

WHAT FEDERAL RULEMAKERS CAN LEARN FROM STATE PROCEDURAL INNOVATIONS

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I. INTRODUCTION

This conference was convened to discuss ideas and proposals for changing the existing Federal Rules of Civil Procedure (FRCP). Change is obviously appropriate in light of the ferment in federal civil procedure today. In particular, the Supreme Court's recent interpretation of standards governing Motions to Dismiss under Rule 12(b)(6) in the *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*² decisions has raised questions about access to, and fair processing of, certain claims in the federal courts.³ In addition, controversy continues about the cost and use of the discovery process, the appropriate use of protective orders and several other issues.

The adoption of the Federal Rules of Civil Procedure in 1938 marked the culmination of the work of a group of procedure experts at least equal to those who have attended this conference.⁴ This "dream team" set out to reimagine civil procedure in the most substantial reform in U.S. history. The newly created FRCP were to ensure the "just, speedy, and inexpensive determination of every action and proceeding."⁵ In 1935, Judge Clark and Professor Moore also had expressed the hope that the federal rules

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¹ 550 U.S. 544 (2007).

² 129 S.Ct. 1937 (2009).

³ See § IID *infra*.

⁴ See, generally, Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 982–91 (1987) [hereinafter Subrin, *How Equity Conquered Common Law*].

⁵ FED. R. CIV. P. 1

might "properly be a model to all the states"⁶ and that lawyers practicing in both federal and state courts in all jurisdictions would practice under substantially similar rules.

More than seventy years later, it is clear those lofty aims have not been achieved. Indeed, many of the papers presented at this conference raise substantial doubts about whether the contemporary federal rules and their application faithfully implement the aspirations of the framers and Rule 1. Using an even wider lens, it is clear that the hoped-for gravitational pull of the FRCP on state procedure has waned considerably. In a 2002 update to his survey on the conformity of state rules of civil procedure to the FRCP, Professor Oakley noted "the FRCP have lost credibility as an avatar of procedural reform."⁷

Civil procedure in state courts is important for a number of reasons. The number of cases in state courts dwarfs the federal caseload.⁸ Millions of individual Americans and businesses rely upon the state civil justice system to resolve crucial issues in their lives, e.g., personal injuries, family law matters and commercial disputes. While our common law litigation tradition has involved primarily private parties seeking redress for private wrongs, courts today are often required to decide questions which transcend the rights and obligations of the individual parties.

DeToqueville noted in the 1840's that law, lawyers and the legal system are central ingredients in our American democracy. "Scarcely any political question arises in the

⁶ Charles Clark & James William Moore, *A New Federal Civil Procedure*, 44 YALE L.J. 387, 387 (1935).

⁷ John B. Oakley, *A Fresh Look at the Federal Rules in State Courts*, 3 NEV L.J. 354, 358 (2002).

⁸ More than fourteen million civil cases were filed in general jurisdiction state courts in 2007 and another sixty-nine million in limited jurisdiction courts. National Center for State Courts, *Examining the Work of State Courts: A National Perspective from the Court Statistics Project* (2009), available at http://www.ncsconline.org/D_Research/csp/2007B_files/EWSC-2007-v21-online.pdf (hereinafter "NCSC 2009"). In contrast, the number of civil cases filed in federal district courts in 2009 totaled 276,397. U.S. Gov't Printing Off., *Judicial Business of the United States Courts: 2009 Annual Report of the Director*, T. S-7 (2009).

United States that is not resolved, sooner or later, into a judicial question.”⁹ The Supreme Court has recognized the “prominence of the States in matters of public health and safety.”¹⁰ Major public policy issues are routinely decided through civil litigation in the United States, many of these in state courts. Contemporary examples include the liability of tobacco companies to smokers and to government for the costs of smoking-related illnesses,¹¹ damages from Hurricane Katrina,¹² the nation-wide scandal of abusive Catholic priests,¹³ and numerous current “front page issues.”¹⁴ The public nature of this litigation emerges in a variety of contexts: (a) private suits involving

⁹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 290 (Henry Reeve ed., Vintage Books 1945) (1795).

¹⁰ *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996).

¹¹ See, e.g., CARRICK MOLLENKAMP, ADAM LEVY, JOSEPH MENN & JEFFREY ROTHFEDDER, *THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS* (1998).

¹² See *Barbara Landry v. La. Citizens Prop. Ins. Col.*, 983 So.2d 66, 83 (La. 2008) (upholding flood damage exclusion in insurance policies); *State v. All Prop. & Cas. Ins. Carriers Authorized & Licensed to do Bus. in the St. of La.*, 937 So. 2d 313, 330 (La. 2006) (holding that an executive act by the governor extending the time frame in which citizens had to file insurance claims was constitutional). See generally *La. Supreme Ct., Rules for La. Dist. Cts.*, available at <http://www.lasc.org/rules/dist.ct/CDCAppendices.pdf> (providing specific procedure and cause number types for claims arising out of Hurricanes Katrina and Rita and suggesting that the continued number of claims in Louisiana courts pertaining to these disasters is still large).

¹³ See, e.g., *Doe v. Norwich Roman Catholic Diocese*, 909 A.2d 983, 987 (Conn. Super. 2006) (denying defendant’s motion for summary judgment on claims alleging negligence, breach of fiduciary duty and reckless or wanton misconduct in a suit alleging sexual abuse of minors by priests); *Doe v. Roman Catholic Archdiocese of St. Louis*, 2010 WL 623698, at *3 (Mo. App. E.D. 2010) (holding that the First Amendment bars tort claims against a religious institution based on its negligent hiring, retention, or supervisions of sexually abusive clerics); Tom Hals & Santosh Nadgir, *Mediator Named in Delaware Catholic Abuse Claims*, REUTERS, May 4, 2010, <http://www.reuters.com/article/idUSTRE6435K920100504> (discussing the naming of a mediator after a Catholic diocese filed for bankruptcy to diffuse the start of civil trials in state court stemming from sexual abuse allegations dating to 1950s). See generally TIMOTHY D. LYTTON, *HOLDING BISHOPS ACCOUNTABLE* (2008).

¹⁴ *Pena v. Newell Funding, LLC*, No. ESX-C-16-09 (N.J. Super. Ct. Apr. 23, 2010) (order awarding attorney’s fees in consumer fraud action against foreclosure-rescue companies). See, e.g., New Jersey Judiciary, *Mass Tort – NuvaRing*, http://www.judiciary.state.nj.us/mass-tort/nuvaring/case_list.htm (last visited May 17, 2010) (complaints allege birth control method increases risk of blood clots due to the high amounts of hormones released; class action includes the death of a woman caused by deep vein thrombosis); Laurel Brubaker Calkins & Margaret Cronin Fisk, *BP, Transocean Lawsuits Surge as Oil Spill Spreads in Gulf*, BUSINESSWEEK, available at <http://www.businessweek.com/news/2010-05-01/bp-transocean-lawsuits-surge-as-oil-spill-spreads-in-gulf.html> (stating that BP and Transocean face at least 36 state lawsuits arising out of the oil spill in the Gulf of Mexico). See Amanda Bronstad, *Act I for Toyota: State Lawsuits Could Set the Stage for the Automaker’s Federal Mass Tort*, THE NAT’L LAW J. (May 3, 2010), available at <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202457483899> for a discussion of this and other state cases.

product safety, corporate governance, and other issues of common concern;¹⁵ (b) suits by or against government or government agencies¹⁶ including “private attorney general” suits;¹⁷ and (c) class actions and other representative actions, which, by definition, involve the substantive rights of large groups of people.¹⁸

Dean Carrington has noted that courts are the American alternative to a bureaucratic state: “[t]he superiority of private litigation over the administrative process was recognized in the years following 1938, when modern discovery was introduced.”¹⁹ The need to supplement, or to create greater, remedies than those provided by regulatory agencies is widely recognized. Civil litigation has become an important instrument for creating public reforms and for challenging existing institutional practices.

Long ago Justice Brandeis praised the ability of states to be laboratories in which

¹⁵ See products and events described *supra* nn. ____ and accompanying text.

¹⁶ See *e.g.* Miller v. Filter, 150 Cal. App. 4th 652, 666 (3d Dist. 2007) (affording immunity to rural prosecutors for bringing an action to enforce mine safety regulations); Asbury Park Press v. Lakewood Tp. Police Dept., 804 A.2d 1178, 1192 (N.J. Super. L. Div. 2002) (ordering the release of 911 tapes to the press regarding a police brutality allegation).

¹⁷ See *e.g.*, Savaglio v. Wal-Mart Stores, Inc., 149 Cal. App. 4th 588 (1st Dist. 2007). In a case alleging that Wal-Mart denied employees meal breaks, the court stated:

The private attorney general doctrine codified in section 1021.5 “ ‘rests upon the recognition that privately initiated lawsuits are often essential to the effectuation of the fundamental public policies embodied in constitutional or statutory provisions, and that, without some mechanism authorizing the award of attorney fees, private actions to enforce such important public policies will as a practical matter frequently be infeasible.’” Thus, the fundamental objective of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants in such cases.”*Id.*

See also State v. Marsh & McLennan Cos., 2007 Conn. Super. LEXIS 216 (Jan. 25, 2007) (discussing private attorney general suits and anti-trust law).

¹⁸ Over the past generation, the Supreme Court has dramatically limited the availability of the federal forum for large scale class action suits. See, *e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173 (1974) (individual notice to each identifiable class member in FED. R. CIV. P. 23(b)(3) actions required; full costs to be borne by plaintiffs) See, *e.g.*, MICH. CT. R. 3.501(A)(4) (providing that “[c]lass members have the right to intervene in the action, subject to the authority of the court to regulate the orderly course of the action”); OHIO CIV. R. 23(E) (providing that a class action suit cannot be dismissed without approval of the court and notice of the proposed dismissal to members of the class). See Nat’l Center for St. Cts., *Mass Torts: Lessons in Competing Strategies and Unintended Consequences*, CIVIL ACTION, Vol. 2, No. 1, 1–2 (Spring 2003). Snyder v. Harris, 394 U.S. 332, 341 (1969) (no aggregation of claims of individual class members allowed to satisfy amount in controversy requirement in diversity cases) “Ninety-eight percent of mass tort cases are ultimately resolved in state courts.” *Id.* at 1.

¹⁹ Paul D. Carrington, *Renovating Discovery*, 49 ALA. L. REV. 51, 54 (1997).

experiments in the law might be conducted.²⁰ Federal rulemakers considering changes can learn much from these trial runs. To that end, this essay focuses on two major themes: the increasing divergence in pretrial rules and processes between state and federal rules and why federal law should follow a growing state trend to lift the veil of secrecy which has made litigation inaccessible to the public. Changes in the FRCP can help recapture the original vision of federal litigation expressed in Rule 1.

II. THE GROWING DIVERGENCE BETWEEN THE FRCP & STATE PROCEDURE

A. Customized Rules

A fundamental principle of the 1938 procedural revolution was transsubstantive rules, i.e., uniform practice in all types of federal civil cases.²¹ Boldly combining the previously separate law and equity systems, the FRCP has remained true to this principle.²² While many states initially adopted the federal rules, either totally or in substantial part,²³ state procedure today often makes sharp differentiations between cases defined by subject, amount in question, or other characteristics. A few examples suffice to illustrate.²⁴ In Arizona, medical malpractice cases have their own rules.²⁵ In

²⁰ *New St. Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

²¹ The Rules Enabling Act prescribes “general rules of practice and procedure.” 28 U.S.C. § 2072 (1934). See generally, Geoffrey C. Hazard, Jr., Symposium, *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2244–46 (1989).

²² Federal Article I courts, of course, have their own rules. See generally FED R. BANKR. P.; U.S. TAX CT. R. PRAC. & P.; R. U.S. CT. FED. CLAIMS.

²³ John B. Oakley & Arthur F. Coons, *The Federal Rules In State Courts: A Survey of State Court Systems of Civil Procedure*, 61 WASH. L. REV. 1367, 1381 (1986).

²⁴ This essay is not the venue to exhaustively detail these differences but they are collected in other sources. For example, in volumes 11-16 of Matthew Bender’s Forms of Discovery I annually update a rule-by-rule comparison between the 50 state rules on discovery and Rules 26–37 of the FRCP. The rules are summarized in charts or presented in full text and are annually compared to the comparable federal discovery rules. See 11 BENDER’S FORMS OF DISCOVERY, app. B (2007) (Comparison of State Rules with Federal Rules of Civil Procedure 26 through 33); *Id.* at app. C (State Rules Governing Discovery at Variance With the Federal Rules); 12 BENDER’S FORMS OF DISCOVERY, app. E (2007) (Comparison of State Rules With Federal Rule of Civil Procedure 34); *Id.* at app. F (State Rules at Variance With Federal Rule 34); 13 BENDER’S FORMS OF DISCOVERY, app. H (2007) (Comparison of State

New York negligence cases, interrogatories and depositions are mutually exclusive except with leave of court.²⁶ Alaska has special discovery rules for domestic relations matters²⁷ and in Colorado distinct rules are used in many kinds of cases.²⁸

The different nature of the caseload in state courts from that in the federal courts partially explains some of this variety of rules. The scope, cost, and speed of pretrial process in state litigation has been debated as vigorously as in the federal courts²⁹ The volume and type of allowable discovery in the states are now often differentiated by the amount in controversy. Alaska Rule 26(g), for example, permits only limited discovery and requires expedited calendaring for personal injury or property damages cases involving less than \$100,000.00.³⁰ South Carolina bans physical or mental examinations unless the case involves more than \$100,000.00.³¹ Some states bar all discovery, except by agreement of parties or leave of court, in particular courts or in cases involving less than a stipulated amount.³² Categorizing cases based on the amount in controversy is common in a society which values efficiency, but raises

Rules With Federal Rules of Civil Procedure 35 & 36); *Id.* app. I (State Rules at Variance With Federal Rules of Civil Procedure 35 & 36); 14 BENDER'S FORMS OF DISCOVERY, app. K (2007) (Comparison of State Rules With Federal Rules of Civil Procedure 37 & 45).

²⁵ ARIZ. R. CIV. P. 26.2 requires exchange of all relevant medical records, exchange of uniform interrogatories and a request for production of specified documents prior to the Rule 16(c) comprehensive pretrial conference.

²⁶ N.Y. CIV. PRAC. L&R 3130(1).

²⁷ ALASKA R. CIV. P. 26.1.

²⁸ COLO. R. CIV. PRO 16.2.

²⁹ See generally Amy Farmer & Paul Pecorino, *Civil Litigation with Mandatory Disclosure and Voluntary Transmission of Private Data*, 34 J. Legal Stud. 137 (2005); Richard P. Holme, *Just, Speedy and Inexpensive: Possible Simplified Procedure for Cases Under \$100,000*, 29 COLO. LAW. 5 (2000); Hon. Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 13 (1993) (discussing the conclusion of an Arizona committee that greatest cause of inefficiency in the state civil process was delay and excessive cost created by lawyers in the discovery process).

³⁰ ALASKA R. CIV. P. 26(g).

³¹ S.C. R. CIV. P. 35(a). In addition depositions in cases under \$10,000.00 and interrogatories in cases under \$25,000.00 and are prohibited. *Id.*

³² E.g., MICH. CT. R. 2.302(A)(2) (providing that in District Court no discovery is permitted). MICH. COMP. LAWS ANN. § 600.8301 (West 2010) (Michigan District Courts have exclusive jurisdiction in civil actions when the amount in controversy does not exceed \$25,000.00). In Utah, no discovery is allowed in contract cases of less than \$20,000.00 and in other specified cases. UTAH R. CIV. P. 26(2)(2)(A).

questions of fairness to litigants with smaller claims.³³

A number of states that formerly followed the FRCP closely have experimented with even more comprehensive innovations. In January, 1999 new Texas rules became effective.³⁴ The changes were to reduce “costs, delays and misuse” associated with the existing pretrial practice.³⁵ Texas Rule 190 divides cases into categories and requires “discovery control plans” in each category.³⁶ “Level 1” cases involve claims for monetary relief of \$50,000 or less.³⁷ Discovery is limited severely in these cases.³⁸ In “Level 2,” parties use the pre-existing Texas Discovery Rules but with specified restrictions.³⁹ Discovery in Level 3 cases (complex cases that do not fit Levels 1 and 2) is individually managed by the court which has wide latitude in overseeing the pretrial phase.⁴⁰

Colorado was the second state in the country to adopt the Federal Rules as its own state rules in 1941⁴¹ but it has now created procedure distinct from the FRCP. Mandatory disclosure and explicit limits on traditional discovery were the central themes

³³ See generally Robert D. Cooter & Daniel L. Rubinfeld, *Reforming the New Discovery Rules*, 84 Geo. L.J. 61 (1995).

³⁴ TEX. R. CIV. P. 190-215.

³⁵ Explanatory Statement Accompanying the 1999 Amendments to the Rules of Civil Procedure Governing Discovery, Order of Aug. 5, 1998.

³⁶ TEX. R. CIV. P. § 190.1 (cmt. 1 to 1999 changes).

³⁷ *Id.* § 190.2 (cmt. 1 to 1999 changes). Divorces not involving children where the value of the marital estate is less than \$50,000. *Id.* § 190.2(a) cmt. 2 to 1999 changes.

³⁸ For example, each party is restricted to six hours of oral depositions. *Id.* § 190.2(c)(2). Interrogatories may not exceed twenty-five. *Id.* § 190.2(c)(3) and all other limitations set by other rules apply. *Id.* § 190.2.

³⁹ *Id.* § 190.3(b)(3). Interrogatories are limited to twenty-five. *Id.* An aggregate limit of fifty hours is imposed on each side for depositions of parties. *Id.* § 190.3(b)(2).

⁴⁰ *Id.* § 190.4, 4(a). In a pretrial scheduling order, the trial judge determines the discovery period, limitations on the amount of discovery, deadlines for pleading, and any other matters that may be addressed under Rule 166(a). *Id.* § 190.4(b). Requests for Disclosure by which a party may obtain basic discoverable information bar objections based on work product or unnecessary expense. *Id.* § 192.4 (cmt. 1 to 1999 changes). Failure to fully disclose is an abuse of the discovery process. *Id.* § 194 (cmt. 1 to 1999 changes).

⁴¹ John B. Oakley & Arthur F. Coons, *The Federal Rules In State Courts*, 61 WASH L. REV. 1367, 1384 (1986).

of the 1995 amendments to the Colorado rules. A party may take only one deposition of each adverse party and of two other persons.⁴² Other discovery devices are similarly prescribed.⁴³ Colorado Rule 26.3 provides special procedures for disclosure, alternate dispute resolution, discovery and trial procedures for civil actions in which the claimant seeks monetary damages under \$50,000.⁴⁴ Colorado Rule 37, the sanctions provision, was amended to include the new disclosure procedures as well as the discovery process.⁴⁵ Failure to disclose bars presentation of that evidence unless the failure is harmless.⁴⁶

A third provocative reform differentiating state procedural rules from the FRCP is the use of court created, rather than lawyer initiated, discovery. In this area, state courts have begun to reflect a more civil law concept of litigation in which the judge, rather than the parties, is in charge of collecting and organizing evidence.⁴⁷ Arizona has standard interrogatories for personal injury, including wrongful death, and contract actions.⁴⁸ Connecticut uses form interrogatories in actions arising from the operation or ownership of a motor vehicle or the ownership, maintenance, or control of real property.⁴⁹ California⁵⁰ New Jersey,⁵¹ Colorado,⁵² Florida,⁵³ Maryland,⁵⁴ and South Carolina⁵⁵

⁴² COLO. R. CIV. P. 26(b)(2)(A).

⁴³ *Id.* § 26(b)(2)(B). Only twenty interrogatories, requests for production and requests for admissions are permitted. *Id.* § 26(b)(2)(D), 26(b)(2)(E).

⁴⁴ *Id.* § 26.3. In 2004, special "Simplified Rules" were instituted for civil cases seeking damages of less than \$100,000.

⁴⁵ *Id.* § 37(a), 37(a)(2)(A).

⁴⁶ *Id.* 37(c)(1). Reasonable expenses and attorneys fees are available when one party has failed to produce the required information. *Id.*

⁴⁷ See generally Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299 (2002).

⁴⁸ ARIZ. R. CIV. P. 33.1; see e.g. ARIZ. R. CIV. P. FORM 4A/4.

⁴⁹ ARIZ. R. CIV. P. 33.1. See, e.g., ARIZ. R. CIV. P. FORM 4A/4.

⁵⁰ See e.g. CAL. CIV. PROC. CODE §§ 2030(c), 2033.5.

⁵¹ See N.J. CN. PRAC. R. 4:17-1(h)(i); N.J. COURT RULES APP. II.

⁵² COLO. R. CIV. P. 33(e); COLO. R. CIV. P. FORMS 20 (providing uniform interrogatories); *Id.* § 21.2 (providing uniform Requests for Production in domestic relations matters)

likewise encourage or require the use of pattern discovery, i.e., standard interrogatories, requests for production and requests for admission, in specific types of cases.⁵⁶

Powerful incentives are employed to encourage the use of court-initiated forms, a reflection of the desire to make the pretrial process more economical and efficient. Many states now impose numerical limits on interrogatories, requests for admission and other discovery. Interrogatories initiated by parties count each subpart as a single interrogatory; court created interrogatories, however, even containing subparts are counted as one.⁵⁷ Parties in many state courts are now deemed to have been served automatically with applicable form interrogatories or other requests for information without request by the opposing party.⁵⁸

B. Specialty Courts and Dockets

Dissatisfaction with the delays and costs of litigation have often been expressed about casehandling in the federal courts. State courts have moved nimbly and aggressively to meet these problems. The creation of specialty courts, staffed with chosen judges and deploying innovative and differential case management, is another important experiment underway in the states. These courts, variously called Business Courts, Complex Litigation Dockets, or similar titles, have been created to deal with a small subset of the total state caseload. They owe their genesis to judicial initiatives, after careful investigation of problems, rather than to legislative mandates.

⁵³ See FLA. R. CIV. P. 1.340(a) (requiring that "if the supreme court has form interrogatories for the type of action, the initial interrogatories shall be in the form approved by the court").

⁵⁴ See MD. R. CIV. P. 2-421(a) (counting court "form" interrogatories only as a single interrogatory).

⁵⁵ See S.C. R. CIV. P. 33(b)(i)–(b)(7) (setting out standard form interrogatories to be used)

⁵⁶ See UTAH R. CIV. P. FORMS 18, 29, 20.

⁵⁷ See e.g. MD. R. CIV. P. 2-421(a).

⁵⁸ New Jersey utilizes pattern interrogatories in this manner. After a case is filed, the parties must automatically respond to the court-created discovery without service of any paper. N.J. CIV. PRAC. R. 4:17-1(b)(2). See also, CONN. SUPER. CT. R. § 13-6 (allows service of Notice of Interrogatories in lieu of actually serving the interrogatories set forth in the forms); CONN. SUPER. CT. R. § 13-8(a) (provides no objection may be filed with respect to interrogatories set forth in the form).

At least nine states have courts of this general description. These tribunals administer and decide commercial litigation often involving large dollar amounts, issues of corporate governance, banking law or securities, technology issues and similar matters. Judges utilize continuous case management over matters which need special oversight, particularly discovery matters, motion practice, and special proceedings. Expedited rulings on motions and firm dates for trial are characteristic. An additional common objective is the development a consistent body of precedent in these topics.

Connecticut may serve as a prototypical example for these courts. The Complex Litigation Docket (CLD) was established to cope with cases involving multiple litigants, legally intricate issues, or claims for damages that could total millions of dollars.⁵⁹ These cases benefit from individualized judicial oversight, most particularly in discovery. While there are no set rules for inclusion on the CLD, the following cases have often been found to be appropriate; mass torts, construction contracts, corporate governance, dissolution or transfer of control of business entities, Uniform Commercial Code, securities, and others.⁶⁰

Courts in other states display similar innovations. In Florida, the Complex Business Litigation Courts were created by judges to handle cases involving antitrust, intellectual property cases, franchise, and unfair competition matters.⁶¹ Strict limits are imposed upon traditional discovery methods. In Georgia, the Business Court determines actions in which the amount in controversy exceeds \$1,000,000 and which are brought pursuant to state statutes governing securities, commercial relations, corporations and

⁵⁹ State of Connecticut Judicial Branch, *Facts About the Connecticut Judicial Branch Complex Litigation Docket*, <http://www.jud.ct.gov/external/super/facts.pdf> (last visited May 20, 2010).

⁶⁰ *Id.*

⁶¹ Florida Business Courts, *About the Florida Business Courts*, <http://flabuscourts.org/> (last visited May 20, 2010).

related topics.⁶²

Expedited procedure is a striking feature of these specialty courts. In Ohio, judges must decide all motions in commercial cases within sixty days of their filing; cases must be resolved within eighteen months.⁶³ Maryland judges are specially trained in business and technology. Cases are assigned different tracks at an initial scheduling conference. An expedited track requires trial within seven months from the date of filing of defendant's responsive pleading while a second track brings cases to trial within twelve months.⁶⁴

A number of authors have discussed whether these Business/Complex Litigation Courts receive a disproportionate amount of resources and attention thereby disadvantaging smaller cases.⁶⁵ While these cases do consume considerable judicial and administrative resources, these suits would be in the legal system regardless of venue. Efficiency, consistency, and lower costs may well counsel special treatment for this class of cases.

C. Swords to Ploughshares: Mandatory Disclosure in State Courts

"Where the object always is to beat every ploughshare into a sword, the discovery procedure is employed variously as weaponry."⁶⁶

⁶² Fulton Superior Court, *Rule 1004-Amended Business Case Division*, available at http://sca.fultoncourt.org/superiorcourt/pdf/business_court.pdf.

⁶³ Franklin County Court of Common Pleas, Court News, <http://www.fccourts.org/gen/WebFront.nsf/wp/56A54A2DE9D04EB38525752000720CF8?opendocument> (last visited May 20, 2010).

⁶⁴ Maryland Courts, *Maryland Business and Technology Case Management Program* (2001), available at <http://courts.state.md.us/b&t-ccfinal.pdf>.

⁶⁵ See Mitchell L. Bach, Lee Applebaum, *A History of the Creation and Jurisdiction of Business Courts in the Last Decade*, 60 Bus. Law. 147, 211 (2004) (discussing how the cases in business courts may generally take more resources, but are still a more efficient use of resources); Ember Reichgott Junge, *Business Courts: Efficient Justice or Two-Tiered Elitism?*, 24 Wm. Mitchell L. Rev. 315, 318–19 (1998).

⁶⁶ MARVIN E. FRANKEL, *PARTISAN JUSTICE* 18 (1980).

Mandatory disclosure of specified information by the parties in state courts is now common.⁶⁷ Although the FRCP also require some mandatory disclosure,⁶⁸ state rules are often significantly more demanding in an attempt to limit or eliminate the “litigation within litigation” which often characterizes formal discovery. The underlying rationale is to mandate cooperation during the pretrial period and to restrict overt conflict between parties to its appropriate venue—the trial. A number of recent state rule changes illustrate this movement.

In Arizona, a wide range of information must be disclosed by each party within 40 days of a responsive pleading.⁶⁹ Former Arizona Justice Zlaket, the architect of the new rules, has written

[A]t the outset of a case the parties must make a full, mutual and simultaneous disclosure of all relevant information known by or available to them and their lawyers. In other words no more 'hide the pea'. No longer will it be advantageous to play games of semantics ("If he'd have just asked the right question..."). Hopefully, Rule 26.1 will eliminate the need for extensive discovery in most cases...⁷⁰

Relevant documents and electronically stored information must be exchanged together with a list of all materials withheld and the reasons for nonproduction.⁷¹ None of this is required in federal court. Failure to produce is enforced by sanctions based on a

⁶⁷ See e.g. ALASKA R. CIV. P. 26(a); ARIZ. R. CIV. P. 26.1(a); ILL. S. CT. R. 222(d); UTAH R. CIV. P. 26(a)(1).

⁶⁸ FED. R. CIV. P. 26(a).

⁶⁹ ARIZ. R. CIV. P. 37(c). Prior to adopting the disclosure-discovery changes statewide, Arizona tested the proposed rules in a single county. Hon. Robert D. Myers, *MAD Track: An Experiment in Terror*, 25 ARIZ. ST. L.J. 11, 13 (1993). The demonstration showed that cases using the new procedures terminated almost two months earlier on average than cases using traditional discovery methods, and depositions and other discovery devices were used far less. *Id.* Attorneys who handled cases under the new system commented that disclosure significantly reduced the amount of time needed to exchange information for appropriate resolution of cases. *Id.* at 23.

⁷⁰ Thomas A. Zlaket, *Encouraging Litigators to be Lawyers: Arizona's New Civil Rules*, 25 ARIZ. ST. L.J. 1, 5 (1993).

⁷¹ ARCP 26.1, Prompt Disclosure of Information.

“disclose it or lose it” philosophy; any information not timely disclosed is barred from trial except by leave of court for good cause shown.⁷²

In Illinois mandatory disclosure requirements and strict limitations on discovery are imposed in civil actions seeking money damages under \$50,000.⁷³ If a judgment is rendered in excess of that amount, a post-trial reduction of the judgment is required.⁷⁴ Disclosure of information and documents is mandatory within 120 days after the filing of a responsive pleading and occurs automatically; no request is needed.⁷⁵

Mandatory disclosure, expedited procedure and explicit limits on traditional discovery are also the central themes of contemporary Colorado rules.⁷⁶ Once a case is at issue counsel must confer within 15 days, transmit all mandatory disclosure within 30 days, and submit a proposed case management order within 45 days.⁷⁷ Another innovation is that attorneys must advise clients of the estimated costs and fees of conducting discovery.⁷⁸ Clients are thus better informed consumers of legal services and may better calculate the costs and benefits of litigating their claim.

In addition, Simplified Rules in Colorado for cases involving less than \$100,000 substitute required mutual exchange of information within thirty days for almost all traditional discovery rights.⁷⁹ In employment cases, for example, plaintiffs must provide prior employment history documentation, demonstrate efforts to find work, and sign

⁷² ARIZ. R. CIV. P. 37(c). Rule 26.1(c) was deleted in 1996 but a modified rule was incorporated into Rule 37(c)(i). See *Id.* at cmt. 1 to 1996 amends.

⁷³ ILL. S. CT. R. 222.

⁷⁴ ILL. S. CT. R. 222(b).

⁷⁵ ILL. S. CT. R. 222(c).

⁷⁶ COLO. R. CIV. P. 16(b).

⁷⁷ *Id.*

⁷⁸ COLO. R. CIV. P. 16(B)(1)(IV).

⁷⁹ In place of traditional discovery, these rules provide for disclosure of witnesses or persons likely to have discoverable information, relevant documents, data compilation and tangible things, a computation of damages claimed, and insurance policies concerning "disputed facts alleged with particularity in the pleading." COLO. R. SIMPLIFIED P. 1.1(c)(1); COLO. R. CIV. P. 26(a).

waivers allowing access to their prior personnel files.⁸⁰ The defendant must produce the plaintiff's personnel file.⁸¹ A refusal to provide the requested information or an incomplete response is subject to sanction.⁸²

Those choosing to use this Colorado pretrial system receive early trial settings and speedy adjudications. The Simplified Rules offer an alternative to current problems including failure to distinguish between major, complicated disputes and those that might be tried effectively with little or no pretrial discovery, high cost, and slow processing of cases. The simplified procedure is designed to dramatically reduce the flow of paper, meetings, time and expense of our existing system.

These state processes forcing information exchange improve pretrial process.⁸³ Traditional discovery is often brass knuckled conflict, conducted largely without a referee. Each request for information is treated as narrowly as possible and every claim of privilege or irrelevance asserted as broadly as possible.⁸⁴

The general principle guiding discovery requests for documents is that defense counsel may not flatly lie or hide documents, but they are entitled to be "aggressive," making the plaintiff's lawyer "work for what he wants," and withhold from relieving the plaintiff's lawyer of the burden of preparing his own case.⁸⁵

⁸⁰ COLO. R. SIMPLIFIED P. 1.1(c)(1)(B)(II).

⁸¹ COLO. R. SIMPLIFIED P. 1.1(c)(1).

⁸² COLO. R. SIMPLIFIED P. 1.1(c)(1)(B)(iii). The Colorado rules provide a variety of remedies for improperly withholding information in pretrial procedures: precluding evidence at trial that was not disclosed; requiring payment of expenses, including attorneys fees caused by the failure to disclose; judicially designating facts as being established for purposes of the litigation; striking all or parts of the resisting party's pleadings; and even entering default judgment for failure to comply with pretrial obligations. COLO. R. CIV. P. 37(c). Additional specific information and documentation that a party believes should be disclosed may be demanded. Rule 1.1(c)(1)(B)(iii).

⁸³ FED. R. CIV. P. 1 and state analogues, e.g., COLO. R. CIV. P. 1.

⁸⁴ See generally Robert W. Gordon, *The Ethical Worlds of Large Firm Litigators: Preliminary Observations*, 67 *FORDHAM L. REV.* 709 (1998)

⁸⁵ *Id.* at 712.

In this environment, counsel use the pretrial process to maximize information gathering and admissions from the opponent, while at the same time resisting sharing information with the adversary.⁸⁶

Providing information to an opponent is substantively and psychologically difficult in our existing system. Traditionally, the lawyer's duty is zealous representation of her client's interests.⁸⁷ Recently, there is no ethical obligation to ensure that all relevant information is made known. But many state procedural rules now are unequivocal in requiring counsel and their clients to disclose even information that may prove harmful to their own interests. My hope is that the disclosure rules in Arizona, Illinois, Colorado, and other states will eventually lead to an ethical duty to the court on attorneys to seek a full presentation of all facts. Rule 3.4(a) of the ABA Model Rules of Professional Conduct provides "a lawyer shall not: (a) unlawfully obstruct another party's access to evidence."⁸⁸ Legal disputes should be resolved by what the facts reveal rather than what is concealed. As the Supreme Court has noted "[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation."⁸⁹ Clients'

⁸⁶ See, e.g., Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK L. REV. 263, 264 (1992) (concluding that discovery can be used to impose costs on opponents and avoid adverse decision); Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 32 CLEVE. ST. L. REV. 17 (1988) at 18–19 (opining that discovery "gives impetus and opportunity to the baser litigational instincts of delay, deception, and unbridled confrontational advocacy").

⁸⁷ ABA MODEL R. PROF'L CONDUCT 3.4 (cmt. 2). See, e.g., Colin Campbell & John Rea, *Civil Litigation and the Ethics of Mandatory Disclosure: Moving Toward Brady v. Maryland*, 25 ARIZ. ST. L.J. 237 (1993).

⁸⁸ ABA MODEL R. PROF'L CONDUCT 3.4(a). The alleged "unlawfulness" would be a violation of the disclosure requirement. Rule 3.4(d) likewise imposes a duty of fairness to opposing party and counsel. *Id.* § 3.4(d). Since lawyers are also under a duty to comply with prevailing rules of procedure, Rule 3.4(d) might also be said to be a specific application of Rule 3.4(c), Obedience to Rules of a Tribunal. See *Id.*

⁸⁹ *Hickman v. Taylor*, 329 U.S. 495, 507 (1947); see also *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682-83 (1958) (discovery together with fair trial procedures "make trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.") (citing *Hickman*, 329 U.S. at 501).

interests would be as zealously protected under a cooperative pretrial regime as under our current practice.

D. Access to Courts and Motions to Dismiss

The adoption of the Federal Rules in 1938 provided powerful weapons to the litigation campaigns for civil rights which characterized the mid-twentieth century.⁹⁰ Charles Clark, former President of the Association of American Law Schools and the drafter of the Federal Rules was fond of quoting Frankfurter: “[n]ew winds are blowing on the old doctrines, the critical spirit infiltrates traditional formulas . . .”⁹¹ The Federal Rules simplified pleading,⁹² expanded joinder of parties and claims, and emphasized ease of litigation rather than technical legal pleadings.⁹³ Notice pleading was undergirded by liberal discovery.

In the 1930s and 1940s the Supreme Court began to respond to test case litigation by African Americans which, step by step, ultimately dismantled *de jure* segregation.⁹⁴ In 1957, the link between the burgeoning substantive doctrine of civil rights equality and the pleading regime was explicitly recognized in *Conley v. Gibson*⁹⁵. Thirteen years earlier, in *Steele v. Louisville and Nashville Railroad Co.*,⁹⁶ the Supreme Court had held that black employees possess statutory rights under collective bargaining laws. The

⁹⁰ ERWIN CHERMERINSKY, CONSTITUTIONAL LAW, 768–69 (2009).

⁹¹ Charles Clark, *What Now?, Address of the President of the Association of American Law Schools at the 31st Annual Meeting* (December 28-30, 1933), in 20 A.B.A J. 431, 432 (1934) (quoting Felix Frankfurter, *The Early Writings of O.W. Holmes, Jr.*, 44 HARV. L. REV. 717 (1931)).

⁹² FED. R. CIV. P. 8.

⁹³ FED. R. CIV. P. 13, 14, 18–24; Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 908, 982–91 (1987).

⁹⁴ In *Missouri Ex Rel. Gains v. Canada*, 305 U.S. 337, (1938) the Supreme Court held that it was unconstitutional to deny blacks admittance to a state law school because the state disparately offered opportunities for law study on the grounds of color. It repeatedly struck down discriminatory practices on the basis of the lack of substantial equality in educational opportunities, e.g., *Sweatt v. Painter*, 339 U.S. 629 (1950). The High Court soon moved on to declare that separate could never be equal in *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁹⁵ 355 U.S. 41 (1957).

⁹⁶ 323 U.S. 192 (1944).

statutory grant of exclusive representation by a Union implied a corresponding duty to represent minority employees “fairly, impartially and in good faith”.⁹⁷

In *Conley*, black railway workers sued their Union alleging that their racially segregated local union had been denied representation equal to that afforded white employees. In particular, plaintiffs alleged that the union refused to represent their interests when the railway abolished 45 jobs held by African-American employees and then immediately rehired white employees and some of the previously fired African-American employees with lesser seniority. The complaint contained general allegations about a discriminatory plan to disadvantage black workers,⁹⁸

The district court dismissed the complaint and the appellate court affirmed,⁹⁹ but the Supreme Court reversed. A complaint should not be dismissed for failure to state a claim “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”¹⁰⁰ Plaintiffs’ allegations, albeit general, could establish a potential breach of the Union’s statutory duty.¹⁰¹ “[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.”¹⁰² Rule 8 requires only a short and plain statement giving defendant “fair notice of plaintiff’s claim and the grounds upon which it rests.”¹⁰³

⁹⁷ 323 U.S. 192, 204 (1944). See generally Deborah C. Malamud, *The Story of Steele v. Louisville and Nashville Railroad: White Unions, Black Unions and the Struggle for Racial Justice on the Rails*, in LABOR LAW STORIES (Laura J. Cooper and Katherine L. Fisk, eds., 2005). Professor Malamud unearths the interconnectedness between *Steele* and other “racial discrimination” cases also appearing on the Supreme Court’s docket at that time. Notable among these were the well-known Japanese internment cases *Hirabayashi v. U.S.* and *Koromatsu v. U.S.*, 320 U.S. 81 (1943), 323 U.S. 214 (1944). *Id.* at 82–83. Professor Malamud notes that a second round of voting had to occur in *Steele* and a companion case regarding certiorari. Malamud, at 82–84.

⁹⁸ *Conley*, 355 U.S. at 43–44.

⁹⁹ *Id.* at 45–46.

¹⁰⁰ *Id.* at 45–46.

¹⁰¹ *Id.* at 46.

¹⁰² *Id.*

¹⁰³ *Id.*

Simplified notice pleading, established in *Conley*, was based upon the liberal opportunity for subsequent discovery and other pretrial procedures “which enable plaintiffs to later disclose more precisely the basis of the claim and defense and define more narrowly the disputed facts and issues.”¹⁰⁴

For a half century *Conley* was recognized as the definitive federal statement on pleading. It was cited more than 34,000 times by federal courts between 1957 and 2007.¹⁰⁵ In addition to formidable precedential value, the reasons for its strength and longevity included a historic commitment to enforcement of civil rights by the federal courts¹⁰⁶ and the very practical recognition that information available to potential plaintiffs before discovery is often limited. The Supreme Court has often acknowledged these information asymmetries.¹⁰⁷

Fast forward now fifty years to a procedural counterrevolution in a very different legal and political climate. The radical nature and implications of the new standards for deciding Rule 12(b)(6) motions enunciated in *Bell Atlantic Corporation v. Twombly*¹⁰⁸ and *Ashcroft v. Iqbal*¹⁰⁹ become clear by reference to this history. *Iqbal*, in particular, specifically declared that it was “time to inter *Conley*.”¹¹⁰ Together, the two cases require a district court to engage in a two step inquiry. First, factual allegations must be

¹⁰⁴ *Id.* at 47-48.

¹⁰⁵ Westlaw, *Conley v. Gibson Citing References*, <http://westlaw.com> (consulted May 19, 2010) (limited by jurisdiction, date, and document type).

¹⁰⁶ See e.g., *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968). See also *U.S. v. Barnett*, 346 F.2d 99, 108 (C.A. 5 1965). “What cannot be overestimated, however, in a short-run or long-run solution, is the importance of federal courts’ standing fast in protecting federal guaranteed rights of individuals.

¹⁰⁷ See *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (noting in a race discrimination case that “[t]here will seldom be ‘eyewitness’ testimony as to the employer’s mental processes”); *Bailey v. Alabama*, 219 U.S. 219, 233 (1911) (“As the intent is the design, purpose, resolve, or determination in the mind of the accused, it can rarely be proved by direct evidence, but must be ascertained by means of inferences from facts and circumstances developed by the proof.”).

¹⁰⁸ 550 U.S. 544 (2007).

¹⁰⁹ 29 S.Ct. 1937 (2009).

¹¹⁰ *Iqbal*, 129 S.Ct. at 1940.

separated from legal conclusions; only the former are to be accepted for purposes of the Rule 12(b)(6) motion.¹¹¹ Second, the judge must decide whether a “plausible” claim for relief has been shown. This determination is to be made on the basis of “judicial experience and common sense.”¹¹²

The upshot is that a complaint must now plead facts and even some evidence giving a “particularized mention of the factual circumstances of each element of the claim.”¹¹³ The burden on claimants alleging causes of action based on intent or motive is evident, particularly before discovery is available and in situations where defendants are solely in control of the facts. Access to the federal courts and protection of civil rights will inevitably be limited.

Empirical studies of dispositions of Rule 12(b)(6) motions since *Twombly-Iqbal* in substantive areas where important national nondiscrimination policies are at stake have already demonstrated the disparate impact of these new pleading standards. Successful defendants’ motions to dismiss in Title VII cases rose from 42% under the Conley standard to 54% under *Twombly*, to 63% under *Iqbal*.¹¹⁴ Similar results have already been reported in disability cases.¹¹⁵ Reviewing employment discrimination cases, issued one year prior and six to twelve months after *Twombly*, Professor Seiner established that motions to dismiss, granted in whole or in part, increased from an

¹¹¹ *Id.*

¹¹² *Id.* at 1950.

¹¹³ *Id.* at 1953–54.

¹¹⁴ Patricia Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 Am. U. L. Rev. 553 (2010) (studying two year periods before and after *Twombly* and the period after *Iqbal*).

¹¹⁵ Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 117 (2010).

already high 75.4 percent to 80.9 percent.¹¹⁶ A review of the caselaw indicates that district courts switched quickly from *Conley* to *Twombly*.¹¹⁷

I believe when additional research is done we will see similar or even dramatically higher rates of dismissal. The casualties will include cases involving products liability, and suits where intent is often determinative and circumstantial evidence of defendant's state of mind is available only after discovery. The latter category includes constitutional and civil rights cases, excessive use of force by police and a host of others.¹¹⁸

The federal rules offer little opportunity for plaintiffs to extricate themselves from this procedural Catch 22. FRCP 27 provides an extraordinarily limited opportunity for parties, before filing a complaint, "to perpetuate testimony regarding any matter that may be cognizable in any court of the United States" by oral or written deposition "to prevent a failure or delay of justice."¹¹⁹ This limited opportunity is in no way equivalent

¹¹⁶ Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L.REV. 1011, 1027–29 (2009).

¹¹⁷ Since 2007, *Twombly* has been cited to 27,938 times by the federal courts. Westlaw, *Bell Atlantic Corp. v. Twombly Citing References*, <http://westlaw.com> (consulted May 20, 2010) (limited by jurisdiction, date, and document type). The federal courts have cited to *Iqbal* 8,900 times since the Court handed down its decision in that case. Westlaw, *Ashcroft v. Iqbal Citing References*, <http://westlaw.com> (consulted May 20, 2010) (limited by jurisdiction, date, and document type).

¹¹⁸ For examples of federal court reaction to *Twombly* and *Iqbal*, see, e.g., *Sheehy v. Brown*, 2009 WL 1762856 (2d Cir. 2009) (slip op.) § § 1983 and 1985 claims); *Lopez v. Beard*, 2009 WL 1705674 (3d Cir. 2009) (slip op.) (First, Eighth, Fourteenth Amendments, and Age Discrimination Act claims); *Morgan v. Huber*, 2009 WL 1884605 (5th Cir. 2009) (slip op.) (Eighth Amendment deliberate indifference claim); *Moss v. U.S. Secret Service*, 572 F.3d 962 (9th Cir. 2009) (First Amendment viewpoint discrimination claims); *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677 (9th Cir. 2009) (employment standards). Several courts have acknowledged that complaints that would have survived under *Conley* do not do so under *Twombly-Iqbal*. See, e.g., *Kyle v. Holinka*, 2009 WL 1867671, at *1 (W.D. Wis. 2009); *Coleman v. Tulsa County Board of County Comm'rs*, 2009 WL 2513520, at *1 (N.D. Okl. 2009). See, generally, Michael Hoenig, *Heightened Pleading Standards Taking Effect in Products Cases*, 242 N.Y.L.J. 3 (2009); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U.PA L. REV. 517 (2010).

¹¹⁹ FED. R. CIV. P. 27 (a)(1)(3). See *Deiulemar Compagnia Di Navigazione v. M/V Allegra*, 198 F.3d 472, 485 (4th Cir. 1999); see also *Ash v. Cort*, 512 F.2d 909, 911–12 (3d Cir. 1975) ("Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost . . . Rule

to the access to information provided under Rules 26–37. It applies only to situations where testimony might be lost to a prospective litigant unless taken prior to commencement of suit.¹²⁰

State courts provide far more promising opportunities for plaintiffs in these asymmetrical information situations. Texas Rule of Civil Procedure 202, providing that a person “may petition the court for an order authorizing the taking of a deposition . . . (b) to investigate a potential claim or suit,” is directly contrary to the federal practice.¹²¹ The rule allows parties, particularly would-be plaintiffs, an opportunity to comply with heightened “fact-based” pleading requirements and other certification requirements whenever fairness outweighs the burden of the requested discovery.¹²² The available evidence reported by Professor Hoffman indicates that more than half of lawyers surveyed in two of Texas’ largest counties had experience either serving and/or receiving notice of a pre-suit deposition.¹²³ Of eighty-three judges surveyed, 58% reported requests for a Rule 202 presuit deposition at least once.¹²⁴ Among lawyer respondents who initiated Rule 202 petitions, a majority reported the action was taken to ensure that the case they sought to file would be valid under the Texas rules.¹²⁵ When a judge denied a request for presuit deposition, 83% of lawyers reported they did not file a suit.¹²⁶

27 is not a substitute for discovery. It is available in special circumstances to preserve testimony which could otherwise be lost.”)

¹²⁰ 8 A. Charles Allen Wright, Arthur R. Miller and Richard L. Marcus, FEDERAL PRACTICE AND PROCEDURE, section 207.1(3rd Ed. 2010).

¹²¹ TEX. R. CIV. P.. 202-1(b).

¹²² TEX. R. CIV. P. 202.1, 202.4

¹²³ Lonnie Shrinekopf Hoffman, *Access to Information, Access to Justice: The Role of Pre-suit Investigatory Discovery*, 40 U.MICH. J.L. REF. 217, 251 (2007).

¹²⁴ *Id.* at 252.

¹²⁵ *Id.* at 255.

¹²⁶ *Id.*

Professor Hoffman interprets these results as a recognition that if a petition for a presuit deposition is denied, there is little possibility for successful litigation.¹²⁷ This result obviously benefits all parties-potential plaintiffs, defendants, and the courts. Since 70% of all lawyer respondents reported that the request was granted, aimless “fishing” is clearly not the effect of this procedure.¹²⁸ Presuit discovery is used primarily to evaluate the factual elements in the case, i.e., liability, damages, and other relevant concerns pre-suit, including the financial solvency of potential defendants.¹²⁹

A number of other state procedural rules follow the Texas model, in contrast to Federal Rule 27. Alabama allows presuit discovery “regarding any matter that may be cognizable in any court of this state.”¹³⁰ Parties may thus use this procedure to search for information relevant to their claims, albeit only after judicial permission.¹³¹ Similarly, Ohio similarly allows a potential plaintiff to “file a petition to obtain discovery,”¹³² to provide the information needed to determine whether a valid cause of action exists.¹³³ New York¹³⁴ and other states provide somewhat similar opportunities when the equities in a given situation dictate.

E. State Court Nonacquiescence to Twombly-Iqbal

The holdings and implications of the Supreme Court’s new federal pleading standards were exhaustively discussed in many of the papers presented at this

¹²⁷ *Id.*

¹²⁸ *Id.* at 258.

¹²⁹ *Id.* at 268.

¹³⁰ Ala R. Civ. P. 27.

¹³¹ *Driskill v. Culliver*, 797 So. 2d 495, 497–98 (Ala Civ. App. 2001)(permitting pre-suit investigation “to determine whether plaintiff has a reasonable basis for filing an action”).

¹³² Ohio Civ. R. 34(D)(1).

¹³³ See, e.g., *Benner v. Walker Ambulance Co.*, 692 N.E.2d 1053, 1055 (Ohio Ct. App. 1997)).

¹³⁴ NY.C.P.L.R. § 3102(c) (McKinney 2005).

conference and in the legal literature.¹³⁵ States are, of course, free to develop their own procedural rules within constitutional limits. Another dramatic example of the separation of state from federal procedure is the general rejection by state appellate courts of *Twombly-Iqbal*. To date, nine state appellate courts have discussed or ruled on the issue; only two have followed the Supreme Court's lead.

Some courts have specifically rejected *Twombly-Iqbal*;¹³⁶ others, especially before *Iqbal* was decided, confined *Twombly* to its particular factual setting.¹³⁷ A large number have noted that they would continue to follow previously controlling state precedent until their state supreme court ruled on the issue.¹³⁸ Two state courts have expressly adopted the new federal standard. In Massachusetts, the Supreme Court reasoned that because it previously relied on *Conley* it would now utilize the new federal pleading

¹³⁵ A large corpus of academic writing has been generated by *Twombly-Iqbal*. See, e.g., Robert G. Bone, *Plausibility Pleading Revised and Revised: a Comment on Ashcroft & Iqbal*, 85 NOTRE DAME L. REV. 849 (2010); Kevin Clermont & Stephen Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010); Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. (forthcoming 2010), available at <http://ssrn.com/abstract=1525642>; Edward A. Harnett, *Taming Twombly, Even after Iqbal*, 158 U. PA. L. REV. 473 (2010); A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 1 (2009).

¹³⁶ See, e.g., *Colby v. Umbrella, Inc.*, 955 A.2d 1082, 1087 n.1 (Vt. 2008) (rejecting *Twombly* because federal jurisprudence does not affect state procedural rules); *In re Flood Litigation Coal River Watershed*, 668 S.E.2d 203, 261 (W. Va. 2008) (relying on state law); see also *Cullen v. Auto-Owners Ins. Co.*, 189 P.3d 344 (Ariz. 2008) (stating that *Twombly* didn't change how Arizona interprets its own rule); *Indiana v. American Family Voices, Inc.*, 898 N.E.2d 293, 296 n.1 (Ind. 2008) (choosing to rely on Indiana precedent); *Peak Alarm Co. v. Salt Lake City Corp.*, No. 20080918, 2010 WL 1507942 (Utah Apr. 16, 2010) (stating that citation to *Twombly* does not indicate adoption, but § 1983 doesn't require heightened pleading); *Stonebridge Equip. Leasing, LLC*, No. PB09-1677, 2009 WL 4479246 (R.I. Super. Ct. Nov. 24, 2009) (stating that R.I. Supreme Court continued to cite *Conley* standard after *Twombly/Iqbal*).

¹³⁷ See, e.g., *Bean v. Cummings*, 939 A.2d 676, 680 (Me. 2008) (stating that federal guidance is used for motions to dismiss, but *Twombly* was inapplicable to this case); *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 631 (Minn. 2007) (finding that *Twombly* was fact-specific and not applicable); *Holleman v. Aiken*, 668 S.E.2d 579 (N.C. Ct. App. 2008) (rejecting standard until the state Supreme Court addressed the issue);

¹³⁸ *Compare* *Déjà vu of Nashville, Inc. v. Metropolitan Gov't of Nashville & Davidson County*, No. M2008-01393-COA-R3-CV, 2009 WL 3270195 (Tenn. Ct. App. Oct. 12, 2009) (using *Twombly* as additional support) *with* *Morris v. Grusin*, No. W2009-00033-COA-R3-CV, 2009 WL 4931324 (Tenn. Ct. App. Dec. 22, 2009) (refusing to adopt *Twombly/Iqbal* because Tenn. Supreme Court hadn't changed the standard). *Crum v. Johns Manville, Inc.*, 19 So. 3d 208 (Ala. Civ. App. 2009) (rejecting standard until the Alabama Supreme Court chooses to follow it) *Holleman v. Aiken*, 668 S.E.2d 579 (N.C. Ct. App. 2008) (rejecting standard until the N.C. Supreme Court addressed the issue); *Siemens Fin. Servs. V. McCurry v. Chevy Chase Bank, F.S.B.*, 193 P.3d 155, 157 (Wash Ct. App. 2008) (stating that absent guidance from the Wash. Supreme Court, it would not adopt *Twombly*)

formula.¹³⁹ The South Dakota Supreme Court adopted *Twombly* in a case where plaintiff alleged federal § 1983 and 1985 claims as well as state statutory claims¹⁴⁰

III. STATE EFFORTS TO PIERCE THE VEIL OF PRETRIAL SECRECY

I begin this section with some personal reminiscence. When I began practice in the 1970's almost all discovery requests and responses, including depositions, were filed in the Clerk's Office.¹⁴¹ There were no explicit limitations on discovery, although often negotiations pared down or eliminated some of what was requested. Protective orders were sometimes requested from the court to seal some information, disclosed during discovery because of trade secrets, medical or other personal information and other materials deemed worthy of protection under the standards set out by Rule 26(c) and its state analogues.¹⁴² Rarely did I encounter a request for an agreed upon protective order, blanket or otherwise. Most litigation moved toward a negotiated settlement, a disposition by dispositive motion, or a trial in a slow but steady pace. No cases were sent to mediation, arbitration, or other third party resolution machinery. Trials, while not resolving the majority of cases, were not rare. Settlements were typically filed in court and open to public scrutiny.

Today, this scenario is largely an historical artifact. Discovery is almost never filed in court. Demands, typically by defendants, for agreed-upon protective orders for information exchanged pretrial are common. Trials are held in only a small percentage of the caseload and almost no negotiated settlements are open to the public, either

¹³⁹ *Iannacchino v Ford Motor Co.*, 888 N.E.3d 879, 890 (Mass. 2008).

¹⁴⁰ *Sisney v. Best, Inc.*, 754 N.W.2d 804, 808 (S.D. 2008).

¹⁴¹ FED. R. CIV. P. 5. Service and Filing of Pleadings and Other Papers. (a) Service: ". . . every paper relating to discovery . . . shall be served upon each of the parties. (d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. *Id.*

¹⁴² FED. R. CIV. P. 26(c)(1) ("[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . .").

because they are not filed in court or are filed under seal.

These changes produce critical differences in the way law is practiced by lawyers and experienced by the parties and the public. In particular, much of the information about cases that was formerly available to third parties—litigants in similar cases, potential claimants, or the media—is now hidden from view. Transparency of the operations of courts is threatened by numerous factors. Civil trials are presumptively open to the public and the press¹⁴³ but only a minute number of the cases now go to trial.¹⁴⁴ While the public has a well-established right to inspect and copy court records,¹⁴⁵ information gathered in discovery is not now filed in court unless used in a trial or a hearing.¹⁴⁶ Parties, typically at defendant's insistence, often stipulate that discovery information will not be filed or will be filed under seal, will be destroyed or returned at the conclusion of the case and will not be revealed to third parties.¹⁴⁷ Since the majority of cases are resolved by negotiated settlement, typically with a

¹⁴³ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) (“historically both civil and criminal trials have been presumptively open.”).

¹⁴⁴ For example, in 2004, in New Jersey, completed trials comprised only 1.9% of all completed civil dispositions. National Center for State Courts, *Examining the Work of State Courts* 12 (2005), available at http://www.ncsconline.org/D_Research/csp/2005_files/4-EWCivil_final_1.pdf. In Arizona, the number of completed civil cases disposed of via trial in 2001 was 5%. Rosalind R. Greene & Jan Mills Spaeth, *The Vanishing Jury Trial Phenomenon & Trial Preparation*, 46 *Ariz. Att’y* 22, 22 (Apr. 2010). By 2008, this number had dropped to 1%. *Id.* Professor Marc Galanter first reported this trend in 2004 when his research revealed that despite civil dispositions in the federal district courts having increased by a factor of five between 1962 and 2002, the number of trials had dropped by 20%. Marc Galanter, *The Vanishing Trial: An Examination of the Trials and Related Matters in Federal and State Courts*, 1 *J. Empirical Legal Stud.* 459–61, 479–81, 507. In 1972, 36.1% of state court cases were disposed of by trial; the average time from filing to trial was 16 months.

¹⁴⁵ *Nixon v. Warner Commun. Inc.*, 435 U.S. 589, 597 (1978).

¹⁴⁶ See, e.g., F.R.C.P. 5(d) as amended in 2000. KAN. R. CIV. P. 60-205(d)(1) (“Interrogatories, depositions . . . discovery requests or responses . . . shall not be filed except on order of the court or until used in a trial or hearing, at which time the documents shall be filed.”); ME. R. CIV. P. 26(f)(1) (“Unless otherwise ordered by the court, or necessary for use in the proceeding, notices, written questions and transcripts of depositions prepared in accordance with Rule 5(f), interrogatories, requests pursuant to Rules 34 and 36, and answers, objections and responses thereto shall be served upon other parties but shall not be filed with the court.”).

¹⁴⁷ See, N.J. FORMS OF CIV P. C. L. 1 6.625.04 (providing samples of language for agreed upon protective orders.)

confidentiality clause, little is known about the disposition of many cases.¹⁴⁸

In addition, increasingly numerous alternate dispute resolution (ADR) processes—e.g., court ordered or privately contracted mediation and/or arbitration—operate completely outside public view or knowledge.¹⁴⁹ Third parties will rarely learn of the information gathered in these proceedings, the result, or whether an issue was ever disputed. Contractually enforced ADR, thus can hide patterns of abuse by a corporation or by an entire industry.¹⁵⁰ These processes and current court practices consequently rob the community of a crucial function of the dispute resolution system. They shield from public view deep issues of community interest and evidence of misconduct.¹⁵¹

O.W. Holmes famously noted "the prophecies of what the courts will do in fact, and

¹⁴⁸ One insurance defense attorney noted he had not "put a settlement together in the past five to six years that [lacked] a confidentiality clause" Blanca Fromm, *Comment: Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 676 (2001) (quoting California lawyer Glenn Gilsleider). Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases; Settlements Kept Scope of Issue Out of Public Eye*, BOS. GLOBE, Jan. 31, 2002, at A1 (reporting that the Archdiocese of Boston had "quietly settled child molestation claims against at least 70 priests" within the past ten years).

"[A] troubling tendency accompanies the increasing frequency and scope of confidentiality agreements that are ordered by the court. These agreements are reached by private parties and often involve materials and information that is never even presented to the court . . . Once signed, a confidentiality order, which has converted a private agreement into an order of the court, requires the court to use its contempt power to enforce the private agreement...."

In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litigation, 255 F.R.D. 308, 322 (D. Conn. 2009) (quoting *City of Hartford v. Chase*, 942 F.2d 130, 137 (2d Cir. 1991)).

¹⁴⁹ In the last decade, the use of mandatory ADR has increased rapidly. STEPHEN B. GOLDBERG, FRANK E.A. SANDER, NANCY H. ROBERS & SARAH RUDOLPH COLE, *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES* 402 (5th ed., 2007). Though the Uniform Mediation Act does not impose general confidentiality obligations through the statute, other statutes may obligate a mediator to keep information in a mediation confidential. *Id.* at 460.

¹⁵⁰ See *Corporate Responsibility: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. 19 (2002) (statement of Joan Claybrook, President, Public Citizen, testifying that financial companies were forcing consumers to arbitrate claims of securities fraud, hiding widespread abuse by the industry). See generally *Sunshine in Litigation Act of 2009: Hearing on H.R. 1508 Before the Subcomm. on Comm. And Admin. Law*, 111th Cong. (2009), available at http://judiciary.house.gov/hearings/printers/111th/111-40_50069.PDF (discussing Sunshine in Litigation Acts); Joseph F. Anderson, *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, available at <http://www.law.com/pdf/nlj/011204secrets-article.pdf> (discussing the Sunshine in Litigation Bill and the dangers that overutilization of confidentiality orders create for the public and legal system generally).

¹⁵¹ See generally Owen M. Fiss, *Comment: Against Settlement*, 93 YALE L.J. 1073 (1984).

nothing more pretentious, is what I mean by the law."¹⁵² Current practices rob the community of law itself and of the process by which courts help reform our society. They emasculate deterrence and prevent accurate evaluation of the worth of cases. Many lawsuits are not merely private disputes but matters of public concern.

"[L]itigants serve as nerve endings registering the aches and pains of the body politic, which the courts attempt to treat by refining the law. Using litigants as stimuli for refining the law is a legitimate public interest in the literal sense of the term: the public is interested in learning the practical implications of past political choices and the values they embody. The law is a self-portrait of our politics, and adjudication is at once the interpretation and the refinement of the portrait."¹⁵³

Lack of access to information gathered pretrial creates a serious structural problem for the functioning of this unique feature of the American judicial system. Secrecy often thwarts efforts to avoid unnecessary risks to the public.

The list of examples is long and tragic. Beginning in 1933 information in, and the results of, lawsuits against Johns Manville Company for damages from asbestos were sealed.¹⁵⁴ Asbestos continued to be used in many products. Five decades later federal scientists published data showing asbestos caused more cancer than any other workplace product.¹⁵⁵ There are numerous additional instances of harm. Leslie Bailey an attorney with the Public Justice, succinctly described the dangers associated with court secrecy in Congressional testimony:

Famous examples about of damaging information revealed in litigation but

¹⁵² O.W. Holmes, *Path of the Law*, 10 HARV. L. REV. 457, 460–61(1897). Holmes' colleague from Harvard, John Chipman Gray, reiterated: "the law of the state...is composed of the rules which the courts, that is the judicial organs of that body, lay down for the determination of legal rights and duties." J.C. GRAY, *THE NATURE AND SOURCES OF THE LAW*, 84 (2d ed. 1921).

¹⁵³ David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2637 (1995).

¹⁵⁴ PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* 114 (1985).

¹⁵⁵ See Kenneth Bridbord, Pierre Decoufle, Joseph F. Fraumeni, Jr., David G. Hoel, Robert N. Hoover, David P. Rall, Umberto Saffiotti, Marvin A. Schneiderman & Arthur C. Upton, *Estimates of the Fraction of Cancer in the United States Related to Occupational Factors*, in *BANBURY REPORT 9: QUANTIFICATION OF OCCUPATIONAL CANCER*, APP. (Richard Peto & Marvin Schneiderman eds., 1981)

kept secret from the public for long periods of time: Bic lighters, car seats, breast implants, and all-terrain vehicles were all subject to protective orders while countless consumers continued to be at risk from using themManufacturers of dangerous drugs settled cases brought by injured patients on terms that forbade the patients' attorneys from notifying the FDA that the drug caused harm.¹⁵⁶

The risks are not confined to individuals; public health concerns are likewise implicated.

Civil litigation uncovers a great deal of otherwise unavailable information about practices and products which may cause disease and injury. However, common practices in and related to lawsuits, trials, and courts, such as protective orders, sealing orders, and confidential settlements, can deprive health authorities and the public itself of information that might be helpful to prevent disease, injury, disability, and death.¹⁵⁷

Nor are judgments of courts immune from this disease. In 2006, a Florida newspaper revealed that since 2001 courts in several counties had maintained secret dockets of nearly two hundred cases including negligence, malpractice and fraud.¹⁵⁸ Similar occurrences are reported in other venues.¹⁵⁹

The secrecy created by parties' agreements, often at the insistence of defendants who dangle financial incentives to plaintiffs, and closed court processes cause damage to individuals and to the system as a whole. How many deaths and injuries might have been prevented but for protective orders and confidential settlements shielding information about tire safety defects which caused tread to peel off and Ford Explorers

¹⁵⁶ *Hearings, supra* note __, at 3–4 (written statement of Leslie A. Bailey).

¹⁵⁷ Daniel J. Givelber & Anthony Robbins, *Public Health Versus Court-Sponsored Secrecy*, 69 LAW & CONTEMP. PROBS. 131, 131 (2006).

¹⁵⁸ Patrick Daumer & Dan Christensen, *Court Cases Hidden From Public*, MIAMI HERALD (Apr 16, 2001 at A1).

¹⁵⁹ In Connecticut, for example, investigations by the *Hartford Courant* and the *Connecticut Law Tribune* in late 2002 revealed that Connecticut courts had sealed files of about 7,000 cases and designated another forty or more cases as so "super-secret" that court clerks were instructed to deny their existence. See CONN. BAR ASS'N, REPORT OF THE TASK FORCE ON CONFIDENTIALITY AND THE COURTS 12–13 (2004) [hereinafter CBA REPORT]; see also *Hartford Courant Co.*, 380 F.3d 83, 86–87 (detailing how Connecticut courts had been routinely sealing scores of entire case files and docket sheets without providing any justification).

to roll over?¹⁶⁰ Can administrative agencies, assuming their will to enforce statutory standards, perform adequately under these opaque conditions? Can consumers act rationally in this environment?

There are many legitimate reasons, e.g., trade secrets or highly personal information, to restrict access to information gathered in litigation and to grant protective orders are upon a showing of good cause.¹⁶¹ Commonly, however, parties create “Agreed Upon Protective Orders” sealing discovery.¹⁶² The judicial determination of whether good cause actually exists never takes place. In addition, absent a protective order, a party has the right to disseminate information obtained during discovery for lawful purposes.¹⁶³ This right is also bought and sold

In recent decades, federal and state rules eliminated the requirement of filing

¹⁶⁰ Eventually, 14.4 million tires were recalled in 2000. Memorandum of Law of Amicus Curiae Public Citizen in Support of Plaintiff's Motion to Compel and Opposition to Protective Order, *Trahan v. Ford Motor Co.*, No. 99-62989 (61st Dist. of Harris County, Tex. Sept. 18, 2000), *available at* <http://citizen.org.litigation/briefs/OpenCourt/articles.cfm?ID=1070>.

¹⁶¹ *Id.* 26(c). Rule 26(c) identifies eight kinds of protective orders that a district court might issue, but the list is nonexclusive and courts have wide discretion to order other appropriate discovery restriction. Such an order is appropriate where “justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” See Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2036 (2d ed., 1997) (quoting Fed. R. Civ. P. 26(c)); *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) (noting that “trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery”). See generally Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2684 (1995) (addressing privacy issues in settlement of cases).

The states have comparable provisions to the federal rule. For example, OHIO R. CIV. P. 26(c) provides the eight types of protective orders that may issue from the court, but also requires that before the order is sought, the parties must attempt to resolve the issue among themselves, and certify as such to the court before requesting the protective order. OHIO CIV. R. 26(c). See also MASS. R. CIV. P. 26(c); IOWA R. CIV. P. 1.504 (providing that the court has the discretion to issue a protective order in eight situations).

¹⁶² See NJ FORMS OF CIV. P. CLI 6.625.04 (providing a sample of language used in agreed upon protective orders).

¹⁶³ See, e.g., *Exum v. U.S. Olympic Comm.*, 209 F.R.D. 201, 205 (D. Colo. 2002) (“Parties to litigation have a First Amendment right to disseminate information they obtained in discovery absent a valid protective order.”); *Federal Trade Comm'n v. Digital Interactive Assocs., Inc.*, No. 95-Z-754, 1996 WL 912156, *2 (D. Colo. 1996) (emphasizing that in ruling on motion for a protective order, court “begins with the premise that a party to litigation has a Constitutionally protected right to disclose the fruits of discovery to non parties absent a valid protective order entered by a court”).

discovery information.¹⁶⁴ Since the amendment to FRCP 5(d) in 2000 pretrial information is typically unavailable. Federal courts are surprisingly hostile to third party access to this information. For example, the Second Circuit established a “general and strong presumption against access to documents sealed under protective order when there was reasonable reliance upon such an order.”¹⁶⁵ The court reached this conclusion, despite the fact that the protective order in this case was a privately agreed upon umbrella order, lacking any judicial determination of good cause.¹⁶⁶

Parties, almost invariably plaintiffs, may be willing to auction public access to pretrial information or settlements for quicker access to discovery or monetary concessions by defendants. When there is a demonstrable public interest in the information, however, parties should have no right to buy or sell nondisclosure.¹⁶⁷ It is the court discovery rules—including protective orders—which govern the obligation to produce information. The law, not the parties, should govern the use of that information and who will have access to it.

¹⁶⁴ The 2000 amendment to Rule 5(d) affirmatively barred filing discovery. FED. R. CIV. P. 5(d). I have detailed the history of this and earlier changes to Rule 5 in Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts, 1938—2006*, 78 COLO. L. REV. 817 (2007). State filing rules were changed with the same result. See, e.g., ARIZ. R. CIV. P. 5(g), N.D. R. CIV. P. 5(d)(i); ALA. R. CIV. P. 5(d).

¹⁶⁵ *TheStreet.com*, 273 F.3d 222 at 231 (2d Circ. 2001).

¹⁶⁶ *TheStreet.com*, 273 F.3d 222 at 225 (“Under the October 2000 Order, each party had the right to designate material as ‘confidential information’ if it believed in good faith that the material should be so classified.”).

¹⁶⁷ See generally Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal or Something in Between?*, 30 HOFSTRA L. REV. 783 (2002) (analyzing arguments against contracting for secrecy in federal litigation). Even confidentiality duties imposed on professionals are abrogated under certain circumstances. For example, communications between attorneys and their clients are protected, but societal interests may override these duties where public health or safety is involved. See, e.g., N.Y. CIV. PRAC. L&R §§ 4503, 4505. A “compelling interest in public health” takes precedence, for example, over the attorney-client privilege claimed by the defendant in written communications between counsel and firm executives. *Sackman v. Liggett Group, Inc.*, 920 F. Supp. 357, 365 (E.D. N.Y. 1996), *vacated*, 167 F.R.D. 6 (E.D. N.Y. 1996); see generally 2 JOHN W. STRONG, MCCORMICK ON EVIDENCE 225 (1999).

A. State Anti-Secrecy Measures

At its October 2009 meeting, the Federal Rules Advisory Committee noted the “time has come to take another serious look at discovery protective orders.”¹⁶⁸ The federal rulemakers might seriously consider some existing standards in state law. Under none of the state sunshine statutes or court rules now described are parties unable to secure protection of trade secrets, other proprietary information, privacy or other legitimate interests. Rather the burden is appropriately placed on those who seek protective orders to justify these concerns. These statutes and rules recognize that there may be a public interest in pretrial information or in settlements affecting health and safety.

i. Montana

The most recent state to act was Montana in 2005. The “Gus Barber Anti-Secrecy Act”¹⁶⁹ was named after a nine-year-old child killed when a Remington Model 700 rifle discharged while being cleaned by the child’s mother.¹⁷⁰ The family learned later that Remington had been sued more than 80 times about the gun triggering mechanism.¹⁷¹ Most of the lawsuits had been resolved with confidentiality orders preventing disclosure of the information gathered and the settlements negotiated. Under the Montana statute no portion of a final order, a judgment, or a settlement agreement that “has the purpose or effect of concealing a public hazard” may be enforced.¹⁷² Nor may a party request,

¹⁶⁸ Memorandum from Honorable Mark R. Kravitz, Chair, Advisory Committee on Federal Rules of Civil Procedure to Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure, Dec. 8, 2009, at 5.

¹⁶⁹ MONT. CODE ANN. § 2-6-112(1).

¹⁷⁰ “I pulled the safety off and it fired. The gun went off. My finger was nowhere near the trigger. I had an open hand” Ms. Barber recalled. CBS News, *Richard and Barbara Barber Interview*, <http://www.cbsnews.com/stories/2001/02/06/eveningnews/main269786.shtml> (last visited May 19, 2010).

¹⁷¹ See Walt Williams, *Richard Barber of Manhattan isn’t one to Step Away from a Fight*, BOZEMAN CHRONICLE (2006).

¹⁷² MONT. CODE ANN. § 2-6-112 (3). Public hazard is defined as a “device, instrument, or manufactured product, or a condition of a device, instrument, or manufactured product, that endangers public safety or

as a condition to the production of discovery, that another party stipulate to such an order or judgment.¹⁷³

The goal is to outlaw the market for sale of information about public hazards. Procedural means to challenge secrecy are established. “[A]ny affected person,” including news media, may contest a final order or judgment or settlement violating the Act.¹⁷⁴ Once challenged, the court must examine the disputed information or materials *in camera*. If it determines the information concerns a public hazard the court must allow disclosure.

ii. Florida and Other States

One of the oldest Sunshine in Litigation Acts was enacted in Florida in 1990.

[N]o court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.¹⁷⁵

A “public hazard” “is an instrumentality, including but not limited to any device, instrument, person, procedure, product or a condition of a device, instrument . . . that has caused and is likely to cause injury.”¹⁷⁶ Unlike the Montana statute, however, no procedure is specified for intervention to contest orders or judgments that conceal public hazards. Nor does the statute provide when the determination of public hazard is to be made.¹⁷⁷ These deficiencies have created enforcement difficulties, but a number of

health and has caused injury.” *Id.* § 2-6-112 (2). Trade secrets, defined by state law, and information made confidential by law, are exempt. *Id.* § 2-6-112(6).

¹⁷³ *Id.* § 2-6-112(5).

¹⁷⁴ *Id.* § 2-6-112(7).

¹⁷⁵ FLA. STAT. ANN. § 69.081(1), (3) (West 2010).

¹⁷⁶ *Id.* § 69.081(2).

¹⁷⁷ See Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI. KENT L.R. 375, 424–26 (2006).

high profile cases have illustrated the usefulness of the Act.¹⁷⁸

Other states have similar statutes. In Louisiana, protective orders shall not be issued and nondisclosure provisions not be enforced in cases involving public hazards.¹⁷⁹ Arkansas bans contracts or agreements entered into to settle a lawsuit barring the disclosure or of an environmental hazard.¹⁸⁰ Other states have narrower statutes forbidding the sealing of settlement agreements where an agency of the state or its subdivisions is a party.¹⁸¹

State court created rules have also addressed these access issues. Texas Rule of Civil Procedure 76a bans the sealing of any "court order or opinion issued in the adjudication of a case."¹⁸² Court records are presumed to be open to the general public and may only be sealed upon a showing that specific private rights outweigh "the presumption of openness and any probable adverse effect that sealing will have upon the general public health or safety."¹⁸³ Notably, Rule 76a defines court records to include *unfiled* discovery and settlement agreements.¹⁸⁴ These provisions address the most common means of shielding pretrial information from the public.

¹⁷⁸ See, e.g., *State v. American Tobacco Comp.*, 723 So. 2d 263 (Fla 1998); *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899 (Fla Dist. App. 2003).

¹⁷⁹ See LA. CODE. CIV. PROC. ANN. ART. 1426(E).

¹⁸⁰ "ARK. CODE ANN. "environmental hazard" means a substance or condition that may affect land, air, or water in a way that may cause harm to the property or person of someone other than the contracting parties to a lawsuit settlement contract referred to in subsection (a) of this section." ARK. CODE ANN. 16-55-122(b) (Westlaw current through end of 2010 Fiscal Sess., including changes made by Ark. Code Rev. Comm. received through 4/26/10).

¹⁸¹ The North Carolina statute makes settlement agreements public records where government agencies official actions are at issue., as defined in G.S. 132-1, on such suits public records. N.C. GEN. STAT. ANN. § 132-1.3(a), (b) (2009).

¹⁸² TEX. R. CIV. P. 76a(1).

¹⁸³ The proponent of sealing a court record also has the burden of showing no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted. *Id.*

¹⁸⁴ *Id.* (Emphasis added).

Procedural mechanisms are provided for enforcement. An open court hearing is required when sealing of information is challenged¹⁸⁵ and the court must explain which interests are furthered by secrecy.¹⁸⁶ The Rule also gives courts continuing jurisdiction over such orders and allows intervention to try to unseal the information at or before judgment.¹⁸⁷

IV. Conclusion

Procedure matters in litigation. Today the pretrial process is critical to the disposition of most cases. Although first year law students in civil procedure courses across the United States study the Federal Rules of Civil Procedure in depth, once in practice these lawyers quickly recognize the significance of state procedure. These state rules impact millions of individuals, public and private entities and society as a whole. The enterprise of this essay has been to demonstrate that various states, using procedures distinct from the FRCP have created experiments which Federal rulemakers should consider in their ongoing work. Coupled with empirical analysis of the results of these trials, we may produce a system both just and efficient.

¹⁸⁵ TEX. R. CIV. P. 76a(3), 76a(4).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* 76a(7)