show 'good cause' why a protective order should issue. Good cause requires a showing that the discovery request is considered likely to oppress an adversary or might otherwise impose an undue burden." *Forest Prods. Northwest, Inc. v. United States*, 453 F.3d 1355, 1361 (Fed. Cir. 2006) (citing *Capital Props., Inc. v. United States*, 49 Fed. Cl. 607, 611 (2001)).

Standard for Modifying a Protective Order

- In one case, applying First Circuit law, the Federal Circuit noted that "in determining whether a protective order should be modified, the court must balance the privacy interests of the parties against the public interest in access to the discovery information." *Baystate Techs., Inc. v. Bowers*, 283 F. App'x 808, 810 (Fed. Cir. 2008) (unpublished) (per curiam).

- In another case, applying Ninth Circuit law, the Federal Circuit stated:

> In *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 475 (9th Cir. 1992), the court stated that "Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation." The court stated that "legitimate interests in privacy can be protected by putting the intervenors [the parties requesting modification of the protective order] under the same restrictions as those contained in the original protective order" and

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[12] The Federal Circuit applies the law of the regional circuit when considering procedural issues not unique to patent law. *See In re Advanced Micro Devices, Inc.*, 230 F. App'x 971, 972 (Fed. Cir. 2007) (unpublished) ("Because this case involves a procedural issue not unique to patent law, we apply the law of the regional circuit . . . .") (citing *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 n.2 (Fed. Cir. 1996)); *see also Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1304 (Fed. Cir. 2009) ("We apply our own law with respect to issues of substantive patent law and also with respect to certain procedural issues pertaining to patent law. We apply the law of the regional circuit on non-patent issues.") (internal citation omitted); *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1373 (Fed. Cir. 2008) ("This court applies the law of the regional circuit to discovery issues.") (citation omitted). Because whether to grant or modify a protective order is a procedural issue not unique to patent law, the law of the regional circuit, rather than the law of the Federal Circuit, would apply when the Federal Circuit considers requests to grant or modify a protective order. *See Advanced Micro Devices*, 230 F. App'x at 972–73 (applying Ninth Circuit law to the decision of whether to grant a motion for protective order); *Schlafly v. Caro-Kann Corp.*, No. 98-1005, 1998 WL 205766, at *3 (Fed. Cir. Apr. 28, 1998) (unpublished table decision) (considering a request to review a protective order under Ninth Circuit law because the Federal Circuit "review[s] matters not within [its] exclusive jurisdiction, such as matters relating to discovery, under the applicable law of the regional circuit in which the district court sits . . . ") (citation omitted). As a result, there is not a unique set of decisions in the Federal Circuit regarding the standard for granting or modifying protective orders. The cases discussed from the Federal Circuit are examples of the application of the law of other circuits.

noted that the parties in the case had agreed to use the information only in accordance with the protective orders. *Id.*

In re Jenoptik, AG, 109 F.3d 721, 723 (Fed. Cir. 1997).[13]

[13] The dissent argued that the court also should have considered issues of comity, and argued that "[i]t is improper use of United States discovery procedures, by a party to a German action, to place in evidence, in Germany, trade secret information that is not discoverable under German law." *In re Jenoptik*, 109 F.3d at 725 (Newman, J., dissenting).

TAB 7-8-9

Calendar for September–November 2010 (United States)

September

Su	Mo	Tu	We	Th	Fr	Sa
			1	2	3	4
5	6	7	8	9	10	11
12	13	14	15	16	17	18
19	20	21	22	23	24	25
26	27	28	29	30		

October

Su	Mo	Tu	We	Th	Fr	Sa
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30
31						

November

Su	Mo	Tu	We	Th	Fr	Sa
	1	2	3	4	5	6
7	8	9	10	11	12	13
14	15	16	17	18	19	20
21	22	23	24	25	26	27
28	29	30				

Holidays and Observances:

Sep 6 Labor Day
Oct 11 Columbus Day (Most regions)
Nov 11 Veterans Day
Nov 25 Thanksgiving Day