

**ADVISORY COMMITTEE
ON
CIVIL RULES**

**Washington, D.C.
November 15-16, 2010**

Agenda
Civil Rules Advisory Committee
November 15-16, 2010

1. Introductory Remarks by the Chair and Reporter
 - (a) Welcome
 - (b) Report on the June Standing Committee and September Judicial Conference Meetings
 - (c) Legislative activity

2. **ACTION ITEM:** Approval of the minutes for the March 2010 Civil Rules Advisory Committee meeting

3. Rule 45
 - (a) Report on the October mini-conference
 - (b) Proposals to address Rule 45

4. Discovery – Preservation Obligations and Sanctions

5. Pleading Standards
 - (a) FJC Report on pleading research [Oral Report]
 - (b) Discussion of next steps

6. Report of the Duke Conference Subcommittee

7. Protective Orders

8. Civil-Appellate Subcommittee Report

9. Report of the group working on pattern discovery

10. Spring Meeting: Civil Rules Committee will meet on April 4-5, 2011, in Austin, Texas

ADVISORY COMMITTEE ON CIVIL RULES

<p>Chair:</p> <p>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</p>	<p>Reporter:</p> <p>Professor Edward H. Cooper University of Michigan Law School 312 Hutchins Hall Ann Arbor, MI 48109-1215</p> <hr/> <p>Professor Richard L. Marcus University of California Hastings College of the Law 200 McAllister Street San Francisco, CA 94102-4978</p>
<p>Members:</p> <p>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</p>	<p>Honorable Steven M. Colloton United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044</p>
<p>Honorable Paul S. Diamond United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 6613 Philadelphia, PA 19106</p>	<p>Professor Steven S. Gensler University of Oklahoma Law Center 300 Timberdell Road Norman, OK 73019-5081</p>
<p>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</p>	<p>Ted Hirt, Esquire Office of Immigration Litigation 450 5th Street, NW – Room 5312 Washington, DC 20530</p>
<p>Peter D. Keisler, Esquire Sidley Austin, LLP 1501 K Street, N.W. Washington, DC 20005</p>	<p>Honorable John G. Koeltl United States District Court 1030 Daniel Patrick Moynihan United States Courthouse 500 Pearl Street New York, NY 10007-1312</p>

Revised: October 18, 2010 (EFFECTIVE OCTOBER 1, 2010)

ADVISORY COMMITTEE ON CIVIL RULES (CONT'D.)

<p>Honorable Gene E. K. Pratter United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 7614 Philadelphia, PA 19106-1797</p>	<p>Honorable Randall T. Shepard Indiana Supreme Court 200 West Washington Street State House, Room 304 Indianapolis, IN 46204</p>
<p>Anton R. Valukas, Esquire Jenner & Block LLP One IBM Plaza Chicago, IL 60611</p>	<p>Honorable Vaughn R. Walker United States District Court Phillip Burton United States Courthouse 450 Golden Gate Avenue, 17th Floor San Francisco, CA 94102-3434</p>
<p>Honorable Tony West Assistant AG, Civil Division U.S. Dept. of Justice 950 Pennsylvania Ave., NW – Room 3141 Washington, DC 20530</p>	<p>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</p>
<p>Representative: Laura A. Briggs United States District Court 105 Birch Bayh Federal Building and United States Courthouse 46 East Ohio Street Indianapolis, IN 46204</p>	<p>Secretary: Peter G. McCabe Secretary, Committee on Rules of Practice and Procedure Washington, DC 20544</p>

ADVISORY COMMITTEE ON CIVIL RULES

			<u>Start Date</u>	<u>End Date</u>
Mark R. Kravitz Chair	D	Connecticut	2007	2011
David G. Campbell	D	Arizona	2005	2011
Steven M. Colloton	C	Eighth Circuit	2008	2013
Paul S. Diamond	D	Pennsylvania (Eastern)	2009	2012
Steven S. Gensler	ACAD	Oklahoma	2005	2011
Paul W. Grimm	M	Maryland	2009	2012
Peter D. Keisler	ESQ	District of Columbia	2008	2011
John G. Koeltl	D	New York (Southern)	2007	2013
Gene E. K. Pratter	D	Pennsylvania (Eastern)	2010	2013
Randall T. Shepard	CJUST	Indiana	2006	2012
Anton R. Valukas	ESQ	Illinois	2006	2012
Vaughn R. Walker	D	California (Northern)	2006	2012
Tony West*	DOJ	Washington, DC	----	Open
Edward H. Cooper Reporter	ACAD	Michigan	1992	Open

Principal Staff: John K. Rabiej (202) 502-1820

* Ex-officio

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

John K. Rabiej

Senior Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

James N. Ishida

Senior Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Jeffrey N. Barr

Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Henry Wigglesworth

Attorney-Advisor

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

James H. Wannamaker III

Senior Attorney

Bankruptcy Judges Division

Administrative Office of the U.S. Courts

Washington, DC 20544

Revised: October 18, 2010 (**EFFECTIVE OCTOBER 1, 2010**)

Scott Myers

Attorney Advisor

Bankruptcy Judges Division

Administrative Office of the U.S. Courts

Washington, DC 20544

Ms. Gale B. Mitchell

Administrative Specialist

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Ms. Denise London

Administrative Officer

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Oscar Poma (**Temporary**)

Staff Assistant

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Program Assistant

Rules Committee Support Office

Administrative Office of the U.S. Courts

Washington, DC 20544

Revised: October 18, 2010 (**EFFECTIVE OCTOBER 1, 2010**)

FEDERAL JUDICIAL CENTER

Joe Cecil (Rules of Practice & Procedure) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Marie Leary (Appellate Rules Committee) Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Molly T. Johnson (Bankruptcy Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Emery G. Lee (Civil Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003
Laural L. Hooper (Criminal Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003	Tim Reagan (Evidence Rules Committee) Senior Research Associate Research Division One Columbus Circle, N.E. Washington, DC 20002-8003

Revised: October 18, 2010 (EFFECTIVE OCTOBER 1, 2010)

TAB 1A - C

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 2010
Washington, DC
Draft Minutes

TABLE OF CONTENTS

Attendance.....	1
Introductory Remarks.....	3
Approval of the Minutes of the Last Meeting.....	5
Legislative Report.....	5
Reports of the Advisory Committees:	
Appellate Rules.....	6
Bankruptcy Rules.....	9
Civil Rules.....	21
Criminal Rules.....	30
Evidence Rules.....	40
Report of the Sealing Subcommittee.....	44
Report of the Privacy Subcommittee.....	46
Long Range Planning.....	47
Next Committee Meeting.....	47

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 14 and 15, 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
Chief Justice Wallace Jefferson
John G. Kester, Esquire
Dean David F. Levi
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

The Department of Justice was represented on the committee by Lisa O. Monaco, Principal Associate Deputy Attorney General. Other attendees from the Department included Karyn Temple Claggett, Elizabeth Shapiro, Kathleen Felton, J. Christopher Kohn, and Ted Hirt.

Professor R. Joseph Kimble, the committee's style consultant, participated throughout the meeting, and Judge Barbara Jacobs Rothstein, director of the Federal Judicial Center, participated in part of the meeting.

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
Henry Wigglesworth	Senior attorney, Administrative Office
Joe Cecil	Research Division, Federal Judicial Center
Emery G. Lee III	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
 - Professor Richard L. Marcus, Associate Reporter
- Advisory Committee on Criminal Rules —
 - Judge Richard C. Tallman, Chair
 - Professor Sara Sun Beale, Reporter
 - Professor Nancy J. King, Associate Reporter
- Advisory Committee on Evidence Rules —
 - Judge Robert L. Hinkle, Chair
 - Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Rosenthal reported that the Supreme Court had transmitted to Congress all the rule amendments approved by the Judicial Conference in September 2009, except the proposed amendment to FED. R. CRIM. P. 15 (depositions). That proposal would have authorized taking the deposition of a witness in a foreign country outside the presence of the defendant if the presiding judge were to make several special findings of fact. The Court remitted the amendment to the committee without comment, but some further explanation of the action is anticipated. She noted that the advisory committee had crafted the rule carefully to deal with delicate Confrontation Clause issues, and it appears that it may have further work to do.

Judge Rosenthal reflected that the rules committees had accomplished an enormous amount of work since the last Standing Committee meeting in January 2010. First, she said, the Advisory Committee on Evidence Rules had completed the restyling of the entire Federal Rules of Evidence and was now presenting them for final approval. The evidence rules, she noted, are the fourth set of federal rules to be restyled, and the final product is truly impressive.

Second, she said, final approval was being sought for important changes in the appellate and bankruptcy rules and for a package of amendments to the criminal rules that would allow courts and law enforcement authorities to take greater advantage of technological developments. Third, she pointed to the recent work of the sealing and privacy subcommittees and the Federal Judicial Center's major report on sealed cases in the federal courts.

Finally, she emphasized that the civil rules conference held at Duke Law School in May 2010 had been an unqualified success. She noted that the conference proceedings and the many studies and articles produced for the event should be viewed as just the beginning of a major rules project that will continue for years. All in all, she said, it had been a truly productive year for the rules committees, and the year was still not half over.

Judge Rosenthal introduced the committee's newest member, Chief Justice Wallace Jefferson of Texas. She noted that he is extremely well regarded across the entire legal community and recently received more votes than any other candidate for state office in Texas. She described some of his many accomplishments and honors, and she noted that he will be the next presiding officer of the Conference of Chief Justices.

With regret, she reported that several rules committee chairs and members were attending their last Standing Committee meeting because their terms would expire on October 1, 2010. She thanked Judge Swain and Judge Hinkle for their leadership and enormous contributions as advisory committee chairs for the past three years.

She pointed out that Judge Swain, as chair of the Advisory Committee on Bankruptcy Rules, had embarked on new projects to modernize the official bankruptcy forms and update the bankruptcy appellate rules, and had guided the committee through controversial rules amendments that were necessary to respond to economic developments. She emphasized that the work had been extremely complicated, timely, and meticulous.

Judge Hinkle's many accomplishments as chair of the Advisory Committee on Evidence Rules, she said, included the major, and very difficult, project of restyling the Federal Rules of Evidence. The new rules, she said, are outstanding and are an appropriate monument to his leadership as chair.

Judge Rosenthal said that the terms of two members of the Standing Committee were also about to end – Judge Hartz and Mr. Kester. She noted that Judge Hartz had come perfectly prepared to serve on the committee, having been a private practitioner, a prosecutor, a law professor, and a state judge. She thanked him for his incisive work as chair of the sealing subcommittee, for his amazing attention to detail, and for his willingness to do more than his share of hard preparatory work.

She said that Mr. Kester had been a wonderful member, bringing to the committee invaluable insights and wisdom as a distinguished lawyer. She detailed some of his background as a partner at a major Washington law firm, a law clerk to Justice Hugo Black, a former president of Harvard Law Review, a former high-level official at the Department of Defense, and a member of many public and civic bodies. She noted that he always shows great respect and appreciation for the work of judges and has written articles on law clerks and how they affect the work of judges.

Judge Rosenthal pointed out that two of the committee's consultants – Professor Geoffrey C. Hazard, Jr. and Joseph F. Spaniol, Jr. – had been unable to attend the meeting and would be greatly missed. She noted that Mr. Spaniol had been part of the federal rules process for more than 50 years.

Judge Rosenthal reported that Tom Willging was about to retire from his senior position with the Research Division of the Federal Judicial Center. She noted that Dr. Willging had worked closely with the Advisory Committee on Civil Rules for more than 20 years and had directed many of the most important research projects for that committee. She thanked him for his many valuable contributions to the rules committees and emphasized his hard work, innovative approach, and completely honest assessments.

Judge Rosenthal also thanked the staff of the Administrative Office for their uniformly excellent work in supporting the rules committees, noting in particular that they coped successfully with the recent upsurge in rules committee activities and contributed mightily to the success of the May 2010 civil rules conference at Duke Law School.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 7-8, 2010.

LEGISLATIVE REPORT

Civil Pleading

Judge Rosenthal reported that legislation had been introduced in 2009 in each house of Congress attempting 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). Three hearings had been held on the bills, but none since January 2010.

In May 2010, she said, a discussion draft had been circulated of new legislation that would take a somewhat different approach from the two earlier bills. She added that Congressional markup of some sort of pleading legislation had been anticipated by May, but had been postponed indefinitely. Another markup session, she said, may be scheduled before the summer Congressional recess, but there is still a good deal of uncertainty over what action the legislature will take.

Judge Rosenthal pointed out that the judiciary's primary emphasis has been to promote the integrity of the rulemaking process and to urge Congress to use that process, rather than legislation, to address pleading issues. She noted that the rules committees have been: (1) monitoring pleading developments since *Twombly* and *Iqbal*; (2) memorializing the extensive case law developed since those decisions; and (3) drawing on the Administrative Office and the Federal Judicial Center to gather statistics and other empirical information on civil cases before and after *Twombly* and *Iqbal*. That information, she said, had been given to Congress and posted on the judiciary's website. In addition, she, Judge Kravitz, and Administrative Office Director Duff had written letters to Congress emphasizing the importance of respecting and deferring to the Rules Enabling Act process, especially in such a delicate and technical legal area as pleading standards.

Sunshine in Litigation

Judge Rosenthal reported that the committee was continuing to monitor proposed "sunshine in litigation" legislation that would impose restrictions on judges issuing protective orders during discovery in cases where the information to be protected by the order might affect public health or safety. She noted that a new bill had recently been introduced by Representative Nadler that is narrower than earlier legislation. But, she

said, it too would require a judge to make specific findings of fact regarding any potential danger to public health and safety before issuing a protective order. As a practical matter, she explained, the legislation would be disruptive to the civil discovery process and require a judge to make important findings of fact without the assistance of counsel and before any discovery has taken place in a case.

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 May 28, 2010 (Agenda Item 11).

Amendments for Final Approval

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

PROPOSED STATUTORY AMENDMENT TO 28 U.S.C. § 2107

Judge Sutton reported that the proposed changes to Rule 4 (time to appeal) and Rule 40 (petition for panel rehearing) had been published for comment in 2007. The current rules, he explained, provide additional time to all parties to file a notice of appeal under Rule 4 (60 days, rather than 30) or to seek a panel rehearing under Rule 40 (45 days, rather than 14) in civil cases in which one of the parties in the case is a federal government officer or employee sued in an *official* capacity. The proposed amendments, he said, would clarify the law by specifying that additional time is also provided in cases where one of the parties is a federal government officer or employee sued in an *individual* capacity for an act or omission occurring in connection with duties performed on the government's behalf.

He noted, by way of analogy, that both FED. R. CIV. P. 4(i)(3) (serving a summons) and FED. R. CIV. P. 12(a)(3) (serving a responsive pleading) refer to a government officer or employee sued "in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The same concept was being imported from the civil rules to the appellate rules.

Judge Sutton pointed out that the advisory committee had encountered a complication when the Supreme Court held in *Bowles v. Russell*, 551 U.S. 205 (2007), that an appeal time period reflected in a statute is jurisdictional in nature. In light of that opinion, the advisory committee questioned the advisability of making the change in Rule 4 without also securing a similar statutory amendment to 28 U.S.C. § 2107.

The advisory committee, he said, had considered dropping the proposed amendment to Rule 4 and proceeding with just the amendment to Rule 40 – which has no statutory counterpart. But the committee was uncomfortable with making the change in one rule but not the other because the two deal with similar issues and use identical language. Accordingly, after further discussion, the committee decided to pursue both the Rule 4 and Rule 40 amendments, together with a proposed statutory change to 28 U.S.C. § 2107. Amending all three will bring uniformity and clarity in all civil cases in which a federal officer or employee is a party.

Judge Sutton reported that the advisory committee had made a change in the proposed amendments following publication to specify that the rules apply to both current and former government employees.

He also explained that the advisory committee had debated whether to set forth specific safe harbors in the text of the rule to ensure that the longer time periods apply in certain situations. All committee members, he said, agreed to include two safe harbors in the rule. They would cover cases where the United States: (1) represents the officer or employee at the time the relevant judgment is entered; or (2) files the appeal or rehearing petition for the officer or employee.

Judge Sutton explained that two committee members had wanted to add a third safe harbor, to cover cases where the United States pays for private representation for the government officer or employee. There was no opposition to the third safe harbor on the merits, but a seven-member majority of the committee pointed to practical problems that cautioned against its inclusion. For example, neither the clerk's office nor other parties in a case will know whether additional time is provided because they will not be able to tell from the pleadings and the record whether the United States is in fact financing private counsel. The rule, moreover, had proven quite complicated to draft, and adding another safe harbor would make it more difficult to read.

In short, he said, the advisory committee concluded that the third safe harbor was simply not appropriate for inclusion in the text of the rule. He suggested, though, that some language addressing it could be included in the committee note, even though it would be unusual to specify a safe harbor in the note that is not set forth in the rule itself.

A participant inquired as to how often the situation arises where the government funds an appeal but does not provide the representation directly. Judge Sutton responded that the advisory committee had been informed that it arises rather infrequently, in about 30 to 50 cases a year.

A member suggested that the committee either add the third safe harbor to the text of the rules or not include any safe harbors in the rules at all. For example, the text of the two rules could be made simpler and a non-exclusive list added to the committee notes.

Judge Sutton explained that the advisory committee had originally drafted the rule using the words, “including, but not limited to” The style subcommittee, however, did not accept that formulation because it was not consistent with general usage elsewhere in the rules. He suggested, therefore, that two options appeared appropriate: (1) returning to the original language proposed by the advisory committee, *i.e.*, “including but not limited to”; or (2) retaining the current language of the rule with two safe harbors, but adding language to the note referring to the third safe harbor as part of a non-exclusive list. Professor Struve offered to draft note language to accomplish the latter result.

A member moved to adopt the second option, using the language drafted by Professor Struve, with a minor modification.

The committee without objection by voice vote approved the proposed amendments to Rules 4 and 40, including the additional language for the committee notes. Without objection by voice vote, it also approved the proposed corresponding statutory amendment to 28 U.S.C. § 2107.

Informational Items

Judge Sutton reported that the advisory committee was considering proposals to amend FED. R. APP. P. 13 (review of Tax Court decisions) and FED. R. APP. P. 14 (applicability of other rules to review of Tax Court decisions) to address interlocutory appeals from the Tax Court. He noted that the committee would probably ask the Standing Committee to authorize publication of the proposed amendments at its January 2011 meeting.

He reported that the advisory committee was continuing to study whether federally recognized Indian tribes should be given the same status as states under FED. R. APP. P. 29 (amicus briefs), thereby allowing them to file amicus briefs without party consent or court permission. He said that he would consult on the matter with the chief judges of the Eighth, Ninth, and Tenth Circuits, where most tribal amicus filings occur. One possibility, he suggested, would be for those circuits to amend their local rules to take care of any practical problems. This course might avoid the need to amend the national rules. Otherwise, he said, the advisory committee would consider amending Rule 29. In addition, he noted that the Supreme Court does not give tribes the right to file amicus briefs without permission, but it does allow municipalities to do so.

He also reported that the advisory committee was considering some long-term projects, including possible rule amendments in light of the recent Supreme Court decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), which held that a ruling by a district court on attorney-client privilege did not qualify for an immediate appeal under the “collateral order” doctrine. Another long-term project, he said, involved studying the case law on premature notices of appeal. He noted that there are splits

among the circuits regarding the status of appeals filed prior to the entry of an appealable final judgment.

Finally, Judge Sutton noted that the advisory committee was considering whether to modify the requirements in FED. R. APP. P. 28(a)(6) and (7) (briefs) that briefs contain separate statements of the case and of the facts. He suggested that the requirements prevent lawyers from telling their side of the case in chronological order. Several members agreed with that assessment and encouraged the advisory committee to proceed.

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 May 27, 2010 (Agenda Item 10).

Amendments for Final Approval

FED. R. BANKR. P. 1004.2

Judge Swain reported that proposed new Rule 1004.2 (chapter 15 petition) would require a chapter 15 petition – which seeks recognition of a foreign proceeding – to designate the country in which the debtor has “its center of main interests.” The proposal, originally published in 2008, had been criticized in the public comments for allowing too much time for a party to file a motion challenging the designation. As a result, the advisory committee republished the rule in 2009 to reduce the time for filing an objection from 60 days after notice of the petition is given to 7 days before the date set for the hearing on the petition.

She noted that no comments had been submitted on the revised proposal, and only stylistic changes had been made after publication.

The committee without objection by voice vote approved the proposed new rule for approval by the Judicial Conference.

FED. R. BANKR. P. 2003

Professor Gibson explained that under current law the officer presiding at the first meeting of creditors or equity security holders, normally the trustee, may defer completion of the meeting to a later date without further notice. The proposed amendment to Rule 2003 (meeting of creditors or equity security holders) would require the officer to file a statement specifying the date and time to which the meeting is

adjourned. This procedure will make it clear on the record for those parties not attending whether the meeting was actually concluded or adjourned to another day.

She noted that § 1308 of the Bankruptcy Code requires chapter 13 debtors to file their tax returns for the last four taxable periods before the scheduled date of the meeting. If, however, a debtor has not filed the returns by that date, § 1308(b)(1) permits the trustee to “hold open” the meeting for up to 120 days to allow the debtor additional time to file.

Under FED. R. BANKR. P. 3002(c) (filing a proof of claim or interest), taxing authorities have 60 days to file their proofs of claim after the debtor files the returns. If the debtor fails to file them within the time period provided by § 1308, the failure is a basis under § 1307 of the Code for mandatory dismissal of the case or conversion to chapter 7.

Professor Gibson pointed out that the purpose of the proposed amendment to Rule 2003 was to give clear notice to all parties as to whether a meeting of creditors has been concluded or adjourned and, if adjourned, for how long. It will let them know whether the trustee has extended the debtor’s time to file tax returns as required for continuation of a chapter 13 case, since adjourning the meeting functions as “holding open” the meeting for purposes of the tax return filing provision.

She noted that eight of the nine public comments on the rule had been favorable. The Internal Revenue Service, however, recommended that the rule be revised to require the presiding officer to specify whether the meeting of creditors is being: (1) “held open” explicitly under § 1308 of the Code to give a taxpayer additional time to file returns; or (2) adjourned for some other purpose.

She reported that the advisory committee had debated the matter, and the majority voted to approve the rule as published for three reasons. First, no court has required a presiding officer to state specifically that the meeting is being “held open” or to cite § 1308. Rather, courts distinguish only between whether the meeting is concluded or continued. Second, the advisory committee believed that “holding open” and “adjourning” are truly equivalent terms, even though Congress used the inartful term “hold open” in § 1308. Third, the advisory committee was persuaded that the consequences of a presiding officer not specifically using the term “hold open” would be sufficiently severe for the debtor – conversion or dismissal of the case – that use of the exact words should not be required. Moreover, the taxing authorities are not prejudiced because they still have 60 days to file their proofs of claim.

Professor Gibson reported that the only change made since publication was the addition of a sentence to the committee note stating that adjourning is the same as holding

open. The modification was made to address the concerns expressed by the Internal Revenue Service.

Ms. Claggett and Mr. Kohn stated that the Department of Justice appreciated the advisory committee's concerns for the Internal Revenue Service's position, but wanted to reiterate the position for the record. Mr. Kohn explained that making a distinction in the rule between adjourning a meeting for any possible reason and holding it open for the narrow purpose of § 1308 is fully consistent with § 1308. The meeting, he said, can be "held open" for only one purpose. Congress, he said, had used the term deliberately, and it should be carried over to the rule.

The Department, he said, agreed that § 1308 had been designed to help taxing authorities prod debtors into filing returns and promptly providing information early in a case. The Department, he said, was concerned that there will be confusion if the distinction between holding open and adjourning a meeting is blurred. Moreover, the sanctions that may be imposed for failing to file in a timely fashion may be compromised.

The committee by voice vote with one objection (the Department of Justice) approved the proposed amendment for approval by the Judicial Conference.

FED. R. BANKR. P. 2019

Judge Swain reported that the advisory committee was recommending a substantial revision of Rule 2019 (disclosure of interests) to expand both the coverage of the rule and the content of its disclosure requirements. The rule, she said, provides the courts and parties with needed insight into the interests and potentially competing motivations of groups participating in a case. It attracted little attention over the years until buyers of distressed debt began to participate actively in chapter 11 cases.

The revised rule would require official and unofficial committees, groups, or entities that consist of, or represent, more than one creditor or equity security holder to disclose their "disclosable economic interests." That term is defined broadly in the revised rule to include not only a claim, but any other economic right or interest that could be affected by the treatment of a claim or interest in the case.

Among other things, she said, there has been strategic use of the current rule, especially to force hedge funds and other distressed-debt investors to reveal their holdings when they act as ad hoc committees of creditors or equity security holders. As a result, a hedge fund association suggested that the rule be repealed in its entirety. Other groups, however, including the National Bankruptcy Conference and the American Bar Association, recommended that the rule be retained and broadened.

Judge Swain pointed out that the proposal had drawn considerable attention, including 14 written comments and testimony from seven witnesses at the advisory committee's public hearing. In the end, she said, all but one commentator acknowledged the need for disclosure and supported expansion of the current rule.

Three sets of objections were voiced to the proposal as published. First, distressed-debt buyers objected to the proposed requirement to divulge the date that each disclosable economic interest was acquired and the amount paid for it. That information, the industry said, would compromise critical business secrets, such as trading strategies, seriously damage their operations, and undercut the bankruptcy process. Second, objections were raised to applying the disclosure requirements to entities acting in certain institutional roles, such as entities acting in a purely fiduciary capacity. Third, there were objections to applying the rule to "groups" that are really composed of a single affiliated set of actors, or to law firms or other entities that are only passively involved in a case.

On the other hand, she said, there had been many public comments in support of the rule. The supporters, however, agreed that the rule would still be effective even if narrowed to address some of the objections. Accordingly, after publication, the committee made a number of changes to narrow the disclosure requirements and the sanctions provision.

She said that republication would not be necessary because all the subject matter included in the revised rule had been included in the broader published rule, and the advisory committee had added no new restrictions or requirements. Republication, moreover, would delay the rule by a year, and it is important to have it take effect as soon as possible to avoid further litigation over the scope and meaning of the current rule and strategic invocation of the current rule to gain leverage in disputes.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 3001

Professor Gibson reported that the proposed amendments to Rule 3001 (proof of claim) and new Rule 3002.1 (notice of fees, charges and payment amount changes imposed during the life of a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) were designed to address problems encountered in the bankruptcy courts with inadequate claims documentation in consumer cases. First, she said, proofs of claims are frequently filed without the documentation currently required by the rules and Official Form 10, especially by bulk purchasers of consumer claims. Second, problems arise in chapter 13 cases as a result of inadequate notice of various fees and penalties assessed on home mortgages. Debtors who

successfully complete their plan payments may be faced with deficiency or foreclosure notices soon after they emerge from bankruptcy with a discharge.

Professor Gibson explained that current Rule 3001(c) lays down the basic requirement that whenever a claim is based on a writing, the original or a duplicate of the writing must be filed with the proof of claim. The published amendments to Rule 3001(c)(1) would have added a requirement that a copy of the debtor's last account statement be attached to open-end or revolving credit-card account claims. The statement would let the debtor and trustee know who the most recent holder of the claim was, how old the claim is and whether it may be barred by the statute of limitations. Because accounting mistakes occur and creditors change periodically, it would also help debtors to match up the claim with the specific debt.

She reported that the two rules had attracted a good deal of attention, including more than a hundred written comments and several witnesses at the advisory committee's public hearing. Comments from buyers of consumer debt objected because the last account statements, they said, are often no longer available. Federal law, for example, requires that they be kept for only two years. In addition, industry representatives stated that some of the loan information required by the amendments is not readily available to current creditors and cannot be broken out as specified in the proposed rules. Some commentators also argued that a copy of the last statement would unnecessarily reveal private information as to the nature and specifics of the credit card purchases of the debtor.

Professor Gibson reported that as a result of the public comments and testimony, the advisory committee had decided to withdraw the proposed revolving and open-end credit related amendments, redraft them, and republish them for further comment as a proposed new paragraph (c)(3). See *infra*, page 18.

The advisory committee, therefore, was seeking final approval at this point of only the proposed changes in Rule 3001(c)(2). They would require that additional information be filed with a proof of claim in cases in which the debtor is an individual, including: (1) itemized interest charges and fees; and (2) a statement of the amount necessary to cure any pre-petition default and bring the debt current. In addition, a home mortgage creditor with an escrow account would have to file an escrow statement in the form normally required outside bankruptcy.

To standardize the new requirements of paragraph (c)(2) and supersede the many local forms already imposing similar requirements, the advisory committee was also seeking approval to publish for comment a proposed new standard national form – Official Form 10, Attachment A. See *infra*, page 20. The form would take effect on December 1, 2011, the same date as the proposed amendments to Rule 3001(c)(2).

Professor Gibson added that some public comments had recommended requiring a creditor to provide additional information on fees and calculations, while others argued for less information. The advisory committee, she said, had tried to strike the correct balance between obtaining additional disclosures needed for the debtor and trustee to understand the claim amounts and avoiding imposing undue burdens on creditors.

Professor Gibson pointed out that proposed new subparagraph (c)(2)(D) sets forth sanctions that a court may impose if a creditor fails to provide any of the information specified in Rule 3001(c). Modeled after FED. R. CIV. P. 37(c)(1), it specifies that if the holder of a claim fails to provide the required information, the court may preclude its use as evidence or award other appropriate relief.

She reported that the provision had attracted several comments. After publication, the advisory committee revised the rule and committee note to emphasize that: (1) a court has flexibility to decide what sanction to apply and whether to apply a sanction at all; (2) the rule does not create a new ground to disallow a claim, beyond the grounds specified in § 502 of the Code; and (3) a court has discretion to allow a holder of the claim to file amendments to the claim. The proposed rule, she said, is a clear rejection of the concept that creditors may routinely ignore the documentation requirements of the rule and force debtors to go to the court to obtain necessary information.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 3002.1

Professor Gibson explained that proposed new rule 3002.1 (notice related to post-petition changes in payment amounts, and fees and charges, during a chapter 13 case in connection with claims secured by a security interest in the debtor's principal residence) implements § 1322(b)(5) of the Bankruptcy Code. It would provide a procedure for debtors to cure any pre-petition default, maintain payments, and emerge current on their home mortgage at the conclusion of their chapter 13 plan. For the option to work, she explained, the chapter 13 trustee needs to know the required payment amounts, and the debtor should face no surprises at the end of the case.

She noted that subdivision (b) of the new rule would require the secured creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition changes in the monthly mortgage payment amount, including changes in the interest rate or escrow account adjustments. As published, the rule would have required a creditor to provide the notice 30 days in advance of a change. Public comments pointed out, though, that only 25 days is sometimes required by non-bankruptcy law. Accordingly, the advisory committee modified the rule after publication to require 21 days' advance notice of changes.

She added that the advisory committee had drafted a new form to implement subdivision (b) (Official Form 10, Supplement 1, Notice of Mortgage Payment Change). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra*, page 20.

Professor Gibson reported that subdivision (c) would require the creditor to provide notice to the debtor, debtor's counsel, and the trustee of any post-petition fees, expenses, and charges within 180 days after they are imposed. She explained that debtors are often unaware of the different kinds of charges that creditors assess, some of which may not be warranted or appropriate under the mortgage agreement or applicable non-bankruptcy law. The proposed amendments would give the debtor or trustee the chance to object to any claimed fee, expense, or charge within one year of service of the notice. She added that the advisory committee had worked hard to strike the right balance between providing fair notice to debtors and avoiding imposing unnecessary burdens on creditors.

She noted that the advisory committee had drafted a new form to implement subdivision (c) (Official Form 10, Supplement 2, Notice of Postpetition Mortgage Fees, Expenses, and Charges). It would be published for comment in August 2010 and take effect on December 1, 2011, the same time as the proposed new rule. See *infra*, page 20.

Professor Gibson explained that subdivisions (f) through (h) deal with final-cure payments and end-of-case proceedings. They will permit debtors to obtain a determination as to whether they are emerging from bankruptcy current on their mortgage. The amendments recognize that in some districts, debtors make mortgage payments directly, and in others they are paid by the chapter 13 trustee. In all districts, the trustee makes the default payments.

Within 30 days of the debtor's completion of all payments under the plan, the trustee would be required by the rule to provide notice to the debtor, debtor's counsel, and the holder of the mortgage claim that the debtor has cured any default. The holder of the claim would be required to file a response indicating whether it agrees that the debtor has cured any default and also indicating whether the debtor is current on all payments.

She pointed out that subdivision (i) contains a sanction provision for failure to provide the information required under the rule, similar to the sanction provision proposed in Rule 3001, *supra* page 14.

The committee without objection by voice vote approved the proposed new rule for approval by the Judicial Conference.

FED. R. BANKR. P. 4004

Professor Gibson explained that the proposed amendments to Rule 4004 (grant or denial of discharge) would resolve a problem identified by the 7th Circuit in *Zedan v. Habash*, 529 F.3d 398 (2008). They would permit a party in specific, limited circumstances to seek an extension of the time to object to the debtor's discharge after the time for objecting has expired. The proposal would address the unusual situation in which there is a significant gap in time between the deadline in Rule 4004(a) for a party to object to the discharge (60 days after the first date set for the meeting of creditors) and the date that the court actually enters the discharge order.

During such a gap, a party – normally a creditor or the trustee – may learn of facts that may provide grounds to revoke the debtor's discharge under § 727(a) of the Code, such as fraud committed by the debtor. But it is too late at that point to file an objection. The party, moreover, cannot seek revocation because § 727(d) of the Code specifies that revocation is not permitted if a party learns of fraud *before* the discharge is granted. The party, therefore, may be left without appropriate recourse.

The proposed amendments would allow a party to file a motion to extend the time to object to discharge after the objection deadline has expired and before the discharge is granted. The motion must show that: (1) the objection is based on facts that, if learned after the discharge was entered, would provide a basis for revocation under § 727(d); and (2) the party did not know of those facts in time to file an objection to discharge. The motion, moreover, must be filed promptly upon discovery of the facts.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. BANKR. P. 6003

Judge Swain reported that Rule 6003 (relief immediately after commencement of a chapter 11 case) generally prohibits a court from issuing certain orders during the first 21 days of a chapter 11 case, such as approving the employment of counsel, the sale of property, or the assumption of an executory contract or unexpired lease. The proposed rule amendment would make it clear that the waiting period does not prevent a court from later issuing an order with retroactive effect, relating back, for example, to the date that the application or motion was filed. Thus, professionals can be paid for work undertaken while their application is pending.

The amendment would also clarify that the court is only prevented from granting the relief specifically identified in the rule. A court, for example, could approve the procedures for a sale during the 21-day waiting period, but not the actual sale of estate property itself.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

OFFICIAL FORMS 22A, 22B, and 22C

Judge Swain reported that the proposed amendments to the “means-test” forms, Official Forms 22A (chapter 7), 22B (chapter 11), and 22C (chapter 13), would replace in several instances the terms “household” and “household size” with “number of persons” or “family size.” The revised terminology more closely reflects § 707(b) of the Code and IRS standards. Section 707(b)(2)(A)(ii)(I) of the Code specifies that the debtor’s means-test deductions for various monthly expenses may be taken in the amounts specified in the IRS National and Local Standards. The national standards, she said, are based on numbers of persons, rather than household size. The local standards are based on family size, rather than household size.

In addition, she said, an instruction would be added to each form explaining that only one joint filer should report household expenses regularly paid by a third person. Instructions would also be added directing debtors to file separate forms if only one joint debtor is entitled to an exemption under Part I (report of income) and they believe that filing separate forms is required by § 707(b)(2)(C) of the Code. The statutory provisions, she said, are ambiguous on means-testing exclusions. Therefore, the form does not impose a particular interpretation, and the instructions allow debtors to take positions consistent with their interpretations of the ambiguous exemption provisions.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference.

Amendments for Final Approval, Without Publication

OFFICIAL FORMS 20A AND 20B

Judge Swain reported that the proposed changes to Official Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were technical in nature and did not require publication. They would conform the forms to: (1) the 2005 amendment to § 727(a)(8) of the Code, which extends the time during which a debtor is barred from receiving successive discharges from 6 years to 8 years; and (2) the 2007 addition of FED. R. BANKR. R. 9037, which directs filers to provide only the last four digits of any social security number or individual taxpayer-identification number.

The revisions, she said, would become effective on December 1, 2010.

The committee without objection by voice vote approved the proposed amendments to the forms for approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 3001

As noted above on pages 12-14, the proposed amendments to Rule 3001(c)(1) (proof of claim) published in August 2009 would have required a creditor with a proof of claim based on an open-end or revolving consumer credit agreement to file the debtor's last account statement with the proof of claim. The main problem that the rule was designed to address is that credit-card debt purchased in bulk claims may be stale.

Professor Gibson explained that the advisory committee had withdrawn the published proposal in light of many comments from creditors that they could not effectively produce the account statements, especially since claims for credit-card debt may be sold one or more times before the debtor's bankruptcy. Some recommended that pertinent information be required instead.

Professor Gibson explained that the advisory committee would replace the proposal with a substitute new paragraph 3001(c)(3). In lieu of requiring that a copy of the debtor's last account statement be attached, the revised proposal would require the holder of a claim to file with the proof of claim a statement that sets forth several specific names and dates relevant to a consumer-credit account. Those details, she said, are important for a debtor or trustee to be able to associate the claim with a known account and to determine whether the claim is timely or stale.

Although the creditor would not have to attach the underlying writing on which the claim is based, a party, on written request, could require the creditor to provide the writing. In certain cases, the debtor needs the information to assert an objection.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7054

Judge Swain reported that the proposed amendment to Rule 7054 (judgment and costs) would conform the rule to FED. R. CIV. P. 54 and increase the time for a party to respond to the prevailing party's bill of costs from one day to 14 days. The current period, she said, is an unrealistically short amount of time for a party to prepare a response. In addition, the time for serving a motion for court review of the clerk's action

in taxing costs would be extended from 5 to 7 days, consistent with the 2009 time-computation rules that changed most 5-day deadlines to 7 days.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7056

Judge Swain explained that Rule 7056 (summary judgment) incorporates FED. R. CIV. P. 56 in adversary proceedings. Rule 56 is also incorporated in contested matters through FED. R. BANKR. P. 9014(c).

She reported that the proposed amendment to Rule 7056 would alter the rule's default deadline for filing a summary judgment motion in bankruptcy cases. She explained that the deadline in civil cases – 30 days after the close of discovery – may not work well in fast-moving bankruptcy contested matters, where hearings often occur shortly after the close of discovery. Therefore, the advisory committee decided to set the deadline for filing a summary judgment motion in bankruptcy at 30 days before the initial date set for an evidentiary hearing on the issue for which summary judgment is sought. As with FED. R. CIV. P. 56(c)(1), she noted, the deadline may be altered by local rule or court order.

A member suggested that the proposed language of the amendment was a bit awkward and recommended moving the authorization for local rule variation to the end of the sentence. Judge Swain agreed to make the change.

The committee without objection by voice vote approved the proposed amendment for publication.

OFFICIAL FORM 10

and

ATTACHMENT A, SUPPLEMENT 1, AND SUPPLEMENT 2

Judge Swain reported that the advisory committee was recommending several changes in Official Form 10 (proof of claim). The holder of a secured claim would be required to specify the annual interest rate on the debt at the time of filing and whether the rate is fixed or variable. In addition, an ambiguity on the current form would be eliminated to make it clear that the holder of a claim must attach the documents that support a claim, and not just a summary of the documents.

To emphasize the duty of accuracy imposed on a party filing a proof of claim, the signature box would be amended to include a certification that the information submitted on the form meets the requirements of FED. R. BANKR. P. 9011(b) (representations to the

court), *i.e.*, that the claim is “true and correct to the best of the signer’s knowledge, information, and reasonable belief.” This is particularly important, she said, because a proof of claim is *prima facie* evidence of the validity of a claim. In addition, a new space would be provided on the form for optional use of a “uniform claim identifier,” a system implemented by some creditors and chapter 13 trustees to facilitate making and crediting plan payments by electronic funds transfer

Professor Gibson reported that three new claim-attachment forms had been drafted to implement the mortgage claims provisions of proposed Rules 3001(c)(2) and 3002.1. They would prescribe a uniform format for providing additional information on claims involving a security interest in a debtor’s principal residence.

Attachment A to Official Form 10 would implement proposed Rule 3001(c)(2) and provide a uniform format for the required itemization of pre-petition interest, fees, expenses, and charges included in the home-mortgage claim amount. It would also require a statement of the amount needed to cure any default as of the petition date. If the mortgage installment payments include an escrow deposit, an escrow account statement would have to be attached, as required by proposed Rule 3001(c)(2)(C).

Supplement 1 to Official Form 10 would implement proposed Rule 3002.1(b) and require the home-mortgage creditor in a chapter 13 case to provide notice of changes in the mortgage installment payment amounts.

Supplement 2 to Official Form 10 would implement proposed Rule 3002.1(c) and provide a uniform format for the home-mortgage creditor to list post-petition fees, expenses, and charges incurred during the course of a chapter 13 case.

Judge Swain noted that, following publication, the proposed form changes would become effective on December 1, 2011.

The committee without objection by voice vote approved the proposed amendments to Form 10 and the new Attachment A and Supplements 1 and 2 to the form for publication.

OFFICIAL FORM 25A

Judge Swain reported that Official Form 25A is a model plan of reorganization for a small business. It would be amended to reflect the recent increase of the appeal period in bankruptcy from 10 to 14 days in the 2009 time-computation rule amendments. The effective date of the plan would become the first business day following 14 days after entry of the court’s order of confirmation.

The committee without objection by voice vote approved the proposed amendments to the form for publication.

Informational Items

Professor Gibson reported that the advisory committee was continuing to make progress on its two major ongoing projects – revising the bankruptcy appellate rules and modernizing the bankruptcy forms. She noted that the committee would begin considering a draft of a completely revised Part VIII of the Bankruptcy Rules at its fall 2010 meeting. In addition, it would try to hold its spring 2011 meeting in conjunction with the meeting of the Advisory Committee on Appellate Rules in order to have the two committees consider the proposed revisions together.

Judge Swain reported that the forms modernization project, under the leadership of Judge Elizabeth L. Perris, had made significant progress in reformatting and rephrasing the many forms filed at the outset of a individual bankruptcy case. She noted that the project had obtained invaluable support from Carolyn Bagin, a nationally renowned forms-design expert, and it was continuing to reach out to users of the forms to solicit their feedback through surveys and questionnaires. In addition, the project was working closely with the groups designing the next generation replacement for CM/ECF to make sure that the new system includes the ability to extract and store data from the forms and to retrieve the data for user-specified reports.

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 May 17, 2010 (Agenda Item 5). The advisory committee had no action items to present.

Informational Items

FED. R. CIV. P. 45

Judge Kravitz reported that the advisory committee, aided by a subcommittee chaired by Judge David G. Campbell, was exploring potential improvements to Rule 45 (subpoenas). Professor Marcus, he noted, was serving as the subcommittee's reporter.

Judge Kravitz said that substantial progress had been made in addressing some of the problems most often cited with the current rule. The subcommittee's efforts have included: (1) reworking the division of responsibility between the court where the main action is pending and the ancillary discovery court; (2) enhancing notice to all parties before serving document subpoenas; and (3) simplifying the overly complex rule. The

subcommittee, he noted, had drafted three models to illustrate different approaches to simplification, including one that would separate discovery subpoenas from trial subpoenas.

Judge Kravitz reported that the committee would convene a Rule 45 mini-conference with members of the bench and bar in Dallas in October 2010. The conference, he said, should be helpful in informing the advisory committee on what approach to take at its fall 2010 and spring 2011 meetings. Rule amendments might be presented to the Standing Committee in June 2011.

PLEADING

Judge Kravitz reported that the advisory committee was continuing to monitor dismissal-motion statistics and case-law developments in light of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). The committee, he said, was focusing in particular on whether the decisions have had an impact on motions to dismiss and rates of dismissal.

Dr. Cecil explained that the Federal Judicial Center was collecting and coding court orders disposing of Rule 12(b)(6) motions in about 20 district courts and comparing outcomes in 2006 with those in 2010 to see whether there are any differences. In addition, the Center was examining court records to determine whether judges in granting dismissal motions allow leave to amend and whether the plaintiffs in fact file amended complaints.

Judge Kravitz noted that a division of opinion had been voiced at the May 2010 Duke conference on the practical impact of *Twombly* and *Iqbal*. One prominent judge, for example, urged the participants to focus on the actual holdings in the two cases, and not on the language of the opinions. Other judges concurred and argued that the two cases had not changed the law materially and were being implemented very sensibly by the lower courts. On the other hand, two prominent professors argued that the two Supreme Court decisions would cause great harm, were cause for alarm, and would effectively diminish access to justice.

Judge Kravitz emphasized that stability matters. He suggested that the advisory committee's intense research efforts demonstrated that the law of pleading in the federal courts was clearly settling down, and the evolutionary process of common-law development was working well. For that reason, he said, it would make no sense to enact legislation or change pleading standards at this point. He noted that the advisory committee's reporters were considering different ways to respond to the cases by rule, but they were awaiting the outcome of further research efforts by the Federal Judicial Center.

He pointed out that the advisory committee was looking carefully at the frequently cited problem of “information asymmetry.” To that end, it was considering permitting some pre-dismissal, focused discovery to elicit information needed specifically for pleading. Another approach, he said, might be to amend FED. R. CIV. P. 9 (pleading special matters) to enlarge the types of claims that require more specific pleading. In addition, there may be a need for more detailed pleading requirements regarding affirmative defenses.

In short, he said, the advisory committee was looking at several different approaches and focusing on special, limited discovery for pleading purposes. He added that true “notice pleading” is actually quite rare in the federal courts. To the contrary, he said, when plaintiffs know the facts, they usually set them forth in the pleadings. The problem seems to be that some plaintiffs at the time of filing simply lack access to certain information that they need in order to plead adequately.

Judge Kravitz added that pleading issues should occupy a good deal of the advisory committee’s time at its November 2010 meeting. The committee, he said, should have a report available in January 2011, but it may not have concrete proposals ready until later.

MAY 2010 CIVIL LITIGATION REVIEW CONFERENCE

Judge Kravitz thanked Dean Levi for making the facilities at Duke Law School available for the May 2010 conference. He said that the event had been a resounding success, thanks largely to the efforts of the conference organizer, Judge John G. Koeltl. He pointed out that Judge Koeltl had done an extraordinary job in creating an excellent substantive agenda, assembling an impressive array of speakers, and soliciting a wealth of valuable articles and empirical data.

Several members who had attended the conference agreed that the program had been outstanding. They described the panel discussions as extremely substantive and valuable.

Specific Suggestions Made at the Conference

Judge Kravitz noted that a few recommendations had been made at the conference for major rule changes, such as: (1) moving away from “trans-substantivity” towards different rules for different kinds of cases; (2) abandoning notice pleading; (3) limiting discovery; and (4) recasting the basic goals enunciated in Rule 1. Nevertheless, he emphasized, most of the speakers and participants at the conference did not advocate radical changes in the structure of the rules. Essentially, the consensus at the conference was that the civil process should continue to operate within the broad 1938 outline.

Judge Kravitz noted that the topics discussed at the conference were largely matters that the advisory committee has been considering in one form or another for years. He added that much of the discussion and many of the papers presented dealt with discovery issues, and he proceeded to describe some of the suggestions.

The initial disclosures required by Rule 26(a), he said, came under attack from two sides. Some speakers recommended eliminating them entirely, while others urged that they be expanded and revitalized.

Some support was voiced for imposing presumptive limits on discovery. In particular, it was suggested that the current presumptive ceiling on the number of depositions and the length of depositions might be reduced.

Judge Kravitz reported that strong support was voiced by many participants for increased judicial involvement at the pretrial stage of civil cases. Lawyers at the conference all cited a need for more actual face-to-face time with judges in the discovery process. Judges, they said, need to be personally available to provide direction to the litigants and resolve disputes quickly. Nevertheless, he suggested, it would be difficult to mandate appropriate judicial attention through a national rule change. Other approaches, such as judicial education, may be more effective in achieving this objective.

Support was offered for developing form interrogatories and form document requests specifically tailored to different categories of cases, such as employment discrimination or securities cases. The models could be drafted collectively by lawyers for all sides and established as the discovery norm for various kinds of cases.

A concept voiced repeatedly was the need for greater cooperation among lawyers. Judge Kravitz pointed out that data from the recent Federal Judicial Center's discovery study had demonstrated a direct correlation between lawyer cooperation and reduced discovery requests and costs. He noted that a panelist at the conference emphasized that the discovery process is considerably more coordinated and disciplined in criminal cases (where the defendant's freedom is at stake) than in civil cases (where money is normally the issue). He observed that lawyers in criminal cases focus on the eventual trial and outcome, while civil lawyers focus mostly on the discovery phase itself. There are, moreover, more guidelines and limits in criminal discovery, due to the specific language of FED. R. CRIM. P. 16 and the Jencks Act. In addition, there are no economic incentives for the attorneys to prolong the discovery phase in criminal cases.

Judge Kravitz reported that many participants who represent defendants in civil cases complained about discovery costs. Among other things, they stated that the costs of reviewing discovery documents before turning them over to the other side continue to be huge, despite the recent enactment of FED. R. EVID. 502 (limitations on waiver of attorney-client privilege and work product). He observed that lawyers are naturally

reluctant to let their opponents see their clients' documents, even if the rule now gives them adequate legal protection.

Professor Cooper noted that plaintiffs' lawyers, on the other hand, argued that the emphasis that defendants place on their discovery burdens and costs is misplaced. They suggested, to the contrary, that the greatest problem with discovery is stonewalling on the part of defendants.

Judge Kravitz noted that support was also voiced at the conference for adopting simplified procedures, improving the Rule 16 and Rule 26 conferences, fashioning sensible discovery plans, and providing for greater cost shifting.

He reported that electronic discovery was a major topic at the conference. The lawyers, he said, were in agreement on two points. First, they recommended amending the civil rules to specify with greater precision what materials must be preserved at the outset of a case, and even before a federal case is filed. Second, they urged revision of the current sanctions regime in Rule 37(e) and argued that the rule's safe harbor is too shallow and ineffective.

Judge Kravitz said that current law provides clear triggers for the obligation to preserve potential litigation materials, but they are not specified in the federal rules. Preservation obligations, moreover, vary among the states and among the federal circuits. He said that the advisory committee was examining potential rule amendments to address both the preservation and sanctions problems. But, he cautioned, it will be very difficult to accomplish the changes that the bar clearly wants through the national rules.

He pointed out that the Rules Enabling Act limits the rules committees to matters of procedure, not substance. That statutory limitation is a serious impediment to regulating pre-lawsuit preservation obligations. Yet, once a case is actually filed in a federal court, the rules may address preservation and sanctions issues. Thus, despite the difficulty of drafting a rule to accomplish what the participants recommend, the advisory committee will move forward on the matter.

Professor Cooper agreed that the bar was promoting the laudatory goal of having clear and precise rules on what they must preserve and how they must preserve it. But the task of crafting a national preservation rule will involve complex drafting problems, as well as jurisdictional problems, and it just may not be possible.

Professor Coquillette added that state attorney-conduct rules addressing spoliation have been incorporated in a number of federal district-court rules. He explained that the Standing Committee had considered adopting national rules on attorney conduct a few years ago, but it eventually backed away from doing so because it involved many competing interests and difficult state-law issues.

Judge Kravitz reported that an excellent presentation was made at the conference on a promising pilot project in the Northern District of Illinois that focuses on electronic discovery. It emphasizes educating the bar about electronic discovery, promoting cooperation among the lawyers, and having the parties name information liaisons for discovery.

Judge Kravitz observed that, overall, the bar sees the 2006 electronic-discovery rule amendments as a success. They have worked well despite continuing concerns about preservation and sanctions. He suggested that the rules may well need further refining, but they were, in retrospect, both timely and effective.

Judge Kravitz referred to a panel discussion at the conference that focused on trials and settlement. He noted that substantial angst was expressed by some participants over diminution in the number of trials generally. Nevertheless, no changes to that phenomenon appear in sight. One professor, he noted, argued that since all civil cases are eventually bound for settlement, the rules should focus on settlement, rather than trial. On the other hand, an attorney panelist countered that maintaining the current focus of the rules on the trial facilitates good results before trial.

Perceptions of the Current System

Judge Kravitz reported that several written proposals had been submitted to the conference by bar groups, and a good deal of survey data had been gathered. One clear conclusion to be drawn from the conference, he said, is that a large gap exists between the perceptions of plaintiffs' lawyers and those of defendants' lawyers. Those differences, he said, will be difficult to reconcile. Nevertheless, the advisory committee may be able to take some meaningful steps toward achieving workable consensus.

The general consensus, he said, is that the civil rules are generally working well. At the same time, though, frustration experienced by certain litigants leads them to believe that the system is not in fact working. The two competing perceptions, he said, are reconcilable. The reality appears to be that the process works well in most cases, but not in certain kinds of cases, particularly complex cases with high stakes. The various empirical studies, he said, show that the stakes in cases clearly matter, and complex cases with more money at stake tend to have more discovery problems and greater discovery costs. The goal in each federal civil case, he suggested, should be to agree on a sensible and proportionate discovery plan that relates to the stakes of the litigation.

Dr. Lee described and compared the various studies presented at the conference. He said that two different kinds of surveys had been conducted – those that asked lawyers for their general perceptions and those that were empirically based on actual experiences in specific cases.

The two approaches, he said, produce different results. For example, the responses from lawyers in a perception study showed that they believe that about 70% of litigation costs are associated with discovery. The empirical studies, on the other hand, demonstrate that discovery costs were actually much lower, ranging between 20% and 40%. By way of further example, a recent perception-study showed that 80% or 90% of lawyers agree that litigation is too expensive. Yet the Federal Judicial Center studies demonstrate empirically that costs in the average federal case were only about \$15,000 to \$20,000.

The difference between the two results, he suggested, is due to cognitive biases. Respondents focus naturally on extreme cases and cases that stand out in their memory, and not on all their other cases. Perceptions, understandably, are not always accurate.

Judge Kravitz added that the empirical studies show that the vast majority of civil cases in the federal courts actually have little discovery. Nevertheless, discovery in complex civil cases can be enormous and extremely costly. Lawyers at the conference, he said, emphasized that it is the complex cases that judges should spend their time on.

Dr. Lee added that the empirical studies show that discovery costs clearly increase in complex cases. The stakes in litigation, he said, are the best predictor of costs, and they alone explain about 40-50% of the variations in costs shown in the studies. The economics of law practice, he said, also affects costs. Large firms, for example, have higher costs, and hourly billing increases costs for plaintiffs. He concluded that most of the factors shown in the studies to affect costs – such as complexity, litigation stakes, and law practice economics – are not driven by the rules themselves, but by other causes. Therefore, changing the rules alone may only have a marginal impact on the problems.

Future Committee Action

Judge Kravitz suggested that a handful of common themes had emerged at the conference. (1) There was universal agreement that cooperation among the attorneys in a case has a beneficial impact on limiting cost and delay. (2) There was universal agreement that active judicial involvement in a case, especially a case that has potential discovery problems, is essential. (3) There was little enthusiasm for retaining the Rule 26(a) mandatory disclosures in their current format. (4) Discovery costs in some cases are very high, and they may drive parties to settlement in some cases. (5) Certain types of cases are more prone to high discovery costs than others.

He noted that the advisory committee would address each of these issues, and it may also form a subcommittee to explore how judicial education and pilot projects might contribute to improvements, especially if the pilots are carefully crafted and channeled through the Federal Judicial Center to assure that they generate useful data to inform

future policy choices. The bottom line, he said, is that the advisory committee will be digesting and working on these issues for a long time.

A member suggested that the conference discussions on electronic discovery were particularly meaningful and asked the advisory committee to place its greatest priority on addressing the electronic discovery issues – preservation and sanctions. He said that most of the other problems referred to at the conference can be resolved by lawyers working cooperatively, but rules changes will be needed to address the electronic discovery problems.

Other members agreed, but they questioned whether changes in the electronic discovery rules to address preservation obligations can be promulgated under the Rules Enabling Act. Judge Kravitz pointed out that the advisory committee was very sensitive to the limits on its authority. He said that the committee might be able to rework the sanction provisions, make them clearer, and specify the applicable conduct standards more precisely. On the other hand, preservation obligations are normally addressed in state laws and ethics rules. There are also federal laws on the subject, such as Sarbanes-Oxley. He said that the advisory committee would explore preservation issues closely, and it might be able to make the preservation triggers clearer. Ultimately, though, legislation may be required, as with the 2008 enactment of FED. R. EVID. 502 (attorney-client privilege and work product; limitations on waiver).

A member pointed out that general counsels from several corporations participated actively in the conference. He noted that they did not generally criticize the way that the rules are working and recommended only minor tweaks in the rules. On the other hand, they argued unanimously and strongly for greater judicial involvement in the discovery process, especially early in cases. They tended to be critical of their own lawyers for contributing to increased costs and saw the courts as the best way to drive down costs. He acknowledged that mandating effective early judicial involvement is hard to accomplish formally by a rule, but it should be underscored as an essential ingredient of the civil process.

A judge added that many suggestions raised at the conference are not easily addressed in rules, but might be promoted through best-practices initiatives, handbooks, websites, workshops, and other educational efforts. She added that controlled pilot projects could also be helpful to ascertain what practices work well and produce positive results.

A member noted that he had heard a good deal of criticism of judges at the conference, especially about their lack of sufficient focus on resolving discovery matters. He noted that magistrate judges handle discovery extremely well and can provide the intense focus on discovery that is needed, especially with regard to electronic discovery. The system, though, may not be working effectively in some districts because the

magistrate judges have been assigned by the courts to other types of duties and do not focus on discovery.

A participant cautioned, though, that for every theme raised at the conference, there was a counter theme. Several lawyers suggested, for example, that there should be a single judge in a case. Yet every court has its own culture and different available resources. Essentially, each believes that its own way of doing things is the best approach.

Judge Rosenthal pointed out that a report of the conference and an executive summary would be prepared. She added that the advisory committee and the Standing Committee were resolved to take full advantage of what had transpired at the conference, and the proceedings will be the subject of considerable committee work in the future.

RULE 26(C) PROTECTIVE ORDERS

Judge Kravitz reported that the advisory committee had brought Rule 26(c) (protective orders) back to its agenda for further study in light of continuing legislative efforts to impose restrictions on the use of protective orders. He noted that the chair and reporter had worked on a possible revision of Rule 26(c), working from Ms. Kuperman's thorough analysis of the case law on protective orders in every circuit.

He noted that draft amendments to Rule 26(c) had been circulated at the advisory committee's spring 2010 meeting. They would incorporate into the rule a number of well-established court practices not currently explicit in the rule itself and add a provision on protecting personal privacy.

The committee, he said, was of the view that the federal courts are doing well in applying the protective-order rule in its current form. Nevertheless, it decided to keep the proposed revisions on its agenda for additional consideration. He noted, too, that none of the participants at the May 2010 conference had cited protective orders as a matter of concern to them. That fact, he suggested, was an implicit indication that the current rule is working well.

OTHER MATTERS

Judge Kravitz referred briefly to a number of other matters pending on the advisory committee's agenda, including the future of the illustrative forms issued under Rule 84 and the committee's interplay with the appellate rules committee on a number of issues that intersect both sets of rules.

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 attachments of May 19, 2010 (Agenda Item 6).

Amendments for Final Approval

TECHNOLOGY AMENDMENTS

Judge Tallman reported that the package of proposed technology changes would make it easier and more efficient for law enforcement officers to obtain process, typically early in a criminal case. It includes the following rules:

FED. R. CRIM. P. 1	Scope and definitions
FED. R. CRIM. P. 3	Complaint
FED. R. CRIM. P. 4	Arrest warrant or summons
FED. R. CRIM. P. 4.1 (new)	Issuing process by telephone or other reliable electronic means
FED. R. CRIM. P. 6	Grand jury
FED. R. CRIM. P. 9	Arrest warrant or summons on an indictment or information
FED. R. CRIM. P. 40	Arrest for failing to appear or violating release conditions in another district
FED. R. CRIM. P. 41	Search and seizure
FED. R. CRIM. P. 43	Defendant's presence
FED. R. CRIM. P. 49	Serving and filing papers

Judge Tallman commended the leadership of Judge Anthony Battaglia of the Southern District of California, who chaired the subcommittee that produced the technology package. The project, he said, was a major effort that had required substantial consultation, analysis, and drafting. He also thanked Professors Beale and King, the committee's hard-working reporters, for their contributions to the project.

He noted that the proposed amendments are intended to authorize all forms of reliable technology for communicating information for a judge to consider in reviewing a complaint and affidavits or deciding whether to issue a warrant or summons. Among other things, the term "telephone" would be redefined to include any form of technology for transmitting live electronic voice communications, including cell phones and new technologies that cannot yet be foreseen.

The amendments retain and emphasize the central constitutional safeguard that issuance of process must be made at the direction of a neutral and detached magistrate. They are designed to reduce the number of occasions when law enforcement officers must act without obtaining prior judicial authorization. Since a magistrate judge will normally be available to handle emergencies electronically, the amendments should eliminate most situations where an officer cannot appear before a federal judge for prompt process.

The heart of the technology package, he said, is new Rule 4.1. It prescribes in one place how information is presented electronically to a judge. It requires a live conversation between the applicant and the judge for the purpose of swearing the officer, who serves as the affiant. A record must be made of that affirmation process.

Rule 4.1 also reinforces and expands the concept of a “duplicate original warrant” now found in Rule 41 and extends it to other kinds of documents. In the normal course, he said, the signed warrant will be transmitted back to the applicant, but there will also be occasions in which the judge will authorize the applicant to make changes on the spot to a duplicate original.

He noted that new Rule 4.1 preserves the procedures of current Rule 41 and adds improvements. Like Rule 41, Rule 4.1 permits only a federal judge, not a state judge, to handle electronic proceedings.

Judge Tallman pointed out that the proposed amendments carry the strong endorsement of the Federal Magistrate Judges Association. Helpful comments were also received from individual magistrate judges, federal defenders, and the California state bar. The advisory committee, he said, had amended the published rules in light of those comments.

The advisory committee, he explained, had withdrawn a proposed amendment to FED. R. CRIM. P. 32.1 (revoking or modifying probation or supervised release) that would have allowed video teleconferencing to be used in revocation proceedings. He noted that there is strong societal value in having defendants appear face-to-face before a judge, and many observers fear that embracing technology may diminish the use of courtrooms and undercut the dignity of the court. Revocation proceedings, he said, are in the nature of a sentencing, and they clearly may affect the determination of innocence or guilt. For that reason, the advisory committee concluded that while video teleconferencing is appropriate for certain criminal proceedings, it should not be used for revocation proceedings.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope and definition) would expand the term “telephone,” now found in Rule 41 to allow new kinds of technology.

A member asked whether the term “electronic” is appropriate since other kinds of non-electronic communications may become common in the future. Judge Rosenthal explained that the same issue had arisen with the 2006 “electronic discovery” amendments to the Federal Rules of Civil Procedure. She said that after considerable consultation with many experts, the civil advisory committee chose to adopt the term “electronically stored information.” She added that if new, non-electronic means of communication are developed, it may well be necessary to amend the rules in the future to include those alternatives, but at this point “electronic” appears to be the best term to use in the rule.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 3

Judge Tallman explained that the proposed amendment to Rule 3 (complaint) refers to new Rule 4.1 and authorizes using the protocol of that rule in submitting complaints and supporting materials to a judge by telephone or other reliable electronic means.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 4

Judge Tallman reported that the proposed amendments to Rule 4 (arrest warrant or summons on a complaint) also refers to new Rule 4.1 and authorizes using that rule to issue an arrest warrant or summons.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 4.1

Judge Tallman pointed out that proposed new rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) is the heart of the technology amendments. He emphasized that a judge’s use of the rule is purely discretionary. A judge does not have to permit the use of technology and may insist that paper process be issued in the traditional manner through written documents and personal appearances.

He noted that if the protocol of Rule 4.1 is used, the supporting documents will normally be submitted electronically to the judge in advance. A phone call will then be made, the applicant law enforcement officer will be placed under oath, and a record will be made of the conversation. If the applicant does no more than attest to the contents of the

written affidavit submitted electronically, the record will be limited to the officer's swearing to the accuracy of the documents before the judge. The judge will normally acknowledge the jurat on the face of the warrant. If, however, the judge takes additional testimony or exhibits, the testimony must be recorded verbatim, transcribed, and filed.

The judge may authorize the applicant to prepare a duplicate original of the complaint, warrant, or summons. The duplicate will not be needed, though, if the judge transmits the process back to the applicant.

The judge may modify the complaint, warrant, or summons. If modifications are required, the judge must either transmit the modified version of the document back to the applicant or file the modified original document and direct the applicant to modify the duplicate original document. In addition, Rule 4.1(a) adopts the language in existing Rule 41(d) specifying that, absent a finding of bad faith, evidence obtained from a warrant issued under the rule is not subject to suppression on the grounds that issuing the warrant under the protocol of the rule was unreasonable under the circumstances.

A member noted that the proposed rule expands the requirement in current Rule 41(d) that testimony be recorded and filed. Yet, he said, there is no requirement in either the current or revised rule that the warrant and affidavits themselves be filed. He pointed out that record-keeping processes among the courts are inconsistent, and the advisory committee should explore how documents are being filed and preserved in the courts, especially in the current electronic environment.

Judge Tallman agreed and noted that the advisory committee was aware of the inconsistencies. Some districts, for example, assign a magistrate-judge docket number to warrant applications and file the written documents in a sealed file without converting them to electronic form. Other courts digitize the documents and transfer them to the district court's criminal case file when an indictment is returned and a criminal case number assigned. He said that preserving a record of warrant proceedings is very important to defense lawyers, and the advisory committee will look further into the matter.

Mr. Rabiej reported that one of the working groups designing the next generation CM/ECF system is addressing how best to handle criminal process and other court documents that generally do not appear in the official public case file. Dr. Reagan explained that as part of the Federal Judicial Center's recent study of sealed cases, he had looked at all cases filed in the federal courts in 2006. Typically, he said, a warrant application is assigned a magistrate-judge electronic docket number. Although the records may still be retained in paper form in the magistrate judge's chambers in one or more districts, most courts incorporate them into the files of the clerk's office.

A member suggested that Rule 4.1 may be mandating more requirements than necessary. Judge Tallman pointed out, though, that the requirements had largely been

carried over from the current Rule 41. He said that the rule needs to be broadly drafted because there are so many different situations that may arise in the federal courts. An officer, he said, may be on the telephone speaking with the magistrate judge, writing out the application, and taking down what the judge is saying. More typically, though, an officer will call the U.S. attorney's office and have a prosecutor draft the application.

A member said that the rule assumes that the applicant will wind up with an official piece of paper in hand. Yet in the current age of rapid technological development, perhaps an electronic version of the document should suffice. By way of example, electronic boarding passes are now accepted at airports, and police officers use laptop computers and hand-held devices in their patrol cars.

Judge Tallman explained, though, that Rule 41(f) requires the officer to leave a copy of a search warrant and a receipt for the property taken with the person whose property is being searched. Professor Beale added that Rule 4.1 may need to be changed in the future to take account of electronic substitutes for paper documents. Nevertheless, the rule as currently proposed will help a great deal now because it will make electronic process more widely available and reduce the number of situations where officers act without prior judicial authorization. Ms. Monaco added that the Department of Justice believes that the new rule will be of great help to its personnel, and it plans to provide the U.S. attorneys with guidance on how to implement it.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 6

Judge Tallman reported that the proposed amendment to Rule 6 (grand jury) would allow a judge to take a grand jury return by video teleconference. He noted that there are places in the federal system where the nearest judge is located a substantial distance from the courthouse in which the grand jury sits. The rule states explicitly that it is designed to avoid unnecessary cost and delay. The rule would also preserve the judge's time and safety.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 9

Judge Tallman reported that the proposed amendment would authorize the protocol of Rule 4.1 in considering an arrest warrant or summons on an indictment or information.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 40

Judge Tallman reported that the proposed amendment to Rule 40 (arrest for failing to appear or violating conditions of release in another district) would allow using video teleconferencing for an initial appearance, with the defendant's consent. It will be helpful to some defendants, as, for example, when a defendant faces a long transfer to another district and hopes that the judge might quash the warrant or order release if he or she is able to present a good reason for not having appeared in the other district.

Professor Beale added that Rule 40 currently states that a magistrate judge should proceed with an initial appearance under Rule 5(c)(3), as applicable. The advisory committee, she said, had some concern whether current Rule 5(f), allowing video teleconferencing of initial appearances on consent, would clearly be applicable to Rule 40 situations. So, as a matter of caution, it recommended adding a specific provision in Rule 40 to make the matter clear.

A member cautioned that the committee should not encourage a reduction in the use of courtrooms, and he asked where the participants will be located physically for the Rule 40 video teleconferencing. Judge Tallman suggested that the judge and the defendant normally will both be in a courtroom for the proceedings.

He added that the potential benefits accruing to a defendant who consents to video conferencing under Rule 40 outweigh the general policy concerns about diminishing the use of courtrooms. Professor Beale pointed out that Rule 5 already authorizes video teleconferencing in all initial appearances if the defendant consents. Moreover, the role of lawyers and the use of court interpreters will not change. The proposed amendment merely extends the current provision to the Rule 40 subset of initial appearances.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

FED. R. CRIM. P. 41

Judge Tallman said that the proposed amendments to Rule 41 (search and seizure) are largely conforming in nature. Most of the current text in Rule 41 governing the protocol for using reliable electronic means for process would be moved to the new Rule 4.1. In addition, revised Rule 41(f) would explicitly authorize the return of search warrants and warrants for tracking devices to be made by reliable electronic means.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

FED. R. CRIM. P. 43

Judge Tallman reported that, after considering the public comments, the advisory committee withdrew a proposed amendment to Rule 32.1 (revoking or modifying probation or supervised release) and a proposed conforming cross-reference to Rule 32.1 in Rule 43(a) (defendant's presence). The withdrawn provisions would have authorized a defendant, on consent, to participate in a revocation proceeding by video teleconference.

The remaining Rule 43 amendment would authorize video teleconferencing in misdemeanor or petty offense proceedings with the defendant's written consent. He noted that Rule 43 currently permits arraignment, plea, trial, and sentencing in misdemeanor or petty offense cases in the absence of the defendant. The procedure, he noted, is used mainly in minor offenses occurring on government reservations such as national parks because requiring a defendant to return to the park for court proceedings may impose personal hardship. He emphasized, though, that the presiding judge may always require the defendant's presence and does not have to permit either video teleconferencing or trial in absentia.

A member agreed that there are practical problems with misdemeanors in national parks, but lamented the trend away from courtroom proceedings. The dignity of the courtroom and the courthouse, he said, are very important and have positive societal value. The physical courtroom, moreover, affects personal conduct. In essence, steps that reduce the need for courtroom proceedings should only be taken with the utmost caution and concern.

Judge Tallman agreed and explained that the advisory committee had withdrawn the proposed amendment to Rule 32.1 for just that reason. Several members concurred that substitutes to a physical courtroom should be the exception and never become routine. One member noted, though, that courts are being driven to using video teleconferencing by the convenience demands of others, including law enforcement personnel, lawyers, and parties. A member added that the only practical alternative to video teleconferencing for a defendant in a misdemeanor case now is for the defendant not to show up and to pay a fine.

Members suggested that language be added to the committee note to emphasize that the use of video teleconferencing for misdemeanor or petty offense proceedings should be the exception, not the rule, and that judges should think carefully before allowing video trials or sentencing. They suggested that the advisory committee draft appropriate language to that effect for the committee note. Judge Tallman pointed out that the committee note to the current Rule 5 contains appropriate language that could be

adapted for the Rule 43 note. After a break, the additional language was presented to the committee and approved.

The committee without objection by voice vote approved the proposed amendment, including the additional note language, for approval by the Judicial Conference.

FED. R. CRIM. P. 49

Judge Tallman reported that the proposed amendment to Rule 49 (serving and filing papers) would bring the criminal rules into conformity with the civil rules on electronic filing. Based on FED. R. CIV. P. 5(d)(3), it would authorize the courts by local rule to allow papers to be filed, signed, or verified by reliable electronic means, consistent with any technical standards of the Judicial Conference.

The committee without objection by voice vote approved the proposed amendment for approval by the Judicial Conference.

Technical Amendments for Final Approval without Publication

FED. R. CRIM. P. 32

Judge Tallman reported that the proposed amendments to Rule 32(d)(2)(F) and (G) (sentencing and judgment) had been recommended by the committee's style consultant. They would remedy two technical drafting problems created by the recent package of criminal forfeiture rules.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference without publication.

FED. R. CRIM. P. 41

Judge Tallman reported that the proposed amendments to Rule 41 (search and seizure) were also technical and conforming in nature. The rule currently gives a law enforcement officer 10 "calendar" days after use of a tracking device has ended to return the warrant to the judge and serve a copy on the person tracked. The proposed amendments would delete the unnecessary word "calendar" from the rule because all days are now counted the same under the 2009 time computation amendments' "days are days" approach.

Judge Rosenthal suggested that when the rule is sent to the Judicial Conference for approval, the committee's communication should explain why as a matter of policy it

chose the shorter period of 10 days, rather than 14 days, since the 10-day periods in most other rules had been changed to 14 days as part of the time computation project.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. CRIM. P. 37

Judge Tallman reported that the proposed new Rule 37 (indicative rulings) would authorize indicative rulings in criminal cases, in conformance with the new civil and appellate rules that formalize a procedure for such rulings – FED. R. CIV. P. 62.1 and FED. R. APP. P. 12.1. Professor Beale pointed out that the criminal advisory committee had benefitted greatly from the work of the civil and appellate committees in this matter. She added that the advisory committee would also delete the first sentence of the second paragraph of the proposed committee note.

The committee without objection by voice vote approved the proposed new rule for publication.

FED. R. CRIM. P. 5 and 58

Judge Tallman reported that the proposed amendments to Rule 5 (initial appearance) and Rule 58 (petty offenses and other misdemeanors) had been suggested by the Department of Justice and would implement the government's notice obligations under applicable statutes and treaties.

He noted that the proposed amendment to Rule 5(c)(4) would require that the initial appearance of an extradited foreign defendant take place in the district where the defendant is charged, rather than in the district where the defendant first arrives in the United States. The intent of the amendment is to eliminate logistical delays. A member voiced concern, though, over potential delay of the initial appearance if the defendant no longer receives an initial appearance as soon as he or she arrives in the United States.

A member suggested adding language to the rule requiring that the initial appearance be held promptly. Professor Beale and Judge Tallman pointed out that Rule 5(a)(1)(B) already states explicitly that the initial appearance must be held "without unnecessary delay." The member suggested that it would be helpful to include a reference in the committee note to the language of Rule 5(a)(1)(B). After a break, Judge Tallman presented note language to accomplish that result.

Judge Tallman explained that the other proposed amendments to Rule 5 and 58 would carry out treaty obligations of the United States to notify a consular officer from the defendant's country of nationality that the defendant has been arrested, if the defendant requests. A member recommended removing the first sentence of the committee note for each rule, which refers to the government's concerns. Professor Beale agreed that the sentences could be removed, but she noted that the rule and note had been carefully negotiated with the Department of Justice. Judge Tallman suggested rephrasing the first sentence of each note to state simply that the proposed rule facilitates compliance with treaty obligations, without specifically mentioning the government's motivation.

The committee without objection by voice vote approved the proposed amendments, including the additional note language, for publication.

Informational Items

FED. R. CRIM. P. 16

Judge Tallman noted that at the January 2010 Standing Committee meeting, he had presented a report on the advisory committee's study of proposals to broaden FED. R. CRIM. P. 16 (discovery and inspection) and incorporate the government's obligation to provide exculpatory evidence to the defendant under *Brady v. Maryland*, 373 U.S. 83 (1963) and later cases. He noted that the advisory committee had convened a productive meeting on the subject in February with judges, prosecutors, law enforcement authorities, defense attorneys, and law professors. The participants, he said, had been very candid and non-confrontational, and the meeting provided the committee with important input on the advisability of broadening discovery in criminal cases.

He reported that the Federal Judicial Center had just sent a survey to judges, prosecutors, and defense lawyers on the matter, and the responses have been prompt and massive, with comments received already from 260 judges and nearly 2,000 lawyers. He added that the records of the Department of Justice's Office of Professional Responsibility showed that over the last nine years an average of only two complaints a year had been sustained against prosecutors for misconduct. But, he added, lawyers may be reluctant to file formal complaints with the Department. The current survey, he noted, was intended in part to identify any types of situations that have not been reported.

FED. R. CRIM. P. 12

Judge Tallman noted that in June 2009 the Standing Committee recommitted to the advisory committee a proposed amendment to Rule 12 (pleadings and pretrial motions) that would have required a defendant to raise before trial any claims that an indictment fails to state an offense. The advisory committee was also asked to explore the advisability of using the term "forfeiture," rather than "waiver," in the proposed rule.

He reported that the pertinent Rule 12 issues are complex. Therefore, the committee was considering a more fundamental, broader revision of the rule that might clarify which motions and claims must be raised before trial, distinguish forfeited claims from waived claims, and clarify the relationship between these claims and FED. R. CRIM. P.52 (harmless and plain error).

FED. R. CRIM. P. 11

Judge Tallman reported that the recent Supreme Court decision in *Padilla v. Kentucky*, 130 S. Ct. 1473 (March 31, 2010) had demonstrated the importance of informing an alien defendant of the immigration consequences of a guilty plea. As a result, he said, the advisory committee had appointed a subcommittee to examine whether immigration and citizenship consequences should be added to the list of matters that a judge must include in the courtroom colloquy with a defendant in taking a guilty plea under FED. R. CRIM. P. 11 (pleas).

CRIME VICTIMS' RIGHTS

Judge Tallman reported that the advisory committee was continuing to monitor implementation of the Crime Victims' Rights Act. Among other things, he said, the committee had discovered an instance of an unintended barrier to court access by crime victims. An attorney representing victims had been unable to file a motion asserting the victim's rights because the district court's electronic filing system only authorized motions to be filed by parties in the case. On behalf of the advisory committee, he said, he had brought the matter to the attention of the chair of the Judicial Conference committee having jurisdiction over development of the CM/ECF electronic system.

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 attachments of May 10, 2010 (Agenda Item 7).

Amendments for Final Approval

RESTYLED EVIDENCE RULES 101-1103

Judge Hinkle reported that the restyling of the Federal Rules of Evidence was the only action matter on the agenda. He noted that the project had been a joint undertaking on the part of the advisory committee and the Standing Committee's Style Subcommittee, comprised of Judge Teilborg (chair), Judge Huff, and Mr. Maledon.

He noted that the project to restyle the federal rules had originated in the early 1990s under the sponsorship of the Standing Committee chair at the time, Judge Robert Keeton, who set out to bring greater consistency and readability to the rules. Judge Keeton had appointed Professor Charles Alan Wright as the first chair of the Standing Committee's new Style Subcommittee and Bryan Garner as the committee's first style consultant. Judge Hinkle pointed out that Mr. Garner had authored the pamphlet setting out the style conventions followed by the subcommittee – *Guidelines for Drafting and Editing Court Rules*.

Judge Hinkle explained that the restyled appellate rules took effect in 1998, the restyled criminal rules in 2002, and the restyled civil rules in 2007. With each restyling effort, he said, there had been doubters who said that restyling was not worth the effort and that the potential disruption would outweigh the benefits. Each time, he said, the doubters had been proven wrong. He pointed out, for example, that a professor who had opposed restyling changes later wrote an article proclaiming that they were indeed an improvement.

He added that whatever disruption there may be initially will evaporate rather quickly because the committee worked intensively to avoid any changes in substance. He pointed out, though, that there are indeed differences between the evidence rules and the other sets of federal rules because the evidence rules are used in courtrooms every day, and lawyers need to know them intimately and instinctively.

Judge Hinkle reported that Professor Kimble had assumed the duties of style consultant near the end of the criminal rules restyling project and had been an indispensable part of both the civil and evidence restyling efforts. He pointed out that the restyled civil rules had proven so successful that they had been awarded the Burton Award for Reform in Law, probably the nation's most prestigious prize for excellence in legal writing.

Judge Hinkle explained that the process used by the advisory committee to restyle the rules had involved several steps. It started with Professor Kimble drafting a first cut of the restyled rules. That product was reviewed by Professor Capra, the committee's reporter, who examined the revisions carefully to make sure that they were technically correct and did not affect substance. Then the rules were reviewed again by the two professors and by members of the advisory committee. They were next sent to the Style Subcommittee for comment. After the subcommittee's input, they were reviewed by the full advisory committee.

The advisory committee members reviewed the revised rules in advance of the committee meeting and again at the meeting. He added that the committee had also been assisted throughout the project by Professor Kenneth S. Broun, consultant and former member of the committee, by Professor Stephen A. Saltzburg, representing the American Bar Association (and former reporter to the criminal advisory committee), and by several other prominent advisors. He explained that the rules were all published for comment at

the same time, even though they had been reviewed and approved for publication by the Standing Committee in three batches at three different meetings.

Judge Hinkle reported that if the advisory committee decided that any change in the language of a rule impacted substance, it made the final call on the revised language. If, however, a change was seen as purely stylistic, the advisory committee noted that it was not a matter of substance, and the Style Subcommittee made the final decision on language.

Judge Hinkle reported that the public comments had been very positive. The American College of Trial Lawyers, for example, assigned the rules to a special committee, which commented favorably many times on the product. The Litigation Section of the American Bar Association also praised the revised rules and stated that they are clearly better written than the current rules. The only doubt raised in the comments was whether the restyling was worth the potential disruption. Nevertheless, only one negative written public comment to that effect had been received.

At its last meeting, the advisory committee considered the comments and took a fresh look at the rules. In addition, Professors Capra and Kimble completed another top-to-bottom review of the rules. The Style Subcommittee also reviewed them carefully and conducted many meetings by conference call.

Finally, the advisory committee received helpful comments from members of the Standing Committee in advance of the current meeting. The comments of Judges Raggi and Hartz were reviewed carefully and described in a recent memorandum from Professor Capra. Dean Levi also suggested changes just before the meeting that Judge Hinkle presented orally to the committee.

A motion was made to approve the package of restyled evidence rules, including the recent changes incorporated in Professor Capra's memo and those described by Judge Hinkle.

A member stated that she would vote for the restyled rules, but expressed ambivalence about the project. She applauded the extraordinary efforts of the committee in producing the restyled rules, but questioned whether they represent a sufficient improvement over the existing rules to justify the transactional costs of the changes.

She also expressed concern over the need to revise the language of all the rules since the evidence rules are so familiar to lawyers as to make them practically iconic. They are cited and relied on everyday in courtroom proceedings. Any changes in language, she said, will inevitably be used by lawyers in future arguments that changes in substance were in fact made.

She noted that some of the changes clearly improve the rules, such as adding headings, breakouts, numbers, and letters that judges and lawyers will find very helpful. Nevertheless, every single federal rule of evidence was changed in the effort, and some of the changes were not improvements. She asked whether it was really necessary to change each rule of evidence, especially because the rules were drafted carefully over the years, and many of them have been interpreted extensively in the case law.

She recited examples of specific restyled rules that may not have been improved and suggested that some of them were actually made worse solely for the sake of stylistic consistency. In short, she concluded, the new rules represent a solution in search of a problem. Nevertheless, despite those reservations, she stated that she would not cast the only negative vote against the revised rules and would vote to approve the package, but with serious doubts.

A member suggested that those comments were the most thoughtful and intelligent criticisms he had ever heard about the restyling project. Yet, he had simply not been persuaded.

Another member also expressed great appreciation for those well-reasoned views, but pointed out that the great bulk of lawyers and organizations having reviewed the revised rules support them enthusiastically. She explained that the new rules eliminate wordiness and outdated terms in the existing rules. They also improve consistency within the body of evidence rules and with the other federal rules. Moreover, the restyling retains the familiar structure and numbering of the existing evidence rules, even though the style conventions might have called for renumbering or other reformatting. In the final analysis, she suggested, the restyled evidence rules are significantly better and lawyers will easily adapt to the changes.

A member agreed and said that, as a practicing lawyer, he had been skeptical when the project had first started. He pointed out, though, that the committee had made extraordinary efforts to avoid any changes in substance or numbering that could potentially disrupt lawyers. This attempt to preserve continuity, he said, had been a cardinal principle of the effort and had been followed meticulously.

On behalf of the Style Subcommittee, Judge Teilborg offered a special tribute to Judge Hinkle for his outstanding leadership of the project, as well as his great scholarship and technical knowledge. The end product, he said, was superlative and could only have been achieved through an enormous amount of work and cooperation. He also thanked Judge Huff and Mr. Maledon for their time and devotion to the Style Subcommittee's efforts, especially for giving up so many of their lunch hours for conference calls.

Judge Teilborg added that it had been a joy to observe the intense interplay between Professors Capra and Kimble, truly experts in their respective fields. He pointed out that Professor Kimble had left his hospital bed after surgery to return quickly to the

project. He also thanked Jeffrey Barr of the Administrative Office for his great work as scribe in keeping the minutes and preparing the drafts. Finally, he thanked Dean Levi and Judges Raggi and Hartz for offering helpful changes in the final days of the project.

A member suggested that one of the great benefits of the restyling process is that the reviewers uncover unintended ambiguities in the rules. He pointed out that Professor Capra was keeping track of all the ambiguities in the evidence rules, so they may be addressed in due course as matters of substance on a separate track. He also remarked that the committee's style conventions are not well known to the public and suggested that they be made available to bench and bar to help them understand the process.

The committee without objection by voice vote approved the proposed amendments for approval by the Judicial Conference.

REPORT OF THE SEALING SUBCOMMITTEE

Judge Hartz, chair of the Sealing Subcommittee, reported that the subcommittee had been charged with examining the sealing of entire cases in the federal courts. The assignment had been generated by a request to the Judicial Conference from the chief judge of the Seventh Circuit.

Judge Hartz noted that the bulk of the subcommittee's work in examining current court practices had been assigned to the Federal Judicial Center. Dr. Reagan of the Center, he said, had reviewed every sealed case filed in the federal courts in 2006.

He pointed out that there are very good reasons for courts to seal cases – such as matters involving juveniles, grand juries, fugitives, and unexecuted warrants. The study, he added, revealed that many of the sealed “cases” docketed by the courts were not entire cases, but miscellaneous proceedings that carry miscellaneous docket numbers.

He noted that the Center's report had been exhaustive, and the subcommittee felt comfortable that virtually all the sealing decisions made by the courts had been supported by appropriate justification. On the other hand, it was also apparent from the study that court sealing processes could be improved. In some cases, for example, lesser measures than sealing an entire case might have sufficed, such as sealing particular documents. Moreover, the study found that in practice many sealed matters are not timely unsealed after the reason for sealing has expired.

In the end, the subcommittee decided that there is no need for new federal rules on sealing. The standards for sealing, he said, are quite clear in the case law of every circuit, and the courts appear to be acting properly in sealing matters. Nevertheless, there does appear to be a need for Judicial Conference guidelines and some practical education on sealing.

Professor Marcus said that it is worth emphasizing that when the matter was first assigned to the rules committee, the focus was on whether new national rules are needed. He added that there is a general misperception that many cases are sealed in the courts. The Federal Judicial Center study, though, showed that there are in fact very few sealed cases, and many of those are sealed in light of a specific statute or rule, such as in *qui tam* cases and grand jury proceedings. As for dealing with public perceptions, he said, the committee should emphasize that the standards for sealing are clear and that judges are acting appropriately. Nevertheless, some practical steps should be taken to improve sealing practices in the courts.

He noted that the subcommittee's report does not recommend any changes in the national rules. Its recommendations, rather, are addressed to the Judicial Conference's Court Administration and Case Management Committee. The report recommends consideration of a national policy statement on sealing that includes three criteria.

First, an entire case should be sealed only when authorized by statute or rule or justified by a showing of exceptional circumstances and when there is no lesser alternative to sealing the whole case, such as sealing only certain documents.

Second, the decision to seal should be made only by a judge. Instances arise when another person, such as the clerk of court, may seal initially, but that decision should be reviewed promptly by a judge.

Third, once the reason for sealing has passed, the sealing should be lifted. He noted that the most common problem identified during the study was that courts often neglect to unseal documents promptly.

Professor Marcus explained that the subcommittee was also recommending that the Court Administration and Case Management Committee consider exploring the following steps to promote compliance with the proposed national policy statement:

- (1) judicial education to make sure that judges are aware of the proper criteria for sealing, including the lesser alternatives;
- (2) education for judges and clerks to ensure that sealing is ordered only by a judge or reviewed promptly by a judge;
- (3) a study to identify when a clerk may seal a matter temporarily and to establish procedures to ensure prompt review by a judge;
- (4) judicial education to ensure that judges know of the need to unseal matters promptly and to set expiration dates for sealing;
- (5) programming CM/ECF to generate notices to courts and parties that a sealing order must be reviewed after a certain time period;
- (6) programming CM/ECF to generate periodic reports of sealed cases to facilitate more effective and efficient review of them; and

- (7) administrative measures that the courts might take to improve handling requests for sealing.

The committee endorsed the subcommittee report and recommendations and voted to refer them to the Court Administration and Case Management Committee for appropriate action.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi, chair of the Privacy Subcommittee, reported that the subcommittee's assignment was to consider whether the current privacy rules are adequate to protect privacy interests. At the same time, she noted, it is also important to emphasize the need to protect the core value of providing maximum public access to court proceedings.

She noted that the subcommittee included three representatives from the Court Administration and Case Management Committee, whose contributions have been invaluable. In addition, she said, Judge John R. Tunheim, former chair of the Court Administration and Case Management Committee, and Judge Hinkle were serving as advisors to the subcommittee.

In short, the subcommittee was reviewing: (1) whether the new rules are being followed; and (2) whether they are adequate. To address those questions, she explained, the subcommittee had started its efforts with extensive surveys by the Administrative Office and the Federal Judicial Center. It then conducted a major program at Fordham Law School, organized by Professor Capra, to which more than 30 knowledgeable individuals with particular interests in privacy matters were invited. The invitees included judges, members of the press, representatives from non-government organizations, an historian, government lawyers, criminal defense lawyers, and lawyers active in civil, commercial, and immigration cases. With the benefit of all the information and views accumulated at the conference, the subcommittee will spend the summer drafting its report for the January 2011 Standing Committee meeting.

Judge Raggi noted that, like the sealing subcommittee, her subcommittee's report will likely not include any recommendations for changes in the federal rules. Rather, it will provide relevant information on current practices in the courts and on the effectiveness of the new privacy rules. Professor Capra added that the Federal Judicial Center had prepared an excellent report on the use of social security numbers in case filings that will be a part of the subcommittee report.

LONG RANGE PLANNING

It was noted that the April 2010 version of the proposed *Draft Strategic Plan for the Federal Judiciary* had been included in the committee's agenda materials, and several of the plan's strategies and goals relate to the work of the rules committees. It was also pointed out that a separate chart had been included in the materials setting out the specific matters in the proposed plan that have potential rules implications.

NEXT MEETING

The members agreed to hold the next committee meeting on January 6-7, 2011, in San Francisco.

Respectfully submitted,

Peter G. McCabe,
Secretary



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 14, 2010

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.

At its September 14, 2010 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 2010.

Approved the *Strategic Plan for the Federal Judiciary*.

Approved the following with regard to a planning process for the Judicial Conference and its committees:

- a. The Executive Committee chair may designate for a two-year renewable term an active or senior judge, who will report to that Committee, to serve as the judiciary planning coordinator. The planning coordinator will have responsibility to facilitate and coordinate the strategic planning efforts of the Judicial Conference and its committees.
- b. With suggestions from Judicial Conference committees and others, and the input of the judiciary planning coordinator, the Executive Committee will identify issues, strategies, or goals to receive priority attention over the next two years.
- c. The committees of the Judicial Conference will integrate the *Strategic Plan for the Federal Judiciary* into committee planning and policy development activities.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

With regard to appellate rules:

- a. Approved proposed amendments to Appellate Rules 4 and 40 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.

- b. Agreed to seek legislation amending 28 U.S.C. § 2107, consistent with the proposed amendments to Appellate Rule 4, to clarify the treatment of the time to appeal in a case in which a United States officer or employee is a party.

With regard to bankruptcy rules:

- a. Approved proposed amendments to Bankruptcy Rules 2003, 2019, 3001, 4004, and 6003, and new Rules 1004.2 and 3002.1, 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.
- b. Approved proposed revisions of Bankruptcy Official Forms 9A, 9C, 9I, 20A, 20B, 22A, 22B, and 22C, to take effect on December 1, 2010.

Approved proposed amendments to Criminal Rules 1, 3, 4, 6, 9, 32, 40, 41, 43, and 49, and new Rule 4.1, 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 Rules 101 through 1103 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.

**REPORT OF THE PROCEEDINGS
OF THE JUDICIAL CONFERENCE
OF THE UNITED STATES**

March 16, 2010

The Judicial Conference of the United States convened in Washington, D.C., on March 16, 2010, pursuant to the call of the Chief Justice of the United States issued under 28 U.S.C. § 331. The Chief Justice presided, and the following members of the Conference were present:

First Circuit:

Chief Judge Sandra L. Lynch
Chief Judge Mark L. Wolf,
District of Massachusetts

Second Circuit:

Chief Judge Dennis Jacobs
Chief Judge William K. Sessions III,
District of Vermont

Third Circuit:

Chief Judge Anthony J. Scirica
Chief Judge Harvey Bartle III,
Eastern District of Pennsylvania

Fourth Circuit:

Chief Judge William B. Traxler, Jr.
Chief Judge James P. Jones,
Western District of Virginia

Fifth Circuit:

Chief Judge Edith Hollan Jones
Judge Sim Lake,
Southern District of Texas

COMMITTEE ACTIVITIES

The Committee on the Administration of the Magistrate Judges System reported that pursuant to the September 2004 Judicial Conference policy regarding the review of magistrate judge position vacancies (JCUS-SEP 04, p. 26), during the period between the Committee's June 2009 and December 2009 meetings, the Committee chair approved filling fourteen full-time magistrate judge position vacancies. At its December 2009 meeting, the full Committee approved filling two additional magistrate judge position vacancies. The Committee also agreed to share with the Ad Hoc Advisory Committee on Judiciary Planning some ideas in response to a draft strategic plan for the federal judiciary circulated by the Ad Hoc Committee.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

COMMITTEE ACTIVITIES

The Committee on Rules of Practice and Procedure reported that the Advisory Committee on Civil Rules is sponsoring a major conference at Duke University School of Law in May 2010 to consider the current civil litigation process and whether any changes are needed to the Federal Rules of Civil Procedure to achieve just, cost-effective, and timely disposition of cases. The Advisory Committees on Bankruptcy, Criminal, and Evidence Rules are reviewing comments from the public submitted on amendments proposed in August 2009 to their respective sets of rules. The proposals include a comprehensive restyling of the Federal Rules of Evidence.

COMMITTEE ON SPACE AND FACILITIES

COMMITTEE ACTIVITIES

The Committee on Space and Facilities reported that it approved a change to the Circuit Rent Budget (CRB) Business Rules to allow more flexibility for "Component C" spending and amended the business rules and CRB Program Manual to reflect the courtroom-sharing policies previously approved by the Judicial Conference for senior and magistrate judges (see JCUS-MAR 09, pp. 14-16; JCUS-SEP 09, pp. 9-11). The Committee also approved amendments to the Asset Management Planning (AMP) Business



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

May 11, 2010

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

On March 17, 2010, Judge Lee H. Rosenthal, Chair of the Judicial Conference Committee on Rules of Practice and Procedure, and Judge Mark R. Kravitz, Chair of the Advisory Committee on Civil Rules, sent Representative Henry C. Johnson, Jr., a letter briefly commenting on the "Open Access to Courts Act of 2009" (H.R. 4115). I write now on behalf of the Judicial Conference to urge you not to proceed on this legislation to rewrite the pleading rules for the federal courts. We urge you instead to allow the Rules Enabling Act rulemaking process a fair opportunity to finish the thorough, transparent, and inclusive work that is well under way to understand the impact of the Supreme Court's decisions in *Twombly* and *Iqbal*.¹

Under the Rules Enabling Act, proposed amendments to federal court rules are subjected to extensive examination by the Rules Committees, the public, the bar, and the bench, as well as by Congress. It is an exacting and deliberative process, designed to provide exhaustive scrutiny of every proposed rule amendment by many knowledgeable individuals and entities, so that problems can be identified and addressed and inconsistencies and ambiguities uncovered and removed. It is a process in which empirical research is a vitally important component in identifying problems and ensuring that the solutions are fair, workable, and effective and do not create unintended consequences. Amending the federal rules through legislation circumvents these careful safeguards that Congress itself established in the Rules Enabling Act. The safeguards are especially critical in considering changes to rules as fundamental and delicate as those setting the pleading standards in the federal courts.

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 – Rules 8(a)(2), 12(b)(6), 12(c), and 12(e) – and would significantly impact other rules that address pleading.

¹*Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

Honorable John Conyers, Jr.

Page 2

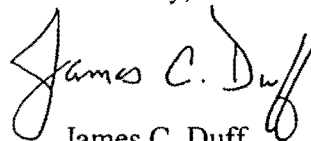
H.R. 4115 uses a literal application of a phrase from the 1957 case of *Conley v. Gibson*. By stating that a court "shall not dismiss a complaint ... unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief," H.R. 4115 essentially forbids a court from dismissing any complaint unless its allegations are clearly impossible or clearly defeat liability. This phrase was not literally applied, even before *Twombly* was decided. H.R. 4115 thus conflicts with its stated purpose of providing a "restoration of notice pleading in Federal courts." Implementing the standard in H.R. 4115 would result in confusion, uncertainty, and consequent delays and inconsistencies.

Because the Rules Committees swiftly undertook the work of gathering information necessary to understand the impact of *Twombly* and *Iqbal*, the study contemplated by the Rules Enabling Act is well under way, but additional time is needed. Rule 8(a), which sets the pleading standards in the federal courts, has not been substantively changed since 1938. The difficulties in drafting the pleading standard that applies to the many different kinds of cases in the federal courts are exemplified by the different bills that have been introduced and that have been circulated for discussion. It is essential to understand the impact of the latest Supreme Court interpretations before any decision can be made on changing the pleading rules.

In addition, the case law has continued to develop for almost three years since *Twombly* and a year since *Iqbal*, particularly in the appellate courts. Interrupting that case-law development with a legislatively imposed pleading standard will itself engender confusion and uncertainty, impairing the rights of those who seek redress in the federal courts.

Thank you for considering our views on H.R. 4115 and the information the Committees' work has and will produce. As part of that work, the Advisory Committee on Civil Rules held a conference at the Duke Law School just this week. That conference examined extensive empirical studies and brought together lawyers, judges, and academics with diverse views and experience to analyze whether changes should be made to realize the goal stated in Rule 1 of the Federal Rules of Civil Procedure: "the just, speedy, and inexpensive determination of every action and proceeding." We look forward to continuing to work with you on these issues, which are vital to the federal civil justice system we are all dedicated to preserving and improving.

Sincerely,

A handwritten signature in cursive script that reads "James C. Duff". The signature is written in black ink and is positioned above the printed name and title.

James C. Duff
Secretary

cc: Honorable Henry C. Johnson, Jr.

Identical letter sent to: Honorable Lamar S. Smith

TAB 2

DRAFT MINUTES
CIVIL RULES ADVISORY COMMITTEE
MARCH 18-19, 2010

1 The Civil Rules Advisory Committee met in Atlanta, Georgia, at the Emory University
2 School of Law on March 18 and 19, 2010. The meeting was attended by Judge Mark R. Kravitz,
3 Chair; Judge Michael M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor
4 Steven S. Gensler; Judge Paul W. Grimm; Daniel C. Girard, Esq.; Peter D. Keisler, Esq.; Judge John
5 G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton D. Varner, Esq.; Judge
6 Vaughn R. Walker; and Hon. Tony West. Professor Edward H. Cooper was present as Reporter, and
7 Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair, and
8 Professor Daniel R. Coquillette, Reporter, represented the Standing Committee. Judge Eugene R.
9 Wedoff attended as liaison from the Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the
10 court-clerk representative. Peter G. McCabe, John K. Rabiej, Jeffrey Barr, and Henry Wigglesworth
11 represented the Administrative Office. Emery Lee and Thomas Willging represented the Federal
12 Judicial Center. Ted Hirt, Esq., Department of Justice, was present. Andrea Kuperman, Rules Clerk
13 for Judge Rosenthal, attended. Observers included Alfred W. Cortese, Jr., Esq.; Joseph Garrison,
14 Esq. (National Employment Lawyers Association liaison); John Barkett, Esq. (ABA Litigation
15 Section liaison); Ken Lazarus, Esq. (American Medical Association); Joseph Loveland, Esq.;
16 Professor Robert A. Schapiro; John Vail, Esq. (American Association for Justice); and Emory Law
17 School students.

18 Judge Kravitz opened the meeting with a general welcome to all present. He expressed deep
19 appreciation to Emory for making their school available for the meeting, noting that the Committee
20 enjoys meeting at law schools and the opportunity to interact with civil procedure teachers and
21 students. He noted that Emory is a distinguished school, with a reputation for changing legal
22 education and the profession. He also thanked Chilton Varner for helping to make the arrangements
23 for the meeting.

24 Dean David F. Partlett and Associate Dean Gregory L. Riggs provided warm and gracious
25 welcomes to Emory Law School. Dean Partlett observed that students seem to think that things like
26 the Civil Rules appear from a mountain top; it is good for them to be able to observe the effort and
27 talent brought to the work of rulemaking. Chilton Varner provided brief notes on the Law School's
28 history. The school was founded with the purpose of establishing an institution that would vie with
29 the best law schools in the country. It began with admissions requirements more demanding than
30 the general standards of the time. It has continually fulfilled its commitment to achieving diversity,
31 with high numbers of students from traditionally underrepresented minorities and with an even
32 balance between men and women. It led the way in invalidating a Georgia law denying tax
33 exemptions to private schools that integrate. It has continually moved upward in the much-watched
34 US News & World Report rankings.

35 Judge Kravitz welcomed Judge Wedoff back, fully recovered from the injury that kept him
36 from the October meeting. Judge Wedoff expressed his pleasure to be back. Judge Kravitz further
37 noted that Judge Diamond was unable to attend, as was Judge Wood. He also reported that Chief
38 Justice Shepard had recently received the Sixth Annual Dwight D. Opperman Award for Judicial
39 Excellence. The citation noted many of Chief Justice Shepard's achievements, including chairing
40 the National Conference of Chief Justices, serving the Indiana State Courts for more than 20 years,
41 winning many awards for his work to achieve diversity in the profession and to advance
42 professionalism, and recognition as an authority on judicial ethics. Judge Kravitz went on to
43 comment on the extensive press coverage devoted to Anton Valukas's recent report as examiner in
44 the bankruptcy proceedings for Lehman Brothers. The report concluded that the firm's failure was
45 "more the consequence than the cause of our deteriorating economic climate." One securities

46 litigator has called the report “porn for securities lawyers,” so engrossed are they in exploring every
47 facet of its 3,000 pages. “Repo 105 has entered our vocabulary.”

48 Judge Kravitz also reminded the Committee that September 30 would mark the end of the
49 Committee terms for members Baylson, Girard, Kravitz, and Varner. He hoped that all would be
50 able to attend the fall meeting to be suitably recognized for their service to the Committee’s work.

51 The Time Computation amendments took effect December 1, 2009. So far lawyers seem to
52 be adjusting to the changes without difficulty.

53 The January Standing Committee meeting went well. Professor Robert Bone led a lively
54 discussion of the pleading decisions in the Twombly and Iqbal cases. Joe Cecil described his hopes
55 for the FJC study of those decisions. And all joined in congratulating “the most famous law clerk
56 in the world,” Andrea Kuperman, for her work in tracking the evolution of lower-court pleading
57 decisions in the wake of Twombly and Iqbal. The sense of the Standing Committee seemed to be
58 that more information must be gathered before undertaking serious consideration of possible
59 rulemaking responses to these developments. It is important to carry on diligent work in assessing
60 practice, and to address the information in the Committees’ usual deliberate process.

61 *October 2009 Minutes*

62 The Committee approved the draft Minutes for the October 8 and 9, 2009, meeting, subject
63 to correction of typographical and similar errors.

64 *2010 Conference*

65 Judge Kravitz introduced the plans for the 2010 Conference by observing that the conference
66 calls show that presenters and panelists are working very hard. “Judge Koeltl has the orchestra finely
67 tuned.” The papers are being prepared. Data are being gathered and crunched. Participants are
68 already working to find consensus on proposals for change.

69 Judge Koeltl said that people have indeed done a great job in preparing for the conference.
70 The Administrative Office has done yeoman work in setting it up. The Duke Law School has been
71 deeply involved, and they seem excited to be hosting the conference. The FJC has done wonderful
72 work. The moderators and panelists are discussing the issues, working to make the conference more
73 than a two-day long continuing education course. Issues of cost and delay will be addressed with
74 the purpose of seeing how we can do better. The panels are well balanced, with lawyers who
75 regularly represent plaintiffs, those who regularly represent defendants, and those who dwell in the
76 academy. The response of people invited to attend has been strong; more want to come than the
77 facilities can accommodate. Duke, and perhaps the Administrative Office, will stream it live. The
78 Conference is open — the main meeting room will accommodate 160 people and there is an
79 overflow room.

80 The conference will begin with the empirical research. The Institute for the Advancement
81 of the American Legal System has a number of studies. First is the survey jointly administered with
82 the American College of Trial Lawyers that is already familiar. They also are doing surveys of
83 Arizona lawyers and of Oregon lawyers. Each of those states has a set of procedure rules that differ
84 markedly from the federal rules. Lawyers in each state seem pleased with their own rules, and to

Draft Minutes
Civil Rules Advisory Committee, March 18-19, 2010
page -3-

85 prefer state courts over federal courts. The Oregon bar, moreover, is small and collegial — they seem
86 to like dealing with each other. The IAALS also is doing a survey on the cost of litigation, to be
87 completed this month.

88 The Searle Institute is working on a survey of litigation costs. The National Employment
89 Lawyers Association distributed to its members a survey based on a revised version of the American
90 College-IAALS survey; the FJC has looked at the results, and the NELA is doing a report. The ABA
91 Litigation Section is doing a report on its survey of section members, which also was based on the
92 American College-IAALS survey. RAND is studying the costs of individual cases; it will not have
93 a report in time for the conference, but the results will be presented.

94 A web site has been established for the conference. All papers and data can be downloaded.
95 Access to the site is currently limited to conference participants because many of the resources are
96 still in draft form. Eventually open access will be provided.

97 Other panels begin with one on pleading and dispositive motions. It is not easy to achieve
98 consensus on these topics. When consensus can be achieved, it is useful — it may provide a more
99 secure foundation for further work by the Advisory Committee on any topics that seem to call for
100 further work. Daniel Girard’s paper on specific discovery abuse, in the form of evasive answers,
101 suggests some specific rules changes.

102 The next panel will address the current state of discovery. Elizabeth Cabraser’s paper is one
103 of the seed papers for the conference. She presents a plaintiff’s view of what is wrong. Defendants,
104 on her view, are refusing to produce and are running up the costs of discovery. She would accept
105 fact-based pleading, but only if discovery to facilitate pleading is made available. Judge Grimm’s
106 paper is wonderful. The problem is seen to be one of attitude — the attitudes of clients who ask
107 lawyers to do things that lawyers should not do; the attitudes of plaintiff and defense lawyers; and
108 the attitudes of judges who do not enforce the rules. The concept of proportionality is not enforced
109 by judges, who have the tools but will not use them. All of this means that changing the rules
110 without changing attitudes will not fix much. Changing attitudes, however, is a task that must begin
111 as early as law school. Judge Campbell suggests that without major changes, still some changes
112 could be made in the matrix of the rules. “An idea is percolating that some things can be done
113 without big system changes.”

114 Judge Higginbotham will moderate the panel on judicial management. His paper can be read
115 as highly critical of judges who are no longer trying cases. Judge Baylson responds that active
116 judicial management can reduce the costs of discovery and enable trial if the lawyers and parties
117 really want to go to trial. Judge Hornby’s thesis is that people — clients — do not want to try cases;
118 judges should honor this desire to avoid trial.

119 Discovery of electronically stored information will be addressed by a panel led by Gregory
120 Joseph. They will address spoliation, sanctions, prelitigation preservation issues, and the like.
121 Joseph has led a series of panel meetings. He put a series of thirty questions to the panel members
122 asking for agreement, disagreement, and comments. Some of the propositions achieved unanimity,
123 or close to it. Others revealed deep splits. This is already a remarkable achievement.

163 meaningful associations with specific factors by holding other factors constant. The results often
164 represent centers around which real events cluster — as a simple analogy, no one person in a room
165 may be the average weight of all the people in the room. No single case may look like the center of
166 a broad range of cases.

167 One finding was that a 1% increase in the dollar stakes leads to a 0.25% increase in costs,
168 based on real dollar cost numbers as reported by the lawyers. There was no difference between
169 plaintiff lawyers and defendant lawyers in reporting on the relationship. When nonmonetary stakes
170 were important to the client, plaintiff lawyers reported a 42% increase in costs, while defendant
171 lawyers reported a 25% increase. It does not seem likely that revisions in the Civil Rules can do
172 anything to affect the stakes involved in litigation.

173 Time to disposition also increases costs. For each 1% increase in the time to disposition,
174 plaintiff costs go up 0.32%, and defendant costs go up 0.25%. These figures include all litigation
175 costs, including attorney fees; they do not reflect opportunity costs. (Attorney fees in contingent-fee
176 cases were based on estimates of dollar values.)

177 If a case actually goes to trial, plaintiff costs increase by 53%, while defendant costs increase
178 by 25%. It may be that the disproportionate effects between plaintiffs and defendants arise because
179 defendants incur greater costs before the eve of trial, while some plaintiffs defer “real preparation”
180 until it is evident that the case will go to trial.

181 If there is any court ruling on a motion for summary judgment — grant, deny, grant in part
182 — plaintiff costs are 24% higher, and defendant costs 22% higher. It may be that this reflects
183 discovery costs, because summary-judgment rulings are likely to be made only after discovery is
184 completed. The survey data do not support an inquiry into the relationship between the length of
185 time a case was pending and an actual ruling on a summary-judgment motion. Neither is it possible
186 to sort out cases in which there was a summary-judgment motion but no ruling before the case
187 actually went to trial.

188 Measuring discovery is difficult. The sample of cases was constructed to exclude cases not
189 likely to have any discovery. Cases where there was no answer or motion to dismiss were excluded,
190 as were categories of cases corresponding to the Rule 26(a)(1) categories in which initial disclosure
191 is not required. All cases that lasted more than four years, and all cases that went to trial, were
192 included; this oversampling likely increased the number of discovery events. The next step is to
193 distinguish different types of discovery. The study used 12 kinds — expert discovery, the number
194 of depositions, third-party subpoenas, e-discovery, and so on. Distinctions were drawn between
195 parties who requested or produced discovery, or those who did both. Eight types of disputes over
196 e-discovery were distinguished. In general, for each type of discovery used, there was a 5% increase
197 in costs for defendants, but no increase for plaintiffs. For depositions, plaintiffs found an 11%
198 increase in costs for each expert deposition, and a 5% increase for other depositions. For defendants
199 there was no increase for an added expert deposition, but a 5% increase for each other deposition.

200 E-discovery responses were mixed. Plaintiffs who only produced ESI reported no
201 significantly higher costs than those with no e-discovery. Plaintiffs who only requested ESI
202 experienced a 37% increase in costs, and those who both requested and produced experienced a 48%
203 increase. The pattern was different for defendants. There was no statistically significant increase

204 in costs for those who only requested, nor for those who only produced, ESI. Those who both
205 requested and produced, however, had 17% higher costs. For both plaintiffs and defendants, each
206 dispute over e-discovery increased costs by 10%. E-discovery, in short, is most costly when there
207 is reciprocal e-discovery and when there are disputes over production.

208 Other findings show, not surprisingly, that case complexity increases costs. Case
209 management might reduce costs, but it is difficult to control for the factors that have an influence;
210 it is easily possible that case management is most active in more complex cases, and is associated
211 with higher-cost cases even if in fact it holds the costs of those cases below the level that would
212 occur without management. Similarly, each case referred to a magistrate judge had a 24% increase
213 in costs, but that may be because the reference was based on the nature of the case, the level of
214 contentiousness, or other factors.

215 Plaintiff attorneys who bill by the hour reported higher costs than those who bill by other
216 methods. No similar association could be found for defense attorneys, but 95% of them bill by the
217 hour so there was no reliable basis to study the question. It is clear that costs vary directly with the
218 size of the law firm.

219 Differences in judicial workload had no meaningful correlation with costs. Nor were there
220 significant differences among the circuits.

221 Attorney Views About Costs and Procedures: Thomas Willging reported on interviews with 35
222 attorneys chosen from the much larger number who responded to the survey. Of the 35, 16
223 principally represent plaintiffs, 12 principally represent defendants, and 7 represent plaintiffs and
224 defendants about equally. These attorneys volunteered for the interviews; it cannot be known how
225 far they are representative of all who participated in the survey.

226 The report includes many quotes from the lawyers. The quotes are useful illustrations. They
227 may go some way toward explaining the survey results.

228 In discussing the relationship between costs and the stakes in the litigation, the attorneys said
229 that the stakes are the principal guide in deciding what to do. The level of discovery was the most
230 direct measure of costs. The best guess is that this behavior is economically based, not rule-based.
231 The stakes influence how much clients are willing to pay, or how much effort a contingent-fee
232 attorney is willing to invest.

233 The attorneys agreed that complexity affects costs, and that complexity is defined in terms
234 of the number of parties and the number of transactions underlying the litigation.

235 Types of suit do not tell much about the costs of litigation, apart from intellectual property
236 cases. Intellectual property cases often cost a lot. One lawyer said a company will spend \$20 million
237 for the right to sell a drug for \$1 billion.

238 The survey shows that a 500-lawyer firm incurs litigation costs double those incurred by a
239 solo practitioner. The survey lawyers confirmed this finding. "You have to feed the tiger" before
240 the case can be settled.

241 Hourly billing also affects costs. When lawyers on both sides bill by the hour, costs go up.
242 One of the interviewed lawyers said that hourly-billing lawyers lose all perspective on the value of

243 the case. But another said that what counts is really the size and resources of the client. Clients may
244 instruct the lawyer to engage in scorched-earth tactics. Some attorneys respond by holding
245 themselves out as scorched-earth litigators, and clients know who these lawyers are.

246 All of the interviewed lawyers agree that the volume of discovery presents cost problems.
247 It must be remembered that the lawyers in the survey generally said that the amount of discovery in
248 the survey case was just right, or was too low; only 25% of them said there was too much discovery.
249 So how do lawyers know when to stop? The typical response was that this is constantly assessed.
250 The quest is not for perfect information, but for enough information in relation to the stakes. This
251 is self-monitoring, not a result of enforcing the discovery rules. Lawyers also look to the scheduling
252 order, which they see as a major control. They do what they can within its constraints. But one
253 lawyer said that a scheduling order can actually increase costs when young lawyers think they are
254 obliged to do everything that is permissible within the limits of the order. Other lawyers say they
255 measure discovery by looking to the elements of the claim or defense — they pursue discovery to
256 the point of securing reliable information on each element. And specialists in particular types of
257 litigation often have protocols that they follow. An example is first to use interrogatories to find out
258 about sources of discoverable information, then requests to admit, then depositions.

259 The interviews also asked questions about pleading, building on the National Employment
260 Lawyers Association survey. In the survey, 94% of those who have filed an action after the
261 Twombly and Iqbal decisions report adding more facts to their complaints. Seventy-four percent
262 said they had responded to motions to dismiss that would not have been filed before the Twombly
263 decision. Fifteen percent reported doing more pre-filing investigation. Only 7% reported having
264 cases dismissed on the pleadings after Twombly, but the survey does not show whether the same
265 cases would have been dismissed under pre-Twombly practice.

266 A committee-member judge reported that Twombly and Iqbal had not changed the results
267 in rulings on motions to dismiss. The only change is that he now cites them as the current Supreme
268 Court statements of pleading standards. He asked whether the survey respondents counted it as a
269 dismissal if the complaint was filed with leave to amend. The answer is that it is not possible to tell
270 how the survey question was interpreted; that is one of the difficulties faced in attempting to measure
271 the results of a survey that was not designed by the FJC.

272 Another judge noted that in talking with the district-judge representatives at the Judicial
273 Conference this month, every judge said that Twombly and Iqbal had made no difference in what
274 they do. But it was noted that the possibility of surveying judges generally on this question must be
275 approached with care. The FJC is reluctant to intrude surveys into judges' busy lives unless there
276 is very good reason and it is possible to frame questions that will give clear guidance.

277 The interviews showed both plaintiff and defendant lawyers agreeing that motions to dismiss
278 are a waste of time. Several defendant attorneys said that in most cases they could not justify billing
279 for a motion to dismiss. The plaintiff attorneys said they generally survive motions to dismiss, and
280 even motions for summary judgment. Most also say that they seldom encounter notice pleading,
281 although one said that notice pleading often occurs in patent cases. One lawyer confessed to being
282 a notice pleader, meaning pleading that includes sufficient facts to tell the story but avoids adding
283 facts that might come back to haunt the pleader. Most lawyers want to tell a persuasive story, aiming
284 not only at the judge but also at the adversary.

285 Attorney Satisfaction: Emery Lee presented a summary of the results found by comparing the
286 surveys done by the American College of Trial Lawyers with the IAALS, by the ABA Litigation
287 Section, and by the National Employment Lawyers Association. The American College respondents
288 “are much more senior” than those who responded to the other two surveys, with an average of 37.9
289 years in practice. Respondents to the other two surveys averaged 22.9 years (ABA) and 21.4 years
290 (NELA), very close to the 20.9-year average in the FJC survey.

291 One question asked whether the Civil Rules are conducive to meeting the Rule 1 goals of
292 just, speedy, and inexpensive determination. Only about 35% of the ACTL respondents agreed, a
293 discouraging showing. About 40% of NELA respondents agreed. More than 60% of Litigation
294 Section respondents agreed. No explanation for these disparities is immediately apparent.

295 Many of the succeeding questions are presented as “net agreement” charts: if, for example,
296 50% of respondents agreed with a proposition and 20% disagreed, the net agreement would be 30%.

297 The second survey statement was that the Rules must be reviewed in their entirety and
298 rewritten to address the needs of today’s litigants. All groups registered net disagreement; the
299 strongest net disagreement, more than 40%, was from Litigation Section lawyers who typically
300 represent defendants.

301 The next survey proposition was that one set of rules cannot accommodate every type of case.
302 ACTL respondents showed a modest net agreement. NELA respondents showed a modest net
303 disagreement, while ABA respondents showed substantial net disagreement.

304 The first three questions, in short, present a mixed picture. There was no net support in any
305 survey for drastic revision of the Rules, but the other questions did not suggest resounding approval
306 of the present system.

307 Another question stated that discovery is abused in almost every case. ACTL respondents
308 showed modest net disagreement. ABA plaintiff lawyers showed slight net disagreement, while the
309 defendant lawyers showed slight net agreement — 7.2 % — and those representing plaintiffs and
310 defendants about equally showed 10.9% net agreement. NELA respondents — representing
311 plaintiffs — showed 31.5% net agreement. The FJC survey showed very different results. It may
312 be that the FJC survey respondents were not in any of these organizations. And there can be an
313 “organization culture,” propagated in organization magazines and at organization meetings, that
314 influences these views. Perhaps more importantly, different respondents may have quite different
315 views of what is abuse. Plaintiffs tend to find abuse in “stonewalling” by failing to provide
316 responsive information. Defendants tend to find abuse in overuse of discovery.

317 Respondents were asked to agree or disagree with the statement that the cumulative effect
318 of changes enacted since 1976 has significantly reduced discovery abuse. ACTL plaintiff
319 respondents showed a net disagreement of 12.4%, and defendants showed net disagreement of 22%.
320 Among the Litigation Section respondents, plaintiff attorneys agreed by a net of 0.4%, while
321 defendant attorneys showed net 17.9% disagreement and those who represent both plaintiffs and
322 defendants showed net 11.6% disagreement. NELA respondents showed net 39.5% disagreement.
323 However they defined abuse, then, most respondents thought rules amendments had not had any
324 effect. (It was pointed out that the median time in practice for the Litigation Section and NELA

325 respondents goes back to about 1988, some time after the 1983 amendment adding what is now Rule
326 26(b)(2)(C).)

327 The next statement was that early intervention by judges helps to limit discovery. All groups
328 of respondents in all three surveys agreed by wide margins; the highest net agreement was by
329 Litigation Section attorneys representing defendants, 56.6%, and those representing both plaintiffs
330 and defendants, 57.9%. Interpreting these responses is complicated by the possibility that "limit"
331 could be interpreted as no more than an arbitrary cut off rather than imposing focus and sensible
332 limits. But there are other indications that the respondents interpreted the question to mean that early
333 judicial intervention helps.

334 Summary judgment responses showed a clear divide between plaintiff and defendant
335 attorneys. The statement was that summary judgment practice increases cost and delay without
336 proportionate benefit. ACTL plaintiff attorneys showed net agreement at 26.2%, while the defendant
337 attorneys showed net disagreement at 59.6%. In the Litigation Section, plaintiff attorneys agreed at
338 a net of 26.9%, while defendant attorneys showed net disagreement at 77.2% and those who
339 represent both showed net disagreement of 45.1%. NELA respondents showed net agreement of
340 76.9%.

341 Another statement was that litigation costs are not proportional to the value of a case. The
342 ACTL survey did not distinguish between small-value cases and large-value cases. The plaintiff
343 respondents showed net 36.5% agreement, and defendant attorneys agreed 45.5% more than they
344 disagreed. The Litigation Section and NELA cases distinguished small-value case from large-value
345 cases. With respect to small-value cases, Litigation Section plaintiff attorneys showed net agreement
346 of 63.2%, defendants were at 85.3% net agreement, and those representing both had 89% net
347 agreement. NELA respondents had 69.8% net agreement. For large-value cases, Litigation Section
348 plaintiff attorneys registered net disagreement of 25.1%, defendants came in at 6.4% net
349 disagreement, and those representing both showed 11.2% net disagreement. NELA respondents
350 came in at 5.9% net disagreement. (It seems likely that the ACTL respondents were reading "small
351 value" into the question, but this is an example of the difficulty of interpreting a survey written by
352 someone else.)

353 The 2006 e-discovery rules also were discussed. The most common response was that they
354 provide for efficient and cost-effective discovery of electronically stored information "some of the
355 time." Defendant attorneys were more likely to say "no, never" across the different groups of
356 respondents.

357 Judge Kravitz thanked the FJC for its work, which will play an important role in the 2010
358 conference.

359 *Willging Retirement*

360 Judge Kravitz then noted that Thomas Willging "is purporting to retire." He has rendered
361 brilliant service to the Advisory Committee as FJC Senior Research Attorney over the course of 26
362 years. Judge Kravitz and Judge Rosenthal presented a plaque with this inscription:

363 In recognition and appreciation of the

364 distinguished service of

365 **THOMAS E. WILLGING**

366 for his unsurpassed devotion to the administration of justice, dedication to the Rules Enabling
367 Act, and commitment to the federal judiciary while serving as a researcher to the

368 Advisory Committee

369 on the Federal Rules of Civil Procedure

370 Judicial Conference of the United States

371 1984 — 2010

372 During Tom's 26 years as a senior research associate with the Federal Judicial Center, the
373 Advisory Committee was involved in many important projects that have had a profound impact
374 on the judicial system. Tom worked on many of the projects at the request of the Advisory
375 Committee, providing comprehensive research and analysis on a wide range of subjects,
376 including class actions, mass torts, electronic discovery, special masters, Civil Rule 11, and
377 general civil litigation practices. His superb work informed the Committee's decision-making
378 process and contributed to many proposed rules amendments. Tom's departure will mark the end
379 of a long and distinguished association with the Judicial Conference Rules Committees. His
380 diligence, wise counsel, and quiet leadership have earned him the respect and admiration of all
381 with whom he served. Tom was a wonderful friend and colleague to the Rules Committees. He
382 will be greatly missed. The Rules Committees extend to Tom their very best wishes and
383 congratulations on a well-earned retirement.

384

385 _____
Honorable Lee H. Rosenthal, Chair,

386 Committee on Rules of Practice

387 and Procedure

Honorable Mark R. Kravitz, Chair

Advisory Committee on

Civil Rules

388 Judge Kravitz concluded that Willging has been a wonderful friend and colleague who
389 will be greatly missed.

390 Willging responded that he had never heard so many favorable adjectives in a single
391 paragraph.

392 *Pleading Standards*

393 Judge Kravitz introduced the discussion of pleading standards by noting that the
394 Twombly and Iqbal decisions have been a boon to academia. They have fostered more law
395 reviews, and supported more tenure awards, than any recent civil-procedure phenomenon. It is

396 puzzling that some of the writing calls for legislation to reverse the decisions — that could easily
397 bring a halt to the train of articles.

398 Andrea Kuperman continues to update her survey of judicial responses to Twombly and
399 Iqbal. Her current work will focus on decisions in the courts of appeals, where standards and
400 guidance are being threshed out.

401 The Administrative Office is continuing its monthly update of statistics on motions to
402 dismiss. The statistics track the number of cases filed, the number of motions to dismiss, and the
403 rate of granting motions to dismiss. The statistics are broken out into several case categories.

404 The FJC is working to dig deeper into the raw statistics provided by the Administrative
405 Office docket data. Joe Cecil is starting by separating out Rule 12(b)(6) motions from other
406 motions to dismiss in ten large districts. He will focus on statistics for the months from
407 September through December in 2005, 2006, 2007, 2008, and 2009. This will cover two years
408 before the Twombly decision, the two years between Twombly and Iqbal, and the end of the year
409 in which Iqbal was decided. The data will be divided by case types. A preliminary report should
410 be ready for the 2010 Conference, and a detailed report should be ready for the fall Committee
411 meeting. The report will not include Rule 12(e) motions.

412 Peter McCabe noted that studying docket information remains a challenge because there
413 is no standardization in how information is reported. But “docket events” do seem useful in
414 identifying motions to dismiss. The Administrative Office is working toward the goal of
415 establishing criteria for uniform reporting that will support research in other fields comparable to
416 the research now being undertaken for pleading dismissals.

417 Judge Kravitz expressed appreciation for the FJC study that is ongoing. One important
418 feature will be to inquire whether dismissal is accompanied or followed by leave to amend, and
419 — when amendment is undertaken — what is the post-amendment disposition. Andrea
420 Kuperman’s review of application in the lower courts suggests that the courts of appeals are
421 sanding down the rough edges that inevitably emerge as district courts respond in the immediate
422 aftermath of ambiguous opinions. The Supreme Court itself may be sending further signals; a
423 per curiam opinion this January cited the Leatherman “no heightened pleading” decision as the
424 standard on a motion to dismiss. And an opportunity for further clarification is presented by a
425 pending petition for certiorari that asks the question whether the Swierkiewicz decision remains
426 good law. (Certiorari was denied on March 22, *Townes v. Jarvis*, 2010 WL 1005965.)

427 The continuing work to gather data is important. We do not yet know whether there is a
428 problem, nor what the problem is if indeed there is a problem. It may be that future work should
429 be directed not so much at pleading standards as at developing means of enabling discovery to
430 support sufficient pleading in cases in which plaintiffs with potentially good claims cannot frame
431 an adequate complaint because defendants (or perhaps others) control the necessary information.
432 This problem of information asymmetry is approached informally by many judges. Discovery
433 may be permitted while a motion to dismiss is taken under advisement. Or in an action with two
434 defendants, one may be dismissed with the express caveat that leave to amend and reinstate will
435 be granted if discovery against the remaining defendant provides information that supports a
436 sufficient complaint.

437 Judge Rosenthal noted that bills to supersede Twombly and Iqbal are pending in the
438 House and the Senate. The initial draft of the Senate bill carries Conley v. Gibson forward in
439 terms that could be read to supersede the Private Securities Litigation Reform Act and the
440 Prisoner Litigation Reform Act. The bill expressly recognizes that Enabling Act rules can
441 supersede the bill's standard, an important matter. But it will be difficult to turn the clock back
442 to 1957, ignoring everything that happened in the half-century between 1957 and 2007. The
443 Senate bill may be a place holder, designed to introduce the topic while revised drafting is
444 undertaken. A revised version is circulating for discussion. This version would turn the clock
445 back to May 20, 2007; it would clearly preserve PSLRA standards, and may preserve PLRA
446 standards. It still defers to any Rule adopted under the Enabling Act after the statute's effective
447 date. The draft includes legislative findings that accuse the Supreme Court of violating the
448 Enabling Act by amending the pleading rules in decisions that bypass Enabling Act procedures.
449 At different points it cites the Swierkiewicz and Leatherman decisions for appropriate pleading
450 standards. It says that only Rule 56 can resolve questions of fact insufficiency; it is not clear
451 what that means. The Senate has had a hearing, with witnesses supporting the bill outnumbering
452 those who oppose.

453 The House bill seeks to create a standard: "beyond doubt there is no set of facts that
454 would support the claim." It would supplant the PSLRA and PLRA. There have been two
455 hearings in the House. Again, the witnesses in support outnumber those who oppose.

456 The Committees' role in all this is to inform Congress that the Committees are pursuing
457 questions of pleading standards in a very careful way. The Committees are grateful that the bills
458 recognize the role of the Enabling Act process as the appropriate means to consider and, if
459 change is needed, adopt new pleading standards for the long run. The discussions in Congress
460 are very political. The Committees have constantly refused to be drawn into such political
461 divisions, and must continue to avoid entanglement. They must continue to focus on what they
462 do best, founded on careful and thorough study. The results can be presented to Congress.
463 Providing Andrea Kuperman's memorandum is an example.

464 Judge Kravitz added that the Kuperman memorandum shows there is little difference
465 among the circuits. There are a few district-court decisions saying there has been a big change in
466 pleading standards, but they are outliers.

467 Judge Rosenthal noted that the Administrative Office data are based on consistent
468 identification of all motions to dismiss. The accuracy of the data is shown by the spikes of
469 activity in March and September, when district judges address accumulating motions to be ready
470 for their six-month reports. The data show not much increase in rates of filing motions to
471 dismiss, nor in the rates of granting. There has been much concern about the effects on civil
472 rights and employment cases, but the data show the rates are flat in those cases. Surveys so far
473 have been consistent with this data. There is no apparent information that would support a need
474 for immediate action. The district courts that read the Iqbal decision more aggressively are being
475 reversed.

476 Pleading is both fundamental and delicate. The Committees are gathering information in
477 a disciplined and thorough way. They are prepared to offer rule changes if good reason appears.

478 It was noted that pleading standards have become a topic of lively discussion in the
479 Department of Justice. A working group has been formed to gather views from different
480 Department components — civil, civil rights, environment, and so on. There is no sense yet
481 whether any changes are needed, but it is agreed that any changes should be effected through the
482 Enabling Act process.

483 Judge Kravitz noted that the Second Circuit has established pretty good pleading
484 guidelines. Legislation — and particularly vague legislation — will delay attempts to determine
485 where practice is moving. The Committee will keep on moving, deliberately but as rapidly as
486 possible. The pleading rules are interrelated with all the other rules, most obviously discovery.
487 This interdependence will be a constant factor in Committee deliberations. It must be recognized
488 not only that some cases are dismissed on the pleadings, but also that some are wrongly
489 dismissed. That happened before *Twombly* and *Iqbal*. It is possible that there has been some
490 increase in the number of unwarranted dismissals. But there is nothing to suggest that there has
491 been a large increase in unwarranted dismissals.

492 A member asked how the Committee could evaluate the data if indeed it shows an
493 increase in the number of dismissals on the pleadings. How can we tell whether that is a good
494 thing or a bad thing?

495 A first response was that rules changes might be required if it were shown that district
496 judges think they cannot allow targeted discovery when the defendant controls the information
497 needed to frame a complaint. Another ground for rules changes might appear if judges become
498 confused about the relationship between Rule 12(b)(6) and the Rule 11(b)(3) standard that
499 explicitly allows pleading factual contentions that “will likely have evidentiary support after a
500 reasonable opportunity for further investigation or discovery.” Another response was that it will
501 be important to learn whether dismissals seem randomly distributed, or instead whether there are
502 big increases in identifiable categories of cases. Concern continues to be expressed about
503 employment cases and civil rights cases. If it should be borne out — remember that present
504 numbers do not seem to bear it out — that would become a reason for close inquiry.

505 Those concerns focus on the fear that pleading standards may become too rigid. From the
506 time of the *Leatherman* decision in 1993, on the other hand, the Committee has considered the
507 Court’s suggestion that heightened pleading standards might appropriately be adopted for some
508 types of cases by amending the Civil Rules. “Conspiracy” claims might be added to Rule 9(b),
509 for example, responding to the *Twombly* decision. Official-immunity cases are another example.
510 These two examples, not coincidentally, would address the concerns reflected in the *Twombly*
511 and *Iqbal* decisions, and indirectly in the *Leatherman* decision. Adopting specific rules for those
512 cases might have the effect of restraining any impulse to expand the *Twombly* and *Iqbal*
513 decisions beyond the specific problems they address.

514 The member who asked whether it is possible to determine whether any heightened rate
515 of dismissals is a good thing or bad agreed that it is important to gather data. “But in the end, it
516 will be a policy decision.” It was agreed that this is a good caution to observe. It is distinctively
517 difficult for the rules committees to make policy decisions in a way that is not political, or seen to
518 be political.

519 Another member agreed that the Committee must continue to wait while working hard to
520 learn more about evolving practice. When the time comes to act, one option may be to reaffirm
521 Rule 8 notice pleading. Pennsylvania, a fact-pleading state, is actively considering a move
522 toward notice pleading. If careful study persuades the Committee that notice pleading, as it has
523 been practiced, is still the best choice, the Committee can report that.

524 It was noted that the academic literature says that there has been a change, and that the
525 change makes a difference. Some articles point to “statistics” claimed to show an increase in the
526 rate of dismissals. Others say simply that even dismissal of one case that would not have been
527 dismissed before Twombly and Iqbal is one too many. But it was noted that the “statistics” are
528 derived from WestLaw. WestLaw gets 3% of district-court opinions. Dismissals are more likely
529 to be sent to WestLaw than refusals to dismiss. The number of grants is far lower in relation to
530 the number of denials than reported. It would be helpful to have a critique of these “data,” which
531 are being used at conferences now to paint an inaccurate picture of what is going on. “We should
532 be in a position to refute” the supposed data.

533 The focus on academic commentary continued by noting that after *Conley v. Gibson*,
534 “academic interest in pleading almost vanished. Now it’s getting out of hand. There is little
535 correlation between the anguish in much of the writing and what courts are actually doing.”

536 It was further observed that “academics are not the source of the political pressure. There
537 are powerful political sources at work here.”

538 It was said that the Bankruptcy Rules Committee will be grateful for the Civil
539 Committee’s work. A survey is important to find out whether lawyers are refraining from filing
540 cases now that would have been filed before *Twombly* and *Iqbal*. But that will be hard to pick
541 up. A related effect may be that the cases are still filed, but with 6 claims, not 19; with 3
542 defendants, not 7. The FJC study will at least inquire whether dismissals involve only some
543 claims, or only some defendants.

544 It was asked whether the studies will track pro se cases. They may be the most vulnerable
545 to dismissal. “The dynamic is different.” This is indeed part of the FJC study. Pro se status may
546 be associated with a higher rate of dismissals, but there is little sign of change.

547 Discussion of pleading standards concluded by confirming that the Committee is taking
548 the subject most seriously. “We send Congress the information we have. But we see the need
549 for serious, careful, deliberate consideration before action.” It cannot be foretold whether
550 legislation will be enacted in this session of Congress, or in the next. Either way, the
551 Committees must continue their ordinary processes.

552 *Rule 45*

553 Judge Kravitz introduced the Rule 45 report by thanking the Discovery Subcommittee —
554 members Campbell, Girard, Valukas, and Varner — and Reporter Marcus for the enormously
555 hard work that has gone into the report.

556 Judge Campbell introduced the report. A series of comments on Rule 45 prompted the
557 Subcommittee review. Andrea Kuperman did a literature search. With her help, and by

Draft Minutes
Civil Rules Advisory Committee, March 18-19, 2010
page -15-

558 canvassing various bar groups, the Subcommittee identified 17 possible issues. The list was
559 narrowed to 6. Further work has narrowed it still further. Beyond these specific questions, there
560 also were a number of comments on the cumbersome, complex character of Rule 45. It may be
561 the second longest rule in the Civil Rules. The Subcommittee recommendations will be
562 presented in four packages: What issues are “off the list” for further action; recommendations for
563 amendments that can be approved now, without advancing them toward publication until other
564 issues are resolved; the question raised by district-court opinions asserting nationwide
565 jurisdiction to compel a party or a party’s officers to appear as trial witnesses; and the possibility
566 of restructuring Rule 45.

567 No Change: Two issues seem ready to be put aside without further work. One is whether Rule
568 45 should require personal, in-hand service of a subpoena. As compared to Rule 4 methods of
569 service, the issue seems to be a theoretical point, “not a real problem.” When service is on a
570 nonparty, “the drama of personal service may be useful.” The other is cost allocation. Rule 45
571 addresses this in part now. Rule 45(c)(1) directs that a party or attorney issuing a subpoena must
572 take reasonable steps to avoid imposing undue burden or expense on a person subject to the
573 subpoena. Rule 45(c)(2)(B)(ii) says that if a person commanded to produce documents or other
574 things objects, an order enforcing the subpoena “must protect a person who is neither a party nor
575 a party’s officer from significant expense resulting from compliance.” Some lawyers say that
576 compliance costs a lot, and the cost is rarely recovered. Other lawyers — those who serve
577 subpoenas — complain that they are presented with big bills for the costs of compliance and are
578 obliged to pay. The Subcommittee could not find a principled basis for amending the rule; the
579 problems seem best worked out by the lawyers. This approach seemed to be pretty much
580 approved at the Committee meeting last October.

581 Discussion began with the means of serving a subpoena. It was noted that there is a good
582 bit of district-court law allowing “Rule 5-ish” service. These rulings are made in response to
583 objections to service by means other than delivery in hand. Do we want somehow to rein that in?
584 It was further observed that Rule 45(b)(1) is ambiguous. It says only that “[s]erving a subpoena
585 requires delivering a copy to the named person * * *.” “[D]elivering” can easily encompass
586 delivery by means other than in-hand service. If indeed it is wise to limit service to in-hand
587 delivery, a couple of words could be added to the rule to make that direction unambiguous.
588 Lawyers seem to think in-hand delivery is not a big problem.

589 Discussion continued by asking whether the possible ambiguity is creating unnecessary
590 work for courts — are they being asked to resolve the problem by ruling on motions to quash, or
591 motions to compel? Do we need to add the “two words” to close this down? The response was
592 that this does not seem to be a huge problem in terms of burdening the courts. The issue may be
593 a problem for the lawyer who cannot accomplish in-hand service. Sometimes other means of
594 service are made with the judge’s blessing. The most obvious problem arises when a nonparty is
595 evading service. One response is to adopt state-court methods of service.

596 It was further noted that in practice, subpoenas are often mailed when the lawyer expects
597 there will be no objection. In-hand service tends to be reserved for cases in which resistance is
598 expected. The Subcommittee will consider this question further.

Draft Minutes
Civil Rules Advisory Committee, March 18-19, 2010
page -16-

599 As to costs of compliance, it was agreed that the Committee should keep an eye on the
600 issue to see whether problems emerge that might benefit from rule amendments.

601 Changes: Notice. Rule 45(b)(1) clearly provides that before a document subpoena is served,
602 “notice must be served on each party.” But often the notice is not provided. The Subcommittee
603 recommends changes in wording and in location within Rule 45 to emphasize the notice
604 requirement, believing that one reason for noncompliance is that the obscure location at the end
605 of present Rule 45(b)(1) causes lawyers to overlook the clear obligation.

606 The proposed change would transfer the present Rule 45(b)(1) direction to a new Rule
607 45(a)(4), giving it a more prominent position that may be less often overlooked. In addition, the
608 provision would be changed by adding a requirement that a copy of the subpoena be served with
609 the notice. The draft Committee Note includes in brackets an optional paragraph that would
610 address the consequences of failure to provide the required notice. This paragraph expresses an
611 expectation that courts will deal appropriately with such problems as arise, and confidence that
612 ample remedies are available.

613 The Subcommittee decided not to add a requirement that notice be provided some
614 specified number of days before service of the subpoena. There was some support at the October
615 meeting for adding such a requirement. Plaintiffs in employment cases may experience adverse
616 consequences when a subpoena is served on a former employer or a present employer. But the
617 Subcommittee was concerned about the costs of increasing the complexity of Rule 45. Leaving it
618 to those who get notice to act quickly seems about all that can be done. If specific requirements
619 were added, the occasions for seeking sanctions would multiply.

620 Similar concerns led the Subcommittee to decide against recommending that the party
621 who serves a subpoena give notice to other parties when documents are produced in compliance
622 with the subpoena. A particular problem would arise when documents are not produced all at
623 once, but are provided in batches. Notice before service alerts other parties to the need to follow
624 up by later inquiries for access to whatever has been produced.

625 A point of style was raised: the present rule follows the preface describing a document
626 subpoena with “then” before it is served, notice must be given. “Then” is omitted from the
627 proposed draft. The Subcommittee will consider the style choice.

628 Enforcing court: Rule 45 assigns responsibility for enforcement to “the issuing court.” The
629 issuing court may not be the court where the action is pending — the present structure calls for
630 issuance by the court where a deposition is to be taken, or where documents are to be produced.
631 When disputes arise, there may be very good reasons to resolve them in the court where the
632 action is pending. The decision whether to enforce the subpoena may dispose of the case, and be
633 tightly bound up with ongoing management of the case. Or a single action may involve
634 discovery in many different districts, raising the prospect of inconsistent rulings on the same
635 points and further undermining management by the court where the action is pending.

636 These concerns lead to proposals for parallel amendments adding a new Rule
637 45(c)(2)(B)(iii) and (3)(D). They would provide for transfer of a motion to compel production or
638 a motion to quash from the issuing court to the court in which the action is pending. The

639 standard for transfer would be “in the interests of justice.” This standard is borrowed from the
640 “interest of justice” standard in §§ 1404 and 1406, but without the “convenience of parties and
641 witnesses” language. The draft Committee Note includes an optional bracketed paragraph at the
642 end that would address the possible objection that a Civil Rule cannot confer authority on a court
643 sitting in another state to resolve disputes involving a nonparty who has been served with a
644 subpoena outside that state. The question is analogous to personal jurisdiction issues. The
645 Subcommittee thinks it clear that the Enabling Act authorizes the proposed transfer provision.
646 Whether it is useful to address the question in the Committee Note remains open for discussion.

647 The Committee Note recognizes that it may be important to resolve disputes involving a
648 nonparty in the court local to the nonparty. But it also recognizes that transfer may be important
649 for a variety of reasons.

650 It was asked whether a court can transfer on its own, without providing a hearing? The
651 Subcommittee wants to guard against reflexive transfer simply to “get rid of” motions that
652 burden the issuing court. But adding a hearing provision might raise awkward questions about
653 what is a “hearing”? Many motions are “heard” on paper, without oral presentation. Responses
654 to a transfer order can easily qualify as an opportunity for hearing. It will be desirable to have a
655 statement of reasons for transfer, but that is not made explicit in the draft. It was agreed that the
656 issuing court should act only after knowing the positions of the parties and a nonparty served
657 with a subpoena, and to really assess the interest of justice rather than transfer to avoid work.
658 Perhaps the Committee Note should be revised to address this issue more specifically.

659 The “interests of justice” standard was discussed. The Subcommittee does not want
660 transfer to be “too easy.” Does this phrase capture it? Would it be useful to add the parallel
661 focus on the convenience of parties and witnesses, even if only to avoid any negative
662 implications from the obvious comparison to the statutes governing transfer of venue?

663 It was stated that it is important to emphasize that there often are good reasons to decide
664 disputes locally, in the issuing court. “Exceptional circumstances” might be the test, but that
665 seems too strong. The Committee Note does emphasize the factors that often weigh against
666 transfer. But it may be important to focus the rule text on the convenience of the parties and,
667 especially, a nonparty witness. An alternative form might pick up the § 1407(a) standard which,
668 for multidistrict transfers, addresses both the convenience of the parties and witnesses and also
669 asks whether transfer “will promote the just and efficient conduct of such actions.” The analogy
670 to coordinated pretrial proceedings lends weight to this alternative.

671 It was asked whether there should be a bias against transfer. The Subcommittee did not
672 try to quantify the balance. “We don’t want it to be an easy out for the local judge.” But transfer
673 may be important when sound resolution of the dispute requires close familiarity with the action.
674 It is hard to draw general formulas from the cases that struggle with these problems. There is a
675 great variety of circumstances. The Subcommittee will, however, consider further the choice of
676 words to express the standard for transfer.

677 Party Witnesses at Trial: Judge Campbell described the questions that have emerged from the
678 ruling in *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D.La.2006). Rule
679 45(b)(2) limits the place of serving a subpoena. The understanding has been that the limits on

680 service also limit the place where compliance can be enforced. Compliance cannot be required
681 outside the limits of service. When Rule 45 was extensively amended in 1991, Rule
682 45(c)(3)(A)(ii) was added. This provision requires a court to quash or modify a subpoena that
683 “requires a person who is neither a party nor a party’s officer to travel more than 100 miles from
684 where that person resides, is employed, or regularly transacts business in person,” except that a
685 trial subpoena can command attendance by traveling from any such place within the state where
686 the trial is held. The Vioxx decision found by “inverse inference” that Rule 45(c)(3)(A)(ii)
687 authorizes authority to compel a party or a party’s officer subpoenaed as a trial witness to travel
688 from outside the state where the trial is held. This inverse inference from the language of the rule
689 was found to trump the 1991 Committee Note saying the amendments made no change. The
690 court also said that the 100-mile limit is antiquated in an era of easy travel over far greater
691 distances. Andrea Kuperman’s memorandum shows that several cases agree, while it also shows
692 several cases that disagree. One of the cases that disagrees is from the same district as the Vioxx
693 decision, *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D.La.2008).

694 Ms. Kuperman noted that although many cases describe the Vioxx rule as the majority
695 rule, they often support this statement by citing inapposite decisions. The more recent decisions
696 tend to reject the Vioxx ruling. There is no circuit authority. And all cases, no matter which side
697 they take, assert that the answer they choose is mandated by the plain language of Rule 45.

698 The Subcommittee recommends that the disagreement in these cases be resolved. It
699 further recommends that the resolution go back to the original meaning: a subpoena to testify at
700 trial can require travel only from a place within the state, whether the witness is a party, a party’s
701 officer, or a nonparty. The only distinction appears in Rule 45(c)(3)(B)(iii) — a person who is
702 neither a party nor a party’s officer can be required to travel more than 100 miles within the state,
703 but the court may modify or quash the subpoena if it requires the person to incur substantial
704 expense.

705 Although the Subcommittee recommends restoration of the 1991 meaning, it recognizes
706 that the question is difficult. The desire to reach further for trial witnesses who are parties, or
707 officers of parties, is expressed not only in the Vioxx line of cases but also in some of the
708 decisions that reject the Vioxx reading of Rule 45. It will be important to provoke extensive
709 discussion of this question at the miniconference the Subcommittee recommends to explore Rule
710 45 issues. It may be important to provide some resolution that allows a reach beyond state lines,
711 but that does not establish routine nationwide subpoenas for trial testimony by a party or a party’s
712 officer.

713 It was recognized that under present rules a subpoena is not required to take a party’s
714 deposition. Parties, as well as their officers, directors, and managing agents often are subjected
715 to depositions in the court where the action is pending. But a deposition can be arranged on
716 terms that are less intrusive than trial testimony. Scheduling a deposition can adjust for the
717 deponent’s schedule, and can avoid the need to wait around during the uncertain pace of trial.
718 The burdens of appearing as a trial witness may encourage strategic use of trial subpoenas
719 naming high-level organization figures, who often are far from the most useful witnesses in the
720 organization, aiming to increase settlement pressure. A more refined rule will be required if we

721 aim to provide for live testimony at trial by people within an organization who do know
722 something useful.

723 One proposed draft, then, would do no more than overrule the Vioxx interpretation of
724 Rule 45. Rule 45(3)(A) would begin by directing the court to quash or modify a subpoena
725 “properly served under Rule 45(b) that” requires travel from beyond the state. This would
726 establish by express language the link originally assumed between the place of serving and the
727 place of complying with a subpoena. In addition, to make twice sure, “subject to Rule
728 45(c)(3)(A)(ii)” would be removed from the beginning of Rule 45(b)(2). This cross-reference to
729 (3)(A)(ii) may be misread to suggest that service can be made at places not actually authorized by
730 (b)(2).

731 An alternative is presented to illustrate the possibilities of extending the reach of trial
732 subpoenas without going all the way to the Vioxx result of nationwide authority over a party or a
733 party’s officer. This draft recognizes that there are circumstances in which a party, or a person
734 within an organization that is a party, may be an important witness. The desire to compel
735 appearance may be more than a mere tactical lever. This alternative, presented as a new Rule
736 45(b)(4), does not rely on serving a subpoena. Instead it authorizes the court to order a party to
737 attend and testify at trial, or to order the party to produce a person employed by the party.
738 Alternatives are presented to identify the employees a party may be required to produce — one
739 who is subject to the party’s legal control, or one who is a party’s officer, director, or managing
740 agent. The decision whether to order appearance at trial should be made only after considering
741 the alternatives of an audiovisual deposition or of testimony by contemporaneous transmission
742 under Rule 43(a). The court may order reasonable compensation for attending the trial or
743 hearing. And the court may impose sanctions authorized by Rule 37(b) for a party’s failure to
744 appear and testify or to produce a person to appear and testify.

745 The first question asked whether the authority to order appearance and testimony at trial
746 is intended to cross international boundaries to reach a party or the employee of an organization
747 party. There are cases dealing with this issue under the party deposition provisions in Rule 37(d).
748 The question often is framed by asking who should have to travel to whom. The organization is
749 before the court, and is subject to sanctions for failing to comply with discovery demands. The
750 broader the categories of people the organization can be ordered to produce at trial the greater the
751 consequences of the rule and the greater the need for care in considering it. As compared to the
752 limited concept of an employee “subject to the legal control” of an organization, is it fair to
753 assume that a corporation can compel any employee to travel to the place of trial?

754 One alternative might be to reconsider the tight limits that Rule 43(a) places on testimony
755 by contemporaneous transmission from a different location.

756 Members of the Subcommittee noted again that the primary concern is “to not encourage
757 gamesmanship.” Remote transmission does alleviate the travel problem. But the CEO may or
758 may not have relevant information. If the testimony is important, it should be taken by video
759 deposition. Improving electronics and changing ways of presenting testimony should be
760 recognized. The Vioxx decision generates enormous practical problems, “holding CEOs and
761 officers hostage to appear at trial.” Another Subcommittee member seconded these observations.
762 Trials were fair before the Vioxx ruling. No solid study shows important differences in the

763 ability to evaluate testimony presented by video deposition as compared to testimony presented
764 live at trial. It is too easy for a persuasive lawyer to win an order compelling appearance at trial.
765 Consider, for example, the president of a foreign automobile manufacturer whose products
766 become embroiled in multiple actions in this country. There is no reason for things to be
767 different than they were before the Vioxx ruling. An observer joined these remarks.

768 It was noted that the Criminal Rules authorize nationwide trial subpoenas, and that the
769 Criminal Rules Committee is working on rules that, despite Confrontation Clause problems,
770 would authorize presentation of trial testimony by deposition of a witness located outside the
771 country when circumstances prevent a witness from appearing live at trial.

772 A third Subcommittee member said that the circumstances of small organizations provide
773 persuasive reasons for simply returning to Rule 45 as it was understood before the Vioxx ruling.
774 Untoward burdens might be imposed by nationwide compulsion to appear at trial when the
775 witness is an officer of a small business or, for example, a small local union.

776 It was noted that at least one district court has asserted inherent power to punish a party
777 who does not produce a witness. This power is asserted without regard to the limits of Rule 45.
778 But the Subcommittee chose not to explore “the raw exercise of judicial power.”

779 Discussion concluded by noting again that district-court opinions reflect a lot of sympathy
780 for the Vioxx ruling, without regard to the language of Rule 45. It will be important to explore
781 these questions in depth at the miniconference.

782 Simplify and Shorten: The Subcommittee has produced sketches of three approaches that might
783 be taken to shorten and simplify Rule 45. Rule 45 has been criticized as too long, too elaborate,
784 too much laden with details, too much beyond the understanding of lawyers — much less
785 nonparties who do not have lawyers — who have not struggled through to mastering its
786 complexities.

787 The criticisms may be justified, at least in part. But any attempt to simplify the rule must
788 reckon with the prospect of unintended consequences. One approach, set out in the October
789 agenda materials, suggested a number of small changes that might be made. It was abandoned as
790 not worth the risk that unforeseen consequences might outweigh the intended benefits. Another
791 approach would be to simply incorporate Rules 26 through 37 into Rule 45 to define the scope of
792 nonparty discovery and provide enforcement mechanisms. That approach would thwart “one-
793 stop shopping,” and might easily lead to confusion as courts and lawyers attempted to work out
794 the intended integration. Abandoning those possibilities, the sketches that have been developed
795 are presented in the agenda materials in progressive steps of aggressiveness.

796 Eliminate the Three-Ring Circus: Rule 45 identifies three courts that can issue a subpoena: the
797 court where a hearing or trial is to be held; the court where a deposition is to be taken; and the
798 court where documents are to be produced. Rule 45(b) creates four permutations on the place of
799 service. And Rule 45(c) establishes three different rules to identify the place where performance
800 can be required. Thirty-six combinations are possible. Since 1991, a lawyer in one place can
801 “issue” a subpoena “from” a court sitting in another place. Identification of an “issuing court” is
802 essentially a fiction. The solution offered by this sketch is to separate the three functions. All

803 subpoenas issue from the court where the action is pending; service may be made anywhere
804 within the United States. The place of performance is identified separately — in this sketch,
805 there is no change in the place of performance, except that the sketch cuts free from any reliance
806 on state practice. And the place of enforcement would be selected on the terms already suggested
807 for choosing between the court for the place where performance is required and the court where
808 the action is pending.

809 Judge Campbell explained this approach by noting that Rule 45 is a workhorse. It does a
810 lot, governing all third-party discovery practice. It is amazing that it does not bring a great many
811 problems to the courts. But “it does have a three-ring circus aspect.” The concept of an issuing
812 “court” is a fiction; the court does not know that the lawyer has issued the subpoena. A lawyer in
813 Illinois, moreover, can issue a subpoena incident to an action pending in a district court in
814 Kansas and arrange service anywhere in the country. The place of performance is governed, but
815 by subtle provisions that require some effort to untangle. Most of the difficulty with Rule 45
816 could be eliminated by providing for nationwide service of subpoenas issued by the court where
817 the action is pending, limiting the place of performance to the places specified by present Rule 45
818 or to some slight variations on those places, and providing for enforcement on the terms already
819 suggested for modifying present Rule 45.

820 Initial discussion suggested that this approach is good, but asked whether there are
821 countering considerations. The first response was that the approach indeed is good; the
822 countering concern is that there are no large problems now. One judge observed that the
823 problems arise just often enough that it is necessary to go back to close study of the rule to figure
824 it out. And it was suggested that one benefit might be to reduce tactical efforts to select a
825 particular issuing court. The revision, further, is fully consistent with the independent
826 suggestions to address the Vioxx problem of compelling a party to attend trial as a witness,
827 “transfer” of enforcement disputes to the court where the action is pending, and improving the
828 notice requirement for document subpoenas. Those provisions can readily be incorporated in the
829 sketch.

830 An observer agreed that it is hard to read Rule 45. One source of the difficulty is treating
831 parties and parties’ officers together, while separating nonparties. It might be better to establish
832 three categories, distinguishing between parties and officers or other persons affiliated with a
833 party.

834 Another suggestion was that the provision for enforcement might be chosen as the court
835 where the witness is, rather than the court where compliance with the subpoena is to occur.

836 It was agreed that this sketch should be presented to the anticipated miniconference.

837 More Aggressive: Judge Baylson: The second sketch has been developed by Judge Baylson,
838 consulting with the Discovery Subcommittee, over the course of the last year. Judge Baylson
839 believes that Rule 45 is too complicated, not only for nonparties who do not have lawyers but
840 also for pro se litigants and even for lawyers who do not come into frequent contact with it.
841 Sufficient illustration is provided by the Rule 45(a)(1)(iv) direction that a subpoena must set out
842 the text of Rule 45(c) and (d). Lawyers who routinely engage in complex federal litigation have

843 worked through to an understanding of subdivisions (c) and (d). Other lawyers have to struggle
844 with them. Nonlawyers have little chance of unraveling them.

845 The proposed draft simplifies extensively. One of the means of achieving simplification
846 is to omit several provisions that have been added to Rule 45 over the years to resolve problems
847 that were causing difficulties in practice. The sketch also adds new things to Rule 45, such as
848 invoking all the provisions of Rules 26 through 37 to address objections or noncompliance by
849 saying the court “may refer” to them.

850 Judge Baylson said that the sketch is still a work in progress. It has been refined with the
851 help of the Discovery Subcommittee in a number of conference calls. The purpose is to provide
852 a model for consideration in the Rule 45 miniconference. Although seasoned lawyers and judges
853 understand Rule 45, a nonparty may not have a lawyer, may not want to pay one, and may not be
854 able to pay one. Compliance can be costly and burdensome. Rule 45 operates unfairly in these
855 circumstances. An illustration of the complexity of Rule 45 arises from the time that has been
856 devoted to achieving a clear understanding of its terms as a foundation for attempting revision.

857 The heart of simplification is elimination of the structure that calls for subpoenas to be
858 issued by a court different from the court where the action is pending. The first sketch, by
859 eliminating this distinction, goes a long way toward improvement. There are not many
860 differences in what a subpoena must cover.

861 This sketch leaves open the distance over which a person may be dragged to perform a
862 subpoena. That is a matter of detail.

863 The provision for objections, subdivision (e), is important. It takes the debatable position
864 that once an objection is made the burden falls on the party serving the subpoena to work it out or
865 to get an order directing compliance.

866 Subdivision (f) is central to the goal of simplification. It invokes Rules 26(c), 37(a)(1),
867 and 37(a)(5) to govern any person seeking court action concerning a subpoena. It requires that
868 all disputes concerning a trial subpoena be resolved by the court where the action is pending. A
869 party seeking relief from any other subpoena also must apply to the court where the action is
870 pending. A nonparty may request relief from any subpoena other than a trial subpoena from the
871 court where the action is pending, but also may request relief from the court for the district where
872 the subpoena is served or is to be performed. That court may refer the dispute to the issuing
873 court. In providing for reference to Rules 26 through 37 the sketch also says that in considering
874 the costs and burdens imposed by compliance the court may require advancement or allocation of
875 costs and expenses, including attorney fees. Finally, the sketch directs that the court must act
876 promptly in ruling on a dispute concerning a subpoena and must state the reasons for any order.

877 It is true that the sketch omits several provisions found in present Rule 45. Some might
878 be restored, perhaps with language changes.

879 The first question asked how cross-reference to the Rule 26 through 37 discovery
880 provisions helps a pro se litigant? Judge Baylson replied that it does not help, but the rules
881 generally are adopted on the premise that a pro se litigant is responsible for achieving some
882 understanding of them. The question was then reframed — how does cross-reference help young

883 lawyers or those otherwise inexperienced with Rule 45? Judge Baylson replied that Rule 45 is
884 too long because it repeats many provisions of the discovery rules, often at length. The need to
885 read Rules 26 through 37 is offset by avoiding the agony of determining whether the duplications
886 are precise or whether there are some variations.

887 The next observation was that the list of things omitted suggests it is better to omit them.
888 The cross-reference to the discovery rules is a good way to simplify. "Simpler is better." There
889 is a problem for a pro se witness who wants to quash a subpoena, but the judge has an obligation
890 to help.

891 In the same vein, it was speculated that the great majority of subpoenas are straight-
892 forward: they ask for a clearly identified set of documents, and compliance is simple. There will
893 be no occasion to pour over the cross-referenced rules.

894 Another observation was that a doctor's office may be served with hundreds of subpoenas
895 a year. They have confidentiality problems. It is difficult to minimize the burden on them. They
896 cannot easily reach the people who served the subpoena to work out the proper means of
897 compliance.

898 Agreement was expressed with the concern that Rule 45 is long, and with the value of
899 discussing this sketch at a miniconference. But it was also noted that a review of the Committee
900 Notes over the years shows evident care in adding the details now in the rule. If this guidance is
901 removed, the same problems may emerge again. And if they emerge, absent guidance in the rule
902 different judges are likely to give different answers. "Economy of words is not the only goal."

903 This view was supported by observing that practice is well settled under present Rule 45.
904 An attempt to "simplify" the rule by omissions will lead to a lot of experimenting. "A shorter
905 rule may not be more effective."

906 It was agreed that the questions raised by this sketch deserve further discussion. "It is a
907 mistake to assume that cross-reference is a simplification."

908 "Rule 36.1": This sketch was introduced as one illustration of the most dramatic approaches that
909 have been considered. It would strip discovery subpoenas out of Rule 45, placing them
910 somewhere in the sequence of all the rest of the discovery rules. Rule 45 would be limited to
911 subpoenas to provide testimony at a hearing or trial. Separating these topics might promote
912 clarification and simplification, but that result is not assured. It is not clear that bright lines can
913 be drawn to separate discovery subpoenas from subpoenas to appear as a witness at a trial or
914 hearing. Nor is it clear that Rule 45 could be much simplified if discovery subpoenas were
915 removed. Any variation on this approach raises a number of fundamental issues.

916 The sketch was presented by focusing on two distinct aspects. The broad question is
917 whether the time has come to integrate discovery subpoenas more directly with the discovery
918 rules, not by cross-reference but by closer drafting. The sketch is one example of how this might
919 be accomplished; many variations are possible. A series of smaller questions are posed by
920 including provisions addressing questions that Rule 45 now leaves to be worked out by the
921 parties. The ever-present risks of inviting unintended consequences, or of disrupting the paths of

922 negotiation that have developed under present Rule 45, must be considered in reviewing these
923 smaller questions.

924 There is little point in drafting rules that separate discovery subpoenas from subpoenas
925 for a hearing or for trial if the distinction has no real meaning in practice. Courts do confront
926 attempts to avoid discovery cut-offs by asserting that a subpoena is used for a trial or hearing, not
927 for discovery. When there is a trial, the distinction seems feasible. The court can enforce the
928 discovery cut-off by limiting compliance to trial itself, forbidding any attempt to examine the
929 documents or question the witness outside the trial. If that seems undesirable, the court can grant
930 relief from the cut-off; relief often will be desirable, for the benefit of all parties, when a trial
931 subpoena is used to secure information that the parties had thought to supply from other sources
932 that have failed, or when new issues at trial make it desirable to present information that were not
933 anticipated during discovery. There may be more difficulty in drawing lines, but perhaps also
934 less need, when witnesses or documents are subpoenaed for a “hearing” that is not a trial. A
935 common illustration would be a preliminary injunction hearing, held well before any discovery
936 cut-off. An exotic illustration would be the use of witnesses at a summary-judgment hearing,
937 relying on Rule 43(c) — summary judgment may be considered before the cut-off of all
938 discovery. In these settings it may be desirable to manage compliance by allowing discovery
939 immediately before or even during the hearing, separate from presentation of testimony or
940 documents at the hearing. Complications might arise from differences in the place for
941 compliance. Compliance with a subpoena for hearing or trial means producing or testifying, by
942 one means or another, at the hearing or trial. Compliance with a discovery subpoena often will
943 be directed to a different place. There may be distinctions in the extent of the burdens that can be
944 imposed for discovery or for trial. But it may be possible to work through these issues, and
945 indeed it may be possible to address them more clearly than Rule 45 now does.

946 There are many possible approaches to separating discovery subpoenas from trial
947 subpoenas if the separation is in fact useful. The current sketch combines deposition subpoenas
948 and production subpoenas in a single rule. It carries forward the opportunity to issue a subpoena
949 to compel a party’s appearance at a deposition, despite the availability of sanctions under Rule
950 37(d) when a party fails to comply with a deposition notice. It expressly limits discovery
951 production subpoenas to nonparties, relying on Rule 34 as the exclusive means for compelling
952 production between the parties. This approach might be carried further by adding nonparties to
953 Rule 34. Rule 34 would have to be expanded to some extent, at least by incorporating some
954 variation on the Rule 45 provisions that prohibit imposing unreasonable burdens and require a
955 court to protect a nonparty from significant expense if the nonparty objects. It likely would be
956 desirable to add provisions addressing the place of performance by a nonparty, and referring
957 enforcement to the court in the place of performance but allowing transfer back to the court
958 where the action is pending.

959 The sketch incorporates the Rule 45 revisions proposed for serious study even if no other
960 changes are made. It also incorporates the approach that has all subpoenas issued by the court
961 where the action is pending, separately governing the place for compliance and the court that
962 resolves disputes.

963 Apart from the overall relocation of discovery subpoenas, the sketch addresses some
964 questions not now addressed by Rule 45.

965 The place where an entity can be subjected to a Rule 30(b)(6) deposition is not clearly
966 addressed by Rule 45. The most likely relevant provision, Rule 45(c)(3)(A)(ii), directs the court
967 to quash or modify a subpoena that requires a person, not a party, “to travel more than 100 miles
968 from where that person resides, is employed, or regularly transacts business in person.”
969 Assuming that an entity is a “person” covered by this rule, applying the concepts of residence,
970 place of employment, or regularly transacting business “in person” is not easy. Reliance on
971 concepts of personal jurisdiction seems an awkward fit when a nonparty is subpoenaed —
972 general personal jurisdiction may open the door too wide, and specific transaction-based personal
973 jurisdiction may fit poorly. But it may be difficult to identify any useful limit. The draft simply
974 provides that the entity may be compelled to produce a person designated to testify on its behalf
975 at any reasonable place. Those words foreclose an “anything goes” approach, but do little more.

976 Rule 45 also fails to specify the place for producing documents or electronically stored
977 information. The sketch provides for inspection and copying of documents or tangible things
978 where they are ordinarily maintained or at another convenient place chosen by the person
979 producing them. It also provides that the subpoena can designate another reasonable place if the
980 requesting party pays all the reasonable added expenses. For electronically stored information,
981 the sketch provides for transmission to an electronic address stated in the request. But it also
982 recognizes that the parties may agree on, or the court may order, participation by the requesting
983 party in searching the nonparty’s storage system. It seems likely that similar terms are regularly
984 worked out in practice; perhaps there is no need to add these provisions.

985 The provisions for enforcement draw from both of the less aggressive models. Rule 37 is
986 incorporated more directly, by providing that a motion to enforce a subpoena against a nonparty
987 must be made under Rule 37(a). Rule 37(a) enforcement substitutes for the contempt procedure
988 provided by Rule 45(e). That means the requesting party must attempt to confer to resolve the
989 problem before moving for an order. The order must specify what must be produced. Sanctions
990 are available only after refusal to obey the order. It seems likely that most of the same incidents
991 are used in contempt enforcement, beginning with a motion to show cause, a hearing, an order
992 that specifies what must be done, and sanctions for disobedience. Rule 37(b) sanctions include
993 contempt. It does not seem likely that other Rule 37(b) sanctions will be appropriate, although
994 some thought might be given to the possibility of party-directed sanctions when the nonparty is
995 closely affiliated with the party and subject to its control.

996 Discussion began with the observation that any such surgery on Rule 45 can be justified,
997 if at all, only by showing clear benefits. It deserves to be explored only if the Committee decides
998 to explore relatively broad revisions. If broad revisions are explored, it seems useful to consider
999 — if only to exclude — all plausible alternatives. Any thorough revision should be designed to
1000 put Rule 45 to rest for many years, at least in its major design. Even then, the risk of unintended
1001 consequences urges caution. The suggested distinctions between discovery subpoenas and
1002 subpoenas for a hearing or trial may not prove workable. Attempts to define the place of
1003 performance more clearly may hinder the process by which workable accommodations are
1004 worked out by negotiations in the shadow of an opaque rule. Simply wrong answers might be

1005 adopted for some questions. There is real reason for concern with the prospect that computer
1006 search programs might not prove able to direct innocent inquiries framed around Rule 36.1 to
1007 earlier interpretations of ancestral provisions in Rule 45.

1008 The distinction between amending existing rules and drafting on a clean slate is uncertain.
1009 The Rule 36.1 sketch draws in large part on present Rule 45, and on the current proposals to
1010 amend or to explore. It deserves to carry forward as at least an exhibit in the materials for a
1011 miniconference, but it is not likely to carry further unless there is a strong upswelling of support.

1012 *Rule 26(c) Protective Orders*

1013 Continuing introductions of “Sunshine in Litigation Act” bills have prompted renewed
1014 attention to Rule 26(c). Similar bills prompted the Committee to study Rule 26(c) in depth and
1015 at length in the 1990s. A proposed amended Rule 26(c) was published for comment. A revised
1016 proposal was sent back by the Judicial Conference because it had not been republished after
1017 making extensive changes to reflect the public comments. The revised proposal was then
1018 published. After considering the comments offered at this second round, the Committee
1019 concluded that there was no need to pursue amendments. The rule seemed to be working well as
1020 it was. The Committee has not devoted much attention to Rule 26(c) since then.

1021 Continuing Congressional attention provides reason to renew consideration of Rule 26(c).
1022 Judge Kravitz testified before Congress last year. Andrea Kuperman undertook a circuit-by-
1023 circuit study of current practices, looking to standards for initially entering protective orders, tests
1024 for filing under seal, and approaches to modifying or dissolving protective orders. This research
1025 suggests that there are few identifiable differences among the circuits. All recognize the need to
1026 adhere to a meaningful good-cause requirement in granting protective orders. All recognize
1027 flexible authority to dissolve or modify protective orders, although the Second Circuit adheres to
1028 a more demanding standard that has been expressly rejected by several circuits. All recognize
1029 that the tests for filing “judicial documents” under seal are far more demanding than the
1030 standards for entering protective discovery orders. This research is reassuring, and provides
1031 some ground for satisfaction with present Rule 26(c). Nonetheless, it is wise to explore possible
1032 revisions.

1033 A draft Rule 26(c) has been prepared by the Committee Chair and Reporter. The draft
1034 was presented solely for discussion purposes. If the Committee decides to take up this topic,
1035 more rigorous drafting will be attempted. Specific suggestions from Committee members will
1036 play an important role in improved drafting.

1037 Good reason may appear to do nothing. Not long after the Committee concluded its last
1038 thorough consideration of Rule 26(c), the Court of Appeals for the District of Columbia Circuit
1039 said this: “Rule 26(c) is highly flexible, having been designed to accommodate all relevant
1040 interests as they arise.” *United States v. Microsoft Corp.*, 165 F.3d 952, 959 (D.C.Cir.1999).
1041 That advice seems to hold good today. The purpose of placing this topic on the agenda is to
1042 determine whether it makes sense to take it up again. Courts are doing desirable things, but some
1043 of these good things do not have an obvious anchor in the rule. Expanded rule language might
1044 save time for bench and bar, and provide valuable reassurance. Some of the rule language seems
1045 antique. It expressly recognizes the need to protect trade secrets and other commercial

1046 information, but does not mention the personal privacy interests that underlie many protective
1047 orders. Some updating and augmentation may be in order. And it will always be important to be
1048 alert to signs that practice might somehow be going astray.

1049 The draft carries forward the “good cause” test established in present Rule 26(c). The
1050 text deliberately omits two topics that generated much discussion in the 1990s. The rule text
1051 might recognize the role of party stipulations, adopting some provision such as “for good cause
1052 shown by a party or by parties who submit a stipulated order.” Party stipulations may show both
1053 that there is good cause for a protective order and that the order will facilitate the smooth flow of
1054 discovery without unnecessary contentiousness. But it is important to recognize that a stipulation
1055 does not eliminate the need for the court to determine that there is good cause for the order.
1056 There is no clear reason to believe that courts fail to understand these contending concerns or fail
1057 to act appropriately. It may be better to leave practice where it lies.

1058 It also would be possible to add rule text that points to reasons for not entering a
1059 protective order. Concern is repeatedly expressed that protective orders may defeat public access
1060 to information needed to safeguard public health and safety. But, both in the 1990s and today,
1061 there has been no persuasive showing that protective orders in fact have had this effect. The
1062 Federal Judicial Center studied protective orders and showed that most enter to protect
1063 information that does not implicate the public health or safety. When the protected information
1064 may bear on public health or safety, alternative sources of information have always been
1065 available. The pleadings in the cases are one source that is routinely available. This concern
1066 does not yet seem real.

1067 The draft rule text does make some changes in the traditional formula that looks to
1068 “annoyance, harassment, embarrassment, oppression, or undue burden or expense.” Many
1069 protective orders enter to preserve personal privacy. In addition, Rule 26(g) recognizes other
1070 potential discovery dangers as an “improper purpose.” Rule 26(c) might benefit from
1071 recognizing some of the same dangers, such as unnecessary delay, harassment, and needless
1072 increase in cost.

1073 The draft also relegates to a footnote the question whether the rule should provide for
1074 disclosing information to state or federal agencies with relevant regulatory or enforcement
1075 authority. The footnote suggests that it may be better to leave it to the courts to continue working
1076 out the countervailing interests they have identified in this area.

1077 Present Rule 26(c) text does not address another familiar problem. Particularly when
1078 large volumes of documents or electronically stored information are involved, protective orders
1079 often provide that a producing party may designate information as confidential. Another party
1080 may wish to challenge the designation. The draft illustrates one possible approach, assigning the
1081 burden of justifying protection to the party seeking protection.

1082 Another familiar problem arises when a party seeks to file protected discovery
1083 information with the court. The standards for sealing court records are more demanding than the
1084 Rule 26(c) standards for entering a protective order. Sealing standards are much higher for
1085 records that are used as evidence at a hearing, trial, or on summary judgment. The draft provides
1086 that a party may file under seal information covered by a protective order and offered to support

1087 or oppose a motion on the merits or offered in evidence at a hearing or trial only if the protective
1088 order directs filing under seal or if the court grants a motion to file under seal. It does not
1089 attempt to restate the judicially developed tests for determining whether sealing is appropriate.

1090 The draft also carries forward, with some changes, the 1990s drafts that provided for
1091 modifying or dissolving a protective order. The 1990s drafts allowed a nonparty to intervene to
1092 seek modification or dissolution, and the Committee Note suggested that the standard for
1093 intervention should be more permissive than the tests for intervening on the merits. The present
1094 draft simply allows any person to seek modification or dissolution, reasoning that it is more
1095 efficient to consider the interests that may support relief all at once. Several factors are identified
1096 for consideration. One of them looks to “the reasons for entering the order, and any new
1097 information that bears on the order.” This factor addresses in circumspect terms the need to
1098 distinguish between protective orders entered after thorough consideration of the interests
1099 implicated by a motion to modify or dissolve and orders entered after less thorough
1100 consideration. “New information” may include arguments that were not as fully presented as
1101 might have been. At the same time, reliance is identified as another factor bearing on
1102 modification or dissolution. Yet another factor reflects the common practice of modifying
1103 protective orders to facilitate discovery and litigation in related cases.

1104 A number of interesting questions are not addressed by the draft. At least some courts
1105 believe there is no common-law right of access to discovery materials not filed with the court.
1106 This view ties to the amendment of Rule 5(d) that prohibits filing most discovery materials until
1107 they are used in the proceeding or the court orders filing. The rule might say something about
1108 access to unfiled materials.

1109 Rule 29(b) provides that parties may stipulate that “procedures governing or limiting
1110 discovery be modified.” Rather than seek a protective order from the court, the parties may
1111 stipulate to limited discovery and to restrictions on using discovery materials. It is also possible
1112 that parties may agree to exchange information voluntarily, entirely outside the formal discovery
1113 processes. It might prove difficult to address such agreements in Rule 26(c), but perhaps the
1114 topic deserves some attention.

1115 This introduction was summarized as identifying issues that probably should be
1116 considered if Rule 26(c) is to be studied further. But the question remains whether there is any
1117 reason to take on Rule 26(c) while “things seem to be working out just fine.”

1118 The first question asked for a summary of the best reasons for taking up Rule 26(c).
1119 Responses suggested again the value of bringing well-established “best practices” into rule text,
1120 and the desire to modernize expression of some provisions. Rule 26(c) “was written in a paper
1121 world. Protecting privacy and access to information filed in court have become more important
1122 in the electronic era.” Pressures grow both to protect the privacy of parties and other persons
1123 with discoverable information, and also to ensure public access. The right balance is difficult,
1124 and is likely to be different now than it was in 1938. Although courts are adjusting well, it may
1125 help to update the rule.

1126 It was further suggested that various provisions could address the concerns reflected in
1127 the Sunshine in Litigation Act proposals. Some are in the draft, including challenges to

1128 designations of information as confidential, modification or dissolution of protective orders, and
1129 sealing of filed materials. But the best reason to act may be to bring best practices into the rule.

1130 The “best practices” suggestion was countered by asking whether there is good reason to
1131 avoid an attempt to distill developed judicial practices into rule text. It is not possible to
1132 incorporate all of the case law. Litigants will argue that leaving some practices out of the rule
1133 reflects a judgment that they are not worthy of incorporation, and should be reconsidered.

1134 The rejoinder was that the case law is pretty consistent. It provides a secure foundation
1135 for incorporation into rule text. It will be useful to provide explicitly for modification or
1136 dissolution. Recognition of the procedure for challenging designations of confidentiality will be
1137 useful, even though a procedure is spelled out in “every protective order I’ve seen.” The risk of
1138 doing more harm than good seems relatively low.

1139 Another reason for taking on Rule 26(c) may be persisting concerns in Congress. But this
1140 preliminary inquiry satisfies much of that burden — there is no apparent reason to revise the
1141 conclusions reached in the 1990s. Courts do consider public health and safety. They do allow
1142 access to litigants in follow-on cases. They do modify or dissolve protective orders. They are
1143 careful about sealing judicial documents. The reasons for going ahead now are more the values
1144 already described — bringing established best practices into rule text expressed in contemporary
1145 language.

1146 This suggestion was elaborated by noting that there is an important value in access to
1147 justice. That includes ensuring that the public in general has a chance to see what courts do. But
1148 it also includes providing ready access to the law for lawyers. Not all practitioners are familiar
1149 with case-law elaborations of Rule 26(c), and not all have the resources required to develop
1150 extensive knowledge. Capturing these values in rule text can be useful.

1151 Another comment began with the suggestion that there is a “wink and nudge” aspect of
1152 real practice, as compared to rule text. Expressing practice in rule text could be useful. But there
1153 are offsetting values in leaving things where they stand. It has been noted that the Second Circuit
1154 takes a distinctive approach to modifying or dissolving a protective order, emphasizing the need
1155 to protect reliance in particular cases so that litigants will be encouraged to rely on protective
1156 orders to facilitate discovery in future cases. So it is well understood that umbrella protective
1157 orders are entered, but the practice is questioned by some. Adopting rule provisions that address
1158 party designations of confidentiality may seem to bless more practices than should be blessed.

1159 Returning to the need for free access to judicial documents, it was observed that the draft
1160 provisions for modification or dissolution are open-ended. They do not interfere with the
1161 provision that a protective order for discovery does not automatically carry over. But it also was
1162 suggested that care should be taken in even referring to the possibility of sealing information
1163 offered as evidence at trial.

1164 The pending proposal to revise Rule 56 was recalled. One of the major reasons for
1165 undertaking revision was that the rule text simply did not correspond to the practices that had
1166 developed over the years. In contrast, Rule 26(c) text is not inconsistent with current practice.

1167 The proposed changes are obvious. There is little reason to revise a rule only to incorporate
1168 obvious present practice.

1169 An observer suggested that one of the most important concerns is that Rule 26(c) is now a
1170 very good thing for employment plaintiffs. If the Committee starts to tinker with it, interest
1171 groups will be stirred to press revisions that would distort the rule. Another observer agreed in
1172 somewhat different terms. There are some benefits in acting to improve Rule 26(c). But there
1173 are risks that once the topic is opened, the end result will make things worse. Sending a revised
1174 rule to Congress, for example, might provide an occasion for enacting the infeasible procedural
1175 incidents contemplated by the Sunshine in Litigation Act bills.

1176 Discussion resumed the next morning. A committee member asked whether it is wise to
1177 pursue Rule 26(c) in depth if the Committee thinks the end result will be to recommend no
1178 changes. Judge Rosenthal noted that the Committee had done that already. Several years were
1179 devoted to Rule 26(c), culminating in a decision to withdraw after two rounds of public comment
1180 because there was no apparent need to revise established practices. At the same time, Judge
1181 Kravitz is right in observing that the Committee should not feel obliged by political
1182 considerations to pursue a topic it thinks does not need attention.

1183 It seems better not to take Rule 26(c) off the agenda in a final way just yet. At a
1184 minimum, the Committee should continue to monitor developing case law. Congress should
1185 understand that the Committee recognizes the importance of Rule 26(c) and continues to monitor
1186 it. If the Federal Judicial Center research staff can free up some time, it might be useful to
1187 update their study. And whether or not there is a further study, it might be desirable to have the
1188 judicial education arm of the Center prepare a pocket guide that helps judges and lawyers through
1189 the case law by summarizing best practices.

1190 These proposals were supplemented by asking whether it would be useful to have an FJC
1191 survey of judges. The FJC prefers to survey judges only when there are compelling reasons.
1192 Judge time is a valuable resource that should not be lightly drawn on. When a survey seems
1193 justified, it seems better to do it by presenting a concrete proposal, not a general question whether
1194 there is some reason to revise a rule.

1195 The 2010 conference may generate ideas that would support a useful survey, most likely
1196 aimed at lawyers. Until then, the prospect seems premature.

1197 Further reason for carrying Rule 26(c) forward was found in the work of two Standing
1198 Committee subcommittees. One is examining privacy concerns, although without a direct focus
1199 on Rule 26(c). Another is examining the practice of sealing entire cases, as distinguished from
1200 sealing particular files or events. Exhaustive empirical investigation has shown that it is very
1201 rare to seal entire cases, but there may be reason to recommend that courts establish systems to
1202 ensure that sealing does not carry forward by default after the occasion for sealing has
1203 disappeared.

1204 *Forms*

1205 The October meeting considered the question whether the time has come to reconsider the
1206 Forms appended to the Rules. Rule 84 says the forms "suffice under these rules." For the most

1207 part, however, the Committee has paid attention to the Forms only when adding new forms to
1208 illustrate new rules provisions. Looking at the set as a whole, there are reasons to wonder why
1209 some topics are included, while others are omitted. Looking at particular forms raises questions
1210 whether they are useful. The pleading forms in particular seem questionable. The pleading
1211 forms were obviously important in 1938. The adoption of notice pleading, a concept not easily
1212 expressed in words, required that the Committee paint pictures in the guise of Forms to illustrate
1213 the meaning of Rule 8(a)(2). That need has long since been served. The current turmoil in
1214 pleading doctrine, moreover, suggests that the Forms may provide more distraction than
1215 illumination.

1216 The benign neglect that has generally characterized the Committee's approach to the
1217 Forms is in part a consequence of the need to tend to matters that seem more important. There is
1218 reason to question whether the Committee should continue to bear primary responsibility for
1219 policing the forms. If responsibility were assigned elsewhere — for example, to the
1220 Administrative Office — it would be appropriate to reconsider Rule 84.

1221 These concerns are detailed at some length in the Minutes for the October meeting. The
1222 Committee was particularly concerned that any effort to revise the Forms, or to abandon them,
1223 might seem to be taking sides in ongoing debates about pleading standards. The Committee
1224 clearly is not yet prepared to address pleading standards in this way. It tentatively concluded that
1225 reconsideration of the Forms should be postponed until pleading practice settles down.

1226 This reaction was reported to the Standing Committee in January. The Standing
1227 Committee agreed that it would be better not to launch a Forms project just now.

1228 Discussion was limited to the question whether it would be useful, as some law review
1229 writers have suggested, to develop a series of forms that illustrate pleadings that just barely
1230 comply with minimum standards, and perhaps some that just barely fail to comply. The response
1231 was that it seems premature to do that. Negligence offers a simple example. The Form 11
1232 automobile negligence complaint seems sufficient for such a case. A claim that a manufacturer
1233 negligently failed to recall a defective product as early as should have been, and negligently
1234 designed the recall campaign when it was launched, would likely require greater fact detail. And
1235 a newspaper report of an actual case suggests the need for still greater details in a negligence
1236 claim — this claim was that the SEC acted negligently in failing to discover and stop the Madoff
1237 ponzi scheme. The general utility of revised forms also seems open to doubt, at least for the
1238 cases that have stirred current debates. A model of a sufficient conspiracy complaint for the
1239 Twombly case, for example, might not provide much use to a plaintiff attempting to plead any
1240 other conspiracy.

1241 It was agreed that the Committee would continue to monitor the long run role of the
1242 Forms.

1243 *Style and Time Computation Glitches*

1244 The question of the approach to glitches discovered in the Style Project was opened for
1245 initial discussion. Throughout the course of the Style Project it was recognized that some
1246 inadvertent changes of meaning were likely to occur. Similar risks may appear with the much

1247 simpler changes effected by the Time Computation Project. It is heartening that few questions
1248 have yet appeared in the first two years of the Style Project, and none have appeared in the first
1249 three months of the Time Computation revisions. But Style questions have been raised, and
1250 others no doubt will appear.

1251 One example of a near-Style Project difficulty has been offered. In 2005, two years
1252 before the overall Style amendments, Rule 6(d) was revised in keeping with Style Project
1253 conventions. Until 2005 it allowed three extra days when a party had a right or was required to
1254 do some act, etc., within a prescribed period after service of a notice or other paper “upon the
1255 party,” and the paper or notice “is served upon the party” by designated means. Clearly that
1256 meant three extra days were available only to the party served. The 2005 amendment provides
1257 that three days are added “Whenever a party must or may act within a prescribed period after
1258 service and service is made” by designated means. It is no longer clearly limited to acts by the
1259 party on whom service is made. It can be read to allow extra time to the party who makes
1260 service. One possible application: Rule 15(a)(1) allows a party to amend a pleading once as a
1261 matter of course within 21 days after serving it. Similar opportunities to act after a party has
1262 served a paper appear in Rules 14(a) and 38(b)(1); Rule 38(c) may also fall into this camp. The
1263 result would be that a party could routinely add three days to its time to act by choosing the
1264 means of service.

1265 It is not clear whether any court or party has encountered this Rule 6(d) question, which is
1266 elaborated at great length in a draft law review article that was sent to Professor Kimble for
1267 comments. But there may be reason to revise the drafting.

1268 That leaves the question whether the Committee should scramble to respond immediately
1269 to each drafting misadventure as it appears. The present disposition is to wait a while to see how
1270 many examples appear, with an eye to accumulating them for disposition in a single package of
1271 proposals.

1272 Brief discussion confirmed the decision to allow time for other drafting lapses to appear.
1273 If a truly important problem arises, it can be dealt with promptly. Otherwise, there is little need
1274 to bombard the profession with a cascading series of amendments, if indeed many problems do
1275 appear.

1276 *Appellate-Civil Rules Subcommittee*

1277 Judge Colloton, Chair of the joint Appellate-Civil Rules Subcommittee, reported that the
1278 Subcommittee will report at the fall meeting.

1279 *2010 Conference Preparation*

1280 Judge Rosenthal noted Judge Kravitz’s suggestion that the Committee should start
1281 thinking about various means of harnessing the fruits of the 2010 Conference. The Conference
1282 will generate momentum that should not be allowed to die. The first step after the Conference
1283 will be a report to the Chief Justice. The report should include suggestions about the next steps.
1284 Some steps may be relatively modest, focusing on judicial education and perhaps lawyers. “Best
1285 practices” guides might be devised. Of course consideration of rules amendments in the regular
1286 Enabling Act process may be important. Beyond that, thought should be given to other

Draft Minutes
Civil Rules Advisory Committee, March 18-19, 2010
page -33-

1287 possibilities. A committee might be formed within the Judicial Conference, to include members
1288 from committees outside the rules committees, and perhaps representatives of Congress. The
1289 Federal Courts Study Committee was formed within the Judicial Conference by statute; a similar
1290 course might be wise now.

1291 *Thank yous*

1292 Judge Rosenthal expressed great thanks to Chilton Varner and the Emory Law School for
1293 making fine arrangements for the meeting. The Committee was made to feel welcome. The
1294 Thursday afternoon reception provided a good opportunity to meet students and faculty, and it
1295 was good to have some students attend the meeting.

1296 Thanks also were extended to the Discovery Subcommittee for all its hard work. The
1297 work has been of very high quality, and has covered many hard topics. Rule 45 remains in the
1298 beginning stages, but it is a very promising beginning.

1299 Judge Koeltl was thanked again for “an amazing amount of enormously effective work in
1300 putting the Conference together.”

1301 The Committee voted thanks to Andrea Kuperman for her great research support for
1302 several Committee projects.

1303 *Next Meeting*

1304 The next regular meeting will be in late October or early November, most likely in
1305 Washington, D.C. A firm date will be set as soon as possible. If possible, the Discovery
1306 Subcommittee will attempt to schedule a Rule 45 miniconference in conjunction with the
Committee meeting.

Respectfully submitted

Edward H. Cooper
Reporter

TAB 3A

RULE 45 ISSUES

The Discovery Subcommittee has been working on Rule 45 for almost two years. We initially addressed 17 possible problems in the rule and, with input from the full committee, eventually reduced the issues to a handful. At the Spring 2010 meeting of the full committee in Atlanta, it was agreed that a mini-conference should be held to solicit the views of lawyers, judges, and various interested groups on possible fixes for the remaining issues.

On Oct. 4, 2010, the Discovery Subcommittee hosted a mini-conference about Rule 45 issues in Dallas, Texas. Plaintiffs lawyers, defense lawyers, a representative of the Federal Magistrate Judges Association (“FMJA”), a representative of the ABA Litigation Section, a representative of the National Employment Lawyers Association, and others were in attendance. Materials were distributed in advance, along with a list of questions to be discussed. Notes on that event should be included in this agenda book. An Appendix to those notes presents responses from 14 of the 18 members of the Rules Committee of the FMJA to a set of questions about Rule 45 practice.

(1) Notice and transfer provisions: During our work on Rule 45, we heard many comments about the need to provide clearer notice requirements in the rule. Lawyers often complained that subpoenas are served without notice to other parties in the litigation, even though Rule 45(b)(1) says that notice must be given. We also encountered problems that arise when the court where the subpoena is issued is called upon to resolve a dispute that affects the merits of the case, even though the case is pending in another court. Some have suggested that the subpoena-issuing court should have the ability to send the dispute to the presiding court for resolution in appropriate cases.

During the Atlanta meeting, the Subcommittee presented proposed changes to slightly modify and call attention to the existing notice requirements of Rule 45(b)(1), and to introduce authority for the judge in the “issuing court” to transfer a subpoena motion to the court where the case is pending “in the interest of justice.” There was uniform support for the proposed change to the notice provision. There was also considerable support for creating transfer authority. During the Dallas mini-conference, concerns arose about possible jurisdictional complications if a distant judge where the action is pending ordered compliance by a local nonparty witness served with a subpoena. We intend to do research on that issue, but currently believe that it should not limit the rulemaking power to authorize such transfers and give effect to the resulting rulings. Accordingly -- subject to yet-to-be-completed research on the jurisdictional question -- the Subcommittee returns with the same provisions that it presented in Atlanta.

(2) The *Vioxx* issue -- distance limitations on requiring hearing or trial testimony by party witnesses: In reliance on language added to Rule 45 in 1991, the Court in *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006), held that parties may subpoena officers of opposing parties to attend trial and give live testimony, even if the party officers are beyond the traditional subpoena boundaries of Rule 45(b)(2). The *Vioxx* decision has led to a split of authority on whether a subpoena can require a party officer to attend a hearing or trial even though beyond the subpoena range of Rule 45(b)(2). There may be room to debate which is the “majority rule,” but it is clear that both camps regard their reading as based on the “plain language” of the current rule. Indeed, some refuse to consider the 1991 Committee Note’s comments on the ground that they cannot vary the plain language of the rule. The Subcommittee continues to believe that this disparity in interpretation of the rule -- which seems unlikely to be resolved any time soon by appellate decisions -- should be cleared up.

On the question what the rule should actually say, the Subcommittee is agreed that the rule should return to the pre-*Vioxx* limitations in Rule 45 -- that attendance at a hearing or trial

may only be required of a person served pursuant to Rule 45(b)(2), whether or not the person is a party or an officer of a party. Accordingly, this memorandum contains a draft of a proposed amendment that would change the rule to eliminate the provisions upon which the *Vioxx* decision was based and to make clear that proper service (subject to the current distance limitations of Rule 45(b)(2)) is essential. An initial draft of a Committee Note (which has not been reviewed by the Subcommittee) is included for informational purposes.

The Dallas mini-conference demonstrated, however, that a number of lawyers favor granting the judge some authority to order a party to produce witnesses for a hearing or trial. This attitude corresponded to an attitude that seemed to prevail among some judges who regard the current rule as denying them this authority -- they feel that having the authority for appropriate cases would be a desirable thing. During the Atlanta meeting, the Subcommittee's report included an initial draft of a possible provision along these lines that would permit a judge to make such an order to a party (not to a proposed witness), and to sanction the party for failing to produce the witness. That draft was not circulated to the participants in the Dallas mini-conference, but many of them expressed approval for the idea of a rule that placed primary stress on whether the proposed witness had important testimony. In addition, several participants emphasized the importance of considering alternatives such as a videotaped deposition or remote transmission of live testimony.

Due to this seemingly widespread sympathy for recognizing some authority for the judge to order a party to produce witnesses, subject to limitations, at trial, this memorandum includes the initial draft first submitted during the Atlanta meeting. It seems worthwhile to give serious consideration to publishing an alternative along these lines if the Committee decides to go forward with the amendment the Subcommittee recommends, which would confirm that judges do not have such authority under the current rule. The widespread sentiment for recognizing some such authority suggests that during the public comment period support for this sort of approach might show that it should be adopted.

The idea of an amendment providing qualified authority to order parties to produce witnesses at trial was strongly opposed by some participants at the mini-conference, however. One question is whether strong enough protections against misuse of the power can be built into a rule. For the upcoming meeting, an important question will be how to refine the initial draft of such a rule idea so that during the Committee's April 2011 meeting it can be presented as part of a publication package in which the main recommendation is to amend the rule to make clear that parties cannot be required to attend trial unless served under Rule 45(b)(2).

A further set of questions arises when one considers amending Rule 45 to adopt a *Vioxx*-like power. For example, should this authority be limited to "officers" of a party -- the only ones covered by the current Rule 45 language that has produced the split in authority? What sort of limitations should be placed on the exercise of this power by the judge? The objective of the draft alternative language is to emphasize that the party seeking to compel such attendance must move the court for an order requiring live testimony (not just serve a subpoena), that the moving party must show that the testimony sought is needed, and that the court must also be persuaded that alternatives to live testimony by this witness (including video deposition testimony, testimony from a remote location, and live testimony by a different witness) would not suffice to provide the jury (or the judge in a court trial) with what will be needed to decide the case.

(3) Simplifying and shortening the rule: In the full committee's Spring 2010 meeting, we presented three possible approaches to shortening and simplifying Rule 45. One approach called for a significant streamlining of Rule 45, omitting detailed provisions in the rule, referring generally to discovery Rules 26-37 for guidance, and leaving many subpoena-related details to

the discretion of judges. A second approach called for document-production portions of Rule 45 to be moved to Rule 34. A third approach called for simplifying the Rule 45 provisions on the issuing court, the place of service, and the place of performance — sometimes referred to in our discussions as the “three-ring circus” aspect of Rule 45. The Dallas mini-conference included extended discussion of all three approaches.

A number of Dallas participants expressed sympathy for efforts to simplify the rule. But many expressed skepticism about whether the current rule is too difficult or intricate. Removing details from the rule and relying instead on the discovery rules and the judge’s discretion might worsen problems of complication by forcing a search through Rules 26 to 37 to identify seemingly pertinent provisions. Such a change might also engender disputes about matters now addressed specifically in the rule. Many of the specifics now in the rule were added to resolve disagreements that had developed among courts about how the rule should be applied, and eliminating those specific provisions could cause those sorts of conflicts to re-emerge. Relatedly, removing the specifics could make it considerably more difficult for lawyers to advise clients on how subpoenas would be handled in court; if central reliance is placed on the court’s discretion, it may be impossible to foretell what the ruling will be. On this score, it may be worth noting that the FMJA Rules Committee survey (in the Appendix to the notes on the mini-conference) showed that magistrates presently spend very little time on Rule 45 issues (see particularly response 8). “Simplification” of Rule 45 could change that.

Relocating the document-production provisions of Rule 45 to the 26-37 sequence was seen as creating fewer such problems, but still creating significant risks. Even though explained as intended solely for simplification, such amendments might be invoked as changing meaning. Moreover, a number of participants said that Rule 45 remains important to obtain documents for use at trial or during a hearing, not just for discovery, suggesting that document-production portions could not be eliminated from Rule 45 altogether.

After the mini-conference, the Subcommittee decided to focus its attention solely on the effort to eliminate the “three-ring circus” caused by complicated provisions about the place of service and the retention of the fiction that a distant court is the “issuing court” for purposes of subpoenas actually prepared by a lawyer in the district where the action is pending. The initial draft of that approach was included in the materials for the Atlanta meeting, and is again included here. It will need more careful attention in the future, particularly to deal with the recurrent phrase “the issuing court,” because the proposal is to make the court where the action is pending the issuing court in all instances. Initial efforts to achieve those purposes have been made, but the Subcommittee will need to study those with care.

Beyond refinements of this proposal, there remains the question whether these changes are warranted. Discussion during the mini-conference indicated some caution about the changes this approach would entail, although many recognized the value of this simplification. Although the reality of the “issuing court” idea is out of step with actual practice (since that court knows nothing about “issuing” the subpoena unless an effort is made there to enforce it), it may retain considerable symbolic importance for lawyers. It may be that the considerable concern expressed during the mini-conference about “jurisdiction” for a court to decide a transferred motion to enforce a subpoena (where the “issuing court” decides to defer to the judge before whom the action is pending) reflects some of that same symbolic importance. So there may be reasons for proceeding with caution.

In addition, proceeding with these changes relates to the other topics the Subcommittee has brought before the Committee. The question of “transfer” (item (1) above) calls for revisions to take account of the change to making the court in which the action is pending the “issuing

court.” Similarly, limiting the duty to respond to the scope of effective service (item (2) above) must be calibrated to correspond to what would prevail under the amendment the Subcommittee recommends to address the three-ring circus problem. Accordingly, integration of the various proposals will need to be done. That integration has not been undertaken as yet, however.

For the present, the main focus of the Subcommittee is on (a) whether there are reasons to forgo even this most modest of simplification efforts that it has considered, and (b) specific concerns about cautions the Subcommittee should have in mind as it addresses these matters in the future.

* * * * *

The Subcommittee hopes to have a Rule 45 amendment package in a form for recommendation to the Standing Committee for publication and public comment at the Spring 2011 meeting of the Committee. As these materials will detail, there are a number of issues yet to be addressed and resolved. Other concerns may arise during this consideration.

TAB 3B

(1) Notice and transfer

These issues have been discussed during two previous meetings of the Committee, but an introduction may nonetheless be useful. The draft Committee Note below has not been the subject of sustained Subcommittee discussion, but nonetheless can provide insight about the orientation of the proposed rule changes and the likely commentary that would accompany them.

Notice: The relocation of the notice provision from Rule 45(b)(1) to a new Rule 45(a)(4) is designed to make the existing notice requirement more visible. The amendment proposal was 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. During the Dallas mini-conference, lawyers confirmed that failure to give the required notice is a serious problem.

Transfer: The Committee's discussion during the Atlanta meeting raised many of the issues echoed by lawyers during the Dallas mini-conference. Whether judges where the subpoena has been served and where performance is required would be too prone to transfer any dispute to the Court presiding over the action was raised in Dallas. Whether there could be a "jurisdictional" problem with a decision by a judge presiding over an action in Seattle regarding enforcing a subpoena in Miami was discussed.¹

¹ The discussion in Dallas also called attention to another issue that the Subcommittee expects to evaluate -- whether the use of the transfer authority could cause problems for attorneys not licensed to practice in the state in which the case is pending. Some lawyers noted that the states in which they practice have strict rules on out-of-state lawyers appearing in cases pending in their states, such as limiting that to three times a year.

Presently Rule 45(a)(3)(B) seems to address a similar question because it says that an attorney may issue a subpoena as "an officer of * * * 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." This provision seems to cure the problem that might otherwise exist for the out-of-state attorney issuing the subpoena.

Adopting a transfer procedure might create a similar issue for the local attorney in the state where performance is required. But the objective of the rule is to permit an application first to that court for relief from the subpoena, which the court in that district could transfer to the court where the action is pending using the transfer authority introduced by the proposed amendment. Ordinarily that transfer would occur after the motion was fully briefed, so that the local attorney would not need to file anything new in the court where the action is pending. In addition, it is hoped that telecommunications would usually obviate a physical appearance in that court if inconvenient for the local attorney. So it is not clear that this issue would often arise due to the transfer authority sought to be added by the amendment. As the Subcommittee has reported in the past, some courts have already engaged in "transfer" efforts, and we have not heard that bar-admission problems resulted.

It might also be noted that the Committee Note to the 1970 discovery amendments included the following regarding 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." So for over 40 years there has been some recognition of the possibility of an application to the court where the action is pending, and we have not heard that it has created bar-admission problems of the sort identified by some at the Dallas mini-conference.

The Subcommittee brings forward again the standard for transfer it presented in Atlanta - "in the interests of justice" -- because it 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 attempts to elaborate 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. Comments on the effectiveness of this draft Note language would be welcome. 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 before the Atlanta meeting. 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. As noted above, this issue was raised during the Dallas mini-conference, and further research will be done to address it. For the present, initial draft Committee Note language about "jurisdictional" issues that was included in the Atlanta materials is retained here.

With that background, the following is the current draft, as initially presented in Atlanta:

1 **Rule 45. Subpoena**

2
3 **(a) In General.**

4 * * * * *

5
6
7 **(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, [then] before the subpoena is served, a notice including a copy of the subpoena must be served on each party.²

8
9
10
11
12 **(b) Service.**

13
14 **(1) ~~By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.~~** Any person
15 who is at least 18 years old and not a party may serve a subpoena. Serving a
16 subpoena requires delivering a copy to the named person and, if the subpoena
17 requires that person's attendance, tendering the fees for 1 day's attendance and the
18 mileage allowed by law. Fees and mileage need not be tendered when the
19 subpoena issues on behalf of the United States or any of its officers or agencies.
20 ~~If the subpoena commands the production of documents, electronically stored~~
21 ~~information, or tangible things or the inspection of premises before trial, then~~
22 ~~before it is served, a notice must be served on each party.~~

23

² The word "then" is included in brackets because it appears in the current rule. It was omitted as adding nothing, but based on discussion during the Atlanta meeting the Subcommittee is to reconsider whether the omission could change meaning.

* * * * *

(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.

- 75 (B) *When Permitted.* To protect a person subject to or affected by a subpoena,
 76 the issuing court may, on motion, quash or modify the subpoena if it
 77 requires:
 78
- 79 (i) disclosing a trade secret or other confidential research,
 80 development, or commercial information;
 - 81
 - 82 (ii) disclosing an unretained expert's opinion or information that does
 83 not describe specific occurrences in dispute and results from the
 84 expert's study that was not requested by a party; or
 - 85
 - 86 (iii) a person who is neither a party nor a party's officer to incur
 87 substantial expense to travel more than 100 miles to attend trial.
 - 88
- 89 (C) *Specifying Conditions as an Alternative.* In the circumstances described in
 90 Rule 45(c)(3)(B), the court may, instead of quashing or modifying a
 91 subpoena, order appearance or production under specified conditions if the
 92 serving party:
 93
- 94 (i) shows a substantial need for the testimony or material that cannot
 95 be otherwise met without undue hardship; and
 - 96
 - 97 (ii) ensures that the subpoenaed person will be reasonably
 98 compensated.
 - 99
- 100 (D) *Transferring Motion to Court in Which Action Pending.* If the action is
 101 pending in a court different from the issuing court, the issuing court may,
 102 in the interests of justice, transfer the motion to the court in which the
 103 action is pending.

DRAFT COMMITTEE NOTE

1 Rule 45 is a workhorse in civil litigation; nonparty discovery based on a subpoena is a
 2 frequent event in the federal courts. In 1991, the rule was extensively amended. Some issues
 3 have emerged since the 1991 revision, and the current amendments respond to those issues.
 4

5 **Subdivision (a).** Rule 41(a)(4) is added to highlight and slightly modify a notice
 6 provision first included in the rule in 1991.
 7

8 The 1991 amendments for the first time authorized use of a subpoena to obtain discovery
 9 from a nonparty similar to Rule 34 discovery from a party, and without any need for a
 10 simultaneous deposition. Because such discovery would not require notice to the other parties
 11 (as a deposition would), the 1991 amendments added a requirement to Rule 45(b)(1) that prior
 12 notice of the service of a "documents only" subpoena be given to the other parties. The
 13 Committee Note accompanying that amendment explained that "[t]he purpose of such notice is
 14 to afford other parties an opportunity to object to the production or inspection, or to serve a
 15 demand for additional documents or things." In the restyling of the rule in 2007, Rule 45(b)(1)
 16 was clarified to specify that the notice to the other parties must be served before the subpoena
 17 was served on the witness.
 18

19 The Committee has been informed that, despite the added notice requirement, parties
20 serving subpoenas frequently fail to give notice to the other parties, and that this failure can
21 significantly interfere with the trial preparation of other parties. This amendment responds to
22 that concern by moving the notice requirement to a new provision in Rule 45(a), where it is
23 hoped that it will be more visible. In addition, new Rule 45(a)(4) requires that the notice include
24 a copy of the subpoena. This requirement is added to achieve the original purpose of enabling
25 the other parties to determine whether they want to serve a demand for additional materials.
26

27 The 1991 Committee Note also observed that “other parties may need notice in order to
28 monitor the discovery and in order to pursue access to any information that may or should be
29 produced.” Rule 45(a)(4)’s added requirement that the notice include a copy of the subpoena
30 should enable the other parties to address these concerns. Parties desiring access to information
31 produced in response to the subpoena will need to follow up with the party serving the subpoena
32 to obtain such access; when access is requested, it should be possible to arrange reasonable
33 provisions for access.³
34

35 [The rule does not address the appropriate response if a party fails to give the notice
36 required by Rule 45(a)(4). It is expected that courts will deal appropriately with such problems
37 should they arise. As noted above, the Committee has been informed that failure to comply with
38 the current notice provision has on occasion interfered significantly with the trial preparation of
39 other parties. Courts have ample remedies to deal with such problems should they arise.]⁴
40

41 **Subdivision (b).** The former notice requirement in Rule 45(b)(1) has been deleted
42 because it has been moved to new Rule 45(a)(4).
43

44 **Subdivision (c).** Subdivision (c) is amended to authorize an issuing court to transfer a
45 motion to quash or enforce a subpoena to the court presiding over the main action if that transfer
46 would be “in the interests of justice.”
47

48 Subpoenas are essential to obtain discovery from nonparties; for discovery occurring
49 outside the district in which the action is pending, they must be issued by the court for the district
50 in which the discovery is to occur.⁵ Rule 45(c) therefore provides that motions to quash or

³ 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.

⁴ 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.

⁵ As noted in the introduction to this memorandum, if we go forward with the three-ring circus revisions the transfer provision will need to be adapted to that set of revisions because the “issuing court” will be the court in which the action is pending, while the place for a motion to enforce will be the place where the person served with the subpoena is required to comply with the subpoena.

51 enforce subpoenas must in the first instance be directed to the issuing court.⁶ In some instances,
52 that requirement can constitute an important protection for local nonparties subpoenaed to
53 provide discovery for use in litigation in a distant district.

54
55 Often the issues raised in relation to enforcement of a subpoena implicate only the local
56 nonparty served with the subpoena. Objections based on medical issues, for example, are likely
57 to be confined to local matters. Questions of burden of compliance -- an important concern
58 recognized in Rule 45(c) -- often focus mainly on the local circumstances of the nonparty subject
59 to the subpoena. In such situations, the issuing court is often best equipped to resolve the
60 dispute.

61
62 On occasion, however, resolving disputes about subpoenas may risk interfering with the
63 management of the underlying case by the judge presiding over that case, and also may be a
64 substantial burden for the issuing court, which is called upon to address issues already addressed,
65 or also to be addressed, by the court presiding over the main action. Such problems may arise in
66 a wide variety of circumstances. Rulings already made by the judge presiding over the main
67 action may have resolved identical or closely analogous issues. Subpoenas presenting identical
68 issues may be served or expected in many districts, making consistent resolution of these
69 recurrent issues urgent. Sometimes the local nonparty may prefer to submit the issue to the court
70 presiding over the main action, whose views may already be known, and it could be the party to
71 the main action that seeks instead to proceed before the local issuing court. Proceeding before
72 the issuing court could result in an inappropriate burden for the issuing court and create a risk of
73 handling a discovery matter in a way inconsistent with rulings of the court presiding over the
74 main action.

75
76 A rule cannot capture all these varying circumstances. This amendment instead directs
77 the court to look to the interests of justice in making a decision whether to transfer. This
78 standard borrows from the transfer standard in 28 U.S.C. §§ 1404(a) and 1407. It also carries
79 forward a comment in the Committee Note to the 1970 amendment of Rule 26(c): “The court in
80 the district where the deposition is being taken may, and frequently will, remit the deponent or
81 party to the court where the action is pending.”

82
83 The starting point in applying this standard should be to recognize the important interest a
84 local nonparty often has in obtaining a ruling on its subpoena obligations close to home. The
85 burden is therefore on the party seeking a transfer of the motion to demonstrate that transfer is
86 justified. If the issues raised are essentially “local,” such as medical concerns or burden on the
87 nonparty, the burden to justify a transfer may be heavy. But the interests in local resolution may
88 sometimes not be strong. For example, if the local nonparty is actually closely linked to one of
89 the parties to the litigation, or engages in substantial relevant activities in the district where the
90 action is pending, those factors may reduce the importance of resolving the matter in the issuing
91 court. If the nonparty actually favors a transfer, and the objection to transfer comes from the
92 party who served the subpoena, the possibility that the party who served the subpoena may be
93 seeking to avoid resolution by the judge presiding over the main action may support transfer. If
94 there are concerns about consistency in resolving discovery matters, either because they have
95 already been addressed by the court presiding over the main action or because they are likely to
96 recur in a number of districts in which subpoenas have been served or are anticipated, those
97 considerations may weigh in support of transfer.

⁶ 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.

98 In considering transfer, the issuing court may also refer to the distance between it and the
99 court in which the main action is pending. Rule 45 itself recognizes that parties may sometimes
100 be required to travel from one state to another to attend court proceedings, and may sometimes be
101 required to travel great distances within a state to attend court proceedings. Even if the court
102 presiding over the main action is distant, resolution of subpoena disputes would ordinarily be
103 more easily handled through telecommunications that would minimize the burdens on the local
104 nonparty served with the subpoena.

105
106 [Whatever the resolution of the discovery dispute, this transfer authority does not change
107 Rule 45's direction that the discovery itself occur in the district in which the issuing court sits.
108 There should be no question about the authority of the issuing court to transfer the decision of the
109 discovery dispute, or about the authority of the court presiding over the main action to resolve the
110 discovery dispute. Indeed, the rules could require that the discovery itself occur in the district in
111 which the main action is pending. Compare Fed. R. Crim. P. 17(e) (authorizing nationwide
112 service of subpoenas for testimony in trials or hearings in criminal cases). Rule 45 itself
113 recognizes that subpoenas may require witnesses to cross state lines to testify in trials or
114 hearings. And other civil rules (e.g., Rules 4(k)(1)(B) and 4(k)(2)) extend the summons power
115 well beyond state lines. Long ago, the Supreme Court recognized that the Constitution does not
116 command that district courts' authority stop at the state line. See *United States v. Union Pacific*
117 *R.R.*, 98 U.S. 569, 602-04 (1878) (suggesting that Congress could have created a single federal
118 trial court with nationwide personal jurisdiction). Given that the initial decision to transfer the
119 motion must be made by the local issuing court, that telecommunications may often make actual
120 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.]⁷

⁷ This bracketed paragraph is included as a possible method of addressing the jurisdiction issue that was raised by several participants during the Dallas mini-conference. 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. As noted above, because the issue was raised by several attorneys during the Dallas mini-conference, it warrants further research before the Committee's Spring meeting.

**(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, and discussed further during the Atlanta meeting. As a refresher, 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 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) (which contains the rule's geographical limitations). 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. Coupled with Rule 45(b)(2)'s statement that it is "subject to" Rule 45(c)(3)(A)(ii), this exclusion from the directive there that the court quash subpoenas if the witness is a party or a party's officer has been invoked as supporting authority for the service of a subpoena on such witnesses without regard to the geographical limitations of Rule 45(b)(2).

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, which was included in the agenda materials for the Atlanta meeting. Among the things it showed was a genuine split in the cases and an apparent desire among some judges for more flexibility in ordering party witnesses to testify at trial.

Participants in the Dallas mini-conference divided about certain aspects of the question presented by these issues. None favored an unrestricted power to subpoena party officers. Some thought that the *Vioxx* ruling -- though sometimes described as the "majority rule" -- is not one lawyers actually believe to be right. Nonetheless, some favored endowing the judge with discretionary power to order attendance by party witnesses whose testimony was shown to be important unless adequate alternative methods of presenting that testimony were available.

With these added insights, the Subcommittee is bringing forward a draft amendment to clarify what we believe was already clear from the 1991 Committee Note -- that the 1991 amendment did not create authority to compel attendance at trial of party officers unless they are served within the bounds permitted by Rule 45(b)(2). Because the "subject to" provision in Rule 45(b)(2) creates a risk of ongoing confusion even with an amendment to Rule 45(c)(3)(A), it is suggested to delete that provision. The point is that even if a witness is served pursuant to Rule 45(b)(2), the court must quash on the grounds described in Rule 45(c)(3)(A)(ii) unless the witness is a party witness. The amendments are designed to make that clear. A brief initial draft Committee Note is included. The Subcommittee has not had a chance to review or discuss this draft Committee Note.

If the three-ring circus proposal (item (3) below) is included in the eventual Rule 45 package, then the following rule changes will need to be adjusted somewhat, because that proposal calls for nationwide service of subpoenas and places stress on the place where compliance is required rather than the place of service to protect witnesses against overreaching. It may be that features of this amendment will, under that approach, become unnecessary.

Rule 45. Subpoena

* * * * *

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
32
33
34
35
36
37
38
39
40
41

(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.

(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 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.

DRAFT COMMITTEE NOTE

The 1991 amendments to Rule 45 required that a subpoena be quashed if it required a nonparty to travel more than 100 miles to attend trial (except that nonparties could be required to attend trial anywhere within their state if undue expense would not be incurred), but did not require quashing the subpoena if the person subpoenaed were a party or a party’s officer. Rule

45(b)(2) -- relating to place of service of a subpoena -- provided that it was "subject to" Rule 45(c)(3)(A)(ii)'s provisions, including the ones about parties and officers of parties.

These provisions have produced conflicting interpretations in the courts, sometimes between judges in the same district. One interpretation was that subpoenas may only be served and enforced within the boundaries permitted by Rule 45(b)(2), and that the additional protections of Rule 45(c)(3)(A)(ii) were subject to those limitations. See *Johnson v. Big Lots Stores, Inc.*, 251 F.R.D. 213 (E.D. La. 2008) (holding that opt-in plaintiffs in Fair Labor Standards Act action could not be compelled to travel more than 100 miles from outside the state to attend trial because they were not served with subpoenas in accordance with Rule 45(b)(2)). Another interpretation was that the exclusion of parties and party officers from the protections of Rule 45(c)(3)(A)(ii) meant that attendance at trial of these witnesses could be compelled without regard to the geographical limitations on serving subpoenas contained in Rule 45(b)(2). See *In re Vioxx Products Liability Litigation*, 438 F.Supp.2d 664 (E.D. La. 2006) (requiring officer of defendant corporation, who lived and worked in New Jersey, to testify at trial in New Orleans even though he was not served in accordance with Rule 45(b)(2)).

The Committee is of the view that the 1991 amendments were never intended to create the expanded subpoena power recognized in *Vioxx* and its progeny. The Committee is also concerned that allowing subpoenas on an adverse party's officers without regard to the geographical limitations of Rule 45(b)(2) would often raise a risk of tactical use of a subpoena to apply inappropriate pressure to the adverse party. Governmental and corporate officers often have extremely busy schedules; requiring them to interrupt those schedules to testify at trial might undermine their ability to perform their duties. Large organizations are often parties to many cases, so that such subpoenas could be served with great frequency. Officers subject to such subpoenas might often be able to succeed on protective order motions against having to attend trial, but such motions would constitute a burden to the courts and to the parties. In addition, it seems unlikely that officers of a party will often have important -- much less unique -- information about the actual matters in dispute in the case. To the extent that their testimony is truly needed, there are alternatives to compelling their attendance at trial with subpoenas. See, e.g., Rule 30(b)(3) (authorizing audiovisual recording of deposition testimony); Rule 43(a) (permitting the court to order testimony by contemporaneous transmission).

These amendments are intended to restore the original meaning of the 1991 amendments and make clear that all subpoenas are subject to the geographical limitations of Rule 45(b)(2). The "subject to" provision of Rule 45(b)(2) is accordingly deleted to avoid the possible misinterpretation of these geographical limits. Rule 45(c)(3)(A) is also amended to make clear that its provisions apply only with regard to witnesses properly served as required by Rule 45(b)(2).⁸

* * * * *

As noted above, many participants at the Dallas mini-conference favored authorizing judges to order live testimony by party witnesses in appropriate circumstances. Andrea Kuperman's memorandum on the courts' handling of these issues, included in the Atlanta agenda book, disclosed what seemed a considerable desire among a number of judges -- including some who rejected the *Vioxx* interpretation of Rule 45 -- for more latitude to require live testimony.

⁸ As noted above, the Subcommittee has not had an opportunity to review this rough initial draft Committee Note.

In considering whether to grant such latitude by rule, one comparison could be made to deposition practice. At least in the abstract, Rule 30 permits a party to notice the deposition of another party or the party's officer, director, or managing agent anywhere without even serving a subpoena. Although it is rare, this authority is sometimes used to compel witnesses to come long distances -- including travelling from other countries -- to testify locally. See, e.g., *Aerocrine AB v. Apieron, Inc.*, 267 F.R.D. 105, 111-12 (D. Del. 2010) (requiring plaintiff to produce for deposition in the U.S. two Scandinavian assignors of the patent it sought to enforce); see also *In re Outsidewall Tire Litigation*, 267 F.R.D. 466 (E.D. Va. 2010) (remanding to magistrate judge the question whether to require defense witnesses to travel from Dubai to Virginia for depositions). See generally 8A Wright, Miller & Marcus, *Federal Practice & Procedure* § 2112 (3d ed. 2110). During the Dallas mini-conference, it was confirmed that this is a very rare thing; a judge will not often order such travel. The question of deposition location usually is resolved by reasonable party agreement, or the lawyers travel to where the witness is located. But the point here is that the judge is not without power, as needed, to compel attendance locally. It might be said that it is odd for the judge to lack similar power when a trial is to occur.

Alternatives do exist and are usually made to serve the needed purpose. For one thing, the judge can "urge" the attendance of needed witnesses quite persuasively; participants in the Dallas mini-conference made it clear this jawboning can be very effective. For another, a videotaped deposition may be much superior (or at least equal) to live testimony. But depositions are expensive; having a live witness at trial may be better and cheaper.

There are probably substantial differences of opinion about the importance of live testimony. Powerful arguments can be made based on psychological research that lay people (and judges) overestimate their ability to evaluate the truthfulness of live testimony. Jurors are increasingly accustomed to receiving information in video-type format. Indeed, many have "friends" around the world with whom they communicate only in this manner. Perhaps it is not useful to leave it to individual judges to make decisions on whether to require witnesses to travel long distances to attend trial based on their own personal views of whether live testimony is helpful. But Rule 32(a)(4)'s unavailability requirement still expresses a general preference for live testimony (and for videotaped over transcribed deposition testimony for unavailable witnesses).

In sum, there is much to discuss about whether some authority to require live testimony from distant witnesses should be provided. Publishing a proposed amendment limited to nullifying the decisions that find authority in current Rule 45 for requiring party testimony may prompt many comments favoring a rule creating such authority, albeit with safeguards. Because of that possibility, it seems worthwhile to suggest the possibility of publishing an alternative to the above proposed amendments on which such comments might focus.

Following, therefore, is material originally presented during the Atlanta meeting. It appears to address the concerns stated by many of the participants in the Dallas mini-conference, and is offered presently as a starting point for the Subcommittee's consideration of a possible alternative formulation that could be included in materials seeking public comment on the amendment along the lines presented above. The goal is to make such an order possible, but not easy to get, and to adopt directives that focus the court and the parties on the matters that should bear on whether there is a good reason for requiring the presence of this witness.

*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.

- 45 (54) *Proof of Service.* Proving service, when necessary, requires filing with the
 46 issuing court a statement showing the date and manner of service and the names
 47 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 otherwise be 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 is subject to this new judicial power.

One end of the spectrum is an officer of a party. This is all that Rule 45(c)(3)(A)(ii) mentions. Although there may sometimes be a debate about who exactly is an “officer,” it is probably more precise than “managing agent.” Keeping this standard would jibe with the provision now relied upon by courts that find they can require the witness’s attendance. But it also means that the person with actual knowledge will often not be subject to this authority.

The draft therefore offers a range of other alternatives. One step from the most restrictive 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 be 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 the required showing of the need for the testimony -- since that portion of the rule amendment says the testimony cannot be presented “without undue hardship” (presumably to the party seeking to present the testimony). Still, it seemed worth requiring in the rule that these alternatives be considered.

(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. (A case involving a sole proprietor or a partnership party with many employees would be an in-between instance.) 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 the deposition of a witness who is not a party or an officer, director, or managing agent of a party 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 Committee, 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 agenda materials for the October 2009 meeting there 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. These slight clarifications may deserve inclusion in proposed amendments if a more general effort to simplify is undertaken.

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 would mean users could not rely on “one-stop shopping” in Rule 45, 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.

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 a subpoena rule relying on cross-references to the discovery rules would be more mysterious still. Some involved in the Dallas mini-conference (including the input from the FMJA) 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 in items (1) and (2) 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.

At the Atlanta meeting, the Subcommittee presented three approaches to simplifying the rule, two of which would shorten it considerably. There was a proposal to eliminate the “three-ring circus” created by a variety of provisions about which is the “issuing court,” where a subpoena can be served, and where its commands could require a response.

Two other alternative approaches were presented at the Atlanta meeting -- removing much detail from Rule 45 and relying on cross-references to the discovery rules and the court’s discretion, and excising from Rule 45 the provisions relating to document subpoenas, including them instead among the discovery rules and leaving Rule 45 limited to compelling witness testimony (whether at trial or a deposition).

All three of these alternatives were presented in detail during the Dallas mini-conference. Many participants there expressed uneasiness about adopting the more aggressive alternatives relying on cross-references or excising the document provisions. One concern was the risk of unintended consequences. Another was that relying on judicial discretion rather than explicit (though long) rule provisions could invite uncertainty, increased disputes, and generate more

motion practice. Removing the document discovery provisions from Rule 45 also raised questions because Rule 45 subpoenas for trial or hearings still may involve document demands.

After the mini-conference, the Subcommittee therefore decided to focus only on the three-ring circus approach. As noted, this approach is intended to address 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) anywhere 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, a deposition may be taken 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. And that does not include the gloss on the third category added by *Vioxx* — that party officers can be required to travel anywhere in the country for trials. Together, these three provisions are a major source of complexity.

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 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. In addition, careful attention to the use of the term “issuing court” in the current rule will be necessary.

For the present, those permutations have not been fully resolved, 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 is that it would not attempt to modify much else that is in the rule, although it would have some implications for the proposals contained in item (2) above. For purposes of the present meeting, the discussion should focus on whether this approach looks promising, and where it can be improved if it does look promising.

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,⁹ 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).¹⁰**(B) Command to Attend a Deposition – Notice of the Recording Method.** A subpoena 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 party¹¹ to permit inspection, copying, testing, or sampling of the materials.

⁹ It may be that this clause is unnecessary if the issuing court is always the one in which the action is pending.

¹⁰ 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.

¹¹ This should probably be "person."

- 38 (2) ~~*Issuing Issued from Which Court Court.*~~ A subpoena must issue from the court in
 39 which the action is pending. as follows:
 40
 41 (A) ~~for attendance at a hearing or trial, from the court for the district where the~~
 42 ~~hearing or trial is to be held;~~
 43
 44 (B) ~~for attendance at a deposition, from the court for the district where the~~
 45 ~~deposition is to be taken; and~~
 46
 47 (C) ~~for production or inspection, if separate from a subpoena commanding a~~
 48 ~~person's attendance, from the court for the district where the production or~~
 49 ~~inspection is to be made.~~
 50
 51 (3) *Issued by Whom.* The clerk must issue a subpoena, signed but otherwise in blank,
 52 to a party who requests it. That party must complete it before service. An
 53 attorney also may issue and sign a subpoena if the attorney is authorized to
 54 practice in the court where the action is pending. as an officer of:
 55
 56 (A) ~~a court in which the attorney is authorized to practice; or~~
 57
 58 (B) ~~a court for a district where a deposition is to be taken or production is to~~
 59 ~~be made, if the attorney is authorized to practice in the court where the~~
 60 ~~action is pending.~~
 61
 62 (b) **Service.**
 63
 64 (1) *By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas.* Any person
 65 who is at least 18 years old and not a party may serve a subpoena. Serving a
 66 subpoena requires delivering a copy to the named person and, if the subpoena
 67 requires that person's attendance, tender the fees for 1 day's attendance and the
 68 mileage allowed by law. Fees and mileage need not be tendered when the
 69 subpoena issues on behalf of the United States or any of its officers or agencies.
 70 If the subpoena commands the production of documents, electronically stored
 71 information, or tangible things or the inspection of premises before trial, then
 72 before it is served, a notice must be served on each party.
 73
 74 (2) *Service in the United States.* A subpoena may be served any place within the
 75 United States. ~~Subject to Rule 45(c)(3)(A)(ii), a subpoena may be served at any~~
 76 ~~place:~~
 77
 78 (A) ~~within the district of the issuing court;~~
 79
 80 (B) ~~outside that district but within 100 miles of the place specified for the~~
 81 ~~deposition, hearing, trial, production, or inspection;~~
 82
 83 (C) ~~within the state of the issuing court if a state statute or court rule allows~~
 84 ~~service at that place of a subpoena issued by a state court of general~~
 85 ~~jurisdiction sitting in the place specified for the deposition, hearing, trial,~~
 86 ~~production, or inspection; or~~
 87
 88 (D) ~~that the court authorizes on motion and for good cause, if a federal statute~~
 89 ~~so provides;~~

- 90 (3) *Service in a Foreign Country.* 28 U.S.C. § 1783 governs issuing and serving a
 91 subpoena directed to a United States national or resident who is in a foreign
 92 country.
 93
- 94 (4) *Proof of Service.* Proving service, when necessary, requires filing with the issuing
 95 court¹² a statement showing the date and manner of service and the names of the
 96 persons served. The statement must be certified by the server.
 97

98 **(c) Place of compliance.**
 99

100 (1) For a trial, hearing, or deposition. A subpoena may require a person to appear at
 101 a trial, hearing, or deposition as follows:
 102

103 (A) For a party or the officer of a party, within the state where the party or
 104 officer resides, is employed, or regularly transacts business, or within 100
 105 miles of where the party or officer resides, is employed, or regularly
 106 transacts business;¹³
 107

108 (B) For a person who is not a party or officer of a party, within 100 miles of
 109 where the person resides, is employed, or regularly transacts business;
 110 except that such a person may be required to attend trial within the state
 111 where the person resides, is employed, or regularly transacts business if
 112 substantial expense would not be incurred.
 113

114 (2) For other discovery.
 115

116 (A) For production of documents or tangible things, where the documents or
 117 tangible things are located, or, in the case of electronically stored
 118 information, at any location reasonably convenient for the producing
 119 person;¹⁴
 120

121 (B) For inspection of premises, at the premises to be inspected.
 122

123 **(d)(c) Protecting a Person Subject to a Subpoena.**
 124

¹² Below, the term “issuing court” is changed to “court for the district where compliance is required under Rule 45(c)” to take account of the changes effected by this set of amendments and recognize that court as the one where applications may be made to enforce, or for relief from, a subpoena. A similar change could be made here, but it seemed on reflection preferable to call for filing of proof of service in the court where the action is pending (the “issuing court” under these amendments) because CM/ECF would then provide notification to the other parties to the action. The Subcommittee has not discussed this point, and a further adjustment may be made if this initial choice does not seem warranted.

¹³ This provision comports with the pre-*Vioxx* limitation of Rule 45 and would therefore effectively overrule *Vioxx*. If the committee ultimately decides to codify *Vioxx*, this section could be changed to accomplish that result.

¹⁴ This provision for electronically stored information is not currently in Rule 45, but seems sensible.

- 125 (1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible
 126 for issuing and serving a subpoena must take reasonable steps to avoid imposing
 127 undue burden or expense on a person subject to the subpoena. The issuing court
 128 for the district where compliance is required under Rule 45(c)¹⁵ must enforce this
 129 duty and impose an appropriate sanction – which may include lost earnings and
 130 reasonable attorney’s fees – on a party or attorney who fails to comply.
 131
- 132 (2) *Command to Produce Materials or Permit Inspection.*
 133
- 134 (A) *Appearance Not Required.* A person commanded to produce documents,
 135 electronically stored information, or tangible things, or to permit the
 136 inspection of premises, need not appear in person at the place of
 137 production or inspection unless also commanded to appear for a
 138 deposition, hearing, or trial.
 139
- 140 (B) *Objections.* A person commanded to produce documents or tangible
 141 things or to permit inspection may serve on the party or attorney
 142 designated in the subpoena a written objection to inspecting, copying,
 143 testing, or sampling any or all of the materials or to inspecting the
 144 premises – or to producing electronically stored information in the form or
 145 forms requested. The objection must be served before the earlier of the
 146 time specified for compliance or 14 days after the subpoena is served.¹⁶ If
 147 an objection is made, the following rules apply:
 148
- 149 (i) At any time, on notice to the commanded person, the serving party
 150 may move the issuing court for the district where compliance is
 151 required under Rule 45(c) for an order compelling production or
 152 inspection.
 153
- 154 (ii) These acts may be required only as directed in the order, and the
 155 order must protect a person who is neither a party nor a party’s
 156 officer from significant expense resulting from compliance.
 157
- 158 (3) *Quashing or Modifying a Subpoena.*
 159
- 160 (A) *When Required.* On timely motion, the issuing court for the district where
 161 compliance is required under Rule 45(c) must quash or modify a subpoena
 162 that:
 163
- 164 (i) fails to allow a reasonable time to comply;
 165
- 166 (ii) ~~requires a person who is neither a party nor a party’s officer to~~
 167 ~~travel more than 100 miles from where that person resides, is~~

¹⁵ This change reflects the shift to having the “issuing court” be the court where the action is pending. Similar changes are made later in the rule. As noted above, the Rule 45(b)(4) requirement that proof of service be filed in the “issuing court” has been retained even though the amendments change that to the court where the action is pending.

¹⁶ During the Dallas mini-conference, concern was expressed about whether this 14-day time limit for service of objections should be made more prominent.

- 168 employed, or regularly transacts business in person—except that,
 169 subject to Rule 45(c)(3)(B)(iii), the person may be commanded to
 170 attend a trial by traveling from any such place within the state
 171 where the trial is held;
- 172
- 173 (iii) requires disclosure of privileged or other protected matter, if no
 174 exception or waiver applies;¹⁷ or
- 175
- 176 (iii) subjects a person to undue burden.
- 177
- 178 (B) *When Permitted.* To protect a person subject to or affected by a subpoena,
 179 the issuing court for the district where compliance is required under Rule
 180 45(c) may, on motion, quash or modify the subpoena if it requires:
- 181
- 182 (i) disclosing a trade secret or other confidential research,
 183 development, or commercial information;
- 184
- 185 (ii) disclosing an unretained expert's opinion or information that does
 186 not describe specific occurrences in dispute and results from the
 187 expert's study that was not requested by a party; or
- 188
- 189 ~~(iii) a person who is neither a party nor a party's officer to incur substantial~~
 190 ~~expense to travel more than 100 miles to attend trial.~~
- 191
- 192 (C) *Specifying Conditions as an Alternative.* In the circumstances described in
 193 Rule 45(~~de~~)(3)(B), the court may, instead of quashing or modifying a
 194 subpoena, order appearance or production under specified conditions if the
 195 serving party:
- 196
- 197 (i) shows a substantial need for the testimony or material that cannot
 198 be otherwise met without undue hardship; and
- 199
- 200 (ii) ensures that the subpoenaed person will be reasonably
 201 compensated.
- 202
- 203 **(e)(d) Duties of Responding to a Subpoena.**
- 204
- 205 (1) *Producing Documents or Electronically Stored Information.* These procedures
 206 apply to producing documents or electronically stored information:
- 207
- 208 (A) *Documents.* A person responding to a subpoena to produce documents
 209 must produce them as they are kept in the ordinary course of business or
 210 must organize and label them to correspond to the categories in the
 211 demand.
- 212

¹⁷ 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.

- 213 (B) *Form for Producing Electronically Stored Information Not Specified.* If a
 214 subpoena does not specify a form for producing electronically stored
 215 information, the person responding must produce it in a form or forms in
 216 which it is ordinarily maintained or in a reasonably usable form or forms.
 217
 218 (C) *Electronically Stored Information Produced in Only One Form.* The
 219 person responding need not produce the same electronically stored
 220 information in more than one form.
 221
 222 (D) *Inaccessible Electronically Stored Information.* The person responding
 223 need not provide discovery of electronically stored information from
 224 sources that the person identifies as not reasonably accessible because of
 225 undue burden or cost. On motion to compel discovery or for a protective
 226 order, the person responding must show that the information is not
 227 reasonably accessible because of undue burden or cost. If that showing is
 228 made, the court may nonetheless order discovery from such sources if the
 229 requesting party shows good cause, considering the limitations of Rule
 230 26(b)(2)(C). The court may specify conditions for the discovery.

231
 232 (2) *Claiming Privilege or Production.*
 233

- 234 (A) *Information Withheld.* A person withholding subpoenaed information
 235 under a claim that it is privileged or subject to protection as trial-
 236 preparation material must:
 237
 238 (i) expressly make the claim; and
 239
 240 (ii) describe the nature of the withheld documents, communications, or
 241 tangible things in a manner that, without revealing information
 242 itself privileged or protected, will enable the parties to assess the
 243 claim.
 244
 245 (B) *Information Produced.* If information produced in response to a subpoena
 246 is subject to a claim of privilege or of protection as trial-preparation
 247 material, the person making the claim may notify any party that received
 248 the information of the claim and the basis for it. After being notified, a
 249 party must promptly return, sequester, or destroy the specified information
 250 and any copies it has; must not use or disclose the information until the
 251 claim is resolved; must take reasonable steps to retrieve the information if
 252 the party disclosed it before being notified; and may promptly present the
 253 information to the court for the district where compliance is required under
 254 Rule 45(c) under seal for a determination of the claim. The person who
 255 produced the information must preserve the information until the claim is
 256 resolved.
 257

258 (e) **Contempt.**
 259

260 The issuing court for the district where compliance is required under Rule 45(c) may hold
 261 in contempt a person who, having been served, fails without adequate excuse to obey the
 262 subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the
 263 nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

TAB 3B

NOTES ON MINI-CONFERENCE
Dallas, TX
Oct. 4, 2010

RULE 45 ISSUES

The Discovery Subcommittee hosted a mini-conference on Rule 45 issues in Dallas, Texas, on Oct. 4, 2010. Those participating included Hon. David Campbell (Chair, Discovery Subcommittee); Hon. Lee Rosenthal (Chair, Standing Committee); Hon. Mark Kravitz (Chair, Advisory Committee), Hon. Paul Grimm, Hon. Michael Baylson, Hon. Gene Prater, Hon. Diane Wood, Chilton Varner, Daniel Girard, Anton Valukas, David Beck (member, Standing Committee), Bill Maledon (member, Standing Committee), Prof. Edward Cooper (Reporter of the Advisory Committee), Emery Lee (FJC), Peter McCabe, John Rabiej, James Ishida, and Jeff Barr (A.O.), Katherine David (Judge Rosenthal's rules law clerk), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee). Additional invited participants included Hon. S. Allan Alexander, Janet Abaray, Gregory K. Arenson, John M. Barkett, Rebecca Hamburg, Margaret A. Harris, Robert C. Heim, Theodore Hirt, Kenneth A. Lazarus, John H. Martin, Peter Safirstein, Alan Saltpeter, and Norman E. Siegel. In addition, Judge Alexander provided a set of responses by 14 of the 18 members of the Federal Magistrate Judges Association Rules Committee to a questionnaire about Rule 45 practice. The responses are reproduced in the Appendix to these notes.

Judge Campbell introduced the mini-conference by describing "how we got here." Over the years, the Advisory Committee had received a variety of comments about Rule 45. Prompted in part by those, the Committee invited further reactions about the functioning of the rule from a variety of judges, bar groups, and lawyers. It also did a literature search for discussions of possible problems with the rule. From these various sources, the Discovery Subcommittee developed a list of 17 possible amendment issues. Further analysis narrowed down that list to a handful of issues.

Initial drafting work was then done on a couple of issues that seemed to warrant such an effort, and that work has resulted in tentative satisfaction with proceeding with possible rule amendments:

- (1) Elevate the notice requirement: Presently Rule 45(b)(1) directs a party serving a subpoena to give advance notice that it will do so to the other parties, but many lawyers say this rule is routinely overlooked. The proposed solution is to move the notice requirement into Rule 45(a), give it its own subsection and title to make it more prominent, and specify that the notice must include a copy of the subpoena.
- (2) Authorize transfer of motions: A number of cases have arisen in which judges in the issuing court have been presented with disputes about subpoenas that should better be addressed to the court presiding over the action for which the discovery is sought. The proposal is to authorize such transfer in appropriate cases.

Two other matters that the Subcommittee discussed at length seemed to require input from a larger group, and getting that input is one of the purposes of this mini-conference. They are identified and discussed in the materials circulated before the conference, and the thought is to address them in relation to the matters raised in those materials.

The *Vioxx* Issue

The *Vioxx* issue is easily stated, and so named because *Vioxx* litigation involved a notable decision about the issue. The question is whether the 1991 amendments to the rule

authorized a subpoena for a party or party's officers to require attendance at trial even though located more than 100 miles from the place of trial and in another state.

A starting question is whether such party officer trial subpoenas occur. An initial reaction was "I've never had that occur." The issue has come up, but what happens is that the judge decides whether the witness is really needed for trial. If the witness is needed, the judge pressures the party to produce the witness, and that is effective.

Another participant noted that in mass torts the cases usually don't get to trial. The similar issue that arises is when the plaintiff wants to take the deposition of the defendant's president. That usually prompts a motion for a protective order, and the judge often will conclude that the deposition is not necessary. Actually, there are lots of employees -- not just officers -- that we would like to get to trial. A deposition is not as good.

Another participant reported similar experiences about judges' attitudes. There is a preliminary process before the judge. The judge may resolve it either way -- endorsing producing the witness or declining to press that point.

Another participant said that his experience was different. In contentious litigation, the other side will often insist on the presence at trial of top officers. Lawyers hope to use this maneuver to force a settlement. When this sort of thing comes before the court, the judge will intercede immediately.

Another reported that this is an infrequent issue. But when it does arise, if the judge favors producing the witness defense counsel will assume responsibility for producing the witnesses. The exact status of the witness (officer or not) will not matter, but counsel may often object that the witness is not necessary. Another agreed that the key issue is the importance of the testimony at trial. From the plaintiff's side, a deposition is not as good. Indeed, if it were possible to be confident the witness would be produced at trial one would normally prefer not to give the witness the advance practice of a deposition.

Another offered that in his experience the issue does not often arise with regard to trial. Instead, similar issues arise in regard to depositions when one side wants to compel the corporate officer to provide a deposition in the forum. Counsel for the corporation is trying to make a decision whether it is advantageous to have the executive testify.

An overall reaction to these attorney comments was that it sounds like judges are reaching commonsense decisions of these issues. Attorneys agreed. The judicial reaction when attorneys can't agree is either to turn to the lawyer for the corporation and say "Tell me why you won't produce the witness" or to turn to the lawyer seeking the testimony and say "Tell me why it is important to have this witness at trial."

It was noted that the problems are often with lower-level employees. This prompted the question whether the corporation and the employee are likely to have separate representation. A reaction was "That happens all the time." Often there are disputes between corporations and individual employees. Another reaction was "The more important the witness is, the more likely he will be individually represented. Corporate strategy may drive this."

Another participant observed that the reports he received from other lawyers indicated that producing the witness -- for a deposition or for trial -- is not usually a problem if the witness was actually involved in the matters in issue. But often the officer was essentially uninvolved, and that is just harassment. A question was whether the status of the employee in the corporation

plays a prominent role in the calculation how to approach these questions. The response was that it does not. The focus is on whether the witness has important information bearing on the case. If the judge says "I think the witness should be here," we will produce the witness.

Another participant said that he polled the lawyers in his firm. Usually the question is resolved informally. An example occurs in plane crash litigation. Often the pilot and the airline have separate representation. The airline's preferences may not weigh heavily in the pilot's decision whether or where to testify.

A question was raised about the vanishing trial. Isn't this really mainly about depositions because trials are so infrequent? A response was that Rule 45 has a big impact on the way in which discovery is done. "We do depositions as though this is trial testimony because we can't be sure the witness will testify at trial." Indeed, it seems that companies are careful to bring in Mr. Nice Guy at trial, which is not the witness we would chose to call as their opponents.

The question was raised whether lawyers assume they will or will not be able to get the witness to testify at trial. Does that come into deciding how to take the deposition? A reaction was that "Most practitioners don't accept the *Vioxx* interpretation." One lawyer said that if the rule were changed, more lawyers might choose to forgo a deposition and examine the witness first and only at trial. A reaction to that comment was that corporate in-house counsel are worried that a change in the rule would open the floodgates.

The discussion shifted to whether demands for live testimony are used as a tactical device to achieve tactical objectives. One reaction is that the basic problem is not with witnesses having genuinely important information; they will be produced. The concern is with the essentially uninvolved witness subpoenaed to put pressure on a party.

A reaction was "Why not have a rule giving the judge the power to order the witness to attend trial depending on whether the witness would offer important testimony?" Maybe such a rule could focus on whether the testimony was very important ("outcome-determinative") and provide protective measures to guard against abuse. Judges can separate the justified from the unjustified demands for testimony. "I have a strong preference for live testimony; that is much more effective."

Another reaction was that this raises a philosophical question. Do we have an overall view on the importance of live testimony as opposed to video depositions or other alternatives? Who has the burden to take the initiative to compel this testimony? Perhaps the problem arises mainly where the judge has not been much involved, and as a result has limited ability to assess the importance of testimony from this witness.

Another participant said tactical use is a very valid worry for corporate defendants. Presently, although counsel may fairly often try to get testimony from the CEO or other high officers, they are usually not successful. *Vioxx* is, in that sense, a minority result. Changing to a rule that would permit a judge to order the testimony "for good cause shown," as some seem to support, would simply provide a new arena for litigation. It would lead to gamesmanship and give opponents of corporate parties a potent weapon.

Another participant agreed. This is not just the problem of having the CEO sitting in the court's corridor for three days waiting to testify. The reality is that the CEO is booked solid every day around the world; any intrusion into the schedule is a very weighty matter. If testimony is needed, a video is more than sufficient to provide it. Offering this option "will change the whole system."

Another participant agreed. It was never assumed even that the plaintiff would have to attend trial. A reaction was that we must decide how flexible a subpoena rule we want.

A question is whether lawyers have confidence that judges can make reliable decisions about whether the witness is really needed. A reaction is that usually judges make commonsense decisions. But if the judge has not been significantly involved in the case that is uncertain. What if the judge simply does not decide the motion to quash the subpoena? What do you tell the witness about showing up at the courthouse on Monday morning?

Another point made was that judges may also be engaged in a bit of strategic activity; if the judge wants the case to settle this may seem a useful way to achieve that result.

Another participant voiced disagreement. There may be a small problem of unfocused judges, but not a significant one. If the rule were to say that the proponent of testimony must show affirmatively that the testimony is necessary, and also to provide protections for the witness, that should be sufficient.

A reaction was that "If the rule favors bringing in the corporate officer, that's a big change. I do not favor that change."

This discussion prompted the reminder that there are decisions on both sides of this issue under the wording of the current rule. And both sides of the division say that they are relying on the language of the current rule. Don't we need to do something about that?

One reaction was that even the judges who read the rule as in the *Big Lots* case to preclude an order for testimony seem to favor giving the court the authority to so order in appropriate cases. Another was that a similar issue arises with the question who is a "managing agent" who must be produced without a subpoena for a deposition.

One reaction was that if a new rule were to authorize a subpoena for any corporate employee it would expand the tactical field. "A large corporation will get a subpoena for ten or twelve employees. Eventually only one or two will testify, but the pressure will be great."

This prompted the suggestion to get back to basics. Rule 45 now refers to "officers." That may sometimes be somewhat elastic, but it is not the same as "managing agents." The real goal of the reference to officers is to provide protections for an officer served within the ambit of Rule 45(b)(2). The question whether the 100-mile limit is archaic is separate. *Vioxx* itself is an unusual case. It was an MDL proceeding. This seemed to be an important witness. What's more, it would be easy to rewrite the rule to fix the problem.

A reaction was that the Subcommittee had concluded that the 1991 amendments were not designed to bring about the *Vioxx* result. It is indeed easy to change the rule to make that clear. But many cases say that would not be a good move on grounds of policy.

A different question was raised: What about noncorporate litigants? The discussion thus far has only been about corporations, but other organizational litigants appear in federal court, such as unions, public interest groups, and the government.

A response was that there could be concerns from the perspective of the Government. There is, for example, a body of caselaw on whether to compel testimony from a cabinet-level official; efforts to do so would be unsuccessful in any but remarkable situations. But if one moved to the Assistant Secretary level, the result would be less clear. An argument might be

made that this is the person who made the policy in issue, and therefore that this official should appear and testify.

Another response was that one must refer to context. The protection matters to litigants that are not corporations. It applies also to individual plaintiffs. But that does not make a difference here; the real question is what is the right rule. The goal is to bring in the person with actual knowledge. We can generally have faith that the judge will appreciate that and will do the right thing.

A cautious note was sounded: Despite the appeal of this appeal, it is important to appreciate that a rule change will probably result in a lot of "rolling the dice." Why not give compelling testimony from the CEO a shot?

Another point was about the effect of the current rule on depositions. Often they are essentially two-stage affairs, both for discovery and for use at trial, and the two stages are handled quite differently. A plaintiff lawyer said "Given the choice, I'd rather do just a discovery deposition, leaving the real cross-examination for trial." A response to that was "Every deposition is potentially a trial deposition, if the witness becomes unavailable."

The Illinois practice was offered as an alternative: In the Illinois state courts, there is a stark dividing line between a discovery deposition and a trial deposition. A discovery deposition may not be used as evidence, and one must choose what type of deposition one is doing in advance. Is this desirable?

An Illinois lawyer reported that this arrangement may mean that there could be two depositions of one witness in the same day. In a case in which the plaintiffs were brought from outside the country, the arrangement was that during the morning defense counsel would do a discovery deposition. Then they would have the lunch break to review the results of that discovery and, in the afternoon, plaintiff's counsel did a direct examination of the witness, followed by a cross-examination by defense counsel (using what they had learned in the morning). Ultimately, plaintiffs were not entirely happy with this arrangement. The witnesses were much more emotional during the discovery deposition in the morning than during the retelling of their stories in the trial deposition during the afternoon.

The question was asked whether the Committee should look at adopting something like the Illinois practice. The response was from Illinois lawyers present was that it should not.

A different reaction was that this urge to insist on live testimony seemed at odds with changes in the handling of criminal trials. There, the move is away from live testimony and toward the use of videoconferencing or other alternatives. A reaction to this idea was that juries often find video depositions more effective than live testimony.

That prompted the question: Do we all agree that live testimony is better? A reaction was that in one trial on which this participant worked the jury preferred the video testimony, although jurors did say that they preferred interspersing video with live testimony to maintain interest. Another point was that with video testimony the jury may ask much more frequently to have the testimony replayed during deliberations, which can cause problems.

A different question was how the availability of video deposition testimony affects incentives. How often does the defendant decide not to produce the witness if the deposition went well? Does that give the defendant two bites at the apple -- keep the witness away if the

deposition went well, and produce the witness (making the deposition inadmissible) if the deposition went poorly.

A different factor was suggested: “We look at the possibility of ten or more trials in mass tort cases. That changes the dynamic on the video deposition.”

Another reaction was that *Vioxx* was an MDL case; shouldn't that make a difference? Some cases, for example, probably were originally pending within 100 miles of the witness's home. Another permutation is the 30(b)(6) witness; is the officer even speaking for the corporation unless so designated? The answer to that seems to be that Evidence Rule 801(d)(2)(B) would usually treat the officer as authorized to speak for the corporation. Besides that legal answer, the practical answer is the jury will regard the officer as speaking for the corporation.

The discussion turned to deposition practice and summoning witnesses from great distances. Rules 30 and 37 together suggest that a mere notice can require attendance in the forum (or anywhere else chosen by the party noticing the deposition) of officers, directors or “managing agents.” Does this really happen?

Several participants said that it never happened. But another said that in asymmetric cases, it has happened. In those situations one must reach an agreement or make a protective order motion. Another report was that in FLSA cases, demanding the attendance of plaintiffs at trial has “become a defense strategy.” Another participant agreed that in corporate cases there are often disputes about where the corporate officer's deposition should be taken.

Another possibility is to rely on live remote testimony pursuant to Rule 43(a). Is this a viable option?

The first reaction was “I've had very difficult experiences with this method. There are time lags, interrupted transmissions. It's nowhere near as good as live testimony or a videotaped deposition.” Another agreed with concerns about whether this really provided the “feel” of live testimony. Another said that he had used this technique for hearings but not for trials.

The discussion returned to whether a calibrated rule permitting a judge to order testimony at trial would be desirable. One reaction was that this would have bad effects. It would “change the entire system. There has been no showing of an injustice due to the current system. Video testimony is an effective substitute. The opportunity will be exploited for tactical reasons.” Remember that we should adhere to the “first do no harm” approach. Here there is a risk of harm and no real need.

Another agreed that there seems to be no example of critical evidence lost due to the current rule that precludes mandatory testimony. Another tactical issue is the possibility that a party will have to spend extra time preparing for the live testimony of a witness whose video testimony is already “in the can.” Another participant agreed with these concerns -- trading certainty for uncertainty is not a good idea.

A response was that, from the plaintiff's perspective, this certainty means that the defendant unilaterally controls who will be a witness; even the judge can't change that. Another was that, even if a rule change were contemplated, it would normally depend on a showing why a video deposition is not sufficient. This is a high standard to meet, if the emphasis is on affirmative proof that the testimony of this witness is crucial. Another said that he supported the general idea of some flexibility, but felt that the use of the deposition should be the norm, not

live testimony. But a response to that was that in some cases the video may become stale as new information -- such as new scientific information -- becomes available.

For a multinational corporation, it was noted, this could change the playing field. Judges are not likely to be sympathetic to a CEO whose full schedule of “important” tasks makes testifying in the judge’s trial unimportant. The key focus should be on whether the witness is important, not whether the witness is busy.

Another reiterated that there has been no articulation of why it is important to change the accepted and longstanding practice. “Before we change the rule, we should have to explain why, particularly with all these risks.”

One response was that travel is much easier now than in the 18th century when this rule came in. But a response was that video depositions were not possible then and are possible now. There is no real problem. “I would rather have officers before the court if they have important evidence. There is no reason to fear needed evidence is not coming in.”

Another factor is that Generation X jurors are accustomed to material on video. But taking video depositions raises costs for plaintiffs. Calling witnesses at trial is cheaper and easier. Another participant said that as an arbitrator he often proposed skipping depositions and favoring live testimony, only to have the lawyers insist on depositions.

A competing consideration was offered -- that depositions themselves raise costs. Calling witnesses at trial is cheaper. Over time, the amount of discovery would decline if it were easier to call witnesses at trial.

Revising the overall structure of Rule 45

Judge Campbell introduced the second major topic for the mini-conference, consideration of simplification or shortening of the rule. Rule 45 is a workhorse, and it works. But it can be hard to follow, particularly for one who is not an attorney. For this reason, the Subcommittee’s outreach about the rule prompted suggestions that there be efforts to shorten and simplify the rule. To introduce this discussion, it seems that the starting point should be to ask (1) whether the length and complexity of the rule causes problems in practice, and (2) whether nonparties served with subpoenas can determine what they should do to comply without hiring lawyers.

A first response was that the rule is indeed long. But it is not so complex that it is unworkable. Most people served with subpoenas have the benefit of assistance of counsel. Counsel understand the intricacies. Even those who don’t have a lawyer are likely to contact the lawyer who served the subpoena, which is not an entirely bad result.

Another reported on reactions from those consulted about the issues raised for the conference. One concern was that the 14-day cutoff for objecting is not made clear enough. Rule 45(c)(2)(B) says that objections are due within 14 days or at the time the subpoena is returnable, if that is shorter. But if the return time is in 30 days, the 14-day time limit for objections may be overlooked. Is there a way to highlight the 14-day time limit so people don’t miss it?

Another offered an example already recognized by the Subcommittee -- the notice provision in Rule 45(b)(1). That is in the rule, but people don’t notice and obey it. That problem seemingly exists for other provisions also. He works with a bar committee, and members of that

committee -- good, experienced lawyers -- have found this rule confusing. To some extent, that is because the rule contains provisions that parallel the discovery rules. It may be that it makes things parallel that need not be parallel.

Another question was about who can contest a subpoena. The rule is not entirely clear on that. Suppose objections based on privilege and burden. Who can raise those? Is it only the nonparty served, or also the opposing party? An initial reaction was that, as to privilege or confidentiality (as in medical records situations) it would seem to be the holder of the privilege who may object, and that the person served often has an obligation to object. But as to burdensomeness, it would seem that the nonparty subject to the burden is the right and only one to object. But another comment suggested that the burden issue may be more varied. Consider, for example, subpoenas served on customers of the opposing party. Could that not cause the opposing party a burden that warrants the court's attention? The reaction was that nonparties do indeed rely on the parties for assistance or advice regarding subpoenas. A different kind of problem can present itself when a former employee is served with a subpoena. The employee may possess material subject to the former employer's privilege.

It was asked whether those present found that there was a race to file a motion regarding the subpoena? Could it be seen as strategically important to be able to choose the venue for resolution by hurrying to the favored court with a motion for a protective order or motion to compel? A response was that this sort of competition does not seem to happen.

Another attorney reported that plaintiff attorneys find it complicated to use the rule to obtain evidence. Sometimes it seems paralegals are the only ones who fully understand what has to be done.

Specific revision ideas

Three-ring circus simplification: The first specific simplification idea was to curtail the "three-ring circus" presently created by the complicated interlocked provisions of the rule about which is the issuing court, where the subpoena may be served, and where performance may be required. The interaction of these various provisions was illustrated with a chart having three columns, as follows:

ISSUING COURT	PLACE OF SERVICE	PLACE OF PERFORMANCE
1. Trial or hearing – district where held (45(a)(2)(A))	1. Within district (45(b)(2)(A))	1. Witness* deposition or production – within 100 miles of home or office 45(c)(3)(A)(ii)
2. Deposition – district where held (45(a)(2)(B))	2. Outside district, but within 100 miles of event (45(b)(2)(B))	2. Witness* trial – within state if no substantial expense (45(c)(3)(B)(iii))
3. Production or inspection – district where held (45(a)(2)(c))	3. Within state if state statute allows (45(b)(2)(C))	3. Party or party officer for trial: <ul style="list-style-type: none"> • <i>VIOXX</i> – anywhere • <i>Big Lots</i> – within place of service (column 2)
		4. Party or party officer deposition subpoena not needed, can occur anywhere (37(d)(1)(A)(i))
		* Witness = not party or party officer

The materials for the conference contained a first effort to simplify these aspects of the rule by eliminating the choices presented in the first and second columns, so that the issuing court is always the court where the underlying action is pending, and the place of service can be anywhere in the United States. The protection necessary for the recipient of the subpoena is provided by the place of performance provisions, which are meant to replicate the current rules. Although the sketch circulated before the meeting did not do so, the intention was to revise each reference to “issuing court” elsewhere in the rule to take account of this change. Thus, in particular, a motion to quash or enforce a subpoena would normally have to be made in the place where performance is to occur. This preference for “local” enforcement might give way to the power to transfer to the court where the action is pending (as covered in another part of the materials for the conference), but that possibility is unrelated to this simplification of the rule.

The reason for considering these changes is that the concept of “issuing court” is passe. A lawyer in Seattle can issue a subpoena “from” the M.D. Fla. without having any contact with that district or its court. The lawyer simply types that district’s name on the top of the subpoena, and gets a Florida process server to serve it.

More aggressive simplification: Judge Baylson (participating by telephone) introduced the second approach to simplification, which relied on (a) cross-reference to the discovery rules, and (b) judicial discretion. This orientation permitted considerable simplification and shortening of the rule. The stimulus behind this suggestion began with experiences in practice. Even before the challenges of electronically stored information emerged, Rule 45 seemed too complex. The advent of ESI has magnified the difficulties. The goal was to move the rule from being a “huge whale” to being an “agile shark.” Judge Campbell’s three-ring circus solution removes much of the complexity, but retains all the other specifics that this approach leaves to judicial discretion.

Splitting off the document discovery provisions: A third approach, introduced by Professor Cooper, would move to the 26-37 series the provisions now in Rule 45 regarding subpoenas for documents or electronically stored information. The draft circulated before the conference assumes that the three-ring circus will be resolved along the lines outlined above, and moves beyond that. Deposition subpoenas would continue to be handled under Rule 45, as now. A question, assuming that simplification goes through, is whether these additional changes would produce further benefits. One concern is whether document production at trial (or a hearing) is important even today, and despite Rule 26(a)(3)'s seeming requirement that at least at trial, the parties disclose the materials they will use in advance. If obtaining documents for trial were still important, that would weigh against adopting this rule. Another question is whether depositions frequently involve production of subpoenaed documents also, for that might counsel against separating the provisions for depositions and document production.

This introduction prompted the reaction that there were at least two issues here. One is whether it is desirable for the subpoena rule to provide "one-stop shopping" -- to present in one place all the directives that bear on subpoena practice. Saying instead that "we will follow Rules 26-37" may suggest that the lawyers must go on a treasure hunt through those rules, which could be regarded as a disservice to those not already fully familiar with those rules. The second is the question whether the "discovery" provisions of Rule 45 regarding production of documents or electronically stored information are actually important only for discovery. Are they sometimes important for trials, or for hearings on such matters as motions for preliminary injunctions? If they are, removing them from Rule 45 might be undesirable if there were no provision for handling the need for such materials at hearings or trials.

An initial response was that documents are required at hearings or trials with some frequency, and Rule 45 is the way to get them. For this reason, it would not seem sensible to move those provisions out of Rule 45; it's better to have these instructions all in one place. In Arizona, the state-court equivalent to Rule 45 has been changed, but it is still as long as the federal version.

A different question was raised -- Should the place of performance be linked to the place of service or location of the court (except for a trial or hearing)? A reaction was "Why go to nationwide service? This will just increase the number of people subject to service. More people will have to respond. I have problems with this." A reaction to those concerns was that we really already have nationwide service, since the lawyer can "issue" the subpoena from any court. Given the complications that result for tight regulation of the place of service and identity of the "issuing court," why not simplify the rule and recognize what's really going on? That really should not produce changes in practice except by eliminating pettifogging objections. The part that matters is where the person served with the subpoena must respond, not where it was served or which court "issued" it.

A counterpoint was offered: "Many practitioners don't appreciate that they can do this now." And another was "Isn't there a requirement to get a miscellaneous number from the issuing court to issue the subpoena?" The response was -- no, there is no requirement of contacting the "issuing court." All the lawyer has to do is type its name onto the subpoena. Another concern was that, if the complications of determining the correct "issuing court" and the place of service of service are eliminated, don't we need to worry about another thing -- place of enforcement. Should nonparties in Florida have to seek relief from the District of Alaska if it is the issuing court? The response to this question was that the goal was that motions be heard by the local court where performance is required. As a result, adopting the amendment to remedy the "three-ring circus" problems would call for clarifying what is meant at each point where the term "issuing court" is used in the rule, including the provisions about where motions are to be directed. The question of transfer (also on the Subcommittee's agenda) might affect where the

motion is resolved, but the intention was that the “three-ring circus” amendment package not affect that determination by itself.

Discussion returned to the wisdom of dividing Rule 45's provisions for document discovery from its provisions on witness testimony -- whether by deposition or at a hearing or trial. How often do subpoenas need to “do both” to provide for both witness testimony and document production. Many respondents said that this “happens a lot.” One lawyer noted that although since 1991 Rule 45 has authorized “documents only” subpoenas, “we usually reserve the right to do a deposition to gather information about how the documents were assembled and what is contained in the production.”

Jurisdiction and location for deciding
subpoena disputes and transfers
of motions regarding subpoenas

The discussion of where motions are to be made prompted the observation that magistrate judges are concerned about proper treatment of nonparties -- changing the “issuing court” provision to refer to the court before which the action is pending should not affect whether they can seek relief in the local federal court. At the same time, regarding transfer, it is certainly true that dispersed decisionmaking can frustrate case management for the judge presiding over the underlying case. A lawyer noted that in one MDL proceeding, the transferee judge agreed to be available to resolve any issues arising in discovery around the country. And in another MDL matter the transferee judge treated the All Writs Act as authority under Rule 45(b)(2)(D) for regulating discovery around the country. A suggestion was that the subpoena itself could say “If you need a ruling on your obligations, go to your local federal court.”

Returning to the question of transfer of motions, the concern was expressed that such transfer would become automatic, meaning that going to the local court would be illusory. The response was that the intent is not to require nonparties often to go across the country for relief from onerous subpoenas.

Another question was “How will this affect jurisdiction to require compliance with the subpoena?” The normal attitude would be “I’m in Miami. I don’t have to do what some judge in Seattle says I have to do. I’m not a party to the case, and I’ve never been to Seattle.” Could litigating the subpoena issue before the Seattle judge be used to show that jurisdiction is really proper in Seattle? Another question was “What happens if the nonparty takes no action -- neither responds nor objects nor files a protective order motion. Can the judge in Seattle make an order against that party in Miami? Alternatively, what if the judge in Seattle makes a ruling on the “transferred” motion, and that nonparty in Miami refuses to comply. Who can hold the Miami nonparty in contempt? Is a Miami judge required to do that? And can that judge revisit the issues addressed first by the judge in Seattle, perhaps concluding that compliance should not be required?

An initial response explained the genesis of the transfer idea. One judge offered two examples of the sorts of problems that the transfer device could solve.

(1) In a case in the District of New Jersey, defendant offered part of its expert’s report in support of a motion, and plaintiff then demanded production of the rest of the report. The magistrate judge in New Jersey ruled that use of one part did not result of a waiver of objections to production of the other parts. But plaintiff’s lawyer nonetheless subpoenaed the expert on the other side of the country to obtain the rest of the report. When that was refused, a motion to compel compliance came before the judge on the other side of the country.

Should that judge treat the issue as a fresh matter or refer it to the New Jersey court? (Note that in this case, the nonparty witness is the one who wants the issue presented to the New Jersey court.)

(2) A suit was filed in federal court in Los Angeles against John Doe defendants accused of defamation in online postings. The plaintiff then served a subpoena on an ISP provider in another state to obtain the identities of the people who posted the allegedly defamatory items. Other similar subpoenas might follow in other states where other ISP providers could be located. The ISP provider objected that privacy provisions of federal legislation prohibited release the identities. This question is “case dispositive,” because without the identities the plaintiff cannot proceed. And it will arise many times in different places. Should the judge asked to enforce the subpoena decide the issue, or refer it to the judge presiding over the case?

These are not commonplace situations, but they do happen, and the judge in the “issuing court” (as well as the judge presiding over the main action) would benefit by the flexibility the transfer device would provide. In some instances, it seems that the party to the underlying case is gaming the home court, as in example (1). In others, it may be crucial that some court have authority to make a ruling that controls for all the subpoenas, as in example (2).

A lawyer experienced in MDL proceedings agreed that these are important practical issues. It is crucial to have these issues resolved by a judge who knows the case and who is committed to the schedule for developing the multidistrict litigation. The judge in the “issuing court” does not know about the case. The MDL judge often spends a great deal of energy becoming familiar with it. The judge in the “issuing court” is not focused on the schedule for discovery in the MDL proceeding, and may not move with as much alacrity as the MDL judge would in resolving the matter. In part, that is due to lack of familiarity, since the MDL judge does not have to get up to speed to address the issues.

A reaction was that there is a range of issues that such subpoena disputes can raise. Some will be simple. Some will be complicated. Some will be very specific and individual. For example, if the question is whether the witness is too ill to submit to a deposition, that can be handled by the local court where the witness is located. But if the question is whether a privilege has been waived by a litigation move before the court presiding over the underlying action -- particularly where that issue has already been resolved by that court -- it would be desirable to have a method for the matter to be presented to that court.

Another suggestion was that technology should help solve many of these distance problems. If the court in Seattle has to address the subpoena served in Miami because the Miami judge transfers the motion, the Miami nonparty might appear by videoconference, or the Seattle judge could rely on the papers (themselves transmitted online).

But won't judges always transfer, it was asked. “Won't the exception for transfer swallow the rule that the nonparty gets a ruling close to home?” One reaction was that this should not be a problem. For one thing, often that is the judge who should decide the question. Telephone conferences can be a simple way of presenting the matter. This could be important even if the issue is not particularly complex. In one MDL pharmaceutical litigation, the question the subpoenas sought to answer using subpoenaed hospital records was “Whose drug did this plaintiff take?” That is not a complicated question.

Another participant affirmed that the issues have to be separated out. On the ISP provider's obligations to guard the privacy of those who post messages, that should go to the court presiding

over the action. But for local issues regarding patient privacy, the local court should make the decision. Case-dispositive issues should go to the judge presiding over the underlying action.

Attention was drawn back to the jurisdictional issue. It's important to be careful not to gloss over that. For example, consider a New York subpoena that the New York court refers to the judge in Arizona presiding over the underlying action. Can we force the nonparty witness in New York to submit to the Arizona judge? Another participant asked whether, if the "issuing court" is the Arizona court, it has authority to take all actions on enforcement.

The response was that the rulemaking power can do such things. Criminal Rule 17 now provides national service of subpoenas for criminal cases. But, it was objected, criminal cases are different. It is true that early legislation on the scope of the subpoena power (the source of the 100-mile limit today) distinguished between criminal and civil cases. But other examples exist. State lines are not barriers the civil rules have to respect if good reasons exist for disregarding them. Rule 4(k)(1)(B) permits a summons to be served outside a state over a party joined under Rule 14 or 19 if service can be done within 100 miles of the courthouse. Rule 4(k)(2) provides that for federal claims, if the defendant is not subject to jurisdiction in any state but has sufficient contacts with the country to make the exercise of jurisdiction constitutional, the court may exercise jurisdiction.

It was suggested that the assumption was that the Constitution provides that state lines are a limitation on the jurisdiction of federal courts, but that the assumption is not really supportable. When the Constitution was written, it created only one court -- the Supreme Court -- for the entire nation. It left to Congress the question whether to create lower federal courts, and Congress did so almost immediately in the First Judiciary Act. At about the time it decided *Pennoyer v. Neff* and held that the in personam jurisdiction of state courts is limited to cases in which defendants are served within their borders, the Supreme Court also suggested that Congress could have created a single federal trial court with nationwide personal jurisdiction. *See United States v. Union Pac. R.R.*, 98 U.S. 569, 602-04 (1878). Congress did not do that, and there are many reasons why the decision not even to have districts that cross state lines made and makes sense. (Consider that the question of splitting the 9th Circuit might involve having part of California in a newly-created circuit, producing the possibility that a single state could have to deal a circuit conflict within its borders.) But Congress did not have to erect barriers for the district courts at the state line, and the Rules Enabling Act does not say that rulemaking must regard state lines as impenetrable either.

The point can also be illustrated with federal statutes providing for nationwide service of process. There have been arguments that Fifth Amendment due process objections might be made to requiring a defendant from Florida to defend such a claim brought in Alaska, but those arguments have not generally been successful in court.

In sum, although further attention to the question of jurisdiction is warranted, it seems likely that it can be solved.

Another problem was raised: Will "transferring" a motion or treating the court in which the action is pending as the "issuing court" present difficulties for lawyers representing witnesses because they are not admitted to practice before that court? It's one thing to say, as the current rule now says, that a lawyer for the nonparty witness can file a motion in the local "issuing court." But if the right court is elsewhere, the lawyer may be unable to file the motion there unless admitted also in that court.

This may be a problem in some places, it was noted. In Florida, for example, there is a very strict attitude toward multijurisdictional practices. Lawyers can appear in Florida courts only a few times each year without paying fees to the Florida Bar. Another example may be Virginia. "In Virginia, you need a local attorney." Also, in many places you are limited to three such appearances per year in the state.

A response was that for MDL practice you are automatically recognized as eligible to practice before the transferee court. Another was that Rule 45(a)(3) seems now to solve the problem for the distant lawyer "issuing" the subpoena from the Florida court. "Can't we solve the problem in a similar manner?"

A different response was that this should not be a problem for telephone conferences or video conferences. Maybe the filings can be made in the court where the subpoena is filed, and then transmitted from there to the court where the action is pending. The problem might only arise if the lawyer has to file something in the court before which the action is pending. More generally, it may be that most federal courts are less preoccupied about these matters. "In the Seventh Circuit, DOJ lawyers from Texas appear before us without any problems."

Splitting and simplifying Rule 45 Moving the discovery provisions

The discussion returned to the simplification and possible splitting of Rule 45. One reaction was that although the general ideas have considerable attraction, the idea of breaking up or significantly changing the rule could produce negative results. Even if the simplification effort were meant and explained as intended not to alter practice, people would try to read changes into it, making practice uncertain. So although the excision of the discovery provisions from Rule 45 holds much intellectual appeal, it is probably prudent not to try to do this. The way to go initially would be the least aggressive alternative -- eliminating the three-ring circus.

It was asked whether taking the document-production features out of Rule 45 would cause problems. Do we still use those features for trial? Many said yes -- the subpoena will say "Doctor, bring along your records." Enforcement issues are very rare for such trial subpoenas, but we need to be able to use them.

A different reaction was related from a participant's colleague -- that moving the provisions from Rule 45 to Rule 34 might raise a risk that nonparties would treat the obligation to respond less seriously. Another said "It's better to have one subpoena rule."

Simplifying Rule 45 more aggressively

A participant recognized that one goal of simplification would be to enable nonlawyers who receive subpoenas to understand what they are supposed to do. It would be good to have an A.O. form that would provide more accessible information about those responsive duties. A comparison was made to notices in class actions. Another comparison was to the forms used by the bankruptcy courts for pro se litigants. These forms could be updated much more easily than rules or forms developed and approved through the rules process.

Another reaction was "How can it be bad to try to simplify and clarify? The trick is to simplify without changing." The initial effort to achieve a more aggressive shortening was very appealing. Another agreed that the order of presentation is logical. Another was that the cross-reference to the discovery rules may not be a good idea. But at least eliminating the three-ring circus would be desirable.

It was asked whether it is wise to remove the current provisions of Rule 45(d) regarding the duties of the party served with the subpoena. The response was that the redraft attempts in paragraph E to explain the need to comply in conjunction with the right to object, and paragraph F says what to do. A reaction was that this answers such questions in part. But the current rule says what to do as a matter of form, for example how to raise issues of privilege. A further note was that paragraph F4 seeks to refer people to the discovery rules.

Another explanation is that one goal of the revision would be to afford the judge maximum discretion. One reaction to that was that the rule might lack important clear direction. There might be a risk that we would have to depend on "a common law of subpoenas." That prompted the suggestion that the current rule is designed to be self-executing, and it permits the lawyer to advise the client because it's pretty specific about what will happen. If it depends on the judge's discretion, you have to go to court to find out what the judge will do. Another point was that it is important to keep in mind lawyers who are not experts at federal practice; cross-referencing the discovery rules may not be helpful to them. Having a self-contained rule would be desirable for them, and particularly true as to third parties.

Another observation was that having the needed information in the subpoena would be desirable. One way to do that would be for the subpoena form to say "You have a choice -- do what you are asked to do, or object within 14 days, unless the subpoena calls for action sooner. If you object, you don't have to do anything unless a judge orders you to take action."

Regarding cross-references, another observed that in contracts cross-references can create complexity and uncertainty. In this case, however, the simplified rule seems clearer. It does seem, however to have modified the current rule's approach to costs.

A reaction to these concerns was that many favor simplifying the rule and focusing on sensible decisions by the trial court. Those goals can be achieved consistent with the simplification effort. One could, for example, simply take out the cross-references to the discovery rules. Similar treatment could be afforded for the 2006 rule provisions to deal with electronically stored information.

An attorney noted that there is some solemnity associated with a subpoena. "You want it all to be there. That's why Rule 45(d) is important. It should have a stand-alone importance." So we should be very careful about dividing up the rule. In light of those concerns, this participant thought that the safest route would be to favor the proposal to eliminate the three-ring circus but not to make other changes.

Regarding the general question of streamlining, it was observed that tracing the history of amendments to Rule 45 shows that the changes that were made (often adding to the rule) were usually in response to specific problems and designed to solve those problems. If we eliminate the details, the problems may return. It would not be helpful to take out details and thereby to prompt the return of problems that then cause the rulemakers to have to restore the specifics to the rule to solve the problems. These observations prompted the reaction that magistrate judges need to spend only a small amount of time now on Rule 45 issues. Taking out the details might generate a lot more motions.

Other amendment ideas

The discussion opened up to other topics for possible change to Rule 45.

One reaction was that if all a subpoena seeks is documents, the 100-mile limits really don't make sense. Changing to a broader area, or an agreed-upon location, would be an improvement. Particularly with electronically stored information, the reality is that material is simply delivered on a CD or portable hard drive. Others agreed that physical production is a holdover from the past. "In 80% of the cases, what you get is a portable hard drive."

Another concern is timely notification of compliance. It would be desirable to make it very clear that you have to give notice to the other parties that you are serving a subpoena, which the rule now says. Unrelatedly, it is important to highlight the 14-day requirement for objections. If the subpoena has a return date in 30 days, that 14-day limit for objecting still applies. That should be highlighted in bold letters.

It was asked whether 14 days is too short. A response was that sometimes the materials are needed for trial; if a trial is coming up, you don't want to be rushed on getting the needed materials. Another attorney reported that in Arizona, when the subpoena rule was reconsidered, the response time was left at 14 days.

Discussion returned to the notice issue. "That's a hot button issue with me. Attorneys do not do what the rule requires." It was reported that the Subcommittee had thoroughly discussed this concern, and determined that the best solution was to relocate the notice requirement and expand it a bit to include a copy of the subpoena. There was also discussion of further notice requirements -- such as notice of modification of the subpoena, or of production in response to it -- and it was concluded that these would be likely to overload the rule. What if one of those was not strictly observed? Then is the evidence inadmissible? Better to leave this to the lawyers to protect their clients' interests by ensuring that they are informed of further developments. The reaction was "I agree with that. The other party can protect itself and ask for notice of any modification of the subpoena." Another added that "The judge will tell the parties to share the documents."

A different question was why Rule 26(a)(3) does not solve the problem of surprise documents. They are all supposed to be listed in that disclosure. How can there be surprise documents? An answer is that this can happen when a party discovers documents that were not recognized as important before. That can come due to a trial subpoena.

The cost concern returned. One concern is that the provisions of Rule 45(d) concerning inaccessible electronically stored information (modeled on Rule 26(b)(2)(B)) are not necessarily consistent with the existing directives in Rules 45(c)(1), (c)(2)(B), and (c)(2)(C), which may be more protective of the person served with the subpoena. It was asked whether the addition of the ESI protections could really be read to weaken the existing protections for the person subpoenaed in Rule 45. Another reaction was that the normal response on costs is "This gets worked out."

One way to deal with the Rule 45(d) concern might be to say that the provision there is "subject to" the provisions in Rule 45(c). But "subject to" provisions can cause mischief. Consider, for example, the problem we've called the Vioxx problem. One reason for that problem is that the rules contain a "subject to" provision.

Another issue was the manner of service -- should it be by hand delivery or by mail? This is handled differently in different cases. It was noted that the Subcommittee did discuss these issues, and concluded that there seemed no need for immediate action. A participant noted that "Some people prefer mail, regarding personal service as an intrusion."

APPENDIX

FMJA RULES COMMITTEE

Rule 45 Questionnaire

September 15, 2010

The following responses are based upon a fourteen out of the eighteen members on the FMJA Rules Committee responding in whole or in part to the questionnaire:

1. Do you favor amendment of Rule 45 to resolve the split in interpretation represented by

3	<i>Vioxx</i>
4	<i>Big Lot's</i>
6	<i>neither</i>

2. If the rule is to be amended, which of the following provisions of Rule 45 need to be amended or clarified? [check all that apply]

5	Those relating to pretrial/discovery subpoenas
7	Those relating to trial subpoenas
8	Those relating to parties/corporate officers
3	Those relating to non-parties

3. Do you favor any geographic expansion of the 100-mile limit [*e.g.*, to 500 miles] in light of societal changes since its adoption?

7	yes
5	no

4. Do you favor a presumption that the forum court is best equipped to resolve Rule 45 issues whether or not the subpoena is served in or compliance is sought in another district?

11	yes [two "yes" responses were qualified by concern for protection of a non-party's interest in avoiding the expense of contesting a subpoena in a distant forum]
----	--

0	no
---	----

5. If such a presumption is adopted, do you favor discretion to transfer the dispute to the district of service/intended compliance for good cause or less?

11	yes
0	no

6. Some have expressed concern that the forum court which does not have personal jurisdiction over a non-party would not have jurisdiction to enforce a subpoena issued by that court. Do you have concerns about the enforceability of a subpoena [*ad testificandum* or *duces tecum*] issued by the forum court but served in another district or state [outside the 100-mile bulge] upon a non-party over whom the court does not otherwise have personal jurisdiction?

8 yes
4 no

7. Do you favor amendment to Rule 45 to make clear who [*e.g.*, another party to the action, another person or entity with a fiduciary relationship with the non-party] has standing to raise objection to a subpoena on a non-party?

6 yes
2 no
1 uncertain

8. What percentage of your time do you spend addressing Rule 45 questions that you believe can be resolved by amending the Rule?

4 members – 0%
 2 members – 0.05%
 2 members – 2%
 5 members – 5%
 1 member – once or twice in 13 years

On average, how many times do these issues arise in your court in a given year?

9 0 to 5 times
1 5 to 10 times
2 10 to 20 times
0 over 20 times

9. Are you concerned that major restructuring of Rule 45 will produce unforeseen and unintended problems?

1 not concerned
7 mildly concerned
6 very concerned

10. How great a role should concerns about the effectiveness or desirability of live testimony versus other forms of testimony [*e.g.*, reading a deposition transcript, playing a video deposition or taking live testimony by various electronic means] play in deciding whether to amend Rule 45?

2	no role
7	some role
4	major role

11. Please briefly itemize other strong feelings about the need or lack of need for any particular amendment to Rule 45:

► I am generally opposed to modifying Rule 45 to allow nationwide service of process for anyone, including distant party witnesses. . . . provisions that allow a party to depose, for use at trial, a distant corporate officer or a witness who is outside the court's subpoena power, are more than adequate to allow parties to secure testimony for trial. . . . In my experience, other than harassment, poor deposition-taking skills are the most common reason that parties seek to get a distant witness to appear live for trial.

If any adjustment is called for, it would only be to give a court discretion upon a showing of good cause (including but not limited to why securing a witness's testimony for trial is inadequate) to require the appearance at trial of party witnesses.

In my experience as a judge and former litigator, Rule 45 is neither too lengthy nor complex. An effort to shorten it by referencing other rules will make it more complicated if not incomprehensible. . . . As to non-lawyer's difficulty with Rule 45, that rule is no more difficult for non-lawyers than any other procedural or evidentiary rule.

On the other hand, it is a good idea to amend the rule to give courts discretion as to where a motion to compel or for a protective order relating to a non-party witness is held. (However, the subpoena should still issue in the District where the witness or material sought are located).

► [T]he beneficiary of a narrow rule limiting the reach of a subpoena even for a party's officers will typically be a large defendant with operations in several states, easily able to absorb the cost of producing the witness without undue burden. Moreover, when a party has engaged in activity that renders it subject to personal jurisdiction in a particular venue, it seems reasonable to me to require that party to produce its officers as witnesses in that venue, assuming the officers have relevant testimony to offer.

Amendments tend to bring unintended consequences. For that reason, I am hesitant to support the second sketch that proposes a "more aggressive streamlining of Rule 45." If the rule is to be amended, it makes sense to consider seriously option C. [M]any lawyers who practice only intermittently in federal court fail to examine Rule 45 and limit their review to the discovery rules when seeking information about the procedures to follow when taking discovery.

I have also heard that the notice requirement in 45(b)(1) is often overlooked and agree that placing the requirement in a more prominent position in the rule would be helpful.

An "issuing" court should have explicit authority to transfer subpoena motion practice to the court presiding over the main action.

► I would not try to reword too much of the rule. A cross reference to other rules might help, but if an attorney does not read the rule he/she will miss any cross reference as well. I agree that most of the problems are caused by a failure to read and follow the rule.

► I don't have a strong sense that it needs to be fixed.

► [T]here is significant inconvenience in requiring a corporate officer or employee to appear for trial at a remote location from his or her office. The likelihood is that if that person has relevant information his or her deposition will have been taken, and is admissible at trial provided that the person is an officer, director, managing agent, or Rule 30(b)(6) designee. *See Fed.R.Civ.P. 32(a)(3).*

[M]any trial judges believe that they have the authority to order a corporate party to produce its employees to testify at trial. I doubt that that authority can expressly be found anywhere in the rules. . . . [P]arties generally agree to produce truly important witnesses who are going to testify anyway, when requested by an adverse party. . . . My primary concern regarding the expansion of rules to permit nationwide service for trial is the abuse factor. [My research indicates that]

1) Absent consent of the subpoenaed party or transfer from an issuing court, the court in which an action is pending lacks jurisdiction to hear and decide a discovery dispute relating to a subpoena issued elsewhere.

2) Under Rule 26(c) a subpoenaed party may retain the option of applying to the trial court as opposed to the issuing court for relief from a deposition or a document subpoena.

3) The courts are divided on whether an issuing court retains the discretion to transfer a dispute concerning a subpoena to the trial court, although the weight of authority appears to hold in favor of recognizing that authority.

[I favor] dividing up the rule regarding subpoenas The rule already contains different provisions and requirements for deposition and document subpoenas and those involving trial. [I]t is counterintuitive to think that a subpoena provision related to discovery would be found in the section of the rules governing trial, as opposed to Rules 26 through 37, which are entitled "Depositions and Discovery." I recommend removing present Rule 29, governing discovery related stipulations, and place that rule either in Rule 26 or as part of Rule 6(b), which governs extensions of time generally. I would then incorporate the discovery and document production provisions of Rule 45 into a new Rule 29, and leave Rule 45 to address trial subpoenas.

► The 100 mile is outdated. A party should be able to issue a trial subpoena anywhere in the United States. If that is too drastic, then I favor the parties having subpoena power anywhere in the forum state and/or district and within a 200 mile radius of where the court sits. Issuance of such a subpoena should not be contingent on obtaining leave of the court. The subpoenaed party could seek relief by motion to the forum court, but court involvement should be the last, rather than the first resort.

► Current Rule 45 is complicated and unclear. The discussion at the mini-conference should not be about tinkering with the current rule, but rather should focus on some basic policy questions that are not clearly answered in the rule as it now stands. Those questions include the following:

1. What is the geographical limit of a subpoena, in other words, how far from where a person lives or regularly conducts business can he be compelled to travel to testify or produce documents? Rule 45(b)(2) is now a hodge-podge of limits, some of which require you to research other law: a district; 100 miles; within the state if a state statute permits; or as the court authorizes if a federal statute provides. What's the policy here?

- 2. Should the limit be the same for trial or hearing as for a deposition?**
- 3. Should the limit be the same for individual parties, organizational parties, officer/managers/directors of organizational parties, and for nonparty witnesses?**
- 4. Where should a subpoena be enforced, and where should a subpoenaed witness be able to get protection from a subpoena?**

There are likely good arguments to be made for a variety of viewpoints on these questions. I think that discussion should be undertaken, and, whatever the consensus is, it should be expressed clearly and simply in the rule.

TAB 4

PRESERVATION/SANCTIONS ISSUES

During the Duke Conference in May, the E-Discovery Panel proposed that the Committee give serious attention to adopting a preservation rule, and presented an outline of possible provisions entitled Elements of a Preservation Rule. That outline should be included in the agenda book.

The Duke Panel was a very distinguished group, and its unanimity on the question whether rulemaking should be seriously considered deserves great weight. Accordingly, the Discovery Subcommittee has already given a considerable amount of thought to the preservation ideas proposed by the Duke Panel. This activity has included a Subcommittee meeting and four conference calls. It has also produced an early sketch of possible amendment ideas designed to foster and further discussion of the issues, and a very thorough research effort by Andrea Kuperman on case law on preservation and sanctions related to the issues raised by the Duke Panel.

Accordingly, the agenda materials on preservation and sanctions issues should include the following:

The Duke Panel's Elements of a Preservation Rule

Notes on the Subcommittee's Oct. 3, 2010, meeting

Notes on the Subcommittee's Sept. 20, 2010, conference call

Notes on the Subcommittee's Sept. 3, 2010, conference call

Notes on the Subcommittee's July 13, 2010, conference call

Andrea Kuperman's Sept. 23, 2010, Memorandum on Case Law on Elements of a Potential Preservation Rule

Rick Marcus's Aug. 5, 2010, memorandum on preservation discussion items

The Discovery Subcommittee has no action items on preservation or sanctions to propose. Instead, its objective during the November 2010 meeting is to discuss the many issues that have emerged from its work on these matters since the Duke Conference. As recounted in greater detail below, factual and legal research is ongoing. In addition, many questions remain about whether rules would be helpful on these topics, what such rules should address, and where the Subcommittee should focus if it begins trying to formulate rules. For present purposes, the goal of the Committee discussion is therefore to report on the work done to date and to explore the basic starting issues. The Subcommittee has made no decision about whether to proceed toward drafting actual rule language to deal with these issues.

Need for action

The concurrence of the distinguished members of the Duke Panel on the need for rulemaking is a powerful impetus, but it remains necessary to consider both whether existing problems call for rulemaking on these subjects, and what those problems are, since that would inform the content of any rules that might be proposed.

By way of background, the E-Discovery amendments of 2006 included Rule 37(e) on sanctions, but that rule related only to sanctions for loss of information due to the “routine operation” of an electronic information system, and the Committee Note emphasized that a litigation hold could require that such routine operations be altered to preserve information. At the same time, Rule 26(f) was amended to direct that the parties discuss preservation of discoverable information during their discovery-planning conference.

Many echo the Duke Panel in saying that preservation has mushroomed to an extent not appreciated when the 2006 amendments were conceived. Indeed, it almost seems that there is a pervasive “collective angst” about these issues. Consider Shapiro, *Conclusions Assumed*, 36 *Litigation* 59, 59 (Spring 2010):

Spoliation, in case you haven’t heard, is the newest battleground of contemporary litigation, now a continuing sideshow, if not the main event, in courtrooms across the country.

It remains important, however, to develop a more thorough understanding of the burdens of preservation and the problems of sanctions. One possibility is that fear of sanctions has produced hugely expensive and unnecessary over-preservation by many potential litigants. This possibility could even be exploited by lawyers seeking to gain a tactical advantage by demanding huge pre-litigation efforts to preserve material. Divergent interpretations of the obligation to preserve, or differences among court decisions on the culpability needed to justify severe sanctions, might prompt potential defendants to over-preserve. Divergent court decisions on these questions may also impede lawyers trying to advise their clients on how to comply with preservation obligations. Certainly there are reports that such undesirable consequences are occurring.

Initial discussions by the Subcommittee have suggested these reports may be well founded. Subcommittee members have described the challenge of trying to advise large national corporations on their preservation obligations, particularly when (as often happens) the corporations do business in a variety of jurisdictions with a variety of court decisions on preservation standards. Subcommittee members have also noted that preservation challenges may confront all litigants, not just large corporations. For example, plaintiffs may be waking up to the possibility that their failure to preserve can be an obstacle to their ability to seek relief, particularly because they often become aware of the prospect of litigation (and therefore subject to the duty to preserve) long before defendants. Many unsophisticated plaintiffs may be entirely unaware of any preservation obligation.

At the same time, there is room to be uncertain about the nature or extent of these problems. For one thing, without regard to potential or pending litigation, various statutes and regulations already include requirements to preserve various kinds of information, often with sanctions for noncompliance. For another, at least in terms of severe sanctions imposed by courts for failure to preserve, anecdotal evidence suggests that such results are quite rare. And at least some judges have not noted an upsurge of sanctions motions.

Concerning costs, it is not entirely clear why the costs of preservation are great. During the Brooklyn mini-conference on E-Discovery in 2000, one leading lawyer opined that because storage is very cheap for electronically stored information cost should never be a reason for discarding this material. Although there was considerable dissent from that view during that meeting, it remains unclear why or how (or how much) the costs of preservation due to litigation have risen.

One consequence of preservation -- as more generally of the centrality of digital information and reliance on digital modes of communication -- is that there is much more information to be considered when litigation occurs. It may be that a major component of the costs resulting from that fact is the cost of having legally-trained people review all this material for relevance, privilege, confidentiality, or something else. Whether that cost can be reduced by technological developments is uncertain. Whether it is a reason for preservation rules is also unclear.

Empirical information about the need for rulemaking

Obtaining information about the costs of discovery is difficult. During the Committee's 1997 Discovery Conference at Boston College, a number of participants objected that the efforts to ascertain discovery costs (in that pre E-Discovery world) did not adequately capture the costs incurred by large entities in complying with Rule 34 discovery. But an organization that undertook to gather such information afterwards ultimately reported that it could not persuade its members (mainly large manufacturers) to reveal the information sought due to confidentiality concerns.

As reported at Duke, RAND has been attempting to develop information about the costs to corporations of preservation of electronically stored information. It is our understanding that this fact-gathering is not finished, and that it is proving challenging, although it does seem that preservation is a major component of E-Discovery costs.

In addition to speaking with the people at RAND, Subcommittee members have had conversations with individuals at the Sedona Conference and IAALS concerning their information on the costs of preservation. It does not appear that either organization has more information than was generally available for the Duke Conference. Any suggestions from members of the Committee on how to gather reliable information on the extent and nature of such costs would be appreciated.

A different empirical focus is on sanction activity in court, something the FJC Research Division can examine. We have obtained the assistance of Dr. Emery Lee of the FJC in developing data on the frequency and nature of sanction activity in a number of districts. Although the precise protocol for this research is still subject to some final adjustments, the goal can be easily stated -- it is to study all 2006, 2007, and 2008 filings in a significant number of districts (around a dozen) to identify spoliation sanction motions and provide information on their frequency and the nature of the issues raised. We hope that Dr. Lee will be able to provide an early foretaste of the data that are emerging during the November meeting.

The FJC project will deepen our appreciation of the amount and nature of sanction activity. But it will not answer all questions. It will involve only selected districts, leaving out more than 80% of them. It will not provide information about over-preservation, which presumably does not lead to sanctions motions. And it may not provide a firm indication whether this sanctions activity is increasing, decreasing, or remaining constant.

The Subcommittee invites suggestions about additional means of gathering information about the courts' handling of sanctions matters.

Diverging Case Law

A significant source of uncertainty for lawyers and parties trying to comply with preservation obligations is that there may be significant differences among circuits or courts about what they must do to avoid serious sanctions. Judge Grimm has, for example, explored such differences at some length in *Victor Stanley, Inc. v. Creative Pipe, Inc.*, ___ F.R.D. ___, 2010 WL 3703696 (D. Md. 2010) (see Part II of the opinion, and the Appendix). In order to gain a better appreciation of the current state of the case law on preservation and sanctions issues, the Subcommittee requested research from Andrea Kuperman, who supplied the very thorough memorandum included in these agenda materials. That review shows that there may be considerable differences between courts in different circuits, particularly on the level of culpability requisite to imposition of severe sanctions.

Pre-litigation Effects

In many ways, the most acute need for guidance could arise before litigation commences. At least once a case is assigned to a judge, there is somebody who can referee disputes about preservation, and that option may prompt people to be more reasonable about their preservation demands or responses. Before a suit is filed, however, there is no obvious way to resolve questions about what a party must preserve. Moreover, if there are significant differences in the law on spoliation in different circuits, it may often be difficult to know in advance where litigation will be filed if it is filed. And the case might be in state court, presenting yet another set of preservation directives. Unless a federal rule could provide some pre-litigation solace, it might be contended, it could not have as much effect as is needed to cope with the demands of preservation.

That does not mean, however, that any rules the Subcommittee should examine must attempt to regulate pre-litigation preservation efforts. Even the Duke Panel was divided on this point. There is reason to refrain from attempting to regulate pre-litigation matters. Rule 1, for example, says that the rules “govern the procedure in all civil actions and proceedings in the United States district courts.” Until the action or proceeding is commenced, it is not obvious that the rules apply.

But there surely is some authority to adopt provisions for post-litigation consequences of pre-litigation actions. A prime example is Rule 11(b), which makes a signature on a document filed in court (including the initial complaint) a certification as to various things based on a “belief, formed after an inquiry reasonable under the circumstances.” That inquiry must, for the plaintiff lawyer, occur before the complaint is filed.

Somewhat similarly, Rule 26(f)(2) directs the parties at their initial conference to “discuss any issues about preserving discoverable information.” It is hard to believe that such discussions may relate only to what was done after the complaint was filed. Is defendant forbidden, for example, to ask what preservation efforts the plaintiff undertook after hiring a lawyer and getting to work on preparing the lawsuit? Similarly, is plaintiff forbidden to inquire about pre-litigation preservation practices of defendant to ascertain whether, for example, to ask that backup tapes or other backup media be preserved?

Also somewhat similarly, Rule 27 authorizes pre-litigation discovery to preserve evidence for future federal-court litigation. A federal court does have a proceeding due to the filing of a Rule 27 petition, but surely such a court has authority to enter an order requiring that discoverable evidence be preserved due to the filing of such a petition, and to take action if a

person from whom such pre-litigation discovery is sought has attempted to destroy the sought-after information.

Further from the beaten track, it is worth noting that one method of dealing with current concerns about pleading requirements has been to consider some sort of pre-litigation court-authorized fact-gathering, perhaps on a Rule 27 model. At least one state (Texas) has something of this sort on its books now. See Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. Mich. J. L. Ref. 217 (2007). In conjunction with that court-sanctioned activity, the court would seemingly have some authority to ensure that the information to be gathered be preserved.

There are surely cases holding that very severe sanctions may be imposed on a plaintiff for pre-litigation failings of this sort. See, e.g., *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (upholding dismissal of plaintiff's suit because he did not notify G.M. of need to inspect allegedly defective air bag before it was repaired, which occurred long before suit was filed); compare *Menz v. New Holland North America, Inc.*, 440 F.3d 1002 (8th Cir. 2006) (reversing dismissal of suit by farmer who repaired tractor involved in accident before filing suit). More generally, it seems that there is some unquestioned "inherent authority" for courts to take actions in connection with pending litigation based on actions taken by the parties before suit was filed. See, e.g., *Carlucci v. Piper Aircraft Corp.*, 102 F.R.D. 472 (S.D.Fla. 1984) (sanctions imposed in 1980s for "purge" of defendant's records in 1960s and 1970s to remove "documents that might be detrimental to Piper").

The Subcommittee has devoted considerable time to discussing the question whether to attempt to address pre-litigation actions, and has concluded for the present that the wisdom or propriety of such a rule would depend in large measure on its exact content. For that reason, the Subcommittee's attention shifted to the content of possible rules, with the intention to reflect on these issues after the content of any possible rule becomes clearer.

Supersession

At the same time, it will also be important to keep in mind the Supersession Clause, 28 U.S.C. § 2072(b), which provides as to rules adopted under the Rules Enabling act that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." The variety of laws that may bear on preservation is very large. For a 30-year old catalogue of some such rules, see John M. Fedders & Lauryn H. Guttleplan, *Document Retention and Destruction: Practical, Legal and Ethical Considerations*, 56 *Notre Dame Law* 5 (1980). Kate David (Judge Rosenthal's rules law clerk) will be doing research on the variety nature, and extent of such preservation provisions, but that work has not yet been done. It will hopefully shed light not only on what might be superseded by a rule, but also on various formulations of the preservation obligation that may be informative to the Subcommittee as it considers whether or how to address similar issues in a rule. We should note that the Subcommittee is not of the view that a preservation rule, if adopted, should be deemed to supersede other preservation obligations. But clearly we should have them in mind when crafting a potential rule.

Possible Rule Elements

As noted above, a rule might be useful in providing a single guide on what the federal courts require in the way of preservation, replacing the seeming patchwork described in the Kuperman memo. Besides that service, to the extent rules could be precise about what the obligations to preserve are, or what must be shown (e.g., bad faith) to justify severe sanctions, that precision might make the job of complying with preservation duties less difficult.

A primary focus during the November meeting, therefore, will be to discuss the various elements the Duke Panel suggested be included in a rule. The Subcommittee has discussed those elements at some length, as reflected in the notes of its meeting and various conference calls included in the agenda book, and this memorandum will not attempt to reproduce that discussion. Instead, it will briefly identify some possible discussion issues in hopes that discussion will amplify on the concerns raised and identify new concerns not previously appreciated. Sketches of possible rule provisions, prepared only to facilitate discussion, were included in the Aug. 5 Marcus memorandum included in the agenda book.

Trigger

The Duke Panel's discussion of possible triggers alternatively suggested a general trigger (restating the common law focus on reasonably foreseeable litigation) and specific triggering events, which could either be offered in a rule as examples or (perhaps) offered as a limiting and comprehensive listing with the duty applicable only if one of the listed triggers occurred. The Subcommittee's preliminary view is that the general rule (reasonable anticipation of litigation) is the only standard that fairly could be applied to the wide variety of cases that arise in federal court, but that a list of illustrative examples could prove helpful in rule text or a Committee Note.

One possible discussion topic is whether restating the common law trigger would actually do anything to remedy the kinds of problems we have heard afflict the preservation area. Arguably it would not provide any assistance, since telling litigants that preservation must begin when litigation is "reasonably foreseeable" does not provide much clarity.

A different topic is whether or how to calibrate a trigger to accommodate the different situations of differing categories of prospective litigants. It seems fair to suggest that the current urge toward rulemaking comes largely from entities that one would call "repeat players" -- organizational litigants that are frequently involved in litigation, often as defendants. These parties seem fairly attuned to the need to worry about preservation.

Individual litigants -- often plaintiffs -- may be on a different footing. Whether the events that might start the statute of limitations running (even in a jurisdiction using a "discovery rule" for limitations) would be fair to trigger preservation obligations for such litigants deserves consideration. The average person might be expected to realize she has a claim without necessarily also realizing that she should preserve all the documents she has (and email messages, etc.) that relate to that topic. Another alternative might be something like the Rule 26(b)(3) standard for application of work product protection -- steps taken in anticipation of litigation -- but this might also trigger the duty to preserve too early for such "one-shot" litigants.

Arguably one antidote to problems of hair-trigger commencement of the duty to preserve is a firm culpability requirement that would protect the unseasoned potential litigant from serious adverse consequences due to failure to appreciate that preservation should become a habit.

Scope

Scope may be the most contentious issue when lawyers start negotiating about preservation; it is probably the topic on which our discussions most often emphasized both reasonableness and proportionality. Again, it is tempting to say that parties should behave reasonably and calibrate preservation in proportion to the stakes of the potential litigation. Of course, those stakes may grow with the passage of time; the first adverse event report on a new drug may not mean that broad preservation should begin, but if there are 999 more reports in quick succession that escalation should affect the scope of preservation.

Parties who negotiate the scope of preservation have many variables they may address, several of which are identified in the Duke Panel's recommendations. These include:

time frame

types of data

sources to be searched

number of key custodians whose data should be searched

form for preservation of data

Drafting a rule that attempts to provide specific requirements in each of these areas seems impossible; there simply is too much variety from case to case.

Alternatively, a rule could command that parties act reasonably in the circumstances. The rule could then identify factors a court should later consider when evaluating the reasonableness of a party's scope of preservation. These could include the likelihood of litigation faced by the preserving party, the likely nature of the litigation, the proportionality of the preservation effort to the likely litigation, and efforts of the preservation-demanding party to help the preserving party determine a reasonable scope for the preservation. It is worth noting, however, that preservation questions would probably arise most frequently in situations in which it is later claimed that needed information was lost, which may tend to cast something of a pall of unreasonableness over the actual preservation efforts undertaken.

For present purposes, the discussion should probably focus on whether the Subcommittee should try to develop specific guidelines that a rule could prescribe. Early efforts to devise some rule language along these lines is included in the Aug. 5 Marcus memorandum included in these agenda materials.

Relatedly, it is worth noting that the preservation decision does not arise only when some prospective plaintiff (or plaintiff lawyer) demands preservation. Emphases on reasonableness may work differently when the design of the preservation is entirely unilateral. Perhaps the same set of touchstones would work equally in both situations, but it is worth considering whether they would.

Duration and Ongoing Duty

These two topics were separated by the Duke Panel, but seem related; both concern what happens after the trigger occurs and the scope is determined. Must the prospective litigant preserve newly acquired or developed information within the scope of preservation? The Subcommittee's initial reaction was that a snapshot is not enough, and ongoing preservation should be the rule. But for how long? Devising a cutoff point is not a simple matter. One referent is the statute of limitations, but that varies widely among jurisdictions and among types of claims. And it is not clear whether it should be the standard anyway. Another would be a number of months or years specified in a rule, but if that period is shorter than what turns out to be the pertinent statute of limitations, so that the rule affirmatively authorizes discarding material before a timely suit is filed, that could seem odd. Whether ongoing preservation could depend on a demand that it be done might be addressed, but in many instances the preservation duty arises without any affirmative demand for preservation. The Subcommittee's preliminary conclusion is that the duration of the preservation duty should also be subject to a reasonableness standard, but

we again wonder how helpful that will be to parties struggling with difficult preservation decisions.

Effect of Litigation Hold Notice

The Duke Panel recommended that dissemination of a litigation hold notice should be “evidence of due care,” so that failure to preserve is “substantially justified” in the same sense that sanctions are to be denied under Rule 37(c)(1) when the failure to disclose is substantially justified. A number of questions may warrant discussion:

Would such a provision be useful without specifics on what must be in a litigation hold? Could a rule prescribe specifics for a litigation hold, or would it have to direct that the hold be “reasonable”? Should the hold have to be disclosed to the opposing party (after litigation has begun) so that the opposing party can object or suggest additions or seek a court ruling on the adequacy of the hold? What would be sufficient dissemination of a hold? Is follow-up checking to make sure that the hold is being honored required? What should be done (i.e., should severe sanctions be presumptively proper) if the hold is not enforced, or in any event if material that should have been retained is not? Should a rule suggest that a litigation hold is required, or would other preservation steps be sufficient in particular circumstances?

Work Product

The Duke Panel suggested that a rule specify the extent to which work product protection applies to actions taken in furtherance of the preservation duty. Such issues have arisen. See, e.g., *In re Intel Corp. Microprocessor Antitrust Litigation*, 258 F.R.D. 280, 288-93 (D. Del. 2008) (addressing waiver of attorney-client privilege regarding attorney notes about compliance with preservation obligations). The Subcommittee has not initially felt comfortable wading into this area.

It seems that some information about the preservation efforts being made by one side must be shared with the other side. Indeed, one of the questions in the previous section was whether the party with the duty can shelter behind a litigation hold if it has not disclosed the hold’s particulars to its adversary. At some point, one would think, a litigation hold has to be disclosed. But if the hold is disclosed, how about lawyer-client communications related to the hold or its enforcement? It may be difficult to specify how work product protection would apply in this area. Surely it seems that a deposition question to the client like “Tell me everything you and your attorney said to each other about preservation” or a document request for “all emails between defendant and counsel about preservation” would raise legitimate objections. On the other hand, it is difficult to conceive of litigation about preservation efforts that does not involve some submission from the client that describes preservation activities that were influenced by the lawyer’s advice. Should a rule offer guidance about these issues?

Sanctions Guidance

It seems that the real focus of much of the concern being expressed is sanctions, and particularly serious sanctions. The Duke Panel recommended that a rule specify different sanctions depending on the state of mind of the party to be sanctioned, perhaps the state of mind necessary to warrant each identified sanction. Would this result in something like the Sentencing Guidelines -- the Sanctioning Guidelines? Can it be done?

Could certain conduct be described with sufficient precision in a rule to permit the rule to prescribe that it presumptively shows a certain state of mind? For example, could it be said that failure to issue a litigation hold is presumptively negligence or gross negligence?

Could a rule adequately define such terms as “gross negligence,” “bad faith,” or “willfully”? Would this be proper rulemaking?

Can we devise a rule that would prescribe preservation duties with sufficient precision and pertinence that anyone who complies with the rule is presumptively insulated against sanctions if material is nevertheless lost?

What exactly are “sanctions”? Is ordering further discovery to try to locate substitute materials to replace the lost items a “sanction”? Does that mean that if the party who lost the item did so in good faith the court may not order further discovery? Does the discovery become a “sanction” if it involves restoring backup tapes? Is the court’s exercise of authority granted by Rule 26(b)(2)(B) to order production of material that is not reasonably accessible a “sanction”? These questions suggest some concerns that may arise if effective limits are placed on sanctions.

The Duke Panel suggested that a model adverse inference jury instruction be drafted as part of a preservation/sanctions rule, or at least in conjunction with developing a rule. Could a model jury instruction be developed? It seems that there is presently considerable diversity among courts in drafting such instructions. In part, that may be because the circumstances of different cases vary. The Subcommittee’s initial view is that drafting a single national adverse inference instruction presents such difficulties that it may be neither practical nor wise.

Should a rule require that sanctions be sought promptly rather than left until the eve of trial? Much might be gained by clearing the air (and beginning the needed preservation) early. But much may be lost if a rule commands that sanctions motions be made prematurely or frequently. Perhaps the timeliness with which preservation is raised should be a consideration in evaluating a party’s claim that information was not preserved as required, or that failure to preserve actually caused prejudice.

The Subcommittee has begun discussion of these matters. Among its concerns are the seeming reality that there are genuine differences between circuits on the culpability that must be shown to justify (perhaps the word should be permit) severe sanctions. Another is that Rule 37(b) contains an array of sanctions, but it may be difficult to determine for certain that some sanctions are “more severe” than others in given cases. In addition, an adverse jury instruction is not presently one of them (although something like that does appear in Rule 37(c)(1)).

Also of note is an abiding tension about the relationship between culpability and prejudice. Ultimately prejudice is a due process requirement for merits sanctions; the most disobedient litigant may be held in contempt but disobedience alone is not a ground for entering an adverse judgment. See *Hovey v. Elliot*, 167 U.S. 409 (1897) (holding that defendants’ due process rights were violated when their answer was stricken and their defaults entered for failure to obey a court order that they deposit money in court).¹

¹ Justice White was quite emphatic on the point:

To say that courts have inherent power to deny all right to defend an action, and to render decrees without any hearing whatever, is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to

But when a party withholds evidence, that action provides a basis for inferring that the evidence would defeat its case and due process permits an adverse judgment for withholding the evidence. *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909).² These due process matters are difficult and subtle. See generally 8B Federal Practice & Procedure § 2283 (3d ed. 2010). But at some point, failure to preserve -- no matter how wrongful in terms of a duty to preserve -- may not suffice to support an inference of consciousness of having a weak case. Due process is therefore at least a background consideration.

The foreground rulemaking consideration, however, is more about the reported difficulty in proving prejudice. One feature of the Kuperman memorandum included in the agenda book is the frequency with which courts say that the sanctions decision depends on the unique facts of the case. Those facts can mean that the most severe sanctions are not visited on a very culpable party because substitute evidence could be found, while severe sanctions have been visited on a fairly innocent party (like the plaintiff in the *Silvestri* case cited above after his landlady sold her car before he sued GM for the injuries he suffered when the air bag did not deploy, with the result that his case was dismissed). Will it be possible in a rule to offer a useful calibration of these two factors, or to provide the sorts of assurances that the Duke Panel recommendations include?

* * * * *

strip it of that attribute of justice upon which the exercise of judicial power necessarily depends.

Id. at 414. At least sometimes, this due process limit stays the court's hand in modern litigation. See, e.g., *Phoceene Sous-Marine v. U.s. Phosmarine, Inc.*, 682 F.2d 802 (9th Cir. 1982), in which Lecocq, defendant's principal officer, obtained a continuance of the trial by submitting to the court a false statement about his health, and then tried to persuade a doctor to commit perjury to support his assertions. The district court found Lecocq guilty of willful deceit, and entered default as a sanction. The Court of Appeals reversed under *Hovey v. Elliott* because "Lecocq's deception related not to the merits of the controversy but to a peripheral matter: whether Lecocq was in fact too ill to attend trial on October 10."

² As Justice White explained:

Hovey v. Elliott involved a denial of all right to defend as a mere punishment. This case presents a failure by the defendant to produce what we must assume was material evidence in its possession, and a resulting striking out of an answer and a default. The proceeding here taken may therefore find its sanction in the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth of an answer to be gotten from the suppression or failure to produce the proof ordered, when such proof concerned the rightful decision of the cause. * * * The difference between mere punishment, as illustrated in *Hovey v. Elliott*, and the power exerted in this, is as follows: In the former, due process of law was denied by the refusal to hear. In this, the preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.

Id. at 350-51.

As should be apparent, there is much work to do and much to discuss. The Subcommittee looks forward to insights and advice from the full Committee as it continues its study of these issues.

ELEMENTS OF A PRESERVATION RULE

Introductory Note: The E-Discovery Panel, composed of Judges Scheindlin and Facciola, and Messrs. Allman, Barkett, Garrison, Joseph and Willoughby, holds the consensus view that a rule addressing preservation (spoliation) would be a valuable addition to the Federal Rules of Civil Procedure. All members of the Panel agree that such a rule should apply once an action has been commenced. (Panel members disagree as to whether such a rule can or should apply, along the lines of Rule 27, prior to the commencement of an action.)

The Panel members also agree that the rules in general, and a preservation rule in particular, should treat differently huge cases, with enormous discovery, and all others.

While not every member of the Panel concurs in every word that follows, the Panel members are in general agreement that it would behoove the Advisory Committee on Civil Rules to draft a preservation rule that takes into account the following elements.

1. **Trigger.** The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:
 - a. A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or
 - b. Specific triggers (which could appear in the text or Advisory Committee Note):
 - i. Written request or notice to preserve delivered to that person (perhaps in a prescribed form).
 - ii. Service on, or delivery to, that person of a
 - A. Complaint or other pleading,
 - B. Notice of claim,
 - C. Subpoena, CID or similar instrument.
 - iii. Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.
 - iv. Statutory, regulatory, contractual duty to preserve.
 - v. Steps taken in anticipation of asserting or defending a potential claim (*e.g.*, preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).
2. **Scope.** The rule should specify with as much precision as possible the scope of the duty to preserve, including, *e.g.*:

- a. Subject matter of the information to be preserved.
 - b. Relevant time frame.
 - c. That a person whose duty has been triggered must act reasonably in the circumstances.
 - d. Types of data or tangible things to be preserved.
 - e. Sources on which data are stored or found.
 - f. Specify the form in which the information should be preserved (*e.g.*, native).
 - g. Consider whether to impose presumptive limits on the types of data or sources that must be searched.
 - h. Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.
 - i. Consider whether the duty should be different for parties (or prospective parties) and non-parties.
3. **Duration.** The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.
 4. **Ongoing Duty.** The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.
 5. **Litigation Hold.** The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.
 6. **Work Product.** The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).
 7. **Consequences/Procedures.** The rule should set forth the consequences of failing to fulfill the responsibilities it mandates, and the obligations of the complainant/failing party.
 - a. Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, Fed.R.Civ.P. 37).
 - i. The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)

- ii. **Certain conduct that presumptively satisfies the requisite state of mind should be specified (*e.g.*, failure to issue a litigation hold = negligence or gross negligence)**
 - b. **A model jury instruction for adverse inference or other jury-specific sanctions should be drafted.**
 - c. **Compliance with the rule should insulate a responding party from sanctions for failure to preserve.**
 - d. **The complainant should be obliged to raise the failure with a judicial officer promptly after it has learned of the alleged spoliation and has assessed the prejudice it has suffered as a result.**
 - e. **Identify the elements that the complainant must specify, such as:**
 - i. **The information or tangible things lost.**
 - ii. **Its relevance (specifying the standard (*e.g.*, 401, 26(b)(1), admissibility, discoverability)).**
 - iii. **The prejudice suffered.**
 - f. **The rule should address burden of proof issues.**
8. **Judicial Determination. It should provide access to a judicial officer, following a meet and confer, to**
- a. **Resolve disputes**
 - b. **Apply Rule 26(c)/proportionality**
 - c. **Consider the potential for cost allocation**
 - d. **Impose sanctions (*e.g.*, of the sort provided for by Rule 37).**

Notes of Meeting
Discovery Subcommittee
Advisory Committee on Civil Rules
Dallas, TX
Oct. 3, 2010

The Discovery Subcommittee met in Dallas, TX, on Oct. 3, 2010, to continue its discussion of the preservation and sanctions issues. Those participating were Hon. David Campbell (Chair, Discovery Subcommittee); Hon. Lee Rosenthal (Chair, Standing Committee); Hon. Mark Kravitz (Chair, Advisory Committee), Hon. Paul Grimm, Chilton Varner, Daniel Girard, Anton Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee), Emery Lee (FJC), John Rabiej (A.O.), and Prof. Richard Marcus (Assoc. Reporter, Advisory Committee). Also participating were John Barkette, Esq., and Alan Saltpeter, Esq., and Katharine David (Judge Rosenthal's rules law clerk).

Judge Campbell introduced the meeting as designed to complete preparations for the Subcommittee's materials and report for the November meeting of the full Committee regarding preservation and spoliation. As a general agenda, the thought was to look first at the FJC research plans, then complete discussion of the elements of a preservation rule suggested by the Duke panel and, if there was time, have some discussion of the details raised by Prof. Marcus' Aug. 5 memo on drafting ideas and questions.

FJC Research

Emery Lee had helpfully provided initial results on an "experimental" evaluation of District of Colorado files regarding sanction motions for failure to preserve. The research project was introduced as raising two kinds of issues, one of which seems to resolve itself. The one that resolves itself is whether to use the "event search" or "text search" method, and the conclusion is that the text search method is the preferable one. At least in the District of Colorado, it identified nearly all the cases of interest identified by the event search method, and the event search method identified a large number of "false positives." Dr. Lee will monitor whether the filing methods of other districts affect this conclusion, but for the present the "text search" appears the method to use. No question was raised about this choice.

The other question is whether additional pieces of information could be obtained about the cases identified by the search. Dr. Lee's initial report had provided some details about the D. Colo. cases, such as whether the plaintiff or defendant sought sanctions, whether the case involved failure to preserve electronically stored information or other information, and what sanction, if any, was imposed. The question was whether any other specifics about these cases should be captured by the coders reviewing the files identified.

An initial suggestion was to include a report on whether culpability was found, or deemed important in determining whether to impose sanctions. The response was that one could try to characterize sanctions decisions as looking at least to whether there was a duty to preserve, whether there was prejudice due to failure to preserve, and culpability. But trying to characterize the decisions of judges was proving very difficult, and probably would continue to prove difficult. This discussion prompted the reaction that this sort of question is probably beyond what we were hoping to obtain from the FJC research. The FJC research is intended to assist the Subcommittee in gauging the magnitude of the problem of preservation sanctions, at least as reflected in court records. Questions related to such topics as culpability and prejudice are the sort of thing that Andrea Kuperman's very thorough memo addresses in great detail. We would be asking too much to task the FJC with replicating or expanding upon that research effort.

A different question was whether we could check 2009 cases as well. The reason is the we are trying to get a feeling for the current conditions, and cases from 2007 or 2008 might not give us such a measure. The response was that the year looks to the year of filing, not the year of the order. The coders can keep track of when the motion was filed, which allows some gauging of whether the frequency of motions has been increasing (although only a limited measure due the shortness of the period involved and the limited number of districts to be studied). One participant noted, however, that there are some indications that the proliferation of sanctions motions may be over, or at least abating. "This was in vogue for a while, but by now most people have found that it is not worth pursuing."

Another question was whether there could be some way to determine the percentage of cases in which such motions were filed. Is it .5% or 5%, for example. That is somewhat difficult. What is the right denominator? It should probably exclude categories of cases that the study itself will exclude -- such as prisoner cases and pro se cases.

Duke Panel Factors

It was noted that the Seventh Circuit project is moving toward adopting a draft set of principles, more as a matter of "best practices" or "practice guide" than as a rule. Nonetheless, it would be helpful to the Subcommittee to see that draft once it has been initially completed.

The discussion of the elements of a rule that have been addressed already by the Subcommittee began with a summary of prior discussions: (1) The idea of a preservation rule seems generally desirable to deal with the widespread uncertainty that we have heard is a major problem for many entities. (2) On the question of scope of preservation, the Subcommittee has inclined toward developing a number of factors that would be important, such as the reasonableness of the efforts to identify and preserve responsive material, the proportionality of the preservation effort to the issues and scope in the litigation, the specificity of any demand for preservation, and whether the potential litigants were reasonable in addressing issues of preservation. The discussion could therefore move on to additional elements proposed by the Duke Panel.

Duration of duty

The Duke Panel said that a rule "should specify how long the information or tangible things should be preserved." Ideas that have been suggested include linking the duty to the statute of limitations or statutory directives on how long information of various sorts must be preserved. The basic question is whether a rule can be more precise than saying that preservation should continue as long as the reasonable anticipation of litigation persists; when that possibility no longer seems viable, the duty to preserve ceases.

A starting reaction was that the statute of limitations is not a reasonable guideline. Too often, for example, the beginning of the limitations period depends on the claimant's discovery of the claim or realization that there may be a claim. Another observation was that "these can go on for decades." To attempt a precise definition of the time period will tend toward expansion. An antitrust conspiracy can go on for decades, an oil spill can cause effects for years.

These comments prompted a response that time limits are important. Inevitably stuff disappears with the passage of time. The focus should be on whether the loss of the information suggests consciousness of a weak case. In this world, "everyone's a file keeper." As time goes by, more of them surface; shouldn't there be a limit on the possibility that somebody will say that

you should have known sooner that you would have to preserve the files of these additional people?

A reaction was that this is really a problem of judicial education. It would be extremely difficult to come up with words that would be useful. Another reaction was that it would be desirable to provide a firm assurance that the most severe sanction is not going to be imposed if reasonable actions were taken in good faith.

Ongoing duty

The Duke Panel urged that a rule “should specify whether the duty to preserve extends to information generated after the duty has accrued.”

On the question of whether the duty would be ongoing, initial reactions were “How could it not?” The duty must continue if it applies at the time of the trigger.

This possibility raised the question, however: “As an attorney for a party with a duty of preservation, do I have to keep all my notes?” An immediate response was that “It’s the client’s duty to preserve, not the lawyer’s.” But experienced counsel cautioned that “It’s not shaking out this way.” Another suggested that it would be arguable that a preservation duty can fall on the lawyer. The party may notify its accountant to preserve materials related to the events potentially in litigation; why should the lawyer be exempt?

One way of looking at these issues is in terms of the scope of the obligation. Privileged material is beyond the scope of discovery under Rule 26(b)(1), it was observed. This is “not really discoverable,” so how can there be a duty to preserve it? A response was that there may be a dispute about whether the material legitimately falls under the privilege; should it be acceptable to say -- after a ruling that it is not privileged -- “Sorry, we destroyed it”? There is also the possibility of a conflict between the client and the lawyer, perhaps regarding who gets sanctioned.

A broader concern was suggested by the reminder that many are moving toward “cloud computing.” Should the potential litigant have to notify Google that it should preserve materials for possible future use in litigation?

A challenge to this line of reasoning asked whether there was really any case in which a court has held that work product has been lost in these circumstances. The response was that the court may consider the reliance on the lawyer’s advice regarding preservation to put that advice at issue, and therefore subject to discovery under that “putting in issue” waiver doctrine.

Returning to the question of duration of the preservation duty, the suggestion was made that there should be a duty on a party demanding preservation to set time limits. “Can it be left open-ended?” This suggestion elicited agreement -- specifying duration ought in part to be a burden on the party demanding preservation. Perhaps such a demand could be likened to abuse of process if sufficiently burdensome and unreasonable. Could there be a “tort of wrongful preservation demand”?

A reaction was “Can’t the recipient repel the assault with a demand for specifics? -- Tell me what you are really getting at so I can determine what I need to keep.” Alternatively, couldn’t the responding party say “I will begin retaining and continue for X time, but unless you have filed suit by then I will consider myself free to return to my ordinary practices regarding preservation.”

A practicing lawyer's reaction was that "You have to respond. Then they are silent for two years. And you can't be sure what a complaint will include until you actually receive it."

A rulemaking reaction was that it would be helpful to emphasize cooperation in designing a reasonable preservation regime -- as to duration as well as other things -- either in a rule or a Note. It was also acknowledged that in large measure these topics relate to best practices more than to rules.

Another lawyer observed that these demand letters arrive, and can be very broad. Writing back asking for specifics often brings a response that they've done their job by notifying you, and that you can proceed at your own peril. In a sense, this is a feature of the problem of addressing preservation before there is a lawsuit and a way to get to a judge for resolution.

Work Product protection

The Duke Panel urged that the rule "specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product."

This topic has already arisen in the Subcommittee's prior discussions. An analogous area arises in employment discrimination cases when the employer defendant says that its actions in response to the complaint about harassment were reasonable because it referred to outside counsel to investigate. That is held to put the advice from outside counsel in issue. There is a similar dynamic here -- the client relies on counsel in deciding what has to be preserved.

A reaction to providing protection is that "If it is work product, it will raise costs a lot." The party challenging the adequacy of the preservation will push on this point. Another attorney observed "It's not work product in my cases." Such things as search terms are increasingly being discussed between opposing counsel. Indeed, one of the goals of the 2006 revision of Rule 26(f) was to prompt such discussions, and work product should not be an obstacle to that. But another participant noted that "All you get is the preservation letter." Although that almost certainly followed attorney-client communications and the lawyer's opinion work product analysis of the case, those things will not be on the table.

This discussion prompted a question: Suppose a lawyer makes a Rule 34 demand for "all materials preserved in connection with this litigation"? The response was that this is not a proper request. Much may not actually be relevant. Much may be privileged and beyond discovery. Much may be inaccessible under Rule 26(b)(2)(B). Similarly, attention focused on the hypothetical request "produce all emails regarding preservation." That could be a road map to "where the skeletons are buried," but the customary limit is inquiry into what was actually done. The role of the lawyer in designing that response does not surface further. "People are not interested in discussions, as opposed to facts about what preservation actually occurred."

The question was asked "How then can we define this protection in a rule?" A reaction was "I would not venture into trying to define work product." Another was "That's a tar baby, of the first order." Another was that the only time there is a question about application of work product or attorney-client protection is when collusion charges are made. Another participant confirmed that -- absent a crime-fraud argument -- conversations between counsel and the client are protected by the privilege. "We put up people every day to attest to what we did."

The question was revised: Is it a problem to try to address this overtly in the rule? That might reduce strategic maneuvering on this topic. One reaction that trying to put this in the rule could cause problems. Another was to raise the situation in which, responding to a sanctions motion, the client says "My lawyer told me to preserve X, and I preserved X, so don't sanction."

Doesn't that put the content of the lawyer's advice in issue and result in a waiver? Perhaps, it was suggested, at least a Committee Note could say "Nothing in this rule is intended to affect work-product or attorney-client privilege protections." That would correspond in part with the directive of Rule 26(b)(1) that privileged materials are not within the scope of discovery.

An explanation for the Duke Panel's suggestion was that some might argue that the hold notice itself is privileged. But it was also recognized that all document retention notices or directives end up surfacing if there is a sanctions motion. That being the case, "Why put in a work-product obstacle?" An analogy was offered -- when a Rule 34 response is challenged, the party provides an affidavit on how the documents produced were gathered and the search done. That's because the lawyer advised the client to do the search that way, but there has not been a work-product problem with such reports to the court. Another participant agreed -- "You have an affidavit in every major case."

Ultimately the conclusion was to leave the work-product idea on the table, but it was noted that in the Aug. 5 memorandum about possible rule-amendment language this idea appears in brackets. The brackets should be retained.

Sanctions

The Duke Panel's recommendations about sanctions were introduced as favoring a rule providing considerable specifics about prerequisites for sanctions and specifying a hierarchy of sanctions. The question was asked: Does anyone favor trying to do that?

One initial reaction was that the interaction of culpability and prejudice considerations makes it extremely difficult to imagine how to calibrate a sanction regime that could be inserted into a rule. Another was that Andrea Kuperman's memo repeatedly showed that courts presented with sanctions issues emphasized that they had to make decisions on a case-by-case basis, and that this is a fact-specific inquiry. Another reaction was that in the cases involving severe sanctions in the Kuperman memo there seemed regularly to be a context and background. The severe sanctions resulted from aberrant behavior and reflected a backup of judicial impatience with the contumacious attitude of a party. In reality, these sanctions do not come out of nowhere.

Another observation was that there is nonetheless a whole array of issues that could be addressed by rule. Should a clear and convincing evidence standard apply? Should this be decided by the judge or left (at least partly) to the jury? There is much variety nationwide on these questions. Perhaps a rule would introduce more consistency.

That possibility prompted the suggestion that for case-ending sanctions one could perhaps enumerate a series of considerations and direct that such sanctions can only be entered in a case in which at least two or three of these circumstances have been proved. Another suggestion was for a rule to provide a guiding set of principles -- such as that the goal should be to place the victim in the same position it would have had but for the violation and to deter similar misconduct by others. Another possibility would be to say that the most severe sanctions may never be imposed in the absence of bad faith, or willfulness, or gross negligence, or some other formulation that involves behavior more heinous than simple negligence. Perhaps any such rule could be coupled with an introduction "Absent extraordinary circumstances," the court may not impose case-ending sanctions unless [bad faith/willfulness/gross negligence] is proven [by clear and convincing evidence, perhaps]. The rule might also try to define "gross negligence," for example. In addition, a rule could address the burden of proof, the problem of additional discovery regarding sanctions, and costs. This sort of approach would change the caselaw in some places.

It was noted that there is a due process foundation to such limitations -- a court may not decide a case against a party just because it disobeyed the court's orders. But for a century, it has been recognized that failure to produce evidence satisfies due process limits because it supports an inference that the withheld evidence would demonstrate the weakness of the party's case. See *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909) (rejecting due process objection to adverse inference as to merits of case based on party's disobedience of order for production of evidence, and distinguishing earlier case holding due process to forbid deciding a case against a party just because it disobeyed a court order). As the showing of culpability necessary for sanctions is reduced further and further, however, this due process limitation is increasingly in issue.

One suggestion was that a rule could insist that the least severe sanction be employed to cure the harm done, and also provide an absolute minimum of culpability that must be proved to support case-ending sanctions. That prompted the question whether any other rule is so specific, and Rule 37(e) was offered as an example of such precise calibration. But won't this be worked out in the caselaw, it was asked. The reaction was that these issues very rarely get to the Court of Appeals, and when they do, they usually involve a defendant who looks a lot like Attila the Hun or is a "lying toad."

A different set of problems was raised -- which sanctions should be covered by these minimum showing requirements? In *Pension Committee*, the issue was an adverse inference instruction. Should that be considered tantamount to a case-ending sanction? One suggestion was that it can be "just short of default." But adverse inference instructions vary a good deal from one another.

It was also noted that there should be a concern about prompting parties to take a calculated risk and destroy crucial evidence. We must keep in mind that the moving party's challenge in proving prejudice due to the disappearance of material "can be a nightmare." Putting a stringent standard regarding state of mind on top of the requirement that prejudice be shown may often impose an unfair burden. A response was that, instead of writing off negligence as sufficient in some instances, could a rule effectively limit the court to the least severe sanction necessary to achieve the purposes of the sanction? "This might focus the district courts."

Discussion shifted to whether the Committee could helpfully address the details of an adverse inference instruction. Perhaps a model jury instruction could be drafted. There certainly are a lot of variations currently in use. The consensus, however, was that even though more uniformity in jury instructions might be desirable that is not something a rule can provide.

Discussion shifted to the Duke Panel's suggestion that the rule prescribe actions to satisfy discovery obligations and direct affirmatively that parties who comply with those requirements are insulated from a sanction for failure to preserve. An immediate reaction was that a rule of reason would have to be used, given the variety of circumstances presented by different cases. "A rule of reason is not a safe harbor." But it was suggested that a listing of factors to be considered might be helpful.

Raising sanctions promptly

The Duke Panel urged that the rule should oblige the complaining party to raise the failure to preserve promptly with a judicial officer. Would that be desirable?

A first reaction was that “There’s a lot of gotcha going on. Three years into the case, as trial is approaching, one party can suddenly complain that the other side has not preserved certain information and argue that its proof at trial should be curtailed as a consequence.” This should have been raised in a timely fashion long before. For one thing, if it were raised at the outset, it could have been much easier to cure than if it was a serious problem. Backup tapes that were available then are no longer available three years later. The idea behind amending Rule 26(f) to require discussion of preservation is to get this issue addressed early. This is just a follow-up on that directive.

A response was that it is dubious to force the person to bring a sanctions motion. In general, the discovery rules do not try to force the parties to bother the court immediately in every case. Why should we treat this issue differently? There is always something that somebody failed to preserve. This approach encourages motion practice in a harmful way.

A reaction was that promptness can nonetheless be a factor regarding cooperation, which we have already agreed should be an important consideration. Others agreed that promptness should be a factor for consideration along with others. Another point was that this is not a matter that produces a plaintiff/defendant division on positions. Both sides have an interest in avoiding last-minute claims of spoliation.

Elements to be proved; burden of proof

The Duke Panel recommended that the rule identify the elements that must be proved to support sanctions and specify the burden of proof. This issue has already arisen in the discussion.

An immediate reaction is that this level of specificity seems to suggest that there should be a separate trial on sanctions. It was responded that currently there are some cases specifying a clear and convincing evidence standard and others treating a preponderance as sufficient. But it may be that the caselaw will gradually work itself out and iron out differences.

A different question was raised: Is there reason to think that the “existential angst” we have heard arises about preservation would be affected by rules on this subject? Aren’t these things rather remote, and isn’t it likely that a party worrying about whether to over-preserve would be little comforted by a rule with demanding proof requirements for the party seeking sanctions? Several participants agreed that clients are not focused on these topics and would not likely be much comforted by changes along this line.

Prompt judicial determinations

The Duke Panel urged that a rule should ensure access to a judicial officer to address issues about spoliation. One aspect of this concern relates to the pre-litigation problem when there is no judge to approach because there is no litigation pending.

It seems clear (and understandable) that the bar favors increased access to courts to resolve discovery disputes. The FJC had a program last week on E-Discovery during which that became clear. And the FJC may develop pilot programs on how that could be furthered.

Concluding thoughts

The bottom line for the present appears to be to invite the full Committee to address the issues raised by the Duke Panel and reviewed by the Subcommittee.

Another point made was that rulemaking could reduce the need for courts to rely on “inherent power.” Presently, Rule 37(b) sanctions ordinarily cannot be imposed unless a party is accused of violating a court order. But we do not want to prompt routine entry of preservation orders, so failure to preserve often does not involve any court order; hence the recurrent reliance on inherent power. If a preservation rule were added, and sanctions authorized for violation of that rule, it would be possible for a Committee Note to say that the need (and hence occasion) for resort to inherent power has been reduced. In general, that is something that the rules process strives to accomplish.

A note of caution was added, however -- This approach may also emphasize problems in terms of rulemaking authority. The problem is that emphasizing the free-floating character of the preservation duty (rather than tying it to the court’s inherent power in pending litigation) may seem to “put the cart before the horse.”

A related caution was to worry that such a rule might expect too much of unsophisticated parties. Our focus has been on corporate “repeat litigation players.” Many litigants, particularly plaintiffs, are not repeat players. For them, an early trigger date and broad preservation duties may lead to unjust results. It was therefore suggested that the sophistication of the parties could be an additional factor in calibrating sanctions.

Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 20, 2010

On Sept. 20, 2010, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Lee Rosenthal (Chair, Standing Committee on Rules of Practice and Procedure), Hon. Mark Kravitz (Chair of the Advisory Committee), Hon. Paul Grimm, Daniel Girard, Anton Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee), John Rabiej of the Administrative Office of the U.S. Courts, Andrea Kuperman (Judge Rosenthal's Rules Law Clerk), and Prof. Richard Marcus (Associate Reporter of the Advisory Committee). Chilton Varner was unable to participate.

The conference call began with discussion of ongoing fact-gathering efforts. During the Judicial Conference, Judge Rothstein (Director of the FJC) indicated she was amenable to having Emery Lee undertake a research project in support of the Subcommittee's work. A formal request will be sent to her building on input from Emery on the nature and dimensions of the research effort.

Inquiries to Nick Pace of RAND produced confirmation that the bulk of the expense of E-Discovery is for outside counsel review. But it also seems that preservation is the "500 pound gorilla" of costs. This cost is not so much in individual cases, but more the result of threats of or concerns about impending litigation. Those cases may not be filed or may be resolved without much discovery, but the preservation efforts can produce mounting costs. Putting a rough number of these costs is proving very difficult.

Inquiries directed to law firm IT departments indicated that, all by itself, a litigation hold need not be too expensive. The big expense is the cost of reviewing the material that is retained and later must be examined for responsiveness and/or privilege. This comment prompted the reaction that another problem is that Fed. R. Evid. 502 has not produced unanimity on what one might have hoped would be the attitude courts would bring to reducing costs due to privilege review. Under Rule 502(b), many courts seem quite exacting in their attitude about what is a reasonable effort to avoid disclosure; efforts that look pretty substantial may be found inadequate. Even if the parties agree in advance on the efforts to be undertaken, using Rule 502(e), courts may be prone to find that a party did not do what the 502(e) agreement said it was supposed to do, and that waiver resulted. Although these sorts of problems have not evidently arisen when the court's approval and order is obtained under Rule 502(d), this sort of result tends to undermine the effectiveness of the rule in reducing expenses. Parties may legitimately feel uneasy about relying on Rule 502(b) or 502(e).

A follow-up question was whether the costs we are talking about are better described as costs of review, not costs of preservation. Even with much less preservation, there would still be big costs for reviewing the voluminous material that would remain. The question prompted agreement, but also the point that preservation tends to expand the search and produce a lot more materials to review. It was asked whether computer-based searches can effectively deal with such volumes of data. The response was that in actual litigation the parties may be able to agree on search terms that confine the amount of material elicited. But "if you go back, you've expanded the base of material." That prompted the question whether it would be possible to quantify the extent of increase in costs that results from broad preservation -- is it a 10% or 50% or 300% increase? As of the present, we have no information quantifying that additional cost.

Elements of a Preservation Rule

The discussion turned to the elements of a preservation rule as suggested by the Duke Panel. An introductory way of looking at these issues is to ask whether there should be a preservation rule. Would having one be likely to cause more problems than it solves?

An initial response was "I'm persuaded that it is certainly a good idea." Another participant noted that even though the number of filed motions that seek sanctions or raise other preservation issues is small, this does not prove too much because the big costs are incurred before litigation begins. "Everyone says the same thing. This is not just smoke; there is a real fire here." Another reaction was that we should try to devise a helpful rule, but recognize that this may not prove possible. Yet another skeptic noted that, besides the sheer difficulty of writing a rule, we must be aware that the problems are complex and varied, and that technology is constantly changing. And it is only rarely a problem -- "Do we want to invite litigation about preservation in the 95% of cases in which it causes no problem now?"

One reaction is that, given the breadth and depth of concerns already expressed, we must make the effort. Another is that, even if we are unable to devise a helpful rule on certain points, on others we could be very useful. For example, the divergence among circuits on the culpability that must be proven to justify sanctions could perhaps be ironed out with a rule. At present, those who operate nationwide don't know what standard will be applied to them in federal court until they know which circuit they are in.

Another participant who supported rulemaking suggested that the problem of the trigger may not be the one that is the best focus for rulemaking. Some sort of "reasonable foresight" standard is likely to emerge from the trigger effort, but being more focused on the scope of the obligation to preserve would be very helpful. Most corporations try to obey the law, and they are frustrated when their lawyers tell them it's not possible to determine what they have to do to obey the law.

The circuit splits on culpability were offered as an example of the sort of divergence that can cause headaches for companies. We know that there seems to be a difference between the Second Circuit and the Fifth Circuit, but the Third Circuit and others seem to have followed significantly different paths. These differences relate to both the trigger and the consequences of failure to preserve.

Another participant said that this drafting task should be possible. "If it's simpler, it's better." From the plaintiff side, there has been a temptation to think it's working well. But plaintiff lawyers are beginning to understand that preservation is a two-sided concern. For companies the problems may be less significant than they are for individuals, because more companies are repeat players and most individuals are having their first brush with the legal system when they begin to realize they may have a claim. Having a standard for individuals that is identical to the one for companies might be unfair to the individuals.

The Trigger

The Duke Panel's treatment of the trigger was introduced as including the common law approach -- reasonable anticipation of litigation. Prof. Marcus' Aug. 5 memo offers three separate approaches -- adopting only the general standard as the rule, adopting the general standard with a list of examples of possible stimuli, or adopting the list as the only stimuli that trigger the obligation to preserve (and thereby shutting the door to other possible triggers).

Adopting a comprehensive list would be a challenge, but might provide more certainty if it could be done.

A first reaction was that one concern was the potential for abuse of preservation demand letters by attorneys for possible plaintiffs. For one thing, there is a question whether or when a broad-based problem should be appreciated. Was Toyota supposed to appreciate it had a big problem from the moment it received the first communique about acceleration? Once there is one report, does the trigger (or scope) change if there are many more?

One reaction was that there can be a trigger without any demand letter from a lawyer. When a lawyer does write, what matters a great deal is the level of specificity in the preservation demand. That prompted the observation that unless the parties can agree on what preservation should be done there's no way to get the issue to a judge. A declaratory judgment action is not a reasonable response of the party that receives the demand. And this relates to the trigger.

Devising a general rule is difficult, however, because these cases are very fact-driven. For example, in employment discrimination cases it seems generally assumed that the duty to preserve is triggered by an EEOC complaint. So that is one example of a widely-agreed "rule." But it seems that only about 3% of EEOC complaints lead to suits.

Besides refining the trigger, the problem, in significant part, is to come up with a method to refine overbroad lists. For example, if the plaintiff lawyer demands retention of 50 categories of information and the recipient agrees with 17 of them, what should then be done? Perhaps one answer is that if many cases show up on the horizon that development justifies a longer list. It was observed that in this situation the difficulty for the lawyer is uncertainty.

This discussion prompted the observation that the problem seems to go more to the scope of required preservation than to the trigger. The response was that this is true, but that the trigger is also an important factor.

Another consideration offered was that the plaintiff is not in a position to be very specific about what to preserve in this pre-litigation setting. How should the plaintiff know whose records should be preserved? Plaintiff has a legitimate incentive to include lots of categories. But that raises serious practical problems. For example, suppose that a company that markets a product learns of an issue with the product in California. Should the company preserve records regarding nationwide use of the product, or only California use? This is the kind of problem lawyers (and clients) confront all the time.

Returning to the trigger, the suggestion was that specifying standards in a rule would be useful. The rule could emphasize the importance of specificity, the cooperation of the demanding party, etc. That could foster some incentive for the demanding party to be reasonable.

A reaction was that this approach "reproduces what happens in Rule 26(f) conferences." The two sides present alternate positions about what must be done. Another reaction was that this resembles recent debates about pleading standards that emphasize that before discovery plaintiff has limited information.

Another reaction was that a rule could helpfully emphasize factors -- reasonableness, proportionality, cooperativeness. At least the proportionality provision seems to focus in part on the question whether this instance is an isolated instance or one of many such instances. But it is not clear that a rule at this level of generality would help.

The goal, another asserted, was to “take away the gotcha” element in preservation. “After suit is filed, I can have a dialogue with the other lawyer.” In the real world, you clearly need to preserve. The degree of preservation that should occur is a “rolling problem;” as more and more instances arise it will become clear that this is a mass problem.

Another reaction was that while the ideas are helpful, they seem to fall far short of providing certainty. This drew the thought that even though certainty seems a distant glimmer, we still have to try to move towards it. A list of topics for consideration may materially improve the treatment of these problems. Another participant suggested that the combination of provisions in a rule would indeed prove helpful. In particular, something on the state of mind required for certain sanctions would be a desirable step to uniformity and toward the best possible rule.

As the hour for the meeting was running out, the conclusion was that this discussion should be continued on Oct. 3 in Dallas, and at that time the focus could also turn to Prof. Marcus’s Aug. 5 memo with sketches of possible rule language. It is hoped that Andrea Kuperman’s research report on caselaw will be completed by Oct. 3 as well.

Notes on Conference Call
Discovery Subcommittee
Advisory Committee on Civil Rules
Sept. 3, 2010

On Sept. 3, 2010, the Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call. Participants included Hon. David Campbell (Chair, Discovery Subcommittee), Hon. Lee Rosenthal (Chair, Standing Committee on Rules of Practice and Procedure), Hon. Mark Kravitz (Chair of the Advisory Committee), Hon. Paul Grimm, Daniel Girard, Anton Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee), John Rabiej of the Administrative Office of the U.S. Courts, Andrea Kuperman (Judge Rosenthal's Rules Law Clerk), and Prof. Richard Marcus (Associate Reporter of the Advisory Committee). Chilton Varner was unable to participate.

The discussion began with a review of the various research undertakings that were initially considered during the Subcommittee's July 13 conference call. First was the question of regulation of pre-filing activity in a rule. Professor Marcus had talked to Professor Coquilette regarding insights gained from the Standing Committee's exploration about a decade ago of possible Federal Rules of Attorney Conduct, and received confirmation that delicate and difficult issues are presented. Prof. Coquilette can be a resource as those emerge.

For the present, however, much seems to turn on the nature and content of rules. For example, a rule that strictly limited or focused a judge's decision to impose sanctions in a case pending in federal court based on rule provisions about what is expected in terms of preservation would probably not be particularly vulnerable since it would focus on exercise by a federal court of its jurisdiction at the time the sanctions issue was resolved. On the other hand, a rule purporting to direct preservation activities of entities or individuals who were not and never became parties to a case pending in federal court, indeed to apply in situations in which no litigation was ever filed in any court, seems harder to justify as within the rulemaking power. Within this range, the idea has been to try to devise the best possible rule and then to consider whether there are reasons for concern about rulemaking power to make such a rule effective. Until the rule's contours are better known, the authority issue probably can't be properly evaluated.

A second topic was research on caselaw on sanctions in spoliation situations and a third was research on the variety of statutory, regulatory and other (e.g., from rules of professional responsibility) directives for preservation of information. For both these topics, we have fortunately been able to call on Andrea Kuperman, Judge Rosenthal's rules law clerk, for assistance. The caselaw project has moved forward and may be nearing completion. The statutory/regulatory research will be done by a temporary rules law clerk who will be filling that position during Andrea Kuperman's maternity leave beginning in early October. Although both these projects are moving forward, therefore, it is likely that they will not both be entirely completed before the full Committee's November meeting.

Discussion turned to the question of obtaining a more complete picture of the frequency of preservation problems and of serious sanctions for failure to preserve. All agree that gaining a fuller appreciation of these subjects is a central task. But all agree also that obtaining useful and accurate information is a daunting task.

One source is data-gathering by the Federal Judicial Center's Research Division. Professor Marcus has had several conversations with Emery Lee of the FJC. These discussions have led to an initial possible research plan to gather information about up to 12 districts for the period 2007-09. Two search techniques were explored. One would be an "event" search, looking for the frequency of certain recorded events -- e.g., motions for sanctions -- in court files.

A better choice seemed to be a text search, seeking to identify filings that use certain terms in hopes that all the cases we would want to examine would be turned up by this search. The search would be of docket entries, and the initial proposed search would be use the following search terms:

spoliation, or spoliation, or destruction of evidence, or preservation order, or preservation and violation in the same docket entry, or 37(e), or 37e, or adverse inference

This search method would hopefully turn up a manageable number of cases, and coders would then have to examine the files in these cases to determine whether they actually presented the features in which we are interested -- a request for sanctions or other issue involving claimed destruction or spoliation of information.

Such an FJC search would provide more comprehensive information than has to date been presented by other studies, although the information from those studies certainly will assist the Subcommittee as well. And it must be recognized that such a study cannot answer all the questions that bear on the Subcommittee's work. For one thing, to the extent fears of draconian sanctions have prompted wasteful preservation efforts, studies of court filings will not provide any information about those out-of-court activities. For another, the study could not examine more than a small proportion of all judicial districts, so the question what had happened in the others would remain open. Furthermore, this may well be a fast-moving target; learning what happened in these districts in 2007-09 might not tell us a great deal about what might be happening in these districts in the next three to five years or after that.

Given the importance of making the best possible judgment about the extent of these problems, it seems a given that obtaining the assistance of the FJC would be desirable. Because it would be unfortunate to conclude later that the search left out terms that should have been included, it would be desirable for all to consider any terms that could usefully be added to the ones mentioned above. Meanwhile, Judges Rosenthal and Kravitz will make a request to the FJC for its assistance.

Discussion then continued on the question of the extent and nature of the preservation concern. One way of looking at the current situation is that there is "collective angst" about the uncertainty and risk associated with failure to preserve. This attitude appears fairly pervasive and probably fuels much of the urgency of support for rulemaking. It probably also is causing considerable and expensive over-preservation. Many have heard that the safest attitude is "Let's choose the strictest standard used anywhere and comply with that."

The Sedona Conference has had some discussion of these issues, and seems scheduled to continue to pursue them (possibly during October). One idea that it is considering would be some sort of collective survey of a broad array of actors in the field in order to gather more useful information than has been collected thus far. It appears that such an effort is going forward without regard to what the Subcommittee does, and also that the Subcommittee cannot in some sense "partner" in the effort. Whether there might be some value to offering reactions to the plans for the survey is difficult to determine as an abstract matter. But in any event, the results of this survey, if it is done, won't be available for at least a year.

This discussion raised the question of costs -- What are they really? For the practicing lawyer dealing with clients who receive demands from counsel for prospective plaintiffs that a litigation hold be imposed, it is recurrent that the client will object that "This is expensive." But it is not easy to be certain how expensive the demanded preservation would be.

One reaction was that RAND has been working on exactly that question, but as of the time of the Duke Conference it had not completed its project. Contacting Nick Pace to determine what it was able to gather is one thing that would help.

At the same time, it is a reality that information on such subjects tends to be very secret and sensitive. For example, during the 1997 Boston College discovery conference, when there was extensive discussion of the costs of Rule 34 discovery (in the pre E-Discovery world), a number of corporate counsel asserted that the FJC survey done for that conference had not adequately captured the "true" cost because it was limited to outside counsel. As a result, even though outside counsel often regarded the cost of discovery as reasonable, what the Committee needed to know was what the additional cost for the client usually turned out to be. The Product Liability Advisory Council undertook to develop such information, but eventually reported that it could not design a method that satisfied its members' concerns about confidentiality; the Committee had to go forward without this cost information. It may be that the cost information currently of interest would be similarly sensitive.

An additional complicating factor depends on the variety of statutes, regulations and the like that mandate the preservation of various things. The research we are hoping to have on that subject has not yet been done, but the fact we know already that there are lots such preservation directives demonstrates that determining the cost of all preservation is not the way for our inquiry to go. One might say that the only concern for us would be the extent to which litigation-anticipation preservation exceeds the "baseline" preservation that must occur due to these various directives even in the absence of litigation.

Another point was raised that contributes to the "angst" that seems to be prevalent now -- the inability to get a judicial direction about preservation in the absence of a pending litigation. In the pre-litigation setting (indeed, when no litigation ever occurs) there is no way to get a ruling from a judge on whether preservation demands are overreaching. It would be desirable to give thought to ways to permit some application to the court in advance of litigation to obtain such direction when parties are acting unreasonably.

This observation prompted the reaction that this is a problem causing the greatest concern among clients: What do I tell the client about responding to the unduly broad preservation demand that may accompany a threat of suit? Is there any way to impose an obligation on the lawyer making that demand to act reasonably?

One reaction to this discussion was that it shows why information about motions filed in court will not tell us all we need to know about the problem we are trying to solve. And the difficulty of the pre-litigation demand is that it is the area in which there is the greatest uncertainty. With a pending lawsuit, there is always the backstop of a judge who can rule. In addition, to the extent there are significant variations among legal rules in different places, at least the pertinent court is then known.

One idea for dealing with this problem is some sort of procedure authorizing an application to the court for a ruling on preservation obligations -- something like Rule 27 on pre-litigation discovery -- contingent on a showing that the party reasonably apprehends being involved in a federal-court suit but is unable at present to precipitate the filing of that suit.

But a key question that remains difficult to answer is whether this set of concerns really should be regarded as another urban myth. For example, manufacturing companies might be challenged to show how significant the problem really is. Is this a matter of preservation costs of \$5,000 per month or \$500,000 per month? \$5,000 per month is more than nothing, but different

by an order of magnitude from \$500,000 per month. We must be careful about encouraging litigation about preservation before there is actually real litigation going on. Is this a real problem we are talking about solving with this extraordinary procedure?

Related questions were suggested: One is how systems are designed. They must be designed to preserve certain information, both for the internal purposes of the organizations that have the systems and to comply with existing preservation requirements that apply to the operations of the organization without regard to litigation preservation. Is it possible that some designs make modification to add litigation-preservation much easier than other designs? A second is to assess the prospects that our rulemaking will actually cure any problems that result from the current handling of litigation-preservation problems. Most lawsuits are in state courts, not federal courts. Why should federal rules make a big dent in the overly aggressive preparation we are told that the current angst produces? Won't the fear of extreme state-court sanctions still fuel over-preservation, even if we devise a "perfect" rule for federal courts?

On that subject, it was noted that many law firms have practice groups that specialize in working with clients on preservation both before and after litigation begins. Moreover, it seems that there is considerable inconsistency among private companies about how to design and implement a litigation hold. In general, larger companies are much more likely to have a "fire drill" for this purpose, and smaller ones much more likely to be under-prepared.

And another set of questions has to do with who is subject to the preservation duty. For example, if the potential party has outside lawyers, do they have to begin preserving materials as well? Who else might be within the net of broad preservation obligations?

Another question that arose was whether these issues are limited to defendants or organizational litigants. How about individual litigants? How about plaintiffs? They probably have a lot of computer-based information as well. This elicited the response that the problems being discussed are real. On the defense side, to begin with, there does seem to be a fair amount of over-preservation; even a plaintiff lawyer may be surprised at what the defendant says it is doing in that regard.

Beyond that, the Rule 26(f) conference may encourage cooperation in a good way to guard legitimate expectations and also guard against over-preservation. But there is a problem of the culture of secrecy; too often lawyers are unwilling to talk frankly in the way that is necessary for effective cooperation.

The discussion of over-preservation should not obscure a very different problem, however: It is very difficult to prove prejudice even in instances where the loss of the information in question reeks of wrongdoing. "Showing prejudice without the documents is very hard." So we must be careful not to insulate against sanctions so fully that even the worst wrongdoers effectively go scott free.

Regarding the individual plaintiff, a preservation standard that emphasizes too strongly the realization that there is a possible legal claim as a trigger for preservation duties could cause great problems. The reality is that individual plaintiffs destroy documents all the time, not in a way that we would regard as wrongdoing but at a time we might regard as after the trigger has been pulled. For example, suppose an investor calls the SEC to complain about being bilked and makes notes of the call. Or suppose a plaintiff who took a drug begins making calls and taking notes regarding online research about the drug's effects. That plaintiff may very well throw the notes away. Even though it would be relatively easy to regard this action as having occurred after the time when the plaintiff realized there was a possible claim, treating that as the trigger

creating a duty to preserve will often be overbearing. It may be different after plaintiff consults counsel, but even then some lag time may occur. Keying on the trigger for the running of the statute of limitations, for example, may put the duty to preserve too early for many potential plaintiffs.

One reaction was that we can handle this concern significantly by calibrating the state of mind necessary for serious sanctions. The plaintiff who has realized she may have a claim but nevertheless throws away notes is not exhibiting bad faith, and a rule that make bad faith a prerequisite for serious sanctions could provide protection.

The conclusion of the discussion was that it had explored fundamental and important issues, and that further discussion was needed. Using the night before the Dallas Rule 45 mini-conference seemed a valuable idea, and arrangements will be made for that. But a further conference call before that event would likely make the Dallas discussion more productive. A further conference call was therefore scheduled for Monday, Sept. 20, at 7:00 a.m. Pacific time.

Notes of Conference Call
July 13, 2010
Discovery Subcommittee
Advisory Committee on Civil Rules

On July 13, 2010, 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. Paul Grimm, Chilton Varner, Daniel Girard, Anton Valukas, Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Associate Reporter of the Advisory Committee).

The conference call was introduced as focusing on approaches to the problems of preservation and sanctions in relation to electronically stored information. As a beginning matter, the goal was to agree on tasks that would need to be performed.

The background is the widespread concern with excessive preservation undertakings produced by uncertainty about what preservation is required and, perhaps, unduly severe sanctions in some cases. There is no doubt, however, that addressing these concerns raises issues of great complexity and difficulty. We will have to look carefully at the many issues involved. As that examination matures, it may be that a mini-conference will be in order.

The E-Discovery Panel at the Duke Conference was made up of leading figures with extraordinarily broad experience in working with E-Discovery. That this group came together on a proposal to pursue a rulemaking solution to preservation problems must be regarded as highly significant. The Subcommittee is therefore beginning to work on the subject even before the full Committee's Fall meeting.

For purposes of getting started, it seems useful to identify some legal issues that will require investigation and develop a working hypothesis on how (and when) they may bear on our work.

(1) Application to pre-litigation activity: A first legal issue is whether -- or to what extent -- a Civil Rule could address or regulate pre-litigation activity. From the discussion at Duke and more generally, it seems that a rule dealing with preservation may fail to accomplish much that is important if it did not apply to pre-litigation activity. For purposes of discussing what would be the best rule, therefore, it seems appropriate to assume that a rule can be devised that applies to pre-litigation conduct while that question is pursued through independent research. Put differently, if we cannot devise a rule that seems to us helpful without regard to this issue, that is telling, but if we can devise such a rule it may be that we could approach Congress to enact it were we to conclude that our rulemaking power is not equal to the task.

At the same time, it would be important to do legal research on the question how or whether a Civil Rule could regulate pre-filing behavior. The E-Discovery Panel at Duke spent a good deal of time and energy discussing this question in preparing for the conference and eventually concluded that a way could be found to achieve this result.

One idea would be to preface a rule with something like "Unless state or federal law provides otherwise . . ." Another point was that existing rules operate in various ways before litigation begins. Rule 27 by its terms invites an application to federal court for pre-litigation discovery. Rule 11 by its terms makes consequences after the litigation is commenced depend on pre-litigation preparations. Moreover, to the extent a rule were limited to regulating sanctions imposed after litigation is commenced, its focus in part on activity occurring before litigation began might not be an obstacle to effective rulemaking.

It was noted that the basic thrust of assuming the problem can be solved is the right way to go. It is better to see if we can devise the "maximum rule" before settling for half-measures. It was resolved that for purposes of discussion the Subcommittee would focus on the "whole loaf," while at the same time pursuing research on how and whether such a rule could be adopted through the Rules Enabling Act process.

(2) Investigating other sources of law on preservation: We are generally aware that a great deal of law exists on preservation of various types of materials -- Sarbanes-Oxley, EEOC requirements, SEC requirements, etc. But it will be important to have a more complete grasp of what those provisions are and what they say. Although the results of this research might not affect the form of any rule we might develop, finding out what exists seems an essential starting point.

It was cautioned that there may be a "gazillion regulations on preservation" contained in federal statutes and regulations, codes of professional responsibility, state statutes and regulations, local enactments and possibly other sources. Trying to find them all could occupy too much time and produce too much information. Ultimately what we really need is a good feel for the dimensions and nature of what is out there, not necessarily a comprehensive listing.

This thought prompted the observation that in all likelihood the Subcommittee would not favor superseding any of these provisions. The Supersession Clause probably could be used to nullify such rules, but it is not clear that anyone is urging that it be so used. To the contrary, the concern seems to be that the threat of litigation sanctions alone is the problem bothering those who worry about preservation. Having to comply with other preservation obligations will probably not cause heartburn, and confronting adverse consequences outside litigation for failure to preserve (in disciplinary or administration proceedings) is not the main concern to be addressed.

(3) Determining how widespread the preservation/sanctions problem has become: There seems little doubt that a significant number of litigants in the federal courts are in fact quite concerned about the preservation/sanctions problem. But it seems less clear that this concern is warranted by the frequency of actual imposition of severe or serious sanctions for failure to preserve.

One resource on this score is the Willoughby & Jones paper from the Duke Conference. It catalogued over 400 sanctions cases, finding that the number of cases involving sanctions increased in recent years. Is that the entire universe of cases? Is that a number that suggests a need for rulemaking?

One reaction was that actually some experienced judges have not found that sanctions issues arise frequently. It may be that such cases are concentrated in a few districts (possibly including the S.D.N.Y.) and not encountered much elsewhere.

Another reaction was that even if there are no additional sanctions cases there could nonetheless be a real problem. One aspect of the problem is that people may routinely be engaged in very expensive preservation efforts because they don't know what they will later be found to have to do if the matter comes before a judge. The fact that the preservation issue never does come before a judge does not mean that the current situation is cost-free. It could even be that the most important cost is the one that can't be measured by examining court dockets.

A further reaction was that many potential litigants are in fact engaging in too much preservation due to uncertainty. That is one of the reasons why there is such a push for clarity; people fervently want to know what they have to do.

It could be that gathering this sort of information might tend to ease the anxiety that seems to be out there. For one thing, if we knew that the 400+ cases found by Willoughby & Jones were all the cases, that might reassure some because they constitute an extremely small proportion of all civil filings. Beyond that, it may be that individual examination of those cases will show that most or all of them involve pretty egregious misbehavior. If so, that could reassure those who believe they face a high risk of serious sanctions for minor slip-ups, leading them to engage in wasteful preservation. If the problem is “fear of the unknown,” learning more about the unknown might be a partial antidote.

But it was cautioned that accurate figures on past sanctions activity may not tell us as much as we would like about future sanctions activity. That possibility seems particularly significant now due to the possible effects of Judge Scheindlin’s Pension Committee decision in January. At least in the “webinar circuit,” that decision has gotten a huge amount of play, and it is being taken by some to mean that any failure to issue a written litigation hold (and perhaps for lawyers to follow up on the hold to make sure it is enforced) constitutes “gross negligence.” Judge Rosenthal’s Rimkus decision in February moderated some of that concern.

At the same time, it seems that there really are very few cases of severe sanctions. Even in Pension Committee the sanctions were not extraordinary severe. And in Rimkus, which involved what almost certainly was worse behavior, the sanctions actually imposed were hardly draconian.

It seems that the problem is largely one of perceptions, particularly acute among institutional litigants. To some extent, that concern may be fueled by vendors who hope to generate business with products promoted as enabling worried potential litigants to avoid sanctions.

This observation drew agreement. Although there certainly have been cases of very serious sanctions, the actual experience seems to be that serious sanctions are few and far between. It could be that adopting a rule could actually increase sanctions requests and, perhaps for that reason, the frequency of imposition of sanctions. Creating a rule can elevate the profile of an issue that would otherwise remain quiet.

Another participant had the same reaction. In Rule 26(f) meet-and-confer sessions, it is very rare for anyone to have any problem with E-Discovery. Despite invitations to explore any problems, the usual reaction is “We know what we have to do, and we have it under control.” There seems little urgency out there among many counsel. Another point is that a recent legal newspaper article referred to a Gibson Dunn survey. Perhaps that would supplement the Willoughby and Jones listing.

Besides looking to listings that already exist, it was suggested that the FJC be asked for help on determining the frequency of sanctions motions. Perhaps Ken Withers at the Sedona Conference could be asked for the information available to Sedona.

(4) Current legal standards regarding preservation: The Duke Panel urged that a rule be adopted to address a variety of issues -- trigger for preservation, time period for preservation, types of information that must be preserved, etc. It seems likely that the various bodies of law that already exist on preservation (see item (1) above) include specifics on these topics. If we are

to try to develop a national rule addressing these things, it would be very helpful to know what is already prescribed elsewhere. This again would be legal research.

An immediate reaction was that this research is vital. Judge Rosenthal captured some of this in her Rimkus decision, particularly on the varying standards for what mental state is required to support severe sanctions.

In some circuits it is oddly true that one can get a dismissal in some cases for simple negligent failure to preserve, but not even a binding instruction in others unless there is a high degree of culpability. One explanation for these seeming divergences is that the centrality of the missing information may vary greatly. In one case, for example, a plaintiff who sued claiming that an airbag did not operate properly suffered dismissal for his seemingly negligent failure to preserve the offending airbag, while other cases involving clearly intentional destruction of evidence resulted in considerably milder sanctions. Probably the difference has to do with whether it can be said with confidence that the lack of the lost evidence really hampers the other side's litigation preparation. Without the airbag, the manufacturer was entirely out of luck. Nonetheless, the comparison raises questions about how one should calibrate the culpability standard.

Besides the above four topics, it was asked whether there were any other overarching topics that might productively be discussed.

One reaction was that it might be useful to try to articulate the policy objectives being sought by this effort. One might be to minimize the number and burden of collateral proceedings. It was noted that Judge Scheindlin mentioned in her Pension Committee decision that the sanctions matter had required some 300 hours of work from her and her law clerks. Having sanctions decisions focus on state of mind in particular seemed an invitation to large expenditures of energy on matters outside the perimeter of the basic dispute. A recent case involving a hotly contested preservation issue involved a huge amount of activity on points that were peripheral at best to the resolution of the case. Meanwhile, the case itself got stale because the litigants were fighting about preservation and sanctions. This is not an outcome to be promoted.

Another participant echoed these concerns. It did not seem that there was a groundswell in favor of a rule. And having a rule could, by itself, cause exactly this kind of litigation activity. We must proceed carefully. If a rule is put in place, people will use it to achieve advantage.

Another participant pursued the point. Couldn't this affect situations in which there is never any litigation? Suppose, for example, that Company A and Company B are negotiating something. Could preservation become a lever in the negotiation? Suppose Company A sends a letter to Company B saying that due to the way the negotiations are going Company A is contemplating litigation, and therefore demanding that Company B preserve all information about the subject of the negotiations. Suppose that Company B then has to get a lawyer involved and has to start gathering the materials involved. Couldn't this be an effective tactic for Company A? Could there be a tort of "wrongful invocation of preservation"?

This drew the response that the seeming current diversity of attitudes on these topics nationwide itself exacts a significant toll on potential and actual litigants. Why should a company that operates nationally have to keep track of the variant rules on these topics in the Second, Fourth, Fifth, and Eighth Circuits?

It was cautioned, however, that uniformity is sometimes difficult to achieve even with a rule. For example, the recent experience with Evidence Rule 502, which was hoped to produce national uniformity, in fact has not done so yet. “The best laid plans take time.” Right now, there are significant variations in rulings on what Rule 502 covers.

A reaction was that even if there is not immediate uniformity, there may be dispersion around a higher and better standard, creating less disparity of view, and in time relative uniformity.

But, asked another, is this a procedural rule? This sounds like substantive law. It was noted that the issues raised by this topic seem different from the typical civil procedure concerns, usually looking to issues of fairness and efficiency in the resolution of matters in court. Particularly with regard to pre-litigation conduct, it seems that the basic focus is on events occurring outside court.

That drew the response that rule provisions about preservation that are linked to sanctions provisions seem clearly within the authority of the rulemakers. This might be called “procedural obligations” that can have procedural consequences. One of the features of those obligations, or criteria for selection of the consequences, might be the state of mind of the party accused of violating the rule. In Rule 37(e), for example, the focus is on sanctions “under these rules,” but the fact this rule provision exists has supplanted the use of other sources of possible authority.

To recap, an effort was made to determine where to look for assistance on the various topics identified above:

- (1) The problem of pre-litigation conduct: Professor Marcus would address this issue, in part in the expectation that it will be an ingredient in any drafting effort. One early objective will be to talk to Prof. Coquilette, Reporter of the Standing Committee, about his experience dealing with similar issues in relation to the project on Federal Rules of Attorney Conduct.
- (2) Identifying sources of preservation requirements outside the Civil Rules: We will ask whether Andrea Kuperman can address this topic.
- (3) Determining how widespread the actual problem of sanctions for failure to preserve is: We will approach both the Sedona Conference and FJC for reactions to these issues. Judge Kravitz will write Emery Lee of the FJC and Judge Grimm will contact Ken Withers of Sedona.
- (4) Identifying the common law standards on preservation issues: We will also ask whether Andrea Kuperman can address this topic. It may be that the necessary research is closely related to topic (2) above.

Finally, the question of beginning to try to draft some rule language arose. It was clear that the Subcommittee had not reached a point of any serious consideration of any possible rule language. Indeed, it had not yet even begun discussing the list of topics suggested by the Duke Conference panel. Nonetheless, having some idea what language might look like is very useful in focusing the mind on what might be done by rule changes. More general discussion often does not do the job as well. Accordingly, Professor Marcus is to try to put together something in time for the next conference call.

Next conference call: The goal is to convene a further conference call in mid-August during which the Subcommittee can discuss the topics listed by the Duke Conference E-

Discovery Panel. It may be that there will be an initial mock-up of some ideas about rule language to accompany that discussion.

MEMORANDUM

DATE: September 23, 2010

TO: Discovery Subcommittee

FROM: Andrea Kuperman

CC: Judge Mark Kravitz
Judge Lee H. Rosenthal
Professor Edward Cooper
John Rabiej

SUBJECT: Case Law on Elements of a Potential Preservation Rule

This memorandum summarizes research on case law addressing potential elements of a civil rule on preservation of evidence. During the May 2010 Conference on Civil Litigation, the e-discovery panel suggested that the Civil Rules Advisory Committee examine the possibility of adopting a rule on preservation/spoliation. The panel submitted a proposal containing elements of a potential preservation rule and suggested that the Committee consider the proposal in its examination of the possibility of adopting a preservation rule. Following the 2010 Conference, the Discovery Subcommittee began examining the possibility of adopting a rule on preservation and determined that it would be useful to have information on how courts have handled various preservation and spoliation issues. The Discovery Subcommittee asked me to research the case law on each of the elements in the e-discovery panel's proposal. This memo summarizes a representative sampling of case law regarding each of the elements.¹ Each element suggested by the e-discovery

¹ The elements suggested by the e-discovery panel encompass a broad range of issues considered by courts in evaluating preservation/spoliation issues. Because preservation involves discovery conduct, many of the issues have been examined in much more detail at the district court level than at the appellate level. Limiting the research to the appellate level likely would have failed to capture some of the more substantial discussions of these issues. However, expanding the research to include district court cases in every circuit on each of the various elements suggested by the e-discovery panel would encompass virtually every decision on preservation or spoliation in the country and would have resulted in thousands of results. To narrow the results to a useful

panel is set out below, followed by the case law on that particular element.

and manageable set of cases, I used key search terms in Westlaw for each of the proposed elements, searching in a database that covers all federal court decisions, including appellate, district, and bankruptcy cases. From those results, I examined the cases that seemed to have the most significant discussions of the key issues. In short, this memo covers a representative sample of the cases addressing spoliation rather than an exhaustive summary of all of the case law in every circuit for every proposed element. If the Subcommittee desires more research into any of the proposed elements, I can continue to collect cases.

TABLE OF CONTENTS

I.	Trigger.....	5
	A. E-Discovery Panel’s Proposal.....	5
	B. Case Law on the Trigger Element.....	5
II.	Scope.....	17
	A. E-Discovery Panel’s Proposal.....	17
	B. Case Law on the Scope Element.....	18
III.	Duration.....	30
	A. E-Discovery Panel’s Proposal.....	30
	B. Case Law on the Duration Element.....	30
IV.	Ongoing Duty.....	31
	A. E-Discovery Panel’s Proposal.....	31
	B. Case Law on the Ongoing Duty Element.....	31
V.	Litigation Hold.....	32
	A. E-Discovery Panel’s Proposal.....	32
	B. Case Law on the Litigation Hold Element.....	32
VI.	Work Product.....	38
	A. E-Discovery Panel’s Proposal.....	38
	B. Case Law on the Work Product Element.....	38
VII.	Consequences/Procedures.....	38
	A. E-Discovery Panel’s Proposal.....	38
	B. Case Law on the Consequences/Procedures Element.....	39
	1. Authority/Purpose.....	39
	2. Case-by-Case Determination.....	44
	3. Dismissal or Default Judgment.....	46
	4. Exclusion of Evidence.....	53
	5. Adverse Inference.....	54
	6. Monetary Sanctions.....	56
	7. State of Mind.....	58
	8. Elements the Complainant Must Prove.....	77
	a. Generally.....	77
	b. Culpable State of Mind.....	82
	c. Relevance and Prejudice.....	82
	9. Burden of Proof.....	93
	10. Agency Liability.....	96
	11. Safe Harbor.....	96

12.	Timeliness.....	97
13.	Choice of Law.	99
VIII.	Judicial Determination.	100
A.	E-Discovery Panel’s Proposal.....	100
B.	Case Law on the Judicial Determination Element.	100
IX.	Conclusion.....	104

I. Trigger

A. E-Discovery Panel's Proposal

The rule should specify the point in time when the obligation to preserve information, including electronically stored information, accrues. Potential triggers:

- a. A general trigger restating the common law (pending or reasonably foreseeable litigation) standard and/or
- b. Specific triggers (which could appear in the text or Advisory Committee Note):
 - i. Written request or notice to preserve delivered to that person (perhaps in a prescribed form).
 - ii. Service on, or delivery to, that person of a
 - A. Complaint or other pleading,
 - B. Notice of claim,
 - C. Subpoena, CID or similar instrument.
 - iii. Actual notice of complaint or other pleading, or a notice of claim, asserting a claim against, or defense involving that person or an affiliate of that person.
 - iv. Statutory, regulatory, contractual duty to preserve.
 - v. Steps taken in anticipation of asserting or defending a potential claim (*e.g.*, preparation of incident report, hiring expert, drafting/filing claim with regulator, drafting/sending prelitigation notice, drafting complaint, hiring counsel, destructive testing).

B. Case Law on the Trigger Element

Nearly all cases addressing preservation of evidence touch on when the duty to preserve evidence attaches and there is not much variation between the circuits on the general common law standard. The courts generally require that a party begin preservation efforts once it knows or should know that that evidence is likely to be relevant to pending or future litigation. *See, e.g., Consol.*

Edison Co. of N.Y., Inc. v. United States, 90 Fed. Cl. 228, 256–57 (2009) (“The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” (quotation marks omitted) (quoting *Dong Ah Tire & Rubber Co. v. Glasforms, Inc.*, No. 06-3359, 2008 WL 4298331, at *3 (N.D. Cal. Sept. 19, 2008))); *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57, 60 (2003) (“[T]he case law imposes a ‘duty to preserve material evidence . . . not only during litigation but also . . . [during] that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.’ A party’s obligation to preserve evidence that may be relevant to litigation is triggered once the party has notice that litigation may occur.” (second alteration and omissions in original) (internal citation omitted)); *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2010 WL 3530097, at *22–23 (D. Md. Sept. 9, 2010) (noting that the duty to preserve “‘may arise from statutes, regulations, ethical rules, court orders, or the common law . . . , a contract, or another special circumstance,’” and that “[t]he common law imposes the obligation to preserve evidence from the moment that litigation is reasonably anticipated.” (citations omitted)); *O’Brien v. Ed Donnelly Enters., Inc.*, No. 2:04-cv-85, 2010 WL 1741352, at *3 (S.D. Ohio Apr. 29, 2010) (“The duty to preserve evidence in civil litigation is triggered when a party either has notice or ‘should have known that the evidence may be relevant to future litigation.’” (quoting *John B. v. Goetz*, 531 F.3d 448, 459 (6th Cir. 2008))); *Crown Castle USA Inc. v. Fred A. Nudd Corp.*, No. 05-CV-6163T, 2010 WL 1286366, at *9 (W.D.N.Y. Mar. 31, 2010) (“A party is obligated to preserve evidence when it has ‘notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.’” (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d Cir. 2001))); *Rimkus Consulting*

Group, Inc. v. Cammarata, 688 F. Supp. 2d 598, 612 (S.D. Tex. 2010) (“Generally, the duty to preserve arises when a party “has notice that the evidence is relevant to litigation or . . . should have known that the evidence may be relevant to future litigation.”” (omission in original) (citations omitted)); *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456, 465 (S.D.N.Y. 2010) (“Spoliation refers to the destruction or material alteration of evidence or to the failure to preserve property for another’s use as evidence *in pending or reasonably foreseeable litigation.*” (emphasis added));² *id.* at 466 (“It is well established that the duty to preserve evidence arises when a party reasonably anticipates litigation.” (footnote omitted)); *In re Nat’l Century Fin. Enters., Inc. Fin. Inv. Litig.*, No. 2:03-md-1565, 2009 WL 2169174, at *3 (S.D. Ohio Jul. 16, 2009) (“The obligation to preserve evidence arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” (citing *Zubulake v. UBS Warburg, LLC (Zubulake IV)*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003))); *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 509 (D. Md. 2009) (“[T]he duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.” (quoting *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001))); *Asher Assocs., LLC v. Baker Hughes Oilfield Operations, Inc.*, No. 07-cv-01379-WYD-CBS, 2009 WL 1328483, at *7 (D. Colo. May 12, 2009) (“In most cases, the duty to preserve evidence is triggered by the filing of a lawsuit. However, the obligation to preserve evidence may arise even earlier if a party has notice that future litigation is likely.” (citations omitted)); *Marceau*

² The *Pension Committee* court also recognized that “[a] plaintiff’s duty is more often triggered before litigation commences, in large part because plaintiffs control the timing of litigation.” 685 F. Supp. 2d at 466 (footnote omitted).

v. Int'l Bhd. of Elec. Workers, 618 F. Supp. 2d 1127, 1174 (D. Ariz. 2009) (“‘The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.’” (quoting *World Courier v. Barone*, No. C 06-3072 THE, 2007 WL 1119196, at *1 (N.D. Cal. 2007))); *Micron Tech., Inc. v. Rambus, Inc.*, 255 F.R.D. 135, 148 (D. Del. 2009) (“A duty to preserve evidence arises when there is knowledge of a potential claim. A potential claim is generally deemed cognizable in this regard when litigation is pending or imminent, or when there is a reasonable belief that litigation is foreseeable. For instance, a duty to preserve evidence can arise many years before litigation commences; imminency is sufficient to create the duty, but it is not a requirement.” (internal citation and other citations omitted)); *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008) (“[T]his obligation [to preserve evidence] predates the filing of the complaint and arises once litigation is reasonably anticipated.”); *Nucor Corp. v. Bell*, 251 F.R.D. 191, 194 (D.S.C. 2008) (“A party has a duty to preserve evidence during litigation and at any time ‘before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation.’” (quoting *Silvestri*, 271 F.3d at 591)); *Bd. of Regents of Univ. of Neb. v. BASF Corp.*, No. 4:04CV3356, 2007 WL 3342423, at *4 (D. Neb. Nov. 5, 2007) (“The obligation to preserve evidence begins when a party knows or should have known that the evidence is relevant to future or current litigation.” (citations omitted)); *Cache La Poudre Feeds, LLC v. Land O’Lakes, Inc.*, 244 F.R.D. 614, 621 (D. Colo. 2007) (“In most cases, the duty to preserve is triggered by the filing of a lawsuit. However, the obligation to preserve evidence may arise even earlier if a party has notice that future litigation is likely.” (citations omitted)); *Consol. Aluminum Corp. v. Alcoa, Inc.*, 244 F.R.D. 335, 339 (M.D. La. Jul. 19, 2006) (“According to *Zubulake IV*, spoliation is ‘the destruction or

significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation.” (quoting *Zubulake IV*, 220 F.R.D. at 216);³ *id.* (The duty to preserve “arises when the party has notice that the evidence is relevant to litigation or when a party should have known that the evidence may be relevant to future litigation.” (quoting *Zubulake IV*, 220 F.R.D. at 216)); *id.* at 342 (“Alcoa’s duty to preserve was triggered, not when it had actual knowledge of this litigation and its scope, but instead when it had constructive knowledge or should have known that certain information may be relevant to future litigation.”); *Danis v. USN Commc’ns, Inc.*, No. 98 C 7482, 2000 WL 1694325, at *33 (N.D. Ill. Oct. 23, 2000) (“[T]he case law establishes that a discovery request is not necessary to trigger this duty [to preserve]. ‘A party clearly is on notice of [t]he relevance of evidence once it receives a discovery request. However, the complaint itself may also alert a party that certain information is relevant and likely to be sought in discovery.’” (third alteration in original) (citations omitted)); *McGinnity v. Metro-North Commuter R.R.*, 183 F.R.D. 58, 60 (D. Conn. Aug. 18, 1998) (“[N]o duty to preserve arises unless the party possessing the evidence has notice of its relevance. Of course, a party is on notice once it has received a discovery request. Beyond that, the complaint itself may alert a party that certain information is relevant, and likely to be sought in discovery. Finally, the obligation to preserve evidence even arises prior to the filing of a complaint where the party is on notice that litigation is likely to be

³ The *Consolidated Aluminum* court noted that, at the time of its opinion, “[n]either the Fifth Circuit Court of Appeal nor any district court within the Fifth Circuit ha[d] had the opportunity to directly address the standards for preservation of electronic evidence and applicable sanctions where such evidence has been spoliated,” and it therefore looked to “[t]he cases which have been recognized as setting the benchmark standards for modern discovery and evidence-preservation issues”—“the series of *Zubulake* decisions out of the Southern District of New York.” *Consol. Aluminum*, 244 F.R.D at 339. The *Zubulake* decisions include *Zubulake v. UBS Warburg, LLC (Zubulake I)*, 217 F.R.D. 309 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC (Zubulake II)*, 230 F.R.D. 290 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC (Zubulake III)*, 216 F.R.D. 280 (S.D.N.Y. 2003); *Zubulake v. UBS Warburg, LLC (Zubulake IV)*, 220 F.R.D. 212 (S.D.N.Y. 2003); and *Zubulake v. UBS Warburg, LLC (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004).

commenced.” (alteration in original) (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 72–73 (S.D.N.Y. 1991), *aff’d*, No. 89 Civ. 4252(PKL), 1992 WL 51570, at *3–4 (S.D.N.Y. Mar. 9, 1992)); *Indem. Ins. Co. of N. Am. v. Liebert Corp.*, No. 96 CIV. 6675(DC), 1998 WL 363834, at *3 (S.D.N.Y. Jun. 29, 1998) (“The obligation to preserve evidence also ‘arises prior to the filing of a complaint where a party is on notice that litigation is likely to be commenced.’” (quoting *Turner v. Hudson Transit Lines, Inc.*, 142 F.R.D. 68, 73 (S.D.N.Y. 1991))); *In re Kmart Corp.*, 371 B.R. 823, 842 (Bankr. N.D. Ill. 2007) (“[A] party’s duty to preserve specific types of documents does not arise unless the party controlling the documents has notice of those documents’ relevance,” and “[t]his notice ordinarily comes from discovery requests or from the complaint itself,” but “the obligation to preserve evidence may arise prior to the filing of a complaint where a party is on notice that litigation is likely to commence.” (citations omitted)).

Although a party’s duty to preserve may often be triggered before litigation, courts have emphasized that the mere possibility of litigation is not sufficient to trigger the duty because “[t]he undeniable reality is that litigation ‘is an ever-present possibility’ in our society.” *See Cache*, 244 F.R.D. at 621; *accord Salvatore v. Pingel*, No. 08-cv-00312-BNB-KMT, 2009 WL 943713, at *4 (D. Colo. Apr. 6, 2009); *see also RealNetworks, Inc. v. DVD Copy Control Ass’n, Inc.*, 264 F.R.D. 517, 523–24 (N.D. Cal. 2009) (noting that “[a]s soon as a potential claim is identified, a litigant is under a duty to preserve evidence which it knows or reasonably should know is relevant to the action,” but that “[t]he future litigation must be ‘probable,’ which has been held to mean ‘more than a possibility’” (citations omitted)); *id.* at 526 (“A general concern over litigation does not trigger a duty to preserve evidence.”); *but see Goodman*, 632 F. Supp. 2d at 509 n.7 (declining to follow *Cache*’s holding that more than a mere possibility of litigation is necessary to trigger a duty to

preserve, explaining that “the law surrounding the duty to preserve is well-settled in the Fourth Circuit” and requires preservation whenever litigation is *reasonably anticipated* and that date does not necessarily correspond to when litigation becomes *probable* (citing *Silvestri*, 271 F.3d at 591; *Samsung Elecs. Co., Ltd. v. Rambus, Inc.*, 439 F. Supp. 2d 524, 568 (E.D. Va. 2006), *vacated on other grounds*, 523 F.3d 1374 (Fed Cir. 2008), *cert. denied*, 129 S. Ct. 279 (2008))).⁴ In *Cache*, the court explained that “[w]hile a party should not be permitted to destroy potential evidence after receiving unequivocal notice of impending litigation, the duty to preserve relevant documents should require more than a mere possibility of litigation,” 244 F.R.D. at 621 (citing *Hynix Semiconductor Inc. v. Rambus, Inc.*, 591 F. Supp. 2d 1038, No. C-0020905 RMW, 2006 WL 565893, at *21 (N.D. Cal. Jan. 5, 2006)), and that “[u]ltimately, the court’s decision must be guided by the facts of each case,” *id.*; accord *Ernest v. Lockheed Martin Corp.*, No. 07-cv-02038-WYD-KLM, 2008 WL 2945608, at *2 (D. Colo. Jul. 28, 2008) (citing *Cache*, 244 F.R.D. at 621). Other courts have explained that “‘imminence [is] sufficient, rather than necessary, to trigger the duty to preserve documents.’” *Keithley v. Homestore.com, Inc.*, No. C-03-04447 SI (EDL), 2008 WL 4830752, at *7 (N.D. Cal. Nov. 6, 2008) (quoting *UMG Recordings, Inc. v. Hummer Winblad Venture Partners (In re Napster, Inc. Copyright Litig.)*, 462 F. Supp. 2d 1060, 1070 (N.D. Cal. 2006)); *see also Micron Tech.*, 255 F.R.D. at 148 (“[I]mminency is sufficient to create the duty, but it is not a requirement.”). One court indicated that “the duty to preserve evidence may arise when a substantial number of key personnel anticipate litigation,” but explained that “speculation by one or two employees regarding a lawsuit ‘does not generally impose a firm-wide duty to preserve.’” *Crown*

⁴ *Goodman* still recognized that “[t]he mere existence of a dispute does not necessarily mean that parties should reasonably anticipate litigation or that the duty to preserve arises.” *Goodman*, 632 F. Supp. 2d at 510 (citing *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 371 (S.D.N.Y. 2006)).

Castle, 2010 WL 1286366, at *9 (quoting *Zubulake IV*, 220 F.R.D. at 217).

Some courts have also likened the “anticipation of litigation” analysis for purposes of preservation duties to the “anticipation of litigation” analysis for purposes of assessing the applicability of the work product doctrine. *See, e.g., Consol. Edison*, 90 Fed. Cl. at 252–53, 258, 259–60, 262 (finding it relevant for purposes of determining whether the duty to preserve had been triggered that the court had previously rejected a work product claim because the documents at issue were not prepared in anticipation of litigation); *Siani v. State Univ. of N.Y. at Farmingdale*, No. C09-407 (JFB)(WDW), 2010 WL 3170664, at *5 (E.D.N.Y. Aug. 10, 2010) (“If it was reasonably foreseeable for work product purposes, Siani argues, it was reasonably foreseeable for duty to preserve purposes. The court agrees.”); *Sanofi-aventis Deutschland GmbH v. Glenmark Pharms. Inc., USA*, No. 07-CV-5855, 2010 WL 2652412, at *5 (D.N.J. Jul. 1, 2010) (holding that the defendants’ duty to impose a litigation hold and institute legal monitoring for purposes of complying with the duty to preserve arose no later than the date on which the defendants began withholding documents as protected by the work-product doctrine because “[a] party claiming work-product immunity bears the burden of showing that the materials in question ‘were prepared in the course of preparation for possible litigation.’” (quoting *Holmes v. Pension Plan of Bethlehem Steel Corp.*, 213 F.3d 124, 138 (3d Cir. 2000))); *Anderson v. Sotheby’s Inc. Severance Plan*, No. 04 Civ. 8180(SAS), 2005 WL 2583715, at *4 (S.D.N.Y. Oct. 11, 2005) (date of documents claimed to be protected by work product triggered the duty to preserve even though the documents were ultimately determined not to be protected by work product); *but see Salvatore*, 2009 WL 943713, at *7 (rejecting the plaintiff’s argument that the defendants’ assertion of work product immunity as to certain documents established that the defendants anticipated litigation for the purpose of triggering the duty to preserve

because “[t]he question is not the propriety of the defendants’ assertion of the work product immunity, but when under the totality of the circumstances the defendants knew or reasonably should have known of the likelihood of litigation stemming from this accident”); *Marceau*, 618 F. Supp. 2d at 1176 (“The fact that the Report was not eligible for work product protection under Rule 26(b)(3) does not dictate a finding that documents that were destroyed at the same time the audit beg[an] were not destroyed in anticipation of litigation.” (citing *Hynix*, 591 F. Supp. 2d at 1064, for its conclusion that “[t]he fact that Rambus has previously claimed work product protection for some documents dated prior to late 1999 does not dictate a finding that Rambus was anticipating litigation at the time the documents were created”)).

The case law has also recognized certain specific triggers in various contexts. *See, e.g., Consol. Edison*, 90 Fed. Cl. at 262 (finding that dispute and audit by IRS were not sufficient to trigger a duty to preserve, given the party’s past experience in resolving disputes with the IRS and the fact that the administrative process is designed specifically to avoid litigation); *Victor Stanley*, 2010 WL 3530097, at *23 (noting that in one case the defendant’s duty arose no later than the date when the plaintiff’s counsel asked the defendant to preserve evidence, even though that request was before the filing of the complaint, but that “the duty exists, for a defendant, at the latest, when the defendant is served with the complaint” (citations omitted)); *O’Brien*, 2010 WL 1741352, at *4 (defendant’s knowledge of litigation against previous owners of defendant’s restaurant and knowledge of two isolated incidents in which restaurant managers manipulated the hours of employees other than the plaintiffs did not put defendant on notice about potential litigation by the plaintiffs under the Fair Labor Standards Act and was not sufficient to trigger a duty to preserve); *Crown Castle*, 2010 WL 1286366, at *10 (duty to preserve was triggered as early as when several of the plaintiff’s employees,

including in-house counsel, considered filing a notice of claim with the defendant's insurance carrier and began labeling communications regarding the defendant as "work product," and no later than when the plaintiff retained outside counsel "for purposes of litigation"); *Richard Green (Fine Paintings) v. McClendon*, 262 F.R.D. 284, 289 (S.D.N.Y. 2009) ("Although [the time when litigation is reasonably anticipated] commonly occurs at the time a complaint is filed, it can also arise earlier, for instance when a disgruntled employee files an EEOC charge or at the point where relevant individuals anticipate becoming parties in imminent litigation." (internal citation omitted) (citing *Zubulake IV*, 220 F.R.D. at 216–17)); *Goodman*, 632 F. Supp. 2d at 511 ("[P]re-filing communications between the litigants can . . . provide constructive notice that litigation is likely. Demand letters stating a claim may be sufficient to trigger an obligation to preserve." (omission in original) (quoting SHIRA A. SCHEINDLIN, DANIEL J. CAPRA & THE SEDONA CONFERENCE, ELECTRONIC DISCOVERY AND DIGITAL EVIDENCE: CASES AND MATERIALS 106 (2008)));⁵ *Asher Assocs.*, 2009 WL 1328483, at *8 (finding a letter from counsel that stated that the plaintiff had been "significantly damaged," that provided the defendant with an "interim damage calculation," that claimed that "damages continue[d] to accrue," that demanded immediate payment with a 5-day deadline, and that identified specific claims that the plaintiff "would assert if it initiated 'such legal or other action to enforce its rights'" was sufficient to trigger a duty to preserve because the defendant "should have understood that future litigation was reasonably foreseeable and substantially 'more than a possibility'"); *Forest Labs., Inc. v. Caraco Pharm. Labs., Ltd.*, No. 06-CV-13143, 2009 WL

⁵ *Goodman* distinguished *Cache*, which had concluded that demand letters that did not threaten litigation did not trigger the duty to preserve when the plaintiff seemed amenable to a non-litigious resolution. See *Goodman*, 632 F. Supp. 2d at 511. The *Goodman* court stated that "[i]t may be that a letter that merely identifies a dispute but expresses an invitation to discuss it or otherwise negotiate does not trigger the duty to preserve evidence, but where, as here, the letter openly threatens litigation, then the recipient is on notice that litigation is reasonably foreseeable and the duty to preserve evidence relevant to that dispute is triggered." *Id.*

998402, at *2 (E.D. Mich. Apr. 14, 2009) (in patent suit, plaintiffs had obligation to preserve evidence related to the patent from the time when plaintiffs received notice that the defendant had filed an Abbreviated New Drug Application); *Salvatore*, 2009 WL 943713, at *7 (finding that a settlement demand that threatened litigation, “albeit equivocal[ly],” triggered a duty to preserve);⁶ *Arista Records LLC v. Usenet.com, Inc.*, 608 F. Supp. 2d 409, 430 (S.D.N.Y. 2009) (“Where copyright infringement is alleged, and a cease and desist letter issues, such a letter triggers the duty to preserve evidence, even prior to the filing of the litigation.” (citations omitted)); *MeccaTech, Inc. v. Kiser*, No. 8:05CV570, 2008 WL 6010937, at *8 (D. Neb. Apr. 2, 2008) (finding that litigation was anticipated for purposes of triggering the duty to preserve when the defendants jointly obtained a legal opinion); *Cache*, 244 F.R.D. at 623 (recognizing that “under different circumstances, a demand letter alone may be sufficient to trigger an obligation to preserve evidence and support a subsequent motion for spoliation sanctions,” but concluding that the letters at issue were not explicit enough and were too equivocal to trigger a duty to preserve);⁷ *Consol. Aluminum*, 244 F.R.D. at 340

⁶ A party’s failure to specifically request preservation does not prevent the duty from being triggered. See *Asher Assocs.*, 2009 WL 1328483, at *8 n.10 (“The court acknowledges that Plaintiffs’ letters of September 1 and 8, 2006, never specifically asked that the ESPs be preserved nor sought an opportunity to conduct their own inspection of the pumps. Those oversights, however, do not excuse Centrilift’s failure to preserve relevant evidence.” (citation omitted)).

⁷ The letters at issue alluded to “possible ‘exposure,’” but did not threaten litigation or demand preservation of evidence. See *Cache*, 244 F.R.D. at 623. Instead, the letters “hinted at the possibility of a non-litigious resolution.” *Id.*; cf. *Schlumberger Tech. Corp. v. Greenwich Metals, Inc.*, No. 07-2252-EFM, 2009 WL 5252644, at *5 & n.21 (D. Kan. Dec. 31, 2009) (declining to find that a duty to preserve was triggered before the lawsuit was filed because “it appears the parties were trying to reach a resolution . . .”). The *Cache* court stated that “[g]iven the dynamic nature of electronically stored information, prudent counsel would be wise to ensure that a demand letter sent to a putative party also addresses any contemporaneous preservation obligations.” 244 F.R.D. at 623. The court also found it relevant that nearly two years passed between an initial phone call between counsel for the parties regarding potential trademark infringement and the filing of the suit. The court concluded that “[t]hat delay, coupled with the less-than adamant tone of Cache La Poudre’s letters belies Plaintiff’s contention that Land O’Lakes should have anticipated litigation as early as” the initial phone call. *Id.* The court “acknowledge[d] that the common-law obligation to preserve relevant material is not necessarily dependent upon the tender of a ‘preservation letter,’” but concluded that “a party’s duty to

n.8 (“The propounding of a demand letter has been found to be the point when litigation should be reasonably anticipated” (citing *Housing Rights Center v. Sterling*, No. CV 03-859 DSF, 2005 WL 3320739 (C.D. Cal. Mar. 2, 2005))); *Broccoli v. Echostar Commc’ns Corp.*, 229 F.R.D. 506, 511 (D. Md. 2005) (finding that duty to preserve arose for employment discrimination claim when the plaintiff complained to his superiors of harassment and when management learned of the plaintiff’s potential Title VII claim); *Kmart*, 371 B.R. at 844 (concluding that debtor’s obligation to preserve documents relating to contested administrative claims arose when the claims were filed, “not because the claim filing date *per se* constitutes the latest possible trigger date, . . . but because the particular administrative claim filed in this case contained sufficient information to put Kmart on notice that litigation was likely”).⁸ In one case, the court determined that the plaintiff was on notice of the need to preserve based on the following factors: “(1) the sheer magnitude of the losses; (2) that plaintiff attempted to document the damage through photographs and reports; and (3) that it immediately brought in counsel as well as experts to assess the damage and attempt to ascertain its likely causes in anticipation of litigation.” *Indem. Ins. Co. of N. Am.*, 1998 WL 363834, at *4 n.3. Certain statutes

preserve evidence in advance of litigation must be predicated on something more than an equivocal statement of discontent, particularly when that discontent does not crystalize into litigation for nearly two years.” *Id.* The court explained: “Any other conclusion would confront a putative litigant with an intractable dilemma: either preserve voluminous records for an indefinite period at potentially great expense, or continue routine document management practices and risk a spoliation claim at some point in the future.” *Id.* (footnote omitted).

⁸ The *Kmart* court explained that “[b]earing in mind that the ‘trigger date’ should represent the date by which a party is on notice of the potential relevance of documents to pending or impending litigation, a *per se* rule that the claim filing date is the latest possible trigger would seem inappropriate” because “[p]roofs of claim are often perfunctory, containing few, if any, details concerning the bases for liability.” *Kmart*, 371 B.R. at 844. The court also determined that “[o]n the other hand, setting the ‘trigger’ in this matter as the objection filing date (or a date shortly before such filing) . . . seems equally unreasonable, not only because the objection deadline may be months or even years after the claim was filed, but also because the onset of the duty would then be largely in [the debtor’s] control.” *Id.* at 845. The court concluded that “in light of the central question of notice, the determination should depend on all the facts and circumstances of the case.” *Id.*

can also trigger a duty to preserve. *See, e.g., Danis*, 2000 WL 1694325, at *32 (“The PSLRA requires that a defendant in a securities action preserve evidence.” (footnote omitted)).

In short, when the duty to preserve is triggered seems to depend on the facts and circumstances of the particular case. *See Consol. Edison*, 90 Fed. Cl. at 259 (“[T]he facts and circumstances of the individual case must be assessed to decide when litigation should be deemed by a court to be anticipated, either in a work product privilege dispute or in a spoliation claim.”).

II. Scope

A. E-Discovery Panel’s Proposal

The rule should specify with as much precision as possible the scope of the duty to preserve, including, *e.g.*:

- a. Subject matter of the information to be preserved.
- b. Relevant time frame.
- c. That a person whose duty has been triggered must act reasonably in the circumstances.
- d. Types of data or tangible things to be preserved.
- e. Sources on which data are stored or found.
- f. Specify the form in which the information should be preserved (*e.g.*, native).
- g. Consider whether to impose presumptive limits on the types of data or sources that must be searched.
- h. Consider whether to impose presumptive limits on the number of key custodians whose information must be preserved.
- i. Consider whether the duty should be different for parties (or prospective parties) and non-parties.

B. Case Law on the Scope Element

“The scope of the duty to preserve is a broad one, commensurate with the breadth of discovery permissible under FED. R. CIV. P. 26.” *Danis*, 2000 WL 1694325, at *32. It “includes an obligation to identify, locate, and maintain, information that is relevant to specific, predictable, and identifiable litigation.” *Victor Stanley*, 2010 WL 3530097, at *23 (quoting THE SEDONA CONFERENCE, THE SEDONA CONFERENCE COMMENTARY ON LEGAL HOLDS: THE TRIGGER AND THE PROCESS 3 (public cmt. ed. Aug. 2007), available at http://www.thesedonaconference.org/content/miscFiles/Legal_holds.pdf). “Generally, the duty to preserve extends to documents or tangible things (defined by Federal Rule of Civil Procedure 34) by or to individuals ‘likely to have discoverable information that the disclosing party may use to support its claims or defenses.’” *Rimkus*, 688 F. Supp. 2d at 612–13 (quoting *Zubulake IV*, 220 F.R.D. at 217–18); accord *Consol. Aluminum*, 244 F.R.D. at 339 (“[T]he duty to preserve extends to any documents or tangible things made by individuals ‘likely to have discoverable information that the disclosing party may use to support its claims or defenses.’ The duty also extends to documents prepared *for* those individuals and to information that is relevant to the claims and defenses of *any* party, or which is ‘relevant to the subject matter involved in the action.’” (internal citation omitted) (quoting *Zubulake IV*, 220 F.R.D. at 218)); *Kmart*, 371 B.R. at 842 (“The duty to preserve evidence includes any relevant evidence over which the non-preserving entity had control and reasonably knew or could reasonably foresee was material to a potential legal action.” (citations omitted)).

Other courts have summarized the scope of the preservation duty as follows:

“While a litigant is under no duty to keep or retain every document in its possession once a complaint is filed, it is under a duty to preserve what it knows, or reasonably should know, is relevant in the action, is reasonably calculated to lead to the discovery of admissible evidence, is reasonably

likely to be requested during discovery, and/or is the subject of a pending discovery request.”

Indem. Ins. Co. of N. Am., 1998 WL 363834, at *3 (quoting *Turner*, 142 F.R.D. at 72); *accord Consol. Edison*, 90 Fed. Cl. at 256 (quoting *Zubulake IV*, 220 F.R.D. at 217); *Crown Castle*, 2010 WL 1286366, at *10 (quoting *Zubulake IV*, 220 F.R.D. at 217); *Arista Records*, 608 F. Supp. 2d at 433 (citations omitted); *Danis*, 2000 WL 1694325, at *32 (citation omitted).

Any relevant documents must be preserved. Some courts have summarized the scope of “relevant” documents as follows:

“Relevant documents” includes the following:

[A]ny documents or tangible things (as defined by [FED. R. CIV. P. 34(a)]) made by individuals “likely to have discoverable information that the disclosing party may use to support its claims or defenses.” The duty also includes documents prepared *for* those individuals, to the extent those documents can be readily identified (*e.g.*, from the “to” field in e-mails). The duty also extends to information that is relevant to the claims or defenses of *any* party, or which is “relevant to the subject matter involved in the action.” Thus, the duty to preserve extends to those employees likely to have relevant information—the “key players” in the case.

Goodman, 632 F. Supp. 2d at 511–12 (alterations in original) (quoting *Zubulake IV*, 220 F.R.D. at 217–18 (footnotes omitted)); *see also Victor Stanley*, 2010 WL 3530097, at *23 (same) (quoting *Zubulake IV*, 220 F.R.D. at 217–18); *Crown Castle*, 2010 WL 1286366, at *10 (stating a similar holding) (quoting *Zubulake IV*, 220 F.R.D. at 217–18). Another court explained that “[r]elevant evidence is that which may prove or disprove a party’s liability theory.” *Velez*, 590 F. Supp. 2d at 258 (citations omitted). Another court described the scope of relevant documents for preservation as follows: “A document is potentially relevant, and thus must be preserved for discovery, if there is a possibility that the information therein is relevant to any of the claims.” *Jones v. Bremen High Sch.*

Dist. 228, No. 08 C 3548, 2010 WL 2106640, at *5 (N.D. Ill. May 25, 2010) (citing *Ares-Serano, Inc. v. Organon Int'l B.V.*, 151 F.R.D. 215, 219 (D. Mass. 1993)).

In addition, the preservation duty clearly encompasses both electronic and paper documents. See *Consol. Edison*, 90 Fed. Cl. at 257 (“The scope of the duty to preserve extends to electronic documents, such as e-mails and back-up tapes.” (quoting *AAB Joint Venture v. United States*, 75 Fed. Cl. 432, 441 (2007))); *Pension Comm.*, 685 F. Supp. 2d at 475 n.82 (“This duty [to preserve electronic records] was well established as early as 1985 and has been repeatedly stated by courts across the country.” (citations omitted)).

But the case law recognizes that the duty to preserve does not expand to cover every possible piece of data that might be relevant. See, e.g., *In re Nat'l Century Fin. Enters.*, 2009 WL 2169174, at *11 (“[A] corporation, upon recognizing the threat of litigation, need not preserve ‘every shred of paper, every email or electronic document, and every backup tape.’” (alteration in original) (quoting *Consol. Aluminum*, 244 F.R.D. at 339)); *Consol. Aluminum*, 244 F.R.D. at 339 (same) (quoting *Zubulake IV*, 220 F.R.D. at 217); *Danis*, 2000 WL 1694325, at *32 (“To be sure, the duty to preserve does not require a litigant to keep every scrap of paper in its file.” (citations omitted)); *Kmart*, 371 B.R. at 842 (“While the scope of the preservation duty is broad, the ‘duty to preserve potentially discoverable information does not require a party to keep every scrap of paper’ in its file.” (internal citations omitted)); but see *Victor Stanley*, 2010 WL 3530097, at *26 (“Although it is well established that there is no obligation to ‘preserve every shred of paper, every e-mail or electronic document, and every backup tape,’ in some circumstances, [t]he general duty to preserve *may* also include deleted data, data in slack spaces, backup tapes, legacy systems, and metadata.” (alteration in original) (internal citation omitted) (quoting Paul W. Grimm, Michael D. Berman, Conor R.

Crowley & Leslie Wharton, *Proportionality in the Post-Hoc Analysis of Pre-Litigation Preservation Decisions*, 37 U. BALT. L. REV. 381, 410 (2008)).

Several courts have followed the *Zubulake IV* court's summary of the scope of the preservation obligation, which generally excludes inaccessible backup tapes from the preservation obligation:

“Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a “litigation hold” to ensure the preservation of relevant documents. As a general rule, that litigation hold does not apply to inaccessible backup tapes (*e.g.*, those typically maintained solely for the purpose of disaster recovery), which may continue to be recycled on the schedule set forth in the company's policy. On the other hand, if backup tapes are accessible (*i.e.*, actively used for information retrieval), then such tapes would likely be subject to the litigation hold.”

Consol. Aluminum, 244 F.R.D. at 339 (quoting *Zubulake IV*, 220 F.R.D. at 218); *see also Cache*, 244 F.R.D. at 628 (“As a general rule, [a] litigation hold does not apply to inaccessible back-up tapes . . . which may continue to be recycled on the schedule set forth in the company's policy.” (footnote omitted) (quoting *Zubulake V*, 229 F.R.D. at 431)); *Consol. Aluminum*, 244 F.R.D. at 339 (“As a general rule, a party need not preserve all backup tapes even when it reasonably anticipates litigation.” (citing *Zubulake IV*, 220 F.R.D. at 217)). Backup tapes need only be preserved if they are the only source of relevant information. *See Pension Comm.*, 685 F. Supp. 2d at 479 n.99 (“I am not requiring that *all* backup tapes must be preserved. Rather, if such tapes are the *sole* source of relevant information (*e.g.*, the active files of key players are no longer available), then such backup tapes should be segregated and preserved. When accessible data satisfies the requirement to search for and produce relevant information, there is no need to save or search backup tapes.” (citing FED. R. CIV. P. 26(b)(2)(B))). In *Victor Stanley*, the court noted that the *Zubulake* court is one of the few courts to have directly addressed retention requirements for multiple copies or backup tapes, and that

court stated that “although ‘[a] party or anticipated party must retain all relevant documents,’ it need not ‘preserve all backup tapes even when it reasonably anticipates litigation’ or retain ‘multiple identical copies.’” *Victor Stanley*, 2010 WL 3530097, at *26 (alteration in original) (quoting *Zubulake IV*, 220 F.R.D. at 217–18). The *Victor Stanley* court noted that while “[d]istrict courts in the Fifth and Sixth Circuit have relied on *Zubulake IV*’s discussion of backup tape preservation, . . . because . . . discrepancies exist among circuits on other topics, it is not clear for litigants how uniformly the *Zubulake IV* opinion will be applied.” *Id.*

The duty to preserve “extends to those employees likely to have relevant information, i.e., the ‘key players’ in the litigation.” *Consol. Aluminum*, 244 F.R.D. at 339 (citing *Zubulake IV*, 220 F.R.D. at 218); *see also Cache*, 244 F.R.D. at 629 (same). In *Goodman*, the court explained that “identifying a ‘key player’ in litigation is not dependent on the volume of interaction between an individual and a litigant, but rather is determined by whether an individual is likely to have information relevant to the events that underlie the litigation.” *Goodman*, 632 F. Supp. 2d at 512. The case law does not generally address placing a limit on the number of “key players.” In *Zubulake V*, the court identified “key players,” as “the people identified in a party’s initial disclosure and any subsequent supplementation thereto,” which might be one means of limiting the identification of “key players.” *See Zubulake V*, 229 F.R.D. at 433 (footnote omitted).

In addition, the duty to preserve covers any relevant evidence within the party’s “control.” *See Danis*, 2000 WL 1694325, at *32 (“The duty to preserve evidence includes any relevant evidence over which the nonpreserving entity had control and reasonably knew or could reasonably foresee was material to a potential legal action.” (emphasis added) (citation omitted)). If relevant evidence is in the hands of third parties, most courts require the party with the preservation obligation to give

notice to its opponents. See *King v. Am. Power Conversion Corp.*, 181 F. App'x 373, 378 (4th Cir. 2006) (unpublished) (per curiam) (“If a party cannot fulfill this duty to preserve *because he does not own or control the evidence*, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction” (quoting *Silvestri*, 271 F.3d at 591)); *Velez*, 590 F. Supp. 2d at 258 (“The duty to preserve extends to giving notice if the evidence is in the hands of third-parties. . . . ‘If a party cannot fulfill this duty to preserve because he does not own or control the evidence, he still has an obligation to give the opposing party notice of access to the evidence or of the possible destruction of the evidence if the party anticipates litigation involving that evidence.’” (quoting *Perez-Velasco v. Suzuki Motor Co. Ltd.*, 266 F. Supp. 2d 266, 268 (D.P.R. 2003))); see also *Goodman*, 632 F. Supp. 2d at 514 (stating a similar holding) (quoting *Silvestri*, 271 F.3d at 591); but see *Townsend v. Am. Insulated Panel Co.*, 174 F.R.D. 1, 5 (D. Mass. 1997) (“[A]bsent some . . . control over the evidence which is in the possession of a nonparty, the plaintiff is not under a duty to act [to preserve the evidence].”).

The *Goodman* court noted that “[w]hat is meant by ‘control,’ as used by *Silvestri* in the context of a spoliation claim, has yet to be fully defined.” *Goodman*, 632 F. Supp. 2d at 514. The *Goodman* court analogized to another case in which the court had analyzed the meaning of “control” in the context of a Rule 34 request for production, and explained that “Rule 34 ‘control’ would not require a party to have legal ownership or actual physical possession of any documents at issue,” and that “[i]nstead, documents are considered to be under a party’s control when that party has “the right, authority, or *practical ability* to obtain the documents from a non-party to the action.”” *Id.* at 515 (emphasis added) (quoting *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007)). The court noted, however, that the “practical ability” test has not been uniformly adopted:

In *Steele Software Sys., Corp. v. DataQuick Info. Sys., Inc.*, 237 F.R.D. 561 (D. Md. 2006), this Court adopted, by reference, the “practical ability” test when determining the scope of a party’s obligation to produce documents in response to a Rule 34 request. *Id.* at 564 (“Control has been construed broadly by the courts as the legal right, authority, or practical ability to obtain the materials sought on demand.”) (citations and internal quotation marks omitted). However, not all courts have accepted this test, *see Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993) (“[T]he fact that a party could obtain a document if it tried hard enough and maybe if it didn’t try hard at all does not mean that the document is in its possession, custody, or control; in fact, it means the opposite.”); *Bleecker v. Standard Fire Ins. Co.*, 130 F. Supp. 2d 726, 739 (E.D.N.C. 2000) (“Adopting the ‘ability to obtain’ test would usurp [the principles of Rule 34], allowing parties to obtain documents from non-parties who were in no way controlled by either party.”), and the contours of the practical ability test are still evolving. *See, e.g., In re Rudolfo Lozano*, 392 B.R. 48, 55–56 (Bankr. S.D.N.Y. 2008) (holding there is a practical ability to obtain documents “if the assignee of the original mortgagee, or the current loan servicer, can by custom or practice in the mortgage business informally request and obtain the original loan file, and any related documents, including a payment history”); *Ice Corp. v. Hamilton Sundstrand Corp.*, 245 F.R.D. 513, 521 (D. Kan. 2007) (finding a practical ability present when the defendants could “simply ask” or “employ their ‘right or ability to influence’” so as to gain documents); *Bank of N.Y. [v. Meridien Biao Bank Tanzania Ltd.]*, 171 F.R.D. [135, 149 (S.D.N.Y. 1997)] (holding there was a practical ability by defendant to obtain documents from third-party because “[the defendant] ha[d] been able to obtain documents from [the third-party] when it ha[d] requested them,” and the third-party readily cooperated with the defendant’s requests by searching for and turning over relevant documents from its files); *Shcherbakovskiy v. Da Capo Al Fine, Ltd.*, 490 F.3d 130, 138–39 (2d Cir. 2007) (suggesting a practical ability to obtain documents if a party “has access to them and can produce them”) (citing *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 530 (S.D.N.Y. 1996) (citations omitted)); *Synopsys, Inc. v. Ricoh Co.*, No. C-03-2289 MJJ (EMC), 2006 WL 1867529, at *2 (N.D. Cal. July 5, 2006) (finding defendant had practical ability to obtain documents because third-party agreed to be represented by defense counsel for purposes of discovery, and that the defendant was able to secure a search for documents in the third-party’s facility within three days); *Golden Trade, S.r.L. v. Lee Apparel Co.*, 143 F.R.D. 514, 525 (S.D.N.Y. 1992) (holding there was a practical ability of plaintiff to obtain documents from third-party, because sub-license agreement provided the plaintiff the “right to cooperation” by the third-party, and that prior history of the case suggested such cooperation encompassed “production of documents and other assistance in conducting

discovery”). While the practical ability test may be useful in assessing a party’s obligations under Rule 34, the “control” test articulated by the *In re NTL, Inc. Securities Litigation* court appears to be more useful in determining the control required under *Silvestri* to trigger a party’s duty to preserve evidence.

Id. at 516 n.11 (all alterations, except the third and fourth, in original). Similarly, the *Victor Stanley* court noted a lack of uniformity across the circuits as to when documents are considered within a party’s control:

[P]arties must preserve potentially relevant evidence under their “control,” and in the Fourth Circuit and the Second Circuit, “documents are considered to be under a party’s control when that party has the right, authority, or practical ability to obtain the documents from a non-party to the action.” *Goodman*, 632 F. Supp. 2d at 515 (quoting *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 195 (S.D.N.Y. 2007)). And, in this circuit, as well as the First and Sixth Circuits, the preservation duty applies not only when the evidence is in the party’s control; there is also a duty to notify the opposing party of evidence in the hands of third parties. *See Silvestri*, 271 F.3d at 590; *Velez v. Marriott PR Mgmt., Inc.*, 590 F. Supp. 2d 235, 258 (D.P.R. 2008); *Jain v. Memphis Shelby Airport Auth.*, No. 08-2119-STA-dkv, 2010 WL 711328, at *2 (W.D. Tenn. Feb. 25, 2010). In contrast, district courts in the Third, Fifth, and Ninth Circuits have held that the preservation duty exists only when the party controls the evidence, without extending that duty to evidence controlled by third parties. *Bensel v. Allied Pilots Ass’n*, 263 F.R.D. 150, 152 (D.N.J. 2009); *Rimkus*, 688 F. Supp. 2d at 615–16; *Melendres [v. Arpaio]*, No. CV-07-2513-PHX-GMS, 2010 WL 582189, at *4 [(D. Ariz. Feb. 12, 2010)]. So, what should a company that conducts business in the First, Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits do to develop a preservation policy that complies with the inconsistent obligations imposed by these circuits? This is the question for which a suitable answer has proven elusive.

Victor Stanley, 2010 WL 3530097, at *25.

With respect to the format in which documents must be preserved, the *Zubulake IV* court noted that “[i]n recognition of the fact that there are many ways to manage electronic data, litigants are free to choose how this task [of retaining relevant documents (but not multiple identical copies)] is

accomplished.” *Zubulake IV*, 220 F.R.D. at 218.⁹ Another court declined to impose sanctions for a party’s failure to keep electronic documents in an accessible format, even after it anticipated litigation. See *Quinby v. WestLB AG (Quinby I)*, No. 07Civ-7406(WHP)(HBP), 2005 WL 3453908, at *8 n.10 (S.D.N.Y. Dec. 15, 2005) (“I am unaware of any case . . . that states that the duty to preserve electronic data includes a duty to keep the data in an accessible format. The cases plaintiff cites speak to the general proposition that a defendant has a duty to preserve evidence, but do not state that the evidence must be kept in a particular form. Based on this, I decline to sanction defendant for converting data from an accessible to inaccessible format, even if they should have anticipated litigation.” (internal citations omitted)); see also *Best Buy Stores, L.P. v. Developers Diversified Realty Corp., DDR GLH, LLC*, 247 F.R.D. 567, 570 (D. Minn. 2007) (concluding that the plaintiff did not have to maintain a database at a monthly cost of over \$27,000, absent specific discovery requests or additional facts suggesting that the database was of particular relevance to the litigation, even though Best Buy should have been on notice that some of the information in the database would be sought in discovery, explaining that “by downgrading the database, Best Buy did not destroy the information it contained but rather removed it from a searchable format”);¹⁰ *Quinby*

⁹ The court explained:

For example, a litigant could choose to retain all then-existing backup tapes for the relevant personnel (if such tapes store data by individual or the contents can be identified in good faith and through reasonable effort), and to catalog any later-created documents in a separate electronic file. That, along with a mirror-image of the computer system taken at the time the duty to preserve attaches (to preserve documents in the state they existed at that time), creates a complete set of relevant documents. Presumably there are a multitude of other ways to achieve the same result.

Zubulake IV, 220 F.R.D. at 218.

¹⁰ The court concluded that because Best Buy did not have a duty to preserve the database, it was not obligated

v. WestLB AG (Quinby II), 245 F.R.D. 94, 104 (S.D.N.Y. 2006) (“This conclusion [that a party need not preserve data in an accessible format] ensures that in complying with a duty to preserve evidence, a party will be free to preserve electronic evidence in any format it chooses, including inaccessible formats. Preservation of data, even in an inaccessible form, will not result in spoliation because the responding party will be able to produce the electronic evidence by restoring it from an inaccessible format, albeit at a higher cost.”). However, another court within the same district as the *Quinby* court subsequently disagreed with the conclusion that making data inaccessible is compatible with preservation:

One of my colleagues recently declined to sanction a party for converting data to an inaccessible format, taking the position that there is no obligation to preserve electronic data in an accessible form, even when litigation is anticipated. See *Quinby v. Westlab AG [(Quinby I)]*, No. 04 Civ. 7406, 2005 WL 3453908, at *8 n. 10 (S.D.N.Y. Dec. 15, 2005). I respectfully disagree. The Second Circuit has held that conduct that hinders access to relevant information is sanctionable, even if it does not result in the loss or destruction of evidence. See *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 110 (2d Cir. 2002). Accordingly, permitting the downgrading of data to a less accessible form—which systematically hinders future discovery by making the recovery of the information more costly and burdensome—is a violation of the preservation obligation.

Treppel v. Biovail, 233 F.R.D. 363, 372 n.4 (S.D.N.Y. 2006).¹¹

to restore the information to a searchable format unless the defendants established good cause. *Best Buy Stores*, 247 F.R.D. at 570–71.

¹¹ In *Quinby II*, the court countered that the *Residential Funding* court addressed only the proper standards for giving an adverse inference instruction against a party that failed to produce emails sufficiently in advance of trial, but “did not hold that sanctions were appropriate for downgrading into an inaccessible format electronic evidence that was subject to a litigation hold.” *Quinby II*, 245 F.R.D. at 103 n.12. The court concluded that “if, as *Residential Funding* implies, any document storage practice that makes the recovery of documents more burdensome constitutes a violation of the preservation obligation, then a whole range of document storage practices, such as off-site storage in ‘dead’ files, microfilming and digital imaging, would violate the preservation obligation because these practices also increase the burden of retrieving documents.” *Id.* The court concluded that “construing the preservation obligation this broadly is inappropriate because it creates the potential for punishing routine business practices that do not destroy documents or alter them in any

The case law also recognizes the element proposed by the e-discovery panel that a person whose duty to preserve has been triggered must act reasonably in the circumstances. *See Victor Stanley*, 2010 WL 3530097, at *24 (“Proper analysis requires the Court to determine reasonableness under the circumstances—‘reasonable and good faith efforts to retain information that may be relevant to pending or threatened litigation.’” (quoting THE SEDONA CONFERENCE, THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION ii (2d ed. 2007), available at <http://www.thesedonaconference.org/content/miscFiles/> (follow link))); *id.* at *26 (“Breach of the preservation duty, also, is premised on reasonableness: A party breaches its duty to preserve relevant evidence if it fails to act reasonably by taking ‘positive action to preserve material evidence.’” (quoting *Jones*, 2010 WL 2106640, at *6)); *Jones*, 2010 WL 2106640, at *6 (“A party fulfills its duty to preserve evidence if it acts reasonably. ‘More than good intentions [are] required; those intentions [must] be followed up with concrete actions reasonably calculated to ensure that relevant materials will be preserved,’ such as giving out specific criteria on what should or should not be saved for litigation.” (alterations in original) (internal citations and footnotes omitted)); *Rimkus*, 688 F. Supp. 2d at 613 (“Whether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional*

material sense.” *Id.* The court stated that “if a party creates its own burden by converting into an inaccessible format data that it should have reasonably foreseen would be discoverable material at a time when it should have anticipated litigation, then it should not be entitled to shift the costs of restoring and searching the data.” *Id.* at 104. The court concluded that “[t]his would permit parties to maintain data in whatever format they choose, but discourage them from converting evidence to inaccessible formats because the party responsible for the conversion will bear the cost of restoring the data.” *Id.* However, “[i]f, on the other hand, it is not reasonably foreseeable that the particular evidence in issue will have to be produced, the responding party who converts the evidence into an inaccessible format after the duty to preserve evidence arose may still seek to shift the costs associated with restoring and searching for relevant evidence.” *Id.* at 105.

to that case and consistent with clearly established applicable standards.” (citing THE SEDONA PRINCIPLES: SECOND EDITION, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 17 cmt. 2.b. (2007)); *Zubulake V*, 229 F.R.D. at 433 (noting that “[a]bove all, the requirement [that counsel ensure preservation] must be reasonable”); *Miller v. Holzmann*, No. 95-01231 (RCL/JMF), 2007 WL 172327, at *6 (D.D.C. Jan. 17, 2007) (“The obligation to preserve electronic data and documents requires *reasonable and good faith efforts* to retain information that may be relevant to pending or threatened litigation.” (emphasis added) (quoting THE SEDONA CONFERENCE, BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION 44 (2004 Annotated Version))); *Consol. Aluminum*, 244 F.R.D. at 345 n.18 (“The obligation to preserve electronic data and documents requires *reasonable and good faith efforts* to retain information that may be relevant to pending or threatened litigation. However, it is unreasonable to expect parties to take every conceivable step to preserve all potentially relevant data.” (emphasis added) (citing THE SEDONA PRINCIPLES: BEST PRACTICES RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Sept. 2005))).

The *Rimkus* court explained that the “analysis depends heavily on the facts and circumstances of each case and cannot be reduced to a generalized checklist of what is acceptable or unacceptable.” *Rimkus*, 688 F. Supp. 2d at 613 (citing *Pension Comm.*, 685 F. Supp. 2d at 464–65). And the *Victor Stanley* court explained that “the duty to preserve evidence should not be analyzed in absolute terms; it requires nuance, because the duty “cannot be defined with precision.”” *Victor Stanley*, 2010 WL 3530097, at *24 (quoting *Grimm et al.*, 37 U. BALT. L. REV. at 393). The *Victor Stanley* court emphasized that the focus should be on both what is reasonable under the circumstances and what

is proportional to the case:

Thus, “[w]hether preservation or discovery conduct is acceptable in a case depends on what is *reasonable*, and that in turn depends on whether what was done—or not done—was *proportional* to that case and consistent with clearly established applicable standards.” . . . “Put another way, ‘the scope of preservation should somehow be proportional to the amount in controversy and the costs and burdens of preservation.’” Although, with few exceptions, such as the recent and highly instructive *Rimkus* decision, courts have tended to overlook the importance of proportionality in determining whether a party has complied with its duty to preserve evidence in a particular case, this should not be the case because Fed. R. Civ. P. 26(b)(2)(C) cautions that all permissible discovery must be measured against the yardstick of proportionality. Moreover, the permissible scope of discovery as set forth in Rule 26(b) includes a proportionality component of sorts with respect to discovery of ESI, because Rule 26(b)(2)(B) permits a party to refuse to produce ESI if it is not reasonably accessible without undue burden and expense. Similarly, Rule 26(g)(1)(B)(iii) requires all parties seeking discovery to certify that the request is “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, the amount in controversy, and the importance of the issues at stake in the action.” Thus, assessment of reasonableness and proportionality should be at the forefront of all inquiries into whether a party has fulfilled its duty to preserve relevant evidence. *Jones*, 2010 WL 2106640, at *6–7 (“[R]easonableness is the key to determining whether or not a party breached its duty to preserve evidence.”).

Id. (alterations in original) (internal citations and footnote omitted).

III. Duration

A. E-Discovery Panel’s Proposal

The rule should specify how long the information or tangible things must be preserved, but should explicitly provide that the rule does not supersede any statute or regulation.

B. Case Law on the Duration Element

“The duty to preserve discoverable information persists throughout the discovery process; a litigant must ensure that all potentially relevant evidence is retained.” *Richard Green*, 262 F.R.D. at 289 (citing *Zubulake V*, 229 F.R.D. at 433; FED. R. CIV. P. 26(e)); *see also Schlumberger*, 2009

WL 5252644, at *7 (“Defendant’s preservation duty extends throughout the case and the fact that Plaintiff did not request to inspect or sample the [evidence] at the start of the litigation does not give Defendant the ability to dispose of evidence.”). However, “[t]he Second Circuit has made clear that the obligation to preserve may not continue indefinitely, and, where the defendant fails to ask to inspect the evidence at issue, the defendant may not later seek sanctions for spoliation from the court.” *Wade v. Tiffin MotorHomes, Inc.*, 686 F. Supp. 2d 174, 194 n.17 (N.D.N.Y. 2009) (citing *Allstate Ins. Co. v. Hamilton Beach/Proctor Silex, Inc.*, 473 F.3d 450, 458 (2d Cir. 2007)); *see also Townes ex rel. Estate of Townes v. Cove Haven, Inc.*, No. 00 CV 5603 (RCC), 2003 WL 22861921, at *4 (S.D.N.Y. Dec. 2, 2003) (noting that “[t]he scope of the duty to preserve evidence is not boundless,” and “[a] potential spoliator need do only what is reasonable,” and concluding that the defendants’ preservation of the pool at issue for two years after the accident and one year after the filing of the complaint afforded the plaintiff a reasonable opportunity to inspect it). There appears to be some disagreement in the case law as to whether the duty to preserve extends throughout the litigation even if the opposing party makes no attempt to inspect the evidence.

IV. Ongoing Duty

A. E-Discovery Panel’s Proposal

The rule should specify whether the duty to preserve extends to information generated after the duty has accrued.

B. Case Law on the Ongoing Duty Element

Courts recognize that the duty to preserve continues after it is initially triggered. *See, e.g., Cache*, 244 F.R.D. at 629 (“A party must ensure that relevant information is retained on a continuing basis once the preservation obligation arises.” (citing *Zubulake V*, 229 F.R.D. at 431)); *id.* at 630

(“While instituting a ‘litigation hold’ may be an important first step in the discovery process, the obligation to conduct a reasonable search for responsive documents continues throughout the litigation. A ‘litigation hold,’ without more, will not suffice to satisfy the ‘reasonable inquiry’ requirement in Rule 26(g)(2). Counsel retains an ongoing responsibility to take appropriate measures to ensure that the client has provided all available information and documents which are responsive to discovery requests.” (internal citation to FED. R. CIV. P. 26(e)(2) omitted)); *Zubulake V*, 229 F.R.D. at 433 (“The *continuing* duty to supplement disclosures strongly suggests that parties also have a duty to make sure that discoverable information is not lost. Indeed, the notion of a ‘duty to preserve’ connotes an ongoing obligation.”).

V. Litigation Hold

A. E-Discovery Panel’s Proposal

The rule should provide that if an organization whose duty has been triggered prepares and disseminates a litigation hold notice, that is evidence of due care on the part of the organization. If the rule requires issuance of a litigation hold, it should include an out like that in Rule 37(c)(1) excusing (for sanctions purposes) a failure that was substantially justified or is harmless.

B. Case Law on the Litigation Hold Element

The case law generally recognizes that once a party’s duty to preserve is triggered, it must implement a litigation hold. *See, e.g., Pension Comm.*, 685 F. Supp. 2d at 466 (“[O]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a ‘litigation hold’ to ensure the preservation of relevant documents.” (alteration in original) (quoting *Treppel v. Biovail Corp.*, 249 F.R.D. 111, 118 (S.D.N.Y. 2008) (quoting *Zubulake IV*, 220 F.R.D. at 218))); *see also Consol. Edison*, 90 Fed. Cl. at 256 (same) (quoting *Adorno v. Port*

Auth. of N.Y. & N.J., 258 F.R.D. 217, 227 (S.D.N.Y. 2009)); *Crown Castle*, 2010 WL 1286366, at *10 (similar) (citation omitted); *Richard Green*, 262 F.R.D. at 289 (same) (citing *Zubulake V*, 229 F.R.D. at 431); *Major Tours, Inc. v. Colorel*, No. 05-3091 (JBS/JS), 2009 WL 2413631, at *2 (D.N.J. Aug. 4, 2009) (same) (citing *Zubulake IV*, 220 F.R.D. at 218); *Goodman*, 632 F. Supp. 2d at 511 (same) (citing *Thompson v. U.S. Dep't of Housing & Urban Dev.*, 219 F.R.D. 93, 100 (D. Md. 2003)); *Micron Tech.*, 255 F.R.D. at 148 (same) (quoting *Zubulake IV*, 220 F.R.D. at 218); *Consol. Aluminum*, 244 F.R.D. at 342 (same) (citing *Zubulake IV*, 220 F.R.D. at 218); *cf. Bd. of Regents of Univ. of Neb.*, 2007 WL 3342423, at *4 (“At a minimum, . . . counsel must direct the client to ensure that documents are preserved, not deleted from an electronically stored information system or otherwise destroyed or made unavailable. Failure to do so has been found to be ‘grossly negligent.’” (citing *Zubulake IV*, 220 F.R.D. at 221)); *but see Victor Stanley*, 2010 WL 3530097, at *25 (noting that a litigation hold is generally required once the duty to preserve is triggered, but that “a litigation hold might not be necessary under certain circumstances, and reasonableness is still a consideration.” (citations omitted)); *Jones*, 2010 WL 2106640, at *6 (“In the Northern District of Illinois, a party’s failure to issue a litigation hold is not per se evidence that the party breached its duty to preserve evidence. Instead, reasonableness is the key” (internal citation and footnote omitted));¹² *Kmart*, 371 B.R. at 847 (“[W]hile failure to implement a litigation hold does not necessarily give rise to sanctions for spoliation of evidence, it is at least ‘relevant’ to the spoliation

¹² The *Jones* court distinguished another case that had “found that, in certain cases, a defendant’s failure to issue a litigation hold at the start of a case would not, standing alone, be a breach of the duty to preserve documents,” noting that the defendant in that case was a party in approximately 800 pending lawsuits and in those circumstances “[i]mposing a broad litigation hold in each case could cause an undue burden to the [party].” *Jones*, 2010 WL 2106640, at *7 (citing *Haynes v. Dart*, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010)). In contrast, in the *Jones* case, the court found that there was “no evidence that a simple litigation hold to preserve existing electronic mail would have placed any burden on defendant.” *Id.*

inquiry . . .”).

The hold must require employees to preserve both electronic and paper documents and create a mechanism for collecting the documents so they can be searched. *See Pension Comm.*, 685 F. Supp. 2d at 473 (disapproving of a litigation hold instruction that did “not direct employees to *preserve* all relevant records—both paper and electronic—[and that did not] create a mechanism for *collecting* the preserved records so that they can be searched by someone other than the employee” (footnote omitted)); *see also Consol. Edison*, 90 Fed. Cl. at 257 (“[T]he obligation to retain discoverable materials is an affirmative one; it requires that the agency or corporate officers having notice of discovery obligations communicate those obligations to employees in possession of discoverable materials.” (quoting *Dong Ah Tire & Rubber Co.*, 2008 WL 4298331, at *3)); *Kmart*, 371 B.R. at 846 (“As a large corporation, Bank One can only discharge its duty by: 1) creating a ‘comprehensive’ document retention policy that will ensure that relevant documents are retained . . . and 2) disseminating that policy to its employees.” (quoting *Larson v. Bank One Corp.*, No. 00 C 2100, 2005 WL 4652509, at *8 (N.D. Ill. Aug. 18, 2005))).

The case law emphasizes that after a litigation hold is instituted, a party should not rely on its employees to determine what documents are relevant to the litigation. *See Jones*, 2010 WL 2106640, at *7 (“It is unreasonable to allow a party’s interested employees to make the decision about the relevance of such documents, especially when those same employees have the ability to permanently delete unfavorable email from a party’s system.”); *Pension Comm.*, 685 F. Supp. 2d at 473 (disapproving of a litigation hold instruction that “place[d] total reliance on the employee to search and select what that employee believed to be responsive records without any supervision from Counsel” (footnote omitted)); *Richard Green*, 262 F.R.D. at 289 (“Once a ‘litigation hold’ is in

place, a party *and her counsel* must make certain that all sources of potentially relevant information are identified and placed ‘on hold’’ Then, ‘[c]ounsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.’” (emphasis added) (internal citation omitted) (citing *Zubulake V*, 229 F.R.D. at 432)); *Major Tours*, 2009 WL 2413631, at *2 (“[A] party’s discovery obligations do not end with the implementation of a litigation hold. *Counsel must oversee compliance* with the litigation hold, monitoring the party’s efforts to retain and produce relevant documents.” (emphasis added) (internal citation omitted) (citing *Zubulake V*, 229 F.R.D. at 432)); *Bd. of Regents of Univ. of Neb.*, 2007 WL 3342423, at *5 (“When faced with responding to a request for the production of documents, *counsel are required to direct the conduct of a thorough search* for responsive documents with due diligence and ensure all responsive documents under the ‘custody or control’ of the client, unless protected from discovery, are produced.” (emphasis added) (citing FED. R. CIV. P. 34)); *Cache*, 244 F.R.D. at 627–28 (“Certainly, ‘once a ‘litigation hold’ in place, a party *and her counsel* must make certain that all sources of potentially relevant information are identified and placed ‘on hold.’” (emphasis added) (quoting *Zubulake V*, 229 F.R.D. at 432));¹³ *id.* at 629 (“[C]ounsel cannot turn a blind eye to a procedure that he or she should realize will adversely impact that search.”);¹⁴ *In re NTL, Inc., Sec. Litig.*, 244 F.R.D.

¹³ In *Cache*, the court noted that the *Zubulake* court had recognized that it might not be possible for counsel to speak to every key player and had suggested the alternative of running a systemwide keyword search to find responsive materials. *Cache*, 244 F.R.D. at 628 (citing *Zubulake V*, 229 F.R.D. at 432). But the *Cache* court did “not interpret Judge Scheindlin’s suggestion as establishing an immutable ‘obligation,’” explaining that “in the typical case, [r]esponding parties are best situated to evaluate the procedures, methodologies, and technologies appropriate for preserving and producing their own electronic data and documents.” *Id.* (alteration in original) (quoting THE SEDONA PRINCIPLES: BEST PRACTICES, RECOMMENDATIONS & PRINCIPLES FOR ADDRESSING ELECTRONIC DOCUMENT PRODUCTION (Sedona Conference Working Group Series July 2005)).

¹⁴ In *Cache*, the court detailed counsel’s failure to properly monitor employees’ collection of documents:

at 194 (“Although NTL sent out hold memos in March and June 2002 . . . , those hold memos were not sufficient, since they were ignored by both NTLs.” (citing *Zubulake V*, 229 F.R.D. at 432)); *Zubulake V*, 229 F.R.D. at 432 (“In short, it is *not* sufficient to notify all employees of a litigation hold and expect that the party will then retain and produce all relevant information. Counsel must take affirmative steps to monitor compliance so that all sources of discoverable information are identified and searched.”);¹⁵ *Danis*, 2000 WL 1694325, at *32 (“The duty to preserve documents in

Land O’Lakes directed employees to produce all relevant information, and then relied upon those same employees to exercise their discretion in determining what specific information to save. As Mr. Janzen said repeatedly, he and outside counsel simply accepted whatever documents or information might be produced by Land O’Lakes employees. Yet here, counsel was aware that an accessible source of information (i.e., computer hard drives used by departed employees) was being eliminated as a routine practice, thereby further distancing counsel from the discovery process and his monitoring obligations. By wiping clean the computer hard drives of former employees who worked on the PROFILE project, Land O’Lakes effectively eliminated a readily accessible source of potentially relevant information. This procedure is all the more questionable given [counsel’s] understanding that Land O’Lakes did not keep backup tapes for computer hard drives for more than ten days. Once a “litigation hold” has been established, a party cannot continue a routine procedure that effectively ensures that potentially relevant and readily available information is no longer “reasonably accessible” under Rule 26(b)(2)(B).

244 F.R.D. at 629. The court explained that counsel was required to oversee the litigation hold and make sure it was properly implemented:

In this case, Land O’Lakes’s General Counsel and retained counsel failed in many respects to discharge their obligations to coordinate and oversee discovery. Admittedly, in-house counsel established a litigation hold shortly after the lawsuit commenced and communicated that fact to Land O’Lakes employees who were believed to possess relevant materials. However, by his own admission, Land O’Lakes’ General Counsel took no independent action to verify the completeness of the employees’ document production.

Id. at 630.

¹⁵ In *Zubulake V*, the court suggested that counsel follow the following procedures to ensure the client’s

the face of pending litigation is not a passive obligation. Rather, it must be discharged actively: ‘The obligation to preserve documents that are potentially discoverable materials is an affirmative one that rests squarely on the shoulders of senior corporate officers.’” (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 169 F.R.D. 598, 615 (D.N.J. 1997))).

Although most case law requires implementing a litigation hold once the duty to preserve is triggered, a litigation hold may not be sufficient on its own to show that the party acted with due care, particularly if the implementation of the hold is not properly supervised by the party and its counsel. *See Cache*, 244 F.R.D. at 630 (noting that although the party implemented a litigation hold shortly after litigation was commenced, counsel did not properly supervise whether the hold led to complete document production). In addition, “courts differ in the fault they assign when a party fails to implement a litigation hold.” *Victor Stanley*, 2010 WL 3530097, at *25 (comparing *Pension Comm.*, 685 F. Supp. 2d at 466 (“stating that failure to implement a written litigation hold is gross negligence

preservation of relevant documents:

In particular, once the duty to preserve attaches, counsel must identify sources of discoverable information. This will usually entail speaking directly with the key players in the litigation, as well as the client’s information technology personnel. In addition, when the duty to preserve attaches, counsel must put in place a litigation hold and make that known to all relevant employees by communicating with them directly. The litigation hold instructions must be reiterated regularly and compliance must be monitored. Counsel must also call for employees to produce copies of relevant electronic evidence, and must arrange for the segregation and safeguarding of any archival media (e.g., backup tapes) that the party has a duty to preserve.

Once counsel takes these steps (or once a court order is in place), a party is fully on notice of its discovery obligations. If a party acts contrary to counsel’s instructions or to a court’s order, it acts at its own peril.

Zubulake V, 229 F.R.D. at 439.

per se”) with *Haynes v. Dart*, No. 08 C 4834, 2010 WL 140387, at *4 (N.D. Ill. Jan. 11, 2010) (“The failure to institute a document retention policy, in the form of a litigation hold, is relevant to the court’s consideration, but it is not *per se* evidence of sanctionable conduct.”)).

VI. Work Product

A. E-Discovery Panel’s Proposal

The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).

B. Case Law on the Work Product Element

“As a general matter hold letters are not discoverable, particularly when a party has made an adequate showing that the letters include material protected under attorney-client privilege or the work-product doctrine.” *Major Tours*, 2009 WL 2413631, at *2 (citations omitted). However, “[d]espite the fact that plaintiffs typically do not have the automatic right to obtain copies of a defendant’s litigation hold letters, plaintiffs are entitled to know which categories of electronic storage information employees were instructed to preserve and collect, and what specific actions they were instructed to undertake to that end.” *Id.* (citation omitted). “Although in general hold letters are privileged, the prevailing view . . . is that when spoliation occurs the letters are discoverable.”¹⁶ *Id.* (footnote and citations omitted).

VII. Consequences/Procedures

A. E-Discovery Panel’s Proposal

The rule should set forth the consequences of failing to fulfill the responsibilities it mandates,

¹⁶ The court noted that the Third Circuit had not ruled on this issue, but that “most applicable authority from around the country provides that litigation hold letters should be produced if there has been a preliminary showing of spoliation.” *Major Tours*, 2009 WL 2413631, at *5.

and the obligations of the complainant/failing party.

- a. Sanctions for noncompliance resulting in prejudice to the requesting party should be specified (*e.g.*, FED. R. CIV. P. 37).
 - i. The rule should apply different sanctions depending on the state of mind of the offender. (The state of mind necessary to warrant each identified sanction should be specified.)
 - ii. Certain conduct that presumptively satisfies the requisite state of mind should be specified (*e.g.*, failure to issue a litigation hold = negligence or gross negligence)
- b. A model jury instruction for adverse inference or other jury-specific sanctions should be drafted.
- c. Compliance with the rule should insulate a responding party from sanctions for failure to preserve.
- d. The complainant should be obliged to raise the failure with a judicial officer promptly after it has learned of the alleged spoliation and has assessed the prejudice it has suffered as a result.
- e. Identify the elements that the complainant must specify, such as:
 - i. The information or tangible things lost.
 - ii. Its relevance (specifying the standard (*e.g.*, 401, 26(b)(1), admissibility, discoverability)).
 - iii. The prejudice suffered.
- f. The rule should address burden of proof issues.

B. Case Law on the Consequences/Procedures Element

1. Authority/Purpose

A court may impose sanctions for spoliation under its inherent authority or under rule or statute. *See, e.g., Consol. Edison*, 90 Fed. Cl. at 254 (“Sanctions for spoliation arise out of the court’s inherent power “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of

cases.[']” (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)); *Rimkus*, 688 F. Supp. 2d at 611 (“Allegations of spoliation, including the destruction of evidence in pending or reasonably foreseeable litigation, are addressed in federal courts through the inherent power to regulate the litigation process if the conduct occurs before a case is filed or if, for another reason, there is no statute or rule that adequately addresses the conduct.” (citing *Chambers*, 501 U.S. at 43–46; *Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1408 (5th Cir. 1993)); *Richard Green*, 262 F.R.D. at 288 (noting that a court’s authority to impose spoliation sanctions derives from at least two sources, including Rule 37 for violation of a court order and a court’s inherent authority); *Goodman*, 632 F. Supp. 2d at 505–06 (“Under federal law, a court’s authority to levy sanctions on a spoliator ultimately derives from two main sources. First, there is the ‘court’s inherent power to control the judicial process and litigation, a power that is necessary to redress conduct ‘which abuses the judicial process.’” Second, if the spoliation violates a specific court order or disrupts the court’s discovery plan, sanctions also may be imposed under FED. R. CIV. P. 37.” (internal citations omitted)); *Asher Assocs.*, 2009 WL 1328483, at *5 (“Plaintiffs correctly note that the court has inherent power to impose sanctions for the destruction or loss of evidence.” (citations omitted)); *Nucor*, 251 F.R.D. at 194 (“The court’s ability to impose sanctions for spoliation stems from its ‘inherent power to control the judicial process and litigation,’” but “‘is limited to that necessary to redress conduct ‘which abuses the judicial process.’” (quoting *Silvestri*, 271 F.3d at 590)); *Kmart*, 371 B.R. at 839 (“A court’s authority to impose sanctions for a party’s failure to preserve or to produce documents is both inherent and statutory.” (citations omitted)). However, “[i]f an applicable statute or rule can adequately sanction the conduct, that statute or rule should ordinarily be applied, with its attendant limits, rather than a more flexible or expansive ‘inherent power.’” *Rimkus*, 688 F. Supp. 2d at 611

(citations omitted); *see also Victor Stanley*, 2010 WL 3530097, at *19 (“[T]he court relies instead on statutory authority when applicable.” (citation omitted)). “When inherent power does apply, it is ‘interpreted narrowly, and its reach is limited by its ultimate source—the court’s need to orderly and expeditiously perform its duties.’” *Rimkus*, 688 F. Supp. 2d at 611 (quoting *Newby v. Enron Corp.*, 302 F.3d 295, 302 (5th Cir. 2002) (footnote omitted)). The *Rimkus* court pointed out that “[i]f inherent power, rather than a specific rule or statute, provides the source of the sanctioning authority, under *Chambers*, it may be limited to a degree of culpability greater than negligence.” *Id.*; *see also Victor Stanley*, 2010 WL 3530097, at *19 (“[T]he court’s inherent authority only may be exercised to sanction ‘bad-faith conduct,’ and ‘must be exercised with restraint and discretion.’” (second alteration in original) (internal citation to *Chambers*, 501 U.S. at 50, omitted)).

Potential sanctions for spoliation include “from least harsh to most harsh—further discovery, cost-shifting, fines, special jury instructions, preclusion, and the entry of default judgment or dismissal (terminating sanctions).” *Pension Comm.*, 685 F. Supp. 2d at 469 (footnotes omitted). “Pursuant to their inherent authority, courts may impose fines or prison sentences for contempt and enforce ‘the observance of order.’ Additionally, they may ‘prevent undue delays in the disposition of pending cases and . . . avoid congestion in the calendars of the District Courts,’ such as by dismissing a case.” *Victor Stanley*, 2010 WL 3530097, at *19 (internal citation omitted).¹⁷ “In addition, a court has statutory authority to impose costs, expenses, and attorneys’ fees on ‘any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously.’” *Rimkus*, 688 F. Supp. 2d at

¹⁷ The *Victor Stanley* court ordered that as a sanction for spoliation, the defendant be held in contempt of court and imprisoned for up to two years, unless he paid the plaintiff’s attorneys’ fees and costs associated with the filing of the spoliation motion and the efforts throughout to the case to demonstrate the defendant’s spoliation. *See Victor Stanley*, 2010 WL 3530097, at *44.

612 (quoting 28 U.S.C. § 1927). “Sanctions may be imposed ‘on an attorney, a party, or both.’” *Richard Green*, 262 F.R.D. at 288 (citation omitted).

“Whether proceeding under Rule 37 of the Federal Rules of Civil Procedure or a court’s inherent powers, the ‘analysis is essentially the same.’” *Kmart*, 371 B.R. at 839 (citations omitted). However, “[w]hen seeking sanctions under subdivision (b) of Rule 37 (as opposed to other subdivisions of that rule), violation of a court order or discovery ruling of some sort is a prerequisite.” *Id.* (citation omitted). “Courts have broadly interpreted what constitutes an ‘order’ for purposes of imposing sanctions [under Rule 37(b)].” *Id.* (citations omitted); *cf. Victor Stanley*, 2010 WL 3530097, at *21 (concluding that the court had “authority to impose Rule 37(b)(2) sanctions, if otherwise appropriate, for violations of a Court-issued preservation order, even if that order d[id] not actually order the actual production of the evidence to be preserved.”).

The courts have recognized several purposes for implementing spoliation sanctions:

If spoliation has occurred, the court should design sanctions “to: (1) deter parties from engaging in spoliation; (2) place the risk of erroneous judgment on the party who wrongfully created the risk; and (3) restore ‘the prejudiced party to the same position he [or she] would have been in absent the wrongful destruction of evidence by the opposing party.’”

Consol. Edison, 90 Fed. Cl. at 257 (alteration in original) (quoting *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999)); *accord Crown Castle*, 2010 WL 1286366, at *16 (quoting *West*, 167 F.3d at 779); *Pension Comm.*, 685 F. Supp. 2d at 469; *Wade*, 686 F. Supp. 2d at 196 (quoting *West*, 167 F.3d at 779); *Arista Records*, 608 F. Supp. 2d at 442 (quoting *West*, 167 F.3d at 779); *see also Richard Green*, 262 F.R.D. at 288 (“[A]ny ‘applicable sanction should be molded to serve the prophylactic, punitive, and remedial rationales underlying the spoliation doctrine.’” (citing *West*, 167 F.3d at 779; *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)));

Keithley, 2008 WL 4830752, at *7 (“The policies underlying the spoliation sanctions are many: ‘to punish the spoliator, so as to ensure that it does not benefit from its misdeeds; to deter future misconduct; to remedy, or at least minimize, the evidentiary or financial damages caused by the spoliation; and last, but not least, to preserve the integrity of the judicial process and its truth-seeking function.’” (quoting *United Med. Supply Co. v. United States*, 77 Fed. Cl. 257, 264 (2007))); *Danis*, 2000 WL 1694325, at *31 (“In general, sanctions are intended to serve one or more of the following purposes: (1) to ameliorate the prejudice caused to an innocent party by a discovery violation; (2) to punish the party who violates his or her obligations; and/or (3) to deter others from committing like violations.” (citation omitted)); *Kmart*, 371 B.R. at 840 (“Sanctions are generally intended to serve the following purposes: (1) amelioration of prejudice; (2) punishment; and/or (3) deterrence.” (citations omitted)). Another court has explained that courts should seek to impose a sanction that accomplishes the following objectives:

(1) penalize[s] those whose conduct may be deemed to warrant such a sanction; (2) deter[s] parties from engaging in the sanctioned conduct; (3) place[s] the risk of an erroneous judgment on the party who wrongfully created the risk; and (4) restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.

United States v. Maxxam, Inc., No. C-06-07497 CW (JCS), 2009 WL 817264, at *8 (N.D. Cal. Mar. 27, 2009) (quotation marks omitted) (quoting *Advantacare Health Partners L.P. v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997, at *3 (N.D. Cal. Aug. 17, 2004)). “Because . . . the duty to preserve relevant evidence is owed to the court, it is also appropriate for a court to consider whether the sanctions it imposes will ‘prevent abuses of the judicial system’ and ‘promote the least harsh sanction that can provide an adequate remedy.’” *Victor Stanley*, 2010 WL 3530097, at *37 (quoting *Pension Comm.*, 685 F. Supp. 2d at 469; citing *Rimkus*, 688 F. Supp. 2d at 618).

2. Case-by-Case Determination

The courts have emphasized that the determination of the appropriate sanction is within the district court's discretion and that it should be made on a case-by-case basis. *See Crown Castle*, 2010 WL 1286366, at *16 (“The determination of an appropriate sanction for spoliation, if any, is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis.” (quoting *Fujitsu*, 247 F.3d at 436)); *Pension Comm.*, 685 F. Supp. 2d at 469 (same) (quoting *Fujitsu*, 247 F.3d at 436); *Richard Green*, 262 F.R.D. at 288 (same) (quoting *Zubulake V*, 229 F.R.D. at 430); *Consol. Aluminum*, 244 F.R.D. at 339 (same) (citing *Zubulake IV*, 220 F.R.D. at 216); *Kmart*, 371 B.R. at 840 (“Courts have broad discretion to select the appropriate sanction for a discovery violation in light of the unique factual circumstances of the case.” (citations omitted)).

The *Pension Committee* court emphasized that “at the end of the day the judgment call of whether to award sanctions is inherently subjective,” based on the court’s “‘gut reaction’ based on years of experience as to whether a litigant has complied with its discovery obligations and how hard it worked to comply.” *Id.* at 471. The court stated that “while it would be helpful to develop a list of relevant criteria a court should review in evaluating discovery conduct, these inquiries are inherently fact intensive and must be reviewed case by case.” *Id.* Similarly, in *Rimkus*, the court explained that it would be difficult to come up with a detailed approach to sanctions that would apply in every case:

Applying a categorical approach to sanctions issues is also difficult Determining whether sanctions are warranted and, if so, what they should include, requires a court to consider both the spoliating party’s culpability and the level of prejudice to the party seeking discovery. Culpability can range along a continuum from destruction intended to make evidence unavailable in litigation to inadvertent loss of information for reasons unrelated to the litigation. Prejudice can range along a continuum from an inability to prove claims or defenses to little or no impact on the

presentation of proof. A court's response to the loss of evidence depends on both the degree of culpability and the extent of prejudice. Even if there is intentional destruction of potentially relevant evidence, if there is no prejudice to the opposing party, that influences the sanctions consequence. And even if there is an inadvertent loss of evidence but severe prejudice to the opposing party, that too will influence the appropriate response, recognizing that sanctions (as opposed to other remedial steps) require some degree of culpability.

Rimkus, 688 F. Supp. 2d at 613.

In *Rimkus*, the court noted that “[c]ourts . . . agree that the severity of a sanction for failing to preserve when a duty to do so has arisen must be proportionate to the culpability involved and the prejudice that results.” 688 F. Supp. 2d at 618; *see also Richard Green*, 262 F.R.D. at 288 (“[T]he severity of the sanctions imposed should be congruent with the destroyer’s degree of culpability.” (citations omitted)); *Consol. Aluminum*, 244 F.R.D. at 340 (“[T]he seriousness of the sanctions imposed by a court as a result of spoliation of evidence depends upon: (1) the degree of fault of the party who altered or destroyed the evidence; (2) the degree of prejudice suffered by the opposing party; and (3) whether there is a lesser sanction that will avoid substantial unfairness to the opposing party.” (citation omitted));¹⁸ *Asher Assocs.*, 2009 WL 1328483, at *10 (“In striving to ‘level the playing field,’ there must be some reasonable relationship between the sanction imposed and the prejudice actually suffered by the moving party.” (citations omitted)); *Keithley*, 2008 WL 4830752, at *2 (“[T]he judge should take pains neither to use an elephant gun to slay a mouse nor to wield a cardboard sword if a dragon looms.” (quoting *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 395 (1st Cir. 1990))); *Danis*, 2000 WL 1694325, at *31 (“Any sanction leveled must adhere to ‘the norm of proportionality’” (omission in original) (quoting *Newman v. Metro. Pier & Exposition Auth.*,

¹⁸ *See also Micron*, 255 F.R.D. at 149 (identifying the same three factors as the key considerations in determining whether spoliation sanctions are warranted).

962 F.2d 589, 591 (7th Cir. 1992)); *id.* (“The Seventh Circuit has directed that any sanctions rendered be proportionate to the offending conduct” (citing *United States v. Golden Elevator, Inc.*, 27 F.3d 301, 303 (7th Cir. 1994); *Crown Life Ins. Co. v. Craig*, 995 F.2d 1376, 1382 (7th Cir. 1993)); *Kmart*, 371 B.R. at 840 (“[T]he Seventh Circuit has cautioned that sanctions must be proportionate to the offending conduct.” (citation omitted)). The *Rimkus* court also noted that sanctions “should be no harsher than necessary to respond to the need to punish or deter and to address the impact on discovery.” 688 F. Supp. 2d at 618 (footnote omitted); *see also Jones*, 2010 WL 2106640, at *5 (“If the court finds that sanctions are appropriate, it must determine whether the proposed sanction can ameliorate the prejudice that arose from the breach; if a lesser sanction can accomplish the same goal, the Court must award the lesser sanction.” (citation omitted)); *Pension Comm.*, 685 F. Supp. 2d at 469 (“[A] court should always impose the least harsh sanction that can provide an adequate remedy.”); *but see Danis*, 2000 WL 1694325, at *31 (“Nor must a court select the ‘least drastic’ or ‘most reasonable’ sanction. Dismissal or default, although harsh, may be appropriate so long as ‘the sanction selected [is] one that a reasonable jurist, appr[i]s[ed] of all the circumstances, would have chosen as proportionate to the infraction.’” (alteration in original) (internal citation omitted)). “A measure of the appropriateness of a sanction is whether it ‘restore[s] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence by the opposing party.’” *Rimkus*, 688 F. Supp. 2d at 618 (alteration in original) (quoting *West*, 167 F.3d at 779).

3. Dismissal or Default Judgment

The sanction of dismissal or default judgment is the harshest sanction available, and “is appropriate only if the spoliation or destruction of evidence resulted in ‘irreparable prejudice’ and no

lesser sanction would suffice.” *Rinkus*, 688 F. Supp. 2d at 644 (citing *Silvestri*, 271 F.3d at 593–94); see also *Schumacher Immobilien Und Beteiligungs AD v. Prova, Inc.*, No. 2:09CV18, 2010 WL 2867603, at *7 (M.D.N.C. Jul. 21, 2010) (“The ‘ultimate sanction’ of dismissal is appropriate where the loss or destruction of the evidence was done in bad faith, or where the prejudice to the defendant is extraordinary and denied defendant the ability to adequately defend its case.” (citing *Silvestri*, 271 F.3d at 593)); *Crown Castle*, 2010 WL 1286366, at *16 (“Before imposing a sanction of dismissal, a court should make a finding of willfulness or bad faith, and should consider whether lesser sanction would be effective.” (internal citations omitted)); *Pension Comm.*, 685 F. Supp. 2d at 469–70 (“[A] terminating sanction is justified in only the most egregious cases, such as where a party has engaged in perjury, tampering with evidence, or intentionally destroying evidence by burning, shredding, or wiping out computer hard drives.” (footnotes omitted)); *Goodman*, 632 F. Supp. 2d at 518–19 (“Generally, dismissal is justified ‘in circumstances of bad faith or other ‘like action,’ and courts should impose sanctions that dispose of a case only in the most egregious circumstances” (internal citation omitted)); *Greyhound Lines, Inc. v. Goodyear Tire & Rubber Co.*, No. 3:08cv516-WHA (WO), 2009 WL 798947, at *2 (M.D. Ala. Mar. 25, 2009) (noting that the Eleventh Circuit has “explained that dismissal is the most severe sanction available and should only be used where there is a showing of bad faith and where lesser sanctions will not suffice” (citing *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939, 944 (11th Cir. 2005)));¹⁹ *Micron*, 255 F.R.D. at 149 (“[S]uch [dispositive] sanctions are not warranted in the absence of demonstrated bad faith (i.e., the intentional

¹⁹ The court stated that “[i]n describing the standard governing bad faith, the Eleventh Circuit explained that the law does not require a showing of malice, but that instead, in determining whether there is bad faith, a court should weigh the degree of the spoliator’s culpability against the prejudice to the opposing party.” *Greyhound Lines*, 2009 WL 798947, at *2 (citing *Flury*, 427 F.3d at 946).

destruction of evidence) and prejudice. With respect to the latter, the imposition of a dispositive sanction should be confined to those cases where the failure to produce “materially affect[s] the substantial rights of the adverse party’ and is ‘prejudicial to the presentation of his case.’” (third alteration in original) (citation omitted)); *Nucor*, 251 F.R.D. at 201 (“Default judgment is a harsh sanction and district courts should be reluctant to impose that penalty. Nonetheless, a district court may impose default judgment if that sanction ‘serves the twin purposes of ‘leveling the evidentiary playing field and . . . sanctioning the improper conduct.’” (internal citations omitted)); *id.* (“[D]efault judgment should be imposed only if ‘a lesser sanction will [not] perform the necessary function.’” (quoting *Silvestri*, 271 F.3d at 593)); *Indemnity Ins. Co. of N. Am.*, 1998 WL 363834, at *3 (“Dismissal of a case with prejudice . . . ‘is a drastic remedy that should be imposed only in extreme circumstances . . . usually after consideration of alternative, less drastic sanctions.’” (quoting *John B. Hull, Inc. v. Waterbury Petroleum Prods.*, 845 F.2d 1172, 1176 (2d Cir. 1988) (internal citations omitted))); *but see S. New England Tel. Co. v. Global NAPs Inc.*, --- F.3d ----, No. 08-4518-cv, 2010 WL 3325962, at *18 (2d Cir. Aug. 25, 2010) (“[D]istrict courts are not required to exhaust possible lesser sanctions before imposing dismissal or default if such a sanction is appropriate on the overall record.” (citing *John B. Hull*, 845 F.2d at 1176–77)).

As one court put it, “[b]ecause a default judgment deprives a party of a hearing on the merits, the harsh nature of this sanction should usually be employed only in extreme situations where there is evidence of willfulness, bad faith or fault by the noncomplying party.” *Danis*, 2000 WL 1694325, at *33 (citing *Societe Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 212 (1958)); *see also S. New England Tel. Co.*, 2010 WL 3325962, at *15 (noting that “dismissal or default imposed pursuant to Rule 37 is a ‘drastic remedy’ generally to be

used only when the district judge has considered lesser alternatives,” but that “[d]espite the harshness of these measures, . . . ‘discovery orders are meant to be followed,’ and dismissal or default is justified if the district court finds that the failure to comply with discovery orders was due to ‘willfulness, bad faith, or any fault’ of the party sanctioned.” (internal citations omitted); *Clark Constr. Group, Inc. v. City of Memphis*, 229 F.R.D. 131, 138 (W.D. Tenn. 2005) (“In the Sixth Circuit, ‘[d]ismissal is the sanction of last resort. It should be imposed only if the court concludes that the party’s failure to cooperate in discovery was willful, in bad faith, or due to its own fault.’” (alteration in original) (quoting *Beil v. Lakewood Eng’g & Mfg. Co.*, 15 F.3d 546, 552 (6th Cir. 1994))); *Kmart*, 371 B.R. at 840 (Because “the Supreme Court has indicated that there are Fifth Amendment limitations on the power of courts to dismiss an action (or enter default judgment) without affording a hearing on the merits[,] . . . courts hold that this sanction should ordinarily be employed only in extreme circumstances where there is evidence of ‘willfulness,’ ‘bad faith,’ or ‘fault.’” (citations omitted)); *but see King*, 181 F. App’x at 376 (“Because of the extreme nature of dismissal as a sanction for spoliation, it is usually appropriate ‘only in circumstances of bad faith or other ‘like action.’” However, bad faith conduct by the plaintiff may not be needed to justify dismissal if the spoliation of evidence effectively renders the defendant unable to defend its case.” (internal citation to *Silvestri*, 271 F.3d at 593, omitted)). Although the *Danis* court explained that “‘fault’ in this context is more than a mistake, but less than intentional or reckless behavior, it noted that “[t]he Seventh Circuit has also held that dismissal may be appropriate where there is a ‘clear record of delay’ or ‘contumacious conduct,’ or when ‘other less drastic sanctions have proven unavailable.’” *Danis*, 2000 WL 1694325, at *34 n.21 (quoting *Marrocco v. Gen Motors*, 966 F.2d 220, 224 (7th Cir. 1992)). The *Danis* court also concluded that even if there is some prejudice, default judgment

is not appropriate if less drastic measures would remedy the prejudice. *See id.* at *35 (“[T]he purposes for sanctions do not support the entry of a default judgment—which deprives parties of a trial on the merits—when there is at least *some* evidence that allows the plaintiff to prove the case and where there are less drastic remedies available to cure the absence of certain evidence, deter others from similar conduct, and to punish the wrongdoer for destruction of this evidence.” (citations omitted)).

Courts have stated the framework for analyzing the propriety of entering a default sanction in a variety of ways. For example, *Rimkus* pointed out that “[e]xtreme sanctions—dismissal or default—have been upheld when ‘the spoliator’s conduct was so egregious as to amount to a forfeiture of his claim’ and ‘the effect of the spoliator’s conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim.’” 688 F. Supp. 2d at 618 (quoting *Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 180 (D. Md. 2008)); *see also Victor Stanley*, 2010 WL 3530097, at *38 (“[I]n the Fifth Circuit, ‘[a] severe sanction such as a default judgment or an adverse inference instruction requires bad faith *and* prejudice.’” (quoting *Rimkus*, 688 F. Supp. 2d at 642)).

A court in the Second Circuit has explained that whether dismissal is appropriate is a function of both the offender’s culpability and the prejudice suffered:

“Dismissal of the complaint would be appropriate if the spoliation was done with wilfulness, bad faith, or fault on the part of the sanctioned party.” However, “dismissal is not limited only to matters where the offending party has acted with bad faith or willful intent, but is permitted where there is any fault of the sanctioned party.” This is because other factors—such as the degree of prejudice to the moving party—may be considered by the court.

Wade, 686 F. Supp. 2d at 196 (internal citations and footnote omitted). Similarly, the *Victor Stanley* court noted:

In the Fourth Circuit, to order these harshest sanctions, the court must “be

able to conclude either (1) that the spoliator's conduct was so egregious as to amount to a forfeiture of his claim, *or* (2) that the effect of the spoliator's conduct was so prejudicial that it substantially denied the defendant the ability to defend the claim."

Victor Stanley, 2010 WL 3530097, at *38 (emphasis added) (additional quotation marks omitted) (quoting *Goodman*, 632 F. Supp. 2d at 519). The court noted that "[a]lthough '*Silvestri* posits an either/or test,' indicating two distinct means of justifying severe sanctions, this Court has not terminated a case where a spoliator acted in bad faith, absent a showing of substantial prejudice," and that other circuits have held that "dispositive or potentially dispositive sanctions are impermissible without bad faith, even if there is considerable prejudice." *Id.* (internal citation and footnote). In one case, however, the court granted dismissal after concluding that the disposal of material evidence was willful, "[e]ven though Plaintiffs' motives were apparently innocent," because the plaintiffs had "denied Defendant access to the only evidence from which Defendant c[ould] adequately investigate Plaintiff's claims and develop its defenses." *Erlandson v. Ford Motor Co.*, No. 08-CV-1137-BR, 2009 WL 3672898, at *6 (D. Or. Oct. 30, 2009).

One court explained that the Ninth Circuit has required consideration of the following factors before implementing a dismissal sanction: "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." *Maxxam*, 2009 WL 817264, at *8 (quotation marks and citation omitted).

In another case, the court stated that the following five factors should be considered in evaluating whether to use dismissal as a sanction:

(1) the degree of actual prejudice to the defendant; (2) the amount of interference with the judicial process; (3) the culpability of the litigant; (4) whether the court warned the party in advance that dismissal of the action

would be a likely sanction for noncompliance; and (5) the efficacy of lesser sanctions.

Schlumberger, 2009 WL 5252644, at *3 (quoting *Davis v. Miller*, 571 F.3d 1058, 1061 (10th Cir. 2009)). The *Schlumberger* court emphasized that “[i]t is only when the aggravating factors outweigh the judicial system’s strong predisposition to resolve cases on their merits that dismissal is an appropriate sanction.” *Id.* (quoting *Davis*, 571 F.3d at 1061 (internal citations and quotations omitted)).

In another case, the court set out a similar framework:

When evaluating whether dismissal is an appropriate sanction, courts consider whether the party’s failure is due to willfulness, bad faith, or fault; whether the adversary was prejudiced by the dismissed party’s conduct; whether the dismissed party was warned that failure to cooperate could lead to dismissal; and whether less drastic sanctions were imposed or considered before dismissal was ordered. . . . See *U.S. v. Reyes*, 307 F.3d 451, 458 (6th Cir. 2002) (quoting *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 363 (6th Cir. 1999)). “Although no one factor is dispositive, dismissal is proper if the record demonstrates delay or contumacious conduct.” *Id.* Dismissal for failing to cooperate in discovery is a “sanction of last resort that may be imposed only if the court concludes that a party’s failure to cooperate in discovery is due to willfulness, bad faith, or fault.” *Patton v. Aerojet Ordnance Co.*, 765 F.2d 604, 607 (6th Cir. 1985).

In re Nat’l Century Fin. Enters., 2009 WL 2169174, at *2. The court emphasized that “[t]hose courts which have imposed the sanction of dismissal have done so when a party’s conduct has been egregious.” *Id.* at *3.

Yet another court described the following analysis for considering a default sanction:

When considering a default sanction in response to spoliation of evidence, the court must determine “(1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the efficacy of lesser sanctions, [and] (4) the relationship or nexus between the misconduct drawing the [default] sanction and the matters in controversy in the case.” *Halaco Eng’g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988). In addition, the court may consider the

prejudice to the moving party as an “optional” consideration where appropriate. *Id.* This multi-factor test is not “a mechanical means of determining what discovery sanction is just,” but rather “a way for a district judge to think about what to do.” *Valley Engineers, Inc. v. Electric Eng’g Co.*, 158 F.3d 1051, 1057 (9th Cir. 1998).

In re Napster, Inc. Copyright Litig., 462 F. Supp. 2d at 1070 (alterations in original). “In the Ninth Circuit, ‘extraordinary circumstances exist where there is a pattern of disregard for Court orders and deceptive litigation tactics that threaten to interfere with the rightful decision of a case.’” *Id.* at 1071 (quoting *Advantacare Health Partners, LP v. Access IV*, No. C 03-04496 JF, 2004 WL 1837997, at *5 (N.D. Cal. Aug. 17, 2004)). “Courts have held that a party’s ‘failure to preserve evidence that they knew or reasonably should have known would be relevant to a potential action and might be sought in discovery’ does not necessarily warrant default or dismissal if these actions ‘do not eclipse entirely the possibility of a just result.’” *Id.* (quoting *Advantacare*, 2004 WL 1837997, at *5).

4. Exclusion of Evidence

“‘[T]he district court has inherent power to exclude evidence that has been improperly altered or damaged by a party where necessary to prevent the non-offending side from suffering unfair prejudice.’” *Velez*, 590 F. Supp. 2d at 258 (alteration in original) (quoting *Collazo-Santiago v. Toyota Motor Corp.*, 149 F.3d 23, 28 (1st Cir. 1998)).

“The intended goals behind excluding evidence, or at the extreme, dismissing a complaint, are to rectify any prejudice the non-offending party may have suffered as a result of the loss of evidence and to deter any future conduct, particularly deliberate conduct, leading to such loss of evidence Therefore, of particular importance when considering the appropriateness of sanctions is the prejudice to the non-offending party and the degree of fault of the offending party.”

Id. (quoting *Collazo-Santiago*, 149 F.3d at 29). “Applicable case law in the First Circuit has clearly established that ‘bad faith or comparable bad motive’ is not required for the court to exclude evidence

in situations involving spoliation.” *Id.* (citing *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 95 (1st Cir. 1999)).

5. Adverse Inference

“It is a well-established and long-standing principle of law that a party’s intentional destruction of evidence relevant to proof of an issue at trial can support an inference that the evidence would have been unfavorable to the party responsible for its destruction.” *Arista Records*, 608 F. Supp. 2d at 443 (quoting *Kronisch*, 150 F.3d at 126). The *Pension Committee* court examined the potential sanction of an adverse inference and its different forms. The court explained:

Like many other sanctions, an adverse inference instruction can take many forms, again ranging in degrees of harshness. The harshness of the instruction should be determined based on the nature of the spoliating party’s conduct—the more egregious the conduct, the more harsh the instruction.

In its most harsh form, when a spoliating party has acted willfully or in bad faith, a jury can be instructed that certain facts are deemed admitted and must be accepted as true. At the next level, when a spoliating party has acted willfully or recklessly, a court may impose a mandatory presumption. Even a mandatory *presumption*, however, is considered to be rebuttable.

The least harsh instruction *permits* (but does not require) a jury to *presume* that the lost evidence is both relevant and favorable to the innocent party. If it makes this presumption, the spoliating party’s rebuttal evidence must then be considered by the jury, which must then decide whether to draw an adverse inference against the spoliating party. This sanction still benefits the innocent party in that it allows the jury to consider both the misconduct of the spoliating party as well as proof of prejudice to the innocent party. Such a charge should be termed a “spoliation charge” to distinguish it from a charge where the a jury is *directed* to presume, albeit still subject to rebuttal, that the missing evidence would have been favorable to the innocent party, and from a charge where the jury is *directed* to deem certain facts admitted.

Pension Comm., 685 F. Supp. 2d at 470–71 (footnotes omitted).

In *Rimkus*, the court explained:

When a party is prejudiced, but not irreparably, from the loss of evidence that was destroyed with a high degree of culpability, a harsh but less extreme sanction than dismissal or default is to permit the fact finder to presume that the destroyed evidence was prejudicial. Such a sanction has been imposed for the intentional destruction of electronic evidence. Although adverse inference instructions can take varying forms that range in harshness, and although all such instructions are less harsh than so-called terminating sanctions, they are properly viewed as among the most severe sanctions a court can administer.

Rimkus, 688 F. Supp. 2d at 618–19 (footnotes omitted); *see also Consol. Aluminum*, 244 F.R.D. at 340 (“In exercising its discretion, a court may exclude the spoiled evidence or allow a jury to infer that the party spoiled the evidence because the evidence was unfavorable to the party’s case. However, these sanctions are considered drastic, and courts generally try to avoid imposing them when lesser sanctions are available.” (footnote omitted)); *id.* at 340 n.5 (“Imposition of an adverse inference instruction has been recognized as a powerful tool in a jury trial since, when imposed, it basically ‘brands one party as a bad actor, guilty of destroying evidence that it should have retained for use by the jury.’” (quoting *Morris v. Union Pacific R.R.*, 373 F.3d 896, 900 (8th Cir. 2004))).

The *Consolidated Aluminum* court explained that “[t]ypically, the giving of an adverse inference instruction has been upheld where the facts of the case are extreme, such as where the destroyed evidence was the very automobile that was the subject of the products liability action.” *Consol. Aluminum*, 244 F.R.D. at 344 (citations omitted). The court noted that “[c]ourts have also found sufficient prejudice to impose an adverse inference instruction where the destroying party has selectively retained relevant evidence and has used retained evidence in prior disputes to its advantage.” *Id.* at 344 n.15 (citation omitted).

In *Keithley*, the court explained the rationales behind imposing an adverse inference:

Imposition of an adverse inference is:

based on two rationales, one evidentiary and one not. The evidentiary rationale is nothing more than the common sense observation that a party who has notice that a document is relevant to litigation and who proceeds to destroy the document is more likely to have been threatened by the document than is a party in the same position who does not destroy the document

The other rationale for the inference has to do with its prophylactic and punitive effects. Allowing the trier of fact to draw the inference presumably deters parties from destroying relevant evidence before it can be introduced at trial.

Keithley, 2008 WL 4830752, at *9 (omission in original) (quoting *Sensonic v. Aerosonic Corp.*, 81 F.3d 1566 (Fed. Cir. 1996)).

6. Monetary Sanctions

The *Pension Committee* court also examined the circumstances in which monetary sanctions are appropriate:

“Monetary sanctions are appropriate ‘to punish the offending party for its actions [and] to deter the litigant’s conduct, sending the message that egregious conduct will not be tolerated.’” Awarding monetary sanctions “serves the remedial purpose of compensating [the movant] for the reasonable costs it incurred in bringing [a motion for sanctions].”

Pension Comm., 685 F. Supp. 2d at 471 (alterations in original) (footnotes omitted); *see also Richard Green*, 262 F.R.D. at 292 (“Monetary sanctions are appropriate ‘to punish the offending party for its actions [and] to deter the litigant’s conduct, sending the message that egregious conduct will not be tolerated.’” (alteration in original) (quoting *In re WRT Energy Sec. Litig.*, 246 F.R.D. 185, 201 (S.D.N.Y. 2007))). Another court explained:

[A]n award of costs serves both punitive and remedial purposes: it deters spoliation and compensates the opposing party for the additional costs incurred. Such compensable costs may arise either from the discovery necessary to identify alternative sources of information or from the investigation and litigation of the document destruction itself.

Cache, 244 F.R.D. at 636 (quoting *Turner*, 142 F.R.D. at 78 (internal citations omitted)),²⁰ accord *Asher Assocs.*, 2009 WL 1328483, at *12. Another court explained:

Attorneys' fees and costs "may be appropriate to punish the offending party for its actions or to deter [the] litigant's conduct, sending the message that egregious conduct will not be tolerated . . . [.] [S]uch an award serves the remedial purpose of making the opposing party whole for costs incurred as a result of the spoliator's wrongful conduct."

Arista Records, 608 F. Supp. 2d at 444 (first and third alterations and omission in original) (quoting *Chan v. Triple 8 Palace, Inc.*, 03 Civ. 6048(GEL)(JCF), 2005 WL 1925579, at *10 (S.D.N.Y. Aug. 11, 2005) (internal quotation marks and citations omitted)). Similarly, in *Goodman*, the court explained that there are four situations in which a court will award costs or attorneys' fees for spoliation, including "award[ing] legal fees in favor of the moving party as an alternative to dismissal or an adverse jury instruction"; "grant[ing] discovery costs to the moving party if additional discovery must be performed after a finding that evidence was spoliated"; "in addition to a spoliation sanction, . . . award[ing] a prevailing litigant the litigant's reasonable expenses incurred in making the motion, including attorney's fees"; and "in addition to a spoliation sanction, . . . award[ing] a prevailing litigant the reasonable costs associated with the motion *plus* any investigatory costs into the spoliator's conduct." *Goodman*, 632 F. Supp. 2d at 523–24 (citations omitted).

In *Rimkus*, the court stated: "Like an adverse inference, an award of costs and fees deters spoliation and compensates the opposing party for the additional costs incurred. These costs may

²⁰ The *Cache* court declined to impose requested fines payable to the Clerk of Court, noting that although there were several cases imposing such fines as a result of sanctionable conduct, most of those cases involved violation of a court order, and "the Tenth Circuit has held a fine that is neither compensatory nor avoidable by complying with a court order is criminal in nature and, therefore, subject to the procedural safeguards governing a criminal contempt order." *Cache*, 244 F.R.D. at 637 (citations omitted); see also *Victor Stanley*, 2010 WL 3530097, at *2 n.5 ("[T]he Court lacks any 'effective' means to order Defendants to pay a fine to the Clerk of the Court. Such an order is regarded as a form of criminal contempt, which may not be imposed without affording Defendants the procedural protections of Fed. R. Crim. P. 42(b).") (citation omitted)).

arise from additional discovery needed after a finding that evidence was spoliated, the discovery necessary to identify alternative sources of information, or the investigation and litigation of the document destruction itself.” *Rimkus*, 688 F. Supp. 2d at 647 (footnote and citations omitted).

7. State of Mind

The *Goodman* court explained that “there are three possible states of mind that can satisfy the culpability requirement [for imposing spoliation sanctions]: bad faith/known destruction, gross negligence, and ordinary negligence.” *Goodman*, 632 F. Supp. 2d at 518 (citing *Thompson*, 219 F.R.D. at 101). In *Pension Committee*, the court defined various states of mind in the discovery context. *See Pension Comm.*, 685 F. Supp. 2d at 463–64 (noting that there is “no clear definition of [the terms “negligence,” “gross negligence,” and “willfulness”] in the context of discovery misconduct,” but that “it is well established that *negligence* involves unreasonable conduct in that it creates a risk of harm to others, but *willfulness* involves intentional or reckless conduct that is so unreasonable that harm is highly likely to occur.”). The *Pension Committee* court elaborated:

A failure to preserve evidence resulting in the loss or destruction of relevant information is surely negligent, and, depending on the circumstances, may be grossly negligent or willful. For example, the intentional destruction of relevant records, either paper or electronic, after the duty to preserve has attached, is willful. Possibly after October, 2003, when *Zubulake IV* was issued, and definitely after July, 2004, when the final relevant *Zubulake* opinion was issued, the failure to issue a *written* litigation hold constitutes gross negligence because that failure is likely to result in the destruction of relevant information.

The next step in the discovery process is collection and review. Once again, depending on the extent of the failure to collect evidence, or the sloppiness of the review, the resulting loss or destruction of evidence is surely negligent, and, depending on the circumstances may be grossly negligent or willful. For example, the failure to collect records—either paper or electronic—from key players constitutes gross negligence or willfulness as does the destruction of email or certain backup tapes after the duty to preserve has attached. By contrast, the failure to obtain records

from all those employees who had any involvement with the issues raised in the litigation or anticipated litigation, as opposed to just the . . . key players, could constitute negligence. Similarly, the failure to take all appropriate measures to preserve ESI likely falls in the negligence category. These examples are not meant as a definitive list. Each case will turn on its own facts and the varieties of efforts and failures [are] infinite. I have drawn the examples above from this case and others. Recent cases have also addressed the failure to collect information from the files of former employees that remain in a party's possession, custody, or control after the duty to preserve has attached (gross negligence) or the failure to assess the accuracy and validity of selected search terms (negligence).

Id. at 464–65 (footnotes omitted).

The *Pension Committee* court also offered the following guidance as to conduct that would generally amount to gross negligence:

[A]fter the final relevant *Zubulake* opinion in July, 2004, the following failures support a finding of gross negligence, when the duty to preserve has attached: to issue a written litigation hold; to identify all of the key players and to ensure that their electronic and paper records are preserved; to cease the deletion of email or to preserve the records of former employees that are in a party's possession, custody, or control; and to preserve backup tapes when they are the sole source of relevant information or when they relate to key players, if the relevant information maintained by those players is not obtainable from readily accessible sources.

Id. at 471; *see also Harkabi v. SanDisk Corp.*, No. 08 Civ. 8203(WHP), 2010 WL 3377338, at *4 (S.D.N.Y. Aug. 23, 2010) (“Gross negligence is the ‘failure to exercise even that care which a careless person would use.’ In the discovery context, courts have found gross negligence where data was spoliated because a party failed to take widely-recognized steps to preserve it, such as failing to issue a written litigation hold or failing to prevent backup tapes from being erased.” (internal citation omitted)); *Crown Castle*, 2010 WL 1286366, at *11 (“[F]ailure to implement a litigation hold at the outset of litigation amounts to gross negligence.” (citations omitted)); *Richard Green*, 262 F.R.D. at 290 (“[T]he failure to implement a litigation hold is, by itself, considered grossly negligent

behavior.” (citations omitted)); *but see Victor Stanley*, 2010 WL 3530097, at *32 (noting that in another case, the court had held that a “defendant was negligent, but not grossly negligent, when it failed to implement a litigation hold, because it instructed the employees most involved in the litigation to retain documents” (citing *Sampson*, 251 F.R.D. at 181–82)).

As to what constitutes ordinary negligence, the *Harkabi* court explained that “[i]n the discovery context, negligence is a ‘failure to conform to th[e] standard’ of ‘what a party must do to meet its obligation to participate meaningfully and fairly in the discovery phase of a judicial proceeding.’ ‘A failure to conform to this standard is negligence even if it results from a pure heart and an empty head.’” *Harkabi*, 2010 WL 3377338, at *4 (second alteration in original) (internal citation to *Pension Comm.*, 685 F. Supp. 2d at 464, omitted); *see also Victor Stanley*, 2010 WL 3530097, at *31 (“Negligence, or ‘culpable carelessness,’ is ‘[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation[.]’ . . . With regard to preservation of evidence, if either the failure to collect or preserve evidence or the sloppiness of the review of evidence causes the loss or destruction of relevant information, the spoliator’s actions may amount to negligence, gross negligence, or even intentional misconduct. Failure ‘to assess the accuracy and validity of selected search terms’ also could be negligence.” (alterations in original) (internal citations omitted)).

As to what constitutes “fault,” one court has explained that “[f]ault’ is unconcerned with the non-complying party’s subjective motivation, but rather describes the reasonableness of the conduct.” *Mintel Int’l Group, Ltd. v. Neergheen*, No. 08-cv-3939, 2010 WL 145786, at *7 (N.D. Ill. Jan. 12, 2010) (quoting *Langley v. Union Elec. Co.*, 107 F.3d 510, 514 (7th Cir. 1997)). “Fault may include ‘gross negligence’ or ‘a flagrant disregard’ of the duty to ‘preserve and monitor the condition’ of

material evidence.” *Id.* (quoting *Marrocco v. Gen. Motors*, 966 F.2d 220, 224 (7th Cir. 1992)); *see also Jones*, 2010 WL 2106640, at *6 (“Fault is defined not by the party’s intent, but by the reasonableness of the party’s conduct. It may include gross negligence of the duty to preserve material evidence.”) (internal citation and footnote omitted) (citing *Park v. City of Chicago*, 297 F.3d 606, 615 (7th Cir. 2002); *Marrocco*, 966 F.2d at 224)).

As to what constitutes bad faith, one court explained: “‘Bad faith’ is the antithesis of good faith and has been defined in the cases to be when a thing is done dishonestly and not merely negligently. It is also defined as that which imports a dishonest purpose and implies wrongdoing or some motive of self-interest.” *Cache*, 244 F.R.D. at 635 (quoting *Attorneys Title Guaranty Fund v. Goodman*, 179 F. Supp. 2d 1268, 1277 (D. Utah 2001)); *accord Asher Assocs.*, 2009 WL 1328483, at *8 n.11 (same); *see also Jones*, 2010 WL 2106640, at *6 (“Bad faith requires the intent to hide unfavorable information. This intent may be inferred if a document’s destruction violates regulations (with the exception of EEOC record regulations).” (internal citation omitted) (citing *Mathis v. John Morden Buick, Inc.*, 136 F.3d 1153, 1155 (7th Cir. 1998); *Park*, 297 F.3d at 615)); *id.* at *8 (“Bad faith may be inferred when a party disposes of documents in violation of its own policies.” (citing *Park*, 297 F.3d at 615)); *Mintel Int’l Group*, 2010 WL 145786, at *7 (“‘Bad faith’ means destruction ‘for the purpose of hiding adverse information.’” (quoting *Mathis*, 136 F.3d at 1155)); *Goodman*, 632 F. Supp. 2d at 520 (“[D]estruction is willful when it is deliberate or intentional,’ whereas ‘bad faith’ was deemed to ‘mean destruction for the purpose of depriving the adversary of the evidence.’” (quoting *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008))); *Nucor*, 251 F.R.D. at 196 (“Destroying potential evidence in an effort to prevent another party from obtaining it certainly qualifies as ‘bad faith’ under any reasonable definition of the

term.”). In *Victor Stanley*, the court distinguished willful conduct from bad faith:

Willfulness is equivalent to intentional, purposeful, or deliberate conduct. *Buckley v. Mukasey*, 538 F.3d 306, 323 (4th Cir. 2008). In *Goodman*, 632 F. Supp. 2d at 523, this Court held that the defendant “willfully destroyed evidence that it knew to be relevant” because its chief executive officer deleted her emails, and the defendant destroyed the officer’s computer. Conduct that is in bad faith must be willful, but conduct that is willful need not rise to bad faith actions. See *Buckley*, 538 F.3d at 323; *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995); *Goodman*, 632 F. Supp. 2d at 520. While bad faith requires “destruction for the purpose of depriving the adversary of the evidence,” *Powell v. Town of Sharpsburg*, 591 F. Supp. 2d 814, 820 (E.D.N.C. 2008), for willfulness, it is sufficient that the actor intended to destroy the evidence. See *Goodman*, 632 F. Supp. 2d at 520; see also *United Med. Supply Co.*, 77 Fed. Cl. at 268 (distinguishing bad faith and willfulness).

Victor Stanley, 2010 WL 3530097, at *32. The court noted that despite the differences between willfulness and bad faith, courts often combine their analysis of the two. *Id.* at *33 (citations omitted). Another court explained that “[a] party’s destruction of evidence qualifies as willful spoliation if the party has ‘some notice that the [evidence was] potentially relevant to the litigation before [it was] destroyed.’” *Erlandson*, 2009 WL 3672898, at *4 (second and third alterations in original) (quoting *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 959 (9th Cir. 2006)).

The circuits are split as to whether negligence can be sufficient to impose spoliation sanctions. At least in the Second Circuit, most authority indicates that “[s]poliation sanctions ‘are not limited to cases where the evidence was destroyed willfully or in bad faith, since a party’s negligent loss of evidence can be just as fatal to the other party’s ability to present a defense.’” *Indem. Ins. Co. of N. Am.*, 1998 WL 363834, at *3 (citations omitted); see also *Residential Funding Corp. v. DeGeorge Fin. Corp.*, 306 F.3d 99, 108 (2d Cir. 2002) (“The sanction of an adverse inference may be appropriate in some cases involving the negligent destruction of evidence because each party should

bear the risk of its own negligence.”)²¹ *Harkabi*, 2010 WL 3377338, at *4 (“[T]he culpable state of mind factor is satisfied by a showing that the evidence was destroyed knowingly, even if without intent to breach a duty to preserve it, or *negligently*.” (alteration in original) (quoting *Residential Funding*, 306 F.3d at 108); *Crown Castle*, 2010 WL 1286366, at *11 (“[A] finding of bad faith or intentional misconduct is not a *sine qua non* to sanctioning a spoliator.’ Rather, a finding of gross negligence will satisfy the ‘culpable state of mind’ requirement, as will knowing or negligent destruction of evidence.” (alteration in original) (internal citation omitted)); *Richard Green*, 262 F.R.D. at 290 (“In this circuit, a ‘culpable state of mind’ for purposes of a spoliation inference includes ordinary negligence.” (citing *Residential Funding*, 306 F.3d at 108)); *Cache*, 244 F.R.D. at 635 n.17 (noting that “[t]he Second Circuit has held that an adverse inference instruction may be based [on] a showing of negligence, rather than bad faith,” but stating it was bound to follow Tenth Circuit law to the contrary); *cf. S. New England Tel. Co.*, 2010 WL 3325962, at *18 (“[W]hile the district court concluded that the Global entities engaged in the *willful* destruction of evidence, even the simple failure to produce evidence in a timely manner in and of itself can support an inference that the evidence withheld would be unfavorable to the noncompliant party.” (citing *Residential Funding*, 306 F.3d at 109)); *but see Arista Records*, 608 F. Supp. 2d at 429–30 (“Accordingly, [the Second Circuit] has required a finding of bad faith for the imposition of sanctions under the inherent power doctrine.” (alteration in original) (quoting *DLC Mgmt. Corp. v. Town of Hyde Park*, 163 F.3d 124,

²¹ The *Residential Funding* court may have been considering sanctions under Rule 37, as opposed to sanctions imposed under the court’s inherent authority. See *Residential Funding*, 306 F.3d at 106 (“[T]his case is more akin to those in which a party breaches a discovery obligation or fails to comply with a court order regarding discovery.”). Although at least one district court within the Second Circuit recently noted that the Second Circuit has required bad faith to impose sanctions under the court’s inherent authority, see *Arista Records*, 608 F. Supp. 2d at 429–30, it is not clear that most cases subsequent to *Residential Funding* have limited its holding that negligence can be sufficient to impose sanctions to circumstances involving sanctions under Rule 37.

136 (2d Cir. 1998));²² *McGinnity*, 183 F.R.D. at 61–62 (noting that earlier “Second Circuit decisions were ‘ambiguous’ [as to] whether an ‘adverse inference may be drawn only when it has been shown that the destruction of evidence was intentional[,]’ or whether ‘negligent or reckless destruction of evidence may warrant such a sanction,’” but concluding that the issue was resolved by the Second Circuit in *Kronisch v. United States*, 150 F.3d 112 (2d Cir. 1998), in which the court held that “[o]nce a court has concluded that a party was under an obligation to preserve the evidence that it destroyed, it must then consider whether the evidence was *intentionally* destroyed, and the likely contents of that evidence,” and holding that “destruction of evidence cannot be merely negligent or inadvertent” (first alteration in original) (citation omitted)).²³

Not all courts within the Second Circuit have taken a consistent approach. See *Arista Records*, 608 F. Supp. 2d at 434 (“In analyzing this [culpability] prong of the spoliation test, some courts in this Circuit have required a showing of bad faith, some have required proof of intentional destruction, and others have drawn an inference of bad faith based on negligence. The Second Circuit has concluded that a case by case approach [is] appropriate.” (second alteration in original) (internal citation omitted)). Another court explained that the Second Circuit’s approach was inconsistent before the issue was resolved in 2002 in *Residential Funding*:

Before 2002, “[t]he law in this circuit [was] not clear on what state of mind” was sufficiently culpable. *Byrnie v. Town of Cromwell*, 243 F.3d 93, 107–108 (2d Cir. 2001). At various times, the Second Circuit had required showings that the party intentionally destroyed evidence, that the party had

²² The *Arista Records* court noted that bad faith could “be shown by (1) ‘clear evidence’ or (2) ‘harassment or delay or . . . other improper purposes.’” *Arista Records*, 608 F. Supp. 2d at 430 (omission in original) (quoting *United States v. Int’l Bhd. of Teamsters*, 948 F.2d 1338, 1345 (2d Cir. 1991)).

²³ The *McGinnity* opinion was issued before the Second Circuit’s opinion in *Residential Funding*. Many courts have relied on *Residential Funding* to support the proposition that sanctions may be imposed for negligent conduct.

acted in bad faith, and that the party acted with gross negligence. *Byrnie*, 243 F.3d at 107–108. Acknowledging that its precedents were inconsistent, the Second Circuit concluded that a case-by-case approach was appropriate. *Id.* In 2002, the Second Circuit held that even simple negligence was a sufficiently culpable “state of mind.” *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99, 108 (2d Cir. 2002)[.]

Wade, 686 F. Supp. 2d at 194–95 (first and second alterations in original). It may be that the Second Circuit embraces a case-by-case approach, with negligence sometimes, but not always, being sufficient to impose sanctions.

In addition to the Second Circuit, some other circuits also may not always require bad faith to impose an adverse inference or other sanctions. *See Hatfield v. Wal-Mart Stores, Inc.*, 335 F. App’x 796, 804 (10th Cir. 2009) (unpublished) (noting that to be entitled to an adverse inference instruction, the plaintiff would have been required to show that the defendant knew or should have known that the litigation was imminent and that the plaintiff was prejudiced by the destruction of evidence, but not that the defendant acted in bad faith or intentionally destroyed the evidence); *Goodman*, 632 F. Supp. 2d at 519 (“[A] showing of bad faith is not a prerequisite to obtaining an adverse jury instruction, and a court must only find that the spoliator acted willfully in the destruction of evidence.” (footnote omitted) (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148 (4th Cir. 1995))); *RealNetworks*, 264 F.R.D. at 523 (“A party’s destruction of evidence need not be in ‘bad faith’ to warrant a court’s imposition of sanctions,” but “a party’s motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed.” (citing *Glover v. BIC Corp.*, 6 F.3d 1318, 1329 (9th Cir. 1993); *Unigard Sec. Ins. Co. v. Lakewood Eng’g & Mfg. Corp.*, 982 F.2d 363, 368 (9th Cir. 1992)) (additional citations omitted)); *Forest Labs.*, 2009 WL 998402, at *5 (“[A] court need not find bad faith or intentional misconduct before sanctioning a spoliator.” (quoting *Klezmer ex rel. Desyatnik v. Buynak*, 227 F.R.D. 43, 50 (E.D.N.Y. 2005)); *Salvatore*, 2009

WL 943713, at *9–10 (noting that the Tenth Circuit requires bad faith for an adverse inference instruction, but that “[a] sanction less severe than an adverse inference may be imposed . . . without a showing of bad faith.” (citing *103 Investors I, L.P. v. Square D Co.*, 470 F.3d 985, 989 (10th Cir. 2006))); *Marceau*, 618 F. Supp. 2d at 1174 (“[T]he party seeking to introduce evidence of spoliation need not establish bad faith on the part of the party who destroyed the evidence.” (citing *Glover*, 6 F.3d at 1329)); *Maxxam*, 2009 WL 817264, at *7 (“A party’s destruction of evidence need not be done in bad faith to warrant imposition of sanctions, so long as there is a finding of fault.” (citing *Unigard Sec. Ins. Co.*, 982 F.2d at 368)); *Keithley*, 2008 WL 4830752, at *9 (“In drawing an adverse inference, a court need not find bad faith arising from intentional, as opposed to inadvertent, conduct.” (citing *Glover*, 6 F.3d at 1329)); *Nucor*, 251 F.R.D. at 194 (“The court may impose the [adverse inference] sanction even in the absence of bad faith,” but “[t]he harsher sanctions of dismissal and default judgment require a showing of ‘bad faith or other ‘like action,’ unless the spoliation was so prejudicial that it prevents the non-spoliating party from maintaining his case.” (citing *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 450 (4th Cir. 2004); *Silvestri*, 271 F.3d at 583)); *see also id.* at 198 (noting that “[a] party acts intentionally if it knew the evidence would be relevant at trial and its ‘willful conduct’ resulted in the evidence’s loss or destruction”; that “it is not necessary that a party intends to bring about the loss of evidence”; that “spoliation may be inferred when a party intended to take those actions that caused the evidence’s alteration or destruction”; and that requiring “[a]nything more (e.g., requiring that the party intended to bring about the evidence’s loss) would be tantamount to requiring bad faith, and the Fourth Circuit has expressly rejected bad faith as an ‘essential element of the spoliation rule’” (quoting *Vodusek*, 71 F.3d at 156)); *Mazloun v. Dist. of Columbia Metro. Police Dep’t*, 530 F. Supp. 2d 282, 293 (D.D.C. 2008) (“To be sure, any

adverse inference instruction grounded in negligence would be considerably weaker in both language and probative force than an instruction regarding deliberate destruction. But it is nonetheless a cognizable basis for an instruction.”); *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d at 1066–67 (“A party’s destruction of evidence need not be in ‘bad faith’ to warrant a court’s imposition of sanctions. . . . However, a party’s motive or degree of fault in destroying evidence is relevant to what sanction, if any, is imposed.” (citing *Glover*, 6 F.3d at 1329; *Unigard Sec. Ins. Co.*, 982 F.2d at 368; *Baliotis v. McNeil*, 870 F. Supp. 1285, 1291 (M.D. Pa. 1994))).

In one case, a court in the Third Circuit indicated that relevance and prejudice could support the imposition of an adverse inference instruction, even in the absence of bad faith:

Although the Third Circuit has yet to elaborate on what it meant when it stated that it “must appear that there has been actual suppression,” *Samsung* provides no, and this Court did not find any case law in this circuit that requires a finding of bad faith before allowing a spoliation inference. Some courts in the Third Circuit have construed “actual suppression” to mean that the evidence must be intentionally or knowingly destroyed or withheld, as opposed to lost, accidentally destroyed or otherwise properly accounted for. Others have used a more flexible approach that defies being labeled as requiring intentional or knowing destruction.

Having considered the two different approaches courts take under the Third Circuit’s “actual suppression” standard, and the Third Circuit’s characterization of the spoliation inference as a lesser sanction, this Court believes the flexible approach is the better and more appropriate approach. Primarily, the spoliation inference serves a remedial function—leveling the playing field after a party has destroyed or withheld relevant evidence. As long as there is some showing that the evidence is relevant, and does not fall into one of the three categories enumerated in *Schmid [v. Milwaukee Elec. Tool Corp.]*, 13 F.3d 76 (3d Cir. 1994)], the offending party’s culpability is largely irrelevant as it cannot be denied that the opposing party has been prejudiced. Contrary to *Samsung*’s contention, negligent destruction of relevant evidence can be sufficient to give rise to the spoliation inference. If a party has notice that evidence is relevant to an action, and either proceeds to destroy that evidence or allows it to be destroyed by failing to take reasonable precautions, common sense dictates that the party is more likely to have been threatened by that evidence. *See Schmid*, 13 F.3d at 78.

By allowing the spoliation inference in such circumstances, the Court protects the integrity of its proceedings and the administration of justice.

MOSAID Techs. Inc. v. Samsung Elecs. Co., Ltd., 348 F. Supp. 2d 332, 338 (D.N.J. 2004) (internal citations and footnotes omitted). The court emphasized that its analysis was “limited to the spoliation inference and [wa]s not meant to infer that a lesser showing of culpability permits imposition of the far more serious sanctions—dismissal, summary judgment, and exclusion of evidence.” *Id.* at 338 n.11.

Even when bad faith is not required, some courts may not impose an adverse inference based on an innocent mistake. *See Marceau*, 618 F. Supp. 2d at 1174 (noting that even though bad faith is not required, “when relevant evidence is lost accidentally or for an innocent reason, an adverse evidentiary inference from the loss may be rejected” (quoting *Med. Lab. Mgmt. Consultants v. Am. Broadcasting Cos., Inc.*, 306 F.3d 806, 824 (9th Cir. 2002))).

In contrast to the approach taken in the Second Circuit, which generally allows imposition of an adverse inference instruction for even negligent behavior, several other circuits have rejected the imposition of at least some sanctions without a showing of bad faith. In *Rimkus*, for example, the court stated that in the Fifth Circuit, “the severe sanctions of granting default judgment, striking pleadings, or giving adverse inference instructions may not be imposed unless there is evidence of ‘bad faith,’” and that “[m]ere negligence is not enough’ to warrant an instruction on spoliation.” *Rimkus*, 688 F. Supp. 2d at 614 (citations omitted); *see also id.* at 642 (“A severe sanction such as a default judgment or an adverse inference instruction requires bad faith and prejudice.” (citations omitted)); *Consol. Aluminum*, 244 F.R.D. at 340 (“[T]he Fifth Circuit only permits an adverse inference sanction against a destroyer of evidence upon a showing of ‘bad faith’ or ‘bad conduct.’” (citing *Condrey v. SunTrust Bank of Ga.*, 431 F.3d 191 (5th Cir. 2005); *King v. Ill. Cent. R.R.*, 337

F.3d 550 (5th Cir. 2003); *United States v. Wise*, 221 F.3d 140, 156 (5th Cir. 2000)).²⁴ The *Rimkus* court noted that, in contrast to the approach taken in the Second Circuit, “[i]n the Fifth Circuit and others, negligent as opposed to intentional ‘bad faith’ destruction of evidence is not sufficient to give an adverse inference instruction and may not relieve a party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial,” and that “to the extent sanctions are based on inherent power, the Supreme Court’s decision in *Chambers* may also require a degree of culpability greater than negligence.” *Rimkus*, 688 F. Supp. 2d at 615. The *Rimkus* court also noted that the Fifth Circuit is not alone in requiring bad faith for an adverse inference instruction:

Other circuits have also held negligence insufficient for an adverse inference instruction. The Eleventh Circuit has held that bad faith is required for an adverse inference instruction. The Seventh, Eighth, Tenth, and D.C. Circuits also appear to require bad faith. The First, Fourth, and Ninth Circuits hold that bad faith is not essential to imposing severe sanctions if there is severe prejudice, although the cases often emphasize the presence of bad faith. In the Third Circuit, the courts balance the degree of fault and prejudice.

Id. at 614–15 (footnotes omitted); *see also id.* at 614–15 nn.10–13 (collecting cases in the First, Third, Fourth, Eighth, Ninth, Tenth, Eleventh, and D.C. Circuits discussing whether bad faith is required to impose an adverse inference instruction); *Mann v. Taser Int’l, Inc.*, 588 F.3d 1291, 1310 (11th Cir. 2009) (“In the Eleventh Circuit, ‘an adverse inference is drawn from a party’s failure to preserve evidence only when the absence of that evidence is predicated on bad faith.’” (quoting

²⁴ The *Consolidated Aluminum* court explained that “[f]or the spoliator to have a ‘culpable state of mind,’ it must act with fraudulent intent and a desire to suppress the truth. Such state of mind is not present where the destruction is a matter of routine or where employees have simply deleted emails because they had no legitimate business reason, even though the contents of the communications might, at a later date, have some relevance to a lawsuit.” 244 F.R.D. at 344 (citation omitted). The court concluded that “[t]hough the nature of the sanction depends in part on the state of mind of the destroyer, some remedy may be appropriate even where the destruction is merely negligent.” *Id.* at 347 n.28 (citing *Chan*, 2005 WL 1925579).

Bashir v. Amtrak, 119 F.3d 929, 931 (11th Cir. 1997) (per curiam));²⁵ *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1149 (10th Cir. 2009) (“[I]f the aggrieved party seeks an adverse inference to remedy the spoliation, it must also prove bad faith. ‘Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.’ Without a showing of bad faith, a district court may only impose lesser sanctions.” (internal citation omitted)); *Renda Marine*, 58 Fed. Cl. at 61 n.4 (“To draw an adverse inference based on the alleged spoliation of documents, the court requires a showing of subjective bad faith.” (citations omitted)); *Grubb v. Bd. of Trustees of Univ. of Ill.*, --- F. Supp. 2d ---, No. 09-cv-2255, 2010 WL 3075517, at *3 (N.D. Ill. Aug. 4, 2010) (“Before a Court may impose sanctions for the destruction of evidence, the party moving for sanctions must make a showing that destruction of materials occurred in bad faith.” (citing *Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681 (7th Cir. 2008))); *Walter v. Carnival Corp.*, No. 09-20962-CIV, 2010 WL 2927962, at *2 (S.D. Fla. Jul. 23, 2010) (“[A] party’s failure to preserve evidence rises to the level of sanctionable spoliation ‘only when the absence of that evidence is predicated on bad faith,’ such as where a party purposely loses or destroys relevant evidence.” (quoting *Bashir*, 119 F.3d at 931));²⁶ *Jones*, 2010 WL 2106640, at *6 (“[A] court may

²⁵ The court explained that “[w]hile [the Eleventh Circuit] does not require a showing of malice in order to find bad faith, mere negligence in losing or destroying records is not sufficient to draw an adverse inference.” *Mann*, 588 F.3d at 1310 (citing *Bashir*, 119 F.3d at 931).

²⁶ The *Walter* court explained:

If direct evidence of bad faith is unavailable, bad faith may be founded on circumstantial evidence when the following criteria are met: (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator. *Calixto v.*

only grant an adverse inference sanction upon a showing of bad faith. . . . Mere negligence is not enough for a factfinder to draw a negative inference based on document destruction.” (citing *Fass v. Sears, Roebuck & Co.*, 532 F.3d 633, 644 (7th Cir. 2008); *Rodgers v. Lowe’s Home Ctrs., Inc.*, 05 C 0502, 2007 WL 257714, at *5 (N.D. Ill. Jan. 30, 2007)); *Schlumberger*, 2009 WL 5252644, at *8 (“Before a litigant is entitled to a spoliation instruction, *i.e.*, an adverse-inference instruction, there must be evidence of intentional destruction or bad faith. . . . The Tenth Circuit, however, does not have a similar requirement of bad faith for other spoliation sanctions.” (citing *Henning v. Union Pac. R.R. Co.*, 530 F.3d 1206, 1220 (10th Cir. 2008); *103 Investors I*, 470 F.3d at 988)); *In re Nat’l Century Fin. Enters.*, 2009 WL 2169174, at *2 (“Absent exceptional circumstances, courts generally do not dismiss an action or permit an adverse inference without consideration of whether the party acted in bad faith.”); *Asher Assocs.*, 2009 WL 1328483, at *8 (noting that the Tenth Circuit has found that bad faith gives rise to an adverse inference, while negligence does not); *Cache*, 244 F.R.D. at 635 (noting that the Tenth Circuit has found that an adverse inference should not be imposed “where the destruction of a document resulted from mere negligence, because only bad faith would support an ‘inference of consciousness of a weak case.’” (quoting *Aramburu v. Boeing Co.*, 112 F.3d 1398, 1407 (10th Cir. 1997)));²⁷ *Miller*, 2007 WL 172327, at *2 (“The exercise of this [inherent] power [to sanction] is subject to the requirement that it be based on a showing of bad faith.” (citing

Watson Bowman Acme Corp., 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009)[.]

Walter, 2010 WL 2927962, at *2.

²⁷ The *Cache* court noted that “the evidence upon which the movant relies to show bad faith must be more than conjecture or speculation; the movant must present evidence that would support an inference that a party actually suppressed or withheld evidence because they were conscious of a weakness in their case.” 244 F.R.D. at 635 (citing *Richins v. Deere & Co.*, 231 F.R.D. 623, 626 (D.N.M. 2004)).

United States v. Wallace, 964 F.2d 1214, 1219 (D.C. Cir. 1992); *Lucas v. Spellings*, 408 F. Supp. 2d 8, 10 (D.D.C. 2006)); *Clark Constr. Group*, 229 F.R.D. at 139 (“In [the Sixth] Circuit, ‘[i]n general, a court may not allow an inference that a party destroyed evidence that is in its control, unless the party did so in bad faith.’” (second alteration in original) (quoting *Tucker v. Gen. Motors Corp.*, No. 91-3019, 1991 WL 193458, at *2 (6th Cir. Sept. 30, 1991)));²⁸ *cf. O’Brien*, 2010 WL 1741352, at *5 (“According to federal-spoliation law, ‘[a]ny adverse inference from spoliation, while not entirely dependent on bad faith, is based on the spoliator’s mental state.’” (alteration in original) (quoting *Joostberns v. United Parcel Serv., Inc.*, 166 F. App’x 783, 797 (6th Cir. 2006))).

In *Salvatore*, the court explained the standard in the Tenth Circuit:

“[T]he general rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to an inference that production of the document would have been unfavorable to the party responsible for its destruction. The adverse inference must be predicated on the bad faith of the party destroying the records. Mere negligence in losing or destroying records is not enough because it does not support an inference of consciousness of a weak case.”

Salvatore, 2009 WL 943713, at *9 (alteration in original) (quoting *Aramburu*, 112 F.3d at 1407 (internal citations omitted)).

The *Goodman* court stated the standard in the Fourth Circuit:

“[T]he trial court has broad discretion to permit a jury to draw adverse inferences from a party’s failure to present evidence, the loss of evidence, or the destruction of evidence. While a finding of bad faith suffices to permit

²⁸ However, the *Clark Constr. Group* court stated that “the Sixth Circuit, in an unpublished opinion, note[d] that a negative inference should *generally* not be allowed absent bad faith,” and that “[t]herefore, the Court should not be precluded from imposing a rebuttable adverse inference sanction against a party because the party did not act in bad faith.” 229 F.R.D. at 139. The court noted that “numerous other Circuits have established that bad faith is a prerequisite to ordering a negative inference against a party,” but, “using its inherent power, conclude[d] that the facts of th[e] case justifi[ed] a rebuttable adverse inference . . .,” despite the absence of bad faith. *Id.* at 139 n.2. The court relied in part on state law, but the Sixth Circuit has subsequently determined that federal law applies to spoliation issues.

such an inference, *it is not always necessary* An adverse inference about a party's consciousness of the weakness of his case, however, cannot be drawn merely from his negligent loss or destruction of evidence; the inference requires a showing that the party *knew the evidence was relevant to some issue at trial and that his willful conduct resulted in its loss or destruction.*"

Goodman, 632 F. Supp. 2d at 520 (alteration and omission in original) (quoting *Vodusek*, 71 F.3d at 156 (emphasis added) (citations omitted)); *see also Victor Stanley*, 2010 WL 3530097, at *27 (“[A]n adverse inference instruction makes little logical sense if given as a sanction for negligent breach of the duty to preserve, because the inference that a party failed to preserve evidence because it believed that the evidence was harmful to its case does not flow from mere negligence—particularly if the destruction was of ESI and was caused by the automatic deletion function of a program that the party negligently failed to disable once the duty to preserve was triggered. The more logical inference is that the party was disorganized, or distracted, or technically challenged, or overextended, not that it failed to preserve evidence because of an awareness that it was harmful.”); *id.* at *38 (“In [the Fourth] Circuit, to impose an adverse jury instruction, the court ‘must only find that the spoliator acted willfully in the destruction of evidence.’” (quoting *Goodman*, 632 F. Supp. 2d at 519)); *id.* (“While negligence or even gross negligence is not sufficient in this Circuit, the conduct need not rise to the level of bad faith.” (citing *Goodman*, 632 F. Supp. 2d at 519)).

The *Victor Stanley* court explained that there is wide variation among the circuits as to the level of intent required for spoliation sanctions:

“Courts differ in their interpretation of the level of intent required before sanctions may be warranted.” [THE SEDONA CONFERENCE,] SEDONA CONFERENCE GLOSSARY[: E-DISCOVERY & DIGITAL INFORMATION MANAGEMENT 48 (2d ed. 2007), *available at* http://www.thesedonaconference.org/content/miscFiles/TSCGlossary_12_07.pdf]. In *United Medical Supply Co. v. United States*, 77 Fed. Cl. 257, 266 (Fed. Cl. 2007), the court noted that a “distinct minority” of courts

“require a showing of bad faith before any form of sanction is applied”; some courts require a showing of bad faith, but only “for the imposition of certain more serious sanctions”; some do not require bad faith for sanctions, but require more than negligence; and others “require merely that there be a showing of fault.” In the Fourth Circuit, for a court to impose some form of sanctions for spoliation, any fault—be it bad faith, willfulness, gross negligence, or ordinary negligence—is a sufficiently culpable mindset. *Goodman*, 632 F. Supp. 2d at 518, 520; *Thompson*, [219] F.R.D. at 101; see *Pandora Jewelry, LLC v. Chamilia, LLC*, No. CCB-06-3041, 2008 WL 4533902, at *9 (D. Md. Sept. 30, 2008). Under existing case law, the nuanced, fact-specific differences among these states of mind become significant in determining what sanctions are appropriate See *Sampson*, 251 F.R.D. at 179 (“Although, some courts require a showing of bad faith before imposing sanctions, the Fourth Circuit requires only a showing of fault, with the degree of fault impacting the severity of sanctions.”) (citing *Silvestri*, 271 F.3d at 590).

Victor Stanley, 2010 WL 3530097, at *31; see also *id.*, slip op. app. (identifying the state of mind required by circuit for imposing sanctions generally, for imposing dispositive sanctions, and for imposing an adverse inference instruction sanction, and showing disparities between and within the circuits).²⁹

In *Consolidated Edison*, the Federal Claims Court noted that the Federal Circuit has not definitively addressed whether bad faith is required to impose an adverse inference sanction or other sanction, and that judges in the Federal Claims Court have taken differing positions on the bad faith requirement. See *Consol. Edison*, 90 Fed. Cl. at 255 n.20.

One court in the Seventh Circuit, in stating that severe sanctions, such as a default judgment, require evidence of willfulness, bad faith, or fault, explained that a party need not act with intentional or reckless behavior to be subject to such sanctions:

“Although wilfulness and bad faith are associated with conduct that is intentional or reckless, the same is not true for fault. Fault does not speak

²⁹ The appendix is not currently available in Westlaw.

to the noncomplying party's disposition at all, but rather only describes the reasonableness of the conduct—or lack thereof—which eventually culminated in the violation. Fault, however, is not a catch-all for any minor blunder that a litigant or his counsel might make. Fault, in this context, suggests objectively unreasonable behavior; it does not include conduct that we would classify as a mere mistake or slight error in judgment.”

Danis, 2000 WL 1694325, at *33 (quoting *Long v. Steepro*, 213 F.3d 983, 987 (7th Cir. 2000)). But the court stated that “[t]o justify a dismissal or default judgment, the level of ‘fault’ must reflect ‘extraordinarily poor judgment,’ ‘gross negligence,’ or ‘a flagrant disregard’ of the duty to ‘preserve and monitor the condition of evidence which could be pivotal in a lawsuit.’” *Id.* at *34 (quoting *Marrocco*, 966 F.2d at 224).

A court in the Eighth Circuit explained that whether bad faith must be shown in order to impose sanctions depends on whether the spoliation occurred before or after the litigation was commenced:

If destruction of relevant information occurs before any litigation has begun, in order to justify sanctions, the requesting party must show that the destruction was the result of bad faith. [*Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746 (8th Cir. 2004)]. Bad faith need not directly be shown but can be implied by the party's behavior. For example, the Eighth Circuit has explained that (1) a party's decision to selectively preserve some evidence while failing to retain other or (2) a party's use of the same type of evidence to their advantage in prior instances, may be used to demonstrate a party's bad faith. *Stevenson*, 354 F.3d at 747–48. In order to determine whether sanctions are warranted when documents have been destroyed due to a company's retention policy prior to litigation, the court must consider: “(1) whether the retention policy is reasonable considering the facts and circumstances surrounding those documents, (2) whether lawsuits or complaints have been filed frequently concerning the type of records at issue, and (3) whether the document retention policy was instituted in bad faith.” *Id.* (citing *Lewy v. Remington Arms Co.*, 836 F.2d 1104, 1112 (8th Cir. 1988)).

If, however, the destruction of evidence occurs after litigation is imminent or has begun, no bad faith need be shown by the moving party. *Id.* When litigation is imminent or has already commenced, “a corporation cannot blindly destroy documents and expect to be shielded by a seemingly innocuous document retention policy.” *See id.* at 749 (quoting *Lewy*, 836

F.2d at 1112).

MeccaTech, 2008 WL 6010937, at *7–8 (alteration in original) (quotations marks omitted) (quoting *E*Trade Sec. LLC v. Deutsche Bank AG*, 230 F.R.D. 582, 588–89 (D. Minn. 2005)).

Another court stated that the state of mind required for imposing spoliation sanctions depends on whether the sanctions are imposed under the court’s inherent authority or under Rule 37:

Although there is some ambiguity in the caselaw as to the precise state of mind required to support the imposition of sanctions under the Court’s inherent power (see *United Medical Supply*, 77 Fed. Cl. at 266–67), the Ninth Circuit has stated that sanctions are available under the Court’s inherent power if “preceded by a finding of bad faith, or conduct tantamount to bad faith,” such as recklessness “combined with an additional factor such as frivolousness, harassment, or an improper purpose.” See *Fink v. Gomez*, 239 F.3d 989, 994 (9th Cir. 2001); see also *Gomez v. Vernon*, 255 F.3d 1118, 1134 (9th Cir. 2001). Dismissal sanctions under a court’s inherent power may be imposed upon a finding of willfulness, fault or bad faith. See *Leon v. IDX Systems Corp.*, 464 F.3d 951, 958 (9th Cir. 2006). . . .

Sanctions for violations of Rule 37, by contrast, may be imposed for even negligent conduct. See FED. R. CIV. P. 37(b); *Fjelstad*, 762 F.2d at 1343; *Hyde & Drath v. Baker*, 24 F.3d 1162, 1171 (9th Cir. 1994) (“We have not required a finding of bad faith on the part of the attorney before imposing sanctions under Rule 37.”). The lack of bad faith does not immunize a party or its attorney from sanctions, although a finding of good or bad faith may be a consideration in determining whether imposition of sanctions would be unjust, see *Hyde & Drath*, 24 F.3d at 1171, and how severe the sanctions should be. Dismissal, the most drastic sanction, generally requires a finding that the conduct was “due to willfulness, bad faith or fault of the party,” including “[d]isobedient conduct not shown to be outside the litigants’s control.” *In re Phenylpropanolamine (PPA) Products Liability Litig.*, 460 F.3d 1217, 1233 (9th Cir. 2006). In deciding whether to grant a motion for sanctions under Rule 37, the Court may “properly consider all of a party’s discovery misconduct . . . , including conduct which has been the subject of earlier sanctions.” *Payne v. Exxon Corp.*, 121 F.3d 503, 508 (9th Cir. 1997).

Keithley, 2008 WL 4830752, at *1–2 (alteration and omission in original).

Often, the degree of culpability required may depend on the sanction sought. For example, in

Arista Records, the court noted that severe sanctions, such as dismissal, require intentional conduct such as bad faith or gross negligence, while “[l]esser sanctions, such as an adverse inference instruction, may be imposed where a party acted ‘knowingly, even if without intent . . . or negligently.’” 608 F. Supp. 2d at 434 (omission in original) (quoting *Residential Funding*, 306 F.3d at 108)); *see also Goodman*, 632 F. Supp. 2d at 518 (“The degree of fault impacts the severity of the sanction”); *Asher Assocs.*, 2009 WL 1328483, at *8 (“Of course, in cases where an adverse instruction is neither requested nor appropriate, the Tenth Circuit has held that a finding of bad faith is not required to impose non-dispositive sanctions, such as excluding evidence.” (citing *103 Investors I*, 470 F.3d at 988–89)).

In sum, no clear standard for the state of mind required for various types of sanctions emerges from the case law. Some courts require bad faith to impose any sanctions. Others require bad faith only for severe sanctions. Some require more than negligence, but less than bad faith, for certain sanctions. And still others allow sanctions such as an adverse inference based on only negligence. This is complicated further by the fact that the degree of prejudice and relevance sometimes factors into the state of mind requirement. Some circuits even vary within the circuit on the requisite state of mind. It seems that a case-by-case approach is often used.

8. Elements the Complainant Must Prove

a. Generally

The case law describes several elements that the party seeking spoliation sanctions must prove. The *Pension Committee* court set out the following elements, which are similarly used by many other courts:

In short, the innocent party must prove the following three elements: that the spoliating party (1) had control over the evidence and an obligation

to preserve it at the time of destruction or loss; (2) acted with a culpable state of mind upon destroying or losing the evidence; and that (3) the missing evidence is relevant to the innocent party's claim or defense.

Pension Comm., 685 F. Supp. 2d at 467 (footnote omitted); *accord Consol. Edison*, 90 Fed. Cl. at 255 (quoting *Jandreau v. Nicholson*, 492 F.3d 1372, 1375–76 (Fed. Cir. 2007) (quoting *Residential Funding*, 306 F.3d at 107)); *Harkabi*, 2010 WL 3377338, at *4 (quoting *Residential Funding*, 306 F.3d at 107); *Schumacher*, 2010 WL 2867603, at *5 (quoting *Goodman*, 632 F. Supp. 2d at 509); *Rimkus*, 688 F. Supp. 2d at 615–16 (citing *Zubulake IV*, 220 F.R.D. at 220); *Crown Castle*, 2010 WL 1286366, at *9 (citing *Residential Funding*, 306 F.3d at 107); *Wade*, 686 F. Supp. 2d at 194 (citing *Residential Funding*, 306 F.3d at 107); *Richard Green*, 262 F.R.D. at 289 (quoting *Residential Funding*, 306 F.3d at 107); *Goodman*, 632 F. Supp. 2d at 509 (quoting *Thompson*, 219 F.R.D. at 101 (citing *Zubulake IV*, 220 F.R.D. at 220));³⁰ *Arista Records*, 608 F. Supp. 2d at 430 (citing *Residential Funding*, 306 F.3d at 107; *Zubulake IV*, 220 F.R.D. at 220); *Keithley*, 2008 WL 4830752, at *9 (quoting *Residential Funding*, 306 F.3d at 105); *Consol. Aluminum*, 244 F.R.D. at 340 (citing *Zubulake IV*, 220 F.R.D. at 220); *see also Victor Stanley*, 2010 WL 3530097, at *22 & n.31 (noting that a party must prove similar elements in the Fourth Circuit; that “[d]istrict courts in the Second, Fifth, Sixth, Seventh, and Ninth Circuits have identified the same factors for sanction-worthy spoliation”; and that “[t]he same factors can be culled from the case law in most other circuits”);³¹

³⁰ In *Goodman*, the court noted that “[t]he *Zubulake IV* test has perennially been cited by other courts when considering spoliation sanctions.” 632 F. Supp. 2d at 519 n.15 (collecting cases). The court determined that the *Zubulake IV* test applied to the case before it, but noted that “[w]hile *Zubulake IV* remains insightful, to the extent it could be read to limit the availability of sanctions, *Vodusek* must ultimately prevail in the Fourth Circuit.” *Id.*

³¹ The *Victor Stanley* court noted that while the case law in most circuits recognizes the same factors, “some courts address the factors in the context of two separate issues: was there spoliation, and if so, what sanctions are appropriate, with state of mind only figuring into the second issue.” 2010 WL 3530097, at *22 n.31 (citations omitted).

Maxxam, 2009 WL 817264, at *13 (noting that the party alleging spoliation had the burden to demonstrate that the missing evidence existed at a time when a duty to preserve was triggered). As the *Victor Stanley* court explained, “[t]he first element involves both the duty to preserve and the breach of that duty through the destruction or alteration of the evidence.” 2010 WL 3530097, at *22 (citing *Jones*, 2010 WL 2106640, at *5). The appropriate sanction is often dependent on how the various factors interact. *See id.* at *36 (“The harshest sanctions may apply not only when both severe prejudice and bad faith are present, but also when, for example, culpability is minimally present, if there is a considerable showing of prejudice, or, alternatively, the prejudice is minimal but the culpability is great For example, in some, but not all, circuits, conduct that does not rise above ordinary negligence may be sanctioned by dismissal if the resulting prejudice is great. Conversely, absence of either intentional conduct or significant prejudice may lessen the potential appropriate sanctions. In the Fifth and Eleventh Circuits, for example, courts may not impose severe sanctions absent evidence of bad faith.” (internal citations omitted)).

In *Victor Stanley*, the court noted that whether relevance and prejudice may be presumed after a showing of culpable conduct varies among the circuits:

When the party alleging spoliation shows that the other party acted willfully in failing to preserve evidence, the relevance of that evidence is presumed in the Fourth Circuit. *Sampson*, 251 F.R.D. at 179; *Thompson*, 219 F.R.D. at 101. Negligent or even grossly negligent conduct is not sufficient to give rise to the presumption; in the absence of intentional loss or destruction of evidence, the party “must establish that the lost documents were relevant to her case.” *Sampson*, 251 F.R.D. at 179; *see Thompson*, 219 F.R.D. at 101. Similarly, in the Seventh Circuit, unintentional conduct is insufficient for a presumption of relevance. *In re Kmart Corp.*, 371 B.R. 823, 853–54 (Bankr. N.D. Ill. 2007). However, in the Second Circuit, in the court’s discretion, “[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.” *Pension Comm.*, 685 F. Supp. 2d at 467 (emphasis added). Also, “[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction

of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial.” *Rinkus*, 688 F. Supp. 2d at 617–18. Where there is a presumption, the spoliating party may rebut this presumption by showing “that the innocent party has not been prejudiced by the absence of the missing information.” *Pension Comm.*, 685 F. Supp. 2d at 468. If the spoliating party makes such a showing, “the innocent party, of course, may offer evidence to counter that proof.” *Id.* As with the other elements, the lack of a uniform standard regarding the level of culpability required to warrant spoliation sanctions has created uncertainty and added to the concern that institutional and organizational entities have expressed regarding how to conduct themselves in a way that will comply with multiple, inconsistent standards.

2010 WL 3530097, at *35 (alterations in original) (footnote omitted). The court noted that the fact that the Second Circuit allows relevance and prejudice to be presumed if the spoliating party acted with gross negligence “is all the more significant because . . . in the Second Circuit, certain conduct is considered gross negligence *per se*. Thus, for example, if a party fails to issue a written litigation hold, the court finds that it is grossly negligent, in which case relevance and prejudice are presumed. Point. Game. Match.” *Id.* at *35 n.34 (internal citation omitted).

Other courts have discussed the elements in slightly different terms from those used in the *Pension Committee* court’s formulation. For example, one court has described the spoliation analysis as follows:

In determining whether sanctions are appropriate, the court must first determine whether the missing documents or materials would be relevant to an issue at trial. If not, then the court’s analysis stops there. If the missing documents would be relevant, the court must then decide whether Land O’Lakes was under an obligation to preserve the records at issue. Finally, if such a duty existed, the court must consider what sanction, if any, is appropriate given the non-moving party’s degree of culpability, the degree of any prejudice to the moving party, and the purposes to be served by exercising the court’s power to sanction.

Cache, 244 F.R.D. at 621; accord *Asher Assocs.*, 2009 WL 1328483, at *5 (same); *Salvatore*, 2009 WL 943713, at *3 (same, and noting that the standard under Colorado law is similar). The *Cache*

court explained that the analysis is similar to that used in the non-spoliation context:

In a non-spoliation context, the Tenth Circuit has held that the trial court should weigh several factors in determining an appropriate sanction: (1) the degree of actual prejudice to the moving party; (2) the amount of interference with the judicial process; (3) the culpability of the non-moving party; (4) whether the court warned the party in advance that a dispositive sanction would be likely for non-compliance, and (5) the efficacy of lesser sanctions.

244 F.R.D. at 636 (citations omitted); *accord Asher Assocs.*, 2009 WL 1328483, at *10. But the court stated that “[w]here a non-dispositive sanction is not at issue, only the first three factors are applicable.” *Cache*, 244 F.R.D. at 636 (citation omitted).

Another court stated that in order to find spoliation, the court must find the following: “(1) that there was a duty to preserve the specific documents and/or evidence, 2) that the duty was breached, 3) that the other party was harmed by the breach, and 4) that the breach was caused by the breaching party’s wilfulness, bad faith, or fault.” *Jones*, 2010 WL 2106640, at *5 (citation omitted).

And a court within the Eleventh Circuit has stated that the party seeking sanctions must prove: “first, that the missing evidence existed at one time; second, that the alleged spoliator had a duty to preserve the evidence; and third, that the evidence was crucial to the movant being able to prove its prima facie case or defense.” *Walter*, 2010 WL 2927962, at *2.

When sanctions are sought under Rule 37(b),

“[s]everal factors may be useful in evaluating a district court’s exercise of discretion” . . . , including “(1) the willfulness of the non-compliant party or the reason for noncompliance; (2) the efficacy of lesser sanctions; (3) the duration of the period of noncompliance, and (4) whether the non-compliant party had been warned of the consequences of noncompliance.” *Agiwal v. Mid Island Mortg. Corp.*, 555 F.3d 298, 302 (2d Cir. 2009) (quoting *Nieves v. City of New York*, 208 F.R.D. 531, 535 (S.D.N.Y. 2002)) (internal quotation marks and alteration omitted). Because the text of the rule requires only that the district court’s orders be “just,” however, and because the district court has “wide discretion in imposing sanctions under Rule 37,”

Shcherbakovskiy v. Da Capo Al Fine, Ltd., 490 F.3d 130, 135 (2d Cir. 2007) (internal quotation marks omitted), these factors are not exclusive, and they need not each be resolved against the party challenging the district court's sanctions for us to conclude that those sanctions were within the court's discretion. See, e.g., *Daval Steel Prods., a Div. of Francosteel Corp. v. M/V Fakredine*, 951 F.2d 1357, 1366 (2d Cir. 1991).

S. New England Tel. Co., 2010 WL 3325962, at *15.

b. Culpable State of Mind

The requisite state of mind varies by sanction sought and by circuit. The variety of standards are discussed earlier in this memo in the section on state of mind.

c. Relevance and Prejudice

The court in *Rimkus* explained that “[t]he ‘relevance’ and ‘prejudice’ factors of the adverse inference analysis are often broken down into three subparts: ‘(1) whether the evidence is relevant to the lawsuit; (2) whether the evidence would have supported the inference sought; and (3) whether the nondestroying party has suffered prejudice from the destruction of the evidence.’” *Rimkus*, 688 F. Supp. 2d at 616 (quoting *Consol. Aluminum*, 244 F.R.D. at 346). Similarly, in *Salvatore*, the court noted that “[t]he burden is on the aggrieved party to establish a reasonable possibility, based on concrete evidence rather than a fertile imagination, that access to the lost material would have produced evidence favorable to his cause.” *Salvatore*, 2009 WL 943713, at *10 (quoting *Gates Rubber Co. v. Bando Chem. Indus., Ltd.*, 167 F.R.D. 90, 104 (D. Colo. 1996) (internal citation and quotation omitted)); see also *Asher Assocs.*, 2009 WL 1328483, at *10 (“[T]he imposition of severe sanctions requires a showing that the lost information would have been favorable to the moving party.”).

In the Second Circuit, “[r]elevance and prejudice may be presumed when the spoliating party acted in bad faith or in a grossly negligent manner.” *Pension Comm.*, 685 F. Supp. 2d at 467. The

Pension Committee court explained that in the Second Circuit, “[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.” *Id.* (quoting *Residential Funding*, 306 F.3d at 109); *see also Wade*, 686 F. Supp. 2d at 195 (“When a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from . . . which a reasonable fact finder could conclude that the missing evidence was unfavorable to that party.” (quoting *Residential Funding*, 306 F. 3d at 109)); *Richard Green*, 262 F.R.D. at 291 (“When evidence is destroyed in bad faith, that fact alone is sufficient to support an inference that the missing evidence would have been favorable to the party seeking sanctions, and therefore relevant.” (citing *Residential Funding*, 306 F.3d at 109));³² *Arista Records*, 608 F. Supp. 2d at 439 (same) (citations omitted). The *Pension Committee* court also noted that while many courts in its district “presume relevance where there is a finding of gross negligence, application of the presumption is not required.” 685 F. Supp. 2d at 467 (footnote omitted); *cf. Arista Records*, 608 F. Supp. 2d at 439–40 (“[A] showing of gross negligence in the destruction or untimely production of evidence’ will support an inference that the evidence would have been unfavorable to the spoliator.” (quoting *Residential Funding*, 306 F.3d at 109)).

But the *Pension Committee* court explained that “when the spoliating party was merely negligent, the innocent party must prove both relevance and prejudice in order to justify the imposition of a severe sanction.” 685 F. Supp. 2d at 467–68; *see also Harkabi*, 2010 WL 3377338,

³² The court noted that “under certain circumstances ‘a showing of gross negligence in the destruction or untimely production of evidence’ will support the same inference,” but found that the circumstances of the case did not warrant such an inference. *Richard Green*, 262 F.R.D. at 291 n.6; *see also Crown Castle*, 2010 WL 1286366, at *13 (“A court may assume that the destroyed evidence was relevant if it was destroyed in bad faith or through gross negligence.” (quoting *Residential Funding*, 306 F.3d at 109)).

at *6 (“When a spoliating party is negligent, the innocent party bears the burden of proving the relevance of the lost materials in order to justify the imposition of a severe sanction.” (citing *Pension Comm.*, 685 F. Supp. 2d at 467–68)); *Wade*, 686 F. Supp. 2d at 195 (“[W]hen destruction is negligent, relevance must be proven by the party seeking the sanctions.” (quoting *Zubulake IV*, 220 F.R.D. at 220)); *Richard Green*, 262 F.R.D. at 291 (“[W]hen the destruction is negligent or reckless, relevance must be proven by the party seeking the sanctions.” (citing *Zubulake IV*, 220 F.R.D. at 221)); *Arista Records*, 608 F. Supp. 2d at 439 (“[W]hen the destruction of evidence is negligent, relevance must be proven through extrinsic evidence by the party seeking sanctions. ‘This corroboration requirement is . . . necessary where the destruction was merely negligent since in those cases it cannot be inferred from the conduct of the spoliator that the evidence would even have been harmful.’” (omission in original) (internal citation omitted) (quoting *Zubulake IV*, 220 F.R.D. at 221)). The *Pension Committee* court further explained that the innocent party could prove relevance and prejudice “by ‘adduc[ing] sufficient evidence from which a reasonable trier of fact could infer that ‘the destroyed [or unavailable] evidence would have been of the nature alleged by the party affected by its destruction.’” 685 F. Supp. 2d at 468 (alterations in original) (quoting *Residential Funding*, 306 F.3d at 109); accord *Harkabi*, 2010 WL 3377338, at *6 (quoting *Residential Funding*, 306 F.3d at 109). The *Pension Committee* court continued:

“In other words, the [innocent party] must present extrinsic evidence tending to show that the destroyed e-mails would have been favorable to [its] case.”
“Courts must take care not to ‘hold[] the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed [or unavailable] evidence,’ because doing so ‘would . . . allow parties who have . . . destroyed evidence to profit from that destruction.’”

685 F. Supp. 2d at 468 (alterations in original) (footnotes omitted). The court also explained that “[n]o matter what level of culpability is found, any presumption is rebuttable and the spoliating party

should have the opportunity to demonstrate that the innocent party has not been prejudiced by the absence of the missing information.” *Id.* (footnote omitted). And, “[i]f the spoliating party offers proof that there has been no prejudice, the innocent party, of course, may offer evidence to counter that proof.” *Id.*

With respect to requiring the innocent party to show relevance of missing documents, the *Pension Committee* court acknowledged the potential unfairness in requiring such a demonstration from a party that has not reviewed the information, but concluded that “the party seeking relief has some obligation to make a showing of relevance and eventually prejudice, lest litigation become a ‘gotcha’ game rather than a full and fair opportunity to air the merits of a dispute.” *Pension Comm.*, 685 F. Supp. 2d at 468. The court developed a test “[t]o ensure that no party’s task is too onerous or too lenient,” stating:

When the spoliating party’s conduct is sufficiently egregious to justify a court’s *imposition* of a presumption of relevance and prejudice, or when the spoliating party’s conduct warrants *permitting* the jury to make such a presumption, the burden then shifts to the spoliating party to rebut that presumption. The spoliating party can do so, for example, by demonstrating that the innocent party had access to the evidence alleged to have been destroyed or that the evidence would not support the innocent party’s claims or defenses. If the spoliating party demonstrates to a court’s satisfaction that there could not have been any prejudice to the innocent party, then no jury instruction will be warranted, although a lesser sanction might still be required.

Id. at 468–69; *cf. Rimkus*, 688 F. Supp. 2d at 616 (“Courts recognize that ‘[t]he burden placed on the moving party to show that the lost evidence would have been favorable to it ought not be too onerous, lest the spoliator be permitted to profit from its destruction.’” (alteration in original) (quoting *Chan*, 2005 WL 1925579, at *7)). In *Rimkus*, the court noted that “[c]ourts recognize that a showing that the lost information is relevant and prejudicial is an important check on spoliation

allegations and sanctions motions.” *Rimkus*, 688 F. Supp. 2d at 616. In addition, “[c]ourts have held that speculative or generalized assertions that the missing evidence would have been favorable to the party seeking sanctions are insufficient.” *Id.* (footnote omitted). “By contrast, when the evidence in the case as a whole would allow a reasonable fact finder to conclude that the missing evidence would have helped the requesting party support its claims or defenses, that may be a sufficient showing of both relevance and prejudice to make an adverse inference instruction appropriate.” *Id.* at 616–17 (footnote omitted). In contrast to the approach utilized in *Pension Committee*, in which the court allowed relevance and prejudice to be presumed when the spoliating party acted with gross negligence,³³ the *Rimkus* court explained that “[t]he Fifth Circuit has not explicitly addressed whether even bad-faith destruction of evidence allows a court to presume that the destroyed evidence was relevant or its loss prejudicial.” *Id.* at 617. The court stated that “[c]ase law in the Fifth Circuit indicates that an adverse inference instruction is not proper unless there is a showing that the spoliated evidence would have been relevant.”³⁴ *Id.* (citations omitted); *but see Consol. Aluminum*, 244 F.R.D. at 340 n.6 (“When evidence is destroyed in bad faith, that fact alone is sufficient to demonstrate relevance. However, when the destruction is negligent, relevance must be proven by the party seeking sanctions.” (citing *Zubulake IV*, 220 F.R.D. at 220)).

In *Consolidated Aluminum*, the court described what the innocent party must show with respect to relevance:

³³ Under the *Pension Committee* approach, “[w]hen the level of culpability is ‘mere’ negligence, the presumption of relevance and prejudice is not available; the *Pension Committee* court imposed a limited burden on the innocent party to present some extrinsic evidence.” *Rimkus*, 688 F. Supp. 2d at 617.

³⁴ The *Rimkus* court did not need to decide whether to apply a presumption of relevance or prejudice because the innocent party had presented evidence on both issues. *See Rimkus*, 688 F. Supp. 2d at 617–18.

The party seeking the sanction of an adverse inference “must adduce sufficient evidence from which a reasonable trier of fact could infer that the ‘destroyed or [unavailable] evidence would have been of the nature alleged by the party affected by its destruction.’” *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2nd Cir. 2002). In other words, some extrinsic evidence of the content of the emails is necessary for the trier of fact to be able to determine in what respect and to what extent the emails would have been detrimental. Thus, before an adverse inference may be drawn, there must be some showing that there is in fact a nexus between the proposed inference and the information contained in the lost evidence.

Consol. Aluminum, 244 F.R.D. at 346 (alteration in original) (internal citations and footnote omitted); see also *In re Nat’l Century Fin. Enters.*, 2009 WL 2169174, at *12 (“There must be some showing of a nexus between the missing information and the issue on which the instruction is requested.” (citing *Consol. Aluminum*, 244 F.R.D. at 346)); *Forest Labs.*, 2009 WL 998402, at *6 (“The Fourth Circuit, for example, ‘describes the test for relevant evidence necessary to impose sanctions as that evidence which would ‘naturally have been introduced into evidence.’” (quoting *Sampson*, 251 F.R.D. at 179–80)); *Nucor*, 251 F.R.D. at 195 (“To justify the imposition of a sanction for spoliation, ‘it would have to appear that the evidence would have been relevant to an issue at trial and otherwise would naturally have been introduced into evidence.’ The non-spoliator does not have to show that the evidence would have been favorable to his case; it is enough to show that the evidence ‘naturally would have elucidated a fact at issue.’” (internal citation omitted) (quoting *Vodusek*, 71 F.3d at 156)); *McGinnity*, 183 F.R.D. at 62 (“‘Before an adverse inference may be drawn, there must be some showing that there is in fact a nexus between the proposed inference and the information contained in the lost evidence.’” (quoting *Turner*, 142 F.R.D. at 76)). The *Consolidated Aluminum* court emphasized that “a court cannot infer that destroyed documents would contradict the destroying party’s theory of the case, and corroborate the other[] party’s theory, simply based upon temporal coincidence.” *Consol. Aluminum*, 244 F.R.D. at 347. Providing evidence of the existence of relevant

documents will not, standing alone, be sufficient to prove that missing documents are relevant. *See id.* at 347 n.25 (“Courts will not make an ‘inferential leap’ that because some relevant emails are in existence, the deleted emails must have been relevant also.” (citation omitted)). Instead, there must be some evidence that the missing documents would have been unfavorable to the spoliator’s case. *See id.* at 347 n.26 (“It is inappropriate to give an adverse inference instruction based upon speculation that the deleted emails would have been unfavorable to Alcoa’s case. Without some evidence, direct or circumstantial, of the unfavorable content of the deleted emails, the Court simply cannot justify giving the requested adverse inference instructions.” (citation omitted)).

Several courts have concluded that “relevance” in the context of preservation means something more than “relevance” as defined in Federal Rule of Evidence 401. For example, in *Pension Committee*, the court stated:

“[O]ur cases make clear that ‘relevant’ in this context means something *more than sufficiently probative to satisfy Rule 401* of the Federal Rules of Evidence. Rather, the party seeking an adverse inference must adduce sufficient evidence from which a reasonable trier of fact could infer that ‘the destroyed or unavailable evidence would have been of the nature alleged by the party affected by its destruction.’”

685 F. Supp. 2d at 467 (alteration in original) (quoting *Residential Funding*, 306 F.3d at 108–09); accord *Crown Castle*, 2010 WL 1286366, at *13 (quoting *Residential Funding*, 306 F.3d at 108–09); *Wade*, 686 F. Supp. 2d at 195 (quoting *Residential Funding*, 306 F.3d at 108–09); *Richard Green*, 262 F.R.D. at 291 (quoting *Residential Funding*, 306 F.3d at 108–09); *Arista Records*, 608 F. Supp. 2d at 439 (quoting *Residential Funding*, 306 F.3d at 108–09); see also *Victor Stanley*, 2010 WL 3530097, at *34 (“In the context of spoliation, lost or destroyed evidence is ‘relevant’ if ‘a reasonable trier of fact could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.’ It is not enough for the evidence to have been ‘sufficiently

probative to satisfy Rule 401 of the Federal Rules of Evidence,'" (internal citations omitted)). In addition, "[i]t is not enough for the innocent party to show that the destroyed evidence would have been responsive to a document request." *Pension Comm.*, 685 F. Supp. 2d at 467. Instead, "[t]he innocent party must also show that the evidence would have been helpful in proving its claims or defenses—*i.e.*, that the innocent party is prejudiced without that evidence." *Id.*; *see also Goodman*, 632 F. Supp. 2d at 522 ("In a spoliation motion, 'relevancy' is determined 'to the extent that a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it.'" (quoting *Thompson*, 219 F.R.D. at 101)). But "evidence need not be conclusive in order to be relevant." *Asher Assocs.*, 2009 WL 1328483, at *6 (quoting *United States v. Schultz*, 333 F.3d 393, 416 (2d Cir. 2003)). While the relevance and prejudice elements seem to be intertwined, the *Pension Committee* court emphasized that "[p]roof of relevance does not necessarily equal proof of prejudice." 685 F. Supp. 2d at 467.

Most, but not all, courts take the degree of prejudice into account in determining the appropriate remedy. *See, e.g., Victor Stanley*, 2010 WL 3530097, at *34 ("[A] finding of 'relevance' for purposes of spoliation sanctions is a two-pronged finding of relevance and prejudice."); *Crown Castle*, 2010 WL 1286366, at *16 ("An instruction to the jury 'that the [destroyed] evidence would have been unfavorable to the party responsible for its destruction,' 'serves to 'restor[e] the prejudiced party to the same position he would have been in absent the wrongful destruction of evidence.'" For this reason, an adverse inference instruction may not be appropriate where the destruction of evidence has not prejudiced the movant." (alterations in original) (internal citations omitted)); *Schlumberger*, 2009 WL 5252644, at *5 (In determining whether to impose a spoliation sanction, "[t]he court considers two primary factors: '(1) the degree of culpability of the party who lost or destroyed the

evidence; and (2) the degree of actual prejudice to the other party.” (citation omitted)); *In re Nat'l Century Fin. Enters.*, 2009 WL 2169174, at *12 (“The party seeking [a] spoliation instruction must demonstrate that it was prejudiced by the loss of the information.”); *Asher Assocs.*, 2009 WL 1328483, at *5 (“A spoliation sanction is proper where (1) a party has a duty to preserve evidence because it knew, or should have known, that litigation was imminent, and (2) the adverse party was prejudiced by the destruction of the evidence.” (quoting *Burlington N. & Santa Fe Ry. Co. v. Grant*, 505 F.3d 1013, 1032 (10th Cir. 2007))); *Salvatore*, 2009 WL 943713, at *11 (“A sanction for spoliation is not appropriate where, as here, the destruction of evidence does not cause any prejudice.” (citations omitted)); *E*Trade Sec.*, 230 F.R.D. at 592 (“An imposition of sanctions is only merited when the moving party can demonstrate that they have suffered prejudice as a result of the spoliation.” (citation omitted)); *Indem. Ins. Co. of N. Am.*, 1998 WL 363834, at *5 (“Where . . . a party has had some opportunity to view the allegedly defective product in its post-accident state, spoliation motions generally are denied.” (citation omitted)). In *Consolidated Edison*, the court explained that “[o]nce a showing of spoliation has been established, the burden shifts to the party against which the motion was made to show that the destruction of the evidence and failure to produce the documents did not prejudice the opponent.” *Consol. Edison*, 90 Fed. Cl. at 257 (citation omitted).

In describing the measure of prejudice, one court stated that “[p]rejudice will be measured by the degree in which a party’s ability to adequately develop its liability theory or mount a proper defense has been hampered.” *Velez*, 590 F. Supp. 2d at 258 (citations omitted); *see also Victor Stanley*, 2010 WL 3530097, at *35 (“Spoliation of evidence causes prejudice when, as a result of the spoliation, the party claiming spoliation cannot present ‘evidence essential to its underlying claim.’”

(quoting *Krumwiede v. Brighton Assocs., L.L.C.*, No. 05-C-3003, 2006 WL 1308629, at *10 (N.D. Ill. May 8, 2006)); *id.* (“Generally, courts find prejudice where a party’s ability to present its case or to defend is compromised.” (citing *Silvestri*, 271 F.3d at 593–94)). “The court considers prejudice to the party and ‘prejudice to the judicial system.’” *Victor Stanley*, 2010 WL 3530097, at *35 (quoting *Krumwiede*, 2006 WL 1308629, at *11).

If prejudice is severe, that can weigh in favor of entering a severe sanction. *See Danis*, 2000 WL 1694325, at *35 (“The prejudice suffered from the destruction of documents can take many forms, the most severe of which occurs when the evidence destroyed is the only proof available on an issue or defense in the case. In such cases, evidence of fault in conjunction with such prejudice would support the entry of severe sanctions, such as a default judgment . . . because ‘the dilemma of lost evidence is that the aggrieved party can never know what it was, and can therefore never know the value that it may have had to the aggrieved party’s case’” (internal citations omitted)). But even severe prejudice may not warrant a severe sanction if the spoliating party did not act with a culpable state of mind, even if that party is at fault. *See id.* (“[I]n cases where fault, rather than a culpable state of mind, gives rise to the destruction of evidence and the prejudice suffered is because some—perhaps even the ‘best,’ but not necessarily the only—evidence has been destroyed, then the choice of the severest sanction is not necessarily justified.” (citations omitted)); *see also Kmart*, 371 B.R. at 842 (“In cases where spoliation is the result of ‘fault,’ as opposed to willfulness or bad faith, courts often use prejudice as a ‘balancing tool’ to tip the scales in favor of or away from severe sanctions.” (citations omitted)).

While most courts require a showing of prejudice in order to impose sanctions for spoliation, some courts have stated that prejudice is not required, even if it is often a consideration in the

sanctions analysis. See *In re Napster, Inc. Copyright Litig.*, 462 F. Supp. 2d at 1075 (“Prejudice is an ‘optional’ consideration when determining whether default sanctions are appropriate.” (footnote omitted) (citing *Halaco Eng’g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988)); *Danis*, 2000 WL 1694325, at *34 (“Although careful to ‘eschew grafting a requirement of prejudice onto a district court’s ability to dismiss or enter judgment as a sanction under its inherent power[,] the Seventh Circuit has recognized that ‘dismissal or judgment is such a serious sanction that it should not be invoked without first considering what effect—if any—the challenged conduct has had on the course of the litigation.’” (quoting *Barnhill v. United States*, 11 F.3d 1360, 1368 (7th Cir. 1993))); *Kmart*, 371 B.R. at 842 (“[W]hile prejudice is not an element in imposing sanctions, the prejudice to the non-offending party should be considered by the court.” (citations omitted)); see also *S. New England Tel. Co.*, 2010 WL 3325962, at *19 (“We, along with the Supreme Court, have consistently rejected the ‘no harm, no foul’ standard for evaluating discovery sanctions Although *one* purpose of Rule 37 sanctions may in some cases be to protect other parties to the litigation from prejudice resulting from a party’s noncompliance with discovery obligations, Rule 37 sanctions serve other functions unrelated to the prejudice suffered by individual litigants” (internal citations omitted)).³⁵

³⁵ The *Southern New England Telephone Co.* court explained:

Disciplinary sanctions under Rule 37 are intended to serve three purposes. First, they ensure that a party will not benefit from its own failure to comply. Second, they are specific deterrents and seek to obtain compliance with the particular order issued. Third, they are intended to serve a general deterrent effect on the case at hand and on other litigation, provided that the party against whom they are imposed was in some sense at fault.

2010 WL 3325962, at *19 (quotation marks omitted) (quoting *Update Art, Inc. v. Modiin Publ’g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988)). The court concluded that “[e]ven when a party finally (albeit belatedly) *complies* with discovery orders after sanctions are imposed, these purposes may still justify sanctions” *Id.*

9. Burden of Proof

There is some disagreement in the case law as to whether the party attempting to show spoliation must prove the elements by clear and convincing evidence or only by a preponderance of the evidence. In *Danis*, the court explained:

The Seventh Circuit has not indicated the quantum of proof necessary for a moving party to establish such culpability [willfulness, bad faith, or fault required to impose dismissal or a default judgment] under Rule 37. With respect to a court's *inherent powers*, cases outside this Circuit apply a clear and convincing evidence standard for default judgments. Compare *Shepherd v. Am. Broadcasting Companies, Inc.*, 62 F.3d 1469, 1472, 1477 (D.D.C. 1995) (because sanction of dismissal serves same purpose as contempt, same standard of proof, clear and convincing evidence, should apply) with *Gates Rubber Co.*, 167 F.R.D. at 108 (“burden of proof for sanctions should be as stringent as the circumstances require” and “if a judge intends to order dismissal or default judgment . . . the judge should do so only . . . by evidence which is clear and convincing”). Because there is no material difference between an analysis under the Court's inherent powers and under Rule 37, we believe the rationale for applying a clear and convincing evidence standard applies with equal force to Rule 37 cases, and in the absence of any contrary authority, adopt the clear and convincing evidence standard in this case.

Danis, 2000 WL 1694325, at *34 (footnote omitted); see also *Mintel Int'l Group*, 2010 WL 145786, at *6 (“A party asserting spoliation must show by ‘clear and convincing evidence’ that the opposing party intentionally destroyed the evidence.” (citations omitted)); *Am. Family Mut. Ins. Co. v. Roth*, No. 05 C 3839, 2009 WL 982788, at *11 (N.D. Ill. Feb. 20, 2009) (“Until the Court of Appeals speaks definitively to the question, the test is whether spoliation has been proved by clear and convincing evidence.”); cf. *Grubb*, 2010 WL 3075517, at *4 (noting that there is case law supporting the imposition of a “clear and convincing” burden of proof to support a sanctions motion, but that “a more recent Seventh Circuit case calls that holding into question and indicates that the proper standard is ‘preponderance of the evidence.’” (citing *Ridge Chrysler Jeep, LLC v. DaimlerChrysler*

Fin. Servs. Ams. LLC, 516 F.3d 623, 625 (7th Cir. 2008), and *Maynard v. Nygren*, 332 F.3d 462, 468 (7th Cir. 2003))). The *Danis* court noted that the burden of proof is lower for certain other sanctions:

Issue-related sanctions, such as adverse inferences, preclusion of evidence, and jury instructions do not require clear and convincing evidence but may be imposed by preponderance of the evidence showings “that a party's misconduct has tainted the evidentiary resolution of the issue.” *Shepherd*, 62 F.3d at 1478. This is because “issue-related sanctions are fundamentally remedial rather than punitive and do not preclude a trial on the merits.” *Id.* Fines, however, still require clear and convincing evidence under the *Shepherd* rationale because they are “fundamentally penal.” *Id.*

2000 WL 1694325, at *34 n.22.

Another court indicated that the burden of proof is also unclear in the Third Circuit, at least for the imposition of dispositive sanctions. *See Micron*, 255 F.R.D. at 149 (“The required burden of proof to establish spoliation is not a matter of settled law in the Third Circuit. On the one hand, in order to prove prejudice ‘[u]nder *Schmid [v. Milwaukee Elec. Tool Corp.]*, 13 F.3d 76 (3d Cir. 1994)], a party need only ‘come forward with plausible, concrete suggestions as to what [the destroyed] evidence might have been.’” On the other hand, because dispositive sanctions ‘contravene the strong public policy [that] favors adjudication of cases on their merits,’ a higher burden of proof may be appropriate.” (first, third, and fourth alterations in original) (internal citations omitted)). The court noted that “[t]he elimination of valued rights should not occur in the absence of a degree of proof [that] reflects the very serious nature of the decision,’ that is, proof by clear and convincing evidence.” *Id.* (alterations in original) (quoting *Gates Rubber Co. v. Bando Chem. Indus. Ltd.*, 167 F.R.D. 90, 108 (D. Colo. 1996)). The court concluded that clear and convincing evidence was required to impose dispositive sanctions:

Although the court recognizes that requiring clear and convincing

evidence for the imposition of dispositive sanctions for spoliation places an onerous burden on the aggrieved party (where the very proof of intent and prejudice arguably has been destroyed), . . . the court concludes that this higher burden can appropriately operate as the clear and convincing burden operates in the patent arena in proving inequitable conduct. More specifically, once intent and prejudice have been established, the court must determine whether their total weight satisfies the clear and convincing standard of proof. In this regard, the showing of intent (i.e., bad faith) can be proportionally less when balanced against high prejudice. In contrast, the showing of intent must be proportionally greater when balanced against low prejudice. *See, e.g., N.V. Akzo v. E.I. DuPont de Nemours*, 810 F.2d 1148, 1153 (Fed. Cir. 1987).

Id.

In *Kmart*, the court noted that “the quantum of proof necessary for the imposition of the various sanctions depends on the severity of the specific sanction sought.” *Kmart*, 371 B.R. at 841 (citation omitted). The court explained that “[c]lear and convincing evidence of willfulness, bad faith, or fault is required for the sanction of dismissal with prejudice or default judgment,” but that “[n]on-dismissal sanctions are generally permissible even without clear and convincing evidence.” *Id.* (citations omitted).

Other cases state that the burden of proof for imposing spoliation sanctions is a preponderance of the evidence. *See, e.g., Fairfield Dev., Inc. v. J.D.I. Contractor & Supply, Inc.*, No. 08-cv-02792-MSK-KMT, 2010 WL 3023822, at *2 (D. Colo. Jul. 30, 2010) (“The burden is on the moving party to prove, by a preponderance of the evidence, that the opposing party failed to preserve evidence or destroyed it.” (citation omitted)); *Sue v. Milyard*, No. 07-cv-01711-REB-MJW, 2009 WL 2424435, at *1 (D. Colo. Aug. 6, 2009) (“The movant has the burden of proving, by a preponderance of the evidence, that the opposing party failed to preserve evidence or destroyed it.” (citation omitted)); *Ernest v. Lockheed Martin Corp.*, No. 07-cv-02038-WYD-KLM, 2008 WL 2945608, at *1 (D. Colo. Jul. 28, 2008) (same). In *In re Napster, Inc. Copyright Litigation*, the court rejected the argument

that willfulness, bad faith, or fault necessitated proof by clear and convincing evidence in order to warrant a dismissal sanction. 462 F. Supp. 2d at 1072. The court noted that the party facing sanctions pointed “to no Ninth Circuit authority applying the clear and convincing standard to the exercise of the court’s inherent authority to impose dismissal or default sanctions, and [that] the Ninth Circuit has not squarely addressed the issue of which standard of proof is appropriate.” *Id.*

10. Agency Liability

A party can be sanctioned for spoliation acts committed by its employees or other agents. *See Victor Stanley*, 2010 WL 3530097, at *17 n.23 (“[A]gency law is directly applicable to a spoliation motion, and the level of culpability of the agent can be imputed to the master.” (citations omitted)); *Nucor*, 251 F.R.D. at 196 (“Ordinary agency principles govern a party’s responsibility for spoliation committed by its employees. An employer is liable for any acts committed by employees acting within the scope of their employment.” (internal citations omitted)); *see also Schumacher*, 2010 WL 2867603, at *5 (“[A] party can be held liable for spoliation of relevant evidence by its agents.” (citation omitted)); *Goodman*, 632 F. Supp. 2d at 522 n.16 (“A party may be held responsible for the spoliation of relevant evidence done by its agents. Thus, agency law is directly applicable to a spoliation motion, and the level of culpability of the agent can be imputed to the master.” (internal citation omitted)). A party may also be held responsible for failing to preserve if its counsel had knowledge of that duty. *See Maxxam*, 2009 WL 817264, at *13 (“Defendants are therefore chargeable with their agent Morrison & Foerster’s knowledge that a duty to preserve evidence had been triggered.” (citation omitted)).

11. Safe Harbor

The e-discovery panel proposed having a safe harbor that would insulate a party from sanctions

for failure to preserve if the party complied with the rule. One court has noted that the safe harbor provision in Rule 37(e), which provides that “[a]bsent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system,” does not apply when a court sanctions a party under its inherent powers because the rule text is specifically limited to sanctions entered under the rules. *See Nucor*, 251 F.R.D. at 196 n.3. Although the statement by the *Nucor* court involved the safe harbor in Rule 37(e), its point that the rule’s safe harbor could not overrule a court’s inherent authority to sanction may be applicable in the context of drafting a preservation rule. One question may be how a safe harbor in a preservation rule would interact with a court’s inherent authority to sanction despite compliance with the rule’s requirements.

12. Timeliness

In *Goodman*, the court addressed the importance of bringing a spoliation claim to the court’s attention as soon as possible and considered the circumstances in which a motion for sanctions for spoliation would be untimely. The court stated:

Courts considering this issue have identified a number of factors that can be used to assess the timeliness of spoliation motions. First, “[k]ey to the discretionary timeliness assessment of lower courts is how long after the close of discovery the relevant spoliation motion has been made” Second, a court should examine the temporal proximity between a spoliation motion and motions for summary judgment. Third, courts should be wary of any spoliation motion made on the eve of trial. Fourth, courts should consider whether there was any governing deadline for filing spoliation motions in the scheduling order issued pursuant to FED. R. CIV. P. 16(b) or by local rule. Finally, the explanation of the moving party as to why the motion was not filed earlier should be considered.

Goodman, 632 F. Supp. 2d at 506–08 (alteration and omission in original) (internal citations and

footnote omitted).³⁶ The court emphasized the need for spoliation motions to be filed as soon as possible:

The lesson to be learned from the cases that have sought to define when a spoliation motion should be filed in order to be timely is that there is a particular need for these motions to be filed as soon as reasonably possible after discovery of the facts that underlie the motion. This is because resolution of spoliation motions are fact intensive, requiring the court to assess when the duty to preserve commenced, whether the party accused of spoliation properly complied with its preservation duty, the degree of culpability involved, the relevance of the lost evidence to the case, and the concomitant prejudice to the party that was deprived of access to the evidence because it was not preserved. *See, e.g., Silvestri*, 271 F.3d at 594–95. Before ruling on a spoliation motion, a court may have to hold a hearing, and if spoliation is found, consideration of an appropriate remedy can involve determinations that may end the litigation or severely alter its course by striking pleadings, precluding proof of facts, foreclosing claims or defenses, or even granting a default judgment. And, in deciding a spoliation motion, the court may order that additional discovery take place either to develop facts needed to rule on the motion or to afford the party deprived of relevant evidence an additional opportunity to develop it from other sources. *The least disruptive time to undertake this is during the discovery phase, not after it has closed.* Reopening discovery, even if for a limited purpose, months after it has closed or after dispositive motions have been filed, or worse still, on the eve of trial, can completely disrupt the pretrial schedule, involve significant cost, and burden the court and parties. Courts are justifiably unsympathetic to litigants who, because of inattention, neglect, or purposeful delay aimed at achieving an unwarranted tactical advantage, attempt to reargue a substantive issue already ruled on by the court through the guise of a spoliation motion, or use such a motion to try to reopen or prolong discovery beyond the time allotted in the pretrial order.

Id. at 508 (emphasis added) (footnote omitted).

³⁶ The court noted that “[s]ome courts have examined whether the spoliation motion ‘was made in accordance with Rule 37,’” and that the courts evaluating this factor do not “provide an explanation as to the meaning of this phrase; however, it stands to reason that a court should take Rule 37 compliance into consideration when dealing with a spoliation motion founded on a violation of a specific court order, rather than a motion brought under the court’s inherent power to control the judicial process.” *Goodman*, 632 F. Supp. 2d at 507 n.5. The *Goodman* court did not evaluate this factor because the plaintiff did not argue that the alleged spoliation violated an order of the court, making “compliance with Rule 37 . . . irrelevant to determining whether *Goodman*’s Motion was timely.” *Id.*

13. Choice of Law³⁷

Most courts apply federal law to spoliation issues. *See Walter*, 2010 WL 2927962, at *2 (“Federal law governs the imposition of sanctions for spoliation of evidence in a diversity action.” (citing *Martinez v. Brink’s, Inc.*, 171 F. App’x 263, 269 (11th Cir. 2006))); *Schumacher*, 2010 WL 2867603, at *5 (federal law of spoliation applied in a diversity case because “the power to sanction for spoliation derives from the inherent power of the court, not substantive law.” (quoting *Silvestri*, 271 F.3d at 590; citing *Hodge v. Wal-Mart Stores, Inc.*, 360 F.3d 446, 449–50 (4th Cir. 2004))); *O’Brien*, 2010 WL 1741352, at *3 (“In determining whether spoliation sanctions are appropriate, federal law applies.” (citing *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009))); *In re Nat’l Century Fin. Enters.*, 2009 WL 2169174, at *3 (“[C]ourts should apply federal law in cases concerning spoliation of evidence, which is derived from a court’s inherent power to control the judicial process.”); *Forest Labs.*, 2009 WL 998402, at *1 (“The Sixth Circuit has recently recognized that federal law governs spoliation sanctions in all federal court cases, thereby bringing the case law in the Sixth Circuit ‘in line with other courts of appeals.’” (quoting *Adkins*, 554 F.3d at 652));³⁸ *Greyhound Lines*, 2009 WL 798947, at *1 (“The Eleventh Circuit has held that federal law governs the imposition of sanctions for spoliation of the evidence in a diversity suit because spoliation sanctions are an evidentiary matter. The Eleventh Circuit also has explained, however, that in

³⁷ The e-discovery panel did not suggest that choice-of-law issues be addressed in the preservation rule, but since I came across some case law on that issue in looking into the other elements, a brief summary is included here.

³⁸ Earlier Sixth Circuit case law indicated that spoliation sanctions may be governed by state law. *See Clark Constr. Group*, 229 F.R.D. at 138 (“This matter involves possible bad faith conduct during the discovery period and the destruction of potentially relevant evidence; therefore, [t]he rules that apply to the spoiling of evidence and the range of appropriate sanctions are defined by state law” (alteration and omission in original) (quoting *Beck v. Haik*, 377 F.3d 624, 641 (6th Cir. 2004))).

evaluating the need for sanctions, federal courts look to factors enumerated in state law, because federal law does not set forth specific guidelines regarding sanctions for spoliation.” (internal citation to *Flury*, 427 F.3d at 944, omitted)); *Townsend*, 174 F.R.D. at 4 (federal law controls spoliation sanctions issues). In patent cases, regional circuit law governs sanctions for spoliation. *Micron*, 255 F.R.D. at 148 (citing *Monsanto Co. v. Ralph*, 382 F.3d 1374, 1380 (Fed. Cir. 2004)).

VIII. Judicial Determination

A. E-Discovery Panel’s Proposal

It should provide access to a judicial officer, following a meet and confer, to

- a. Resolve disputes
- b. Apply Rule 26(c)/proportionality
- c. Consider the potential for cost allocation
- d. Impose sanctions (*e.g.*, of the sort provided for by Rule 37).

B. Case Law on the Judicial Determination Element

While it is difficult to find case law specifically addressing access to a judicial officer to handle preservation issues, a related issue is what spoliation issues are for the judge and what issues are for the jury. For example, in *Nucor*, the court explained:

There is inconsistency in how courts deal with the division of fact-finding labor in spoliation cases. The court makes the findings of fact necessary to reach a conclusion on the spoliation issue. *See, e.g., Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958–61 (9th Cir. 2006); *Zubulake v. UBS Warburg (Zubulake V)*, 229 F.R.D. 422 (S.D.N.Y. 2004). That practice follows the usual rule that the court, rather than a jury, is responsible for finding facts on a motion for sanctions. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 399–401, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990)[;] *Brubaker v. City of Richmond*, 943 F.2d 1363, 1374 (4th Cir. 1991)[;] *Blue v. U.S. Dep’t of the Army*, 914 F.2d 525, 540–44 (4th Cir. 1990). Indeed, a district court is granted broad discretion to impose appropriate sanctions, *Silvestri*, 271 F.3d at 590, and the abuse of discretion

standard accounts for the judge's role as a fact-finder. *See Cooter & Gell*, 496 U.S. at 400–01, 110 S. Ct. 2447[;] *see also Brubaker*, 943 F.2d at 1374 (“A district court abuses its discretion if it bases its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.”)[.]

Nonetheless, when imposing an adverse inference charge as a sanction for spoliation, district courts permit the jurors to re-assess the evidence and determine whether, in their judgment, spoliation has occurred at all. For example, in *Zubulake V*, the court engaged in a thorough and well-reasoned assessment of the evidence, and ultimately concluded that the defendant had spoliated relevant evidence. Nonetheless, the district court's charge stated that the jury should decide whether the defendant failed to produce relevant evidence and, if it answered that question affirmatively, then decide whether to apply an adverse inference. *See Zubulake V*, 229 F.R.D. at 439–40.

251 F.R.D. at 202–03 (footnote omitted). The *Nucor* court questioned the approach of allowing the jury to reassess spoliation issues previously addressed by the court:

While this court is content to allow the jury to decide whether spoliation occurred for itself, the allocation of labor in *Zubulake V*, *Vodusek*, and other cases makes little sense when viewed in light of all the sanctions available to remedy spoliation of evidence. If a district court finds that a party spoliated evidence and sanctions that conduct by giving an adverse inference charge, the spoliating party gets an opportunity to re-argue the spoliation issue before the jury. However, if a district court makes the same findings and chooses to impose any other sanction, including the harsher sanctions of default judgment or dismissal, the spoliating party is not afforded the same opportunity. In other words, the judge is the final authority to make the relevant findings of fact (subject, of course, to appellate review) in those cases. Because good authority trends toward such an outcome, notably the *Zubulake V* and *Vodusek* cases, this court will permit the parties to present all spoliation issues anew before the jury. The inconsistency is noted simply because courts and parties should be mindful of the consequences the different sanctions may have on who ultimately gets to decide the factual disputes.

Id. at 203.

In *Residential Funding*, the Second Circuit explained:

Although the issue of whether evidence was destroyed with a “culpable state of mind” is one for a court to decide in determining whether the imposition of sanctions is warranted, whether the materials were in fact unfavorable to

the culpable party is an issue of fact to be determined by the jury. Accordingly, a court's role in evaluating the "relevance" factor in the adverse inference analysis is limited to insuring that the party seeking the inference had adduced enough evidence of the contents of the missing materials such that a reasonable jury could find in its favor.

Residential Funding, 306 F.3d at 109 n.4 (internal citations omitted).

A court within the Eleventh Circuit noted that the Eleventh Circuit has concluded that "a district court's drawing of an adverse inference had to be supported by a finding of bad faith . . . , and that it was proper for the court, not the jury, to find bad faith, because the inference is a sanction for the failure to preserve evidence." See *Greyhound Lines*, 2009 WL 798947, at *2 (citing *BP Prods. N.A., Inc. v. SE Energy Group, Inc.*, 282 F. App'x 776, 780 n.3 (11th Cir. 2008)).

Another issue related to judicial oversight is when a court should enter a preservation order.

One court has described the test used for evaluating whether such an order is warranted:

It is true that the issuance of a preservation order is by no means automatic, even in a complex case. Nevertheless, such orders "are increasingly routine in cases involving electronic evidence, such as e-mails and other forms of electronic communication." *Pueblo of Laguna v. United States*, 60 Fed. Cl. 133, 136 (2004). The critical question is under what circumstances a preservation order should be issued.

Some courts have taken the position that a party seeking a preservation order must meet the standards for obtaining injunctive relief. In the Second Circuit, a party seeking a preliminary injunction "must show, first, irreparable injury and, second, either (a) likelihood of success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in the movant's favor."

However, attempting to apply these requirements in the context of a request for a preservation order creates anomalies. For example, the court must evaluate the merits of the litigation even before evidence has been gathered, let alone produced to the opposing party or submitted to the court. As one court has observed, there is no reason "to consider whether plaintiff is likely to be successful on the merits of its case in deciding whether to protect records from destruction. . . . [S]uch an approach would be decidedly to put the cart before the horse." Likewise, it is difficult to

evaluate the injury that might be caused by the destruction of evidence without yet knowing the content of that evidence.

Instead of importing the standards for injunctive relief, some courts have instituted a balancing test for determining whether to issue a preservation order. For example, in *Capricorn Power [Co. v. Siemens Westinghouse Power Corp.]*, 220 F.R.D. 429 (W.D. Pa. 2004)], the court outlined a three-factor test, taking into consideration:

1) the level of concern that the court has for the continuing existence and maintenance of the integrity of the evidence in question in the absence of an order directing preservation of the evidence; 2) any irreparable harm likely to result to the party seeking the preservation of evidence absent an order directing preservation; and 3) the capability of an individual, entity, or party to maintain the evidence sought to be preserved, not only as to the evidence's original form, condition, or contents, but also the physical, spatial and financial burdens created by ordering evidence preservation.

220 F.R.D. at 433–34. Other courts have adopted a more streamlined test that simply “requires that one seeking a preservation order demonstrate that it is necessary and not unduly burdensome.” The difference between these two tests lies in what the moving party must show with respect to the content of the evidence that is in danger of being destroyed. However, the distinction is more apparent than real. Even under the two-factor approach, one element of demonstrating the necessity for an order is a showing that the documents in jeopardy are in fact relevant. And, while the three-factor test suggests a more specific demonstration of the importance of the evidence—whether, for example, it is “one-of-a-kind,”—neither this nor any other single factor is determinative. Thus, while the ability to establish that unique and critical evidence will be destroyed would certainly buttress any motion for a preservation order, it is not an absolute requirement under either articulation of the balancing test. That test, in turn, is better adapted than the standard for injunctive relief for dealing with the question of whether to require the preservation of evidence, the nature of which may not yet be fully known, and I will therefore apply a balancing standard in this case.

Treppel v. Biovail, 233 F.R.D. 363, 369–71 (S.D.N.Y. 2006) (first alteration in original) (internal citations omitted).

IX. Conclusion

The case law across the country contains many variations as to what is necessary to establish each of the proposed elements of a preservation rule. While there is general agreement on some of the elements, such as when the duty to preserve is triggered, there is disagreement with respect to aspects of many others. The widest range of disagreement is with respect to sanctions and the state of mind required to impose different types of sanctions. Particularly with respect to the state-of-mind element, the standards often vary even within a circuit.

Memo to: Discovery Subcommittee, Adv. Comm. on Civil Rules
CC: Mark Kravitz, Ed Cooper
Date: Aug. 5, 2010
RE: Preservation discussion items

This memorandum is designed to introduce possible discussion items for the Subcommittee's forthcoming conference call. It sketches ideas about how rules relating to preservation and sanctions for failure to preserve might be handled. It is intended solely for focusing discussion of the Discovery Subcommittee, and does not imply any intention to propose any rule amendments to address preservation or sanctions, much less any proposal to amend similar to those sketched below. Instead, the goal is to provide background for a general discussion of the possibilities of rulemaking improvements of the current situation; as with other topics, it is likely that some concrete examples of the sorts of rule provisions that might be pursued will be useful for discussion of the question whether or how to proceed.

NEED FOR ACTION?

One critical component of the process is to assess the gravity of the problem of preservation and sanctions. Sources that emerged through coincidence provide a grab-bag of items that may bear on the salience of the topic. For example, the most recent issue of *Litigation Magazine* (the publication of the ABA Section of Litigation) included the following:

Spoliation, in case you haven't heard, is the newest battleground of contemporary litigation, now a continuing sideshow, if not the main event, in courtrooms across the country.

Robert E. Shapiro, *Conclusion Assumed*, 36 *Litigation* 59, 59 (Spring 2010).

On July 29, 2010, the San Francisco Daily Journal reported on an appeal from a defense verdict in a slip-and-fall case involving the Vons grocery chain. One issue raised on appeal was the refusal of the trial court to permit plaintiff to call attorneys for other patrons of Vons who had found that it no longer possessed the security videotapes of their mishaps when they sued. Plaintiff in the case in question had not initially appeared to be seriously injured, but later developed pain in her foot that allegedly led her to spend approximately \$400,000 for treatment. By the time plaintiff's lawyer asked to see Vons' security tapes, they had been erased (probably reused). Vons argued then that plaintiff was the only witness to the incident and didn't report the severity of her injury until after the footage was erased in the normal course of business. *Claran McEvoy, Plaintiff Presses Vons on Tapes*, S.F. Daily J., July 29, 2010, at 3. (Note that the issue here was not sanctions but admissibility of evidence, probably over objections based in part on the California equivalent of Evidence Rule 403.)

A third illustration comes from the Aug. 4, 2010, S.F. Daily Journal, in an article reporting on *Reeves v. MV Transportation, Inc.*, 186 Cal.App.4th 666, 2010 WL 2696834 (Cal. Ct. App., July 9, 2010), an age discrimination case. Plaintiff claimed defendant hired a younger lawyer instead of him in violation of the California Fair Employment and Housing Act, and the lower court granted defendant's motion for summary judgment. On appeal, plaintiff objected that defendant had not retained all applications for the position, relying on Cal. Gov't Code § 12946, which requires employers to retain all job applications for at least two years after receiving them. The lawyer who wrote up the case says that it "illustrates the importance of preserving job applications and resumes themselves. * * * [E]mployers must maintain all employment applications for at least two years, and should consult with legal counsel before destroying records related to any employee or applicant who might reasonably be expected to file a complaint or lawsuit." *Brianne Marriott, Dozens of Plaintiffs For Every Position: Retaining Hiring-Related Documents*, S.F. Daily J., Aug. 4, 2010, at 5.

Ed Cooper calls attention to *O'Brien v. Ed Donnelly Enterprises, Inc.*, 575 F.3d 567 (6th Cir. 2009), an action under the FLSA and Ohio law for failure to pay wages premised in part on alteration of records of how many hours plaintiffs had worked. Among other things, plaintiffs objected that defendant had failed to retain Time Punch Change Approval Reports, which related to hours worked by plaintiffs. Defendant's computer system kept only 72 days' worth of reports in its backup, and plaintiffs claimed that discarded reports would have supported their claims that defendant robbed them of time worked. The court of appeals ruled that the district court was wrong in assuming that defendant was not on notice of the suit until it was filed. Plaintiffs asserted that defendant (which bought the facility where they worked from another operator) learned that the seller had been sued by another employee for failure to pay her full wages, and that defendant was aware a manager was making employees work off the clock. This sufficed, in the appellate court's view, to permit (but not require) the conclusion that defendant was on notice earlier of the need to retain these records. (It is worth noting that the very changing of the records itself might be actionable.)

John Rabiej brings to our attention the stipulation regarding retention of documents in *U.S. v. Louisiana Generating LLC*, 2010 U.S. Dist Lexis 20207 (M.D. La., March 5, 2010). This stipulation (which I will attempt to send to you) contains a very specific set of directives about what must be preserved that the Department of Justice found suitable in at least this case. It has a long paragraph, for example, addressing what "draft" documents must be retained. Whether this level of detail is warranted in a rule is, of course, a matter for review as we move forward. But here is at least one specific example of a regime resulting from parties' negotiation.

Finally, we have had some communications with Emery Lee of the Federal Judicial Center about possible data-gathering to inform our discussions. He can do searches of the CM/ECF case event database for "sanctions" district by district, and also can make a more focused search using terms like "spoliation." The former search will produce false positives -- Rule 11 motions, Rule 37 motions not about spoliation, etc. The latter will probably create a false negative problem -- failing to identify all motions that interest us. It would probably be possible for us to get help from the FJC on identifying pertinent motions, for example, in a limited number of districts for a calendar year or two.

It is unclear how much this information would assist us in our task. For one thing, it would not show what over-preservation has occurred. For another, it would provide only a limited basis for assessing the argument that corporate potential defendants feel they must assume the worst in terms of preservation. In any event, this initial identification effort would just be a precursor to gathering more information later. Most of that information-gathering could be done from Washington, but it would take considerable time.

For purposes of reference, as ballpark figures, Emery's initial inquiry about cases filed in 2007-2008 for the following districts revealed the following:

- N.D. Cal. -- 190 civil cases with a "motion for sanctions" and 13 "spoliation" motions.
- S.D.N.Y. -- 118 "motion for sanctions" cases and 20 "spoliation" motions.
- S.D. Tex. -- 96 "motion for sanctions" cases and 11 "spoliation" motions.
- E.D. Va. -- 60 "motion for sanctions" cases and 5 "spoliation" motions.

SKETCHING POSSIBLE RULE AMENDMENTS

The Subcommittee has only begun its process of gathering information about situations that further illustrate concerns about the frequency and content of preservation and sanctions rulings. As it evaluates those topics and considers possible ways of improving practice in the area, the following initial sketches of rule ideas can provide illustrative possibilities. The sketches can also prompt further suggestions such some of these ideas appear worth pursuing.

PRE-LITIGATION PRESERVATION DUTY

One general concern is to define in the rules what the duty to preserve should be for federal civil cases. One question raised by this topic is the extent to which a rule can regulate pre-litigation conduct. In general, one could be uneasy about regulation of pre-litigation conduct. Rule 1, for example, says that the rules “govern the procedure in all civil actions and proceedings in the United States district courts.” Until the action or proceeding is commenced, it is not obvious that the rules apply.

But there surely is some authority to adopt provisions for post-litigation consequences of pre-litigation actions. A prime example of that is Rule 11(b), which makes a signature on a document filed in court (including the initial complaint) a certification as to various things based on a “belief, formed after an inquiry reasonable under the circumstances.” That inquiry must, for the plaintiff lawyer, occur before the complaint is filed.

Somewhat similarly, Rule 26(f)(2) directs the parties at their initial conference to “discuss any issues about preserving discoverable information.” It is hard to believe that such discussions may relate only to what was done after the complaint was filed. Is defendant forbidden, for example, to ask what preservation efforts the plaintiff undertook after hiring a lawyer and getting to work on preparing the lawsuit? Similarly, is plaintiff forbidden to inquire about pre-litigation preservation practices of defendant to ascertain whether, for example, to ask that backup tapes or other backup media be preserved?

Also somewhat similarly, Rule 27 authorizes pre-litigation discovery to preserve evidence for future federal-court litigation. A federal court does have a proceeding due to the filing of a Rule 27 petition, but surely such a court has authority to enter an order requiring that discoverable evidence be preserved due to the filing of such a petition, and to take action if a person from whom such pre-litigation discovery is sought has attempted to destroy the sought-after information.

Further from the beaten track, it is worth noting that one method of dealing with current concerns about pleading requirements has been to consider some sort of pre-litigation court-authorized fact-gathering, perhaps on a Rule 27 model. At least one state (Texas) has something of this sort on its books now. See Lonny Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. Mich. J. L. Ref. 217 (2007). In conjunction with that court-sanctioned activity, the court would seemingly have some authority to ensure that the information to be gathered be preserved.

There are surely cases holding that very severe sanctions may be imposed on a plaintiff for pre-litigation failings of this sort. See, e.g., *Silvestri v. General Motors Corp.*, 271 F.3d 583 (4th Cir. 2001) (upholding dismissal of plaintiff’s suit because he did not notify G.M. of need to inspect allegedly defective air bag before it was repaired, which occurred long before suit was filed); compare *Menz v. New Holland North America, Inc.*, 440 F.3d 1002 (8th Cir. 2006) (reversing dismissal of suit by farmer who repaired tractor involved in accident before filing

suit). More generally, it seems that there is some unquestioned “inherent authority” for courts to take actions in connection with pending litigation based on actions taken by the parties before suit was filed. *See, e.g.,* Carlucci v. Piper Aircraft Corp., 102 F.R.D. 472 (S.D.Fla. 1984) (sanctions imposed in 1980s for “purge” of defendant’s records in 1960s and 1970s to remove “documents that might be detrimental to Piper”).

Although this issue will be with us throughout, therefore, it seems impossible to assume there is an unavoidable and bright line precluding any attention in the rules to actions taken before the litigation was commenced. And since the rules can only come into effect if the action is later commenced in (or removed to) federal court, there is a natural limitation on the effect of such rules.

At the same time, it will be important to keep in mind the Supersession Clause, 28 U.S.C. § 2072(b), which provides as to rules adopted under the Rules Enabling act that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” The variety of laws that may bear on preservation is very large. For a 30-year old catalogue of some such rules that existed then, see John M. Fedders & Lauryn H. Guttleplan, Document Retention and Destruction: Practical, Legal and Ethical Considerations, 56 Notre Dame Law. 5 (1980). The recent California Court of Appeal decision mentioned above illustrates how important such legislation can be. We presently are attempting to compile at least representative information about the various sources of such rules, and must appreciate that they are very numerous.

Approaching the question of a preservation rule, therefore, raises difficult issues in addition to the basic question what such a rule should say. The following ideas are nothing more than ideas, and designed only to provide food for thought. Our goal is to devise the best possible rule, and then to consider whether there are authority obstacles to adopting such a rule.

DRAFTING POSSIBILITIES FOR PRESERVATION RULE

Rule 26.1. Duty to Preserve Discoverable Information

- (a) **General Duty to Preserve.** [In addition to any duty to preserve information provided by other law,] {Without regard to any other duty to preserve information,}¹ every person

¹ The reason for these qualifiers is to provide a rule-based predicate for Note language saying that the goal of this rule is not to supersede any existing duty to preserve information. A Note would probably illustrate some of the kinds of sources that may bear on particular situations but also say that the illustrative listing was just that, and not complete.

An alternative could be to prescribe a duty to preserve and then assert that it supersedes all other duties. But those duties are probably numerous and emanate from many sources, both state and federal. Purportedly nullifying them would be a difficult business, particularly since much litigation does not end up in federal court, and in some instances could not constitutionally end up in federal court.

who reasonably expects to be a party² to an action cognizable in a United States court³ must preserve discoverable [electronically stored]⁴ information in accordance with this rule.

- (b) **Trigger for Duty to Preserve.** *[Alternative 1]* The duty to preserve discoverable information under Rule 26.1(a) applies [arises] when a person becomes aware of facts or circumstances⁵ that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court].⁶
- (b) **Trigger for Duty to Preserve.** *[Alternative 2]* The duty to preserve discoverable information applies [arises] when a person becomes aware of facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court] such as:
- (1) Service of a pleading or other document asserting a claim;⁷ or

² Should this be limited to prospective parties? Do we want to impose a preservation duty on a third-party witness to an accident? Though that sounds extreme, we probably would say that after service with a subpoena for specified information such a third-party witness would have a duty to preserve.

³ This formulation is modeled on Rule 27(a), which speaks of a petitioner who “expects to be a party to an action cognizable in a United States court” and of “persons whom the petitioner expects to be adverse parties.”

⁴ One question is whether this duty to preserve should be limited to electronically stored information. On the one hand, that appears to be the main focus of current concerns emphasized to the Committee. On the other hand, other material remains very important in much litigation, and many recent sanctions cases involve more traditional sources of information.

⁵ Is “facts or circumstances” too many words? Would it suffice to say only “facts” or “circumstances”?

⁶ At least one problem with this formulation is that it includes awareness that the action might be in a federal court. Since subdivision (a) imposes a duty only on those who reasonably expect being a party of an action in federal court, saying that again here may be harmful; the only duty we are talking about here is the one in (a).

⁷ This need not be a claim against this person, presumably. Under Rule 15(c)(1)(C), relation back may apply to a claim later asserted against an original nonparty who “should have known that the action would have been brought against it, but for a mistake concerning the proper party’s identity.” See *Krupski v. Costa Crociere, S.p.A.*, 130 S.Ct. 2485 (2010) (applying Rule 15(c)(1)(C) to uphold relation back of claim against added defendant). Indeed, in this instance

- (2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or
- (3) Service of a subpoena, CID, or similar demand for information; or
- (4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim⁸ or taking any other action in anticipation of litigation;⁹ or
- (5) Receipt of a notice or demand to preserve discoverable information;¹⁰ or
- (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program.¹¹

the duty to preserve may arise after the commencement of the action but long before the formal assertion of a claim against this party.

⁸ This terminology is meant to track Evidence Rule 408.

⁹ This provision draws on Rule 26(b)(3) for the general notion of "anticipation of litigation." It is worth noting that this is the one most likely to be important to plaintiffs, who do not usually await notice of a claim by others since they are the claimants. But whether the duty to preserve should arise at the same moment Rule 26(b)(3) protection attaches might be debated.

¹⁰ This is very open-ended. It does not purport to address the scope of the obligation to preserve, but only the trigger. It does not focus on the form of this notice, but does focus upon "receipt," which presumably means the demand is directed to the person to whom the duty will thereupon apply. It is worth noting, however, that delivery of such a notice to *A* might be regarded as sufficient to notify *B* of the need to preserve.

¹¹ Including this provision might be said somewhat to undercut subdivision (a) above, for that provision was designed to specify a duty to preserve imposed by the rules without regard to what other sources of law require. Yet it may well be that failure to comply with other legal requirements would be a legitimate consideration for a preservation requirement imposed by the rules. To the extent subdivision (c) below is the sole definition of the scope of the duty to preserve, making another law (which may have a different scope) the trigger could cause difficulties.

The reference to the person's own retention program was not suggested by the Duke panel, but does appear in cases. See *Kerkendall v. Department of the Army*, 573 F.2d 1318, 1325-27 (Fed. Cir. 2009) (upholding adverse inference for destruction of documents by government agency in violation of its own retention program).

- (b) **Trigger for Duty to Preserve.** *[Alternative 3]* The duty to preserve discoverable information applies [arises] only if a person becomes aware of one of the following facts or circumstances that would lead a reasonable person to expect to be a party to an action [cognizable in a United States court]:¹²
- (1) Service of a pleading or other document asserting a claim; or
 - (2) Receipt of a notice of claim or other communication -- whether formal or informal -- indicating an intention to assert a claim; or
 - (3) Service of a subpoena, CID, or similar demand for information; or
 - (4) Retention of counsel, retention of an expert witness or consultant, testing of materials, discussion of possible compromise of a claim or taking any other action in anticipation of litigation; or
 - (5) Receipt of a notice or demand to preserve discoverable information; or
 - (6) The occurrence of an event that results in a duty to preserve information under a statute, regulation, contract, or the person's own retention program.
- (c) **Scope of Duty to Preserve.** *[Alternative 1]* A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take all actions reasonable [and proportional] under the circumstances to preserve discoverable information.¹³

¹² The notion of Alternative 3 is to limit the trigger to the listed events. Doing so could be very problematical, since the rule would need to be comprehensive, and foreseeing all the events that would justify preservation is very difficult.

¹³ One suggestion from the Duke panel was to specify a different preservation duty for parties and nonparties. In the pre-litigation context, this seems particularly challenging since nobody is yet a party. Whether there should be a distinction on this ground is debatable in any event. For example, should it matter if, under Rule 15(c), the nonparty is one that should have realized it would have been sued?

It may be that a revision to Rule 45 to address the preservation duties that flow from service of a subpoena (a trigger point mentioned in draft 26.1(b) above) would be worth

- (c) **Scope of Duty to Preserve.** *[Alternative 2]* A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must make reasonable [and proportional] efforts to preserve any information that would be within the scope of discovery under Rule 26(b)(1) [in regard to the potential claim of which the person is or should be aware].¹⁴
- (c) **Scope of Duty to Preserve.** *[Alternative 3]* A person whose duty to preserve discoverable information has been triggered under Rule 26.1(b) must take all actions reasonable [and proportional] under the circumstances to preserve discoverable information as follows:
- (1) **Subject matter.** *[Alternative 1]* The person must preserve any information relevant to any claim that might be asserted in the action to which the person might become a party [or to a defense to such a claim];¹⁵
- (1) **Subject matter.** *[Alternative 2]* The person must preserve any information that constitutes evidence of a claim or of a defense to a claim;¹⁶

considering. Perhaps it would be best to cover all these topics in one place. At some point, this discussion relates to ongoing consideration of amendments to simplify and shorten Rule 45.

¹⁴ The idea here is to invoke the concept of relevance as a defining factor for the duty to preserve. Using it might raise several problems. For one thing, the claim involved has not been made in a formal way. For another, relevance is a very broad concept. Indeed, one might need to address whether this means relevant to the claim or defense or to the subject matter, topics last addressed in the 2000 amendments to Rule 26(b)(1).

Another question that might arise at this point is whether allegedly privileged materials must be preserved. Those are not within the scope of discovery, but the court can't pass on whether discarded materials were indeed privileged. This problem will be mentioned again below.

¹⁵ The notion here is to invoke the scope of discovery or right under Rule 26(b)(1). Note that this scope may include such things as other similar incidents, impeaching material, and additional items that may not, on their face, relate to the claim raised.

¹⁶ The effort here is to narrow the scope to what the rulemakers were trying to identify as "core information" in 1991 when initial disclosure was first proposed. This phraseology is different, and raises difficulties about deciding what is "evidence." For example, does that exclude hearsay? In general, hearsay is discoverable under Rule 26(b)(1) whether or not admissible.

- (1) **Subject matter.** [Alternative 3] The person must preserve any information that is relevant to a subject on which a potential claimant has demanded [requested] that information be preserved;¹⁷
- (1) **Subject matter.** [Alternative 4] The person must preserve any information that a reasonable person would appreciate should be preserved under the circumstances;¹⁸
- (2) **Sources of information to be preserved.** [Alternative 1] The duty to preserve under Rule 26.1(a) extends to all information in the person's possession, custody or control¹⁹ that is reasonably accessible to the person;²⁰

¹⁷ This would impose a very narrow requirement to preserve; unless a party giving notice of a claim has said something about preserving information there would be no duty. This sort of provision would seem to encourage broad demands to preserve in advance of litigation, probably not a desirable thing. Among other things, the person who receives such a demand has no immediate way to challenge the demand, as could happen in regard to undue demands during a Rule 26(f) conference, for those can be submitted to the judge for resolution if needed. Perhaps more significantly, it would impose no duty to preserve unless a demand to preserve were made, seemingly disadvantaging those who don't have lawyers. A lesser point on that score is that it would cause uncertainty about whether there had been such a demand.

¹⁸ This alternative invokes one of the suggestions of the Duke panel. It may be circular, and seems to provide very little guidance to the party subject to the duty to preserve.

¹⁹ This invokes Rule 34(a)(1)'s definition of the scope of the duty to produce in response to a Rule 34 request.

²⁰ The last clause invokes a version of Rule 26(b)(1)(B)'s exemption from initial discovery of electronically stored information that is "not reasonably accessible because of undue burden or cost."

It is debatable whether any such limitation should be included in a preservation rule. In the Committee Notes to Rules 26(b)(2)(B) and 37(e) in 2006, an effort was made to distinguish between the duty to preserve such information and the duty to provide it in response to discovery.

Another issue here (already mentioned above) is the question of preserving allegedly privileged material. To the extent that the trigger for the duty to preserve under Rule 26.1 corresponds to the "in anticipation of litigation" criterion of Rule 26(b)(3), for example, much material generated in trial preparation activity might fall within the duty to preserve. Does the fact that a party claims it need not produce this material exempt it from preservation? Ordinarily, as emphasized in Rule 26(b)(5), the decision whether a claim of privilege is valid is for the court, not the party; if the court cannot examine the material because it no longer exists, that is a problem.

- (2) *Sources of information to be preserved.* [Alternative 2] The duty to preserve under Rule 26.1(a) extends to all information in the person's possession, custody or control that is routinely used [accessed] in the usual course of business of the person;²¹
- (3) *Types of information to be preserved.* The duty to preserve under Rule 26.1(a) extends to all documents, electronically stored information, or tangible things within Rule 34(a)(1).²²
- (4) *Form for preserving electronically stored information.* A person under a Rule 26.1(a) duty to preserve electronically stored information must preserve that information in a form or forms in which it is ordinarily maintained.²³ The person need not preserve the same electronically stored information in more than one form;²⁴

Another issue has to do with whether it is desirable to expand the Rule 26(b)(2)(B) standard (at least as to preservation) to discoverable information that is not electronically stored. Hard copy information may be difficult to access or locate, but Rule 26(b)(2)(B) does not provide any exemption from providing it in response to a discovery request. Should preservation be treated differently?

²¹ The idea here is to invoke something that was frequently discussed in relation to preservation around a decade ago -- limiting duties to provide discovery to that electronically stored information that is regularly used by the party. The phrasing used here is borrowed from Rule 34(b)(2)(E)(i) regarding production of electronically stored information.

A different issue is how this duty should be phrased for individual nonbusiness litigants, such as individual plaintiffs. The idea should probably be to look to what they access and use on a regular basis, such as their active email accounts. But what if they have a cache for discarded items. Should that be included?

²² The Duke panel suggested including a provision about types of information to be preserved. It did not suggest limitations on the Rule 34(a)(1) scope of the duty to produce, and this initial effort therefore uses that provision as a guide. One possibility mentioned above is that backup tapes or the like could be excluded. But it may be that the scope of the duty provision already suffices for that purpose, and also that excluding backup materials may be unwise.

²³ This provision is borrowed from Rule 34(b)(2)(E)(ii).

²⁴ This provision corresponds to Rule 34(b)(2)(E)(iii).

- (5) *Time frame for preservation of information.* The duty to preserve under Rule 26.1(a) is limited to information [created during] {that relates to events occurring during}

[Alternative 1] __ years prior to the date of the trigger under Rule 26.1(b)²⁵

[Alternative 2] the period of the statute of limitations prior to the date of the trigger under Rule 26.1(b)²⁶

[Alternative 3] a reasonable period under the circumstances.²⁷

²⁵ This provision has at least two problems. One is that it tracks backward from the date of the triggering event. It is not necessarily obvious that this should be the pertinent event, but in one sense it seems logical -- ordinarily preservation can't be expected to occur until that triggering event occurs.

A second difficulty is that it calls for the rules to specify a time period for this duty. Statutes of limitation vary considerably for different kinds of claims, and from jurisdiction to jurisdiction. That variability suggests the difficulty that might attend an effort to set a specific all-encompassing limitation here. It also might foster arguments about the limits of the rulemaking power. One possibility would be to adopt the four-year period specified by Congress for federal claims without congressionally-set limitations periods in 28 U.S.C. § 1658.

²⁶ This approach might be preferred to setting a specific limit in a rule because it would borrow from other sources of law. But the borrowing experience for limitations periods has sometimes been an unhappy one. For limitations periods for federal claims lacking congressionally-set limitations, the task produced much disarray and finally Congress adopted the four-year limit in 28 U.S.C. § 1658.

An additional difficulty here is that the person subject to the duty to preserve must make predictions to use this approach. One is to determine what claim would be asserted; a pre-litigation notice may suggest a variety of claims that have different limitations periods. In addition, the limitations period for a given claim may differ significantly in different jurisdictions, so there is a potential choice-of-law guess involved in the forecast.

²⁷ Given the difficulties mentioned in relation to the other two approaches, this might be preferred. But one could object that it provides limited or nonexistent guidance.

- (6) *Number of key custodians whose information must be preserved.*²⁸ The duty to preserve under Rule 26.1(a) is limited to information [possessed by] {under the control of} the [number] {a reasonable number of} key custodians in the person's organization who are [most likely to possess] {best positioned to identify} information subject to preservation under Rule 26.1(c).²⁹

²⁸ This sort of provision was suggested by the Duke Panel. It is not clear that "key custodian" is a definite enough term, but it is the one proposed by our panelists. If we want to adopt something along this line, there should be careful consideration about what term to use. The Committee Note could elaborate on what is meant. For one court's use of the "custodian" term, see *Edelen v. Campbell Soup Co.*, 265 F.R.D. 676, 684 (N.D.Ga. 2010) ("Plaintiff then proposed a request that encompasses 55 custodians and 55 search terms over a three-year period.").

²⁹ This provision is a very halting first effort that bristles with issues. The question of how to define "key custodian" has already been mentioned. The question whether we are talking about "possession" or "control" of the information or something else seems somewhat tricky.

Choosing a number is another challenge. Shouldn't that depend on the size and makeup of the organization? In addition, might it not depend on the type of information involved? How is the person to make this determination with confidence? Isn't there always a risk that 20/20 hindsight will suggest that somebody else is an obvious choice who was overlooked? The alternative of saying "a reasonable number" may be more reasonable but not reassuring to the person seeking certainty about what to do to satisfy preservation obligations. Perhaps the answer is to designate twice as many as are minimally necessary. But even then there is the argument that somebody really important was overlooked.

A different question is whether this should excuse preservation by anyone who is not a "key custodian." Are those the individuals who were most involved in the events that matter in the suit, or the individuals who are officially designated as "custodians" in the organization? If the latter, could it be that there is no need to preserve information possessed by the people most involved? Does that bear on what is an adequate litigation hold?

It seems that what we are talking about is the whole scope of information to be preserved pursuant to Rule 26.1(c). Are there likely to be different custodians for different types of information?

This topic seems to relate to the time factor identified in Rule 26.1(c)(5). Are we talking about holders of specified positions in the organization, or the specific individuals? If the former (more likely), how should we deal with the hiring, promotion, and firing of specific holders of these positions, and with revisions in the organizational structure during the pertinent period?

A final question has to do with a litigation hold. Does the listing in this rule identify the only people who should be directed to retain information in a litigation hold? My sense is that normally the notice of a hold should be directed to a larger group, but perhaps the goal here is to guard against requiring that effort.

- (d) **Ongoing duty.** *[Alternative 1]* The person must take reasonable [and proportional] measures to preserve information subject to preservation under Rule 26.1(c) from the date the obligation to preserve is triggered under Rule 26.1(b) until [the expiration of the statute of limitations if no suit is filed by that date] {the termination of litigation if a suit is filed}.³⁰
- (d) **Ongoing duty.** *[Alternative 2]* The person must take reasonable [and proportional] measures to preserve information subject to preservation under Rule 26.1(c) for a reasonable period after the date the obligation to preserve is triggered under Rule 26.1(b).
- (d) **No ongoing duty.** *[Alternative 3]* A person who preserves information in accordance with Rule 26.1(c) on the date of the trigger for preservation under Rule 26.1(b) need not preserve [later-generated information] {information received after the trigger date} unless [the court so orders] {it receives a request to engage in ongoing preservation}.³¹
- (d) **Ongoing duty.** *[Alternative 4]* The person must take reasonable [and proportional] measures to preserve [later-generated information] {information received after the trigger date} subject to preservation under Rule 26.1(c) unless it notifies [the person requesting preservation] {all reasonably identifiable interested persons} that it is not engaged in ongoing preservation.³²

³⁰ It would seem curious that, upon the trigger of the duty to preserve, a party who does so at that moment is forever free of the obligation to preserve newly generated information (although Alternative 3 tries to say something like that). But if we are to specify in the rule how long the duty lasts, we are left with the problem of deciding how long it lasts. One is “a reasonable time,” as in Alternative 2. Others are possible and, though more definite, perhaps worse.

³¹ This represents an effort to identify some issues that would seem to arise from setting specific end point to the duty to preserve. One possibility is that a request for preservation will itself call for ongoing preservation. Surely a court can so order, and on that score we are dealing with a default rule.

³² This alternative attempts to provide an out for those who wish to curtail the ongoing burden. But one serious difficulty is determining who should be notified that preservation is not ongoing.

- [(e) **Trial-preparation protection.** Rules 26(b)(3)(A) and (B) protect any actions taken by a person to comply with the duty to preserve information under Rule 26.1.]³³
- [(f) **Remedies for failure to preserve.** The sole remedy for failure to preserve information is under Rule 37(e).]³⁴

RULE 37 REVISIONS TO ADDRESS SANCTIONS LIMITATIONS

It seems that the main focus of concern about preservation is really about sanctions; to the extent that sanctions worries can be satisfied, there may be no further concern about preservation duties. If this is true, it may strengthen the argument that the adoption of preservation duties is proper rulemaking -- if the only way those duties can come into play is through application of sanctions, they really are nothing more than an appropriate regulation of litigation in the federal courts. That would mean that a rule forbidding application of any sanction for failure to preserve to a person who complied with Rule 26.1 would obviate most or all concerns about overstepping

³³ This subdivision is a placeholder for a topic raised by our Duke panel -- “The rule should specify whether, or to what extent, actions taken in furtherance of the preservation duty are protected by work product (or privilege).”

As an initial matter, it should be true that work-product protection applies to these litigation-preparation activities as to others. Depending on the trigger definition adopted, there may be a close correlation between the “in anticipation of litigation” provision of Rule 26(b)(3) and the events that trigger a duty to preserve.

One complicating factor might involve situations in which the person subject to the duty to preserve is not an actual (or potential) party to litigation. The work-product protection ordinarily would not apply to such a person. Perhaps such protection should be provided nonetheless.

But aggressive protection for actions taken to preserve seems inconsistent with the duty to confer already in Rule 26(f) and also to the general desirability of cooperative efforts to preserve needed information. In general, it is desirable for one party or potential party to ask another “What are you preserving?” and for the other party to answer the question rather than saying “That’s a work-product secret.”

³⁴ This hypothetical provision is designed as a bridge to possible amendments to Rule 37, as explored more fully below. The goal is to make clear that Rule 26.1 does not purport to do more than set ground rules in relation to litigation that actually occurs in federal court. Thus, one could not argue for any adverse consequence due to failure to preserve except in a pending case in federal court. By the time that argument occurs, there is no big problem with the authority of a federal court to address the problem. And there seems to be no problem with the idea that it may apply legal federal legal principles in determining whether a person has failed to preserve. So Rule 26.1 becomes more an advance warning that may limit federal principles of preservation than an all-purpose intrusion into the already crowded realm of preservation.

the scope of rulemaking. That is the thrust of Rule 26.1(f) above, and could be pursued in Rule 37.

One question, then, is whether such a provision should supersede current Rule 37(e). For purposes of the present discussion, the assumption is that the existing rule should be abrogated. But to the extent its concepts of “good faith,” etc. might require more than Rule 26.1 directs, that might be a reason to retain current Rule 37(e) in conjunction with other changes to Rule 37. To the extent that the current rule seems preferable, one question will be whether the revised rule provision can preserve the desirable features of the current rule.

**Rule 37. Failure to Make Disclosures
or to Cooperate in Discovery; Sanctions**

* * * * *

- (e) **Sanctions for failure to preserve [electronically stored] {discoverable} information.** A court may not impose sanctions³⁵ [under these rules]³⁶ on a party for failure to preserve information if the party has complied with Rule 26.1. The following rules apply to a request for sanctions for violation of Rule 26.1:³⁷
- (1) ***Burden of proof.*** The party seeking sanctions bears the burden of proving the following:
- (A) that a violation of Rule 26.1 has occurred;

³⁵ A perennial question is to determine what is a “sanction.” For example, to what extent is a directive to restore backup tapes to locate materials that were inappropriately deleted a “sanction.” To many, it might seem a curative measure.

³⁶ This phrase was inserted in Rule 37(e) by the Standing Committee in 2004, and permits sanctions pursuant to “inherent authority” or based on other sources of law while limiting sanctions under Rule 37(b) or other Civil Rules. Whether that limitation should endure if the rules themselves include a more expansive (and affirmative) set of preservation provisions, like hypothetical Rule 26.1, is not certain.

³⁷ Note that including a provision like this could obviate reliance on “inherent authority” to support sanctions like those listed in Rule 37(b) in cases in which failure to preserve did not violate any court order. A Committee Note could presumably say something like: “Given the introduction of a specific basis in Rule 37 for imposition of sanctions, and specific provisions in Rule 26.1 regarding the scope of the preservation duty, there should no longer be occasion for courts to rely on inherent authority to support sanctions in cases in which a party has failed to preserve discoverable information.”

- (B) that as a result of that violation, the party seeking sanctions has been denied access to specified electronically stored information, [documents or tangible things];³⁸
- (C) that no alternative source exists for the specified electronically stored information [documents or tangible things];³⁹
- (D) that the specified electronically stored information [documents or tangible things] would be [relevant under Rule 26(b)(1)] {relevant under Evidence Rule 401} [material] to the claim or defense of the party seeking sanctions;⁴⁰
- (E) that the party seeking sanctions promptly sought relief in court after it became aware [should have become aware] of the violation of Rule 26.1.⁴¹

³⁸ This criterion was suggested by the Duke Panel. The abiding problem is that one does not know what was there before the inappropriate deletion occurred; that makes it rather difficult for the party seeking sanctions (which has presumably not breached its responsibilities under the rules) to specify what it lost.

This factor seems to address the same thing as the harmless provision in current Rule 37(e), but to put the burden with regard to that issue on the party seeking sanctions. Perhaps harmless is a better way of putting it; doing so would presumably shift the burden of proof to the party resisting sanctions.

³⁹ This resembles the current harmless criterion, and seems an important focus; to the extent alternative sources of information (or sources of alternative information) exist, there seems little reason for the sorts of sanctions listed in Rule 37(b)(2)(A). As noted above, however, measures designed to extract such information from those sources (e.g., backup tapes) might be called “sanctions” by some.

⁴⁰ Again, the moving party’s difficulty in specifying what was lost presents something of a conundrum on this subject.

It is not clear that this provision adds usefully to (B), which focuses on the harm to the party seeking sanctions.

⁴¹ This provision does not call for initial attempts to confer with the other side to obtain the nonjudicial solution to the problem. It might be said in a Committee Note that informal communication seems like a good way to explore the availability of other sources of information, but given that hypothetical subdivision (e) is only about sanctions of a rather serious sort, it may be that the time for conferring has passed.

- (2) ***Selection of sanction.*** If the party seeking sanctions makes the showings specified in Rule 37(e)(1), the following rules apply to selection of a sanction:
- (A) the court may employ any sanction under Rule 37(b)(2)(A)⁴² but must select the least severe sanction necessary to redress [undo the harm caused by] the violation of Rule 26.1;⁴³
 - (B) [*Alternative 1*] the court may not impose a sanction under Rule 37(b)(2)(A) unless the party seeking sanctions establishes that the party to be sanctioned violated Rule 26.1 [negligently] {due to gross negligence} [willfully] {in bad faith};⁴⁴
 - (B) [*Alternative 2*] the court must not impose a sanction if the party to be sanctioned establishes that it acted in good faith in relation to the violation of Rule 26.1;⁴⁵

⁴² It should be noted that an adverse inference instruction is not included in the Rule 37(b) listing. It could be addressed separately and ranked among the others in terms of “severity.” Another issue might be the extent to which Fed. R. Evid. 301 (on presumptions) affects the use of this sanction.

In the same vein, one could consider listing other possible “sanctions” in this new provision. No effort has yet been made to chart these waters.

⁴³ This is a first effort to stratify sanctions. It seems from the ordering in Rule 37(b)(2)(A) that the list there goes from less severe to more severe. It is worth re-emphasizing, however, that an adverse inference instruction is not explicitly included on the list in Rule 37(b). Presumably that sanction is available also. Should sanctions be limited to those listed in Rule 37(b)?

⁴⁴ This is an effort to incorporate a showing of state of mind into the criteria for sanctions. Either here on in a Committee Note, one could address the significance of a litigation hold. That is not included in the draft rule language in part because it seems so difficult to determine what a “litigation hold” is, and also because the question whether adequate follow-up occurred could often be important.

The Duke panel urged that “[t]he state of mind necessary to warrant each identified sanction should be specified.” Doing that seems quite difficult, given the range of sanctions listed in Rule 37(b)(2)(A) and the range of states of mind identified above.

⁴⁵ This is an effort to shift the state-of-mind inquiry from being a matter to be proven to support sanctions into being a matter of defense for the party resisting sanctions.

- (C) the court must be guided by proportionality, making the sanction proportional to the harm caused to the party seeking sanctions and the level of culpability⁴⁶ of the party to be sanctioned.
- (3) *Payment of Expenses.* Instead of or in addition to imposing a sanction, the court must order the party in violation of Rule 26.1, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the violation, unless the violation was substantially justified or other circumstances make an award of expenses unjust.

ADDITIONAL RULE CHANGES

The foregoing attempts to identify the main places changes would seem warranted. Other ideas have been suggested, or suggest themselves, and some are noted here.

Rule 26(f): This rule probably should be reexamined if a preservation rule is adopted. Currently (as amended in 2006) Rule 26(f) directs the parties to discuss preservation of discoverable information. Maybe it should be changed to say "discuss preservation as required by Rule 26.1."

Rule 16(b): The active involvement of the court might be sought through changes to this rule about the judge's role in regard to preservation.

Pre-litigation resolution of preservation issues: One result of ideas sketched above might be that notices to preserve would become more frequent or broader. A possible problem arises if there is nowhere to get a resolution of what should be preserved. It might be that something like Rule 27 (a Rule 27.1 on pre-litigation preservation?) could be useful.

Costs of preservation: Nothing above directly addresses the question of costs of preservation. Ordinarily those are to be borne by the party who has the duty to preserve. It may be that explicit consideration of this topic should be in the rules.

Adverse inference instruction: Another suggestion of the Duke panel was to draft a model adverse inference instruction. At present, that is not even a sanction mentioned in Rule 37(b). Moreover, instructions are not matters usually covered by the rules.

⁴⁶ This phrase is far from ideal, but attempts to capture what is meant.

TAB 5A - B

Pleading-Discovery Approaches

This memorandum provides an incomplete and preliminary overview of some of the approaches that might be considered in reacting to the continuing expressions of concern about the development of pleading practices in response to the *Twombly* and *Iqbal* decisions. Incomplete both for want of imagination and for fear of unseemly proliferation. Preliminary because practice continues to evolve, and more importantly because even the first rigorous efforts to evaluate practice are still under way.

The Federal Judicial Center remains hard at work on its project. Tentative evaluations may be available in time for the November meeting, but final analysis will require more time.

Andrea Kuperman's massive survey of lower-court decisions, focusing primarily on the courts of appeals, continues to grow. Many will find it — at least in large part — reassuring. But not even scores of appellate opinions can provide clear evidence of what is happening in law offices and in the district courts. It is easily possible that in the end the cases will seem to have done as good a job of integrating the Supreme Court's pronouncements into working practice as could be done by amending any Civil Rule. But it is important to continue to focus on these questions so as to be ready to propose rule amendments if the need appears.

PLEADING: CLAIM

An obvious place to begin is with Rule 8(a)(2). Even if some need appears to propose rule amendments, Rule 8 must be approached carefully. No matter what words might be chosen, the message would be ambiguous in ways that a Committee Note could not cure. Even if it were announced that the new language was intended to enshrine exactly the meaning of the *Twombly* and *Iqbal* opinions as elaborated by the lower courts, disputes would remain as to just what that meaning might be. If instead the purpose were to redirect in some way the paths taken by the lower courts, greater uncertainty — and likely some real confusion — would follow. The manifest vulnerabilities of almost any Rule 8 proposal would support cogent protests by any group that feared adverse effects, and there might be many such groups. Still, Rule 8 must hold a high place on any agenda for addressing pleading standards.

Restore What Never Was: Some of the reactions to the *Twombly* decision seem to ask for restoration of the dictum in *Conley v. Gibson* that a complaint may be dismissed for failure to state claim only if “it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief.” The plea for restoration in turn seems to ask that these words be taken literally. Most courts, at least, did not take the literal meaning. But Rule 8 might be redrafted in an attempt to restore a standard that never was: “a short and plain statement giving notice of the claim.”

Restore What Was: A more realistic approach might attempt to restore pleading practice as it was on May 20, 2007, the day before the *Twombly* decision. This approach is more realistic only if it is accepted that there can be no precise definition of the practice in place at the time *Twombly* was decided. The idea would be to “go back to doing whatever it was you were doing, and continue to develop pleading practice without regard to anything in the *Twombly* or *Iqbal* decisions that might point you in a different direction.” Even then it is difficult to believe that lower courts, recalling the *Twombly* and *Iqbal* opinions, could in fact recreate whatever they would have done had those cases never gone to the Supreme Court. But the attempt could be made. Two simple drafting possibilities are:

Republish present Rule 8(a)(2), with a Committee Note disavowing plausibility, context, judicial experience, and common sense. Explaining that it was messy, all those things counted, but it doesn't do to say so.

“a short and plain statement of the claim, showing that the pleader is may be entitled to relief.”

“Notice plus”: The ABA Section of Litigation paper, “Civil Procedure in the 21st Century” proposes this as a mid-ground between their perception of Twombly-Iqbal standards and the notice pleading practice that prevailed on May 20, 2007:

“A complaint shall allege facts based on knowledge or on information and belief that, along with reasonable inferences from those factual allegations, taken as true, set forth the elements necessary to sustain recovery.”

Twombly-Iqbal in Rule Speak: Another approach would reflect basic agreement that the time had come to raise pleading standards to some extent — that the Court was right to make the attempt, and also right to express the new approach in capacious language leaving the way open for lower-court improvisation on the way to hammering out new standards through a common-law process. Although the opinions are written as opinions, not in an attempt to mimic rule language, some of the key words could be absorbed into Rule 8. These are among the possibilities:

“a short and plain statement showing a plausible claim for relief.”

“a short and plain statement of facts and context showing the pleader is entitled to relief”

“a statement of non-conclusional facts, direct or inferential, showing the pleader is entitled to relief”

“a short and plain nonconclusory statement showing the pleader is entitled to relief”

“a short and plain statement of a transaction or occurrence showing * * *.”¹

“a short and plain statement of acts or events showing * * *”

“a short and plain nonconclusory statement of grounds sufficient to provide notice of (a) the claim and (b) the relief sought”²

“a short and plain statement, made with particularity, of all material facts known to the pleading party that support the claim creating a reasonable inference that the pleader is plausibly entitled to relief,” defining “material fact” as “one that is necessary to the claim and without which it could not be supported.”³

¹ An early draft of Rule 8(a)(2) required a “statement of the acts and occurrences upon which the plaintiff bases his claim or claims for relief.” Without “showing that the pleader is entitled to relief,” this would be quite relaxed.

² This is the proposal of the New York State Bar Association Special Committee on Pleading Standards in Federal Litigation; see letter of July 13, 2010, Samuel F. Abernethy, Esq., to Judge Mark R. Kravitz. Bringing “notice” into rule text is evocative, perhaps too evocative — it may imply a more general relaxation of pleading standards than actually existed before Twombly and Iqbal.

³ This is the proposal of Lawyers for Civil Justice, DRI, the Federation of Defense & Corporate Counsel, and the International Association of Defense Counsel.

More than Twombly-Iqbal: “The party that bears the burden of proof with respect to any claim or affirmative defense must plead with particularity all material facts that are known to that party that support that claim or affirmative defense and each remedy sought, including any known monetary damages. A material fact is one that is essential to the claim or defense and without which it could not be supported. As to facts that are pleaded on information and belief, the pleading party must set forth in detail the basis for the information and belief.”⁴

Variations on Facts: Although the label is likely to prove controversial, Rule 8 could be pushed in the direction of something that could be called “fact pleading.” The second of the three variations shown here approaches Code pleading; the first and third are designed to make it easier to disclaim any intent to revive indeterminate distinctions between “fact,” “ultimate fact,” and “evidence.”

“a short and plain statement of facts showing that the pleader is entitled to relief.”

“a short and plain statement of facts constituting the claim”

“a short and plain statement of the claim, including facts showing that the pleader is entitled to relief”

Elements Pleading: Occasionally it is suggested that a pleader should be required to plead the elements of the claim: “a short and plain statement of the elements of the claim.”

Pre-filing pleading: Alan Morrison’s Duke Conference paper proposes an approach to situations in which the defendant has control of fact information required to state a claim. Iqbal as would-be plaintiff, for example, could submit a letter or draft complaint to the defendant alleging that they ordered the challenged practices. If the defendants do not supply information in their control showing how the policies were established, they would be barred from challenging the complaint for failure to allege specifically facts connecting them to the orders. A mere blanket denial would not do, because there is likely to be a paper or e-mail trail. But if the defendants present evidence countering the claims, then the plaintiff must present “some basis * * * to avoid dismissal, rather like a mini summary judgment.”

Reverse Pleading Burdens: Professor Miller suggests that if the plaintiff alleges the inaccessibility of critical information and “articulates a reasonable basis for the information’s existence and the defendant’s control over it,” “it might be reasonable to reverse the pleading burden and require the defendant to make the needed material available to the plaintiff along with whatever explanation it thinks appropriate.” The court could allow further discovery. 60 Duke L.J. 1 at 110.

Appellate Review: Professor Miller asks whether the “subjective appraisals” that inhere in “judicial experience and common sense” will lead to diluted appellate review. Need the rules be amended to ensure continued de novo review of dismissals for failure to state a claim?

RULE 9(B)

From time to time thought has been given to adopting “heightened pleading” standards for specific kinds of claims, expanding the Rule 9(b) requirement that “fraud or mistake” be stated “with particularity.” (Rule 9(c) also requires that a party denying that “a condition precedent has occurred or been performed * * * must do so with particularity.”) One reason to hesitate has been concern that picking out specific claims might seem to imply substantive choices. Requiring greater fact information to allow a claim past the Rule 12(b)(6) threshold into the heavenly fields of discovery

⁴ This is ACTL/IAALS Pilot Project Rule 2.1.

might seem to reflect a judgment about the relative desirability of enforcing that kind of claim. Although this concern must be taken seriously, there are powerful arguments that the purpose is as much procedural as the purpose of original Rule 9(b). (The original procedural purpose of Rule 9(b) may not be entirely clear, but any obscurity may bolster the argument that some blend of real-world procedural concern with substantive concerns is proper under the Enabling Act.)

Greater difficulty might arise in deciding just which claims to embrace in heightened pleading standards. Broad informal consultation might establish a tentative list. Actual choices for development might be supported by miniconferences or a general request for public comment before any specific rule or set of rules is proposed.

Implementation by drafting would be influenced by the direction taken. If the revised rule simply expanded the categories of claims that must be stated “with particularity,” the main challenge would be finding a way to identify the claims. Would it suffice to list “antitrust” claims, or should a more specific list of statutes be adopted? Some categories might be relatively easy to specify — civil RICO would be an example. But what of “environmental” claims — statutory, common-law (e.g., nuisance), or perhaps administrative? “Institutional reform”? Even the familiar example of claims likely to encounter an immunity defense could prove tricky; qualified or absolute official immunity to federal-law claims might be clear enough, but what of parallel immunities to state-law claims? Sovereign immunity, domestic or foreign? More exotic immunities?

Finally, a quite different Rule 9(b) question may be found in the Iqbal opinion. Rule 9(b) provides that “[m]alice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” The Court rejected the argument that this provision makes adequate a bare allegation of “intent.” “[G]enerally” is a relative term. * * * It does not give * * * license to evade the less rigid — though still operative — strictures of Rule 8.” The task of pleading greater supporting detail for an allegation of intent is daunting, and is encountered frequently. Discrimination claims provide a common example. This question may deserve close attention.

REVERSE RULE 9(B): SPECIAL RELAXED PLEADING RULES

Rather than expand the categories of claims that must be pleaded with particularity, whether in Rule 9(b) or in new rules, a reverse approach might be taken. Pleading standards could be raised for most claims, retaining relaxed notice pleading for specified claims. Individual discrimination (at least in employment: what of “class-of-one” equal-protection claims?), intent to discriminate, “civil rights,” claims based on facts inferred from circumstance, and others could be listed. One problem will be finding categories that can be kept within meaningful bounds — “civil rights” is a pretty loose concept. It would be difficult to draft in terms that focus directly on information asymmetry, on “favored” claims, or “real people” claims. It would be possible to adopt an express pro se rule — but that might tempt lawyers to suggest a limited advising role at the beginning, to be followed by explicit representation later on. And past discussions have generally concluded that it is better to hold pro se parties to some semblance of the general pleading rules, perhaps with help from local forms and often with help from sympathetic judges.

OFFICIAL IMMUNITY

The recurring problem of official immunity pleading is difficult to address by focusing on the complaint. Perhaps the most feasible approach would be to require pleading with particularity whenever an individual-capacity claim is brought against a “public officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on a public employer’s behalf.”

An alternative approach would call for a reply, in the practice made famous by the Fifth Circuit. The rule might be framed as a Rule 9(b)(2), or as a Rule 7(a)(8), or something still different. The major difficulty with the Rule 7(a)(8) approach might be that plaintiffs would often overlook it. But it would be easy to draft if the reply is optional: “(8) a reply to an official immunity defense.” If the reply is mandatory, there would be a cross-reference in Rule 7(a)(7), and a new Rule 9(b)(2): “(2) *Reply to [Official] Immunity Defense*. If a defense of [official] immunity is made [to a claim], the claimant must respond by a reply that states with particularity the circumstances that defeat immunity.” “Official” is placed in brackets to indicate one of the drafting dilemmas — what sorts of immunity should be covered? Should the rule be framed explicitly in terms of an individual-capacity claim against a public officer or employee, etc.? “Official” itself would lead to such questions as Eleventh Amendment “immunity,” claims against foreign sovereigns, and various immunities under state law. Without “official,” all sorts of questions would arise: workers’ compensation immunity? Charitable immunity if it exists anywhere? Family immunities, if they exist anywhere? Even such things as immunity from attachment or the like?

RULE 12(D)

Rule 12(d) might serve better than Rule 56 as the location for a rule allowing a party opposing a claim to make what in effect is a preliminary motion for summary judgment. The motion would rely on matters outside the pleadings to challenge facts poorly pleaded, facts omitted, and perhaps facts “well pleaded.” The pleader would have an opportunity for discovery similar to that provided by Rule 56 before responding to the motion. A rough draft:

(d) Preliminary Summary Judgment. A party [opposing a claim] may combine a motion under Rule 12(b)(6) or 12(c) with a preliminary motion for summary judgment under Rule 56. The movant may show there is no genuine dispute as to material facts that are required to support the claim or that defeat the claim. The court must allow the nonmovant a reasonable opportunity for discovery on the facts asserted by the movant before ruling on the motion.

(It would be possible to carry forward some version of present Rule 12(d), which gives the court the choice between treating the pleadings motion as one for summary judgment by undertaking to consider the “matters outside the pleading.” Or discretion to refuse to allow a premature Rule 56 motion could be expressed directly. The advantage of treating it as a Rule 56 motion is to pick up the full Rule 56 procedure from the beginning. Less elliptical drafting also may be desirable, but might encounter the reluctance to refer directly to the Rule 56 moving burdens that shaped new Rule 56.)

RULE 12(E)

We might consider reviving earlier Rule 12(e) proposals. The rule could focus on directing a more definite statement for the purpose of facilitating pretrial management, including initially limited discovery to support more precise pleading. Professor Miller describes this as a “Motion to Particularize a Claim for Relief,” allowing a plaintiff to anticipate a motion to dismiss by moving for “plausibility discovery.” 60 *Duke L.J.* 1, 112-113.

RULE 12(B): TIED TO DISCOVERY

A great part of the dismay engendered by the Twombly and Iqbal decisions arises from concerns about “information asymmetry.” The concerns tend to focus on categories of claims — product liability, some forms of employment discrimination, and so on. Plaintiffs, it is argued, typically lack access to information controlled by defendants and necessary to satisfy higher pleading standards. The need to support adequate pleading by discovery to elicit information controlled by

the defendant might be built into Rule 12. The provision could focus only on 12(b)(6). Discovery may be needed to respond to other 12(b) motions, but it may be better to leave that to present practice. Discovery also may be needed to respond to a motion under Rule 12(c) or (f). The idea would be to allow — probably not require — the court to permit discovery for the purpose of improving the pleading before ruling on the motion.

Placing this approach in Rule 12 will prove awkward. The enumeration of Rule 12(b) motions as (1) through (7) is more a list than a sequence of paragraphs. The best approach might be to add a new subdivision after Rule 12(f) — subdivisions (g) and (h) do not have the same sacred identification as 12(b)(6) or even 12(c), and subdivision (i) was created in 2007 by the Style Project. So a new Rule 12(g) might look something like this: “(g) *Discovery in Aid of Pleading*. Before ruling on a motion under Rule 12(b),(c), or (f), the court may allow discovery [under Rules 26 through 37] to aid [more detailed pleading][amendment of the pleading].”

RULE 27.1 DISCOVERY IN AID OF PLEADING

Discovery in aid of pleading might be fit into Rule 26, but Rule 26 is already too long. It could be fit into present Rule 27, but perpetuation of testimony is a distinct problem and drafting would likely be more complicated. A new Rule 27.1 may be the simplest approach.

The first question will be whether to provide for discovery before filing an action. There are several state-law models. In addition, the ACTL/IAALS Pilot Project Rules include a detailed provision, set out in the Appendix, that provides a helpful illustration. The most persuasive reason to move in this direction may be the plaintiff who does not know the identity of the defendant — which officer in a large police department shot the plaintiff’s decedent? Which company made the exploding dynamite cap? Discovery could be limited by requiring showings that the plaintiff has exhausted reasonable alternatives for finding the information, the plaintiff can state all elements of a claim apart from identifying the defendant, and there are good reasons to impose the burdens of discovery on the person asked for the information. This possibility has been twice suggested during earlier rounds of discovery work, and was quickly rejected each time. It may not prove any more popular now, but reconsideration may be appropriate if elevated pleading requirements create a risk that valid claims will frequently be defeated for lack of access to information controlled by the defendant. (The ABA 21st Century Proposals would allow pre-complaint discovery only to determine the identify of the defendant.)

An alternative is to provide discovery in aid of framing a claim after an action is commenced by filing a complaint. Discovery might be made available by allowing the plaintiff to file an incomplete complaint, specifically designating items on which discovery will be sought to support better-informed pleading. The defendant could respond by providing information without waiting for discovery, by agreeing to discovery, or by opposing discovery for stated reasons. Or discovery might be provided only after a motion challenging the claim (or defense). This approach comes closest to something that might be fit into Rule 26, perhaps with a cross-reference in Rule 12: the point would be to emphasize the authority to limit discovery to specific matters needed to support “better” pleading.

The ABA proposals include: “The court may permit focused post-complaint discovery in those limited cases where, because of the nature of the case, the plaintiff does not have access to sufficient information to satisfy the” pleading standard.” Examples are antitrust cases and discrimination cases where intent is an element of the claim.

INITIAL DISCLOSURE

Pleading and discovery may overlap in a different way. Early disclosure of facts might be accomplished immediately after the papers that are called “pleadings,” by obligations of unitateral disclosure. This approach might address the concerns that underlie the Twombly and Iqbal decisions by providing a secure foundation for guiding or eliminating discovery, while reducing fears that evaluation of “plausibility” in light of “judicial experience and common sense” will devolve into poorly supported speculation about the “facts” that have been pleaded and the inferences that can be drawn from them.

PLEADING IN RESPONSE

It will be difficult to improve on the drafting of Rule 8(b) to meet the frequent complaints that defendants deny too much, too casually. Rule 8(b)(2) requires that a denial fairly respond to the substance of the allegation. (3) requires that a party that does not intend to deny all allegations “must either specifically deny designated allegations or generally deny all except those specifically admitted.” (4) requires that a party admit the part of an allegation that is true and deny the rest. If a true fact is pleaded with characterizations, adverbs, or adjectives, the answer must admit the fact even while denying the characterization, adverbs, or adjectives. Rule 11 enforces this duty; indeed the safe-harbor provision, 11(c)(2), specifically includes defenses and denials. The safe harbor may make it difficult to make much use of Rule 11 in this context, but amendment of Rule 11 may not be a satisfactory approach.

Defendants defend their practices by arguing that plaintiffs cause the problem by overpleading and by violating the separate-statement requirement of Rule 10(b). In effect, they assert it is unfair to impose on defendants the work of picking through the mess made by sloppy pleading. Again, it will be difficult to draft a satisfactory rule to promote clearer pleading. Anything done to perpetuate the Twombly and Iqbal decisions may actually make this problem more difficult.

So: Is there anything reasonable to be done? One comment in the ABA survey suggested whatever Rule 8(a) requires, good fact pleading could be useful as a request for admissions, and laments that defendants do not respond as Rule 8(b) requires. That sounds good. But is it possible to get there?

PLEADING AFFIRMATIVE DEFENSES

Plaintiffs complain that defendants thoughtlessly add long lists of affirmative defenses to their answers, providing nothing more than the words that identify the theory. Something more could be required.

Two examples from present Rule 8(c) illustrate the range of pleading possibilities. A defendant may plead comparative negligence — is there any reason to require greater detail than we require of a plaintiff pleading negligence? Or a defendant may plead laches — should it not have to plead something to support the elements of unreasonable delay and actual prejudice in defending?

The range of desirable pleading practices may not be as broad as it is for complaints, but it is not much narrower. If anything is to be done, it may be better to avoid any attempt to provide specific pleading directions for specific affirmative defenses. There are far too many affirmative defenses, most of them not listed in Rule 8(c).

One illustration can invoke all of the possible variations in [re]drafting Rule 8(a)(2): “In responding to a pleading, a party must affirmatively state in short and plain terms any avoidance or affirmative defense * * *.”

APPENDIX

ACTL/IAALS Pilot Project Rule

3.1 On motion by a proposed plaintiff with notice to the proposed defendant and opportunity to be heard, a proposed plaintiff may obtain precomplaint discovery upon the court's determination, after hearing, that: (a) the moving party cannot prepare a legally sufficient complaint in the absence of the information sought by discovery; (b) the moving party has probable cause to believe that the information sought by discovery will enable preparation of a legally sufficient complaint; (c) the moving party has probable cause to believe that the information sought is in the possession of the person or entity from which it is sought; (d) the proposed discovery is narrowly tailored to minimize expense and inconvenience; and (e) the moving party's need for the discovery outweighs the burden and expense on other persons and entities.

3.1 The court may grant a motion for precomplaint discovery directed to a nonparty pursuant to PPR ____.

3.2 Advance notice to the nonparty is not required, but the nonparty's ability to file a motion to quash shall be preserved.

3.3 If the court grants a motion for precomplaint discovery, the court may impose limitations and conditions, including provisions for the allocation of costs and attorneys' fees, on the scope and other terms of discovery.

latory Design Problem, 81 N.Y.U. L.Rev. 1553, 1583–86 (2006); *cf.* 21 C.F.R. § 314.107(c)(1)-(2) (only first-filer eligible for exclusivity period); 180-Day Generic Drug Exclusivity for Abbreviated New Drug Applications, 64 Fed.Reg. 42,873, 42,874 (Aug. 6, 1999) (revisiting and re-endorsing FDA interpretation of exclusivity provisions); 21 U.S.C. § 355(j)(5)(D)(iii) (codifying FDA interpretation).²¹

In addition, unlike *Tamoxifen*, which was decided at the 12(b)(6) stage, this case involves a summary judgment decision based on a full record. This case could provide our full Court with an opportunity to revisit the issues in play in *Tamoxifen* and to analyze the competing interests that underlie antitrust challenges to reverse payment settlements in light of the full record and the arguments of the parties and amici, including the United States, that have been raised in this appeal. We therefore invite plaintiffs-appellants to petition for in banc rehearing.

CONCLUSION

In sum, as long as *Tamoxifen* is controlling law, plaintiffs' claims cannot survive. Accordingly, we AFFIRM the judgment of the district court. However, we believe there are compelling reasons to revisit *Tamoxifen* with the benefit of the full Court's consideration of the difficult questions at issue and the important interests at stake. We therefore invite the plaintiffs-appellants to petition for rehearing in banc.



21. Although the panel majority might conceivably be understood to have described only the *beliefs* of ANDA filers before 2003, we think that the above-quoted language is more

ARISTA RECORDS LLC, a Delaware limited liability company; Atlantic Recording Corporation, a Delaware Corporation; BMG Music, a New York general partnership; Capitol Records, LLC, a Delaware limited liability company; Elektra Entertainment Group Inc., a Delaware corporation; Interscope Records, a California general partnership; Maverick Recording Company, a California joint venture; Motown Record Company, L.P., a California limited partnership; Sony BMG Music Entertainment, a Delaware general partnership; UMG Recordings, Inc., a Delaware corporation; Virgin Records America, Inc., a California corporation; Warner Bros. Records Inc., a Delaware corporation; and Zomba Recording LLC, a Delaware limited liability company, Plaintiffs–Appellees,

v.

DOE 3, Defendant–Appellant,

Does 1–2 and Does 4–16, Defendants.

Docket No. 09–0905–cv.

United States Court of Appeals,
Second Circuit.

Argued: Nov. 20, 2009.

Decided: April 29, 2010.

Background: Anonymous defendant appealed from an order of the United States District Court for the Northern District of New York, Glenn T. Suddaby, J., 2009 WL 414060, rejecting defendant's objections to magistrate judge's denial of motion to quash subpoena served on Internet service provider (ISP) for disclosure of identities of Internet users allegedly downloading and/or distributing music online in violation of recording companies' copyrights.

naturally read as a legal characterization of the Hatch-Waxman Act's exclusivity provisions.

Holdings: The Court of Appeals, Kearsse, Circuit Judge, held that:

- (1) defendant's First Amendment right to anonymity did not warrant quashing of recording companies' subpoena, and
- (2) companies stated copyright infringement claims that were plausible.

Affirmed.

1. Federal Courts ⇌577

Order rejecting anonymous defendant's objections to magistrate judge's denial of motion to quash subpoena served on Internet service provider (ISP) for disclosure of identities of Internet users allegedly downloading and/or distributing music online in violation of recording companies' copyrights was appealable under the collateral order doctrine, as the subpoena was directed against a third party who was unlikely to risk being held in contempt to vindicate someone else's rights.

2. United States Magistrates ⇌14

Motion to quash subpoena served on Internet service provider (ISP) for disclosure of identities of Internet users allegedly downloading and/or distributing music online in violation of recording companies' copyrights was not a dispositive motion, and therefore was subject to referral to magistrate judge for decision. Fed.Rules Civ.Proc.Rule 72(a), 28 U.S.C.A.; 28 U.S.C.A. § 636(b)(1)(A).

3. Federal Courts ⇌820

A district court's ruling on a motion to quash a subpoena is reviewable for abuse of discretion.

4. Copyrights and Intellectual Property ⇌51

To establish infringement of copyright, two elements must be proven: (1) ownership of a valid copyright, and (2)

copying of constituent elements of the work that are original.

5. Copyrights and Intellectual Property ⇌77

One who, with knowledge of the copyright infringing activity, induces, causes, or materially contributes to the infringing conduct of another, may be subject to contributory infringement liability; such liability exists if the defendant engages in personal conduct that encourages or assists the infringement.

6. Constitutional Law ⇌2088

Privileged Communications and Confidentiality ⇌400

To the extent that anonymity is protected by the First Amendment, a court should quash or modify a subpoena designed to breach anonymity. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 45, 28 U.S.C.A.

7. Constitutional Law ⇌1603

To the extent that anonymity is used to mask copyright infringement or to facilitate such infringement by other persons, it is unprotected by the First Amendment. U.S.C.A. Const.Amend. 1.

8. Constitutional Law ⇌2088

Privileged Communications and Confidentiality ⇌400

Principal factors considered in determining whether qualified privilege requires that the subpoena designed to breach First Amendment-protected anonymity be quashed include: (1) the concreteness of the plaintiff's showing of a prima facie claim of actionable harm, (2) the specificity of the discovery request, (3) the absence of alternative means to obtain the subpoenaed information, (4) the need for the subpoenaed information to advance the claim, and (5) the objecting party's expectation of privacy. U.S.C.A. Const.

Amend. 1; Fed.Rules Civ.Proc.Rule 45, 28 U.S.C.A.

9. Constitutional Law ⇨2150

Privileged Communications and Confidentiality ⇨400

Defendant's First Amendment right to anonymity did not warrant quashing of recording companies' subpoena served on Internet service provider (ISP) seeking disclosure of identities of Internet users allegedly downloading and/or distributing music online in violation of recording companies' copyrights where companies stated copyright infringement claims that were plausible. U.S.C.A. Const.Amend. 1; Fed. Rules Civ.Proc.Rule 45, 28 U.S.C.A.

10. Federal Civil Procedure ⇨678, 1772

Twombly plausibility standard for determining whether pleadings are sufficient to state a claim, which applies to all civil actions, does not prevent a plaintiff from pleading facts alleged "upon information and belief" where the facts are peculiarly within the possession and control of the defendant, or where the belief is based on factual information that makes the inference of culpability plausible. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

11. Copyrights and Intellectual Property ⇨82

Recording companies' pleadings, which alleged that defendants both actually downloaded companies' copyrighted works and distributed them, stated copyright infringement claims that were plausible, despite assertion made "on information-and-belief" that anonymous defendants' copying or distribution of companies' music were without permission; no more definitive assertion as to lack of permission was possible where the users remained anonymous.

12. Copyrights and Intellectual Property ⇨53.2

Fair use defense to copyright infringement presupposes good faith and fair dealing, and one pertinent consideration is whether the user stands to profit from exploitation of the copyrighted material without paying the customary price.

Timothy M. Reynolds, (Katheryn J. Coggon, Thomas M. Kerr, Holme Roberts & Owen, Denver, CO, on the brief), for Plaintiffs-Appellees.

Richard A. Altman, New York, NY, for Defendant-Appellant.

Before: KEARSE, KATZMANN, and LIVINGSTON, Circuit Judges.

KEARSE, Circuit Judge:

Defendant "Doe 3," whose identity is not known to plaintiffs Arista Records LLC *et al.*, appeals from an order of the United States District Court for the Northern District of New York, Glenn T. Suddaby, *Judge*, rejecting Doe 3's objections to the denial by United States Magistrate Judge Randolph F. Treece of Doe 3's motion (originally brought by other anonymous defendants) to quash a subpoena served on his Internet service provider to obtain information sufficient to disclose his identity. The magistrate judge ruled that defendants' qualified First Amendment right of anonymity was outweighed by, *inter alia*, plaintiffs' allegations that defendants were downloading and/or distributing music over the Internet in violation of plaintiffs' copyrights and plaintiffs' need for the information in order to enforce their rights. On appeal, Doe 3 contends principally that the allegations in the Complaint are not sufficient to overcome his First Amendment right of anonymity; in addition, he

contends that the reference of his motion to the magistrate judge and the district judge's review of the magistrate judge's decision were procedurally flawed. Finding no merit in Doe 3's contentions, we affirm.

I. BACKGROUND

Plaintiffs are recording companies that commenced the present action in July 2008, alleging that 16 defendants—known to plaintiffs at that time not by name but only by the Internet Protocol (“IP”) addresses assigned to them at certain specific times by their Internet service provider (“ISP”)—had infringed plaintiffs' copyrights by, without plaintiffs' permission or consent, downloading and/or distributing to the public various music recordings through an online file-sharing network. (See Complaint ¶¶ 18, 22.) File-sharing (or “peer-to-peer” or “P2P”) networks allow users to exchange files directly between their computers without intermediate servers. Attached to the Complaint is an “Exhibit A” listing for each “Doe” defendant, *inter alia*, his or her IP address at a stated date and time, the name of the file-sharing network used (“Gnutella” or “AresWarez”), the titles of 6–10 songs downloaded from the IP address, and, for each song, which plaintiff was the copyright owner. The Complaint requests, *inter alia*, damages and injunctive relief prohibiting further direct and indirect infringement of plaintiffs' copyrights.

In order to identify the defendants, plaintiffs sought authorization to serve a subpoena on defendants' common ISP, the State University of New York at Albany (“SUNYA”), for disclosure of each defendant's name, current and permanent address, telephone number, email address, and Media Access Control address identifying the device engaged in the online communication. In support of their sub-

poena request, plaintiffs submitted a July 8, 2008 declaration by Carlos Linares (“Linares Decl.”), Vice President for Anti-Piracy Legal Affairs, Recording Industry Association of America, Inc. (“RIAA”), who was responsible for the collection of facts alleged in the Complaint's Exhibit A. Linares described, *inter alia*, the retention of a third-party investigator that had proceeded to detect numerous copyrighted music files in the various Doe defendants' file-sharing folders on peer-to-peer networks, including the songs listed in Exhibit A, and he described the RIAA's review of the investigator's evidence to verify that each individual was infringing. (See Linares Decl. ¶¶ 11, 14–15, 18–19.) The court issued the subpoena but required SUNYA to “notify each Doe Defendant that it intends to disclose the requested ISP identifying information to Plaintiffs; and . . . send to each Doe Defendant a copy of the subpoena. . . .” Order dated July 22, 2008, at 2.

Thereafter, plaintiffs voluntarily dismissed the action against most of the defendants. The remaining defendants, eventually including Doe 3, moved to quash the subpoena or, in the alternative, to have the court order a severance requiring that each defendant be sued separately. In support of the motion to quash, these defendants argued that the First Amendment affords a qualified right to use the Internet anonymously and that the court that has issued a subpoena must quash or modify the subpoena when it “requires disclosure of privileged or other protected matter, if no exception or waiver applies,” Fed.R.Civ.P. 45(c)(3)(A)(iii). While acknowledging that “[t]he First Amendment right to communicate anonymously is, of course, not a license to . . . infringe copyrights,” the moving defendants argued principally that their privilege “can only be overcome by a substan-

tial and particularized showing,” sufficient to “plead a prima facie case of copyright infringement.” (Amended Memorandum of Law of Doe Defendants 3, 7, 11, and 15 in Support of Motion To Quash (“Does’ Amended Memorandum”) at 10 (internal quotation marks omitted).) They argued that the Complaint “fall[s] far short of that showing.” (*Id.*)

The moving defendants argued that—in accordance with what they characterized as “the heightened pleading standards imposed since . . . *Bell Atlantic [Corp.] v. Twombly*, [550 U.S. 544] (2007)” (Does’ Amended Memorandum at 15)—in order to overcome the First Amendment privilege, “plaintiffs must state, on personal knowledge, a specific claim for copyright infringement against each and every Doe defendant” (*id.* at 13–14). The moving defendants contended that plaintiffs were required

to present specific evidence, including a declaration from whoever examined the files available for download from each defendant’s computer, listened to the files, verified that they were copyrighted songs, determined that the copyrights were registered (and to which plaintiffs), to list the songs that a particular defendant made available for download, and to annex corresponding copyright registration certificates for the songs.

(*Id.* at 14.) They also argued that the Complaint “fails to allege any actual distribution of song files to the public” and hence “does not state a claim upon which relief can be granted,” *id.* at 17; and that “[i]n addition to establishing that [plaintiffs’] action can withstand a motion to dismiss for failure to state a claim,” plaintiffs, in order to secure disclosure of the Doe defendants’ identities, “must produce sufficient evidence supporting each element of” their claims, *id.* at 12 (emphasis and internal quotation marks omitted).

As amended, defendants’ notice of motion stated that the motion to quash would be returnable before District Judge Sudaby. However, the motion was referred to Magistrate Judge Treece.

A. *The Magistrate Judge’s Denial of Defendants’ Motion To Quash*

In a Memorandum Decision and Order dated February 18, 2009, see *Arista Records LLC v. Does 1–16*, No. 1:08–CV–765 (GTS/RFT), 2009 WL 414060 (N.D.N.Y. Feb. 18, 2009) (“*Arista I*”), the magistrate judge denied the motion to quash the subpoena. Noting the need to balance “the modest First Amendment right to remain anonymous” against “a copyright owner’s right to disclosure of the identity of a possible trespasser of its intellectual property interest,” *Arista I*, 2009 WL 414060, at *3, the magistrate judge looked to the five-factor test set out by then-District Judge Denny Chin in *Sony Music Entertainment Inc. v. Does 1–40*, 326 F.Supp.2d 556 (S.D.N.Y.2004) (“*Sony Music*”), and evaluated the defendants’ expectation of privacy, the prima facie strength of plaintiffs’ claims of injury, the specificity of the discovery request, plaintiffs’ need for the information, and its availability through other means.

The magistrate judge found that all five factors counseled against quashing the subpoena. He noted that plaintiffs had sufficiently pleaded copyright infringement claims, alleging ownership of the copyrights, copying, and distribution of the protected works by the Doe defendants without the consent of the owners. See *Arista I*, 2009 WL 414060, at *1, *5. The court also noted that plaintiffs’ allegations of distribution were supported by Exhibit A to the Complaint, specifying their investigator’s “sampl[ing] of] some of the downloads from shared folders,” *id.* at *5. The magistrate judge also found that the dis-

closure request was reasonable in scope, that identification of the alleged infringers was indispensable for the vindication of plaintiffs' copyright rights, and that the identifying information was unavailable through alternative means.

The magistrate judge found that these factors were not outweighed by the First Amendment rights of the Doe defendants. He stated that the "Doe Defendants have a minimal expectation of privacy, especially when they allegedly engaged in P2P network sharing" because "the notion of allowing others to have access to one's database by virtue of the Internet in order to pluck from a computer information and data that the computer owner or user wishes to share renders void any pretext of privacy." *Id.* at *6. Accordingly, the magistrate judge denied the motion to quash.

B. The District Court's Review of the Magistrate Judge's Order

Pursuant to Fed.R.Civ.P. 72, Doe 3 objected to the magistrate judge's denial of the motion to quash, and sought "*de novo* review," "reversing" and "overruling" that order. As a threshold procedural matter, Doe 3 argued that the motion to quash had been referred to the magistrate judge "without the consent of either party, and without an actual order of referral from the District Judge" (Supporting Declaration of Richard A. Altman dated March 2, 2009, ¶ 3). He also argued that the motion should not have been referred to a magistrate judge for decision because "[t]he motion, while styled as one to quash a subpoena, actually challenged the legal sufficiency of the complaint in the nature of a motion under F.R.Civ.P. 12(b)(6). As such it is dispositive" because "the motion to quash would for practical purposes be determinative of the outcome of the present litigation" (Doe 3's Objections to

Magistrate Judge's Memorandum Decision and Order at 1, 2). Doe 3 argued that the magistrate judge thus lacked jurisdiction to decide the motion to quash and that Doe 3 was entitled to have the district judge review the magistrate judge's decision *de novo*. As to substance, Doe 3 contended, to the extent pertinent to this appeal, that the magistrate judge's order erred in "its conclusion that the complaint states a legally cognizable claim, and that 'making available' music files is automatically copyright infringement." (*Id.* at 5.)

In a Decision and Order dated March 5, 2009 ("*Arista II*"), District Judge Suddaby rejected Doe 3's objections. The court first rejected Doe 3's contention that his motion—which had requested the quashing of the subpoena or the severance of the claims against the various defendants—was a dispositive motion. *See, e.g., Arista II* at 2 ("generally a motion to quash a subpoena is a non-dispositive matter"); *id.* at 3 (a "motion for severance of claims . . . is also properly viewed as a non-dispositive matter since the practical effect of the motion, if granted, would not be to terminate Plaintiff's claims against Defendants (nor would it be to necessarily terminate the current action)"). The court rejected the proposition that the motion to quash was in essence a motion to dismiss under Rule 12(b)(6) and hence was a dispositive motion, noting that that Rule, by its terms, confers the right to move for dismissal for failure to state a claim on "a party." *Id.* at 2. The defendants, not having been served with process, were "not yet 'parties'" and thus could "not properly move for dismissal for failure to state a claim." *Id.* at 2–3. Given that the motion to quash or sever was a nondispositive motion, the court implicitly rejected Doe 3's contention that the magistrate judge lacked authority to rule on it.

Further, because the motion to quash or sever was a nondispositive motion, the district judge concluded that the proper standard for reviewing the magistrate judge's order was "clear error, not *de novo*." *Id.* at 3. The court found no clear error in the magistrate judge's order. It also determined that it would reach the same conclusion "even [upon] *de novo* review." *Id.*

[1] This appeal followed. The order is appealable under the collateral order doctrine, as the subpoena at issue "is directed against a third party who is unlikely to risk being held in contempt to vindicate someone else's rights." *In re Grand Jury Subpoena Duces Tecum Dated May 29, 1987*, 834 F.2d 1128, 1130 (2d Cir.1987) (quoting *In re Katz*, 623 F.2d 122, 124 (2d Cir.1980) (brackets in *In re Grand Jury* omitted)). On motion of Doe 3, this Court stayed SUNYA's compliance with the subpoena with respect to information pertaining to Doe 3 pending resolution of the appeal.

II. DISCUSSION

On appeal, Doe 3 principally argues that the Complaint does not state a claim sufficient to overcome his First Amendment privilege of anonymity. He also pursues his contentions that his motion to quash was improperly referred to the magistrate judge and that the district court thus erred by not reviewing the magistrate judge's decision *de novo*. We find no merit in Doe 3's contentions.

A. The Procedural Challenge

[2] The district court may designate a magistrate judge to hear and decide a pretrial matter that is "not dispositive of a party's claim or defense." Fed.R.Civ.P. 72(a); see 28 U.S.C. § 636(b)(1)(A). Dispositive matters may be referred to a magistrate judge only for recommendation, not for decision; such matters principally in-

clude motions for injunctive relief and motions for dismissal. See 28 U.S.C. § 636(b)(1)(B); Fed.R.Civ.P. 72(b). "Matters concerning discovery generally are considered 'nondispositive' of the litigation." *Thomas E. Hoar, Inc. v. Sara Lee Corp.*, 900 F.2d 522, 525 (2d Cir.), cert. denied, 498 U.S. 846, 111 S.Ct. 132, 112 L.Ed.2d 100 (1990). Like most discovery requests directed to opposing parties, subpoenas to nonparties are designed to elicit information. A motion to quash a subpoena in an action seeking relief other than production of the subpoenaed information is not normally a dispositive motion.

As to a nondispositive matter, "[t]he district judge in the case must consider timely objections and modify or set aside any part of the [magistrate judge's] order that is clearly erroneous or is contrary to law." Fed.R.Civ.P. 72(a). As to a dispositive matter, any part of the magistrate judge's recommendation that has been properly objected to must be reviewed by the district judge *de novo*. See *id.* 72(b).

In the present case, the Doe defendants' motion to quash plaintiffs' subpoena to SUNYA was not a dispositive motion. Although Doe 3 contends to the contrary, arguing that the magistrate judge "necessarily had to decide whether the complaint stated a claim or not" (Doe 3 brief on appeal at 45), that argument ignores, *inter alia*, all factors other than the viability of the Complaint. Applying the five-factor *Sony Music* test, the magistrate judge could have granted the motion to quash despite the sufficiency of the Complaint if it had found, for example, that the subpoena was unduly broad or that plaintiffs had easy access to the Doe defendants' identities through other means. Quashing the subpoena on such a basis plainly would not have ended the action.

In addition, Doe 3's contention that the motion to quash was the equivalent of a motion to dismiss for failure to state a claim ignores arguments he made to the magistrate judge. He argued that in order to overcome the qualified privilege, a plaintiff must produce evidence supporting each element of its claim "[i]n addition to establishing that its action can withstand a motion to dismiss for failure to state a claim." (Doe's Amended Memorandum at 12 (internal quotation marks omitted) (emphasis in Memorandum).)

Finally, even if Doe 3 were correct in characterizing the motion to quash as a dispositive matter, the only consequence would have been that review by the district judge should have been *de novo*. Given that the district judge stated that he would conclude that the motion should be denied even if he reviewed the matter *de novo*, Doe 3's procedural contention provides no basis for reversal. See generally Fed.R.Civ.P. 61 ("At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights.").

B. The Substantive Challenge

[3] A district court's ruling on a motion to quash a subpoena is reviewable for abuse of discretion. See, e.g., *In re: Subpoena Issued to Dennis Friedman*, 350 F.3d 65, 68 (2d Cir.2003). A court abuses its discretion when its decision rests on an error of law or on a clearly erroneous factual finding, see, e.g., *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990); *In re Fitch, Inc.*, 330 F.3d 104, 108 (2d Cir.2003), "or [when] its decision—though not necessarily the product of a legal error or a clearly erroneous factual finding—cannot be located within the range of permissible decisions," *id.* (internal quotation marks omitted); see, e.g., *Zervos v. Verizon New*

York, Inc., 252 F.3d 163, 169 (2d Cir.2001). We see no abuse of discretion in the refusal to quash the subpoena in the present case.

[4] The fundamental copyright principles are clear. The owner of a copyright has the exclusive right to—or to license others to—reproduce, perform publicly, display publicly, prepare derivative works of, and distribute copies of, his copyrighted work. See 17 U.S.C. § 106. To establish infringement of copyright, "two elements must be proven: (1) ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991); see, e.g., *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 548, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985). "The word 'copying' is shorthand for the infringing of any of the copyright owner's five exclusive rights" described in § 106. *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1013 (9th Cir.2001) ("*Napster*") (internal quotation marks omitted).

[5] Further, "[a]lthough '[t]he Copyright Act does not expressly render anyone liable for infringement committed by another,'" *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 930, 125 S.Ct. 2764, 162 L.Ed.2d 781 (2005) ("*Grokster*") (quoting *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984)), it is well established, based on "the common-law doctrine that one who knowingly participates or furthers a tortious act is jointly and severally liable with the prime tortfeasor," that "one who, with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a 'contributory' infringer," *Gershwin Publishing Corp. v. Columbia Artists Manage-*

ment, Inc., 443 F.2d 1159, 1162 (2d Cir. 1971) (“*Gershwin*”) (internal quotation marks and footnote omitted) (emphases ours); *see, e.g., Grokster*, 545 U.S. at 930, 125 S.Ct. 2764. The knowledge standard is an objective one; contributory infringement liability is imposed on persons who “know or have reason to know” of the direct infringement, *Napster*, 239 F.3d at 1020 (emphasis added); *see, e.g., In re: Aimster Copyright Litigation*, 334 F.3d 643, 650 (7th Cir.2003) (“[w]illful blindness is knowledge”), *cert. denied*, 540 U.S. 1107, 124 S.Ct. 1069, 157 L.Ed.2d 893 (2004); *Cable/Home Communication Corp. v. Network Productions, Inc.*, 902 F.2d 829, 845 (11th Cir.1990) (“*Cable/Home*”); *Gershwin*, 443 F.2d at 1162. Such “liability exists if the defendant engages in ‘personal conduct that encourages or assists the infringement,’” *Napster*, 239 F.3d at 1019 (quoting *Matthew Bender & Co. v. West Publishing Co.*, 158 F.3d 693, 706 (2d Cir. 1998)). The “‘resolution of the issue . . . depends upon a determination of the function that [the alleged infringer] plays in the total [reproduction] process.’” *Gershwin*, 443 F.2d at 1162 n. 8 (quoting *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390, 396–397, 88 S.Ct. 2084, 20 L.Ed.2d 1176 (1968) (alterations in *Gershwin*)).

[6] The relevant First Amendment principles are also well established. The Supreme Court has recognized that the First Amendment provides protection for anonymous speech. *See, e.g., Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 199–200, 119 S.Ct. 636, 142 L.Ed.2d 599 (1999); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 341–342, 115 S.Ct. 1511, 131 L.Ed.2d 426 (1995); *see also NAACP v. Alabama*, 357 U.S. 449, 462, 466, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958) (compelled disclosure of membership list would impinge on First

Amendment right of association). In the context of political speech, the Supreme Court has recognized that “[a]nonymity is a shield from the tyranny of the majority,” *McIntyre*, 514 U.S. at 357, 115 S.Ct. 1511. The Court has also recognized that the Internet is a valuable forum for the exchange of ideas. *See, e.g., Reno v. ACLU*, 521 U.S. 844, 870, 117 S.Ct. 2329, 138 L.Ed.2d 874 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.”). To the extent that anonymity is protected by the First Amendment, a court should quash or modify a subpoena designed to breach anonymity. *See Fed. R.Civ.P. 45(c)(3)(A)* (the “issuing court must quash or modify a subpoena” when it “requires disclosure of privileged or other protected matter, if no exception or waiver applies”).

[7] The First Amendment does not, however, provide a license for copyright infringement. *See, e.g., Harper & Row, Publishers*, 471 U.S. at 555–57, 569, 105 S.Ct. 2218; *Cable/Home*, 902 F.2d at 849 (“[w]ith respect to copyright protection, [t]he first amendment is not a license to trammel on legally recognized rights in intellectual property” (quoting *Dallas Cowboys Cheerleaders, Inc. v. Scoreboard Posters, Inc.*, 600 F.2d 1184, 1188 (5th Cir.1979))); *Sony Music*, 326 F.Supp.2d at 563 (“Parties may not use the First Amendment to encroach upon the intellectual property rights of others.”). Thus, to the extent that anonymity is used to mask copyright infringement or to facilitate such infringement by other persons, it is unprotected by the First Amendment.

[8, 9] As indicated in Part I.A. above, the legal standard applied by the district court in the present case in denying the moving Doe defendants’ motion to quash plaintiffs’ subpoena to SUNYA was the

standard adopted by the court in *Sony Music*, 326 F.Supp.2d 556. In *Sony Music*, after discussing the above principles, as well as several cases that had dealt with the tension between First Amendment rights and copyright rights, then-District Judge Chin concluded that in the analysis of whether the qualified privilege requires that the subpoena be quashed, the principal factors include

- (1) [the] concrete[ness of the plaintiff's] showing of a prima facie claim of actionable harm, . . .
- (2) [the] specificity of the discovery request, . . .
- (3) the absence of alternative means to obtain the subpoenaed information, . . .
- (4) [the] need for the subpoenaed information to advance the claim, . . . and
- (5) the [objecting] party's expectation of privacy.

Sony Music, 326 F.Supp.2d at 564–65. We agree that this constitutes an appropriate general standard for determining whether a motion to quash, to preserve the objecting party's anonymity, should be granted.

On this appeal, Doe 3 does not contend that the *Sony Music* standard used by the district court here was an erroneous legal standard. Although he asserts that “downloading, distributing, or making music available constitutes protected First Amendment speech” (Doe 3 brief on appeal at 20), he expressly acknowledges that “[t]he First Amendment right to communicate anonymously is, of course, not a license to . . . infringe copyrights. . . . Nor is it an absolute bar against disclosure of one's identity in a proper case” (*id.*).

Nor does Doe 3 articulate any challenge to the court's evaluation of most of the five factors of the *Sony Music* standard, *i.e.*, the specificity of the information request, the plaintiffs' need for and the limited availability of the information requested, and the anonymous person's expectation of privacy. Rather, Doe 3 contends that the

court should have found that plaintiffs did not make a “particularized showing” (Doe 3 brief on appeal at 20) sufficient to overcome his qualified privilege. In support of his position, Doe 3 contends that the Supreme Court's recent decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (“*Twombly*”), and *Ashcroft v. Iqbal*, — U.S. —, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (“*Iqbal*”), imposed “heightened pleading standards” (*e.g.*, Doe 3 brief on appeal at 18, 28–29) such that plaintiffs were required

to present specific evidence, including a declaration on personal knowledge from the person who examined the files available for download from each defendant's computer, listened to the files, verified that they were copyrighted songs, determined that the copyrights were registered (and to which plaintiffs), and determined what songs a particular defendant downloaded

(*id.* at 28). Neither Doe 3's reliance on *Twombly/Iqbal* nor his contention that plaintiffs' allegations are insufficiently specific has merit.

[10] First, the notion that *Twombly* imposed a heightened standard that requires a complaint to include specific evidence, factual allegations in addition to those required by Rule 8, and declarations from the persons who collected the evidence is belied by the *Twombly* opinion itself. The Court noted that Rule 8(a)(2) of the Federal Rules of Civil Procedure “requires only ‘a short and plain statement of the claim showing that the pleader is entitled to relief,’ in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,” *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (other internal quotation marks omitted); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 508, 512, 122 S.Ct. 992, 152

L.Ed.2d 1 (2002) (holding that, at the pleading stage, an employment discrimination plaintiff who alleges facts that provide fair notice of his claim need not also allege “specific facts establishing a prima facie case,” for such a “heightened pleading standard . . . conflicts with Federal Rule of Civil Procedure 8(a)(2)”). The *Twombly* Court stated that “a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations,” but mere “labels and conclusions” or “formulaic recitation[s] of the elements of a cause of action will not do”; rather, the complaint’s “[f]actual allegations must be enough to raise a right to relief above the speculative level,” *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955 (emphasis added), *i.e.*, enough to make the claim “plausible,” *id.* at 570, 127 S.Ct. 1955. Applying these standards to the complaint before it, which claimed violations of § 1 of the Sherman Act, 15 U.S.C. § 1 (prohibiting contracts, combinations, and conspiracies in restraint of trade), the *Twombly* Court concluded that “stating such a claim requires a complaint with enough *factual* matter (taken as true) to suggest that an agreement was made.” 550 U.S. at 556, 127 S.Ct. 1955 (emphasis added). Because the *Twombly* complaint’s factual allegations described only actions that were parallel, and were doctrinally consistent with lawful conduct, the conclusory allegation on information and belief that the observed conduct was the product of an unlawful agreement was insufficient to make the claim plausible. *See id.* at 556–57, 564–66, 127 S.Ct. 1955. The *Twombly* plausibility standard, which applies to all civil actions, *see Iqbal*, 129 S.Ct. at 1953, does not prevent a plaintiff from “pleading facts alleged ‘upon information and belief’” where the facts are peculiarly within the possession and control of the defendant, *see, e.g., Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir.2008), or where the belief is based on factual

information that makes the inference of culpability plausible, *see Iqbal*, 129 S.Ct. at 1949 (“A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”). The *Twombly* Court stated that “[a]sking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegality.” 550 U.S. at 556, 127 S.Ct. 1955.

Concluding that the complaint before it failed to state a plausible claim, the *Twombly* Court stated that “[i]n reaching this conclusion, we do not apply any ‘heightened’ pleading standard,” *id.* at 569 n. 14, 127 S.Ct. 1955 (emphasis added). Rather, it emphasized that its holding was consistent with its ruling in *Swierkiewicz* that “a heightened pleading requirement,” requiring the pleading of “‘specific facts’ beyond those necessary to state [a] claim and the grounds showing entitlement to relief,” was “impermissibl[e],” *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955. “Here,” the *Twombly* Court stated, “we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.” *Id.* (emphasis added).

Nor did *Iqbal* heighten the pleading requirements. Rather, it reiterated much of the discussion in *Twombly* and rejected as insufficient a pleading that the *Iqbal* Court regarded as entirely conclusory. Accordingly, although *Twombly* and *Iqbal* require “factual amplification [where] needed to render a claim plausible,” *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir.2009) (quoting *Ross v. Bank of America, N.A. (USA)*, 524 F.3d 217, 225 (2d Cir.2008)), we reject Doe 3’s contention that *Twombly* and *Iqbal* require the pleading of specific

evidence or extra facts beyond what is needed to make the claim plausible.

[11] Even less meritorious is Doe 3's contention that plaintiffs' showing in the present case was vague and conclusory. Doe 3 states that

[t]he central allegations in the complaint in this case are that:

Plaintiffs are informed and believe that each Defendant, without the permission or consent of Plaintiffs, has used, and continues to use, an online media distribution system to download and/or distribute certain of the Copyrighted Recordings[.] . . . Through his or her continuous and ongoing acts of downloading and/or distributing to the public the Copyrighted Recordings, each Defendant has violated Plaintiffs' exclusive rights of reproduction and distribution. . . . Plaintiffs are informed and believe that each Defendant has, without the permission or consent of Plaintiffs, continuously downloaded and/or distributed to the public additional sound recordings owned by or exclusively licensed to Plaintiffs or Plaintiffs' affiliate record labels, and Plaintiffs believe that such acts of infringement are ongoing.

(Doe 3 brief on appeal at 31 (quoting portions of the Complaint ¶ 22) (alterations in Doe 3 brief).) Doe 3 criticizes "[t]hese [as] vague allegations, devoid of both direct knowledge and specific facts." (Doe 3 brief on appeal at 32.)

To characterize this criticism by Doe 3 as unfair would be extremely charitable, for the above ellipses in the Doe 3 brief's quotation from ¶ 22 of the Complaint represent deletions of that paragraph's references to Complaint Exhibit A—in which plaintiffs provide ample detail. For example, the first ellipsis omits the allegation that "*Exhibit A identifies on a Defendant-by-Defendant basis (one Defendant per*

page) the IP address with the date and time of capture and a list of copyrighted recordings that each Defendant has, without the permission or consent of Plaintiffs, downloaded and/or distributed to the public" (Complaint ¶ 22 (emphasis added)). The second ellipsis similarly omits the Complaint's reference to "the sound recordings listed for each Defendant on Exhibit A" (Complaint ¶ 22).

To the extent that ¶ 22's allegations are made on information and belief, virtually all of them are supported by factual assertions in Exhibit A. For example, the allegation that each Doe defendant "has used" file-sharing networks to download and distribute plaintiffs' music is supported by Exhibit A's lists of specific songs found in the respective Doe defendants' file-sharing folders, on the date shown, at the time indicated, on the specified online, peer-to-peer, file-sharing network. The allegation that there was "continue[d]" use is supported by, *inter alia*, the utter improbability that the songs observed by plaintiffs' investigators in a given Doe defendant's file-sharing folder at a particular time were there only at the precise instant at which they were observed, and not before and not afterwards; the inference of continued use is also supported by the facts that Exhibit A lists each of the "Doe" defendants as engaging in such file-sharing on a different date and that defendants' attorney has represented that some of the "Doe" defendants are in fact the same person (*see, e.g.*, Doe 3 brief on appeal at 16 n. 13; Amended Supporting Declaration of Richard A. Altman dated October 6, 2008, at 1 n. 1). The principal assertion made only on information-and-belief is that defendants' copying and/or distribution of plaintiffs' music were without permission. But no more definitive assertion as to lack of permission seems possible when the users remain anonymous.

The Complaint's Exhibit A itself is never mentioned in Doe 3's brief. Page 3 of that Exhibit makes assertions as to Doe 3 and could hardly be more specific. It specifies that at "IP Address[] 169.226.226.24" at 2:15:57 a.m. on April 12, 2007, the "P2P Network[] AresWarez" was in use (em-

<i>Copyright Owner</i>	<i>Artist</i>
UMG Recordings, Inc.	Beastie Boys
UMG Recordings, Inc.	Jodeci
Motown Record Company L.P.	Lionel Richie
Interscope Records	Eminem
Capitol Records, LLC	Poison
SONY BMG MUSIC ENTERTAINMENT	Good Charlotte

(Complaint Exhibit A, at 3.) The Complaint alleges that notice of copyright pursuant to 17 U.S.C. § 401 had been placed on each such album cover and on the published copies of each of the sound recordings identified in Exhibit A. (Complaint ¶ 23.) Given the factual detail in the Complaint and its Exhibit, plaintiffs' pleading plainly states copyright infringement claims that are plausible. *See generally Grokster*, 545 U.S. at 920, 125 S.Ct. 2764 (individual "users of peer-to-peer networks . . . have prominently employed those networks in sharing copyrighted music and video files without authorization"); *In re: Aimster Copyright Litigation*, 334 F.3d at 645 ("Teenagers and young adults who have access to the Internet like to swap computer files containing popular music. If the music is copyrighted, such swapping, which involves making and transmitting a digital copy of the music, infringes copyright. The swappers, who are ignorant or more commonly disdainful of copyright and in any event discount the likelihood of being sued or prosecuted for copyright infringement, are the direct infringers.").

In addition, the Linares declaration submitted in support of plaintiffs' subpoena request pointed out that Exhibit A lists only samples of the numerous "audio files that were being shared by [the Doe d]efen-

phases in original); that a total of 236 audio files were present in a file-sharing folder at that IP address at that time; and that among those files were the following songs, whose respective copyrights were owned by the plaintiffs indicated:

<i>Recording Title</i>	<i>Album Title</i>
Girls	Licensed To Ill
Come and Talk to Me	Forever My Lady
Hello	Can't Slow Down
Superman	Eminem Show
Every rose has its thorn	Open Up & Say . . . Ahh!
Lifestyles of the Rich and Famous	The Young and the Hopeless

dants at the time that the RIAA's agent . . . observed the infringing activity" (Linares Decl. ¶ 19; *see* Complaint Exhibit A, stating that as many as 1,143 audio files were found in some of the Doe defendants' file-sharing folders), and that complete lists would be provided to the court upon request (Linares Decl. ¶ 19). No greater specificity in the Complaint or in plaintiffs' submissions in support of their request for the subpoena to SUNYA was required.

Doe 3 argues that the Complaint does not adequately allege copyright infringement because, he argues, merely "making . . . available" a work on a peer-to-peer network does not violate a copyright holder's distribution right absent proof of actual distribution (Doe 3 brief on appeal at 5). We need not address the question of whether copyright infringement occurs when a work is simply made available, however, because the Complaint alleges not that defendants merely made songs available on the network but that defendants both actually downloaded plaintiffs' copyrighted works and distributed them. (Complaint ¶ 22 ("Exhibit A includes the currently-known total number of audio files being distributed by each Defendant.")) The Complaint thus alleges violations of the copyright holders' reproduc-

tion and distribution rights under 17 U.S.C. §§ 106(1) and (3). *See, e.g., London-Sire Records, Inc. v. Doe 1*, 542 F.Supp.2d 153, 166 & n. 16, 169 (D.Mass. 2008) (violations of copyright owner's reproduction and distribution rights were adequately alleged by complaint stating that the defendants used a peer-to-peer network to download copyrighted works without permission and to distribute them to the public). For the reasons stated above, the facts asserted in the Complaint are adequate to support these allegations. *See id.* at 169 ("The Court can draw from the [c]omplaint and the current record a reasonable inference in the plaintiffs' favor—that where the defendant has completed all the necessary steps for a public distribution, a reasonable fact-finder may infer that the distribution actually took place." (emphasis omitted)).

We need not decide whether the requirement we endorse today, that a plaintiff seeking to subpoena an anonymous Internet defendant's identifying information must make a "concrete showing of a prima facie claim of actionable harm," would be satisfied by a well-pleaded complaint unaccompanied by any evidentiary showing. Here, plaintiffs' Complaint, attached exhibit, and supporting declaration are clearly sufficient to meet that standard.

We note that Doe 3 disparages the contents of the Linares declaration, arguing that it is "fatally short on averments *on personal knowledge* about the supposed infringements by Doe 3" (Doe 3 brief on appeal at 28 (emphasis in original)). On the face of the record—even assuming that such a summary-judgment-level or trial-level standard were applicable—that criticism is unjustified. Linares stated in his declaration, "under penalty of perjury," that he "ha[d] personal knowledge of the facts stated [therein]" (Linares Decl. intro-

ductory paragraph), that he had provided "oversight over the review of the lists contained in Exhibit A to the Complaint," and that he "attest[ed] to the veracity of those lists" (*id.* ¶ 15). He stated: "this Declaration is based on my personal knowledge, and if called upon to do so, I would be prepared to testify as to its truth and accuracy." (*Id.* ¶ 2.) Further, even if Linares did not himself view the contents of defendants' file-sharing folders, his testimony may well be sufficient to have the results of the investigation he commissioned admitted in evidence at trial. *See, e.g., Keith v. Volpe*, 858 F.2d 467, 481 (9th Cir.1988) (testimony by a witness who "functioned as the survey director, even though he contracted with another firm to provide interviewers" for the survey, "is sufficient to establish a foundation" for admissibility of the survey at trial), *cert. denied*, 493 U.S. 813, 110 S.Ct. 61, 107 L.Ed.2d 28 (1989); *Piper Aircraft Corp. v. Wag-Aero, Inc.*, 741 F.2d 925, 931 (7th Cir.1984) ("We agree with the suggestion in McCarthy's treatise that the testimony of a survey director alone can establish the foundation for the admission of survey results." (citing 2 J.T. McCarthy, *Trademarks and Unfair Competition* § 32:53 (1973))). No greater proof was required in opposition to the motion to quash the subpoena seeking the identities of the persons who downloaded and/or distributed plaintiffs' copyrighted works.

[12] Finally, we note that Doe 3 several times mentions the copyright doctrine of "fair use," stating, for example, that "the right to make a personal copy of copyrighted material may be protected as fair use" (Doe 3 brief on appeal at 5), and that "some downloading may be permissible as fair use" (*id.* at 25). Whether or not these and other statements are intended to suggest that Doe 3 has a fair-use defense to plaintiffs' claims of copyright infringement,

we reject the proposition that these arguments are sufficient to warrant quashing plaintiffs' subpoena. "Fair use" is an equitable doctrine, the applicability of which presents mixed questions of law and fact. *See, e.g., Harper & Row, Publishers*, 471 U.S. at 560, 105 S.Ct. 2218. "Fair use presupposes good faith and fair dealing," and one pertinent consideration is "whether the user stands to profit from exploitation of the copyrighted material without paying the customary price." *Id.* at 562, 105 S.Ct. 2218 (internal quotation marks omitted).

[E]specially relevant in determining whether [a given] use was fair are: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the substantiality of the portion used in relation to the copyrighted work as a whole; [and] (4) the effect on the potential market for or value of the copyrighted work.

Id. at 560-61, 105 S.Ct. 2218. Here, the second, third, and fourth elements are clear. The works at issue are original musical compositions, present in the respective Doe defendants' file-sharing folders in their entirety; and, assuming lack of the copyright owners' consent, the likely detrimental effect of file-sharing on the value of copyrighted compositions is well documented, *see, e.g., Grokster*, 545 U.S. at 923, 125 S.Ct. 2764 (anecdotal and statistical evidence "gives reason to think that the vast majority of users' downloads are acts of infringement, and because well over 100 million copies of the software in question are known to have been downloaded, and billions of files are shared across the Fast-Track and Gnutella networks each month, the probable scope of copyright infringement is staggering"). And although Doe 3 indicates that he "may" have had a permissible purpose for copying and sharing the music found in his file-sharing folder, any assertion of such a purpose raises ques-

tions of credibility and plausibility that cannot be resolved while Doe 3 avoids suit by hiding behind a shield of anonymity.

We note that we are skeptical of the magistrate judge's view that "any pretext of privacy" on the part of a computer owner is "render[ed] void" simply by "the notion [that he] allow[s] others to have access to [his] database by virtue of the Internet in order to pluck from a computer information and data that the computer owner or user wishes to share," *Arista I*, 2009 WL 414060, at *6. The privacy claimed here is not for the information that the computer owner or user wishes to share but rather for his or her identity. Instead, we regard Doe 3's expectation of privacy for sharing copyrighted music through an online file-sharing network as simply insufficient to permit him to avoid having to defend against a claim of copyright infringement.

CONCLUSION

We have considered all of Doe 3's contentions on this appeal and have found them to be without merit. The order of the district court denying the motion to quash the subpoena is affirmed.

The stay of SUNYA's compliance with so much of the subpoena as sought information pertaining to Doe 3, previously granted by this Court pending resolution of the appeal, is hereby lifted.



Richard Hill	First Amended	None
Barry Honig	First Amended	None



Earl RANDALL, Plaintiff-Appellant,

v.

Jewel SCOTT, in her individual capacity, Headley Leopold Scott, Tracy Graham Lawson, Clayton County District Attorney, in her official capacity, Defendants-Appellees.

No. 09-12862.

United States Court of Appeals,
Eleventh Circuit.

June 30, 2010.

Background: Terminated employee brought § 1983 action in state court against district attorney in her individual capacity and others alleging First Amendment retaliation. Removal was obtained. The United States District Court for the Northern District of Georgia, No. 08-02910-CV-TCB-1, Timothy C. Batten, Sr., J., granted district attorney's motion to dismiss. Employee appealed.

Holdings: The Court of Appeals, Birch, Circuit Judge, held that:

- (1) heightened pleading standard did not apply to employee's action;
- (2) state had no interest in preventing employee from running for office as required to justify termination; but
- (3) employee's First Amendment right to run was not clearly established at time of alleged retaliatory termination.

Affirmed in part and reversed in part.

1. Courts ⇌90(2), 96(3)

Court of Appeals is bound by the holdings of earlier panels unless and until they are clearly overruled by the Court of Appeals en banc or by the Supreme Court.

2. Courts ⇌96(3)

While an intervening decision of the Supreme Court can overrule the decision of a prior Court of Appeals panel, the Supreme Court decision must be clearly on point.

3. Courts ⇌92

Dicta is neither the law of the case nor binding precedent.

4. Civil Rights ⇌1398

Federal Civil Procedure ⇌1835

A district court considering a motion to dismiss a § 1983 action against a defendant able to assert qualified immunity shall begin by identifying conclusory allegations that are not entitled to an assumption of truth; legal conclusions must be supported by factual allegations, and the district court should assume, on a case-by-case basis, that well pleaded factual allegations are true, and then determine whether they plausibly give rise to an entitlement to relief. 42 U.S.C.A. § 1983.

5. Civil Rights ⇌1398

Heightened pleading standard, pursuant to which relevant facts must be alleged with some specificity and complaint would be dismissed where allegations are vague and conclusory, did not apply on district attorney's motion to dismiss, on qualified immunity grounds, county employee's § 1983 action against district attorney in her individual capacity, alleging First

Amendment retaliation based upon his termination as district attorney's chief of staff following employee's announcement of candidacy for chairman of county board. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

6. Constitutional Law ⇌1473

District and Prosecuting Attorneys ⇌3(1)

State had no interest in preventing county employee, who served as chief of staff for district attorney, from running for office of chairman of county board, as required to justify alleged First Amendment burden imposed on employee arising out of district attorney's alleged retaliatory termination of employee's position upon learning of candidacy; district attorney's interest in terminating employee was allegedly for purely personal reasons. U.S.C.A. Const.Amend. 1.

7. Civil Rights ⇌1376(2)

Qualified immunity offers complete protection from § 1983 liability for individual government officials performing discretionary functions insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. 42 U.S.C.A. § 1983.

8. Civil Rights ⇌1376(2)

Qualified immunity from § 1983 liability balances two important interests; the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably. 42 U.S.C.A. § 1983.

9. Civil Rights ⇌1376(1, 2)

Two-step analysis exists for resolving § 1983 qualified immunity claims; first, a court must decide whether the facts that a plaintiff has alleged show the defendant's

conduct violated a constitutional right, and second, the court must decide whether the right was clearly established. 42 U.S.C.A. § 1983.

10. Civil Rights ⇌1376(2)

"Clearly established law," for purposes of claim of qualified immunity from § 1983 liability, is law that is sufficiently established so as to provide public officials with fair notice that the conduct alleged is prohibited. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

11. Civil Rights ⇌1376(2)

When looking at case law, some broad statements of principle can clearly establish law applicable in the future to different sets of detailed facts, for purposes opposing claim of qualified immunity from § 1983 liability. 42 U.S.C.A. § 1983.

12. Civil Rights ⇌1376(10)

County employee's First Amendment right to run for chairman of county board was not clearly established at time of district attorney's alleged retaliatory termination of his employment, so as to entitle district attorney, in her individual capacity, to qualified immunity from § 1983 liability for First Amendment retaliation. U.S.C.A. Const.Amend. 1; 42 U.S.C.A. § 1983.

13. Civil Rights ⇌1376(2)

When looking at materially similar facts, if the circumstances facing a government official are not fairly distinguishable from fact-specific precedent that has established law the precedent can clearly establish the applicable law for purposes of opposing claim of qualified immunity from § 1983 liability. 42 U.S.C.A. § 1983.

14. Civil Rights 1376(2)

To show clearly established law, in order to defeat claim of qualified immunity from § 1983 liability, plaintiff can show that case fits within the exception of conduct which so obviously violates the Constitution that prior case law is unnecessary. 42 U.S.C.A. § 1983.

William J. Atkins, James A. Attwood, Atkins & Attwood, LLC, Atlanta, GA, for Randall.

Matthew Richard LaVallee, Paul Robert Koster, Daley, Koster & LaVallee, LLC, Atlanta, GA, for Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, BARKETT and KRAVITCH, Circuit Judges.

BIRCH, Circuit Judge:

In this 42 U.S.C. § 1983 First Amendment retaliation claim appeal, we (1) re-evaluate the pleading standard requirement for § 1983 cases involving qualified immunity, (2) determine whether Earl Randall's ("Randall") complaint—alleging state conduct restricting his ability to run for public office—raises a claim for violation of his First Amendment rights, and (3) resolve whether Jewel Scott ("Scott") was entitled to qualified immunity. The district court granted Scott's motion to dismiss Randall's individual and official capacity claims against Scott. We reject the district court's application of a heightened pleading standard and the district court's determination that Randall failed to allege a First Amendment violation. We agree, however, with the district court's determination that Scott enjoys qualified immunity

protection for her actions. Accordingly, we AFFIRM the district court's grant of Scott's motion to dismiss Randall's individual capacity claim, and REVERSE the district court's dismissal of Randall's official capacity claim.

I. BACKGROUND

The district court order summarized the factual allegations stated in Randall's complaint as follows:

Randall was hired as an investigator after Jewell Scott was elected to the position of district attorney [of Clayton County, Georgia]. In June of 2005, Randall was promoted by Jewell Scott and became her chief of staff.

On or about September 21, 2007, Randall was approached by three colleagues who asked him to consider running for the position of Chairman of the Clayton County Board of Commissioners ("Chairman"). On or about September 23, 2007, Randall and his wife agreed that he should pursue the opportunity.

On September 26, 2007, Randall met with Jewel Scott and told her that he intended to run for Chairman. According to Randall, Jewel Scott initially expressed to him that she was pleased with his decision to run for the position and mentioned that she did not want her husband, Lee Scott, to run.

That same day, Randall filed a Declaration of Intent to run with the Clayton County Election Office. Within a few days of filing this declaration, Randall learned that Lee Scott was very angry about Randall's decision to run for the position. Randall alleges that Lee Scott was seen slamming his fist into the table at a restaurant and stated that he wanted Jewel Scott to use her position to force Randall out of the race.

On or about September 28, 2007, Jewel Scott advised Randall that her husband was very upset about his decision to run. She told him that Lee Scott wanted to run for Chairman and that Randall's campaign could potentially split the voters who wanted to vote against the incumbent, Eldrin Bell.

Randall refused to withdraw from the race. In October 2007, he met with Lee Scott, Jewel Scott and employees from the Clayton County District Attorney's office. Lee Scott told Randall that he wanted to run for Chairman, and Randall replied that he did not see a problem running for the same office. Lee Scott then became upset and told Randall that they would become enemies if Randall did not back out of the race, and he threatened to "destroy Randall." Randall refused to drop out of the race. Lee Scott then allegedly turned to Jewel Scott and asked her to fire Randall.

In November of 2007, Jewel Scott allegedly told Randall that Lee Scott was pressuring her to fire Randall unless he backed out of the race. She told Randall to look for another job. Randall was approached by several mutual acquaintances who told him that Lee Scott was angry about Randall "reaching out to his political supporters" and warned him that if he stayed in the race he might lose his job because "he was making life difficult for Jewel Scott."

Jewel Scott told Randall that "Lee Scott and Sheriff Hill told her that she would be perceived as a weak leader if she did not fire Randall for expressing his political views in a race against Jewel Scott's husband, among other candidates."

On December 17, 2007, Randall sent invitations to a fundraiser hosted by one of his political supporters. Randall sent an invitation to Jewel Scott. The next

day, Randall learned that Jewel Scott was upset about the fundraiser and that Lee Scott was angry because Randall was seeking campaign contributions through the fundraiser.

Five days after Jewel Scott received the invitation to Randall's fundraiser, she terminated Randall's employment.

Randall alleges that following his termination he has been unable to find permanent employment in law enforcement and has been forced to curtail his campaign activities because of his financial condition. Randall seeks lost wages, compensatory damages and punitive damages.

R1-18 at 2-5.

On 28 April 2008, Randall filed this action in the Superior Court of Clayton County, Georgia, asserting a First Amendment retaliation claim pursuant to 42 U.S.C. § 1983 against Scott, in her individual and official capacities, and a tortious interference claim against her husband, Headley Leopold Scott. *Id.* at 1-2. On 17 September 2008, Scott removed the case to the United States District Court for the Northern District of Georgia. *Id.* at 2. On 22 September 2008, Scott filed a motion to dismiss, in which she argued that Randall's complaint failed to state a First Amendment violation and alternatively that she was immune from suit. *Id.*

The district court granted Scott's motion to dismiss on 20 May 2009. *Id.* at 17. The court concluded that "in light of the heightened pleading standard applicable in § 1983 cases, the mere fact that Randall decided to run for political office and held an event in connection with his candidacy is not enough to trigger First Amendment protection." *Id.* at 14. Alternatively, even if the allegations in the complaint were sufficient to establish a First Amendment violation, the court concluded that Scott was entitled to qualified immunity because

she did not violate clearly established law. *Id.* at 15–16.

On appeal, Randall first argues that the district court improperly subjected his complaint to a heightened pleading standard. Randall suggests that our circuit precedent has been undermined by the Supreme Court's decisions in *Jones v. Bock*, 549 U.S. 199, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007) and *Ashcroft v. Iqbal*, 556 U.S. —, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). Second, Randall contends that the district court's First Amendment protection analysis was flawed, because his First Amendment rights were violated when Scott fired him for deciding to run for Chairman of the Clayton County Board of Commissioners. Randall further submits that Scott is not entitled to qualified immunity for violating his First Amendment rights.

II. DISCUSSION

We review a district court order granting a motion to dismiss *de novo*, applying the same standard as the district court. *Hoffman-Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir.2002). We therefore accept as true the facts as set forth in the complaint and draw all reasonable inferences in the plaintiff's favor. See *Wilson v. Strong*, 156 F.3d 1131, 1133 (11th Cir. 1998).

A. Pleading Standard

In granting Scott's motion to dismiss, the district court "employed a heightened pleading standard." R1–18 at 6. Citing our opinion in *Danley v. Allen*, 540 F.3d 1298, 1313–14 (11th Cir.2008), the court stated that it was "bound to apply the heightened pleading requirement" in a § 1983 case involving qualified immunity." R1–18 at 6. On appeal, Randall argues that our circuit's heightened pleading requirement for § 1983 cases involving quali-

fied immunity has been overruled by *Jones* and *Iqbal*.

1. History of Heightened Pleading Requirement

Generally, under the Federal Rules of Civil Procedure, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. (8)(a)(2). To survive a 12(b)(6) motion to dismiss, the complaint "does not need detailed factual allegations," *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 1964, 167 L.Ed.2d 929 (2007), but must "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957).

Over two decades ago, "in an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims, we, and other courts . . . tightened the application of Rule 8 to § 1983 cases." *Arnold v. Bd. of Educ. of Escambia County*, 880 F.2d 305, 309 (11th Cir.1989). Under this heightened pleading standard, plaintiffs were required to provide "some factual detail" in addition to plain statements showing that they were entitled to relief. *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir.1992). We found such additional factual detail useful in § 1983 cases in order to make qualified immunity determinations at the motion to dismiss stage and to prevent public officials from enduring unnecessary discovery.

In 1993, the Supreme Court decided *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993), a § 1983 case involving a municipal entity defendant. In *Leatherman*, the Supreme Court stated that "it is impossible

to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 168, 113 S.Ct. at 1163 (citing Fed.R.Civ.P. (8)(a)(2)).

Since *Leatherman*, we have yet to decide whether *Leatherman's* holding applies in cases against individual defendants. See, e.g. *GJR Investments, Inc. v. County of Escambia, Fla.*, 132 F.3d 1359, 1367-68 (11th Cir.1998) (stating that "heightened pleading . . . is the law of this circuit" when § 1983 claims are asserted against government officials in their individual capacities.). We read *Leatherman's* holding as limited to § 1983 actions against entities. See *Swann v. Southern Health Partners, Inc.*, 388 F.3d 834, 838 (11th Cir. 2004) ("*Leatherman* overturned our prior decisions to the extent that those cases required a heightened pleading standard in § 1983 actions against entities that cannot raise qualified immunity as a defense.").

In 1998, the Supreme Court decided *Crawford-El v. Britton*, 523 U.S. 574, 118 S.Ct. 1584, 140 L.Ed.2d 759 (1998), in which it addressed how a § 1983 plaintiff must allege unconstitutional motive. The Court stated:

In the past we have consistently . . . refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense, or requiring pleadings of heightened specificity in cases alleging municipal liability As we have noted, the Court of Appeals adopted a heightened proof standard in large part to reduce the availability of discovery in actions

that require proof of motive. To the extent that the court was concerned with this procedural issue, our cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.

Id. at 595, 118 S.Ct. at 1595 (internal citations omitted). In 2002, the Supreme Court decided *Swierkiewicz v. Sorema*, 534 U.S. 506, 513, 122 S.Ct. 992, 998, 152 L.Ed.2d 1 (2002), an employment discrimination case, and held that "complaints . . . must satisfy only the simple requirements of Rule 8(a)." The Court stated:

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b) for example, provides for greater particularity in all averments of fraud or mistake. This Court, however, has declined to extend such exceptions to other contexts. In *Leatherman* we stated: "The Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983" . . . Just as Rule 9(b) makes no mention of municipal liability under [§ 1983] neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).

Id. (footnotes omitted)

While a number of circuits relied upon the language in *Crawford-El* and *Swierkiewicz* to reject a heightened pleading standard in § 1983 individual-official cases,¹ our circuit did not. See *Swann*, 388

1. See, e.g., *Doe v. Cassel*, 403 F.3d 986, 988-89 (8th Cir.2005) (holding that "[t]he only permissible heightened pleading requirements

in civil suits are those contained in the Federal Rules of Civil Procedure or those in federal statutes enacted by Congress."); *Educadores*

F.3d at 838 (reaffirming the heightened pleading standard in § 1983 cases that involve parties eligible for qualified immunity after *Crawford-El* and *Swierkiewicz*).

2. *Heightened Pleading in a Qualified Immunity Case After Jones and Iqbal*

[1, 2] We are bound by the holdings of earlier panels unless and until they are clearly overruled by this court *en banc* or by the Supreme Court. *United States v. Smith*, 122 F.3d 1355, 1359 (11th Cir.1997) (per curiam). “While an intervening decision of the Supreme Court can overrule the decision of a prior panel of our court, the Supreme Court decision must be clearly on point.” *Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 344 F.3d 1288, 1292 (11th Cir.2003) (per curiam).

Puertoriquenos en Accion et al. v. Hernandez, 367 F.3d 61, 66 (1st Cir.2004) (“*Swierkiewicz* has sounded the death knell for the imposition of a heightened pleading standard except in cases in which either a federal statute or specific Civil Rule requires that result.”); *Alston v. Parker*, 363 F.3d 229, 233 (3rd Cir. 2004) (“[A] fact-pleading requirement for civil rights complaints has been rejected by the Supreme Court in no uncertain terms.”); *Phelps v. Kapnolas*, 308 F.3d 180, 186–87 (2d Cir.2002) (using notice pleading in a § 1983 action for violation of the Eighth Amendment); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125–26 (9th Cir.2002) (“[N]early all of the circuits have now disapproved any heightened pleading standard in cases other than those governed by Rule 9(b).”); *Goad v. Mitchell*, 297 F.3d 497, 503 (6th Cir.2002) (“We conclude that the Supreme Court’s decision in *Crawford-El* invalidates the heightened pleading requirement.”); *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (holding that “there are no special pleading rules for prisoner civil rights cases”); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir.2001) (“This court’s heightened pleading requirement cannot survive *Crawford-El*.”).

2. We have already applied *Iqbal* to a § 1983 suit against defendants raising a qualified immunity defense. *Keating v. City of Miami*,

a. *Jones*

We now address for the first time the effect of *Jones* and *Iqbal* on our precedent regarding § 1983 pleading standards for defendants who are able to assert a qualified immunity defense.² In *Jones*, the Supreme Court rejected the contention that Prison Litigation Reform Act (PLRA) plaintiffs were required to affirmatively plead exhaustion of administrative remedies. *Jones*, 549 U.S. at 216, 127 S.Ct. at 921. The Court explained that “[t]he argument that screening would be more effective if exhaustion had to be shown in the complaint proves too much; the same could be said with respect to any affirmative defense.” *Id.* at 215, 127 S.Ct. at 921. The Court further stated that it had explained in *Leatherman* and *Swierkiewicz*

598 F.3d 753 (11th Cir.2010). In that case, we determined that plaintiffs’ allegations met both the *Iqbal* pleading standard and our circuit’s heightened pleading standard. *Id.* at 762–63. The opinion also, in *dicta*, equated the two standards. *Id.* at 763. We now say explicitly what *Keating* implied: whatever requirements our heightened pleading standard once imposed have since been replaced by those of the *Twombly-Iqbal* plausibility standard. As we recently emphasized in *American Dental Ass’n v. Cigna Corp.*, “The [Supreme] Court in *Iqbal* explicitly held that the *Twombly* plausibility standard applies to all civil actions . . . because it is an interpretation of Rule 8.” 605 F.3d 1283, 1290 (11th Cir. 2010) (emphasis added). Thus, like complaints in all other cases, complaints in § 1983 cases must now “‘contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.’” *Bryson v. Gonzales*, 534 F.3d 1282 (10th Cir. 2008) (quoting *In re Plywood Antitrust Litigation*, 655 F.2d 627, 641 (5th Cir. Unit A 1981), quoted with approval in, *Twombly*, 550 U.S. at 562, 127 S.Ct. 1955 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.1984) (quoting *In re Plywood Antitrust Litig.*, 655 F.2d at 641))).

“that courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.” *Id.* at 212, 127 S.Ct. at 919.

[3] While the *Jones* case *dicta* does speak broadly regarding pleading standards, the holding is restricted to PLRA plaintiffs and PLRA pleadings. *Dicta* “is neither the law of the case nor binding precedent.” *Great Lakes Dredge & Dock Co. v. Tanker Robert Watt Miller*, 957 F.2d 1575, 1578 (11th Cir.1992). We therefore conclude that *Jones* does not overrule our precedent regarding heightened pleading requirements in § 1983 actions involving individuals able to assert qualified immunity as a defense.

b. *Iqbal*

Iqbal dealt with an individual who “filed a *Bivens* action³ in the United States District Court for the Eastern District of New York against . . . [numerous] federal officials.” *Iqbal*, 129 S.Ct. at 1943. “[T]he complaint allege[d] that [federal officials] adopted an unconstitutional policy that subjected [Mr. Iqbal] to harsh conditions of confinement on account of his race, religion, or national origin.” *Id.* at 1942. In the district court, the defendant federal officials “raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them.” *Id.* at 1942. On appeal, the Supreme Court addressed the issue of whether Mr. Iqbal, “as the plaintiff in the District Court, plead factual matter that, if taken as true,

states a claim that petitioners deprived him of his clearly established constitutional rights.” *Id.* at 1942–43.

In analyzing the sufficiency of Mr. Iqbal’s complaint, the Supreme Court stated that “[u]nder Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a ‘short and plain statement of the claim showing that the pleader is entitled to relief.’” *Id.* at 1949 (citing Fed.R.Civ.P. 8(a)(2)). The Court, citing *Twombly*, continued: “[t]wo working principles underlie our decision . . . [f]irst, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions [and] . . . second, only a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 1949–50 citing *Twombly*, 550 U.S. at 555, 556, 127 S.Ct. at 1955.

The Court went on to state that Mr. Iqbal’s argument that *Twombly* “should be limited to pleadings in the context of an antitrust dispute . . . is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure.” *Iqbal*, 129 S.Ct. at 1953. “Rule [8] . . . governs the pleading standard ‘in all civil actions and proceedings in the United States district courts.’” *Id.* at 1953 (citing Fed. R.Civ.P. 1). “Our decision in *Twombly* expounded the pleading standard for ‘all civil actions.’” *Id.* at 1953.

Addressing qualified immunity and the discovery process, the Court stated:

Respondent next implies that our construction of Rule 8 should be tempered

3. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 389, 91 S.Ct. 1999, 2001, 29 L.Ed.2d 619 (1971). While *Iqbal* involved a *Bivens* action, and the case before us involves a § 1983 suit, the difference is inconsequential. Both deal with an unconstitutional deprivation of rights which the Supreme Court compares on equal footing for certain analysis. See *Iqbal*, 129 S.Ct. at 1949;

Harlow v. Fitzgerald, 457 U.S. 800, 809, 102 S.Ct. 2727, 2733, 73 L.Ed.2d 396 (1982) (“[I]t would be untenable to draw a distinction for purposes of immunity law between suits brought against state officials under [§ 1983] and suits brought directly under the Constitution against federal officials.”) (quotation marks and citation omitted).

where, as here, the Court of Appeals has “instructed the district court to cabin discovery in such a way as to preserve” petitioners’ defense of qualified immunity “as much as possible in anticipation of a summary judgment motion.” *Iqbal* Brief 27. We have held, however, that the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process. *Twombly*, *supra*, at 559, 127 S.Ct. 1955 (“It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through careful case management given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side” (internal quotation marks and citation omitted)) The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including “avoidance of disruptive discovery.” *Siegert v. Gilley*, 500 U.S. 226, 236, 111 S.Ct. 1789, 114 L.Ed.2d 277 (1991) (KENNEDY, J., concurring in judgment).

. . . .
... It is no answer to these concerns to say that discovery for petitioners can be deferred while pretrial proceedings continue for other defendants. It is quite likely that, when discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery. We decline respondent’s invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive dis-

covery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.

Id. at 1953–54. The Court concluded its analysis of Rule 8 by stating: “Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label ‘general allegation,’ and expect his complaint to survive a motion to dismiss.” *Id.* at 1954.

In short, while the *Iqbal* opinion concerns Rule 8(a)(2) pleading standards in general, the Court specifically describes Rule 8(a)(2) pleading standards for actions regarding an unconstitutional deprivation of rights. The defendant federal officials raised the defense of qualified immunity and moved to dismiss the suit under a 12(b)(6) motion. The Supreme Court held, citing *Twombly*, that the legal conclusions in a complaint must be supported by factual allegations, and that only a complaint which states a plausible claim for relief shall survive a motion to dismiss. The Court did not apply a heightened pleading standard.

[4] While *Swann*, *GJR*, and *Danley* reaffirm application of a heightened pleading standard for § 1983 cases involving defendants able to assert qualified immunity, we agree with Randall that those cases were effectively overturned by the *Iqbal* court. Pleadings for § 1983 cases involving defendants who are able to assert qualified immunity as a defense shall now be held to comply with the standards described in *Iqbal*. A district court considering a motion to dismiss shall begin by identifying conclusory allegations that are not entitled to an assumption of truth—legal conclusions must be supported by

factual allegations. The district court should assume, on a case-by-case basis, that well pleaded factual allegations are true, and then determine whether they plausibly give rise to an entitlement to relief.⁴

[5] Regarding the order at issue here, two days after *Iqbal* was decided, the district court granted Scott's motion to dismiss employing a "heightened pleading standard." R1-18 at 6. We conclude that the district court erred in applying a heightened pleading standard to Randall's complaint. After *Iqbal* it is clear that there is no "heightened pleading standard" as it relates to cases governed by Rule 8(a)(2), including civil rights complaints. All that remains is the Rule 9 heightened pleading standard.

B. *First Amendment Violation*

The district court found that Randall's actions were "not enough to trigger First Amendment protection." *Id.* at 14. While we would generally remand to the district court to reconsider its analysis of Randall's constitutional rights under the *Iqbal* pleading standard before discussing Randall's constitutional rights, in this case we must go further. The court's statements make explicit that under any pleading standard Scott's motion to dismiss would have been granted.⁵

1. *Was Randall Entitled to First Amendment Protection?*

Precedent in the area of constitutional protection for candidacy can be best described as a legal morass. See *Cutcliffe v.*

4. For a thorough discussion of *Twombly* and *Iqbal* precedent, see *American Dental Ass'n*, 605 F.3d at 1290.

5. Rather than remanding to the district court to draw the same conclusion under a different pleading standard—regarding a First Amendment violation and qualified immunity—and

Cochran, 117 F.3d 1353, 1360 (11th Cir. 1997) (Harris, Senior U.S. District Judge sitting by designation and specially concurring) ("Is there confusion in this area of law? Members of the Supreme Court are among those who have expressed their belief that there is, and my study of the subject matter leads me to the same conclusion."). Rather than wading through the bog to determine exactly what level of scrutiny should be applied, and what constitutional protection there is, we will instead determine whether Randall enjoys *enough* First Amendment protection to overcome Scott's motion to dismiss. See, e.g., *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445, 108 S.Ct. 1319, 1325, 99 L.Ed.2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."). We conclude that he does.

a. *Supreme Court Precedent*

In a 1968 case challenging Ohio election laws regulating new political parties being placed on the state ballot, the Supreme Court stated:

No extended discussion is required to establish that the Ohio laws before us give the two old, established parties a decided advantage over any new parties struggling for existence and thus place substantially unequal burdens on both the right to vote and the right to associate. The right to form a party for the advancement of political goals means little if a party can be kept off the election

requiring Randall to appeal that decision, for the purposes of judicial efficiency we will address whether the allegations of Randall's complaint could allege a violation of his First Amendment rights, and whether Scott was entitled to qualified immunity.

ballot and thus denied an equal opportunity to win votes. So also, the right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot. In determining whether the state has a power to place such unequal burdens on minority groups where rights of this kind are at stake, the decisions of this Court have consistently held that “only a compelling state interest in the regulation of a subject within the State’s constitutional power to regulate can justify limiting First Amendment freedoms.” The State has here failed to show any “compelling interest” which justifies imposing such heavy burdens on the right to vote and to associate.

Williams v. Rhodes, 393 U.S. 23, 31–32, 89 S.Ct. 5, 10–11, 21 L.Ed.2d 24 (1968) (citing *NAACP v. Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 341, 9 L.Ed.2d 405 (1963)). Although the issue of new parties being allowed on the ballot was decided under the Equal Protection Clause of the Fourteenth Amendment, the Court viewed the listing of a party or candidate on the state ballot as a First Amendment right to associate, only to be burdened for a “compelling state interest.” *See id.*

Three years later, in a case challenging the large filing fees required by Texas statutes as a condition to having one’s name placed on the primary ballot, the Supreme Court stated:

The initial and direct impact of filing fees is felt by aspirants for office, rather than voters, and the Court has not heretofore attached such fundamental status to candidacy as to invoke a rigorous standard of review. However, the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates

always have at least some theoretical, correlative effect on voters.

Bullock v. Carter, 405 U.S. 134, 142–43, 92 S.Ct. 849, 855–56, 31 L.Ed.2d 92 (1972). The Court thus reaffirmed that the right to candidacy is linked to voters’ rights. While there is no “fundamental status to candidacy” requiring the “rigorous standard of review” that is applied in voters’ rights cases, there is at least some constitutional right to candidacy. *Id.*

In 1976, the Supreme Court spoke directly to the issue of individual public workers’ employment conditioned on supporting a political party, holding that to survive a constitutional challenge:

conditioning the retention of public employment on the employee’s support of the in-party . . . must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights.

Elrod v. Burns, 427 U.S. 347, 363, 96 S.Ct. 2673, 2685, 49 L.Ed.2d 547 (1976). Although being a candidate is not the same as supporting a candidate, the two acts are closely related. *See Carter*, 405 U.S. at 142–43, 92 S.Ct. at 855–56. Thus, restricting candidacy, like conditioning public employment on support of a political party, must be the least restrictive means of furthering a “vital government end.” *Elrod*, 427 U.S. at 363, 96 S.Ct. at 2685.

Finally, speaking directly to candidacy rights, the Supreme Court explained that “[f]ar from recognizing candidacy as a ‘fundamental right,’ we have held that the existence of barriers to a candidate’s access to the ballot ‘does not of itself compel close scrutiny.’” *Clements v. Fashing*, 457 U.S. 957, 963, 102 S.Ct. 2836, 2843, 73 L.Ed.2d 508 (1982) (citing *Carter*, 405 U.S. at 143, 92 S.Ct. at 856). Rather, “[d]ecision[s] in this area of constitutional adjudication

ation [are] a matter of degree, and involve[] a consideration of the facts and circumstances behind the law, the interests the State seeks to protect by placing restrictions on candidacy, and the nature of the interests of those who may be burdened by the restrictions." *Id.* at 963, 102 S.Ct. at 2844. Even though *Clements* does not make clear the degree of constitutional scrutiny required for candidacy restrictions, the Court does suggest that political candidacy is entitled to at least a modicum of constitutional protection.

b. *Circuit Precedent*

While our circuit precedent describes, in *dicta*, a constitutional right to run for office,⁶ our previous case holdings regarding candidacy-terminations all involve plaintiffs who were discharged for supporting a candidate running for office, as opposed to discharges related to running for office themselves.⁷ Regarding deputy sheriffs, clerks, investigators, dispatchers, jailers, and process servers who were replaced by persons supporting the newly elected sheriff, we held that:

[u]nder the *Elrod-Branti* standard, loyalty to the individual sheriff and the goals and policies he seeks to implement

through his office is an appropriate requirement for the effective performance of a deputy sheriff. Such a requirement strikes at the heart of the *Elrod-Branti* least restrictive means test which balances first amendment rights of the deputies and the need for efficient and effective delivery of public services. We can find no less restrictive means for meeting the needs of public service in the case of the sheriff's deputy than to acknowledge a sheriff's absolute authority of appointment and to decline to reinstate those who did not support him.

... [However,] [i]t has not been established that loyalty to an individual sheriff is an appropriate requirement for effective job performance for the ... positions of clerk, investigator, dispatcher, jailer, and process server. This is a determination that depends upon the actual responsibilities of each position and the relationship of each to the sheriff.

Terry v. Cook, 866 F.2d 373, 377-78 (11th Cir.1989). In *Terry*, we balanced the state's interest in office loyalty with the First Amendment rights of the discharged workers. Finding some discharges consti-

6. See *Flinn v. Gordon*, 775 F.2d 1551, 1554 (11th Cir.1985) (stating that a Florida legislator who ran for office "certainly had a constitutional right to run for office and to hold office once elected.").

7. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to 1 October 1981. While not Eleventh Circuit decisions, two binding former Fifth Circuit decisions regarding statutory restrictions on the right to run for office speak broadly about candidacy. In *Morial v. Judiciary Commission of Louisiana*, 565 F.2d 295 (5th Cir.1977) (en banc), the Fifth Circuit considered a state law prohibiting sitting judges from running for non-judicial elective office. Although the court ultimately upheld the law through an

intermediate scrutiny analysis, in reaching that conclusion it described the plaintiff's interest in running for office as "an important, if not constitutionally 'fundamental' right." *Id.* at 301. Two years later, in *United States v. Tonry*, 605 F.2d 144 (5th Cir.1979), the Fifth Circuit addressed a probation condition limiting the right of a probationer to participate in political activity. Again applying intermediate scrutiny, the court stated that "[t]here is no question that candidacy for office and participating in political activities are forms of expression protected by the first amendment." *Id.* at 150. While the *Morial* and *Tonry* decisions address broad statutory restrictions on a right to candidacy, as opposed to single-case terminations, the language, like that in *Flinn v. Gordon*, outlines a general First Amendment protection.

tutional, and others not, we concluded that all the discharged-workers did have *some* First Amendment protection. A second and third sheriff deputy-dismissal case reiterated the *Terry* application of the *Elrod-Branti* standard. See *Cutcliffe*, 117 F.3d at 1356–58; *Silva v. Bieluch*, 351 F.3d 1045, 1047 (11th Cir.2003).

More recently, in *Epps v. Watson*, we addressed whether a county tax commissioner clerk's First Amendment rights were violated when she was discharged by the newly-elected tax commissioner for allowing the commissioner's opponent to place campaign signs on her property. See *Epps v. Watson*, 492 F.3d 1240, 1242 (11th Cir.2007). Analyzing the issue under *Elrod-Branti* and *Terry*, we concluded that Epps' job did not "require[] her to function as the alter ego of the Tax Commissioner or ensure that the policies and goals of the office are implemented." *Id.* at 1245 (quotation marks and citation omitted). Because "Epps was not in any decision making role within the department, . . . [we found that] Epps ha[d] factually alleged the deprivation of a constitutional right to freely associate." *Id.* at 1245 (quotation marks and citations omitted).

In summary, our circuit precedent represents a balancing test between a discharged employee's First Amendment right to support a candidate and the state's interest in office loyalty. Each case found that the discharged employee had *some* constitutional protection.

While we have no circuit precedent regarding the right to candidacy in a case squarely similar to this, we conclude the constitutional-right-versus-the-state's-interests analysis to be no different for a restriction on candidacy than a restriction on candidate support. Scott cites precedent from other circuits regarding an explicit determination that there is no First Amendment right to candidacy, however,

each cited case relates to an employee subject to the Hatch Act (which prohibits civil servants from being candidates for elective office) or a discharged-employee running against a discharging-supervisor. See, e.g., *Molina-Crespo v. United States Merit Sys. Protection Bd.*, 547 F.3d 651, 658 (6th Cir.2008) (finding that the "[Hatch] Act's prohibition on candidacy for elective office is rationally related to the government's interest because it allows the government to remove actual or apparent partisan influence from the administration of federal funds"); *Carver v. Dennis*, 104 F.3d 847, 852–53 (6th Cir.1997) (concluding that the discharge of a deputy clerk after she announced her candidacy for clerk was "neutral in terms of the First Amendment" because "[t]he First Amendment does not require that an official . . . nourish the viper in the nest"); *Bart v. Telford*, 677 F.2d 622, 626 (7th Cir.1982) (upholding mayor's requirement that employee take leave of absence after announcing intent to run for mayor); *Jantzen v. Hawkins*, 188 F.3d 1247, 1250–52 (10th Cir.1999) (addressing issue of sheriff warning office employees that anyone opposing his re-election would be seen as disloyal).

c. Conclusion

Supreme Court and circuit precedent is not entirely clear regarding the degree of First Amendment protection for candidacy, however, every case addressing the issue has found at least some constitutional protection. A plaintiff's candidacy cannot be burdened because a state official wishes to discourage that candidacy without a whisper of valid state interest. An interest in candidacy, and expression of political views without interference from state officials who wish to discourage that interest and expression, lies at the core of values protected by the First Amendment.

2. *Whether Randall's First Amendment Rights Were Violated?*

We agree that if Randall decided to run against Scott for Clayton County District Attorney, Scott would have good legal reason to discharge him due to the state's interest in office loyalty. That is not the case here. Randall was not discharged for a conflict with Scott or the position of Clayton County District Attorney; Randall's discharge was entirely related to Scott's husband, and Scott's personal relationship with her husband.

The district court evaluated Scott's motion to dismiss by first looking at whether Randall could properly allege action qualifying for First Amendment protection. R1-18 at 8. The court split Randall's arguments for potential First Amendment protection into two categories: (1) political patronage—whether he was subjected to an adverse employment action based on his political beliefs or party affiliation, and (2) employee expression—whether he was subjected to an adverse action based on his political speech. *Id.* at 9. We opine that the analysis is different. The dismissal of Randall's complaint can only be affirmed if the state's interest in permitting Scott to fire Randall is of sufficient importance to justify the infringement of Randall's First Amendment right to run for Chairman of the Clayton County Board of Commissioners. These are the same considerations as the *Elrod-Branti* standard applied in *Terry v. Cook* and *Epps v. Watson*. However, we are now comparing the state's interest in preventing an individual from running for office to the individual's First Amendment right to run (as opposed to the state's interest in preventing an individual from supporting a particular candidate

compared to the individual's First Amendment right to support a candidate).

[6] Since Scott's interest in firing Randall was, as alleged in the complaint, for purely personal reasons, the state has no interest in preventing Randall from running for office. While we have not decided the level of scrutiny to be applied, Randall's decision to run for office enjoys *some* First Amendment protection. Comparing this level of protection to the state's interest—manifestly none—the dismissal of Randall's complaint cannot be affirmed on the failure to state the denial of a First Amendment right.

C. *Qualified Immunity*

Randall sued Scott in her individual and official capacities. R1-18 at 1-2. Since federal law provides government officials a qualified immunity when sued individually for an alleged violation of a constitutional right, if Scott can establish qualified immunity, then the individual capacity claim against her must be dismissed. *Kentucky v. Graham*, 473 U.S. 159, 166-67, 105 S.Ct. 3099, 3105-06, 87 L.Ed.2d 114 (1985); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir.1991) (per curiam).

[7-9] Qualified immunity offers complete protection for individual government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982).⁸ "Qualified immunity balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from

8. The parties do not dispute that Scott was acting in a discretionary capacity. R1-18 at

7.

harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 555 U.S. —, 129 S.Ct. 808, 815, 172 L.Ed.2d 565 (2009). In *Saucier v. Katz*, the Supreme Court mandated a two step analysis for resolving qualified immunity claims. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 2156, 150 L.Ed.2d 272 (2001). First, a court must decide whether the facts that a plaintiff has alleged “show the [defendant’s] conduct violated a constitutional right.” *Id.* Second, the court must decide “whether the right was clearly established.”⁹ *Id.* For the purposes of this qualified immunity analysis, since we have already determined that Randall had some First Amendment protection violated, we are only concerned with whether the violated right was clearly established.

[10] “Clearly established law” is law that is sufficiently established so as to provide public officials with “fair notice” that the conduct alleged is prohibited. *Hope v. Pelzer*, 536 U.S. 730, 739, 122 S.Ct. 2508, 2515, 153 L.Ed.2d 666 (2002) (“For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.” (internal citations and quotation omitted)). “[T]he Supreme Court in *Saucier* and *Hope*, as well as this Court en banc in [*Marsh v. Butler County*, 268 F.3d 1014

(11th Cir.2001) (en banc)], explained that such fair and clear notice can be given in various ways.” *Vinyard v. Wilson*, 311 F.3d 1340, 1350 (11th Cir.2002).

[11, 12] First, we turn to broad case law. “When looking at case law, some broad statements of principle . . . can clearly establish law applicable in the future to different sets of detailed facts.” *Id.* at 1351; see also *Mercado v. City of Orlando*, 407 F.3d 1152, 1159 (11th Cir. 2005). “[I]f some authoritative judicial decision decides a case by determining that ‘X Conduct’ is unconstitutional without tying that determination to a particularized set of facts, the decision on ‘X Conduct’ can be read as having clearly established a constitutional principle.” *Vinyard*, 311 F.3d at 1351. In the case at hand, based on the scrupulous legal analysis required to determine whether Randall had a First Amendment right violated, we conclude that Randall’s rights were not clearly established under broad case law.¹⁰

[13] Second, we look for a case based on materially similar facts. When looking at materially similar facts, “if the circumstances facing a government official are not fairly distinguishable [from fact-specific precedent that has established law] . . . the precedent can clearly establish the applicable law.” *Id.* at 1352. Since we are aware of no precedential case with similar facts to those described here, we conclude that Randall’s rights were not clearly established under materially similar facts.

[14] Third, and finally, Randall “could show that this case fits within the excep-

9. *Saucier* mandated that courts first determine whether a constitutional violation occurred, and then decide whether the violated right was clearly established. In *Pearson*, the Supreme Court gave courts the discretion to decide which step they address first. 129 S.Ct. at 818.

10. While *Flinn* did discuss a “constitutional right to run for office,” the mentioning was purely *dicta* as opposed to law actually deciding a case as *Vinyard* describes. *Flinn*, 775 F.2d at 1554.

tion of conduct which so obviously violates [the] [C]onstitution that prior case law is unnecessary." *Mercado*, 407 F.3d at 1159. The peculiar facts of Randall's case must be "so far beyond the hazy border between excessive and acceptable that [every objectively reasonable district attorney] had to know that [she] was violating the Constitution even without caselaw on point." *Priester v. City of Riviera Beach*, 208 F.3d 919, 926 (11th Cir.2000) (quotation mark and citation omitted) (concluding that law was clearly established and force was "clearly-excessive-even-in-absence-of-caselaw" when officer released police dog to attack plaintiff who did not pose a threat to officers or others). We conclude that Scott's alleged unconstitutional act of working to prevent Randall from running for office was not "obviously" clear.

It appears to us that any such right to run for office was not heretofore clearly established. Scott therefore enjoys individual qualified immunity protection for her alleged violation of Randall's First Amendment rights. Accordingly we affirm the district court's judgment on the qualified immunity issue regarding Randall's individual capacity claim against Scott.

III. CONCLUSION

Randall appeals the district court order granting Scott's motion to dismiss. As we have explained: (1) § 1983 cases involving qualified immunity shall now be held to comply with the pleading standards described in *Iqbal*; (2) the allegations described in Randall's complaint are enough to state a claim for violation of his First Amendment rights; and (3) Scott is entitled to qualified immunity because Randall's constitutional rights at issue were not clearly established at the time of Scott's alleged misconduct. Accordingly, the order granting Scott's motion to dis-

miss is AFFIRMED regarding Randall's individual capacity claim, and REVERSED in regards to Randall's official capacity claim.

AFFIRMED in part and REVERSED in part, and REMANDED for further proceedings consistent with this opinion.



Ezell GILBERT, Petitioner–Appellant,

v.

**UNITED STATES of America,
Respondent–Appellee.**

No. 09–12513.

United States Court of Appeals,
Eleventh Circuit.

July 1, 2010.

George Allen Couture, Stephen J. Langs and Rosemary T. Cakmis, Fed. Pub. Defenders, Orlando, FL, for Gilbert.

Michael A. Rotker, U.S. Dept. of Justice, Crim. Div., Washington, DC, David Paul Rhodes and Linda Julin McNamara, Tampa, FL, for U.S.

Appeal from the United States District Court for the Middle District of Florida (No. 99–02054–CT–30–TGW); James S. Moody, Jr., Judge.

Before DUBINA, Chief Judge, and MARTIN and HILL, Circuit Judges.

BY THE COURT:

Presently before the court are:

1. Motion by Defendant/Appellant Gilbert for Release Pending Appeal/Remand;

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

H

United States Court of Appeals,
Seventh Circuit.
Gloria E. SWANSON, Plaintiff-Appellant,
v.
CITIBANK, N.A., et al., Defendants-Appellees.
No. 10-1122.

Submitted May 26, 2010.^{FN*}

FN* After examining the briefs and the record, we have concluded that oral argument is unnecessary. The appeal is therefore submitted on the briefs and the record. FED. R.APP. P. 34(a)(2)(C).

Decided July 30, 2010.

Background: African-American loan applicants filed suit against lender, real estate appraiser, and appraiser's employee, alleging fraud and discrimination in violation of Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA), inter alia, and sought punitive damages for intentional infliction of emotional distress (IIED). The United States District Court for the Northern District of Illinois, James B. Zagel, J., granted defendants' motions to dismiss federal and IIED claims, 706 F.Supp.2d 854, 2009 WL 3380848, and claims for fraud, 2009 WL 5183801.

Holdings: The Court of Appeals, Wood, Circuit Judge, held that:

- (1) applicant, who was proceeding pro se, could not represent her husband;
- (2) applicant stated claim against lender for racial discrimination under FHA;
- (3) applicant failed to state fraud claim against lender;
- (4) applicant stated claim against appraiser and its employee for racial discrimination under FHA; and
- (5) applicant failed to state fraud claim against appraiser and its employee.

Affirmed in part and reversed in part.

Posner, Circuit Judge, dissented in part and filed opinion.

West Headnotes

[1] Attorney and Client 45  **11(2.1)**

45 Attorney and Client

45I The Office of Attorney

45I(A) Admission to Practice


45k11 Practitioners Not Admitted or Not Licensed

45k11(2) Acts Constituting Practice of Law in General

45k11(2.1) k. In general. Most

Cited Cases

African-American loan applicant, who was proceeding pro se, could not represent her husband in action against lender and real estate appraiser alleging fraud and discrimination in violation of Fair Housing Act (FHA) and Equal Credit Opportunity Act (ECOA). Fair Housing Act, § 805, 42 U.S.C.A. § 3605; Equal Credit Opportunity Act, § 701(a)(1), 15 U.S.C.A. § 1691(a)(1); Fed.Rules Civ.Proc.Rule 11(a), 28 U.S.C.A.

[2] Federal Civil Procedure 170A  **673**

170A Federal Civil Procedure


170AVII Pleadings and Motions

170AVII(B) Complaint

170AVII(B)1 In General

170Ak673 k. Claim for relief in general. Most Cited Cases

To state a claim upon which relief can be granted, a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, might suggest that something has happened to her that might be redressed by the law. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] Federal Civil Procedure 170A  **1772**

614 F.3d 400, 77 Fed.R.Serv.3d 203

(Cite as: 614 F.3d 400)

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)3 Pleading, Defects In, in General

170Ak1772 k. Insufficiency in general.

Most Cited Cases

Federal Civil Procedure 170A ⚡1829

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1827 Determination

170Ak1829 k. Construction of

pleadings. Most Cited Cases

For a claim governed only by the notice pleading requirement, it is not necessary for the court, when using the plausibility standard to determine whether to dismiss a complaint for failure to state a claim, to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences. Fed.Rules Civ.Proc.Rules 8, 12(b)(6), 28 U.S.C.A.

[4] Federal Civil Procedure 170A ⚡673

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(B) Complaint

170AVII(B)1 In General

170Ak673 k. Claim for relief in general. Most Cited Cases

Abstract recitations of the elements of a cause of action or conclusory legal statements do nothing to distinguish the particular case that is before the court from every other hypothetically possible case in that field of law, and such statements therefore do not add to the notice that the pleader is required to provide to the opposing party. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

[5] Civil Rights 78 ⚡1395(3)

78 Civil Rights

78III Federal Remedies in General

78k1392 Pleading

78k1395 Particular Causes of Action

78k1395(3) k. Property and housing.

Most Cited Cases

African-American loan applicant stated claim against lender for racial discrimination under Fair Housing Act (FHA), although she included other extraneous facts, by alleging that bank, through its employees and the outside appraisers it used, obtained appraisal of applicant's home that was far below actual market value so that bank would have excuse to deny applicant's request for home-equity loan; applicant did not undermine soundness of her pleading by mentioning facts that might not be particularly helpful for proving her case, such as bank's announced plan to use federal money to make more loans, or employee's comment the he had a mixed-race family. Fair Housing Act, § 805(a), (b)(1)(B), 42 U.S.C.A. § 3605(a), (b)(1)(B).

[6] Federal Civil Procedure 170A ⚡636

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, mistake and condition of mind. Most Cited Cases

A plaintiff must plead actual damages arising from her reliance on a fraudulent statement in order to meet particularity requirement for pleading fraud. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[7] Fraud 184 ⚡59(3)

184 Fraud

184II Actions

184II(E) Damages

184k59 Measure in General

184k59(3) k. Difference between value and price paid. Most Cited Cases

On a fraud claim under Illinois law, without a contract, only out-of-pocket losses allegedly arising from the fraud are recoverable.

614 F.3d 400, 77 Fed.R.Serv.3d 203

(Cite as: 614 F.3d 400)

[8] Federal Civil Procedure 170A ↪636

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, mistake and condition of mind. Most Cited Cases

African-American loan applicant failed to allege with particularity that she suffered any actual loss as a result of her reliance on bank's allegedly fraudulent statement when she applied for home-equity loan, as required under Illinois law to state fraud claim against lender which allegedly falsely announced plans to make federal funds available in the form of loans to all customers, when it actually intended to exclude African-American customers from those who would be eligible for the loans. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

[9] Civil Rights 78 ↪1079

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1074 Housing

78k1079 k. Loans and financing. Most Cited Cases

African-American home-equity loan applicant stated claim against real estate appraiser and its employee for racial discrimination under Fair Housing Act (FHA), by alleging that appraiser, through employee, appraised applicant's home at far below actual market value because defendants disfavored providing loans to African-Americans. Fair Housing Act, § 805(a), (b)(1)(B), 42 U.S.C.A. § 3605(a), (b)(1)(B).

[10] Federal Civil Procedure 170A ↪636

170A Federal Civil Procedure

170AVII Pleadings and Motions

170AVII(A) Pleadings in General

170Ak633 Certainty, Definiteness and Particularity

170Ak636 k. Fraud, mistake and condition of mind. Most Cited Cases

African-American loan applicant failed to allege with particularity that she relied on allegedly fraudulent appraisal or suffered out-of-pocket losses as a result of it, and applicant thus failed to state fraud claim under Illinois law against real estate appraiser and its employee, who allegedly appraised applicant's home at far below actual market value because they disfavored providing loans to African-Americans. Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

*402 Gloria E. Swanson, Chicago, IL, pro se.

Charles M. Routen, Chicago, IL, pro se.

Abram I. Moore, Attorney, K&L Gates LLP, Robert M. Chemers, Attorney, Pretzel & Stouffer, Chicago, IL, for Defendants-Appellees.

Before EASTERBROOK, Chief Judge, and POSNER and WOOD, Circuit Judges.

WOOD, Circuit Judge.

[1] Gloria Swanson sued Citibank, Andre Lanier, and Lanier's employer, PCI Appraisal Services, because she believed that all three had discriminated against her on the basis of her race (African-American) when Citibank turned down her application for a home-equity loan. Swanson also named her husband, Charles Routen, as a co-plaintiff and a co-appellant but since Swanson is proceeding *pro se*, she may not represent her husband. See FED.R.CIV.P. 11(a); *Malone v. Nielson*, 474 F.3d 934, 937 (7th Cir.2007). We have therefore dismissed Routen as a party on appeal; we proceed solely with respect to Swanson's part of the case. She was unsuccessful in the district court, which dismissed in response to the defendants' motion under FED.R.CIV.P. 12(b)(6).

Swanson based her complaint on the following set of events, which we accept as true for purposes of this appeal. *Hemi Group, LLC v. City of New York*,

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

N.Y., --- U.S. ----, 130 S.Ct. 983, 986-87, --- L.Ed.2d ---- (2010). In February 2009 Citibank announced a plan to make loans using funds that it had received from the federal government's Troubled Assets Relief Program. Encouraged by this prospect, Swanson went to a Citibank branch to apply for a home-equity loan. A representative named Skertich told Swanson that she could not apply alone, because she owned her home jointly with her husband; he had to be present as well. Swanson was skeptical, suspecting that Skertich's demand was a ploy to discourage loan applications from African-Americans. She therefore asked to speak to a manager. When the manager joined the group, Swanson disclosed to both Skertich and the manager that Washington Mutual Bank previously had denied her a home-equity loan. The manager warned Swanson that, although she did not want to discourage Swanson from applying for the loan, Citibank's loan criteria were more stringent than those of other banks.

Still interested, Swanson took a loan application home and returned the next day with the necessary information. She was again assisted by Skertich, who entered the information that Swanson had furnished into the computer. When he reached a question regarding race, Skertich told Swanson that she was not required to respond. At some point during this exchange, Skertich pointed to a photograph *403 on his desk and commented that his wife and son were part African-American.

A few days later Citibank conditionally approved Swanson for a home-equity loan of \$50,000. It hired Andre Lanier, who worked for PCI Appraisal Services, to visit Swanson's home for an onsite appraisal. Although Swanson had estimated in her loan application that her house was worth \$270,000, Lanier appraised it at only \$170,000. The difference was critical: Citibank turned down the loan and explained that its conditional approval had been based on the higher valuation. Two months later Swanson paid for and obtained an appraisal from Midwest Valuations, which thought her home

was worth \$240,000.

Swanson saw coordinated action in this chain of events, and so she filed a complaint (later amended) charging that Citibank, Lanier, and PCI disfavor providing home-equity loans to African-Americans, and so they deliberately lowered the appraised value of her home far below its actual market value, so that they would have an excuse to deny her the loan. She charges that in so doing, they violated the Fair Housing Act, 42 U.S.C. § 3605, and the Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1). The district court granted the defendants' motions to dismiss both theories. It relied heavily on *Latimore v. Citibank Fed. Savings Bank*, 151 F.3d 712 (7th Cir.1998), a case in which this court described the evidence required to defeat a defense motion for summary judgment on a credit discrimination claim. Initially, the court liberally construed Swanson's complaint to include a common-law fraud claim and declined to dismiss that aspect of the case. Later, however, the defendants moved to dismiss the fraud claim as well, and the district court granted the motion on the grounds that the statements on which Swanson relied were too indefinite and her reliance was unreasonable. This appeal followed.

[2] Before turning to the particulars of Swanson's case, a brief review of the standards that apply to dismissals for failure to state a claim is in order. It is by now well established that a plaintiff must do better than putting a few words on paper that, in the hands of an imaginative reader, *might* suggest that something has happened to her that *might* be redressed by the law. *Cf. Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), disapproved by *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 563, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) ("after puzzling the profession for 50 years, this famous observation [the 'no set of facts' language] has earned its retirement"). The question with which courts are still struggling is how much higher the Supreme Court meant to set the bar, when it decided not only *Twombly*, but also *Erickson v. Par-*

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

Id., 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007), and *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). This is not an easy question to answer, as the thoughtful dissent from this opinion demonstrates. On the one hand, the Supreme Court has adopted a “plausibility” standard, but on the other hand, it has insisted that it is not requiring fact pleading, nor is it adopting a single pleading standard to replace Rule 8, Rule 9, and specialized regimes like the one in the Private Securities Litigation Reform Act (“PSLRA”), 15 U.S.C. § 78u-4(b)(2).

Critically, in none of the three recent decisions—*Twombly*, *Erickson*, or *Iqbal*—did the Court cast any doubt on the validity of Rule 8 of the Federal Rules of Civil Procedure. To the contrary: at all times it has said that it is interpreting Rule 8, not tossing it out the window. It is therefore useful to begin with a look at the language of the rule:

*404 (a) Claim for Relief. A pleading that states a claim for relief must contain:

* * *

(2) a short and plain statement of the claim showing that the pleader is entitled to relief....

FED.R.CIV.P. 8(a)(2). As one respected treatise put it in 2004,

all that is necessary is that the claim for relief be stated with brevity, conciseness, and clarity.... [T]his portion of Rule 8 indicates that a basic objective of the rules is to avoid civil cases turning on technicalities and to require that the pleading discharge the function of giving the opposing party fair notice of the nature and basis or grounds of the pleader's claim and a general indication of the type of litigation that is involved....

5 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1215 at 165-173 (3d ed. 2004).

Nothing in the recent trio of cases has undermined

these broad principles. As *Erickson* underscored, “[s]pecific facts are not necessary.” 551 U.S. at 93, 127 S.Ct. 2197. The Court was not engaged in a *sub rosa* campaign to reinstate the old fact-pleading system called for by the Field Code or even more modern codes. We know that because it said so in *Erickson*: “the statement need only give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Id.* Instead, the Court has called for more careful attention to be given to several key questions: what, exactly, does it take to give the opposing party “fair notice”; how much detail realistically can be given, and should be given, about the nature and basis or grounds of the claim; and in what way is the pleader expected to signal the type of litigation that is being put before the court?

[3] This is the light in which the Court's references in *Twombly*, repeated in *Iqbal*, to the pleader's responsibility to “state a claim to relief that is plausible on its face” must be understood. See *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955; *Iqbal*, 129 S.Ct. at 1949. “Plausibility” in this context does not imply that the district court should decide whose version to believe, or which version is more likely than not. Indeed, the Court expressly distanced itself from the latter approach in *Iqbal*, “the plausibility standard is not akin to a probability requirement.” 129 S.Ct. at 1949 (quotation marks omitted). As we understand it, the Court is saying instead that the plaintiff must give enough details about the subject-matter of the case to present a story that holds together. In other words, the court will ask itself *could* these things have happened, not *did* they happen. For cases governed only by Rule 8, it is not necessary to stack up inferences side by side and allow the case to go forward only if the plaintiff's inferences seem more compelling than the opposing inferences. Compare *Makor Issues & Rights, Ltd. v. Tellabs Inc.*, 513 F.3d 702, 705 (7th Cir.2008) (applying PSLRA standards).

[4] The Supreme Court's explicit decision to reaffirm the validity of *Swierkiewicz v. Sorema N.A.*,

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), which was cited with approval in *Twombly*, 550 U.S. at 556, 127 S.Ct. 1955, indicates that in many straightforward cases, it will not be any more difficult today for a plaintiff to meet that burden than it was before the Court's recent decisions. A plaintiff who believes that she has been passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else. That is an *405 entirely plausible scenario, whether or not it describes what "really" went on in this plaintiff's case. A more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff's mind at least, the dots should be connected. Finally, as the Supreme Court warned in *Iqbal* and as we acknowledged later in *Brooks v. Ross*, 578 F.3d 574 (7th Cir.2009), "abstract recitations of the elements of a cause of action or conclusory legal statements," 578 F.3d at 581, do nothing to distinguish the particular case that is before the court from every other hypothetically possible case in that field of law. Such statements therefore do not add to the notice that Rule 8 demands.

We realize that one powerful reason that lies behind the Supreme Court's concern about pleading standards is the cost of the discovery that will follow in any case that survives a motion to dismiss on the pleadings. The costs of discovery are often asymmetric, as the dissent points out, and one way to rein them in would be to make it more difficult to earn the right to engage in discovery. That is just what the Court did, by interring the rule that a complaint could go forward if any set of facts at all could be imagined, consistent with the statements in the complaint, that would permit the pleader to obtain relief. Too much chaff was moving ahead with the wheat. But, in other contexts, the Supreme Court has drawn a careful line between those things that can be accomplished by judicial interpretation

and those that should be handled through the procedures set up in the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.* See *Mohawk Indus., Inc. v. Carpenter*, --- U.S. ---, 130 S.Ct. 599, 609, 175 L.Ed.2d 458 (2009). In fact, the Judicial Conference's Advisory Committee on Civil Rules is engaged in an intensive study of pleading rules, discovery practice, and the costs of litigation, as its recent 2010 Civil Litigation Conference, held at Duke Law School May 10-11, 2010, demonstrates. See Summary of 2010 Conference on Civil Litigation at Duke Law School, University of Denver Institute for the Advancement of the American Legal System, at <http://www.du.edu/legalinstitute/pdf/DukeConference.pdf> (last visited July 28, 2010).

[5] Returning to Swanson's case, we must analyze her allegations defendant-by-defendant. We begin with Citibank. On appeal, Swanson challenges only the dismissal of her Fair Housing Act and fraud claims. The Fair Housing Act prohibits businesses engaged in residential real estate transactions, including "[t]he making ... of loans or providing other financial assistance ... secured by residential real estate," from discriminating against any person on account of race. 42 U.S.C. § 3605(a), (b)(1)(B). Swanson's complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home-equity loan). This is all that she needed to put in the complaint. See *Swierkiewicz*, 534 U.S. at 511-12, 122 S.Ct. 992 (employment discrimination); see also *Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 723-24 (6th Cir.2010); *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 715 (9th Cir.2009).

The fact that Swanson included other, largely extraneous facts in her complaint does not undermine the soundness of her pleading. She points to Citibank's announced plan to use federal money to make more loans, its refusal to follow *406 through in her case, and Skertich's comment that he has a

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

mixed-race family. She has not pleaded herself out of court by mentioning these facts; whether they are particularly helpful for proving her case or not is another matter that can safely be put off for another day. It was therefore error for the district court to dismiss Swanson's Fair Housing Act claim against Citibank.

[6][7][8] Her fraud claim against Citibank stands on a different footing. Rule 9(b) of the Federal Rules of Civil Procedure provides that “[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.” Of special relevance here, a plaintiff must plead actual damages arising from her reliance on a fraudulent statement. *Tricontinental Indus., Ltd. v. PricewaterhouseCoopers, LLP*, 475 F.3d 824, 841 (7th Cir.2007). Without a contract, only out-of-pocket losses allegedly arising from the fraud are recoverable. *Roboserve, Inc. v. Kato Kagaku Co., Ltd.*, 78 F.3d 266, 274 (7th Cir.1996) (applying Illinois law). Swanson asserts that Citibank falsely announced plans to make federal funds available in the form of loans to all customers, when it actually intended to exclude African-American customers from those who would be eligible for the loans. Swanson relied, she says, on that false information when she applied for her home-equity loan. But she never alleged that she lost anything from the process of applying for the loan. We do not know, for example, whether there was a loan application fee, or if Citibank or she covered the cost of the appraisal. This is the kind of particular information that Rule 9 requires, and its absence means that the district court was entitled to dismiss the claim.

[9] We now turn to Swanson's claims against Lanier and PCI. Here again, she pursues only her Fair Housing Act and fraud claims. (The appraisal defendants point out that they do not extend credit, and thus their actions are not covered in any event by the Equal Credit Opportunity Act, 15 U.S.C. § 1691a(e).) The Fair Housing Act makes it

“unlawful for any person or other entity whose business includes engaging in residential real estate-related transactions to discriminate against any person in making available such a transaction, or in the terms or conditions of such a transaction, because of race....” 42 U.S.C. § 3605(a). The statute goes on to define the term “residential real estate-related transaction” to include “the selling, brokering, or appraising of residential real property.” 42 U.S.C. § 3605(b)(2). There is an appraisal exemption also, found in § 4605(c), but it provides only that nothing in the statute prohibits appraisers from taking into consideration factors other than race or the other protected characteristics.

Swanson accuses the appraisal defendants of skewing their assessment of her home because of her race. It is unclear whether she believes that they did so as part of a conspiracy with Citibank, or if she thinks that they deliberately undervalued her property on their own initiative. Once again, we find that she has pleaded enough to survive a motion under Rule 12(b)(6). The appraisal defendants knew her race, and she accuses them of discriminating against her in the specific business transaction that they had with her. When it comes to proving her case, she will need to come up with more evidence than the mere fact that PCI (through Lanier) placed a far lower value on her house than Midwest Valuations did. See *Latimore*, 151 F.3d at 715 (need more at the summary judgment stage than evidence of a *407 discrepancy between appraisals). All we hold now is that she is entitled to take the next step in this litigation.

[10] This does not, however, save her common-law fraud claim against Lanier and PCI. She has not adequately alleged that she relied on their appraisal, nor has she pointed to any out-of-pocket losses that she suffered because of it.

We therefore REVERSE the judgment of the district court insofar as it dismissed Swanson's Fair Housing Act claims against all three defendants, and we AFFIRM insofar as it dismissed the common-law fraud claims against all three. Each side

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

will bear its own costs on appeal.

POSNER, Circuit Judge, dissenting in part.

I join the majority opinion except with respect to reversing the dismissal of the plaintiff's claim of housing discrimination. I have difficulty squaring that reversal with *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009), unless *Iqbal* is limited to cases in which there is a defense of official immunity—especially if as in that case it is asserted by very high-ranking officials (the Attorney General of the United States and the Director of the FBI)—because the defense is compromised if the defendants have to respond to discovery demands in a case unlikely to have merit. *Smith v. Duffey*, 576 F.3d 336, 340 (7th Cir.2009); Robert G. Bone, “Plausibility Pleading Revisited and Revised: A Comment on *Ashcroft v. Iqbal*,” 85 *Notre Dame L.Rev.* 849, 882 (2010); Howard M. Wasserman, “*Iqbal*, Procedural Mismatches, and Civil Rights Litigation,” 14 *Lewis & Clark L.Rev.* 157, 172-73 (2010).

The majority opinion does not suggest that the Supreme Court would limit *Iqbal* to immunity cases. The Court said that “our decision in *Twombly* [*Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), the forerunner of *Iqbal*] expounded the pleading standard for ‘all civil actions.’ ” 129 S.Ct. at 1953. It did add that a district judge’s promise of minimally intrusive discovery “provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties.” *Id.* at 1954. But this seems just to mean that the Court thought *Iqbal* a strong case for application of the *Twombly* standard, rather than thinking it the only type of discrimination case to which the standard applies.

There is language in my colleagues’ opinion to suggest that discrimination cases are outside the scope of *Iqbal*, itself a discrimination case. The opinion says that “a plaintiff who believes that she has been

passed over for a promotion because of her sex will be able to plead that she was employed by Company X, that a promotion was offered, that she applied and was qualified for it, and that the job went to someone else.” Though this is not a promotion case, the opinion goes on to say that “Swanson’s complaint identifies the type of discrimination that she thinks occurs (racial), by whom (Citibank, through Skertich, the manager, and the outside appraisers it used), and when (in connection with her effort in early 2009 to obtain a home equity loan). This is all that she needed to put in the complaint.” In contrast, “a more complex case involving financial derivatives, or tax fraud that the parties tried hard to conceal, or antitrust violations, will require more detail, both to give the opposing party notice of what the case is all about and to show how, in the plaintiff’s mind at least, the dots should be connected.” The “more complex” case *408 to which this passage is referring is *Twombly*, an antitrust case. But *Iqbal*, which charged the defendants with having subjected Pakistani Muslims to harsh conditions of confinement because of their religion and national origin, was a discrimination case, as is the present case, and was not especially complex.

Suppose this *were* a promotion case, and several people were vying for a promotion, all were qualified, several were men and one was a woman, and one of the men received the promotion. No complexity; yet the district court would “draw on its judicial experience and common sense,” *Ashcroft v. Iqbal*, *supra*, 129 S.Ct. at 1950, to conclude that discrimination would not be a plausible explanation of the hiring decision, without additional allegations.

This case is even stronger for dismissal because it lacks the competitive situation—man and woman, or white and black, vying for the same job and the man, or the white, getting it. We had emphasized this distinction, long before *Twombly* and *Iqbal*, in *Latimore v. Citibank Federal Savings Bank*, 151 F.3d 712 (7th Cir.1998), like this a case of credit discrimination rather than promotion. “Latimore

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

was not competing with a white person for a \$51,000 loan. A bank does not announce, ‘We are making a \$51,000 real estate loan today; please submit your applications, and we’ll choose the application that we like best and give that applicant the loan.’ ” *Id.* at 714. We held that there was no basis for an inference of discrimination. *Noland v. Commerce Mortgage Corp.*, 122 F.3d 551, 553 (8th Cir.1997), and *Simms v. First Gibraltar Bank*, 83 F.3d 1546, 1558 (5th Cir.1996), rejected credit-discrimination claims because there was no evidence that similar applicants were treated better, and *Boykin v. Bank of America Corp.*, 162 Fed.Appx. 837, 840 (11th Cir.2005) (per curiam), rejected such a claim because “absent direct evidence of discrimination, there is no basis for a trier of fact to assume that a decision to deny a loan was motivated by discriminatory animus unless the plaintiff makes a showing that a pattern of lending suggests the existence of discrimination.”

There is no allegation that the plaintiff in this case was competing with a white person for a loan. It was the low appraisal of her home that killed her chances for the \$50,000 loan that she was seeking. The appraiser thought her home worth only \$170,000, and she already owed \$146,000 on it (a first mortgage of \$121,000 and a home-equity loan of \$25,000). A further loan of \$50,000 would thus have been undersecured. We must assume that the appraisal was a mistake, and the house worth considerably more, as she alleges. But errors in appraising a house are common because “real estate appraisal is not an exact science,” *Latimore v. Citibank Federal Savings Bank*, *supra*, 151 F.3d at 715 -common enough to have created a market for “Real Estate Appraisers Errors & Omissions” insurance policies. See, e.g., OREP (Organization of Real Estate Professionals), “E&O Insurance,” www.orep.org/appraisers-e&o.htm (visited July 11, 2010). The Supreme Court would consider error the plausible inference in this case, rather than discrimination, for it said in *Iqbal* that “as between that ‘obvious alternative explanation’ for the [injury of which the plaintiff is complaining] and the pur-

poseful, invidious discrimination [the plaintiff] asks us to infer, discrimination is not a plausible conclusion.” *Ashcroft v. Iqbal*, *supra*, 129 S.Ct. at 1951-52, quoting *Twombly*, 550 U.S. at 567, 127 S.Ct. 1955.

Even before *Twombly* and *Iqbal*, complaints were dismissed when they alleged facts that refuted the plaintiffs’ claims. See, e.g., *Tierney v. Vahle*, 304 F.3d 734, 740 (7th Cir.2002); *409 *Thomas v. Farley*, 31 F.3d 557 (7th Cir.1994); *Lightner v. City of Wilmington*, 545 F.3d 260, 262 (4th Cir.2008). Under the new regime, it should be enough that the allegations render a claim implausible. The complaint alleges that Citibank was the second bank to turn down the plaintiff’s application for a home-equity loan. This reinforces the inference that she was not qualified. We further learn that, subject to the appraisal, which had not yet been conducted, Citibank had approved the \$50,000 home-equity loan that the plaintiff was seeking on the basis of her representation that her house was worth \$270,000. But she didn’t think it was worth that much when she applied for the loan. The house had been appraised at \$260,000 in 2004, and the complaint alleges that home values had fallen by “only” 16 to 20 percent since. This implies that when she applied for the home-equity loan her house was worth between \$208,000 and \$218,400—much less than what she told Citibank it was worth.

If the house was worth \$208,000, she would have owed a total of \$196,000 had she gotten the loan, or just a shade under the market value of the house. If the bank had insisted that she have a 20 percent equity in the house, which would be \$41,600, it would have lent her only \$20,400 (\$166,400-80 percent of \$208,000—minus the \$146,000 that she already owed on the house). The loan figure rises to \$28,720 if the house was worth \$218,400 rather than \$208,000. In either case a \$50,000 loan would have been out of the question, especially in the wake of the financial crash of September 2008, when credit, including home-equity credit, became extremely tight. E.g., Bob Tedeschi, “Opening the

614 F.3d 400, 77 Fed.R.Serv.3d 203

(Cite as: 614 F.3d 400)

Tap on Home Equity,” *N.Y. Times*, Nov. 7, 2008, p. RE9, www.nytimes.com/2008/11/02/realestate/02mort.html. For it was a home-equity loan that the plaintiff was seeking in early February of 2009, at the nadir of the economic collapse-and seeking it from troubled Citibank, one of the banks that required a federal bailout in the wake of the crash. Financial reports in the weeks surrounding the plaintiff’s application make clear the difficulty of obtaining credit from Citibank during that period. See Binyamin Appelbaum, “Despite Federal Aid, Many Banks Fail to Revive Lending,” *Wash. Post*, Feb. 3, 2009, www.washingtonpost.com/wp-dyn/content/article/2009/02/02/AR2009020203338_pf.html (“some of the first banks to get funding, such as Citigroup and J.P. Morgan Chase, have reported the sharpest drops in lending”); Liz Moyer, “Banks Promise Loans but Hoard Cash,” *Forbes.com*, Feb. 3, 2009, www.forbes.com/2009/02/03/banking-federal-reserve-business-wall-street-0203_loans.html (“banks and other lenders have tightened access to credit and are conserving capital in order to absorb the losses that occur when borrowers default,” the company [Citibank] said: ‘Citi will not and cannot take excessive risk with the capital the American public and other investors have entrusted to the company’”); Mara Der Hovanesian & David Henry, “Citi: The Losses Keep Coming,” *Bloomberg BusinessWeek*, Jan. 12, 2009, www.businessweek.com/bwdaily/dnflash/content/jan2009/db20090112_136301.htm?campaign_id=rss_daily (“banks are not lending. They are using every opportunity to pull loans and force liquidations”). (All web sites were visited on July 11, 2010.)

In *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007) (per curiam), decided two weeks after *Twombly*, the Supreme Court, without citing *Twombly*, reinstated a prisoner’s civil rights suit that had been dismissed on the ground that the allegations of the complaint were “conclusory.” The suit had charged deliberate indifference to the plaintiff’s need for medical treatment. In *410 the key passage in the Court’s opinion, we learn that

“the complaint stated that Dr. Bloor’s decision to remove the petitioner [that is, the plaintiff] from his prescribed hepatitis C medication was ‘endangering [his] life.’ It alleged this medication was withheld ‘shortly after’ petitioner had commenced a treatment program that would take one year, that he was ‘still in need of treatment for this disease,’ and that the prison officials were in the meantime refusing to provide treatment. *This alone was enough to satisfy Rule 8(a)(2)*. Petitioner, in addition, bolstered his claim by making more specific allegations in documents attached to the complaint and in later filings” (emphasis added, record citations omitted). It was reasonable to infer from these allegations, assuming their truth, that the defendants (who included Dr. Bloor, a prison doctor) had acted with deliberate indifference to the petitioner’s serious medical need by refusing to provide him with any medical treatment after taking away his medication. Indeed it’s difficult (again assuming the truth of the allegations) to imagine an alternative interpretation. Hepatitis C is a serious disease and the prisoner had been put in a treatment program expected to last a year. To refuse him any treatment whatsoever seemed (as the other allegations to which the Court referred confirmed) to be punitive. I think *Erickson* is good law even after *Iqbal*, but I also think it’s miles away from a case in which all that’s alleged (besides pure speculation about the defendants’ motive) is that someone was denied a loan because her house is mistakenly appraised for less than its market value.

The majority opinion relies heavily on *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002), cited with approval in *Twombly*, see 550 U.S. at 556, 127 S.Ct. 1955 (though not cited in *Iqbal*) and not overruled. Although it is regarded in some quarters as dead after *Iqbal*, e.g., *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir.2009); Suja A. Thomas, “The New Summary Judgment Motion: The Motion to Dismiss Under *Iqbal* and *Twombly*,” 14 *Lewis & Clark L.Rev.* 15, 35 (2010), lower-court judges are not to deem a Supreme Court decision overruled even if it is plainly

614 F.3d 400, 77 Fed.R.Serv.3d 203

(Cite as: 614 F.3d 400)

inconsistent with a subsequent decision. *State Oil Co. v. Khan*, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997); *Agostini v. Felton*, 521 U.S. 203, 237, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997); *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *National Rifle Ass'n v. City of Chicago*, 567 F.3d 856, 857-58 (7th Cir.2009), reversed under the name *McDonald v. City of Chicago*, --- U.S. ---, 130 S.Ct. 3020, 177 L.Ed.2d 894 (2010). But that principle is not applicable here; *Swierkiewicz* is distinguishable.

The Court rejected a rule that the Second Circuit had created which required “heightened pleading” in Title VII cases. The basic requirement for a complaint (“a short and plain statement of the claim showing that the pleader is entitled to relief”) is set forth in Rule 8(a)(2) of the Federal Rules of Civil Procedure. Rule 9 requires heightened pleading (that is, a specific allegation) of certain elements in particular cases, such as fraud and special damages. There is no reference to heightened pleading of discrimination claims, however, and *Swierkiewicz* holds that the judiciary is not authorized to amend Rule 9 without complying with the procedures in the Rules Enabling Act. 534 U.S. at 513-15, 122 S.Ct. 992; *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168-69, 113 S.Ct. 1160, 122 L.Ed.2d 517 (1993); Saritha Komatireddy Tice, Note, “A ‘Plausible’ Explanation of Pleading Standards: *Bell Atlantic Corp. v. Twombly*,” *41131 *Harv. J.L. & Pub. Pol’y* 827, 832 n. 49 (2008). As the Court explained in *Twombly*, “*Swierkiewicz* did not change the law of pleading, but simply re-emphasized ... that the Second Circuit’s use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules.” 550 U.S. at 570, 127 S.Ct. 1955. But Title VII cases are not exempted by *Swierkiewicz* from the doctrine of the *Iqbal* case. *Iqbal* establishes a general requirement of “plausibility” applicable to all civil cases in federal courts.

It does so, however, in opaque language: “The

plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” 129 S.Ct. at 1949. In statistics the range of probabilities is from 0 to 1, and therefore encompasses “sheer possibility” along with “plausibility.” It seems (no stronger word is possible) that what the Court was driving at was that even if the district judge doesn’t think a plaintiff’s case is more likely than not to be a winner (that is, doesn’t think $p > .5$), as long as it is substantially justified that’s enough to avert dismissal. Cf. Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A). But when a bank turns down a loan applicant because the appraisal of the security for the loan indicates that the loan would not be adequately secured, the alternative hypothesis of racial discrimination does not have substantial merit; it is implausible.

Behind both *Twombly* and *Iqbal* lurks a concern with asymmetric discovery burdens and the potential for extortionate litigation (similar to that created by class actions, to which Rule 23(f) of the civil rules was a response, *Isaacs v. Sprint Corp.*, 261 F.3d 679, 681 (7th Cir.2001); *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir.1999); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 162-65 (3d Cir.2001); *Vallario v. Vandehey*, 554 F.3d 1259, 1263 (10th Cir.2009); Fed.R.Civ.P. 23(f) Committee Note) that such an asymmetry creates. *Ashcroft v. Iqbal*, *supra*, 129 S.Ct. at 1953; *Bell Atlantic Corp. v. Twombly*, *supra*, 550 U.S. at 557-59, 127 S.Ct. 1955; *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir.2009); *Beck v. Dobrowski*, 559 F.3d 680, 682 (7th Cir.2009); *Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1046-47 (9th Cir.2008). In most suits against corporations or other institutions, and in both *Twombly* and *Iqbal*-but also in the present case-the plaintiff wants or needs more discovery of the defendant than the defendant wants or needs of the plaintiff, because the plaintiff has to search the defendant’s records (and, through depositions, the minds of the defendant’s employees) to obtain evidence of wrongdoing. With the electronic archives of

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

large corporations or other large organizations holding millions of emails and other electronic communications, the cost of discovery to a defendant has become in many cases astronomical. And the cost is not only monetary; it can include, as well, the disruption of the defendant's operations. If no similar costs are borne by the plaintiff in complying with the defendant's discovery demands, the costs to the defendant may induce it to agree early in the litigation to a settlement favorable to the plaintiff.

It is true, as critics of *Twombly* and *Iqbal* point out, that district courts have authority to limit discovery. E.g., *Griffin v. Foley*, 542 F.3d 209, 223 (7th Cir.2008); *Searls v. Glasser*, 64 F.3d 1061, 1068 (7th Cir.1995); *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 563 (7th Cir.1984); *Mwani v. bin Laden*, 417 F.3d 1, 17 (D.C.Cir.2005). But especially in busy districts, which is where complex litigation is concentrated, the judges tend to delegate that authority to magistrate judges. And because the magistrate judge to whom a *412 case is delegated for discovery only is not responsible for the trial or the decision and can have only an imperfect sense of how widely the district judge would want the factual inquiry in the case to roam to enable him to decide it, the magistrate judge is likely to err on the permissive side. "One common form of unnecessary discovery (and therefore a ready source of threatened discovery) is delving into ten issues when one will be dispositive. A magistrate lacks the authority to carve off the nine unnecessary issues; for all the magistrate knows, the judge may want evidence on any one of them. So the magistrate stands back and lets the parties have at it. Pursuit of factual and legal issues that will not matter to the outcome of the case is a source of enormous unnecessary costs, yet it is one hard to conquer in a system of notice pleading and even harder to limit when an officer lacking the power to decide the case supervises discovery." Frank H. Easterbrook, "Discovery as Abuse," 69 *B.U. L.Rev.* 635, 639 (1989); see also Milton Pollack, "Discovery-Its Abuse and Correction," 80 *F.R.D.* 219, 223 (1979);

Virginia E. Hench, "Mandatory Disclosure and Equal Access to Justice: The 1993 Federal Discovery Rules Amendments and the Just, Speedy and Inexpensive Determination of Every Action," 67 *Temple L.Rev.* 179, 232 (1994).

This structural flaw helps to explain and justify the Supreme Court's new approach. It requires the plaintiff to conduct a more extensive precomplaint investigation than used to be required and so creates greater symmetry between the plaintiff's and the defendant's litigation costs, and by doing so reduces the scope for extortionate discovery. If the plaintiff shows that he can't conduct an even minimally adequate investigation without limited discovery, the judge presumably can allow that discovery, meanwhile deferring ruling on the defendant's motion to dismiss. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir.2003) (en banc); *Coss v. Playtex Products, LLC*, No. 08 C 50222, 2009 WL 1455358 (N.D.Ill. May 21, 2009); Edward A. Hartnett, "Taming *Twombly*, Even After *Iqbal*," 158 *U. Pa. L.Rev.* 473, 507-14 (2010); Suzette M. Malveaux, "Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of *Iqbal* on Civil Rights Cases," 14 *Lewis & Clark L.Rev.* 65 (2010). No one has suggested such a resolution for this case.

The plaintiff has an implausible case of discrimination, but she will now be permitted to serve discovery demands that will compel elaborate document review by Citibank and require its executives to sit for many hours of depositions. (Not that the plaintiff is capable of conducting such proceedings as a pro se, but on remand she may-indeed she would be well advised to-ask the judge to help her find a lawyer.) The threat of such an imposition will induce Citibank to consider settlement even if the suit has no merit at all. That is the pattern that the Supreme Court's recent decisions are aimed at disrupting.

We should affirm the dismissal of the suit in its entirety.

614 F.3d 400, 77 Fed.R.Serv.3d 203
(Cite as: 614 F.3d 400)

C.A.7 (Ill.),2010.
Swanson v. Citibank, N.A.
614 F.3d 400, 77 Fed.R.Serv.3d 203

END OF DOCUMENT

TAB 6

REPORT: DUKE CONFERENCE SUBCOMMITTEE

TO: Civil Rules Advisory Committee

FROM: Hon. John G. Koeltl, Chair Duke Conference Subcommittee

The Duke Conference Subcommittee has been formed to determine the best ways to seize the benefits of the papers, panel discussions, and general participation presented at the Conference. The Conference generated a wealth of valuable ideas that deserve prompt and effective consideration. The importance of carrying forward the impetus provided by the Conference is reflected in the Report to the Chief Justice.

The Subcommittee launched its work during a conference call meeting on September 10. Notes are attached.

Many of the Conference ideas seem best suited to implementation by means that do not involve amending the Civil Rules. Some — such as the repeated suggestions that the Rules are just fine as written, and what is missing is solid enforcement — seem best considered as suggestions for developing programs and materials that will better educate judges, and perhaps the bar, in pervasive but general ways. Many offer more detailed suggestions of best practices that can be followed within the present rules. The frequently repeated pleas for prompt, continuing, and active case management are a familiar example. Again, manuals, best-practices guides, and education are useful tools to address these concerns. But many of these suggestions also may be cast in terms that suggest possible rule amendments. An example is the suggestion that an early pretrial conference be made mandatory, apparently for fear that educational efforts may not prove sufficiently effective.

Other suggestions go directly to amending the Rules, beginning with Rule 1.

The Subcommittee will sort through the suggestions in an effort to determine which should be initially pursued outside the rule-amending process. A recommendation to take that approach may eventually yield to the conclusion that only a rule amendment will effect the desired improvement; close and continuing attention will be devoted to the more important issues. The Federal Judicial Center will play a central role in these activities.

Consideration of possible rule amendments will begin with a comprehensive review of the Conference materials. Many of the proposals are identified in the Subcommittee Menu, which also is attached. The list is not all-inclusive. Some of the proposals seem unlikely to be manageable in the regular process. The choices reflected in the menu may be wrong, however; suggestions for added rules topics will be welcome. Even within the list, not all ideas are equally strong candidates for development with the resources available for the first phase. The Subcommittee will be aided in its consideration by the reactions of the full Advisory Committee as to relative importance and feasibility.

The menu includes many suggestions directed to initial disclosure under Rule 26(a)(1) and to discovery more generally. Continuing dissatisfaction with discovery practice is no surprise. These suggestions raise important questions as to the allocation of responsibilities among the Discovery Subcommittee, the Duke Conference Subcommittee, any subcommittee that may be assigned to study pleading practices when the time comes to determine whether new rules are needed, and the Advisory Committee. Limits on the amount of work that can fairly be assigned to any one subcommittee, the apparent separability of some issues from others, and the overall value of maintaining the momentum generated by the Conference will affect the ways in which these allocations are made.

SUBCOMMITTEE MENU: RULES PROPOSALS

INTRODUCTION

This memorandum compiles some of the suggestions made at the Duke Conference for amending the Civil Rules. Many of the suggestions addressed discovery and pleading. Most of those suggestions are omitted here. The Discovery Subcommittee is working on preservation and spoliation issues, and may take up other discovery issues. But some discovery issues are noted here because it may become useful for this Subcommittee to address them. Any allocation between the Discovery Subcommittee and this Subcommittee will turn on the overall volume of discovery issues taken on for prompt attention and on the severability of some issues from the ongoing work of the Discovery Subcommittee. Pleading issues are being addressed separately for the time being; this Subcommittee or some new Subcommittee may be asked to address them when the time for action comes close.

The mass of Conference materials is great. A few proposals have been omitted deliberately because they do not seem likely prospects for present consideration. Others may have been overlooked. Subcommittee members should add any proposal that seems to merit consideration, drawing not only from explicit Conference proposals but also from ideas inspired by the Conference.

Descriptions of the proposals are generally brief. The purpose is to identify topics that deserve prompt development, not to provide full-blown evaluation.

The proposals are organized roughly in the order of Rule number, recognizing that some proposals affect two or more Rules and that others do not fit well within any present rule.

Some proposals present issues that might be addressed by rules amendments, but also might be addressed by other means, often working within the framework of a present rule. These proposals are described separately, choosing those that seem plausible candidates for consideration in the rulemaking process.

I RULES PROPOSALS

The Duke Conference deliberately and successfully sought out participants representing the full spectrum of experience with, and perspectives on, contemporary practice under the Civil Rules. As hoped, they generated proposals that reflect the diversity of their experiences and perspectives. Conflicting proposals may indicate that present practice has it just about right, but must be evaluated to make that diagnosis. So too, the absence of conflict does not mean that a proposal is worthy of further consideration.

General

One ABA respondent thinks the Civil Rules “include too much detailed preparation and filing.”

Rule 1

Many participants drew support from the lofty goals of Rule 1 — the “just, speedy, and inexpensive determination of every action and proceeding.” Some of the discussion suggested, or at least implied, that Rule 1 might be revised to provide greater direction on better realizing these related aspirations.

The need to set reasonable time limits for processing an action, and for holding litigants to the time limits, might be expressed.

The need for proportionality, reasonably tailoring the level of litigation activity to the needs of each action, might be expressed in Rule 1, not merely in the discovery rules.

Lawyers, not only the courts, might be made responsible for working toward the Rule 1 goals.

Various arguments were made that tradeoffs must be made between the Rule 1 goals. Speedy and inexpensive determinations may in some sense reduce the total quality of justice produced by the system across all cases, but they are intrinsically important. This concern is in part another argument for expressing the need for proportionality. Essentially the same conclusion can be reached from an opposite direction: justice is not sacrificed but achieved by increasing speed and reducing expense in order to maintain a system that is reasonably available to determine disputes. Alan Morrison's paper observes: "The good news is that courts and parties rarely rely on Rule 1"; "to be accurate, Rule 1 should be recast to require the courts to provide a 'just determination of every action,' and to do so with 'appropriate speed and without undue expense' under the circumstances."

ACTL/IAALS pilot project rules would add these words to Rule 1: "just, timely, efficient, and cost-effective determination * * *." In addition, whether as part of Rule 1 or perhaps as a new Rule 1.1, the rules would direct the court and the parties to "assure that the process and the costs are proportionate to the amount in controversy and the complexity and importance of the issue. The factors to be considered by the court * * * include, without limitation: needs of the case, amount in controversy, parties' resources, and complexity and importance of the issues at stake in the litigation." The Center for Constitutional Litigation responds that "[m]andating cost/benefit analysis is neither desirable nor practical." The attempt in Rule 26(b)(2) to require proportionality in discovery "is difficult to apply, leads to inconsistent results, and has precluded discovery in meritorious cases." It should not be extended.

The most ambitious Rule 1 proposal is advanced in Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 *Denver U.L. Rev.* 287 (2010), presented as a conference paper. A brief summary would be misleading. Essentially he argues that Rule 1 reflects the values of 1938: procedure is separate from substance, it is instrumental, it works best when judges are free from any technical rules but can exercise discretion to proceed in ways that achieve the best result in each particular case. A different view is required today. "[T]he most sensible goal for procedure is distributional. * * * [A]n optimal error risk for a given case is that which results from distributing error risk optimally across different cases and litigants. * * * Adjudication has a public purpose," to enforce substantive law. "[O]utcome error should be measured in terms of how well litigation outcomes further these public goals, not in terms of how well they satisfy the preferences of parties to a suit." Different substantive rights invoke different levels of importance — "if the substantive law protects moral rights, the procedures offered to adjudicate lawsuits involving those rights should take account of their moral weight." There is more. Rethinking the purposes of procedure does not lead to specific rules proposals, but it could be a place to begin.

Rule 2: One Form of [Transsubstantive] Action

Skepticism about the attempt to squeeze all varieties of litigation into a single "transsubstantive" set of rules was expressed frequently. Much of the attention focused on pleading and discovery, but the questions are more general. Reform could be sought by different strategies. One would carry forward the general character of the rules, making special provision only for "complex" cases or categories of cases that in practice have proved to fare poorly in the general rules. Another would be to create a "simplified" system that reduces the opportunities for extensive litigation. Pleading and discovery are likely to hold center stage in exploring these matters. But the

purpose of the inquiry may be sufficiently separate from the base-line pleading and discovery questions to justify independent consideration.

The IAALS “areas of convergence” paper, p. 8, suggests adhering to transsubstantivity in general, but with flexibility to create different sets of rules for certain types of cases. It found “some support” for experimenting with simplified procedure.

The ABA 21st Century proposals were “open to the idea that different standard timelines might be applied depending on the nature or size of the matter,” pointing to a 4-track system in New Jersey. Don L. Davis pointed to the three-level Discovery Control Plans under Tex.R.Civ.P. 192.4.

Vice Chief Justice Hurwitz describes special Arizona procedures for medical malpractice actions, including three sets of uniform interrogatories — plaintiff to individual health-care provider, plaintiff to institutional provider, and defendants to plaintiff. There also is a complex case court project, governed by separate pretrial rules.

Professor Gensler writes at length on case management, exploring alternatives that include more particularized, less discretion-dependent rules for all cases; abandoning trans-substantivity, in whole or in part, by adopting substance-specific rules tailored to different categories of litigation; “track” systems more formalized than general case-management authority; and “simplified rules” for some — presumably simpler — types of cases.

One ABA respondent pointed to California Code of Civil Procedure §§ 90-100 as a model of Economic Litigation for Limited Civil Cases.

Rule 4

Professor Carrington urges that the Committee consider amending Rule 4(d) waiver-of-service provisions by extending the payment of expenses of service to defendants who are not located in the United States, see Rule 4(d)(2).

Rule 7

The ABA would require that every motion be accompanied by a certificate that counsel have conferred in good faith, or attempted to confer, to resolve or narrow the issues in dispute. Only stipulated motions and those for summary judgment would be excepted. Some ABA respondents, however, suggested that “meet and confer” is a waste of time — no one gives up anything anyway. A somewhat different criticism is that the requirement encourages unreasonable behavior: the lawyer can always back off before the court learns of it by a motion.

There was criticism of local rules read to require “permission” to file a motion. But several respondents in the NELA survey urged such a requirement for summary judgment, at least in employment cases.

Rule 8(b)

Quite apart from pleadings that state a claim, answers also came in for substantial criticism. The ABA proposals reflect a fear that “responsive pleading has become an expensive game.” “[A]n answer is often an opaque, uninformative document.” It would be cheaper to allow a simple general denial along with any affirmative defenses, but this alternative seems unattractive, particularly if pleading obligations are raised for claims. Plaintiffs could help themselves by making fact

allegations “in short factual sentences.” This is not a proposal to revise Rule 8(b). Earlier versions may suggest the reason — Rule 8(b) is just fine as written; the problem is widespread disregard.

Many NELA respondents expressed great dissatisfaction with answers that flout Rule 8(b) requirements.

Rule 11

Professor Miller suggests it might help to partially reinstate compensation and punishment as legitimate objectives “to promote efficiency and compliance.” In addition, it may be possible to “see if standards of lawyer behavior can be further articulated to produce a sophisticated and nuanced regime that will minimize litigation misconduct, whatever its form, but at the same time recognize the need to protect adversarial-system values.” 60 Duke L.J. 1, 126.

One ABA respondent suggested a deadline to abandon claims or defenses. If a claim or defense is not in fact pursued after the deadline, the adversary should be awarded the fees and expenses incurred in preparing to contest it.

Rule 12

The ABA suggests adding a requirement that except in complex cases, the court rule promptly on a motion to dismiss, and must rule within 60 days after full briefing.

Rule 16

Most of the proposals aimed at pretrial conferences recommend stronger case management by more vigorous use of present Rule 16. But the New York City Bar recommendation is this: “Strong and consistent judicial management will * * * be enhanced by requiring that the Rule 16(a) initial pre-trial conference be mandatory, rather than discretionary as it is now.” A defendant that intends to file a Rule 12(b) motion or a motion for summary adjudication should inform the court so that the initial pretrial conference can be scheduled before the motion is filed. ACTL/IAALS Rule 8.1 similarly requires a pretrial conference “as soon as practicable after appearance of all parties.” Rule 8.2 requires the judge to set a trial date as soon as possible after the initial conference. Rule 9.4 independently requires that a trial date be set at the earliest practicable time, and forbids change “absent extraordinary circumstances.”

In addressing case management, Professor Miller emphasizes the need for training, education, and other work outside the rules. But he adds: “It may be that recent thinking about management matters has been too static and that Rule 16 and the Manual are not yet sufficiently delineated and textured to meet the challenges of the more difficult aspects of contemporary litigation.” 60 Duke L.J. 1, 117-118.

Rule 23

The Center for Constitutional Litigation takes issue with “common impact” rulings by some courts that are described as allowing certification of a class only if each and every class member is harmed in the same way. The proposal would amend Rule 23(b)(3) so that the predominance of common questions is determined “solely based on issues presented at trial,” and so that the fact or quantity of individual injury “need not be proven at trial.” A new rule 23(c)(6) would support this provision by permitting an award of aggregate class damages, to be allocated after trial by statistical or sampling methods, or some other reasonable method.

Rule 48

Judge Higginbotham's paper reflects continuing interest in restoring the 12-person civil jury, adding a casual footnote suggesting a 10-2 majority verdict rule. (An effort to restore 12-person juries was defeated in the mid-1990s.) Paul Carrington's paper also focuses on the 12-person jury.

Rule 56: Summary Judgment

Summary adjudication: The New York City Bar proposes a new procedure that blends disposition on the pleadings with summary judgment as we know it. The proposal is well fleshed out, warranting description of the details. A defendant can make a conventional motion to dismiss for failure to state a claim, and is entitled to a stay of all discovery pending resolution of the motion. Instead, the defendant may answer — including any affirmative defenses and counterclaims — and move for summary adjudication. Summary adjudication requires enhanced initial disclosures that include 14 hours of deposition “of each side,” and other disclosures within a scope determined by the court. Decision is governed by the summary-judgment standard, but may not be deferred for further discovery. Any issue resolved by summary adjudication becomes the law of the case. A plaintiff may move for summary adjudication if the defendant moves for it, and also if the defendant unsuccessfully seeks a conventional Rule 12(b) dismissal or files an answer. The theory is that motions on the pleadings fail too often, in part because leave to replead is commonly given, while summary judgment is available only after costly discovery. Summary adjudication of some issues will control the scope of discovery, even if it does not resolve any claim, counterclaim, or other claim. Determination of the scope of the mandatory disclosure would be shaped by the issues that commonly prove important in the particular type of litigation, and often would be limited to easily available documents and the like.

The New York County Lawyers' Association explicitly disagrees with the City Bar. Issues that are properly decided without discovery can be resolved under Rule 12. Rule 56 can be used to focus summary judgment on specific issues, with authority to stage discovery as appropriate to those issues. The motion for summary adjudication may be used deliberately to delay discovery. And if summary adjudication is granted on some issues, the attempt to deny discovery on those issues might undesirably curtail discovery. And adhering to the summary adjudication would be unfair if subsequent discovery showed it was wrong. (Note: it is unclear how the “law of the case” phrase in the City Bar proposal is intended. Standard law-of-the-case doctrine permits a district court to depart from its own earlier rulings in a case when error appears.)

Stueve & Keenan propose to allow depositions of nonparties only by agreement or order. In part because of this limit they would allow parties to oppose summary judgment by a declaration, “based on substantial facts, of what they reasonably project that a non-party trial witness' testimony will demonstrate. This declaration should also show why receiving the witness's direct testimony through affidavit is not feasible.” Sanctions may be imposed for making a representation “that proves false at trial.”

Accelerated disposition: The ACTL/IAALS proposals include consideration of an “application” procedure adopted in some Provinces of Canada. The details are sketchy. But the idea is that a plaintiff may commence an action with what is in effect a motion for summary judgment, supplying supporting materials — documents and affidavits — at the outset. Depositions are limited to what is in the affidavits. The court may combine the procedure for decision on the record as it develops with a trial on some particular points.

(The 2010 version of Rule 56 allows a party to move for summary judgment at any time until 30 days after the close of all discovery. The Committee Note observes that a plaintiff can move for

summary judgment at the beginning of the action. This procedure may be useful in collection cases, bringing summary judgment back close to its origins. In addition, needs for prompt specific relief can often be addressed by injunction, see Rule 65. Declaratory relief may be suitable for expeditious handling in situations that do not call for much discovery. These opportunities, the newly emphasized availability of partial summary judgment, and the general authority to manage an action probably suffice.)

Prompt Ruling: Complaints heard during the hearings on Rule 56 amendments were repeated at the conference: some courts take too long to rule on summary-judgment motions, and at times fail to rule at all. The ABA advances an expectation that courts are expected to rule promptly, and always within 90 days after full briefing; it is not clear whether this is proposed as a rule amendment.

Permission to File: Several of the NELA respondents suggested that abuses of Rule 56 in employment cases justify imposing a requirement that a party get court permission to file the motion.

Inefficiency: During the Rule 56 review there were several suggestions that deciding a motion for summary judgment often is more work for the judge than a trial. One NELA respondent offered a similar thought: “[I]t has become less time consuming and costly to try a case to a jury than to go through the summary judgment process. So, the rules should do more to encourage trials and also more to discourage summary judgment.” Others voiced the same thought.

Self-Serving Self-Contradiction: An NELA respondent suggests: “Allow clients to change and clarify answers to depositions not only in the transcript verification but later in affidavits and at trial, subject to impeachment.” This addresses the common practice of refusing to consider self-serving, self-contradicting affidavits.

Disposition on an Administrative Record: Proceedings for review on an administrative record often are resolved without discovery. That is the reason why “an action for review on an administrative record” is excluded from initial disclosure by Rule 26(a)(1)(B)(i). The full routine of Rule 56 summary judgment may be more procedure than these cases need. For that matter, the standard for review is different from the summary-judgment standard. It would be possible to adopt a new and streamlined rule specifically for prompt disposition. But there is good reason to believe that courts generally manage to achieve disposition on the administrative record without undue complication or confusion of the parties. Little need appears to pursue this subject.

Rule 68: Settlement

Conference participants addressed settlement from a variety of perspectives. Professor Nagareda’s paper frames the question: “how to regulate the distortive effect that our modern civil process might exert upon the pricing of claims in a world dominated by settlement, not trial.” Current pretrial procedures focus on whether trial should occur, but trials rarely occur. And discovery imposes great costs in moving from motions on the pleadings to summary judgment. Perhaps procedures should be developed to help the parties price the settlement value of the claim. One possibility is a “preliminary judgment,” provided by the court at an early stage; the judgment could be rejected by any party, but would provide a valuable anchor for converging on settlement value.

Rule 68 has hovered somewhere in the back cupboards of the Committee agenda for several years. Informal suggestions, and occasional formal requests, would invigorate Rule 68 by various means. Stiffer sanctions — fee shifting — are the most common element. There has been considerable resistance to taking up this thorny topic in the wake of unsatisfactory attempts in the 1980s and 1990s. But the time may come again.

Initial Disclosures

Rule 26(a)(1) initial disclosures were questioned by many participants. The subject may be sufficiently distinctive to be considered independently of other discovery topics.

The questions were almost mutually offsetting. Some suggest that the initial disclosures are nearly useless because they do not do enough — all of the same materials will be sought again by discovery demands that embrace them within requests that seek all information relevant to the same issues, not merely the information the disclosing party may use to support its own positions. Others suggest that the initial disclosures are unnecessary because they do too much, forcing the parties to work to disclose materials that the other parties would not bother to seek in discovery.

There is a plausible argument that initial disclosures should either be broadened so as to support a meaningful reduction in subsequent discovery, replaced by some other form of automatic discovery, or abandoned.

Abandonment is easy to accomplish. The ABA proposes both to broaden and to narrow initial disclosures. Disclosure of witnesses would be broadened to cover “each individual likely to have significant discoverable information about facts alleged in the pleadings, identifying the subject of the information for each individual.” It would be narrowed by deleting any initial disclosure requirement as to documents. The parties would be expected to discuss and attempt to agree on exchange of documents before the initial pretrial conference.

Replacement might take a variety of forms of automatic discovery. Initial efforts to develop form interrogatories are under way. A relatively modest approach might amend Rule 33 to allow serving interrogatories, of a sort perhaps vaguely defined, with the complaint and with the answer. The interrogatories could address the topics now covered by Rule 26(a)(1), or go further. They might include a request to produce all documents identified in the response, or perhaps some subset of the identified documents.

Expanded disclosure obligations can be easily imagined. Arizona Rule 26.1 establishes sweeping disclosure obligations that could be used as a model. (The IAALS survey of Arizona lawyers paints a rather mixed picture on experience under Rule 26.1, but supports the conclusion that this approach merits consideration.) The Center for Constitutional Litigation would require that, in a civil equivalent of *Brady* requirements for prosecutors, defendants produce materials that support the plaintiff’s allegations. Judge Baylson suggests a “civil Brady” rule in broader terms: concepts of professional responsibility should oblige attorneys to disclose all materially unfavorable information (also rendered as information favorable to the other side), and parties should be likewise required to disclose; rules of professional confidentiality and privilege should not restrict this duty.

In addition to scope, timing also might be addressed. The ABA proposes that the plaintiff’s disclosures be made within 30 days from filing the complaint, and the defendant’s within 30 days from filing an answer.

There was one particular rule suggestion. An NELA respondent said that defendants almost always identify the address and phone number of witnesses as “c/o the attorney.” The rule should be clear that the actual address and phone number are required.

Discovery: Detailed Changes

Allocation of discovery work between this Subcommittee and the Discovery Subcommittee will be an ad hoc accommodation of the agendas and interests of each. Often enough it will make

sense to assign detailed proposals to the Discovery Subcommittee. But coordination requires initial consideration — it may be useful for this Subcommittee to open up proposals that seem worthy, whether the result is to develop them fully or instead is to commend them for full development by the Discovery Subcommittee.

Scope: The ABA 21st Century proposals reflect a division among Special Committee members — some would eliminate discovery on the “subject matter” of the action. The final ACTL/IAALS proposals suggest consideration of a narrower scope — perhaps by changing the definition of relevance.

Cost Shifting: A proposal by Lawyers for Civil Justice illustrates the kinds of topics that are so important as to be readily separated from more detailed discovery work. This proposal is captured in the first sentence of the suggested rule: “A party submitting a request for discovery is required to pay the reasonable costs incurred by a party responding to a discovery request propounded under these Rules.” (A similar protection for nonparties appears later.) The ACTL/IAALS final report suggests considering cost-shifting or co-pay rules.

Professor Nagareda suggests that a plaintiff should pay the defendant’s discovery costs if the defendant wins on summary judgment. How about partial summary judgment? Affecting the tactical uses of Rule 56 motions?

Controlled Access: Judge Higginbotham’s proposal is a good (and brief) example of a generic possibility: Require the parties to file statements of “likely controlling issues of fact and law.” The court then asserts early case control over access to discovery in two steps: First, a hearing on access; then a hearing on access with a “peek at the merits.” The latter being an effort to reinforce a determination that a claim has been stated and if there is a reasonable basis for accessing further discovery.”

Judge Baylson makes a related suggestion that might be cast in rule form: mid-way during discovery, each party files a statement of contentions “in limited, numbered paragraphs with record support, with the opposing party making a substantive response.” See the Manual for Complex Litigation (Fourth), § 11.473. This can help the parties adjust their discovery efforts.

Girard Proposals: Three specific proposals by Daniel Girard provide a good illustration of possible small-scale revisions that might accomplish quite a bit. They are advanced in Girard & Espinosa, “Limiting Evasive Discovery: A Proposal for Three Cost-Saving Amendments to the Federal Rules,” 87 Denver U.L. Rev. ___ (2010):

(1) Evasive responses: This proposal draws from concern that discovery responses often are evasive, and the process often transforms from the intended “request-response” sequence to “an iterative, multi-step ordeal” in which the pre-motion conference requirement itself serves as an invitation to overbroad requests that anticipate over-narrow responses, negotiation, and eventual responses that may or may not be evasive. Rule 26(g) implicitly forbids evasive responses, but it should be made explicit by adding just two words to Rule 26(g)(1)(B)(i): signing a discovery request, response, or objection certifies that it is “not evasive, consistent with these rules and * * *.”

(2) Rule 34: Production added to Inspection: Rule 34(a)(1) refers to a request “to produce and permit the requesting party * * * to inspect, copy * * * “ documents. Rule 34(b)(1)(B) directs that the request “specify a reasonable time, place, and manner for the inspection and for performing the related acts.” 34(b)(2)(B) directs that for each item or category, the response must “state that inspection and related activities will be permitted as requested,” or object. “Producing” enters only in (b)(2)(D), referring to electronically stored information, and then again in (b)(2)(E), specifying

procedures for “producing documents or electronically stored information.” Rule 34(c) invokes Rule 45 as the means of compelling a nonparty to “produce documents and tangible things.” Girard observes that the common practice is simply to produce, rather than make documents available for inspection and copying. This leaves gaps in the language of the rules. Rule 37(a)(3)(B)(iv) should be amended to include “fails to produce documents” — a motion to compel may be made if “a party fails to produce documents or fails to respond that inspection will be permitted — or fails to permit inspection — as requested under Rule 34.” In addition, a new provision should be added to Rule 34(b)(2)(B): “If the responding party elects to produce copies of documents or electronically stored information in lieu of permitting inspection, the response must state that copies will be produced and the production must be completed no later than the date for inspection stated in the request.”

(3) Rule 34: General Objections: The underlying behavior is a tendency of responding parties to begin a response with a boilerplate list of general objections, and often to repeat the same objections in responding to each individual request, and at the same time to produce documents in a way that leaves the requesting party guessing whether responsive documents have been withheld under cover of the general objections. The proposed cure is to add this sentence to Rule 34(b)(2)(C): “Each objection to a request or part thereof must specify whether any responsive documents are being withheld on the basis of that objection.” (Judge Baylson makes a related suggestion, observing that “[s]ome parties serve objections routinely and maintain them * * *, preferencing every response as ‘subject to objections.’ This tactic delays discovery and may obfuscate the search for facts.” Absent party agreement otherwise, “objections not specifically sustained by the court in a certain time frame should be deemed overruled; the discovery shall be provided as if an objection had never been made.”)

Start Discovery Sooner: Delaying discovery until after the Rule 26(f) conference is a bad idea, or so it is argued by a respondent to the ABA survey.

Stay Discovery Pending Motions: Various suggestions were made about staying discovery pending disposition of a motion to dismiss. The ABA proposal is that the court has discretion whether to stay discovery, but adds that the court should promptly rule on the motion — the ruling should not take more than 60 days in cases that are not “complex.” The ACTL/IAALS Pilot Program Rule 6.1 similarly relies on discretion. The New York City Bar proposal would stay discovery pending disposition of a motion to dismiss or for summary adjudication, unless the court finds good cause to allow discovery. In order to deter strategic use of the motions, discovery should proceed on an expedited basis if a motion is made and denied. Lawyers for Civil Justice propose a stay unless the court finds that particularized discovery is necessary to preserve evidence or prevent undue prejudice.

Exchange Initial Discovery Requests: The New York City Bar recommends that parties be required to exchange actual discovery requests at the Rule 26(f) conference and a Rule 16(b) conference so that the reasonableness of the discovery can be discussed with the court.

Place of Depositions: More than one NELA respondent would require “corporate deponents” to travel to the district where litigation is conducted. Cf. present Rule 37(d)(1).

Word-Processing Format: A suggestion that pops up at intervals over the years is renewed: Rule 33, 34, and 36 discovery requests should be in an electronic form that allows responses directly in the form.

Number of Interrogatories: An NELA respondent suggests that the limit on the number of interrogatories should be deleted. A larger number of simpler, subject-specific interrogatories can be drafted and answered with less time and expense.

Contention Interrogatories: The ABA finds that contention interrogatories “have become a tool of oppression and undue cost”; they should be prohibited absent agreement of the parties or court order. The New York City Bar believes that contention interrogatories “to elicit contentions and narrow areas of disagreement can be effective, but typically not until later in the discovery process.”

Limit Rule 34: Lawyers for Civil Justice and allies propose limits to 25 requests, to 10 custodial or information sources, and to two years prior to the complaint. Others propose comparable limits; Arizona limits requests to 10 distinct items or categories of items.

Requests to Admit: The ABA again finds oppression, and recommends a limit of 35 requests. (The FJC survey, p. 10, found requests used in 25% to 30% of the closed cases; plaintiffs and defendants reported different medians and means, but the means were always well above the medians — indicating that means, mostly hovering just above 20, are influenced by numbers at least veering toward 35 in quite a few cases.) The ACTL/IAALS invokes the general principle of proportionality, interpreting it to mean that contention interrogatories and requests to admit should be used sparingly, if at all.

Other Limits: The ACTL/IAALS final proposals include limiting the persons from whom discovery can be sought (Arizona allows depositions of parties, expert witnesses, and document custodians; court permission or stipulation is required for others); limiting the time available for discovery; limits on the amount of money a party can spend, or force its opponent to spend on discovery; discovery budgets approved by the clients and the court. Stueve & Keenan would limit depositions to parties, requiring agreement or order to depose expert witnesses and nonparties; in return, they would establish nationwide subpoenas to compel trial testimony.

Sanctions: There are many laments that sanctions are rarely imposed, generating reflex refusals to provide discovery designed to provoke a motion to compel. One NELA respondent spoke to the other side: “[T]he presumption of sanctions in Rule 37 makes it too risky for many individual parties to challenge the discovery responses of well-financed adversaries.”

Definitions: An NELA respondent: “Add a definitions section to FRCP to reduce wrangling about, for example, whether questions containing ‘respecting,’ or ‘relevant to’ or ‘related to’ must be answered, and if so, what these words include.”

Expert Witnesses

The broader proposals for restricting expert-witness practice are better suited to the Evidence Rules than to the Civil Rules. The ACTL/IAALS pilot program rule 11 would require that a Rule 702 expert’s testimony be “strictly limited to the contents of the report” furnished in writing. That could be accomplished in Rule 26(a)(2)(B). In addition, the rule would allow only one expert witness per party to testify on “any given issue.” (Arizona allows only one witness per side on an issue; if coparties cannot agree, the court chooses.) Their final report suggests that depositions of experts be eliminated if the testimony is limited to the contents of the report.

II NONRULES PROPOSALS

As noted above, some suggestions for reform could be implemented either by rule amendments or by other means of encouraging best practices. In addition, some proposals may fit within the Rules Enabling Act framework without looking toward actual rule amendments. Only a few of these suggestions are noted here.

Enforce Rules

There were many comments, often in different contexts, that much could be accomplished by simply enforcing present rules. One example recurred through the NELA responses — many NELA members believe courts do not honor the discovery rules in ERISA litigation. Apparently the courts treat ERISA claims as review on an “administrative” record that is not to be supplemented..

Summary Judgment

The NELA respondents produced staggering numbers of responses bemoaning delay in ruling on summary judgment until the eve of trial. A related and also frequently expressed concern is the practice of holding a final pretrial conference before ruling on summary judgment. And there are requests for oral argument. A variation suggests oral argument before the nonmovant has to file a brief. None of these seems particularly amenable to rule text provisions.

Local Rules

“Local rules projects” have been pursued under the aegis of the Standing Committee. Continuing dissatisfaction with local rules was expressed in several of the surveys. There was widespread feeling that local rules are not always consistent with the national rules. In addition, implementation of the local rules themselves may not be consistent — some individual judges depart from both national and local rules.

Local rules also were praised by some of the ABA answers. One virtue is that they give notice of practices that will be followed whether or not expressed in a formal rule — better that all lawyers have access, not just the knowing insiders. Another is that they may be useful means of trying out ideas that may be proved to warrant general adoption. Yet another may be flexibility: generating sets of model local rules for specific types of litigation may be a way to respond to the shortcomings of transsubstantive procedure. Patent litigation rules are offered as an example.

The National Employment Lawyers Association found a consensus that local rules are not consistently applied within the district. It recommends that the judges of each district meet periodically to discuss their variations on local practice. (This does not seem a likely subject for Rule 83.)

Miscellaneous

Require attorneys to disclose to their own clients an expected budget of the costs of the case from beginning to end, including attorney fees; this should include aggregate data from other cases, and “how they are resolved, on average.”

Go Slow

One ABA response echoed a theme that sounds periodically in rules discussions: “Please stop monkeying with the Civil Rules every year or so. Stability and predictability are important * * *. Trying to fix every new problem with a new civil rule is making our system more complex, expensive, and Canonical.”

“Duke” Subcommittee Notes: September 10, 2010

The Duke Subcommittee held a conference call on September 10, 2010. Participants included Judge John G. Koeltl, Chair, and members Professor Steven S. Gensler, Judge Paul W. Grimm, and Judge Gene Pratter. Judge Mark R. Kravitz participated as chair of the Advisory Committee. Judge Barbara Rothstein participated as Director of the Federal Judicial Center, and Judge Diane P. Wood participated as liaison from the Standing Committee. John Rabiej, Chief of the Rules Committee Support Office, also participated.

Judge Koeltl began the call by sketching the scope of the Subcommittee’s responsibilities. The Duke Conference last May generated much valuable empirical information, with more to come. It also generated many suggestions for work to be done. The work will include consideration of many proposals to amend the Federal Rules of Civil Procedure. It also will include work by the Rules Committees outside the formal Enabling Act process to encourage the work of other groups and, in varying ways, participate in such work. Programs to educate judges and lawyers in the opportunities available to improve administration of present rules will be important.

There may be opportunities to shape the development of manuals that present similar work in more detail, readily and continually available. Professor Marcus has noted that many of the American Bar Association Litigation Section suggestions look like a litigation manual. The Court Administration and Case Management Committee has created a Civil Litigation Management Manual; the second edition is about to appear. It may be possible for this Subcommittee to find a way to enlist the Advisory Committee in the evolution of successive editions.

Continuing empirical projects also will be important. Pilot projects may be used to test new ideas, and will be useful if they are carefully designed at the outset to support accurate evaluation of the results. Still other forms of work may be devised.

Initial consideration of Civil Rules amendments will be undertaken by different groups within the Advisory Committee. Many of the specific proposals, and many of the concerns expressed by the participants, focused on discovery and pleading. The Discovery Subcommittee has already begun to study issues surrounding preservation of potentially discoverable information, with a particular focus on electronically stored information. Other specific discovery issues may also fall within its responsibilities. The first steps in canvassing possible rule changes responding to the pleading decisions in the *Twombly* and *Iqbal* cases are being taken by the Advisory Committee chair and reporter. If—or when—the time comes to develop specific proposals, it will be decided whether the work should proceed without the help of a subcommittee. If a subcommittee is assigned to lay the groundwork, it will be necessary to decide whether, in light of other subcommittees’ responsibilities, to form a new subcommittee or to rely on an existing subcommittee.

Other rules changes will fall to this Subcommittee. There may be some discovery questions that should be considered by this Subcommittee because they are far separate from the detailed proposals developed by the Discovery Subcommittee or because the Discovery Subcommittee has as much work as it can handle and coordinated work seems feasible. Suggestions to adopt presumptive limits on the permissible number of documents that can be requested under Rule 34, or on the permissible number of requests to admit under Rule 36, may be an example. Another might be finding a way to sharpen the Rules focus on the need for proportionality. The concept appears, without the label, in Rule 26(b)(2)(C), and in the cross-reference to (b)(2)(C) at the end of Rule 26(b)(1). The questions whether “proportionality” should be referred to as such, and whether it might be directly incorporated in defining the scope of discovery, may be fairly severable from the ongoing work of the Discovery Subcommittee. So of the questions whether there is some way to reduce obfuscating, delayed, and evasive responses to discovery requests. Rule 26(g) addresses this problem, but there may be ways to make it more effective. As it is, the fundamental statement of the obligation to ensure that discovery requests, responses, and objections are neither unreasonable nor

unduly burdensome is buried at the very end of the longest rule in the books. This vital principle may need a more prominent statement in the rules.

Another possibility for the discovery rules would be to undertake a fundamental rethinking of the 1938 package of notice pleading, broad discovery, and summary judgment. That work could be undertaken apart from the ongoing Discovery Subcommittee work to improve the detailed implementation of the basic present system. But there is no sense that the time has come for such drastic revision. The Rules Committees have not shown any sign of interest in such a project. There is little reason to expect that any support would emerge. And in the unlikely event that the rules committees might come to think fundamental restructuring is desirable, there is no reason to believe there would be any substantial support beyond the committees. That seems to hold even for less drastic steps, such as further narrowing the scope of discovery that is available without showing good cause. Work of this scope will not be pursued further.

Other rules topics remain. One that drew some attention was to adopt an across-the-board requirement that any motion be preceded by a pre-motion conference, at least among the lawyers and possibly with the court.

Apart from work focused on possible Rule amendments, other projects are likely to involve cooperation with other groups. The Federal Judicial Center has already launched new education programs for judges that reflect lessons learned from the Duke Conference. This Subcommittee may find a useful role to play in supporting these programs. Bar associations and other groups will become involved in programs aimed at practicing lawyers; again, this Subcommittee may find a useful supporting role.

Another useful effort may involve development of “best practices” guides. Some were discussed at the Duke Conference, including Susman’s Rules for cooperation that the discovery panel seemed to accept as good practices.

The most important thing is to seize and carry on the forces generated by the Conference. The purpose was to seek help in shaping the Rules Committee’s agendas. Great help was provided. It must not be allowed to go to waste.

Judge Kravitz picked up the example of the Susman Rules. They cover a variety of discovery topics. One is that each side can pick 20 documents from the other’s privilege log and submit them for in camera examination by the trial judge for a determination whether there is a valid privilege claim. This practice can greatly reduce the misuse of privilege logs to shield critical documents from discovery. Expert depositions are limited to four hours. Cooperation is encouraged — the lawyers agree to call each other before sending a letter or e-mail message. All depositions are videotaped, a process that by itself elicits more cooperative behavior. Agreement is encouraged on such matters as the identification of people whose e-mail messages must be preserved, allowing destruction of others in the ordinary course of system operation.

General discussion began with the observation that Elizabeth Cabraser probably would endorse the Susman Rules. They are calculated to eliminate the “stonewalling” that plaintiffs’ lawyers find a continuing problem.

It was noted that some of the best practices discussed at the Conference are established in local district rules. The pre-motion conference is an example. And attorneys who distrust each others’ tactics use video depositions.

Another participant noted that “this is cooperative behavior.” A video deposition is very useful if there’s a dispute about what happened. At least one magistrate judge asks lawyers to videotape their conferences, and finds it works very well. If we want to “tweak the rules,” “cooperation” could be worked into Rule 26(f). The District of Maryland Guidelines add an expectation of privacy. The Guidelines became effective last July 1; they were the work of a bar advisory committee. In time, they may provide a useful subject for study. One approach would be to interview attorneys and clients to find out whether the local policy makes it easier to cooperate. Although the Guidelines are already in place, they could be treated as a useful pilot project. Maryland has the advantage of being close to the Federal Judicial Center.

Judge Rothstein noted that the Federal Judicial Center has a number of case-management manuals, called pocket guides. It may be desirable to develop some more pointed guides. The Sedona Conference has developed collaboration principles that might be used to good advantage. Another participant suggested that cooperation is so important that it is useful to put it into the rules in addition to relying on guides. A further suggestion was that experience shows that cooperation is easier for lawyers if the court stresses the need. “Non-confrontational” discovery may be a less threatening label than “cooperative” discovery.

A related suggestion was that bar groups such as the ABA Litigation Section could put on programs to show that vigorous representation is consistent with cooperation, and indeed is better for clients.

The importance of best practice guides and other forms of encouragement was noted by recalling a theme that sounded periodically throughout the conference. If we simply followed present rules in good faith, there would be no need for new rules that attempt to coerce the behavior that the rules now contemplate.

A rejoinder observed that eliciting full cooperation through the present rules will not satisfy those who want significant changes in what the rules permit. The American College of Trial Lawyers and the Institute for the Advancement of the American Legal System want significant changes that would radically limit discovery. The ABA did not propose specific rules changes, but identified pressure points. Steve Gensler has a nice paper for the Sedona Conference on the benefits of cooperation as better representation of the client. The Susman Rules are a useful model. Still, some “tweaks in the rules” would be useful to reassure all lawyers that cooperation is not a sign of weakness.

The prospect of modest rules changes was countered by the observation that “rules changes take forever.” Best practices guides can be very useful. Education can be blended in with the statements of best practices. It would be useful to prepare videos that illustrate what does not work. And experienced lawyers would love to make the videos — many are ham actors at heart. Another participant agreed with these suggestions.

Another idea for a pilot project would be tracking systems for different types of cases. The idea would not be a “rocket docket,” but simpler procedures designed to reduce cost and delay. Tracks might be assigned on the basis of subject matter, or on some measure of complexity. But past efforts should be remembered — a RAND study showed that tracking systems were not particularly helpful, at least in part because no one wanted to believe that their cases were “simple.” And there is a further problem. “Simple cases” can need a lot of supervision when the lawyers refuse to cooperate. And lawyers who cooperate can do very well in complex cases without extensive judicial supervision. It was observed that the FJC did a study of hand-picked districts; some still have forms of tracking systems. It may be that districts that wanted tracking systems liked them. As compared to ad hoc case management, a formal system promotes uniformity and “gives cover to do what you

want to do.” And there are simpler sorts of simplified systems. Judge Campbell described at the Conference a much-simplified system that he offers to those that want it — no discovery, no motions, trial within 90 days. This is a new effort; it may become a useful subject for study.

Pilot projects can be undertaken without searching out sources of funding. What is required is to persuade district courts to do it. The FJC can help with the design. And up-front FJC involvement is needed to ensure the design will yield useful empirical data.

Local rules also may be the source of fruitful study. Local rules limiting discovery would be a good subject. The District of Maryland has e-discovery rules, and other districts also have local rules or protocols for e-discovery. The Seventh Circuit project is going along; the first phase resulted in the survey that was described at the Conference, and the second phase is under way. Professor Gensler has a nearly complete list of local e-discovery rules. These rules are an example of subjects that could be surveyed to assess actual current practices that lie outside the national rules.

This discussion concluded with the observation that “there are lots of ideas.” The hope is that this Subcommittee will bring order to the process of sorting through them, focusing on what makes the most sense, queuing them up, “so we don’t squander the wealth of Conference ideas.”

Turning back to publications, the idea of works more extensive than “pocket guides” was raised. A manual “with as much authority and publicity as the Manual for Complex Litigation could do much good. The Manual “is a bible. Everything you want to know is there.” If the Civil Litigation Management Manual is good, it would be useful to get people accustomed to using it. And enlisting the Rules Committees in the project to assist the Court Administration and Case Management Committee might make the work still better.

Returning to the topic of rules changes, it was suggested that the Subcommittee needs to gather things together into a package. Topics would include “tweaking” changes; cooperation — perhaps better labeled “non-confrontation”; the possibility of injecting proportionality into the rules in ways more visible than the present rules. As an example, “how many judges now think of proportionality as a limit on the scope of discovery defined in Rule 26(b)(1)”?

The value of “proportionality” was questioned: “proportional to what? To many things. Too many. Perhaps it is not enforceable.”

A second caution was noted. The discovery panel at the Conference concluded that there is no need for rule changes, unless they be designed to encourage people to follow the rules we already have. But “a reasonable catalogue of possible rule changes may be a good beginning.” We know how long it takes to adopt rules changes; we do not want to lose momentum.

Initial disclosure was considered. Rule 26(a)(1) limits disclosure to witnesses and documents a party may use to support the claims or defenses. Claims or defenses are identified in the pleadings. A complaint is based on the kinds of information the plaintiff should have before filing. Disclosure might be more useful if directed more toward the information needed after filing and when facing a motion to dismiss. It was observed that those who want more initial disclosure link it to diminished discovery. That could be a problem. Views expressed at the Conference suggested that the present system for initial disclosure is generally useless; it should either be expanded or be abolished.

Turning back to case management, it was asked whether there is any effort to link controls on judges to controls on litigants? All reports say that lawyers believe that more hands-on judge involvement is required. There is a general perception that too many judicial officers are not

sufficiently involved. The question may be one of motivating judges, and with it modifying lawyer and litigant behavior. A possible rule change would be to require early Rule 16 conferences.

Another possible rule change would be to require that motions be decided in a prescribed number of days. But any general rule could not take account of the vast differences in the amount of time required to decide different motions, much less the number of motions that confront a judge at any time, to say nothing of other docket responsibilities. There is no reason to consider this possibility.

This theme continued with the observation that many of the comments at the Conference were directed at judges. But it may turn out that good practices can accomplish much good and also save judge time. One judge reported that most discovery disputes can be decided without a motion, and without briefing — a phone call, with a reporter participating, can resolve most matters. Another judge described a local rule that requires a telephone conference with the judge before making a discovery motion, and requires the lawyers to confer with each other before the conference. These practices really work. The lawyers try hard to resolve their differences without making the call, and often do.

A similar practice in the District of Maryland identifies a “duty” discovery judge who will resolve discovery disputes promptly if the judge assigned to the case is not available. The system has been used twice. Knowing a judge is available resolves disputes without need to go to the judge. This is an example of the value of creating an inventory of ideas that are already out there.

And these practices illustrate things that can be done by rule. A local rule can require a pre-motion conference with the judge; the Southern District of New York has such a rule. But if the practice proves to be a truly good idea, it can be incorporated in the national rules to ensure uniformity and encourage its use.

It was agreed that it would be helpful to compile local rules that illustrate best practices. Ideas that seem particularly good could be publicized. The Subcommittee will explore means of doing this, perhaps with the help of the Administrative Office and the FJC. Again, the Civil Litigation Management Manual may be a good place to start. The Seventh Circuit Practitioner’s Handbook for Appeals is another example of the sort of best-practices guide that can be useful.

Turning back to programs to educate judges in the good practices developed in other courts, it was noted that the FJC programs for new judges focus heavily on case management. Work is being done on a special-focus program on case management for more experienced judges; one of the challenges will be to find ways to encourage judges to attend.

Summarizing this discussion, several specific proposals for moving the process along were undertaken.

Professor Cooper undertook to provide a catalogue of the possible Rule changes that remain on the table to be discussed, after putting aside the wholesale revision of the Rules and a change in the scope of discovery. There is no need to catalogue the ongoing work of the Discovery Subcommittee on E-Discovery, preservation and sanctions, and the current work of the Chair and Reporter on pleading standards.

Judge Wood undertook to circulate the Seventh Circuit Manual that deals with attorney conduct.

Professor Gensler undertook to work with Judge Rothstein and John Rabiej to determine whether there is a current, readily available catalogue of local rules and practices dealing with discovery and cooperation in the District Courts. These may be reflected in either Local Rules or Standing Orders.

Judge Grimm undertook to circulate the recently adopted local rules for discovery in the District of Maryland.

Judge Koeltl undertook to touch base with CACM to determine what projects CACM had underway in the area of case management to see how we might be of assistance, and to avoid duplication.

All members were encouraged to contact Judge Koeltl with any specific suggestions with respect to pilot projects that warranted discussion so that the FJC could be involved in planning and assessment.

All members were invited to contact Judge Koeltl with thoughts about anything else the Subcommittee should be exploring.

Members are encouraged to provide their input by **October 4, 2010** so that the Committee can possibly hold another conference call prior to the next Advisory Committee meeting on November 15, 2010, and, in any event, have a breakfast meeting at that meeting.

The call concluded by repeating the need to sort out work that can be accomplished in the near term, work — most obviously rules changes — that requires a longer-term effort, and work that can begin now but take place over extended periods. It will be important to keep moving forward.

TAB 7

Rule 26(c) Revisions

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 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. It is telling that the extraordinary efforts to explore discovery problems at the Duke Conference generated no indications of any concern about the operation of Rule 26(c). The FJC survey equally failed to show any signs of concern. It reported that protective orders were granted in 9.1% of the cases reported by plaintiff attorneys and denied in 3.0%; orders were granted in 8.8% of the cases reported by defendant attorneys, and denied in 3.3%. Preliminary Report, p. 13 and Table 4 (October 2009).

Despite the apparent lack of professional dissatisfaction, 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.

Ongoing concerns about discovery protective orders reflect two main themes. One is that the work of our courts must be open to public scrutiny. The other is that protective orders may thwart the need to publicize information about circumstances that have caused injury in the past and may continue to injure people who are not aware of the danger.

The fear of threats to public health and safety seems important. But most protective orders are entered in cases that involve no such threats. And even with respect to circumstances that present a plausible threat of ongoing injury — product-liability litigation is the most obvious example — it has been difficult to find any illustration of a protective order that has shielded information that could add a meaningful margin to information readily available from other sources.

The need for open public scrutiny of the courts is accepted on all sides. But a sharp distinction has been drawn between things filed with a court and discovery materials that never are filed. Anything filed with the court is available to the public unless sealed, and the standards for sealing are demanding. Unfiled discovery materials, on the other hand, are treated as private — there is no right of public access if no party wants to provide access. The need for a protective order arises in part from the need to prevent a party from publicly disclosing materials produced by another party in discovery. The standards for a protective order in this setting are markedly different from the standards for sealing part of a court file. Although court authority is the ultimate reason for producing much of what is produced in discovery, the elements of party control — particularly in well-run discovery — have been thought to diminish the need for free public access.

The text of Rule 26(c) can easily be construed and administered to achieve a proper balance between the competing needs for public access to some of the information produced in discovery between private parties and for privacy that protects against unnecessary defeat of confidentiality and facilitates the smooth operation of discovery. All the signs suggest that courts regularly strike the proper balance. But it may be useful to explore that conclusion once again, and perhaps to adopt new rule text that further ensures optimal results.

There is little reason to expect that holding Rule 26(c) open for indefinite consideration will soon produce new insights. It may be time to resolve the agenda status of Rule 26(c) for the immediate future. Working from the draft presented below, and aiming for action at the April 2011 meeting, it may be possible for the Committee to prepare a draft worthy of publication for comment. Little has changed since the mid 1990s. The extensive work done then may support relatively expeditious action now. There is an opportunity to clarify several aspects of protective-order practice, relying on earlier work that in turn drew important strength from the case law. Closer examination, however, may show that it is better to let the rule carry forward as it is. There is no sign that fifteen years of experience since Rule 26(c) was taken off the active agenda have shown more pressing needs for revision. If substantial doubts appear as to the wisdom of adopting new and relatively general rule text to address problems that courts are resolving wisely on their own, it may not be wise to absorb current good practices into rule text.

The choice to be made may be framed like this: If the Committee were acting entirely on its own, it might well decide that courts are doing so well under present Rule 26(c) that it is better not to undertake the chore of drafting a more elegant and more complete rule that clearly expresses the things courts are doing anyway. But some members of Congress are concerned that changes are needed. The Rules Enabling Act recognizes that the need for change can be addressed better and more thoroughly through the regular rulemaking process. Congress might be better helped by more extensive Committee work, whether the result is eventual adoption of a new Rule 26(c) or a more fully informed decision to take no action now.

The materials that follow are rather long. Appendix A includes a draft Rule 26(c) taken in large part from the final version before the Advisory Committee in 1996, inserted in the 2007 Style version of Rule 26(c). Footnotes indicate some of the issues that deserve discussion. Footnote 3 points to a provision that apparently caused rejection by the Judicial Conference in 1995 — an explicit recognition in rule text of the widespread use of stipulated protective orders. (This practice is reflected in the Manual for Complex Litigation Fourth, § 11.432.) Appendix A includes three additional items: A summary of comments from the first publication in 1993; a 1994 draft of a “maximum access” version that was roundly rejected at the October 1994 meeting; and a draft sentence for Rule 5(d) that never progressed further.

Appendix B includes materials on the current Sunshine in Litigation bills and the reasons for finding real problems with the bills.

Appendix C is Andrea Kuperman's research memorandum on current practice in modifying or dissolving protective orders.

Rule 26(c) Text

1 (c) PROTECTIVE ORDERS.

2 (1) *Motion*.

3 (A) A party or any person from whom discovery is sought [or from whom disclosure is
4 due]¹ may move for a protective order. The motion must include a certification that
5 the movant has in good faith conferred or attempted to confer with other affected
6 parties in an effort to resolve the dispute without court action.

7 (B) The motion may be made in the court where the action is pending — or as an alternative
8 on matters relating to a deposition, in the court for the district where the deposition
9 will be taken.²

¹ Present Rule 26(c) wobbles. (1) begins by addressing only “discovery.” The illustrative orders listed later in (1), however, regularly refer to “disclosure or 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. More importantly, the Duke Conference materials, including the free-form responses to the FJC survey, included many observations that initial disclosure works better when documents are produced rather than described. Explicitly recognizing the availability of a protective order may encourage this practice. It seems better to add “disclosure” where it has not appeared. On the other hand, that adds up to a lot of “disclosures”; it would be nice to establish a convention that “discovery” includes “disclosure” for 26(c) purposes, without yet making it a formal definition. But 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. Ordinarily it is fair to subject a party deponent to this burden even if the deposition is conducted in a different district. If the deponent is not a party, it seems likely that in most circumstances it is the deponent who will seek the protective order and who can choose the court it finds more convenient — compare the Rule 45 proposal to transfer enforcement disputes from an ancillary discovery court to the court where the action is pending. If the motion is made by a party, it may at times be unfair to drag the deponent to the court where the action is pending. One party, for example, may want to protect trade secrets or a privilege against the inquisitiveness of another party and the deponent’s willingness to talk. But there has been no sign of distress on this score; need it be raised now?

Is there any reason to add rule text that identifies a motion to quash as one species of request for a protective order?

10 **(2) Order.** The court may, for good cause,³ issue an order to protect a party or person from invasion
 11 of privacy, unnecessary delay, annoyance, harassment, embarrassment, oppression, or undue
 12 burden or expense,⁴ including one or more of the following:⁵

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, including one or more of the following:

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.

- 13 (A) forbidding the disclosure or⁶ discovery;
- 14 (B) specifying terms, including time and place, for the disclosure or discovery;
- 15 (C) prescribing a discovery method other than the one selected by the party seeking
16 discovery;
- 17 (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery
18 to certain matters;
- 19 (E) limiting the scope of discovery under Rule 26(b);⁷

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).

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.

- 20 (EF) designating the persons who may be present while the discovery is conducted, or who
21 may have access to discovery [or disclosure] responses;⁸
- 22 (FG) requiring that a deposition be sealed and opened only on court order;⁹
- 23 (H) requiring that information be produced or filed in redacted form, with or without an
24 unredacted copy filed under seal;
- 25 (GI) requiring that private personal information or a trade secret or other confidential
26 research, development, or commercial information not be revealed or be revealed
27 only in a specified way; or
- 28 (HJ) requiring that the parties simultaneously file specified documents or information in
29 sealed envelopes, to be opened as the court directs.¹⁰
- 30 (23) *Ordering Discovery.* If a motion for a protective order is wholly or partly denied, the court
31 may, on just terms, order that any party or person provide or permit discovery.
- 32 (4) When an order permits a party to designate discovery or disclosure] information as confidential,
33 another party may challenge the designation. The burden of justifying protection is on the
34 party seeking protection.¹¹

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 This has been around for a long time. But it bumps up against the problem of filing under seal; since a court order is required, it may be enough to add a statement in the Committee Note that the court consider the filing question when it shapes the protective order. And sealing does not by itself prevent the deponent from revealing what was said; apparently this provision works only when the deponent is one of those interested in maintaining confidentiality.

¹⁰ 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.

¹¹ 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

35 (5) Filing Protected Information. Discovery [or disclosure] materials covered by a protective order
36 used to address a motion on the merits or offered as evidence at trial may be filed under seal
37 only if the order directs filing under seal or if the court grants a motion to file under seal.¹²

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).”

¹² 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 on the merits 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 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. Sunthion 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 common alternative, referring to “judicial records,” may be no clearer.)

The Ninth Circuit distinguishes discovery attached to “non-dispositive 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

- 38 **(6)** **(A)** The court may modify or dissolve a protective order on motion made by any person [Any
39 person may move to modify or dissolve a protective order.]¹³
- 40 **(B)** In ruling on a motion to dissolve or modify a protective order, the court must consider[,
41 among other matters, the following]{these among other matters}{all relevant matters,
42 including):
- 43 **(i)** the extent of reliance on the order;
- 44 **(ii)** the public and private interests affected by the order;
- 45 **(iii)** the movant’s consent to submit to the terms of the order;
- 46 **(iv)** the reasons for entering the order, and any new information that bears on the
47 order;¹⁴ and

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.

¹³ 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.”

The open-ended provision in the draft text may encounter difficulty if the underlying action has concluded and the materials protected by the order were not filed with the court. In *Bond v. Utreras*, 585 F.3d 1061 (7th Cir.2009), an “independent journalist” and 28 Chicago Aldermen sought permission to intervene to challenge the protective order in an action that had been settled and dismissed. The protected material relating to citizen complaints against police officers was never filed. Neither plaintiff nor defendant sought to be released from the protective order. The court ruled that the would-be intervenors lacked Article III standing. The ruling, however, rested on the conclusion that neither Rule 26(c) nor the First Amendment established a right of access to the discovery materials. The same result is readily reached under the draft text.

¹⁴ 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, but perhaps also noting the need to protect reliance. 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

48 (v) the burden that the order imposes on persons seeking information relevant to
 49 other litigation.

50 (37) *Awarding Expenses.* Rule 37(a)(5) applies to the award of expenses.

51
52
53

Committee Note

54 Present Rule 26(c)(1) refers at the beginning to protection for a party from whom discovery
 55 is sought. Later provisions at times refer to disclosure as well as discovery. [*alt. 1:* There may be
 56 occasions when relief should be available from disclosure obligations. Often protection can be
 57 provided by order under Rule 16. But to ensure that Rule 26(c) is available, “disclosure” is added
 58 to the rule text. Similarly, it may be important to limit access to disclosed information — details
 59 about liability insurance coverage are an example.] [*alt. 2* Subtle reasons may be found to explain
 60 the seeming inconsistent usages. Rather than invite confusion, references to disclosure are deleted.
 61 Relief from disclosure obligations remains available under Rule 26(a).]

62
63
64
65
66
67

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 “harassment, embarrassment, [or] oppression.”

68
69
70
71
72
73

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.

74
75
76
77

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.

78
79
80

Paragraph 2(G) carries forward the familiar provision for sealing a deposition. But it will be useful to consider the issues that surround filing a sealed document as addressed by paragraph (5).

81
82
83
84
85
86

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. [This provision is separate from Rule 5.2(f), which implements the E-Government Act of 2002. The issues that surround filing under seal suggest that it be directed only when there is a strong reason to ensure access to the information if the need for protection diminishes or is overcome by more important concerns.]

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.

87 Paragraph (2)(I) is amended by adding “private personal information” to the enumerated
88 categories of commercial information
89 that may be protected.
90

91 New paragraph (4) reflects a common form of protective order that allows a party to
92 designate discovery information as confidential. When another party challenges the designation the
93 burden of justifying protection is on the party seeking protection.
94

95 New paragraph (5) addresses one aspect of filing under seal information covered by a
96 protective discovery order. When the information is used to support a motion on the merits — for
97 example, a motion for summary judgment — or is offered as evidence at trial, filing under seal is
98 permitted only if the protective order directs filing under seal or if the court grants a motion to file
99 under seal. [The determination whether a filing addresses a motion on the merits should be made
100 under the general law that governs public access to court files. For example, material submitted for
101 in camera review of a privilege claim is treated differently from material submitted on a motion for
102 summary judgment.]
103

104 Paragraph (6) is added to the rule to dispel any doubt whether the power to enter a protective
105 order includes power to modify or vacate the order. The power is made explicit, and includes orders
106 entered by stipulation of the parties as well as orders entered after adversary contest. The power to
107 modify or dissolve should be exercised after careful consideration of the conflicting policies that
108 shape protective orders. Protective orders serve vitally important interests by ensuring that privacy
109 is invaded by discovery only to the extent required by the needs of litigation. Protective orders
110 entered by agreement of the parties also can serve the important need to facilitate discovery without
111 requiring repeated court rulings. A blanket protective order may encourage the exchange of
112 information that a court would not order produced, or would order produced only under a protective
113 order. Parties who rely on protective orders in these circumstances should not risk automatic
114 disclosure simply because the material was once produced in discovery and someone else might want
115 it.
116

117 Modification of a protective order may be sought to increase the level of protection afforded
118 as well as to reduce it. Among the grounds for increasing protection might be violation of the order,
119 enhanced appreciation of the extent to which discovery threatens important interests in privacy or
120 confidentiality, or the need of a nonparty to protect interests that the parties have not adequately
121 protected.
122

123 Modification or dissolution of a protective order does not, without more, ensure access to the
124 once-protected information. If unfiled discovery responses have been filed with the court, access
125 follows from a change of the protective order that permits access. If discovery responses remain in
126 the possession of the parties, however, the absence of a protective order does not without more
127 require that any party share the information with others.
128

129 Despite the important interests served by protective orders, concern has been expressed that
130 protective orders can thwart other interests that also are important. Two interests have drawn special
131 attention. One is the interest in public access to information that involves matters of public concern.
132 The two most common examples of the interest in public access include information about the
133 conduct of government officials and information about dangerous products or situations that have
134 caused injury and may continue to cause injury until the information is widely disseminated. The
135 other interest involves the efficient conduct of related litigation, enabling adversaries of a common
136 party to avoid costly duplication of discovery efforts.
137

138 Paragraph (6)(A) recognizes that a motion to modify or dissolve a protective order may be
139 made by any person. An alternative might be to require a motion to intervene, recognizing that

140 intervention for this purpose is governed by standards different from those that apply to intervention
141 on the merits. There might be some value in a preliminary screening. But the question of “standing”
142 to seek relief is governed by the cogency of the reasons advanced. The court can deny a poorly
143 supported motion as quickly as it can deny intervention.
144

145 Paragraph (6)(B) lists some of the matters that must be considered on a motion to dissolve
146 or modify a protective order. The list is not all-inclusive; the factors that may enter the decision are
147 too varied even to be foreseen.
148

149 The most important form of reliance on a protective order is the production of information
150 that the court would not have ordered produced without the protective order. Often this reliance will
151 take the form of producing information under a “blanket” or “umbrella” protective order without
152 raising the objection that the information is not subject to disclosure or discovery. The information
153 may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other
154 rules. Reliance also may take other forms, including the court’s own reliance on a protective order
155 less sweeping than an order that flatly prohibits discovery. If the court would not have ordered
156 discovery over proper objection, it should not later defeat protection of information that need not
157 have been produced at all. Reliance also deserves consideration when the court would have ordered
158 discovery. But a finding that information is properly discoverable directs attention to the question
159 of the terms — if any — on which protection should continue.
160

161 The public and private interests affected by a protective order include all of the myriad
162 interests that weigh both for and against discovery. The question whether to modify or dissolve a
163 protective order is, apart from the question of reliance, much the same as the initial determination
164 whether there is good cause to enter the order. An almost infinite variety of interests must be
165 weighed. The public and private interests in defeating protection may be great or small, as may be
166 the interests in preserving protection. Special attention must be paid to a claim that protection
167 creates a risk to public health or safety. If a protective order actually thwarts publication of
168 information that might help protect against injury to person or property, only the most compelling
169 reasons, if any, could justify protection. Claims of commercial disadvantage should be examined
170 with particular care, and mere commercial embarrassment deserves little concern. On the other
171 hand, it is proper to demand a realistic showing that there is a need for disclosure of protected
172 information. Often there is full opportunity to publicize a risk without access to protected discovery
173 information. Paradoxically, the cases that pose the most realistic public risk also may be the cases
174 that involve the greatest interests in privacy, such as a yet-to-be-proved claim that a party is infected
175 with a communicable disease.
176

177 Consent to submit to the terms of a protective order may provide strong reason to modify the
178 order. Submission to the terms of the order should include submission to the jurisdiction of the court
179 to enforce the order. This factor will often overlap the fifth enumerated factor that considers the
180 interests of persons seeking information relevant to other litigation. Submission to the protective
181 order, however, does not establish an automatic right to modification. It may be better to leave to
182 the court entertaining related litigation the question whether information is discoverable at all, the
183 balance between the needs for discovery and for privacy, and the terms of protection that may
184 reconcile these competing needs. These issues often are highly case-specific, and the court that
185 entered the protective order may not be in a good position to address them.
186

187 Submission to the protective order and the court’s enforcement jurisdiction also may justify
188 disclosure to a state or federal agency when, without submission, the court would not modify the
189 order for this purpose. A public agency that has regulatory or enforcement jurisdiction often can
190 compel production of the protected information by other means. The test of modification, however,
191 does not turn on a determination whether the agency could compel production. Rather than provoke
192 satellite litigation of this question, protection is provided by requiring the agency to submit to the

193 protective order and the court's enforcement jurisdiction. If there is substantial doubt whether the
194 agency's submission is binding, the court may deny disclosure. One obvious source of doubt would
195 be a freedom of information act that does not clearly exempt information uncovered by this process.
196

197 The role of the court in considering the reasons for entering the protective order is affected
198 by the distinction between contested and stipulated orders. If the order was entered on stipulation
199 of the parties, the motion to modify or dissolve requires the court to consider the reasons for
200 protection for the first time. All of the information that bears on the order is new to the court and
201 must be considered. [The person seeking protection has the burden of justifying the extent and terms
202 of protection.] If the order was entered after argument, however, the court may justifiably focus
203 attention on information that was not considered in entering the order initially. [If there is little new
204 information, the burden of justifying modification or dissolution may well be assigned to the person
205 seeking modification or dissolution.]
206

207 A protective order does not of itself defeat discovery of the protected information by
208 independent discovery demands made in independent litigation on the person who produced the
209 information. The question of protection must be resolved independently in each action. At the same
210 time, it may be more efficient to reap the fruits of discovery already under way or completed without
211 undertaking duplicating discovery. The closer the factual relationships between separate actions or
212 potential actions, the greater the reasons for modifying a protective order to allow disclosure by the
213 most efficient means.
214

215 Assessment of the need for disclosure in support of related litigation may require joint action
216 by two courts. The court that entered the protective order can determine most easily the
217 circumstances that justified the order and the extent of justifiable reliance on the order. The court
218 where related litigation is pending can determine most easily the importance of the information in
219 that litigation, and often can determine most accurately the balance between the interest in disclosure
220 and the interest in nondisclosure or further protection. The rule does not attempt to prescribe
221 procedures for cooperative action.
222

223 Special questions arise from the prospect of multiple related actions brought at different times
224 and in different courts. Great inefficiencies can be avoided by establishing means of sharing
225 information. Informal means are frequently found by counsel, and occasional efforts are made at
226 establishing more formal means even outside the framework of consolidated proceedings. There is
227 not yet sufficient experience to support adoption of formal rules establishing — and regulating the
228 terms of access to — litigation support libraries, document depositories, depositions taken once for
229 many actions, or similar devices. To the extent that consolidation devices may not prove equal to
230 the task, however, courts will continue to develop suitable practices that may find imaginative uses
231 for protective orders.
232

233 Rule 26(c)(6) applies only to the dissolution or modification of protective orders entered by
234 the court under paragraph (c)(2). It does not address private agreements entered into by litigants that
235 are not submitted to the court for its approval. Nor does Rule 26(c)(6) apply to motions seeking to
236 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 harassment, 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. (*Salmeron v. Enterprise Recovery Systems, Inc.*, 579 F.3d 787 (7th Cir.2009) is an example — the court affirmed dismissal of the action as an exercise of inherent power to enforce an agreement to maintain confidentiality.)

Rather than agree to modified discovery procedures, parties might agree to dispense with rules-governed “discovery” entirely, substituting voluntary sharing of information without formal requests or responses. Does Rule 26(c) have any role to play in this setting? (If breach of the agreement is asserted as a contract violation, would the court have subject-matter jurisdiction? Or would this be like an agreement that settles a federal-court action without providing for entry of a federal judgment?)

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.

**BACKGROUND INFORMATION RE:
PROPOSED AMENDMENT TO CIVIL RULE 26(c)
PUBLISHED FOR COMMENT IN 1993**

REPORTER'S SUMMARY

Comments on Proposed Amendments:
Civil Rules 26, 43, 50, 52, 59, 83, and 84

SECTION III
CIV 4/28/94

On October 15, 1993, the Committee on Rules of Practice and Procedure published for public comment proposed amendments to Civil Rules 26, 43, 50, 52, 59, 83, and 84. The public comment period closes on April 15, 1994. A public hearing on the proposals is scheduled for April 28, 1994, to coincide with the first day of the Civil Rules Advisory Committee meeting in Washington, D.C.

This note summarizes the three written comments that have been transmitted by the Administrative Office to the Reporter as of April 1, 1994.

General

John L.A. Lyddane finds "these amendments are essentially non-controversial" and sees "no reason why they should not be implemented."

Rule 50

Judge Cornelia G. Kennedy is concerned that Rule 50(b) continues to be ambiguous on the question whether a motion for judgment as a matter of law must be renewed after verdict "where the court simply fails to rule on the motion made at the close of the evidence rather than denies it." Her court - the Sixth Circuit - does not require renewal "if the trial court reserved its decision on the motion to see if the jury verdict would make the issue moot. If the motion must be renewed under all circumstances, perhaps it would be better to say so."

Rule 83

Stephen Yagman expresses concern that the proposal "do[es] away with" the final sentence of Rule 83, which now requires that procedural orders by individual judges be "not inconsistent with these rules or those of the district in which they act." Since the proposal requires that procedural orders by individual judges be "consistent with federal law, rules adopted under * * * §§ 2072 and 2075, and local rules of the district," the concern must reflect the change from "not inconsistent with" to "consistent with." He extols the virtues of uniformity in local practice.

ADDITIONAL COMMENTS: 1993 PROPOSED AMENDMENTS

Public Citizen Litigation Group

All of the following comments were set out in a single submission by the Public Citizen Litigation Group.

Rule 26(c)(3)

Generally support the proposal. But suggests: (1) "Return or destroy" orders should be permitted only if the party providing discovery responses retains both the request and responding materials in readily accessible form for the benefit of future litigants. (2) It should be made clear that a protective order can be amended after judgment. (3) It may be intended to suggest, by way of an allusion to the last sentence of the Note, that Rule 26 should be amended to provide for amendment of protective provisions included in a judgment. (4) The Rule or Note should state that a court may require that unfiled materials be filed, even after the case has concluded. (5) It should be provided that a nonparty can move for modification without intervening. (6) The list of factors to be considered should be deleted in favor of a "good cause" standard. Considering the extent of reliance may too often defeat modification. Courts seem to have balanced the appropriate factors reasonably well under a general good cause standard.

Rules 50, 52, and 59

The comment reflects the belief that Rule 6(a) permits filing by mail without actual receipt by the court. If a change is intended, it should be made clear. (The source of this belief is uncertain. Rule 5(e) provides for filing with the clerk or a judge. The cases and treatises say that filing requires actual receipt by the clerk or judge; filing by mail occurs at the time of receipt, not at the time of mailing. *Cooper v. City of Ashland*, C.A.9th, 1989, 871 F.2d 104; *Torras Herreria y Construcciones, S.A. v. M/V Timur Star*, 6th Cir.1986, 803 F.2d 215, 216; *Lee v. Dallas Cty. Bd. of Educ.*, C.A.5th, 1978, 578 F.2d 1177, 1178 n. 1, 1179; 4A C. Wright & A. Miller, *Federal Practice & Procedure: Civil 2d*, § 1153.) It also is suggested that provision should be made for filing by private courier services. Local rules have conflicting provisions for filing by means other than United States mail, and should be replaced by a uniform national practice.

Rule 84(b)

This is a good idea, but it is not clear that it is authorized by 28 U.S.C. § 2072. Congress should be asked to amend the statute to confer this authority on the Judicial Conference. The procedure should include provision for notice and comment, and for transmittal to the Supreme Court and Congress at least 30 days before technical changes become effective.

ADVISORY COMMITTEE
ON
CIVIL RULES *File Copy*

Tucson, Arizona
October 20-22, 1994

RULE 26(c): Reporter's Note

The attached "Maximum Access Rule 26(c)" incorporates all of the suggestions made in comments on the proposed Rule 26(c) that was published in 1993. It is set out in simplified form for clarity. There was no controversy about paragraphs (1) and (2) as published in 1993, and they continue to be part of this draft. Please consult the 1993 publication pamphlet for these provisions. This draft completely supersedes paragraph (3) of the 1993 proposal.

The provisions of this draft are severable. It would be possible, for example, to adopt only the new language in paragraph (1) that explicitly allows stipulated protective orders.

Paragraph (6) allocates the burden on a motion to modify or vacate by distinguishing between consent and contested protective orders. This allocation is drawn from the vigorously supported suggestion of the ABCNY committee. The suggestion is intriguing. It may seem unattractive, however, on either of at least two grounds. One is that it might prove difficult to draw clear lines between contested and consent orders; the draft makes no attempt to provide guidance. The other is that the different allocation will encourage parties to seek "contested" orders that are not really contested, further muddying the waters.

Paragraph (6) also overrides two deliberate choices that were made in preparing the published Rule 26(c)(3). It was decided to make no express reference to nonparty standing, or to modification or dissolution after judgment. Most courts now recognize nonparty standing, and allow postjudgment motions. These provisions fall within the general approach of adopting and confirming the general run of better current practice.

The draft Committee Note is intended to suggest a reasonably controlled approach to the draft provisions. Unless and until there is better evidence that protective orders actually are thwarting significant public interests, there is little need to preach a need to be more sensitive to concerns that have been felt even without explicit rule language.

Set out alone, on a separate page, is a possible addition to Rule 5(d) governing "return or destroy" agreements. It responds to one of the suggestions in the comments on the published proposal. The five-year retention period is obviously arbitrary, but seems as good a compromise as any. No effort is made in the draft to state that the discovery materials must be retained in the same order in which they were produced - if that would be a good idea, surely it can be drafted. This provision seems within the reach of the Enabling Act because it complements the provision about filing discovery materials.

Maximum Access Rule 26(c)

- 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
32
33
34
35
36
37
38
39
40
41
42
- (1) * * * the court * * * may, for good cause shown or on stipulation by the parties, make any order * * *

 - (2) When the public or nonparties have an interest in access to discovery materials, the court must limit a protective order to the least restrictive terms necessary to protect more important interests of the parties, the person making the discovery response, and any other person who might be adversely affected by access to the materials.

 - (3) (present (2) on order for discovery and expenses of the motion)

 - (4) A protective order ceases to apply to discovery materials used, on terms that do not violate the protective order, to support or oppose a motion or as evidence at trial.

 - (5) The court may allow a nonparty access to discovery materials governed by a protective order if:
 - (A) the nonparty asserts a claim factually related to the protected materials; and
 - (B) the nonparty agrees to submit to the terms of the protective order and to the jurisdiction of the court to enforce the protective order.

 - (6) A party or nonparty may move at any time before or after judgment to dissolve or modify a protective discovery order made under this rule or a provision in a judgment limiting access to discovery or trial materials. If the order or provision was entered on stipulation of the parties, the burden of establishing the need for continued protection is on the person asserting the need. If the order or provision was contested, the burden of establishing the need for dissolution or modification is on the person seeking access to protected material. The court may dissolve or modify the order or provision to allow access to protected material if:
 - (A) production of the material would have been ordered over objection by the person producing it; and
 - (B) access would be allowed if protection were first sought at the time of the motion.

43

44

COMMITTEE NOTE

45

46

In addition to stylistic changes, the existing provisions of subdivision (c) are divided into numbered paragraphs and several new provisions are added. The new provisions are intended to capture and confirm the better practices that are followed by most courts today. These practices recognize and seek to resolve as well as may be the tensions that inhere in discovery protective orders. These tensions reflect both abstract theories of discovery and important practical problems.

47

48

49

50

51

52

53

54

The abstract theoretical tensions that surround protective orders reflect broader uncertainties about the proper role of adversary civil litigation in society. In the traditional view, the central role of civil litigation and civil procedure is to resolve private disputes. Discovery is provided as part of this process, not as an independent means of compelling publication of private information. The mere fact that ordinarily private information is discoverable does not, without more, justify termination of all privacy. Protective orders are essential means of protecting privacy. In opposition to this view, it is argued that much civil litigation affects interests beyond the immediate parties. There is an interest in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. Perhaps the most commonly offered illustration focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. Apart from such broadly public interests, there also is a more specific interest in fostering the efficient conduct of related litigation, protecting litigants pursuing factually related claims against the wastes of costly duplicating discovery efforts. These interests may justify limitation or even denial of protection.

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

The practical problems reflect similar tensions. A protective order can greatly facilitate the conduct of discovery and disposition of an action. Disputes about the discoverability of specific information may be sharply reduced if in any event the information is protected against disclosure or use outside the litigation. Parties and nonparties alike may produce information in reliance on a protective order when, without the protection, discoverability would be resisted at great cost to court and the participants. This result can follow only if there is a strong prospect that the protective order will hold good, without modification or dissolution. Disputes about discovery orders, moreover, can be reduced or eliminated if the parties stipulate to entry of a blanket protective order that frees them to engage in a

90 relatively free exchange of information without concern for
91 possible collateral uses. Much unwelcome and unnecessary business
92 would be added to court dockets if protection could be won only by
93 explicit judicial determination, not by stipulation.

94 The discovery rules do not of themselves create any
95 independent right of public or private access to discovery
96 materials. Common-law and First Amendment rights of access to
97 judicial proceedings and court files exist outside of the Civil
98 Rules, and "until admitted into the record, material uncovered
99 during pretrial discovery is ordinarily not within the scope of
100 press access." *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*,
101 24 F.3d 893, 897-898 (7th Cir.1994), relying on *Seattle Times Co.*
102 *v. Rhinehart*, 467 U.S. 20, 33, 104 S.Ct. 2199, 2208, 81 L.Ed.2d 17
103 (1984). Protective orders are important, however, to ensure that
104 discovery materials are not disclosed by a party, and even to guard
105 against the possibility that an action may be brought as much for
106 the purpose of gaining information as for pursuing a nonfrivolous
107 claim.

108 Courts generally have administered Rule 26(c) with sensitive
109 concern for the interests that affect the initial decision to grant
110 protection, or later to dissolve or modify the protection. A
111 balancing approach is used, weighing the interests that may counsel
112 access beyond the needs of the immediate litigation against the
113 interests that ordinarily limit use of discovery materials to the
114 immediate litigation that justified the discovery. Recent studies
115 have concluded that Rule 26(c) practice is sound, and that there is
116 no need for amendment. See *Report of the Federal Courts Study*
117 *Committee*, 102-103 (1990); *Marcus, The Discovery Confidentiality*
118 *Controversy*, 1991 U.Ill.L.Rev. 457; and *Miller, Confidentiality,*
119 *Protective Orders, and Public Access to the Courts*, 105 Harv.L.Rev.
120 427 (1991). Practice is not entirely uniform, however, and some
121 concern remains that occasionally protective orders may be entered
122 "without considering the propriety of such orders, or the
123 countervailing public interests which are sacrificed * * *." *Pansy*
124 *v. Borough of Stroudsburg*, 23 F.3d 772, 785 & n. 14 (3d Cir.1994).
125 These amendments incorporate in the text of Rule 26(c) the sound
126 practices normally used by most courts.

127 Paragraph (1) confirms the routine practice of entering
128 protective orders on consent of the parties. Stipulated protective
129 orders commonly include provisions that make it easy to exchange
130 information with the assurance that its use will be limited to the
131 current litigation. Denial of this opportunity would dramatically
132 increase the need for judicial supervision of discovery, both to
133 rule on protective orders and to resolve refusals to provide
134 discovery on any terms.

135 Paragraph (2) articulates a balancing test for weighing the
136 interests of the public or nonparties in access to discovery

137 materials against the interests that support protection. The
138 importance of the interests advanced to support access is affected
139 by many factors. Information that bears on public health or
140 safety, for example, invokes an important interest in access. The
141 interest in access cannot, however, be measured in a vacuum. Often
142 there is ample information available from other sources - including
143 publicity about the allegations in the litigation - that enables
144 public officials and private citizens to take protective measures.
145 A determination whether discovery information in fact bears on
146 public health or safety, moreover, must not be allowed to become a
147 preliminary trial on the merits. The importance of the interests
148 advanced to support protection likewise is affected by many
149 factors. Some matters of individual privacy, for example, may be
150 so important that a party would prefer to surrender the litigation
151 rather than risk public exposure. Plaintiffs in actions for sexual
152 harassment or supplying contaminated blood products are common
153 illustrations. The risks to even commercial reputations from
154 misleading disclosure of discovery information out of context may
155 be so great that disclosure forces a party who might prefer
156 settlement to litigate in hopes of winning public vindication at
157 trial. Actual disposition of a protective order request in any of
158 these seemingly straightforward examples may prove difficult.

159 A balancing formula is used to guide protective orders
160 precisely because no detailed rule, however intricate, can begin to
161 capture, much less reconcile, all of the factors that may become
162 involved. There are infinite degrees of the interests that weigh
163 for and against discovery. Public and private interests in
164 disclosure may be great or small, as may be the interests in
165 preventing disclosure.

166 The balancing test does not require that the court make
167 detailed findings as to the factors weighed in determining whether
168 to grant protection and in shaping the terms of protection. In
169 some circumstances clear findings would defeat the purposes of
170 protection. In other circumstances the findings must necessarily
171 be preliminary, and subject to revision as the case develops.
172 Provisional action may be particularly appropriate if the early
173 stages of discovery do not provide an adequate foundation for
174 determining whether the facts involve matters of public interest
175 that cannot be made known in other ways. Although findings are not
176 required, it is better practice to provide such explanation as
177 seems appropriate for the guidance of the parties and to support
178 review in the infrequent cases that come before an appellate court.

179 Paragraph (4) makes it explicit that a protective discovery
180 order does not of itself curtail the ordinary rights of public
181 access to materials used to support or oppose a motion or as
182 evidence at trial. If protection is to be had in these
183 circumstances, it must be had through judicially developed
184 doctrines that exist independently of discovery practice. If the

185 terms of the protective discovery order bar use on motion or at
186 trial, violation of the order supports sanctions and may be
187 considered in determining whether to permit public access.

188 Paragraph (5) addresses the need to avoid costly duplication
189 of discovery efforts in separate but factually related actions.
190 There is little reason to force different parties, involved in
191 litigation with a common adversary, to bear the burden of
192 repeatedly seeking the same information. Ordinarily adequate
193 protection should be provided by allowing access subject to the
194 terms of any outstanding protective order. The party seeking
195 access on these terms must submit to the jurisdiction of the
196 protective-order court, not only in fairness to the protected party
197 but also in recognition of the advantages of enforcement by the
198 court that entered the order. There may be circumstances, however,
199 in which access should not be allowed on these terms. Despite the
200 existence of some factual relationship, different levels of
201 protection may be appropriate. The need for any discovery, and the
202 best terms of protection, may be better addressed by the court in
203 which the related action has been - or will be - brought. So too,
204 information that has been freely exchanged in reliance on a
205 stipulated protective order with a particular and trusted adversary
206 perhaps ought not be automatically available to another adversary
207 on the same nominal protective terms.

208 Paragraph (6) recognizes the powers to modify a protective
209 order before or after judgment, and at the request of a nonparty as
210 well as a party. Most courts have recognized these powers; helpful
211 discussions are provided in *Pansy v. Borough of Stroudsburg*, 23
212 F.3d 772 (3d Cir.1994), and *United Nuclear Corp. v. Cranford Ins.*
213 *Co.*, 905 F.2d 1424 (10th Cir.1990). These provisions, however,
214 depart in some ways from general current practice.

215 A request for modification or dissolution may be made by
216 motion. A nonparty need not seek to intervene under Rule 24 if its
217 only purpose is to seek relief from the protective order; by making
218 the motion, it submits to the court's jurisdiction for all purposes
219 appropriate to dealing with the motion and enforcing orders related
220 to the motion.

221 Modification or dissolution may be sought after judgment as
222 well as before. Unreasonable delay by the party seeking access may
223 be taken into account, but it must be remembered that delay often
224 is attributable to ignorance of the protective order or uncertainty
225 as to the nature and importance of the protected information. The
226 power to modify or dissolve includes not only discovery protective
227 orders but also protective provisions in final judgments. A
228 judgment provision is likely to be directly related to an earlier
229 protective order, even when it covers trial evidence as well as
230 discovery materials.

231 The burden on a motion to modify or dissolve is allocated

232 according to the nature of the protective order. If the order was
233 entered by stipulation, as authorized by paragraph (1), there never
234 has been a judicial determination that protection is warranted.
235 The burden would have been on the party seeking protection had the
236 order been contested, and the burden should remain on that party.
237 Dissolution or modification of the order, however, does not
238 automatically ensure access to a nonparty. The discovery materials
239 may not have become part of the public record, and access will
240 still require that a party be willing to reveal the materials. If
241 the order was entered after contest by one or more parties, on the
242 other hand, the initial judicial determination that protection is
243 warranted justifies placing the burden on the person seeking
244 modification or dissolution. It may be difficult to carry this
245 burden if the person seeking access has little notion of the nature
246 of the information protected by the outstanding order. The
247 protected information may be sufficiently voluminous that the court
248 does not have the time or resources to sort through it. The
249 circumstances may not justify reliance on a master. This
250 difficulty may be met in some cases by allowing a controlled and
251 provisional relaxation of the protective order for purposes of the
252 motion. Other expedients may be found as well. Protection cannot
253 be defeated automatically, however, by arguing simply that the only
254 way to resolve the motion is to allow full access to the protected
255 information.

256 Subparagraphs (A) and (B) set out the factors that control the
257 decision to modify or dissolve. The first element requires that
258 the court would have ordered production of the material over
259 objection by the person producing it. This element is essential to
260 maintain the lubricating effect of protective orders. One of the
261 great benefits of protective orders is that they facilitate
262 exchange of information without need to raise every available
263 objection that might be made if there were a risk that others would
264 have access to the information. This reliance deserves protection
265 as to any material that the court would have held nondiscoverable,
266 whatever the reason for the ruling might have been, whether
267 privilege, work-product protection, burdensomeness, or some other
268 ground.

269 The second element requires a determination that protection is
270 not appropriate at the time of the motion to dissolve or modify.
271 This element invokes all the preceding Rule 26(c) factors that
272 control a protective order decision. Reliance on the protective
273 order does not figure in this determination, because it is no
274 longer relevant once it has been determined that the court would
275 have ordered discovery at the time the information was produced.

276 Rule 26(c)(6) does not purport to invalidate or impair purely
277 private agreements entered into by litigants that are not submitted
278 to the court for approval or adoption. Nor does the rule govern
279 provisions of final judgments that govern access to information

280
281

that is not discovery or trial material. Agreements to return or
destroy discovery materials, however, are regulated by Rule 5(d).

32 "Return or Destroy" Agreements

33
34 The logical place for a provision controlling "return or
35 destroy" agreements might be at the end of Rule 5(d). The direct
36 tie to the provision on filing should reduce any Enabling Act
37 concerns about limiting private agreements:

38
39 A party may agree to destroy unfiled discovery materials, or
40 return them to the person who produced them, only if the
41 person who produced them undertakes to retain the materials
42 and the corresponding discovery requests for five years after
43 the conclusion of all discovery in the action.

94
95 Committee Note

96
97 This addition to Rule 5(d) complements the amendments to Rule
98 26(c) that govern discovery protective orders. One of the means by
99 which parties have sought to ensure effective protection of
00 discovery materials has been by agreement that the party who
01 receives discovery responses will return the materials to the
02 producing party or destroy them. These agreements may make it
03 unnecessarily difficult to repeat the discovery process in related
04 litigation. Rule 5(d) requires that the person who produced the
05 discovery materials must keep them for five years after the
06 conclusion of all discovery in the action that supported the
07 discovery. The corresponding discovery requests also must be
08 retained, both as a means of ensuring that the proper material has
09 been retained and as a potential index that can facilitate
10 discovery in other but related actions. This provision affects
11 only discovery materials that have not been filed with the court.
12 If discovery materials have been filed subject to a protective
13 order, access can be sought by motion to modify or dissolve the
14 protective order under Rule 26(c)(6).

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

OCTOBER 20 and 21, 1994

The Advisory Committee on Civil Rules met on October 20 and 21, 1994, at the Westin La Paloma in Tucson, Arizona. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge David S. Doty, Justice Christine M. Durham, Carol J. Hansen Fines, Esq., Francis H. Fox, Esq., Assistant Attorney General Frank W. Hunger, Mark O. Kasanin, Esq., Judge David F. Levi, Judge Paul V. Niemeyer, Professor Thomas D. Rowe, Jr., Judge Anthony J. Scirica, Judge C. Roger Vinson, and Phillip A. Wittmann, Esq.. Edward H. Cooper was present as Reporter. Judge William O. Bertelsman attended as Liaison Member from the Standing Committee on Rules of Practice and Procedure, and Professor Daniel R. Coquillette attended as Reporter of that Committee. Judge Jane A. Restani, a member of the Bankruptcy Rules Advisory Committee, attended. Thomas E. Willging of the Federal Judicial Center was present. Peter G. McCabe, John K. Rabiej, and Mark Shapiro represented the Administrative Office. Observers included Robert S. Campbell, Jr., Esq., Alfred W. Cortese, Jr., Esq., John P. Frank, Esq., Barry McNeil, Esq., and Fred S. Souk, Esq.

The Chairman introduced the new members of the Committee, Justice Durham and Judge Levi.

The Minutes for the April 28 and 29, 1994 meeting were approved, subject to correction of typographical errors.

Rule 4(m): Suits in Admiralty Act

The Suits in Admiralty Act, 46 U.S.C. § 742, requires that the libelant "forthwith serve" the libel on the United States Attorney and the Attorney General of the United States. "Forthwith" has been read to require service within a period much shorter than the 120-day period provided for effecting service under Rule 4(m). Several courts, moreover, have ruled that Rule 4(m) does not supersede the statute because the service requirement is a condition on the United States's waiver of sovereign immunity. Concerns have been expressed that Rule 4(m), in conjunction with Rule 4(i), has become a trap for the unwary.

The Committee considered this problem at the meeting in April, 1994, and concluded that rather than amend Rule 4 to provide warning of an exception for cases governed by § 742, § 742 should be amended to delete the service requirement. Section 742 was enacted before the Civil Rules were adopted, and there is no reason that justifies a distinctive service procedure for actions brought under the Suits in Admiralty Act. Further discussion reinforced this conclusion. The Maritime Law Association has recommended amendment of § 742 for years. There has not been any indication that the Department of Justice believes there are special reasons

Rule 26(c)

Proposed amendments to Rule 26(c) were published in October, 1993. The proposal, and public comments on the proposal, were discussed at the April, 1994 meeting of the Committee. The proposal was not acted on at the April meeting. New materials were provided for consideration at this meeting, including two alternative drafts of Rule 26(c) and a proposed amendment of Rule 5(d).

The draft Rule 5(d) amendment would add a new sentence: "A party may agree to destroy unfiled discovery materials, or return them to the person who produced them, only if the person who produced them undertakes to retain the materials and the corresponding discovery requests for five years after the conclusion of all discovery in the action." The Committee did not consider this amendment, and did not consider whether it should remain on the agenda for consideration at a future meeting.

Minutes
Civil Rules Advisory Committee
October 20 and 21, 1994

7

One of the alternative Rule 26(c) drafts was included with the agenda materials for the meeting. This version was intended to incorporate all of the comments on the published draft that urged various proposals for narrowing the scope of protection afforded by a protective order. The other alternative draft incorporated additional provisions capturing concerns reflected in ongoing legislative proposals, and was presented to Committee members for the first time at the meeting in an effort to focus discussion on the differences between the 1993 proposal and the legislative proposals.

Discussion began with review of the history of attempts to consider legislative proposals to amend Rule 26(c). As at the April meeting, it was agreed that careful attention should be paid to the concerns reflected in these legislative proposals. Although the Committee cannot urge adoption of undesirable rules changes for purposes of political expediency, it must be sensitive to the concerns of Congress. Just as public comment on proposed rules provides much valuable information for consideration by the Committee, so legislative proposals reflect information gathered by the legislative process that can prove invaluable in framing the best possible rules proposals. Thoughtful consideration of the concerns that trouble Congress can have a real impact on Congressional deliberations.

It is clear that there is much concern that materials in the federal judicial system "ought to be public." The ongoing political debate is not limited to the particulars of discovery practice, but focuses on larger issues of public information. There is a natural and sharp focus on discovery protective orders, however, and legislation has been proposed that would alter the framework for dealing with protective orders. Judge Higginbotham testified before a Senate Committee, where attention focused on protective orders in products liability and other mass tort settings. It is clear that there is continuing concern in Congress that protective orders may have the effect of preventing access to information that is important to protect the public health and safety, and of making it more costly to litigate parallel claims. There is a risk that this concern, whether or not well-founded in light of actual present practice, will lead to remedies that interfere with the vital lubricating function of discovery protective orders. Over-eager remedies could greatly increase the number of litigated discovery disputes, and ultimately restrict the actual flow of discovery information. It is most important to attempt to achieve a rule that addresses all legitimate needs for limiting protective orders without imposing undue burdens on the courts or causing positive harm to the discovery process.

The proposal published in 1993 dealt with modification or dissolution of protective orders, not with the standards for

initial consideration of protective orders. A deliberate decision was made not to address the questions whether modification or dissolution can be sought by nonparties, or whether action is proper after judgment as well as before judgment. In his Senate committee testimony, however, Judge Higginbotham noted that courts frequently have permitted nonparties to seek modification or dissolution and that the 1993 proposal would permit continuation of this practice.

Preliminary results of the Federal Judicial Center study of protective orders were presented in a paper by Elizabeth C. Wiggins and Melissa J. Pecherski. Several aspects of the study were noted during the discussion. Studying three different districts for three years each, there was protective order activity in a range of 4.7% to 10.0% of all cases. Of course the figure would be higher as a percentage only of cases in which there was some discovery. It seems likely that the figure would be higher still as a percentage of cases in which there was a substantial amount of discovery activity, but the preliminary data do not provide this information. Most protective order activity is initiated by motion, not by stipulation of the parties; the highest figure for initiation by party stipulation was 26%. It was noted, however, that the data do not permit differentiation between types of cases; it would be consistent with these data to find that stipulated protective orders are commonplace in "complex" litigation. Approximately half the motions are met by a response in opposition; almost none were met by a "response in concurrence." The rate of hearings on motions was highly variable: in the District of Columbia, it was 12%, in Eastern Michigan 59%, and in Eastern Pennsylvania, 2%. Of the motions that were ruled upon by a judge, approximately equal numbers were denied, or granted in whole or in part. (By some chance, in all three districts 41% of the motions were granted in whole or in part.) Protective orders included a wide variety of provisions, but many included restrictions on disclosure or established procedures for handling confidential material. Of the suits in which an order was entered to restrict access to discovery materials, contract, civil rights, and "other statutes" actions accounted for large portions of the total. Personal injuries accounted for 8% or 9% of the total, depending on the district. Protective orders were modified or dissolved, whether by court order or agreement, in very few of the cases; there is no indication yet as to the types of cases involved or the reasons for modification or dissolution.

The first change in the 1993 draft would incorporate in (c)(1) an express provision recognizing and confirming the common practice of entering protective orders on stipulation by the parties. This change was accepted, on the express understanding that the court may refuse to enter an order notwithstanding stipulation of all parties. Rule 26(c)(1), as redrafted, simply provides that the

court "may" enter the order; in keeping with the Committee's style conventions, "may" is a word of permission, not mandate.

Throughout the discussion of other proposed changes, several members voiced concern with the substantive effects of protective orders. Information produced in discovery often is not public information. It can be reached, if at all, only by specified procedures limited to specified purposes. There is a substantive right of privacy that should not be violated by rules of procedure. The determination that privacy can be compromised by discovery appropriate to the needs of particular litigation does not justify allowing access to private information for other purposes. Public access to personnel files produced for employment discrimination litigation, for example, cannot be justified by vague invocations of the "public interest." Private information may be property protected against taking by the Fifth Amendment.

The distinction between limiting the scope of protective orders and establishing a positive right of access also ran throughout the discussion. The mere absence of a protective order does not establish a right of public access to discovery information that has not been filed with the court, nor to discovery proceedings. Care must be taken in drafting lest inadvertent references to "access" create a freedom-of-information act in the guise of protective order limits.

Discussion of the alternative draft began with paragraph (2). The draft provided that the court might protect materials only to the extent that the interest in confidentiality substantially outweighs the interest in access to the materials. It was suggested that the burden should lie in the opposite direction -- that the rule should provide that discovery material should be protected unless the public interest substantially outweighs the interest in privacy. It also was suggested that the unrestricted reference to denying protection "when a nonparty has an interest in access" was too broad. Concern was expressed that as with other proposals, this approach might require extensive satellite litigation of the questions of public interest and the balance between the interests in access and in privacy. Such attempts to add to the open-ended "good cause" approach of paragraph (1) were feared as adding another layer of litigation. Concern also was expressed that there is a tension with the provision that expressly permits entry of a protective order on stipulation of the parties: that the draft might be read to limit the court's power to enter a stipulated protective order by requiring that it independently determine the balance between the interests in confidentiality and openness. It was suggested that in most litigation there is no public interest, but the draft might require explicit consideration and rejection of this possibility in all cases. Even imposing the burden on the person asserting that the public interest overcomes

the interest in confidentiality does not clearly avoid this problem. All of these shortcomings could be addressed by limiting these issues to consideration on a motion to modify or dissolve. Present practice could continue. There has been no showing that protective orders are entered improvidently, or that they conceal the very nature or existence of the litigation. Allowing unimpeded entry of protective orders, perhaps with greater guidance as to the circumstances that justify modification or dissolution, would be better.

A motion to delete paragraph (2) of the alternative draft, leaving its provisions for incorporation in the provision on modification or dissolution, carried by vote of 9 to 3.

Paragraph (5) of the alternative draft provided that the court must allow a nonparty access to protected materials if the nonparty agreed to submit to the terms of the protective order and either had a claim or defense factually related to the protected materials or was a state or federal agency with jurisdiction over matters related to the protected materials. Discussion of this paragraph included reference again to the concern that there is a difference between denying protection and ordering access. It also was asked why this provision should be separate from the more general modification or dissolution provisions of the following paragraph (6). As with paragraph (2), it was suggested that this provision should be combined with the more general provisions on modification or dissolution. As a more specific matter, it was urged that a public agency should not be allowed access to materials without regard to whether it would have authority to compel production by its own independent proceedings. In the same vein, it was suggested that submission to the protective order might not be enough to protect against forced disclosure under a freedom-of-information act, not only with respect to federal agencies but also with respect to state agencies governed by a wide variety of state acts. Discussion of the aspect of the draft that would require the court to defeat protection produced general agreement that the verb should be changed to provide that the court "may," not must, defeat protection. No formal action was taken on paragraph (5).

Subparagraph (6) of the alternate draft provided detailed guidance for modification or dissolution of a protective order. One feature was discarded by consensus. The draft would have allocated the burden of justification according to the nature of the protective order. If the order had been entered on stipulation of the parties, the burden of establishing the need for continued protection would be on the party asserting the need. If the order was contested, the burden of establishing the need for modification or dissolution would be on the person seeking access to protected material. This distinction had been vigorously urged by a committee of the Association of the Bar of the City of New York in

commenting on the October, 1993 published draft. Concern was expressed that it might be difficult to determine whether an order had been contested, and that the distinction almost certainly would discourage stipulated orders because of the desire to secure the greater protection of a contested order. Half-hearted contests could lead to further confusion through arguments that an order was not genuinely contested. The values of stipulated protective orders should not be defeated by this provision.

The procedures for nonparty motions to modify or dissolve were discussed at length. It was recognized from the outset that the question of procedures is bound up with the importance of permitting extensive nonparty applications. Although it was noted that one possible means of raising the issue would be a subpoena issued in separate proceedings, commanding production of material subject to a protective order, there was no suggestion that such procedures should be encouraged. A protective order in one action ordinarily does not protect against production in independent proceedings by the party who initially controlled information that has been produced under a protective order. An effort to get the material from a party who received the information subject to a protective order, however, is better made by application to the court that entered the protective order. The alternative draft provided for motions in the court that entered the order by nonparties as well as parties. The motive for this approach was the belief that it should be as easy to deny an ill-founded motion directly as to deny intervention. Intervention, on the other hand, avoids the awkwardness of recognizing a nonparty's standing to make a motion.

Discussion of intervention by nonparty applicants began with recognition that intervention has been the procedure regularly used as the foundation for a motion to modify or dissolve. The rule could provide for use of an intervention procedure without invoking the intervention standards of Rule 24, and without directly addressing the question of "standing" to seek intervention. Intervention, moreover, makes it clear that the nonparty has submitted to the jurisdiction of the court to make binding orders that limit the use of any information released from the full reach of the original protective order.

Robert Campbell observed that the Federal Rules Committee of the American College of Trial Lawyers had spent several hours discussing the Rule 26(c) proposal, but had not anticipated this particular turn of the discussion to intervention. He asked, however, how Rule 24 intervention tests would apply to an applicant urging a public interest, particularly a generalized public interest in health or safety. It was responded that Rule 24 intervention tests are elastic, as shown by regular invocation of Rule 24 in present practice dealing with motions to modify or

dissolve. It was further suggested that an open invitation for nonparty motions might lead to unnecessary work for everyone involved - that an intervention procedure would permit an initial narrow focus on the question whether a plausible claim for modification or dissolution had been stated, sorting out claims that do not justify the burdens of full-scale argument and consideration.

A motion was made to adopt the first sentence of the alternative draft paragraph (6) as modified to refer to intervention. As a working model, it might begin: "A party - or a nonparty who has been granted intervention for this purpose - may move at any time before or after judgment to dissolve or modify * * *." This motion was not acted on. Discussion of the motion, however, further explored the usefulness of intervention along lines similar to the earlier discussion. Although Rule 24 intervention standards may seem to fit poorly the situation of a person who is not interested in the merits of an action, the intervention device allows a court to focus on the nature of the interest asserted as a matter separate from actual application of the standards for modifying or dissolving a protective order. If an applicant obviously cannot justify full-scale consideration of the issue, intervention can be denied. One approach would be to refer to intervention in the text of Rule 26(c) and to explain in the Note that Rule 24 does not identify the standards for intervention.

Another motion was made to strike paragraphs (2), (5), and (6) of the alternative draft. In their place, paragraph (3) of the October 1993 draft would be restored with additional discussion of public interest factors. The problems of nonparty motions, motions after judgment, and other matters would be left to continuing decisional development. This motion rested on doubts about the capacity of the Committee to discharge well the responsibility of drafting in greater detail. It was suggested that this motion was premature because the Committee had not yet finished discussion of all possibilities. The motion was not brought to a vote.

Further discussion noted that relief from a protective order might be sought by a nonparty bound by the order, as well as by a nonparty who simply wished to free someone else from the order.

Discussion of these issues led the Committee to conclude by consent that it would be better to avoid immediate decisions. One or two revised drafts will be prepared, reflecting the discussion, and circulated to the Committee. One draft might hew rather close to the 1993 proposal, while the other might venture into greater detail. If agreement can be reached, either to adhere to the proposal published in October, 1993, or to adopt a revised draft, the topic will be reported to the Standing Committee in time for

Minutes
Civil Rules Advisory Committee
October 20 and 21, 1994

13

its January, 1995 meeting. It was agreed that if the recommendation should be adoption of a draft with significant additions to the published draft, the recommendation would include publication for comment before reaching a final recommendation to the Standing Committee.

MINUTES

ADVISORY COMMITTEE ON CIVIL RULES

APRIL 28 AND 29, 1994

The Advisory Committee on Civil Rules met on April 28 and 29, 1994, at the Administrative Office of the United States Courts in Washington, D.C. The meeting was attended by Judge Patrick E. Higginbotham, Chair, and Committee Members Judge Wayne D. Brazil; Judge David S. Doty; Carol J. Hansen Fines, Esq.; Francis H. Fox, Esq.; Assistant Attorney General Frank W. Hunger; Mark O. Kasanin, Esq.; Judge Paul V. Niemeyer; Professor Thomas D. Rowe, Jr.; Judge Anthony J. Scirica; Judge C. Roger Vinson; and Phillip A. Wittmann, Esq. Edward H. Cooper was present as Reporter. Judge Alicemarie H. Stotler attended as Chair of the Committee on Rules of Practice and Procedure, as did Chief Judge William O. Bertelsman as Liaison Member from that Committee and Professor Daniel R. Coquillette as Reporter of that Committee. Chief Judge Paul Mannes, Chair of the Advisory Committee on Bankruptcy Rules, and Judge Jane A. Restani, a member of that Committee, also attended. Parts of the meeting were attended by Judge William W. Schwarzer, Joe S. Cecil, John Shapard, Elizabeth Wiggins, and Thomas E. Willging of the Federal Judicial Center. Peter G. McCabe, John K. Rabiej, Mark Shapiro, Judith Krivit, and Joseph F. Spaniol Jr., were present from the Administrative Office. Observers included Kenneth J. Sherk, Esq., and Alfred W. Cortese, Jr., Esq.

HEARING

The meeting began with a hearing on the proposals to amend Civil Rules 26, 43, 50, 52, 59, 83, and 84 that were published for comment on October 15, 1993.

Alfred W. Cortese, Jr., Esq. testified on the Rule 26(c)(3) proposal, supporting the amendment as a restatement of current good practice. He provided a history of the public perception that protective orders may defeat public access to information important to protect public health and welfare, and of the efforts that have been made over the past five years to enact state legislation in this area. Some states have adopted statutes or court rules that increase public access; many have failed to act on similar proposals. Washington passed a broad statute and then cut it back. Experience with the Texas rule has shown that it is very difficult to administer. The standards also are difficult to apply; in determining whether there is a public hazard, the judge may seem to be prejudging the merits of the case. He urged that much of the drive for increased access is based not on a need to inform the public of important issues - full information is presently available to protect against any significant hazards - but on the desire for publicity. The examples often given of thwarted public

Rule 26(c)

The comments and discussion on Rule 26(c) focused on proposed Rule 26(c)(3). None of the comments addressed the style changes made in the earlier portions of current Rule 26(c). Discussion of the comments focused on three main themes: the continuing paucity of systematic empirical evidence about the use, modification, and effects of protective orders; the intention of the Committee as to the meaning of the 1993 proposal; and the role that civil litigation may properly play in serving public interests beyond the resolution of the underlying private dispute.

The discussion began with a summary of a recent hearing on S. 1404 before Senators Kohl, Cohen, and Simon. The first panel provided testimony by victims of product injuries, including the parents of a person killed by an alleged design defect in an automobile transmission and a breast implant patient. The gist of the testimony was that these injuries might have been avoided had there been public access to information shielded by protective orders in litigation occurring before the injuries.

The second panel included Chief Judge Mikva, Judge Higginbotham, and two practicing lawyers. Chief Judge Mikva testified that the subject of protective orders is properly one to be addressed through the public processes of Congress, not the Rules Enabling Act process. Judge Higginbotham stressed the need for cooperative work involving both Congress and the Civil Rules Advisory Committee. He noted that one of the issues troubling Congress is the difficulty of acquiring solid empirical information through the Advisory Committee process.

Initial discussion repeated the earlier Committee observations that protective orders have become common. There is a continuing sense that most ongoing practice is proper and desirable. It also is accepted that - as in virtually every other area of practice - there are occasional unwise uses of protective orders. The problem is to find a way to deal with a small number of misuses without doing damage to the larger area of proper practice.

Discovery protective orders are closely related to orders that seal court records, but are distinctively different. Another dimension of the problem is to find ways of understanding the differences and translating them into a good discovery rule. Material initially subject to a protective order, for example, may be used in support of a dispositive motion or at trial. Once the information is used in such settings, access should be governed by the procedures that govern court records, not those that govern discovery materials. To the extent that proposed legislation

mingles discovery materials with other materials, it should be clarified. The general topic of access to court records was addressed again, briefly, in connection with the sketch of a possible Rule 77.1 noted below.

The purpose of the proposal as published was described by several members of the committee as confirmation of present law in the sense of the general and better practice. This purpose seemed well reflected in many of the public comments. Some questioned the need to adopt a rule that simply confirms current practice. Others thought it sensible to confirm current practice as a means of stabilizing practice and making it more uniform. Still others challenged the proposal as not going far enough. The range of comments itself was taken as evidence of the great importance of the topic and the need to think carefully about it.

One topic not addressed by the proposal is the standard for issuing an initial protective order. Some of the comments addressed this omission, suggesting that the standard should be amended to require consideration of public health and safety. Some members of the committee expressed the view that the present rule has worked effectively and that the standard for issuing an initial protective order should not be changed.

The question of reliance on a protective order was addressed in the public comments, some believing reliance an important consideration and some urging that reliance is irrelevant to modification or dissolution.

Some concern was expressed that it is inappropriate for a party to secure sweeping discovery under a protective order that limits use of the discovery materials and then switch fields by arguing that public health or safety require dissemination of the materials. A request for access by a nonparty might be different, at least if it were clear that the nonparty request had not been stimulated by a party. A response to this distinction was ventured that a nonparty who has a legitimate litigating need for information should file suit and undertake its own discovery. A different response was that these questions are genuinely complex. There is a strong pressure on counsel to do whatever best facilitates disposition of the immediate case. Protective orders and related confidentiality agreements can expedite discovery and also can ease the way to settlement. Once the fruits of discovery have been uncovered, however, there may come a new realization that the dispute involves issues that could affect other litigation or the general public.

The philosophy of discovery in relation to private civil litigation also came under consideration. Deep divergences of viewpoints were recognized. One polar view is that public judicial

means of dispute resolution are made available solely for the purpose of resolving private disputes that the parties have been unable to adjust by other means. The only purpose of providing discovery is to support as accurate a decision as possible. For this purpose, courts exert official power to compel disclosure of much information that is not subject to any other means of coerced public disclosure. Civil litigation should not become encumbered with attempts to serve more general public interests in disclosure. If there is some alternative means of compelling disclosure, that means should be pursued, whether it is discovery in other litigation, demand by public regulatory enforcement agencies, or something else. Protective order practice was expanded by the 1970 discovery amendments as a trade-off for sweeping discovery, to ensure that discovery is limited to the private needs of particular litigation. The opposite polar view is that courts are public agencies, and everything a court does is affected with a public interest. If public process is used to force disclosure of information, the information becomes public and access should be limited only for reasons that would justify sealing motion materials or a trial record.

The impact of the proposed amendment was reviewed against this background. It was suggested that it may make discovery material more readily available, and that this may create more problems than it solves. Procedures designed for deliberate pursuit of the "public interest" could prove dangerous. A civil litigation system developed for private dispute resolution could be bent in directions that would cause some litigation to be brought to foster generation of new disputes, not to resolve old ones. The same developments could drive other parties seeking only dispute resolution away from the courts to other means. Still others might capitulate, abandoning claim or defense as a means of avoiding discovery. This suggestion returned discussion to the question of the purpose of the proposal and the unintended effects it might have.

Unintended effects might flow from the explicit recognition of power to modify or dissolve, particularly when built into a structure that makes reliance simply one factor to be considered in acting on a request to modify or dissolve. Counsel advising a client about the consequences of discovery may be even more careful to make clear that it is risky to rely on a protective order in determining whether to resist discovery of information that may be outside the scope of discovery or protected against discovery. The public comments reflect the prospect that unintended effects may be attributed to the proposal.

One possible response to the risk that the proposal would have unintended consequences would be to delete the explicit statement of the power to modify or dissolve. It was moved that the proposal

Minutes
Civil Rules Advisory Committee
April 28 and 29, 1994

8

be amended by deleting the first sentence and incorporating portions of it in the second sentence. As revised, the first sentence would read: "In ruling on a motion to dissolve or modify a protective order, the court must consider * * *." Deletion of the reference to a motion might have some impact on the freedom with which courts act on their own initiative, but it was not intended that the published proposal cut off the power to act without motion. After discussion, it was decided by vote of 6 to 4 that the language should not be changed.

The discussion of the need for a motion also addressed the question of "standing" to seek modification or dissolution. It was supposed that the draft language does not change present practice, that a nonparty would be allowed to seek access in the same circumstances as now support a nonparty request. The question was recognized as a difficult one that deserves further consideration.

The public comments suggested many possible changes in Rule 26(c). One that was picked out for discussion was incorporation of an explicit reference to changes in circumstances between initial issuance of a protective order and the time of a motion to dissolve or modify. No conclusion was reached as to this suggestion.

Another question raised by the public comments is whether it is feasible to administer a test that looks to public health and safety. During the early phases of discovery, when protective orders are most likely to be important, it may be difficult to get behind plausible assertions of a threat to public health or safety. Efforts to determine the question may take on aspects of a preliminary trial. If protection is denied, prospects of settlement may be diminished because publicity drives the defendant to seek vindication by judgment. Again, no conclusion was reached as to this concern.

Discussion then turned to the proper course to take on the present proposal. It was noted that protective discovery orders have been caught up in the more general debate about access to court records, often without distinguishing the differences between discovery information and materials that have been submitted for consideration and action by a court. Congress and many state legislatures have undertaken active consideration of these topics, and it is important to develop some means of integrating the work of the Advisory Committee with the work of Congress. The single most important question, moreover, remains a matter of competing anecdotes. There still is no systematic empirical evidence to show whether legitimate and significant needs for public access to discovery information are often defeated by protective orders. Protective orders do much good. But if they also cause much harm, some means must be found to preserve most of the good and avoid most of the harm.

Minutes
Civil Rules Advisory Committee
April 28 and 29, 1994

9

The desire for more reliable information about the effects of discovery orders turned discussion to the first tentative results of a Federal Judicial Center study of protective order activity in the United States District Court for the District of Columbia. Elizabeth Wiggins presented the results, showing a substantial rate of protective order activity, more often involving contested motions than stipulations. At least these preliminary results suggest the need to examine the common belief that "most" protective orders result from agreement among the parties. Approximately 20% of the orders and stipulations included express provisions governing the reasons for vacating the protection.

After discussion of the first findings, unanimous approval was given to a motion that the Federal Judicial Center be asked to broaden the protective order study. Committee members will work with Judicial Center staff to help frame the study. It is hoped that results will be available in time for the October meeting of the Committee. Protective order questions will be considered again at that meeting.

In addition to the Federal Judicial Center study, information also will be sought by seeking to work with the committees and staff of Congress. The importance of working with Congress was stressed repeatedly.

LEGISLATIVE MATERIALS RE PROTECTIVE ORDERS



JAMES C. DUFF
Director

JILL C. SAYENGA
Deputy Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief

Rules Committee Support Office

August 3, 2010

TO: ANDREW S. GINSBURG
FROM: JOHN K. RABIEJ
SUBJECT: H.R. 5419

On behalf of Judge Lee H. Rosenthal, chair of the Judicial Conference's Committee on Rules of Practice and Procedure ("Standing Rules Committee"), and Judge Mark R. Kravitz, chair of its Advisory Committee on Civil Rules ("Civil Rules Committee"), I want to thank you for the request for comments on the "Sunshine in Litigation Act of 2010," (H.R. 5419), which was introduced on May 26, 2010. The extensive work done to address in H.R. 5419 some of the concerns expressed in the past about similar bills is very much appreciated. However, H.R. 5419 continues to present difficult and unnecessary problems that would make civil litigation more expensive, more burdensome, and more time-consuming, and that would make it more difficult to protect important privacy interests. The proposed new language in H.R. 5419 will not avoid the many problems that lawyers, litigants, and judges would face in complying with the legislation and the resulting burdens on the administration of justice.

This memo addresses specific provisions of H.R. 5419, focusing on its differences from, and similarities to, prior bills. Judge Rosenthal, Judge Kravitz, and I would be pleased to meet in person or to set up a telephone call to discuss these issues further.

1. Overview

H.R. 5419 would change Rule 26(c) of the Federal Rules of Civil Procedure by requiring a judge presiding over a case who is asked to enter a protective order restricting the dissemination of information obtained in discovery to first make "independent findings of fact" that the order would not restrict the disclosure of information "which is relevant to the protection of public health or safety" or, if it is relevant, that "the public interest in the disclosure of potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information" and that the protective order requested is "no broader than necessary to protect the confidentiality interest asserted." The same "independent findings of fact" must be made before a judge may issue an order approving a settlement agreement that would restrict the disclosure of information "which is relevant to the protection of public health or safety" or an order restricting access to "court records." As you know, we have consistently opposed the similar protective-order

bills regularly introduced since 1991. One reason for the opposition has been that the legislation is inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. H.R. 5419 is similar to the earlier bills in this respect.

2. Section 1660(a)(1): The Scope of H.R. 5419

H.R. 5419 is narrower than earlier protective-order bills because it is limited to cases in which the pleadings “state facts that are relevant to the protection of public health or safety.” The narrower application recognizes that most cases in the federal courts do not implicate public health or safety and should not be affected by the added requirements H.R. 5419 would impose. But the provisions defining the scope of H.R. 5419 are problematic. In many cases, it would not be possible for the court to determine by reviewing the pleadings whether H.R. 5419 applies. What does it mean to “state facts that are relevant to the protection of public health or safety”? Would an antitrust claim involving allegations that a drug patent owner had entered into agreements to suppress competition in the development of new drugs qualify? Would a discrimination claim alleging sexual harassment in the workplace qualify? What about a securities action involving a pharmaceutical manufacturer? Or a claim of sexual discrimination involving the refusal to promote highly qualified women working in a pharmaceutical company? These are but a few examples of how difficult it would be for a court to determine if a case was covered by H.R. 5419. The standard of “facts that are relevant to the protection of public health or safety” is so broad and indefinite that it will either sweep up many cases having little to do with public health or safety and impose on all these cases the costly and time-consuming requirements of H.R. 5419, or require the parties and court to spend extensive time and resources litigating whether the statute applies.

The criterion that the pleadings “state facts that are relevant to the protection of public health or safety” raises other concerns as well. How specifically must the facts be stated? Is it sufficient for a party simply to allege that a case involves public health or safety to invoke H.R. 5419 and thereby make it more difficult, time-consuming, and expensive for the opposing party to protect private information from public dissemination? If more specificity in pleading facts “relevant to the protection of public health or safety” is required, how much more? Does the bill require heightened pleading of such facts under Rule 9(b)? Or does the pleading standard of Rule 8 apply? If the answer is that Rule 8 applies but specific facts are required, that would make H.R. 5419 appear inconsistent with Rule 8, creating confusion and uncertainty.

3. Section 1660(a)(1)(A) and (B): The Procedure for Entering a Discovery Protective Order

Once an action is identified as one that based on the pleadings falls under H.R. 5419, the requirement that the court make independent findings of fact before issuing a protective order in discovery is triggered. This requirement is very similar to prior protective-order bills. The Committees have consistently opposed those bills because the procedure they require would delay discovery, increase motions practice, and impose significant and unworkable new burdens on lawyers, litigants, and judges. H.R. 5419 raises the same concerns.

In many cases, parties are unwilling to begin exchanging information in discovery until an enforceable protective order is entered. The vital role protective orders play in effective discovery management is well recognized.¹ The information the parties exchange in discovery often includes highly sensitive personal and private information or extremely valuable confidential information. Plaintiffs as well as defendants have discoverable information that must be protected from public dissemination. And discoverable private or confidential information is often not just in the parties' hands, but may also be held by nonparties such as witnesses, coworkers, patients, customers, and

1

See, e.g., SEC v. Merrill Scott & Assoc. Ltd., 600 F.3d 1262, 1272 (10th Cir. 2010) (“Protective orders 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.’” (alteration in original) (quoting *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979) (quotation and citation omitted))); *SEC v. TheStreet.com*, 273 F.3d 222, 229 (2d Cir. 2001) (“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.’” (quoting FED. R. CIV. P. 26(c))); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1316 (11th Cir. 2001) (Black, J., concurring) (“‘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.’” (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986))); *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 535 (1st Cir. 1993) (“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.”); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (“[P]rotective orders are becoming standard practice in complex cases. 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.’” (internal citation omitted)); *In re Courier-Journal v. Marshall*, 828 F.2d 361, 364 (6th Cir. 1987) (“‘[T]he unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders’” (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984))); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 446 (1991) (“[T]he protective order is a tool particularly well-adapted to minimize discovery abuse. The dissemination of private or valuable information generated during discovery may produce serious harm, both to society and to litigants. A fear of that harm may chill a claimant’s willingness to resort to the courts or encourage either party to settle for reasons and on terms unrelated to the merits of the underlying claim. The protective order guards against these harms without impairing the flow of information to the litigants.” (footnote omitted)); *id.* at 483 (“If litigants know that compliance with a discovery request could lead to uncontrolled dissemination of private or commercially valuable information, many can be expected to contest discovery requests with increasing frequency and tenacity to prevent disclosure. The discretion courts currently have in granting protective orders has allowed them to develop one of the most significant management tools for guiding litigants through the pretrial process with a minimum of motion practice and needless friction.” (footnote omitted)).

many others. The internet has made it much more difficult to protect private and confidential information and has increased the importance of protective orders.

Protective orders avoid delay and cost by allowing the parties to exchange information in discovery that they would not exchange otherwise without objection or motion, hearing, and court order. The requesting party's chief interest is to get discovery produced as quickly and with as little expense and burden as possible. Protective orders serve that interest by allowing the parties to exchange information—with electronic discovery, in volumes that are often huge—without time-consuming, costly, and burdensome pre-production motions and hearings. H.R. 5419 would frustrate the role of protective orders and would make discovery more burdensome, time-consuming, and expensive than it already is.

Under H.R. 5419, as with similar prior bills, no protective order can issue unless and until: (1) the party seeking the order designates all the information that would be produced in discovery subject to restrictions on disclosure; (2) the judge reviews all this information to determine whether any of it is relevant to the protection of public health or safety; (3) if any of the information is determined to be relevant to the protection of public health or safety, the judge determines whether any of the information is subject to a specific and substantial interest in maintaining its confidentiality; (4) the judge then determines whether the public interest in the disclosure of any information about public health or safety hazards is outweighed by that interest; and (5) the judge then decides whether the requested order is no broader than necessary to protect that confidentiality interest. The judge's review would often occur relatively early in the litigation, when the judge—who knows less about the case than the parties—is the least informed about the case. Information sought in discovery does not come labeled “impacts public health or safety” or “raises specific and substantial interest in confidentiality.” The judge will often simply be unable to tell whether the information she is reviewing is relevant to public health or safety. The judge also will not be able to tell whether there are “specific and substantial” privacy or confidentiality interests or how they should be weighed.

Even in cases in which the pleadings state facts relevant to public health or safety, much of the information sought and produced in discovery will not implicate public health or safety. Indeed, much of the information will not be important or even relevant to the case and will not be used by the parties in litigating the case. But there may be significant amounts of private or confidential information that should be protected from public disclosure. Under H.R. 5419, a lawyer representing a client, plaintiff or defendant, could not seek a protective order without first doing the expensive and time-consuming work of identifying specific information to be obtained through discovery that would be subject to disclosure restrictions. The judge could not issue a protective order to restrict the dissemination of any information obtained through discovery without making the independent findings of fact as to all that information. The effect would be delay, increased motions, and a reduction in timely, cost-effective access to justice.

In addition to causing delay and increased costs in the cases in which protective orders are sought, the procedure in H.R. 5419 would cause delays in access to the federal court system in all

cases. If judges have to look through every document produced in discovery in cases in which a protective order is sought, that will take time away from other pressing court business that litigants expect judges to take care of in a timely manner.

Comparing the procedure under H.R. 5419 with the protective-order practice followed under current law in the federal courts further illustrates problems the legislation would create. Under current law, when the parties ask the court to enter a protective order before discovery begins, the language of Rule 26(c) and the case law require the court to find good cause for entering such an order, even if the parties agree on the terms. In most cases in which a discovery protective order is sought, the court makes the good-cause determination by examining the nature of the case and the types or categories of information that are likely to be exchanged in discovery. Neither the parties nor the court is required to conduct a time-consuming and burdensome pre-discovery review of all the information that will be produced.

The protective order typically sets up a procedure for the parties to designate documents exchanged in discovery—as opposed to filed with the court—as confidential, restricting their dissemination. Most protective orders include “challenge provisions” under which the receiving party or third parties may dispute the designation of a particular document or categories of documents as confidential. Even without such challenge provisions, the case law provides this right. Once the requesting party—who knows the case much better than the judge—gets the documents in discovery and can review them, that party may ask the court to permit the dissemination of documents designated as confidential, to modify the terms of the protective order, or to dissolve the protective order. Among the reasons for modification can be the relevance of the documents to protecting public health or safety and the need to bring them to the appropriate regulatory agency, or the desire to use the documents in related litigation. The court can effectively and efficiently consider such requests because they are focused on specific documents or information. With this focus, the court is able to resolve the requests by applying the factors the case law establishes, including the protection of public health or safety.

The procedures followed under current law meet the goals of H.R. 5419, including in the relatively small number of cases filed in federal courts that implicate public health or safety, without the grave additional burdens, costs, and delays H.R. 5419 would impose. In contrast, the procedure established under H.R. 5419 is ineffective to meet its purpose and would create severe problems in discovery.

4. Section 1660(a)(1): The Application to Orders Restricting Access to Court Records

Section 1660(a)(1) imposes the same requirements on court orders that would restrict public access to court records that apply to orders restricting public access to information exchanged in discovery. This provision weakens the standard federal courts apply under current law for ensuring public access to documents that are filed with the federal court. Under current law, if the parties want to take the material exchanged in discovery and file it with the court, either with a motion or

in an evidentiary hearing or at trial, a standard different and higher than the discovery protective-order standard applies before a court can seal it from public view. Courts recognize a general right of public access to all materials filed with the court that bear on the merits of a dispute. This presumption of access usually can be overcome only for compelling reasons; access is granted without the need to show a threat to public health or safety or any other particular justification unless a powerful need for confidentiality is shown. A lower good-cause standard applies to an order restricting disclosure of information exchanged in discovery but not filed with the court.

This distinction between the standard for protecting the confidentiality of information exchanged in discovery and the standard for filing under seal is critical. It reflects the longstanding recognition that while there is no right of public access to information exchanged between litigants in discovery, there is a presumptive right of public access to information that is filed in court and used in deciding cases. Courts require a much more stringent showing to seal documents filed in court than to limit dissemination of documents exchanged in discovery but never filed with the court.

Section 1660(a)(1) reduces the standard necessary to seal documents filed in court and collapses it into the standard necessary to restrict public dissemination of documents exchanged in discovery. As a result, H.R. 5419 weakens the right of public access to court documents, a change in the law that is unnecessary and inconsistent with the bill's purpose. Indeed, § 1660(a)(1) directly conflicts with section (2)(c)(1) of H.R. 5419, which states that the bill may not be construed to “weaken or to limit—(1) existing common law or constitutional standards for information access”

5. Section 1660(a)(2): Discovery Protective Orders After the Entry of Final Judgment

Section 1660(a)(2) would make a discovery protective order unenforceable after final judgment unless the judge made separate findings of fact that each of the requirements of (a)(1)(A) and (B) were met. The burden of proof provision in (a)(3) requires that the need for continuing protection be demonstrated as to all the information obtained in discovery subject to the protective order. Under current practice, the protective order often continues in effect, subject to requests made by either parties or nonparties to release documents or information. Once a party or third party identifies documents or information for which disclosure is sought, the burden of proof is much clearer and efficiently applied. The court is able to effectively and efficiently determine whether the protective order should be modified or lifted because the focus is on specifically identified documents or information. This current practice is adequate to meet the purpose of H.R. 5419 without the added burdens, delays, and costs the bill would add.

Section 1660(a)(2) would greatly add to the costs and burdens of conducting discovery because parties could not be confident that even the most sensitive information they produced would remain subject to the protective order provisions when the case ended. The great importance of limiting access to such highly confidential private information is evidenced by the frequent use in protective orders of “attorneys’ eyes only” provisions, which preclude a receiving attorney from

sharing certain information received in discovery even with her clients. Such provisions are frequently used in litigation involving complex technology. The parties involved in such litigation often require the return or destruction of their highly confidential and proprietary materials at the conclusion of litigation, to ensure that materials so confidential that they could not even be shared with the receiving attorney's client during the litigation remain confidential when the litigation ends. Such provisions are also used in many other cases in which highly sensitive and private information about both parties and nonparties is obtained in discovery. It is essential to the effective and efficient operation of discovery that litigants be able to rely on the continuing confidentiality of information produced, including after the case ends, subject to the right of others to ask the court to permit broader dissemination of specific information for reasons that could include relevance to public health or safety. H.R. 5419 destroys the reliability that makes protective orders effective, with no evidence that such a step is needed.

6. Some Confusing Provisions in the Bill

Section 1660(a)(4)(A) states that “[t]his section” applies “even if an order under paragraph (1) is requested—(A) by motion pursuant to rule 26(c) of the Federal Rules of Civil Procedure” Yet section 1660(a)(1) states that a court “shall not enter an order under rule 26(c) of the Federal Rules of Civil Procedure” without complying with the requirements set forth. The result is confusion.

Section 1660(a)(5)(A) states that the “provisions of this section shall not constitute grounds for the withholding of information in discovery that is otherwise discoverable under rule 26 of the Federal Rules of Civil Procedure.” It is unclear what this section contributes or means. Does this mean that a protective order cannot protect a party against the burden of producing any information within the scope of Rule 26—that an order can only restrict the use of information once produced? That directly conflicts with Rule 26(b)(2) and (c), which authorize a court to limit discovery for important purposes. Under Rule 26(b)(2)(C)(iii), a court must limit discovery if “the burden or expense of the proposed discovery outweighs its likely benefit” This proportionality principle has been a vital part of the rules since 1983. How does the court reconcile the conflict between the language stating that H.R. 5419 precludes withholding information in discovery that is otherwise discoverable under Rule 26 and the proportionality provisions of Rule 26? H.R. 5419 would support arguments that it bestows a right to obtain marginally relevant information even if it is at a cost and burden that is disproportionate to the reasonable needs of the case.

A similar problem is present in § 1660(a)(5)(B), which forbids a party from requesting a stipulation to an order that “would violate this section” as a condition for the production of discovery. How does one know that at the time of the request? Can a party request a stipulation to an order that the party believes does not violate § 1660(a)(1), or to an order in a case that the party believes is not subject to the section because the pleadings do not allege the necessary facts? What is the enforcement mechanism for this provision? The purpose of prohibiting a request for a stipulation is unclear; the other party can refuse and the court may not enter a protective order unless it makes the required “independent findings of fact.” The impact will likely be collateral disputes

over the propriety of the request, further contributing to the increase in the costs and delays of discovery.

Section 1660(d) creates a “rebuttable presumption” relating to personal privacy. What is necessary to rebut the presumption? What kind of personal information is included? The bill says that it is “information relating to financial, health, or other similar information.” Similar to what?

Section (2)(c) of the bill—which, confusingly, is not codified as part of section 1660—states that the bill may not be “construed to weaken or to limit . . . (2) confidentiality protections as a basis for a protective order.” The entire point of § 1660(a) is to weaken or limit confidentiality protections as a basis for a protective order.

These are only a few of the unclear and confusing provisions relating to discovery protective orders under H.R. 5419. The unclear meaning and impact of these and other provisions highlight the importance of the thorough, transparent, and careful Rules Enabling Act process in drafting language that would so directly affect the federal rules.

7. The Provisions Relating to Orders Approving Settlement Agreements

Section 1660(a)(1) would prohibit a court from entering an order approving a settlement agreement that restricts the disclosure of information obtained through discovery, in a case in which the pleadings state facts that are relevant to the protection of public health or safety, unless the court makes the specified independent findings of fact. Section 1660(c)(1) would preclude a court from enforcing any provision of a settlement agreement in a case with such pleadings that restricts a party from disclosing the fact of settlement or the terms of the settlement that involve matters relevant to the protection of public health or safety, other than the amount of money paid; or that restricts a party from “discussing the civil action, or evidence produced in the civil action, that involves matters relating to public health or safety,” unless the court makes the specified independent findings of fact.

There are very few federal court orders approving settlement agreements. Settlements are generally a matter of private contract. Settlement agreements usually are only brought to a court for approval if the applicable law requires it, as in settlements on behalf of minors, or of absent class members. Similarly, federal courts are rarely called on to enforce settlement agreements. Unless the agreement specifically invokes a court’s continuing jurisdiction or an independent basis for jurisdiction applies, enforcement actions are generally brought in state courts. The settlement provisions in H.R. 5419 will rarely apply and are therefore unlikely to be effective.

The Standing and Civil Rules Committees have previously provided the House Judiciary Committee with the extensive empirical study done by the Federal Judicial Center on court orders that limit the disclosure of settlement agreements filed in the federal courts. That study showed no need for legislation such as H.R. 5419. The FJC study and a follow-up study showed that in the few cases in which a potential public health or safety hazard might be involved and in which a settlement

agreement was sealed by court order, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints identified the three most critical pieces of information about possible public health or safety risks: the risk itself, the source of that risk, and the harm that allegedly ensued. In many cases, the complaints went considerably further. The complaints, as well as other documents, provided the public with access to information about the alleged wrongdoers and wrongdoings, without the need to also examine the settlement agreement.

Based on the relatively small number of cases involving any sealed settlement agreement and the availability of other sources to inform the public of potential hazards in these few cases, the Rules Committees concluded that a statute restricting confidentiality provisions in settlement agreements is unnecessary and unlikely to be effective. The primary effect of H.R. 5419 is likely to be an added barrier to access to the federal courts by making it more difficult and cumbersome to resolve disputes. The result is to send more disputes to private mediation or other avenues where there is no public access to information at all.

8. The Civil Rules Committee's Continued Work

In May 2010, the Civil Rules Committee sponsored an important conference on civil litigation at Duke University Law School. That conference addressed problems of costs, delays, and barriers to access at every stage ranging from pre-litigation to pleadings, motions, discovery, case-management, and trial. It is worth noting that in all the studies conducted, the papers submitted, and the criticisms of and suggestions for improving the present system, no one raised problems with protective orders or orders limiting access to settlement agreements filed with the federal courts. This further underscores the lack of any need for legislation.

The Civil and Standing Rules Committees are deeply committed to identifying problems with the federal civil justice system that can be addressed by changes to the Federal Rules of Civil Procedure, and to making those changes through the process Congress established—the Rules Enabling Act. As part of that process, the Civil Rules Committee is continuing to monitor the case law under Rule 26(c) to ensure that it is not operating to prevent public access to important information about public health or safety. The Committee is examining revisions to Rule 26(c) to, among other things, incorporate express provisions on challenging, modifying, or dissolving protective orders. The Advisory Committee will certainly keep you apprised on this work.

Last year, the Committees provided the House Judiciary Committee with a memo on the case law in every circuit on entering protective orders, modifying protective orders, and entering sealing orders. The case law set out in the memo shows that courts are attuned to the public interest and that courts have developed procedures for addressing the need to produce discovery materials to other litigants and agencies. The Advisory Committee continues to monitor the case law. The memo on protective order case law was recently updated and is publicly available online at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf. A copy is attached for your convenience.

Andrew S. Ginsburg
Page 10

Thank you again for the opportunity to comment on H.R. 5419. As I said, Judge Rosenthal, Judge Kravitz, and I are available to meet in person or to set up a telephone call to discuss these issues. I can be reached at 202-502-1820.

cc: Christal Sheppard, Esquire
Blaine Merritt, Esquire

111TH CONGRESS
2D SESSION

H. R. 5419

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MAY 26, 2010

Mr. NADLER of New York introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Sunshine in Litigation
5 Act of 2010”.

1 **SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEAL-**
2 **ING OF CASES AND SETTLEMENTS.**

3 (a) IN GENERAL.—Chapter 111 of title 28, United
4 States Code, is amended by adding at the end the fol-
5 lowing:

6 **“§ 1660. Restrictions on protective orders and sealing**
7 **of cases and settlements**

8 “(a)(1) In any civil action in which the pleadings
9 state facts that are relevant to the protection of public
10 health or safety, a court shall not enter an order under
11 rule 26(c) of the Federal Rules of Civil Procedure restrict-
12 ing the disclosure of information obtained through dis-
13 covery, an order approving a settlement agreement that
14 would restrict the disclosure of such information, or an
15 order restricting access to court records unless in connec-
16 tion with such order the court has first made independent
17 findings of fact that—

18 “(A) such order would not restrict the disclo-
19 sure of information which is relevant to the protec-
20 tion of public health or safety; or

21 “(B)(i) the public interest in the disclosure of
22 potential health or safety hazards is outweighed by
23 a specific and substantial interest in maintaining the
24 confidentiality of the information or records in ques-
25 tion; and

1 “(ii) the requested order is no broader than
2 necessary to protect the confidentiality interest as-
3 serted.

4 “(2) No order entered in accordance with paragraph
5 (1), other than an order approving a settlement agree-
6 ment, shall continue in effect after the entry of final judg-
7 ment, unless at the time of, or after, such entry the court
8 makes a separate finding of fact that the requirements
9 of paragraph (1) have been met.

10 “(3) The party who is the proponent for the entry
11 of an order, as provided under this section, shall have the
12 burden of proof in obtaining such an order.

13 “(4) This section shall apply even if an order under
14 paragraph (1) is requested—

15 “(A) by motion pursuant to rule 26(e) of the
16 Federal Rules of Civil Procedure; or

17 “(B) by application pursuant to the stipulation
18 of the parties.

19 “(5)(A) The provisions of this section shall not con-
20 stitute grounds for the withholding of information in dis-
21 covery that is otherwise discoverable under rule 26 of the
22 Federal Rules of Civil Procedure.

23 “(B) No party shall request, as a condition for the
24 production of discovery, that another party stipulate to an
25 order that would violate this section.

1 “(b)(1) In any civil action in which the pleadings
2 state facts that are relevant to the protection of public
3 health or safety, a court shall not approve or enforce any
4 provision of an agreement between or among parties to
5 a civil action, or approve or enforce an order subject to
6 subsection (a)(1), that prohibits or otherwise restricts a
7 party from disclosing any information relevant to such
8 civil action to any Federal or State agency with authority
9 to enforce laws regulating an activity relating to such in-
10 formation.

11 “(2) Any such information disclosed to a Federal or
12 State agency shall be confidential to the extent provided
13 by law.

14 “(c)(1) Subject to paragraph (2), a court shall not
15 enforce any provision of a settlement agreement in any
16 civil action in which the pleadings state facts that are rel-
17 evant to the protection of public health or safety between
18 or among parties that prohibits one or more parties
19 from—

20 “(A) disclosing that a settlement was reached
21 or the terms of such settlement that involve matters
22 relevant to the protection of public health or safety,
23 other than the amount of money paid; or

1 “(B) discussing the civil action, or evidence pro-
2 duced in the civil action, that involves matters re-
3 lated to public health or safety.

4 “(2) Paragraph (1) applies unless the court has made
5 independent findings of fact that—

6 “(A) the public interest in the disclosure of po-
7 tential health or safety hazards is outweighed by a
8 specific and substantial interest in maintaining the
9 confidentiality of the information or records in ques-
10 tion; and

11 “(B) the requested order is no broader than
12 necessary to protect the confidentiality interest as-
13 serted.

14 “(d) When weighing the interest in maintaining con-
15 fidentiality under this section, there shall be a rebuttable
16 presumption that the interest in protecting personally
17 identifiable information relating to financial, health or
18 other similar information of an individual outweighs the
19 public interest in disclosure.

20 “(e) Nothing in this section shall be construed to per-
21 mit, require, or authorize the disclosure of classified infor-
22 mation (as defined under section 1 of the Classified Infor-
23 mation Procedures Act (18 U.S.C. App.)).”.

24 (b) TECHNICAL AND CONFORMING AMENDMENT.—
25 The table of sections for chapter 111 of title 28, United

1 States Code, is amended by adding after the item relating
2 to section 1659 the following:

“1660. Restrictions on protective orders and sealing of cases and settlements.”.

3 (c) RULE OF CONSTRUCTION.—Nothing in the
4 amendments made by this act shall be construed to weak-
5 en or to limit—

6 (1) existing common law or constitutional
7 standards for information access; or

8 (2) confidentiality protections as a basis for a
9 protective order.

10 **SEC. 3. EFFECTIVE DATE.**

11 The amendments made by this Act shall—

12 (1) take effect 30 days after the date of enact-
13 ment of this Act; and

14 (2) apply only to orders entered in civil actions
15 or agreements entered into on or after such date.

○

111TH CONGRESS
1ST SESSION

H. R. 1508

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

MARCH 12, 2009

Mr. WEXLER (for himself and Mr. NADLER of New York) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To amend chapter 111 of title 28, United States Code, relating to protective orders, sealing of cases, disclosures of discovery information in civil actions, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Sunshine in Litigation
5 Act of 2009”.

1 **SEC. 2. RESTRICTIONS ON PROTECTIVE ORDERS AND SEAL-**
2 **ING OF CASES AND SETTLEMENTS.**

3 (a) IN GENERAL.—Chapter 111 of title 28, United
4 States Code, is amended by adding at the end the fol-
5 lowing:

6 **“§ 1660. Restrictions on protective orders and sealing**
7 **of cases and settlements**

8 “(a)(1) A court shall not enter an order under rule
9 26(c) of the Federal Rules of Civil Procedure restricting
10 the disclosure of information obtained through discovery,
11 an order approving a settlement agreement that would re-
12 strict the disclosure of such information, or an order re-
13 stricting access to court records in a civil case unless the
14 court has made findings of fact that—

15 “(A) such order would not restrict the disclo-
16 sure of information which is relevant to the protec-
17 tion of public health or safety; or

18 “(B)(i) the public interest in the disclosure of
19 potential health or safety hazards is outweighed by
20 a specific and substantial interest in maintaining the
21 confidentiality of the information or records in ques-
22 tion; and

23 “(ii) the requested protective order is no broad-
24 er than necessary to protect the privacy interest as-
25 serted.

1 “(2) No order entered in accordance with paragraph
2 (1), other than an order approving a settlement agree-
3 ment, shall continue in effect after the entry of final judg-
4 ment, unless at the time of, or after, such entry the court
5 makes a separate finding of fact that the requirements
6 of paragraph (1) have been met.

7 “(3) The party who is the proponent for the entry
8 of an order, as provided under this section, shall have the
9 burden of proof in obtaining such an order.

10 “(4) This section shall apply even if an order under
11 paragraph (1) is requested—

12 “(A) by motion pursuant to rule 26(c) of the
13 Federal Rules of Civil Procedure; or

14 “(B) by application pursuant to the stipulation
15 of the parties.

16 “(5)(A) The provisions of this section shall not con-
17 stitute grounds for the withholding of information in dis-
18 covery that is otherwise discoverable under rule 26 of the
19 Federal Rules of Civil Procedure.

20 “(B) No party shall request, as a condition for the
21 production of discovery, that another party stipulate to an
22 order that would violate this section.

23 “(b)(1) A court shall not approve or enforce any pro-
24 vision of an agreement between or among parties to a civil
25 action, or approve or enforce an order subject to sub-

1 section (a)(1), that prohibits or otherwise restricts a party
2 from disclosing any information relevant to such civil ac-
3 tion to any Federal or State agency with authority to en-
4 force laws regulating an activity relating to such informa-
5 tion.

6 “(2) Any such information disclosed to a Federal or
7 State agency shall be confidential to the extent provided
8 by law.

9 “(c)(1) Subject to paragraph (2), a court shall not
10 enforce any provision of a settlement agreement described
11 under subsection (a)(1) between or among parties that
12 prohibits 1 or more parties from—

13 “(A) disclosing that a settlement was reached
14 or the terms of such settlement, other than the
15 amount of money paid; or

16 “(B) discussing a case, or evidence produced in
17 the case, that involves matters related to public
18 health or safety.

19 “(2) Paragraph (1) does not apply if the court has
20 made findings of fact that the public interest in the dislo-
21 sure of potential health or safety hazards is outweighed
22 by a specific and substantial interest in maintaining the
23 confidentiality of the information.

24 “(d) When weighing the interest in maintaining con-
25 fidentiality under this section, there shall be a rebuttable

1 presumption that the interest in protecting personally
2 identifiable information relating to financial, health or
3 other similar information of an individual outweighs the
4 public interest in disclosure.

5 “(e) Nothing in this section shall be construed to per-
6 mit, require, or authorize the disclosure of classified infor-
7 mation (as defined under section 1 of the Classified Infor-
8 mation Procedures Act (18 U.S.C. App.)).”

9 (b) TECHNICAL AND CONFORMING AMENDMENT.—
10 The table of sections for chapter 111 of title 28, United
11 States Code, is amended by adding after the item relating
12 to section 1659 the following:

“1660. Restrictions on protective orders and sealing of cases and settlements.”

13 **SEC. 3. EFFECTIVE DATE.**

14 The amendments made by this Act shall—

15 (1) take effect 30 days after the date of enact-
16 ment of this Act; and

17 (2) apply only to orders entered in civil actions
18 or agreements entered into on or after such date.

○

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

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

June 28, 2010

Honorable Nancy Pelosi
Speaker
United States House of Representatives
Washington, DC 20515

Dear Madam Speaker:

We write on behalf of the Judicial Conference Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure to express our significant concerns about Section 6 of the proposed legislation relating to certain civil actions arising from maritime incidents, H.R. 5503. Section 6, entitled "Unenforceability of Certain Secrecy Agreements," as amended by the Maritime Liability/Secrecy Agreement Revision, would cause severe problems and is inconsistent with, and unnecessary to, the purpose of the legislation. We urge you to remove this section. This letter outlines some of our most pressing concerns.

Section 6 would make court orders restricting the dissemination of broad categories of information void and unenforceable in any legal proceeding, with a very limited exception. The only exception is for court (or government agency) orders that the party seeking enforcement proves by clear and convincing evidence are necessary to protect public health or safety, if the judge makes factual findings and conclusions of law relating to that enforcement. These provisions in effect rewrite Rule 26(c) of the Federal Rules of Civil Procedure for the cases covered by the legislation. Rule 26(c) explicitly authorizes courts to issue orders in pretrial discovery to protect important rights and interests. Not only does Section 6 circumvent the process for amending the Federal Rules of Civil Procedure that Congress established in the Rules Enabling Act, 28 U.S.C. §§ 2072-2077, it threatens litigants' rights and interests and creates an unworkable procedure for the cases covered by H.R. 5503.

The provisions in Section 6 would prohibit a court from enforcing a protective or confidentiality order that is necessary to protect vital privacy rights. For example, a court could not enforce an order limiting the dissemination of intimate health or other highly sensitive personal information about a plaintiff or any other person whose information is sought in discovery. Nor could a court enforce an order limiting the dissemination of highly sensitive trade secret information about proprietary technology or financial information about any party or other person or entity. Such a restriction is inconsistent with well-established case law in every circuit recognizing the importance of protective orders issued under Rule 26(c), based on a good-cause showing, to protect private and confidential information exchanged in pretrial discovery from being broadcast on the internet and otherwise made public. This section of H.R. 5503 is unnecessary to achieve the bill's purposes and has the potential to do great harm to those already struggling with the effects of the oil spill.

Section 6 of H.R. 5503 also provides an unworkable procedure that would delay and complicate discovery in the very cases that should be handled with expedition and efficiency to provide needed relief to those affected by the spill. The vital role protective orders play in enabling parties to exchange information in discovery efficiently, without the delay caused by requiring detailed involvement by a court, is well recognized. Section 6 would frustrate that role. Parties are usually unwilling to begin discovery unless there is an enforceable protective order in place. Under the provisions of H.R. 5503, a court could not enforce a protective order unless the proponent first proved by "clear and convincing evidence that such enforcement is permitted under subsection (c)," which in turn requires that the enforcement is necessary to public health or safety, and unless the court stated factual findings and conclusions of law relating to that enforcement on the record. Under this procedure, no discovery would occur until after the proponent of a protective order showed by clear and convincing evidence that the order was needed for the documents in question and the court made the findings and conclusions. This procedure would greatly delay discovery. It is also unworkable because it requires the court to rule on the adequacy of the showing and to make the findings and conclusions before the party seeking the documents has been able to obtain them. That means that the court is ruling without the benefit of informed input from all sides, which makes it more difficult for the court to rule efficiently and fairly, further complicating and delaying discovery and further delaying the litigation. Ordinarily, it is the party seeking the documents that is in the best position to inform the court whether the documents subject to the protective order are properly designated as subject to the order. Under Section 6, the court will not have that vital input.

In addition, this section of H.R. 5503 is unnecessary to prevent undue restrictions on documents and information that should be publicly available. Under Rule 26(c), federal courts enter a protective order for materials to be produced in pretrial discovery based on a good-cause showing. The case law makes it clear that courts consider a number of factors, including whether the information at issue is important to public health or safety, whether the litigation involves issues important to the public, the importance of a protective order to the fair and efficient conduct of discovery, and the confidentiality interests of the parties or nonparties. Once a protective order issues and discovery is able to proceed, there are recognized procedures for allowing parties, or third parties, to challenge the application of the protective order to particular documents or categories of documents, or to move to modify the order. In deciding such motions, courts consider whether the information at issue is important to public health or safety as well as other factors specific to each case. The procedure under Rule 26, with the case law in each circuit, allows discovery to be conducted subject to the court's oversight to ensure that protective orders do not improperly prevent the public from learning information that should be available to protect public health or safety. The protective order provisions in H.R. 5503 are unnecessary and would instead create severe problems.

The views in this letter are limited to the provisions in H.R. 5503 that affect the Federal Rules of Civil Procedure and do not address other parts of the legislation. We appreciate your consideration of these views and look forward to continuing to work with you on these vital matters.

Sincerely,



Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Standing Committee on Rules
of Practice and Procedure



Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee on the
Federal Rules of Civil Procedure

Identical letters sent to: Honorable Steny Hoyer
 Honorable John Boehner
 Honorable John Conyers
 Honorable Lamar Smith

cc: Members of the House Judiciary Committee

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

JEFFREY S. SUTTON
APPELLATE RULES

LAURA TAYLOR SWAIN
BANKRUPTCY RULES

MARK R. KRAVITZ
CIVIL RULES

RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

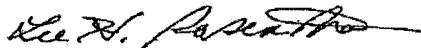
June 29, 2010

Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515

Dear Mr. Chairman:

This letter follows up on our letter of June 28, 2010 regarding H.R. 5503. The purpose of this letter is to confirm that, as we stated in our earlier letter, the only concerns expressed by the Judicial Conference Committee on the Rules of Practice and Procedure and the Advisory Committee on the Federal Rules of Civil Procedure were on section 6 of H.R. 5503, which would directly affect the Federal Rules. Removing that provision from the bill removes the only objections the Committees have raised with the bill. The Committees did not express a position on other aspects of the bill.

Sincerely,



Lee H. Rosenthal
United States District Judge
Southern District of Texas
Chair, Standing Committee on Rules
of Practice and Procedure



Mark R. Kravitz
United States District Judge
District of Connecticut
Chair, Advisory Committee on the
Federal Rules of Civil Procedure

Identical letters sent to: Honorable Nancy Pelosi
Honorable Steny Hoyer
Honorable John Boehner
Honorable Lamar Smith

111TH CONGRESS
2D SESSION

H. R. 5503

To revise laws regarding liability in certain civil actions arising from maritime incidents, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 10, 2010

Mr. CONYERS (for himself, Mr. MELANCON, Mr. NADLER of New York, Ms. JACKSON LEE of Texas, Ms. WATERS, Mr. COHEN, Mr. JOHNSON of Georgia, Ms. CHU, Mr. DEUTCH, Mr. WEINER, Ms. LINDA T. SÁNCHEZ of California, and Mr. BRALEY of Iowa) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Transportation and Infrastructure, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To revise laws regarding liability in certain civil actions arising from maritime incidents, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Securing Protections
5 for the Injured from Limitations on Liability Act”.

1 **SEC. 2. AMENDMENTS TO DEATH ON THE HIGH SEAS ACT.**

2 The Death on the High Seas Act (chapter 303 of title
3 46, United States Code), is amended—

4 (1) in section 30302—

5 (A) by inserting “or law” after “admi-
6 ralty”;

7 (B) by striking “3 nautical miles” and in-
8 sserting “12 nautical miles”;

9 (C) by striking “personal representative of
10 the decedent” and inserting “decedent’s spouse,
11 parent, child, or dependent relative”; and

12 (D) by striking the last sentence;

13 (2) in section 30303—

14 (A) by inserting “and nonpecuniary loss”
15 after “pecuniary loss”;

16 (B) by striking “by” and all that follows
17 through the end, and inserting “, plus a fair
18 compensation for the decedent’s pain and suf-
19 fering.”; and

20 (C) by adding at the end the following: “In
21 this section, the term ‘nonpecuniary loss’ means
22 loss of care, comfort, and companionship.”;

23 (3) in section 30305—

24 (A) by inserting “or law” after “admi-
25 ralty”; and

1 (B) by striking “personal representative of
2 the decedent may be substituted as the plain-
3 tiff” and inserting “the decedent’s spouse, par-
4 ent, child, or dependent relative may be sub-
5 stituted as a plaintiff”;

6 (4) in section 30306, by inserting “or law”
7 after “admiralty”;

8 (5) by striking section 30307, and redesign-
9 ating section 30308 as section 30307;

10 (6) in section 30307, as so redesignated, by
11 amending subsection (b) to read as follows:

12 “(b) INTERNAL AND TERRITORIAL WATERS.—This
13 chapter does not apply to the Great Lakes or waters with-
14 in the territorial limits of a State that do not exceed 12
15 nautical miles from the shore of the United States.”; and

16 (7) in the table of sections at the beginning of
17 such chapter, by striking the items relating to sec-
18 tions 30307 and 30308 and inserting the following:

“30307. Nonapplication.”.

19 **SEC. 3. AMENDMENT TO JONES ACT.**

20 Section 30104 of title 46, United States Code, is
21 amended by adding at the end the following: “In addition
22 to other amounts authorized under such laws, the recovery
23 for a seaman who so dies shall include recovery for loss
24 of care, comfort, and companionship.”.

1 **SEC. 4. REPEAL OF LIMITATION OF LIABILITY ACT.**

2 Chapter 305 of title 46, United States Code, is
3 amended by repealing sections 30505, 30506, 30507,
4 30511, and 30512.

5 **SEC. 5. AMENDMENT TO CLASS ACTION FAIRNESS ACT.**

6 Title 28, United States Code, is amended—

7 (1) in section 1711(2), by inserting “, but does
8 not include an action brought by a State or subdivi-
9 sion of a State on behalf of its citizens” before the
10 period; and

11 (2) in section 1332(d)(1)(B), by inserting “,
12 but does not include an action brought by a State
13 or subdivision of a State on behalf of its citizens”
14 before the semicolon.

15 **SEC. 6. UNENFORCEABILITY OF CERTAIN SECRECY AGREE-**
16 **MENTS.**

17 (a) IN GENERAL.—Subject to subsection (b), an
18 agreement, promise, or directive to restrict the dissemina-
19 tion of information regarding the cause of a discharge into
20 waters off the shore of the United States of a substance
21 that contaminates a marine or coastal environment or en-
22 dangers public health, regarding the nature or extent of
23 such a discharge, regarding the damage caused or threat-
24 ened by such a discharge, or regarding the efforts to reme-
25 diate the effects of such a discharge, shall be void as

1 against public policy and unenforceable in any legal pro-
2 ceeding.

3 (b) EXCEPTION.—Subsection (a) shall not apply with
4 respect to a directive contained in a court order, or issued
5 by a Government agency with authority to enforce such
6 a directive in a court, restricting dissemination of informa-
7 tion as necessary to protect public health or safety.

8 **SEC. 7. AMENDMENTS TO TITLE 11 OF THE UNITED STATES**

9 **CODE.**

10 (a) LIMITATION ON SALE OR LEASE OF CERTAIN
11 PROPERTY IN BANKRUPTCY.—

12 (1) LIMITATION.—Section 363 of title 11, the
13 United States Code, is amended by adding at the
14 end the following:

15 “(q) Notwithstanding any other provision of this sec-
16 tion, the trustee may not sell or lease, other than in the
17 ordinary course of business, property of the estate of a
18 debtor that is liable for a claim arising under any law from
19 an incident (as defined in section 1001 of the Oil Pollution
20 Act of 1990) to which such Act applies, to a purchaser
21 (together with any affiliate of such purchaser) in an aggre-
22 gate dollar amount exceeding the dollar amount then in
23 effect under section 7A(a) of the Clayton Act unless—

24 “(1) such purchaser and any such affiliate
25 agree as a condition of such sale to pay the amount

1 of allowed unsecured claims arising from such inci-
2 dent that is not paid by the debtor; or

3 “(2) all classes of such unsecured claims ap-
4 prove the sale of such assets.”.

5 (2) CONFORMING AMENDMENT.—Section 303(f)
6 of title 11, the United States Code, is amended by
7 striking “(other than subsection (q) of such sec-
8 tion)” after “section 363”.

9 (b) INAPPLICABILITY OF CHAPTER 15.—Section
10 1501(c) of title 11, the United States Code, is amended—

11 (1) in paragraph (2) by striking “or” at the
12 end,

13 (2) in paragraph (3) by striking the period at
14 the end and inserting “; or”, and

15 (3) by adding at the end the following:

16 “(4) an entity that is liable for a claim arising
17 under any law from an incident (as defined in sec-
18 tion 1001 of the Oil Pollution Act of 1990) to which
19 such Act applies.”.

20 **SEC. 8. EFFECTIVE DATE.**

21 This Act and the amendments made by this Act shall
22 take effect on the date of enactment of this Act and shall
23 apply to cases pending on or after such date.

○

CASE LAW ON ENTERING PROTECTIVE ORDERS,
ENTERING SEALING ORDERS, AND MODIFYING
PROTECTIVE ORDERS

Committee on Rules of Practice and Procedure
(Prepared by Andrea Kuperman)
Updated July 2010

TABLE OF CONTENTS

FIRST CIRCUIT 2

 Standard for Entering a Protective Order 2

 Standard for Entering a Sealing Order 5

 Standard for Modifying a Protective Order 6

SECOND CIRCUIT 7

 Standard for Entering a Protective Order 7

 Standard for Entering a Sealing Order 9

 Standard for Modifying a Protective Order 14

THIRD CIRCUIT 21

 Standard for Entering a Protective Order 21

 Standard for Entering a Sealing Order 25

 Standard for Modifying a Protective Order 25

FOURTH CIRCUIT 30

 Standard for Entering a Protective Order 30

 Standard for Entering a Sealing Order 31

 Standard for Modifying a Protective Order 31

FIFTH CIRCUIT 36

 Standard for Entering a Protective Order 36

 Standard for Entering a Sealing Order 37

 Standard for Modifying a Protective Order 39

SIXTH CIRCUIT	43
Standard for Entering a Protective Order	43
Standard for Entering a Sealing Order	45
Standard for Modifying a Protective Order	49
SEVENTH CIRCUIT	52
Standard for Entering a Protective Order	52
Standard for Entering a Sealing Order	55
Standard for Modifying a Protective Order	57
EIGHTH CIRCUIT	67
Standard for Entering a Protective Order	67
Standard for Entering a Sealing Order	68
Standard for Modifying a Protective Order	70
NINTH CIRCUIT	72
Standard for Entering a Protective Order	72
Standard for Entering a Sealing Order	74
Standard for Modifying a Protective Order	75
TENTH CIRCUIT	79
Standard for Entering a Protective Order	79
Standard for Entering a Sealing Order	81
Standard for Modifying a Protective Order	84
ELEVENTH CIRCUIT	88
Standard for Entering a Protective Order	88

Standard for Entering a Sealing Order	93
Standard for Modifying a Protective Order	95
D.C. CIRCUIT	97
Standard for Entering a Protective Order	97
Standard for Entering a Sealing Order	99
Standard for Modifying a Protective Order	103
FEDERAL CIRCUIT	105
Standard for Entering a Protective Order	105
Standard for Modifying a Protective Order	105

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.

The original version of this memo was completed in July 2009. It has now been updated to include cases through June 2010. The more recent cases do not indicate a substantive change in most of the general standards used for entering a protective order, for entering a sealing order, or for modifying a protective order. Some of the more recent case law emphasizes that there is no public right of access to unfiled discovery materials, and one recent case indicates that to the extent earlier cases relied on a presumption of public access to unfiled discovery, they have been superseded by the subsequent amendment to Federal Rule of Civil Procedure 5(d) that removed the obligation of filing all discovery materials.

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).

Pub. 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-Sentinel 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.

- In another case, the First Circuit noted that “[p]lacing court records out of public sight is a serious step, which should be undertaken only rarely and for good cause.” *R & G Mortgage Corp. v. Fed. Home Loan Mortgage Corp.*, 584 F.3d 1, 12 (1st Cir. 2009). The court explained that “[s]ealing orders are not like party favors, available upon request or as a mere accommodation.” *Id.* (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–99 (1978); *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005)). The appellate court did not decide whether sealing was proper in that case because “decisions about whether or not to seal are committed to the sound discretion of the district court,” and the lack of a timely challenge to the sealing order precluded full review on appeal. *Id.* The court noted that permissive intervention is an appropriate means for a third party to challenge a sealing order. *See id.* at 11 (“When a third party essays a challenge to a sealing order, permissive intervention is the procedurally correct vehicle.” (citing *Pub. Citizen*, 858 F.2d at 783)).

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 Pub. 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”); *Tavoulaareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984)

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 SEC 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)).

(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) (alterations in original) (quoting *Pub. 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)).

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 (Amodeo II), 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 II* 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 (emphasis added) (second alteration in original) (internal citations omitted).

- 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).

- The Second Circuit recently noted that “[t]he disclosure of confidential information on an ‘attorneys’ eyes only’ basis is a routine feature of civil litigation involving trade secrets.” *Dinler v. City of New York (In re The City of New York)*, --- F.3d ---, 2010 WL 2294134, at *7 (2d Cir. Jun. 9, 2010) (citing FED. R. CIV. P. 26(c)(1)(G) (““The court may, for good cause, issue an order to protect a party . . . including . . . requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way””) (omissions in original)).

Standard for Entering a Sealing Order

- The Second Circuit has emphasized that sealing documents associated with dispositive motions requires 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 (quotation marks omitted) (quoting *Amodeo II*, 71 F.3d at 1048). 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 (Amodeo I)*, 44 F.3d 141, 145 (2d Cir. 1995)). 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 (second alteration in original) (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.* (alteration in original) (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 (alterations in original) (quotation marks omitted) (quoting *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43–44 (C.D. Cal. 1984)).

- The Second Circuit recently reemphasized the standard set out in *Lugosch*. In *Standard Investment Chartered, Inc. v. Financial Industry Regulatory Authority, Inc.*, 347 F. App'x 615 (2d Cir. 2009) (unpublished summary order), the court stated:

The District Court properly recognized that the normal burden upon the proponent of a protective order to establish good cause for protection, *see* [*Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004)], is significantly enhanced with respect to “judicial documents,” *see* *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119 (2d Cir. 2006), as to which “a common law presumption of access attaches,” *id.* We have described “judicial documents” as those that are ““relevant to the performance of the judicial function,”” *id.* . . . at 119 (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995)), but we have also said that the monitoring of the judicial function is not possible without access to “documents that are used in the performance of Article III functions,” *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) (“*Amodeo II*”) (emphasis added). . . . The District Court also recognized the extra force in favor of disclosure supplied by the qualified First Amendment right of access that we discussed in *Lugosch*, 435 F.3d at 120. However, *Lugosch* pointed out that even this qualified First Amendment right of access “does not end the inquiry.” *Id.* Analogizing to the courtroom closure context, we observed that “[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*, 828 F.2d 110, 116 (2d Cir. 1987)).

Id. at 616–17 (second alteration in original). The court emphasized that “[w]here testimony or documents play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason.” *Id.* at 617 (quoting *Amodeo II*, 71 F.3d at 1050).

- 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’” *SEC 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. (alterations in original) (quotation marks omitted) (quoting *Amodeo I*, 44 F.3d at 147 (citations 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.* (alterations in original) (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 (alteration in original) (quoting *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979)).² The Second Circuit emphasized the importance

² In the related context of whether a grand jury subpoena can trump a protective order entered in civil litigation, the circuits have split as to the proper approach. *See, e.g., In re Grand Jury*, 286 F.3d 153, 156, 158 (3d Cir. 2002) (noting that the Second Circuit has adopted a rule that “absent a showing of improvidence in the grant of the protective order, or extraordinary circumstance or compelling need for the information, a protective order takes priority over a grand jury subpoena,” but that “[t]his presumption in favor of enforcing protective orders against grand jury subpoenas has been rejected by several courts” in favor of “a *per se* rule that a grand jury subpoena always trumps a protective order,” and joining the First Circuit’s intermediate approach by holding that “a grand jury subpoena supercedes a civil protective order unless the party seeking to avoid the subpoena demonstrates the existence of exceptional circumstances that clearly favor enforcement of the protective order” (citations omitted)); *In re Grand Jury Subpoena*, 138 F.3d 442, 444–45 (1st

Cir. 1998) (noting that “[t]he Second Circuit’s rule—positing a presumption in favor of a protective order when such an order clashes with a grand jury subpoena—has received a cool reception elsewhere,” and that several other circuits have adopted “a per se rule that invariably prefers grand jury subpoenas over civil protective orders,” but finding neither approach appropriate and adopting instead a modified per se rule that “[a] grand jury’s subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order” (citations omitted)); *United States v. Janet Greeson’s A Place for Us, Inc. (In re Grand Jury Subpoena Served on Meserve, Mumper & Hughes)*, 62 F.3d 1222, 1226 (9th Cir. 1995) (rejecting the Second Circuit’s compelling need test and adopting the Fourth and Eleventh Circuits’ per se approach that “a grand jury subpoena should, as a matter of course, prevail over a protective order”); *Williams v. United States (In re Grand Jury Proceedings)*, 995 F.2d 1013, 1015, 1017, 1018–20 (11th Cir. 1993) (rejecting the strict *Martindell* test in the context of grand jury subpoenas, in part because while “protective orders help district courts resolve civil matters, [the court could not] agree with the Second Circuit that they are the ‘cornerstone of our administration of civil justice,’” and finding the *Martindell* test “administratively unworkable” in the context of grand jury subpoenas); *United States v. (Under Seal) (In re Grand Jury Subpoena)*, 836 F.2d 1468, 1477 (4th Cir. 1988) (adopting a per se rule that “a reasonable balancing of the respective interests of the civil courts and grand jury investigations favors enforcement of a grand jury subpoena despite the existence of an otherwise valid protective order”). The Fourth Circuit noted that *Martindell* “concerned an informal government request to a federal district court for copies of deposition transcripts which were the subject of a Rule 26 protective order” and “did not express an opinion on how these interests should be balanced when a grand jury subpoena seeks to override a valid protective order.” *In re Grand Jury Subpoena*, 836 F.2d at 1473. *Martindell* disapproved of the government’s informal request for protected discovery. See *Martindell*, 594 F.2d at 294 (“The Government may not, however, simply by picking up the telephone or writing a letter to the court (as was the case here), insinuate itself into a private civil lawsuit between others. The proper procedure, as the Government should know, was either to subpoena the deposition transcripts for use in a pending proceeding such as a grand jury investigation or trial, in which the issue could be raised by motion to quash or modify the subpoena, see Rule 17(c), F. R. CRIM. P., or to seek permissive intervention in the private action pursuant to Rule 24(b), F. R. CIV. P., for the purpose of obtaining vacation or modification of the protective order.” (citations omitted)).

In adopting the intermediate approach, the Third Circuit noted that “[a] protective order is an important device, but it is also a limited one, and is subject to modification.” *In re Grand Jury*, 286 F.3d at 161 (citation omitted). The court stated:

Protective orders are limited instruments that are quite useful in facilitating the efficient disposition of litigation in the many civil cases that involve potentially embarrassing facts or sensitive commercial or other private information. Yet deponents who have reason to fear not just embarrassment or economic disadvantage, but possible criminal charges as well, should be aware that a protective order alone cannot protect them from a grand jury investigation.

Id. The Third Circuit also pointed out that determining whether a party has shown exceptional circumstances to warrant enforcing a protective order in the face of a grand jury subpoena involves a case-by-case analysis, and provided a non-exhaustive list of several factors courts might consider:

- 1) the government’s need for the information (including the availability of other sources);
- 2) the severity of the contemplated criminal charges;
- 3) the harm to society should the alleged criminal wrongdoing go unpunished;
- 4) the interests served by continued maintenance of complete confidentiality in the civil litigation;
- 5) the value of the protective order to the timely resolution of that litigation;
- 6) the harm to the party who sought the protective order if the information is revealed to the grand jury;
- 7) the severity of the harm alleged by the civil-suit plaintiff; and
- 8) the harm to society and the parties should the encroachment upon the protective order hamper the prosecution or defense of the civil case.

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 (omissions and second alteration in original) (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

Id. at 162 (citing *In re Grand Jury Subpoena*, 138 F.3d at 445).

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 [In re] Linerboard [Antitrust Litig.]*, 333 F. Supp. 2d [333,] 339–40 [(E.D. Pa. 2004)] (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); [*In re] Neurontin [Mktg., Sales Practices, & Prods. Liab. Litig.]*, 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 applies only if 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.

The court explained that 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 described by the *EPDM* court includes consideration of 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. (emphasis added) (quotation marks omitted) (quoting *Pansy*, 23 F.3d at 787–91).

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) (alteration and second omission in original) (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 (alterations and omissions in original) (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 (alteration and omission in original) (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 (quotation marks omitted) (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir. 1992)). 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. (alterations and omission in original) (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 (alteration in original) (quoting Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085, 1092 (1981), cited with approval in *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 163 (6th Cir. 1987)).

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 (second, third, fourth, fifth, and sixth alterations in original) (quotation marks omitted) (quoting Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121, 182 (1992)). The court held:

[W]here 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) (alterations in original) (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. In addition, the court 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. American Medical 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 & Biology, No. Civ. A. 92-CV-1182, 1993 WL 332061, at *2 (E.D. Pa. Aug. 19, 1993) (alteration in original) (quotation marks omitted) (quoting *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 630 (S.D. Iowa 1993) (quoting *Wilk*, 635 F.2d at 1299)). 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).

- In *Pichler v. UNITE*, 585 F.3d 741 (3d Cir. 2009), *petition for cert. filed*, 60 U.S.L.W. 3500

(U.S. Feb. 9, 2010) (No. 09-951), the Third Circuit addressed standing to seek modification of a protective order. The district court had granted a third party's request to intervene, but denied that party's request to modify the protective order, noting that "what NRTW seeks has not been filed with the court in any motions or pleadings; instead, it consists of defendants' production to the plaintiffs; such documents are raw discovery and are ordinarily inaccessible to the public through the common law right of access; thus, NRTW has no path of access to this information or a presumptive right to it." *Id.* at 745–46 (footnote omitted). The Third Circuit noted that "[t]he right of access to judicial proceedings and judicial records is beyond dispute," *id.* at 746 n.5 (citing *Pansy*, 23 F.3d 772), but explained that "because the documents the NRTW seeks have never been filed with the district court, they are not judicial records, and, therefore, the NRTW cannot obtain access to them under the right of access doctrine," *id.* The court noted that it had previously held—in the context of a gag order—that "the consent of the parties to the order limiting speech is irrelevant to third-party standing analysis as long as the third party can demonstrate that an individual subject to the order would speak more freely if the order is lifted or modified. . . ." *Id.* at 750 (omission in original) (quoting *United States v. Wecht*, 484 F.3d 194, 203 (3d Cir. 2007)). But the court rejected the intervenor's argument that it had third party standing to seek modification of the protective order because the plaintiffs' class counsel would provide the requested records absent the protective order, explaining that this argument "misinterprets the parameters of the willing speaker doctrine as well as the obstacles to disclosure of the Disputed Search Records." *Id.* The court explained that the records sought were protected under the Driver's Privacy Protection Act, and stated:

The least sympathetic case for discovery sharing is presented by a request for access on behalf of someone who is merely contemplating the commencement of litigation. The risk of a fishing expedition or some other form of mischief is greatest in this context. The safest course seems to be denial of discovery sharing until the requesting party actually has begun a lawsuit, unless he demonstrates extraordinary need.

Pichler, 585 F.3d at 752 (quotation marks omitted) (quoting *Miller*, *supra*, 105 HARV. L. REV. at 499).

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 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. Suntho Pharm. 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.”³ *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. [*TheStreet.com*], 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

³ 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.

control when it is directly involved in that controversy. For these reasons, alternative means of obtaining the information should be 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.

- In a recent case, the Fourth Circuit affirmed the district court’s decision to place the burden of maintaining confidentiality on a third party seeking confidential treatment, when another party sought access to relevant information covered by a protective order. In *Lefkoe v. Jos. A. Bank Clothiers, Inc.*, 577 F.3d 240, 242 (4th Cir. 2009), a nonparty witness asserted a right to anonymity under the First Amendment in a deposition taken pursuant to a subpoena. The court that issued the subpoena, which was not the court presiding over the main action, noted that the third party had “no legal right to complete anonymity,” and entered a protective order prohibiting the lawyers from disclosing the identity of the nonparty witness to anyone else, including the parties. *Id.* at 242, 243 (emphasis omitted). The court specified that its order was subject to modification by a Maryland district court, where the action was pending. *Id.* at 242. The defendant then moved in the Maryland court for unsealing of the deposition, and the Maryland court modified the protective order to allow the third party deponent’s identity to be disclosed to the parties in the case, but maintained the portion of the protective order prohibiting disclosure to the public. *Id.* at 245. The district court concluded that the defendant had “made an adequate showing that this information [wa]s relevant to its opposition to class certification as well as to certain defenses it might raise to Plaintiff’s claims,” and explained that the deponent’s “desire to keep this information private simply does not rise to the level of good cause necessary to maintain it under seal from the parties to this litigation and doing so interferes with Jos. A. Bank’s counsel’s ability to represent its client.” *Id.* at 247. The Fourth Circuit affirmed the district court’s modification of the protective order, noting that the defendant had shown the information was relevant and that the First Amendment right to anonymity was subject to the substantial governmental interest expressed in Rule 26 in providing the defendant a fair opportunity to defend itself in court. *See id.* at 249 (citing FED. R. CIV. P. 26(b)(1)).
- 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 Miller, *supra*, 105 HARV. L. REV. at 499–501)).

- 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).

- In another case, the Fifth Circuit noted that “[t]he grounds for a protective order can include privileged or work-product material, but can also include the improper sharing of confidential information between litigants in separate cases.” *Crosswhite v. Lexington Ins. Co.*, 321 F. App’x 365, 368 (5th Cir. 2009) (unpublished) (citing *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989)).
- 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*)).

SEC 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 documents at issue. *See id.* at 848-49.

The *Van Waeyenberghe* court distinguished 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 (alteration in original) (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)).
- 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) (second alteration in original). 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 (additional citation omitted) (quoting *T.K. & R.K. v. Waterbury Bd. of Ed.*, No. Civ. 303CV1747, 2003 WL 2290433, at *1 (D. Conn. Oct. 19, 2003)). 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 seek

to compel 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). . . .

. . . .

. . . 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) (first alteration and first omission in original) (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.”

. . . .

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 AND 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 Ass’n*, 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 (quotation marks omitted) (quoting *Wilk*, 635 F.2d at 1299 (certain citations 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).

- Another court noted that “[i]t is well established that nonparties to a case seeking access to documents and records under a protective order or under seal in a civil case may do so by a motion for permissive intervention under Rule 24(b)(2).” *See Newby v. Enron Corp. (In re Enron Corp. Sec. Derivative & “ERISA” Litig.)*, 229 F.R.D. 126, 130 (S.D. Tex. 2005) (footnote and citations omitted). The court also noted that an intervening party must have standing. *See id.* The court explained that “[n]ormally the would-be intervenor must demonstrate that it has (1) an independent ground for subject matter jurisdiction, (2) a timely motion, and (3) a claim or defense that has a question of law or fact in common with the main action,” but explained that “[s]ome courts have carved out a narrow exception to the first prong where the party seeks intervention for the limited purpose of obtaining access to documents protected by a confidentiality order because the would-be intervenor is merely asking the court to exercise a power it already has, i.e., to modify the confidentiality order, and not to rule on the merits of a claim or defense.” *Id.* (citing *EEOC v. Nat’l Children’s Ctr.*, 146 F.3d 1042, 1046, 1047 (D.C. Cir. 1998)).

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) (second and third alterations and second omission in original) (quoting *Seattle Times*, 467 U.S. at 37); *see also R.C. Olmstead, Inc. v. CU Interface, LLC*, 606 F.3d 262, 269 (6th Cir. 2010) (“The district court did not abuse its discretion in denying Olmstead employees access to the CUI end use product (the CUI software interface) because the district court’s decision to grant Olmstead’s experts access to the software properly balanced the need for Olmstead to have access to relevant and necessary information with CUI’s interest in preventing a potential competitor from having access to its software.”).

The *Courier-Journal* court rejected a news organization’s “claim of a first amendment right of access to the fruits of discovery” as “unavailing.” *Courier-Journal*, 828 F.2d 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. FTC*, 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. (alteration in original) (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 that 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. (alteration in original) (quotation marks omitted) (quoting *Nixon v. Warner Commc 'ns*, 435 U.S. 589, 598 (1978) (citations 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 (alteration in original) (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).⁴

- Another district court case emphasized the difference in proof required to obtain 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

⁴ 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.

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).

- 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 (quotation marks omitted) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 570 (E.D.N.Y. 1985))⁵; 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

⁵ The district court's decision in *Agent Orange* was affirmed by the Second Circuit, see *In re "Agent Orange" Prod. Liab. Litig.*, 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))).

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 . . .”).

- One district court found *Upjohn* 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 (alteration in original) (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 (first alteration in original).⁶

- 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

⁶ 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.

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 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,"⁷ 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

⁷ 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.

to make a determination of good cause to seal any part of the record of a case,⁸ and explained 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.”⁹ *Citizens First Nat’l Bank*, 178 F.3d at 946 (internal citations omitted).

⁸ 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 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.

⁹ 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. *See Bond v. Utreras*, 585 F.3d 1061, 1075–76 (7th Cir. 2009) (noting that cases suggesting that Rule 26(c) creates a substantive right of public access to discovery were based on the prior version of Rule 5(d) that required all discovery materials to be filed with the court, and explaining that “[w]hatever force these decisions had was destroyed by the 2000 amendment to Rule 5(d), which reversed the longstanding rule generally requiring discovery to be filed with the court”); *see also In re Thow*, 392 B.R. 860, 868

The court stated that “Rule 26(c) would appear to require no less,” and noted that “both the First and Third Circuits, which used to endorse broad umbrella orders (*e.g.*, *Cryovac*, *Cipollone*), have moved away from that position (*Public Citizen*, *Glenmede*, *Pansy*, *Leucadia*).” *Id.*

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

(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 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).

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 *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988)); accord *Salmeron v. Enter. Recovery Sys., Inc.*, 579 F.3d 787, 795 (7th Cir. 2009) (“It is of course true, as *Jepson* holds, that a district court is required to ‘independently determine if ‘good cause’ exists’ before judicially protecting discoverable documents from third-party disclosure.” (quoting *Jepson*, 30 F.3d at 858; citing FED. R. CIV. P. 26(c))).

Standard for Entering a Sealing Order

- Another Seventh Circuit court has explained:

Secrecy is fine at the discovery stage, before the material enters the 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 Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994).¹⁰ 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

¹⁰ In *Bond v. Utreras*, the Seventh Circuit recently noted that “[t]o the extent . . . that these cases [*Grove Fresh, Wilk*, and other cases addressing collateral litigants’ access to discovery in parallel litigation] are premised upon a principle that “pre-trial discovery must take place in . . . public unless compelling reasons exist for denying the public access to the proceedings,” they have been superseded by the 2000 amendment to Rule 5 of the *Federal Rules of Civil Procedure*.” 585 F.3d at 1068 n.4 (second omission in original) (internal citation omitted).

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.”¹¹ *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);¹² *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:

¹¹ The *Bond* court noted that “*Grove Fresh* refers only summarily to the question of the intervenors’ standing,” and that its conclusion that the press has standing to challenge a protective order for abuse or impropriety was based on cases regarding access to sealed documents in court files and a case regarding intervention to challenge a protective order in an ongoing suit. *Bond*, 585 F.3d at 1070 n.5. The *Bond* court differentiated the situation in its case, where the intervenor sought documents that were not in the court file in a lawsuit that had already been settled and dismissed. *Id.*

¹² In *Bond*, the Seventh Circuit recently noted that “*Wilk* did not address either the intervenors’ standing or the standards for intervention under Rule 24 but instead skipped directly to the merits of the collateral litigants’ request for access to discovery.” 585 F.3d at 1068 n.4. As previously noted, the *Bond* court also stated that “[t]o the extent . . . that these cases [*Grove Fresh*, *Wilk*, and other cases addressing collateral litigants’ access to discovery in parallel litigation] are premised upon a principle that “pre-trial discovery must take place in . . . public unless compelling reasons exist for denying the public access to the proceedings,” they have been superseded by the 2000 amendment to Rule 5 of the *Federal Rules of Civil Procedure*.” 585 F.3d at 1068 n.4 (second omission in original) (internal citation omitted).

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).¹³ 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).

- The Seventh Circuit recently examined whether a journalist had standing to intervene to seek modification of an agreed protective order. The court explained that “there is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court,” and that “[u]nfiled discovery is private, not public.” *Bond v. Utreras*, 585 F.3d 1061, 1066 (7th Cir. 2009). The court rejected the journalist’s argument that a “‘presumption’ of public access emanat[es] from Rule 26(c)’s ‘good cause’ requirement,” stating that “[t]here is no such presumption for discovery that is not part of the court file and therefore no ‘right’ or legally protected interest to support [the journalist’s] standing to intervene.” *Id.* The court also noted that the Rules provide for the use of protective orders for good cause, and that “[p]rotective orders are often entered by stipulation when discovery commences.” *Id.* at 1067.

The court stated that it “ha[d] previously held that permissive intervention is a procedurally appropriate device for bringing a third-party challenge to a protective order,” *id.* at 1068 (citing *Jessup v. Luther*, 227 F.3d 993, 996–97 (7th Cir. 2000); *In re Associated Press*, 162 F.3d 503, 507 (7th Cir. 1998); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d

¹³ As noted earlier, the Second Circuit has clarified that the *Martindell* standard is not limited to requests for modification made by the government. See *TheStreet.com*, 273 F.3d at 229 n.7.

893, 896 (7th Cir. 1994)), but explained that “that was in the context of requests for access to sealed records in the court file (*Jessup, Associated Press*) and requests for intervention made during ongoing litigation (*Grove Fresh*),” *id.* (footnote omitted). The court distinguished the situation present in *Bond*, in which “the litigation was over, the case was dismissed, and [the journalist] wanted to intervene in order to press a claimed right of access to *unfiled* discovery material” *Id.* The court noted that *Grove Fresh, Wilk*, and some other cases had addressed collateral litigants’ access to discovery in parallel litigation and were therefore of little relevance in *Bond*, but stated that “[t]o the extent, however, that these cases are premised upon a principle that “pre-trial discovery must take place in . . . public unless compelling reasons exist for denying the public access to the proceedings,” they have been superseded by the 2000 amendment to Rule 5 of the *Federal Rules of Civil Procedure*.” *Bond*, 585 F.3d at 1068 n.4 (omission in original) (internal citations omitted).

With respect to the standing inquiry, the court stated that “at some fundamental level the proposed intervenor must have a stake in the litigation’ in order to satisfy Article III.” *Id.* at 1070 (quoting *Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 946 (7th Cir. 2000)). The court explained that using permissive intervention to allow a third party to challenge a protective order may not be procedurally proper in some circumstances:

Intervention for purposes of challenging a protective order is an unusual species of permissive intervention that triggers its own unique standing issues. Rule 24(b) allows intervenors to join as parties to a lawsuit when they raise a “claim” or a “defense” that “shares with the main action a common question of law or fact.” FED. R. CIV. P. 24(b)(1)(B). We have held that this language is broad enough to encompass a third-party challenge to a protective order even though it is not a neat fit: The “interest” being asserted by such an intervenor is not really a “claim” or “defense.” See *Jessup*, 227 F.3d at 998; *Grove Fresh*, 24 F.3d at 896; see also *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (“On its face, Rule 24(b) would appear to be a questionable procedural basis for a third-party challenge to a confidentiality order.”).

Also, when a third party intervenes to challenge a protective order, it cannot be said to have intervened on an existing party’s “side” unless that party *also* opposes the protective order. Where, as in many cases and in this case, the protective order is entered by stipulation of the parties, “the extra litigant . . . is not simply along for the ride” but rather shifts the progress of the lawsuit in a new direction to obtain relief that neither the plaintiff nor the defendant may want. Intervention to challenge a protective order after a case has been dismissed interferes even more fundamentally: It revives a concluded case for the purpose of entertaining an outsider’s claim of interest in the proceeds of the parties’ discovery process. Rule 24(b)

specifically provides that in deciding whether to permit intervention, “the court *must* consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” FED. R. CIV. P. 24(b)(3) (emphasis added). This language suggests that intervention postjudgment—which necessarily disturbs the final adjudication of the parties’ rights—should generally be disfavored.

Id. at 1070–71 (omission in original) (footnote and internal citation omitted). The court did not decide whether a permissive intervenor needs to establish standing to challenge a protective order in an ongoing case, but concluded that it must establish standing after the case has been dismissed. *Id.* at 1071. The court noted that while it did “not decide whether a permissive intervenor needs independent standing to intervene in a live controversy for the purpose of challenging a protective order[,] . . . most cases addressing third-party challenges to protective orders in ongoing lawsuits overlook the standing question, and those that do address it are conflicting.” *Id.* at 1071 n.7 (citations omitted). The court held that “when a third party seeks intervention under Rule 24(b) for the purpose of challenging a protective order in a case or controversy that is no longer live—as when the case has been dismissed and none of the original parties has sought this relief postjudgment—the intervenor must meet the standing requirements of Article III in addition to Rule 24(b)’s requirements for permissive intervention.” *Id.* at 1072. The court concluded that the standing inquiry involved consideration of whether the documents sought had been filed with the court:

Many of our decisions—as well as decisions from other circuits—speak broadly about a “presumption of public access to discovery materials.” *Citizens First Nat’l Bank*, 178 F.3d at 946; *see also Public Citizen*, 858 F.2d at 788–89; *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 146 (2d Cir.1987) (referring to the public’s “presumptive right of access to discovery materials”). To the extent that this language suggests the existence of a general public right to access the materials that litigating parties exchange in response to discovery requests, it sweeps too broadly. As we will explain, while the public has a presumptive right to access discovery materials that are filed with the court, used in a judicial proceeding, or otherwise constitute “judicial records,” the same is not true of materials produced during discovery but not filed with the court. Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to *unfiled* discovery.

It is beyond dispute that most documents filed in court are presumptively open to the public; members of the media and the public may bring third-party challenges to protective orders that shield court records and court proceedings from public view. *See, e.g., Jessup*, 227 F.3d at 997 (“[T]hose who seek access to [sealed court] material have a right to be heard in a manner that gives full

protection to the asserted right.” (quoting *Associated Press*, 162 F.3d at 507)); *Citizens First Nat’l Bank*, 178 F.3d at 945–46 (regarding filing of appellate appendix under seal); *Associated Press*, 162 F.3d at 507 (regarding press access to sealed court records). This right is derived from the common-law principle that courts are public institutions that operate openly—a principle codified at 28 U.S.C. § 452—and judicially imposed limitations on this right are subject to the First Amendment. See, e.g., *Globe Newspaper Co. v. Super. Ct. for Norfolk County*, 457 U.S. 596, 603–06, 102 S. Ct. 2613, 73 L. Ed. 2d 248 (1982); *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) (“It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.” (footnote omitted)); see also *Smith v. U.S. Dist. Ct. for S. Dist. of Ill.*, 956 F.2d 647, 650 (7th Cir. 1992) (recognizing that although this principle originally stemmed from a need to ensure access to criminal proceedings, the right of access has subsequently been expanded to civil proceedings).

While the public’s right to access court records is not unlimited, see *Nixon*, 435 U.S. at 598, 98 S. Ct. 1306; *Press-Enterprise Co. v. Super. Ct. of Cal., Riverside County*, 464 U.S. 501, 510, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984), and Rule 26(c) allows a court to shield certain documents from the public when there is good cause to do so, *Citizens First Nat’l Bank*, 178 F.3d at 945 (public interest in observing judicial process can be overridden if “the property and privacy interests of the litigants . . . predominate in the particular case”), the general right of public access to judicial records is enough to give members of the public standing to attack a protective order that seals this information from public inspection. See *Jessup*, 227 F.3d at 997–98; *Grove Fresh*, 24 F.3d at 897–98; *Associated Press*, 162 F.3d at 506–09.

Bond, 585 F.3d at 1073–74 (alterations and omission in original). The court differentiated the case before it, in which the journalist sought “access to discovery materials that have never been filed with the court and have never influenced the outcome of a judicial proceeding,” explaining that “[t]he Supreme Court has held that the public’s right of access is limited to traditionally publicly available sources of information, and ‘discovered, but not yet admitted information’ is not ‘a traditionally public source of information.’” *Id.* at 1074 (quoting *Seattle Times*, 467 U.S. at 33; citing *Grove Fresh*, 24 F.3d at 897–98 (“[U]ntil admitted into the record, material uncovered during pretrial discovery is ordinarily not within the scope of press access.”)) (alteration in original)). The court further explained that “[a]t common law, pretrial proceedings were closed to the public, and the federal discovery rules have not changed this common-law tradition.” *Id.* (internal citation omitted). The

court stated that “[a]s the Court noted in *Seattle Times*, ‘[d]iscovery rarely takes place in public,’ and the system created by Rule 26 contemplates that the exchange of information in discovery will occur *with minimal judicial involvement*.” *Id.* (emphasis added) (second alteration in original) (internal citation omitted). The court discussed the rationale for differentiating between materials filed with the court and those just exchanged between the parties:

There are good reasons to treat the public’s right to access filed and unfiled discovery materials differently. For starters, “pretrial discovery, unlike the trial itself, is usually conducted in private.” *Citizens First Nat’l Bank*, 178 F.3d at 944. Pretrial discovery—depositions, interrogatories, and the production of documents—“are not public components of a civil trial,” “were not open to the public at common law,” and “in general, are conducted in private as a matter of modern practice.” *Seattle Times*, 467 U.S. at 33, 104 S. Ct. 2199. That the court’s discovery processes and rules are used to require litigants to produce otherwise private information to an opposing party is not enough to alter the legal rights of the general public. Discovery rules are “a matter of legislative grace,” and “[l]iberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.” *Seattle Times*, 467 U.S. at 32, 34, 104 S. Ct. 2199. We have said that “[s]ecrecy is fine at the discovery stage, before the material enters the judicial record.” *Baxter Int’l, Inc. v. Abbott Labs.*, 297 F.3d 544, 545 (7th Cir. 2002).

The rights of the public kick in when material produced during discovery is filed with the court. *See Seattle Times*, 467 U.S. at 33 & n.19, 104 S. Ct. 2199 (recognizing that the public has a right to access anything that is a “traditionally public source of information” and observing that “courthouse records could serve as a source of public information”). At this point, the documents have been “used in [a court] proceeding,” FED. R. CIV. P. 5(d), and consequently the possibility exists that they could “influence or underpin the judicial decision” and they are therefore presumptively “open to public inspection unless they meet the definition of trade secret or other categories of bona fide long-term confidentiality.” *Baxter Int’l*, 297 F.3d at 545; *see also Citizens First Nat’l Bank*, 178 F.3d at 945.

Id. at 1074–75 (alterations in original) (footnote omitted). The court noted, however, that “the public does not acquire a right to access discovery material just because a judge might review it *in camera* in the course of discovery proceedings.” *Id.* at 1075 n.8 (citing *TheStreet.com*, 273 F.3d at 233; *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263

F.3d 1304, 1312–13 (11th Cir. 2001); *United States v. Wolfson*, 55 F.3d 58, 61 (2d Cir. 1995)).

The court further noted that cases suggesting that Rule 26(c) creates a right of public access to discovery lacked force following the 2000 amendment to Rule 5:

It is true that some cases suggest that Rule 26(c) creates a substantive right of public access to discovery. *See San Jose Mercury News, Inc. v. U.S. Dist. Court for N. Dist.*, 187 F.3d 1096, 1103 (9th Cir. 1999); *Public Citizen*, 858 F.2d at 787–90; *Agent Orange*, 821 F.2d at 145–47. These cases, however, were based on a prior version of Rule 5(d) of the *Federal Rules of Civil Procedure* that generally required *all* discovery materials to be filed with the court unless the court ordered otherwise. *See, e.g., Agent Orange*, 821 F.2d at 146 (citing a prior version of Rule 5(d)). The drafters of a 1980 amendment to Rule 5(d) considered establishing a rule that discouraged the filing of all discovery but decided not to; “such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally.” FED. R. CIV. P. 5(d), advisory committee note (1980). Accordingly, some courts read the prior Rule 5(d) together with Rule 26(c) and concluded that these rules implied the existence of a public right to access discovery even if the discovery was not filed with the court. *E.g., Agent Orange*, 821 F.2d at 145–46.

Whatever force these decisions had was destroyed by the 2000 amendment to Rule 5(d), which reversed the longstanding rule generally requiring discovery to be filed with the court. Since 2000, information exchanged in discovery “must *not* be filed” until it is “used in the proceeding” or until “the court orders filing.” FED. R. CIV. P. 5(d) (emphasis added). In its present form, then, Rule 5(d) separates discovery material—regardless of whether it is subject to a Rule 26(c) protective order—into two categories: (1) that which is filed with the court (because it is used in a court proceeding or is ordered to be filed); and (2) that which remains unfiled and therefore not part of the public court record. As the Second Circuit has recognized, this amendment eliminated any implied right of public access to *unfiled* discovery emanating from the procedural rules. *See SEC v. TheStreet.com*, 273 F.3d 222, 233 n. 11 (2d Cir. 2001) (observing that the 2000 amendment to Rule 5(d) “provides no presumption of filing of all discovery materials, let alone public access to them”) (abrogating *Agent Orange*). Accordingly, nothing in Rule 26(c)—either standing alone or when read in conjunction

with the current version of Rule 5(d)—confers substantive rights upon third parties seeking access to the fruits of discovery.

Bond, 585 F.3d at 1075–76 (footnote omitted). The court concluded that the district court had erred by relying on language in cases mentioning a presumption of public access to discovery materials, explaining that “[t]he ‘presumption’ mentioned in these cases simply refers to the general right of the public to access material contained in court files and the limited right of litigants under the First Amendment to ‘disseminate information discovered in advance of trial,’” and that “[i]t is a mistake to conclude, as the district court did, that Rule 26(c) creates a freestanding public right of access to unfiled discovery.” *Id.* at 1076. The court held that the journalist’s standing could not be grounded in Rule 26(c). *Id.* (footnote omitted). The court noted that the journalist had not sought to obtain the documents under the state’s Freedom of Information Act, and that “[t]he protective order d[id] not interfere with [the journalist’s] ability to try to obtain the documents he s[ought] directly from the City under the Illinois FOIA.” *Id.* at 1076 n.10. The court explained that “nothing in the protective order here prohibits the City from disclosing any of its police department records to the public upon request.” *Id.*

The court also concluded that standing could not be based on the First Amendment, explaining that “[t]he only First Amendment concern raised by a protective order limiting disclosure of *unfiled* discovery is the effect such an order may have on a litigant’s free-expression rights, which the Supreme Court has said are limited by the context through which the information is acquired.” *Id.* at 1077. The court continued:

Seattle Times made it clear that “[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit.” 467 U.S. at 32, 104 S. Ct. 2199. As such, “judicial limitations on a party’s ability to disseminate information discovered in advance of trial implicate[] the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context.” *Id.* at 34, 104 S. Ct. 2199; *see also* Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV.[] 427, 487 (1991) (describing the interest in accessing information produced by discovery as a side effect of—and therefore subordinate to—the judicial system’s central concern of resolving disputes between litigants). Where, as here, the litigants themselves agreed to the protective order and do not seek its modification, this (limited) interest simply is not in play.

Bond, 585 F.3d at 1077 (first and second alterations in original). The court held that the journalist could not claim standing based on a derivative First Amendment right to receive information because there were no “willing speakers.” *See id.* The court noted that while “[m]edia challenges to trial-court gag orders have been allowed where the orders interfere

with the right to receive information from parties and their attorneys who wish to disseminate it,” “a stipulated protective order involves self-imposed secrecy and is therefore not the equivalent of a gag order.” *Id.* (citations omitted). The court explained that “to satisfy Article III on this type of claim, an intervenor must do more than simply assert that a protective order interferes with his inchoate, derivative ‘right’ to receive discovery information” because “[i]magining the existence of a willing speaker runs contrary to the Supreme Court’s command that injuries-in-fact must be ‘actual or imminent, not conjectural or hypothetical.’” *Id.* at 1078 (citations omitted). The court concluded that “[w]here, as here, the litigants have voluntarily bound themselves to keep certain discovery confidential and do not themselves seek relief from the requirements of the protective order, there is no willing speaker on which to premise a First Amendment right-to-receive claim.” *Id.*

The *Bond* court further noted that “[a] sua sponte postjudgment modification of a protective order does not fall within the court’s ancillary jurisdiction; it is not a matter ‘incidental to’ another matter that is ‘properly before’ the court.” *Id.* The court emphasized that “the protective order did not operate to shield the court’s own records from public view,” explaining that “although a court may have inherent authority to modify a protective order sealing documents maintained in the court file, that’s not what’s at issue here.” *Bond*, 585 F.3d at 1079 (internal citation omitted).

The concurrence would have reached the same conclusion as the majority, but would have done so on the merits, rather than on standing grounds. *Id.* at 1080 (Tinder, J., concurring). Judge Tinder explained:

As the majority correctly explains, the district court erroneously applied a presumption of public access under Rule 26(c) to the unfiled discovery documents exchanged in this case. Such a presumption is no longer tenable in light of the 2000 amendment to Rule 5(d), which provided that discovery documents should not be filed with the court until used in a judicial proceeding. So where, as here, the parties have agreed to a confidentiality order covering unfiled discovery materials which, for good cause, was judicially approved, a district court should honor that order absent some showing of abuse or other extraordinary circumstances. To require any less of a showing would undermine the parties’ reliance on protective orders, which are essential to a fair, efficient discovery process. *See SEC v. TheStreet.com*, 273 F.3d 222, 229–30 (2d Cir. 2001). The district court relied on the public’s significant interest in monitoring police misconduct as the basis for lifting the protective order. In my view, this generalized public interest in allegations of police misconduct, while not insignificant, is, standing alone, not sufficiently compelling to conclude that the parties’ stipulated confidentiality order lacks good cause under Rule 26(c). But [the intervening journalist] presented nothing more so he clearly failed to

make a sufficient showing to undo the protective order.

Id. (internal citation omitted). Judge Tinder argued that while it was a close call, the journalist had standing to challenge the protective order:

Courts have recognized that third parties can challenge a protective order under Rule 26(c) for good cause, even where the order covers non-judicial records that fall outside of the public's common law right of access. *See Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 787–88 (1st Cir. 1988) (public interest group had standing to demand good cause under Rule 26(c) to maintain a protective order covering discovery materials); *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 354–56 (11th Cir. 1987) (per curiam) (journalists had standing to bring a Rule 26(c) challenge to a protective order even though they had no First Amendment right of access to the discovery documents). As we explained in *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994), the press has standing to challenge a protective order for abuse or impropriety. A third party may claim that a litigant is exploiting a court's confidentiality order to insulate embarrassing documents that present no "good cause" for secrecy within the meaning of Rule 26(c). *Id.*; *cf. Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944–46 (7th Cir. 1999) (concluding that a protective order allowing the parties to designate virtually any discovery materials as confidential, even those introduced into the judicial record, was overbroad).

After a very thorough review of these and other cases, the majority explains that courts in the past have failed to carefully distinguish between the public's rights of access to judicial records and to unfiled discovery materials, and that Rule 26(c)'s "good cause" requirement does not support any "presumption" of public access to the latter. That is true, and because the information sought here has never been filed with the court, this matter calls for an even more stringent review of standing than the host of cases involving court-filed documents. But I respectfully suggest that it does not follow that a third-party intervenor necessarily lacks standing to bring a Rule 26(c) challenge to a protective order covering unfiled discovery documents. Although unfiled discovery does not fall within the public's presumptive right of access, the public still "has an interest in what goes on at all stages of a judicial proceeding." *Citizens First Nat'l Bank*, 178 F.3d at 945. As noted, third-party Rule 26(c) claims may prevent litigants from abusing a court-approved confidentiality order to seal whatever they want. *See*

Grove Fresh, 24 F.3d at 898. Other circumstances (not present here) could arise where a third party shows such an “extraordinary circumstance or compelling need” for unfiled discovery documents that a district court should modify an order protecting those documents. *TheStreet.com*, 273 F.3d at 229. [The journalist’s] request came so late in the life of this case and is so lacking in merit that it is tempting to simply join in the majority’s well-reasoned and persuasive standing conclusion. However, I hesitate to do so because I fear that a determination that [the journalist] lacks standing might be read as a categorical bar to third parties who would seek unfiled discovery materials that are subject to protective orders. While circumstances in which such requests might be granted ought to be exceedingly rare, I think [the journalist] presented just enough to the district court to get in the door to argue his position.

Id. at 1080–81 (internal citation 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 (alterations and omissions in original) (internal quotation marks omitted) (quoting *Pansy*, 23 F.3d at 787). 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 entered 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 and that courts have supervisory power over their records and may deny access if 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 stated 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.” *SEC 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) (alteration in original). 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). Specifically, “[t]he Court determined which documents contain[ed] trade secrets, proprietary information, or other confidential information and then weighed [the intervenor’s] need for disclosure against the potential harm that unsealing m[ight] cause [the opposing parties].” *Id.*

- 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]”¹⁴ *Id.* at 954 (emphasis added).

¹⁴ 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

- 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.* (omission in original) (quoting *SmithKline Beecham Corp. v. Synthon Pharms., Ltd.*, 210 F.R.D. 163, 166 (M.D.N.C. 2002)), but explained that “*SmithKline* cautions . . . against modifying protective orders ‘in a controversy with which [the Court] is not familiar and over which it lacks control,’” *id.* (alteration in original) (quoting *SmithKline*, 210 F.R.D. at 166). The court implied that “compelling need” was required to warrant modification of a protective order. *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 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

that any further disclosures would violate even the modified protective order. 601 F.2d at 956.

(D. Neb. July 18, 2008) (first alteration and omission in original). 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*, 605 F.3d 665 (9th Cir. 2010),¹⁵ the Ninth Circuit 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

¹⁵ The earlier version of this memo discussed *Pintos v. Pacific Creditors Association*, 565 F.3d 1106 (9th Cir. 2009). That opinion was amended and superseded on denial of rehearing by the May 21, 2010 opinion cited in this version of the memo. The amended opinion added language to a footnote that is not relevant for purposes of this memo.

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 677–78 (alterations and omissions in original) (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—N. Dist. (San Jose)*, 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. (alteration in original).

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*, 187 F.3d at 1102); see also *Pintos*, 605 F.3d at 678 (noting that “[t]o 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,’” but explaining that “[i]n light of the weaker public interest in nondispositive materials, we apply the ‘good cause’ standard when parties wish to keep them under seal” (first alteration and omission in original) (quoting *Kamakana*, 447 F.3d at 1178–79 (internal quotation marks and citations omitted))); *Ctr. for Food Safety v. Johanns*, 310 F. App’x 964, 965 (9th Cir. 2009) (unpublished) (“The applicable standards for sealing documents are drawn from *Kamakana v. City and County of Honolulu*, 447 F.3d 1172 (9th Cir. 2006), and a compelling interest was required to have been shown in this case because the documents were attached to a

dispositive motion.”). The *Foltz* 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.

Foltz, 331 F.3d at 1135 (omission in original) (quotation marks omitted) (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)); accord *Pintos*, 605 F.3d at 679 (“Under the ‘compelling reasons’ standard, a district court must weigh ‘relevant factors,’ base its decision ‘on a compelling reason,’ and ‘articulate the factual basis for its ruling, without relying on hypothesis or conjecture.’” (footnote omitted) (quoting *Hagestad*, 49 F.3d at 1434)). 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.” *Foltz*, 331 F.3d at 1135 (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.* (third alteration in original) (citations omitted).

- In *Pintos*, the court emphasized that the “compelling reasons” standard applicable to most requests to seal judicial records is a higher standard than the “good cause” standard applicable under Rule 26(c) to private documents exchanged in discovery, stating: “A determination by the district court that good cause exists for sealing Experian’s documents does not establish that there are ‘compelling reasons’ to do so.” *Pintos*, 605 F.3d at 679 (citing *Kamakana*, 447 F.3d at 1180 (“holding that ‘a ‘good cause’ showing . . . will not suffice to fulfill the ‘compelling reasons’ standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments’” (omission in original))).

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. (alterations in original) (footnote omitted). But the court explained that the 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 (alterations and omission in original). 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 *Pub. 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 *Pub. 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 (second alteration in original) (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 *Riker v. Federal Bureau of Prisons*, 315 F. App’x 752 (10th Cir. 2009) (unpublished), *cert. denied*, *Jordan v. Federal Bureau of Prisons*, 130 S. Ct. 431 (2009), the court reiterated the standard for sealing discussed in *Mann*, stating:

“Courts have long recognized a common-law right of access to judicial records.” [*Mann*, 477 F.3d at 1149] (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978)). “The right is an important aspect of the overriding concern with preserving the integrity of the law enforcement and judicial processes.” *United States v. Hickey*, 767 F.2d 705, 708 (10th Cir. 1985); *see also FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (“The appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public’s right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch.”). But this right of access is not absolute; it can be rebutted when other interests outweigh the public interests in access. *Mann*, 477 F.3d at 1149. “All courts have supervisory powers over their own records and files. Thus a court, in its discretion, may seal documents if the public’s right of access is outweighed by competing interests.” *Hickey*, 767 F.2d at 708 (citations and quotation marks omitted). “The party seeking to overcome the presumption [of access] bears the burden of showing some significant interest that outweighs the presumption.” *Mann*,

477 F.3d at 1149 (quotation marks omitted). Whether a trial court exercises sound discretion will be based on the facts and circumstances of the individual case and the weighing of the parties' interests. See *Hickey*, 767 F.2d at 708.

Id. at 754–55 (second alteration in original). The court continued:

[W]e first consider the public's interest in the documents. “[J]udicial records are public documents almost by definition, and the public is entitled to access by default.” *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006). Especially “where documents are used to determine litigants’ substantive legal rights, a strong presumption of access attaches.” *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006); see also *Standard Fin. Mgmt. Corp.*, 830 F.2d at 409 (“[R]elevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies[.]”). On the other hand, where the documents “play only a negligible role in the performance of Article III duties, the weight of the presumption is low and amounts to little more than a prediction of public access absent a countervailing reason.” *Lugosch*, 435 F.3d at 121 (quotation marks omitted).

Id. at 755 (second, third, and fourth alterations in original).

With respect to the First Amendment analysis, the court stated:

The Supreme Court has not yet ruled that there is a constitutional right to access court documents. See *United States v. Gonzales*, 150 F.3d 1246, 1256 (10th Cir. 1998); *United States v. McVeigh*, 119 F.3d 806, 812 (10th Cir. 1997). Even assuming, without deciding, that there is a First Amendment right to court documents, that right is not absolute. See *Globe Newspaper*, 457 U.S. at 606, 102 S. Ct. 2613. “Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling government interest, and is narrowly tailored to serve that interest.” *Id.* at 606–07, 102 S. Ct. 2613.

Id. at 756 (omission in original).

- In a district court case, the court explained that it had previously discussed the standard for sealing the record of a case in a nondiscovery 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) (quotation marks omitted) (quoting *Ramirez v. Bravo's Holding Co.*, No. Civ. A. 94-2396-GTV, 1996 WL 507238, at *1 (D. Kan. Aug. 22, 1996)). 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 countervailing 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. [(1964)]), *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 (alteration in original) (quoting *Wilk*, 635 F.2d at 1299 (citations omitted)); *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.* (omission in original) (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.* (alterations in original) (quoting *Superior Oil Co. v. Am. Petrofina Co.*, 785 F.2d 130, 130 (5th Cir. 1986)).

- The Tenth Circuit recently analyzed the standard for modification of a protective order in

a case in which the United States intervened to obtain modification of a protective order to allow disclosure of documents obtained under the protective order to government agencies other than the Securities and Exchange Commission (SEC) and the United States Attorney's Office. See *SEC v. Merrill Scott & Assoc. Ltd.*, 600 F.3d 1262, 1268 (10th Cir. 2010). The court noted that “[a]s a sheer matter of power[,] the court has authority to alter the terms of a protective order it has entered, and . . . ordinarily requests to modify are directed to the district court’s discretion and subject to review only for abuse of discretion.” *Id.* at 1271 (omission in original) (quoting 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2044.1, at 575–76 (2d ed. 1994); citing *Rohrbough v. Harris*, 549 F.3d 1313, 1321 (10th Cir. 2008)). The court emphasized the importance of considering the parties’ reliance on a protective order before modification, particularly in cases where the government seeks modification:

Protective orders 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.” *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir. 1979) (quotation and citation omitted). This being the case, courts should be wary of retroactive attempts to modify them in ways that undermine the justified reliance of a witness such as Dr. Gerber on a valid order circumscribing the use and availability of information disclosed through discovery. Unless protective orders are “fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation, thus undermining a procedural system that has been successfully developed over the years for disposition of civil differences.” *Id.* “[W]itnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.” *Id.* at 295–96.

These concerns overshadow the general rule that “the district court has broad discretion in judging whether [the alleged] injury [to the party opposing modification] 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). Typically, when considering whether to modify a protective order, courts examine any tangible prejudice to the party opposing modification that outweighs the benefits of modification. Where, as here, it is the federal government that seeks to undermine the continued integrity of the protective order, however, courts have required a greater showing than the typical standard. Given the government’s “vast investigatorial resources and power for oppression,” *United Nuclear*, 905 F.2d at 1428 n.1, courts have required a showing of “unusual

circumstances,” *Wilk*, 635 F.2d at 1300, or even “extraordinary circumstances,” *United Nuclear*, 905 F.2d at 1428 (quotation omitted), before permitting the government to benefit from access to confidential information provided pursuant to a protective order via modification of the order.

Id. at 1272–73 (alterations in original).

- 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 (alteration in original) (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.* (alteration in original) (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.* (alteration in original) (quoting *Pub. 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) (quotation marks omitted) (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986)). 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) (omission in original).

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 (alteration in original) (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) (second alteration in original).

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 (alteration and omission in original) (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 (alteration and omission in original) (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.* (second alteration in original) (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 (alteration in original) (footnote omitted) (quoting *State of Florida v. Jones Chems., Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993) (internal citations omitted)). The court also focused on whether other litigation was 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) (omission in original). 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. FBI*, 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. (first and third alteration in original).

- 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) (internal record citation omitted) (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))). 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 (first and second alteration in original).

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) (quotation marks omitted) (quoting *Hubbard*, 650 F.2d at 315–16 (footnotes 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 (alterations in original) (quoting *Johnson v. Greater Se. 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.”¹⁶ *Id.* at 8 (citing *Johnson*, 951 F.2d at

¹⁶ The court denied the motion to seal, noting that the settlement agreement had not been filed with the court and there

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) (second alteration in original) (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.

Id. at *6 n.18 (quotation marks omitted) (quoting *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D.

was no need for its terms to be entered in the record of the case. See *DBI Architects*, 462 F. Supp. 2d at 8.

499, 502 n.7 (S.D. Iowa 1992)).

- 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 *EEOC 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 ex rel. Pogue 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)).¹⁷

¹⁷ 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).

FEDERAL CIRCUIT¹⁸

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 Prods., 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).

¹⁸ 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)), *cert. denied*, 130 S. Ct. 111 (2009); *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); *Schlaflly 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)); but see *In re Deutsche Bank Trust Co. Americas*, 605 F.3d 1373, 1377–78 (Fed. Cir. 2010) (concluding that “[a] determination of whether a trial lawyer should be denied access to information under a protective order because of his additional role in patent prosecution, or alternatively be barred from representing clients in certain matters before the U.S. Patent and Trademark Office (‘PTO’), is an issue unique to patent law,” and holding that “[g]iven the unique relationship of this issue to patent law, and the importance of establishing a uniform standard, . . . the determination of whether a protective order should include a patent prosecution bar is a matter governed by Federal Circuit law”). As a result, the Federal Circuit does not have a unique set of decisions regarding the general 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. In *Deutsche Bank Trust*, which applied Federal Circuit law to the determination of whether a protective order should include a patent prosecution bar, the court noted the general standard that “[a] party seeking a protective order carries the burden of showing good cause for its issuance,” and concluded that “[t]he same is true for a party seeking to include in a protective order a provision effecting a patent prosecution bar.” 605 F.3d at 1378 (citing FED. R. CIV. P. 26(c); *Truswal Sys. Corp. v. Hydro-Air Eng’g, Inc.*, 813 F.2d 1207, 1209–10 (Fed. Cir. 1987)).

- 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 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) (alteration in original).¹⁹

¹⁹ 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 8

CIVIL-APPELLATE RULES SUBCOMMITTEE

The Civil-Appellate Rules Subcommittee met by conference call on September 8. Notes on the call are attached.

Two topics are on the Subcommittee's current active agenda. One begins with a possible revision of Appellate Rule 4 to clarify the time to appeal when a judgment is modified in response to one of the post-judgment motions that restart the time to appeal. The Appellate Rules Committee considered this subject at its October meeting and decided to carry it forward to their Spring meeting. When they are ready to move forward with a proposal for publication, it will be time to consider whether Civil Rule 58 should be amended to reflect the proposal. There is no occasion for considering this question now.

The other active item addresses "manufactured finality." This topic was the subject of the September call. The basic question arises when a party who has lost adverse rulings that do not yet lead to an appealable judgment wishes to achieve appealable finality by voluntary dismissal. Earlier deliberations considered a variety of approaches, both simple and complex. This time the Subcommittee focused on relatively simpler approaches. One would adopt some form of rule that recognizes the generally accepted doctrine that finality can be achieved by dismissing with prejudice as to all remaining claims and parties. On that approach, everything that was voluntarily dismissed is permanently out of the action. Reversal leads only to reinstating the matters that were dismissed by court action. A second approach would recognize dismissal with "conditional prejudice." Under this approach, the would-be appellant can dismiss everything that remains in the action after the adverse rulings, and the dismissal stands as a judgment on the merits if the appeal leads to affirmance of the adverse rulings. But the prejudice is "conditional" in the sense that the appellant can reinstate the parts that were voluntarily dismissed if one or more of the adverse rulings is reversed. A new rule could adopt conditional prejudice as a uniform practice, reject it, or keep silent — perhaps with a Note making explicit an intent to defer to continuing evolution in the case law.

The Subcommittee remains uncertain about the advisability of developing a rule that recognizes the conditional-prejudice approach to manufactured finality. The attached memorandum framing simple rule sketches identifies the choices now being considered. It would be helpful to gather any preliminary reactions that might guide further Subcommittee deliberations. For those interested in a more detailed treatment of manufactured finality, including a survey of the cases that address the problem, Professor Struve's excellent memorandum is also attached.

Notes, Civil-Appellate Conference Call
8 September 2010

The Civil-Appellate Rules Subcommittee convened by conference call on September 8, 2010, to discuss the subject of “manufactured finality.” Participants included Subcommittee Chair Colloton, Subcommittee members Keisler, Letter, Mahoney, and Walker, as well as Reporters Struve and Cooper.

The call began with a reminder that discussion at the most recent prior call concluded with the suggestion that some simplified models be prepared to focus consideration of the core issues. The question for this call is whether the time has come to go to the full advisory committees, with a general request for reactions on the broad topic, with actual specific proposals for new rules, or with a recommendation to remove the topic from the active agenda.

The most recent simplified sketches of rules text were summarized. One would focus on creating finality by dismissing with prejudice everything that remains in an action. This approach could either remain silent on the possibility of manufacturing finality by dismissing without prejudice or by dismissing with “conditional prejudice,” or it could aim to explicitly exclude those alternative paths to finality. Or a rule could expressly recognize the opportunity to create finality by a conditional dismissal with prejudice. The idea would be that the dismissal establishes absolute prejudice (preclusion) if the judgment is affirmed, but dissolves if the judgment is reversed. Any of these approaches could be adopted as an entirely new rule, or by adding to present rules. Civil Rules 41 and 54 would be the most likely places to amend a present rule.

Discussion began with the suggestion that it would be useful to adopt a rule recognizing the power to create a final judgment by dismissing all remaining parts of an action with prejudice. Although most courts recognize this rule, it would help to make it explicit and uniform. Some lawyers may not be aware of this opportunity. It would be useful to provide explicitly that dismissal without prejudice does not suffice to establish finality. And the question of conditional prejudice should be explored further.

Most of the discussion focused on dismissal with conditional prejudice. The view was expressed that on first examination, this seems an attractive idea. Suppose a plaintiff has four claims. Two are regarded as central, while the other two are regarded as peripheral. The defendant wins dismissal of the two central claims. The plaintiff may believe that the remaining two claims do not justify continuing the action, and is prepared to sacrifice them finally if it cannot on appeal overturn dismissal of the two central claims. Why not allow appeal on a “bet-the-case” basis? Affirmance means there is no further trouble for the courts or other parties. Reversal means the plaintiff was right, and should be allowed whatever additional benefit may come from pursuing the peripheral claims on remand. The peripheral claims may add to the relief won on the central claims, or — if the central claims do not survive all the way to judgment — may provide the only relief.

These virtues of conditional-prejudice dismissals were expressed repeatedly.

Doubts were also expressed about the possibility of recognizing conditional prejudice in rule text. One common setting would involve a motion to dismiss all four claims, followed by a ruling that dismisses the two central claims but denies the motion to dismiss the two peripheral claims. In that setting an appeal by the plaintiff would support a cross-appeal by the defendant, so that if dismissal of the two central claims is reversed the court of appeals could address the refusal to dismiss the two peripheral claims and, perhaps, reverse. All of that seems efficient. But suppose the defendant did not move to dismiss the peripheral claims, perhaps judging that they did state a claim and also guessing that they would not support further litigation standing alone? Or suppose the defendant did move to dismiss the peripheral claims, but the court did not rule on the motion? Particularly in complex matters, the court may prefer to address the case in stages. For that matter,

it may choose to dismiss the central claims on one ground without addressing alternative grounds — it might find a lack of subject-matter jurisdiction, deny standing, or the like, and not address the claims on the merits. In that setting the defendant is not in a position to raise on appeal the questions not yet decided in the district court. There is no harm if dismissal of the two central claims is affirmed, hardening the conditional prejudice into absolute prejudice, but if dismissal is reversed the defendant faces the prospect that there may be multiple piecemeal appeals on other points as the case progresses. That may be undesirable. Yet another complication was introduced. Suppose there are six claims. The trial court dismisses four, reserving rulings as to the remaining two. A conditional-prejudice appeal is taken, but only as to the first two, notwithstanding the opportunity to include the third and fourth claims in the appeal. Dismissal of the first two claims is reversed. What should be the effect of failure to appeal as to the third and fourth claims? Should the trial court remain free to depart from the law of the case if it finds good reason to do so, as affected by the fact that further proceedings are required as to claims one, two, five, and six? If the trial court chooses to stand firm as to claims three and four, should the plaintiff be allowed to resurrect them on appeal from a final judgment? Law-of-the-case doctrine is often employed to refuse consideration on a second appeal of matters open for review but not raised on the first appeal. So it is likely to be here. But need a rule address the problem?

Concerns were also expressed that even if a rule could be crafted for cases involving only one plaintiff and one defendant, it may be difficult for a rule to address the complexities that arise with multiparty, multiclaim cases.

Given the risk of piecemeal appeals, it was suggested that perhaps Rule 54(b) should remain, without change, the only alternative to dismissing all remaining parts of the action with real prejudice. This alternative limits the opportunity to appeal when an adverse ruling severely affects a claim but does not finally dispose of it. A court might rule, for example, that conduct challenged under § 1 of the Sherman Act must be subjected to full-blown rule-of-reason proof, not per se or quick-look analysis. The claim survives, and Rule 54(b) is not available. But the impact on the claim can be immense. Or the court might exclude the most persuasive and important evidence on a claim, leaving the plaintiff with just enough to survive summary judgment and limp through trial. One way to frame the question is to ask whether Rule 54(b) might be expanded. Rule 54(b) has the advantage that it retains the role of the trial judge as “dispatcher,” determining whether a present appeal makes sense for the most orderly management of the case going forward. A variation might be to designate all of present Rule 54(b) as a separate paragraph, Rule 54(b)(1), and add a new (b)(2) that authorizes the court to enter a partial final judgment if a party asks to dismiss a claim that has not been definitively disposed of for the purpose of appealing rulings affecting the claim. This provision could require dismissal of the designated claim with prejudice, so that no part of it could be revived in the event of affirmance, while remaining claims remain alive in the trial court. The trial judge’s evaluation of the impact of an appeal on case management and on other parties might resolve the concerns about piecemeal appeals. To be sure, a trial judge’s calculation may be influenced by vague intuitions about the progress and proper outcome of the case, and by insufficient regard for the impact on appellate workloads. It might be possible to require permission of both courts, as in § 1292(b), but that alternative may prove unduly cumbersome. Abuse of discretion would remain a safeguard, as it is now under Rule 54(b).

The Second Circuit was identified as a court that has recognized conditional-prejudice finality for several years. It was recognized that experience of courts in the Second Circuit may provide a small-scale laboratory to test the fear that undesirable piecemeal appeals may be encouraged by this practice. One of the tasks to be addressed next will be an attempt to discover whether there indeed have been problems. If substantial problems are found, that will be an important caution. The apparent lack of substantial problems also will be interesting, but may not be as useful. It will not be clear how many lawyers are aware of this variation on manufactured

finality. Adoption of a rule expressly recognizing the practice might easily encourage greater use — perhaps far greater use — than an appellate opinion known only to a few cognoscenti. A member did question, however, whether there is sufficient demonstrated need for a conditional-prejudice rule if the matter has not arisen in a single published decision since the Second Circuit recognized the device in 2001.

A recurring theme was brought back for brief discussion. Comparable problems may arise in criminal cases. An example is conviction by conditional plea. The conditional plea explicitly preserves designated issues for appeal. If all of the rulings preserved for appeal are affirmed, the conviction stands. But if one or more are reversed, the first question is whether the defendant wishes to withdraw the plea on remand. If the plea is withdrawn, a question might arise whether the defendant can revive other issues that were not reserved in the conditional plea. It will be useful to pursue this question, with an eye to deciding whether any new provisions should be included in the Civil Rules and perhaps the Criminal Rules, or whether instead a combined provision might be included in the Appellate Rules.

Bringing these various strands together, discussion returned to the questions framed at the outset. There is substantial support for going forward to consider a new rule. It will be useful to establish a uniform and well-known rule, clearing up some of the inconsistencies among different circuit approaches. But the question is complicated even when approached from a perspective that focuses directly only on a two-party case with all claims advanced by the plaintiff. It may be possible to confine a rule to such cases. It may be wise to focus only on the simpler cases, leaving more complex cases to continued evolution in decisional law. Or it may be sensible to allow manufactured finality only in simple cases — an example would be a rule allowing manufactured finality only if the would-be appellant can engineer a complete dismissal with prejudice of all that remains in the action. A difficult question continues to be whether the conditional-prejudice approach can be adopted on terms that do enough good by securing prompt appellate review of rulings on “bet-the-case” terms to justify the risk of undesirable piecemeal appeals. Questions also remain about how frequently this situation arises, and whether it is common enough to warrant the attention of the rulemaking process and to justify the potential negative consequences.

These questions will be the subject of further deliberations. When it becomes better focused, it will be time enough to bring something to the Appellate and Civil Rules Committees. The first report may simply ask for broader discussion of a model, or competing models. Or it might ask review of a firm proposal. Work will continue toward these ends.

Simplified Manufactured Finality

This set of sketches addresses only the simplest variations on manufactured finality. No sketch attempts to capture a consensus reflecting whatever common features may be found in present decisions. More importantly, no attempt is made to address the many possible complications that would be addressed by a comprehensive rule. Three major potential elements are ignored: whether or when to require consent of all parties, or at least any party who would be exposed to an immediate appeal; whether or when to require the court's consent; and what to do about partial finality in cases involving multiple parties. The potential costs of simplifying any potential rule are noted in a few pages after the sketches are presented.

This order of presentation does not imply any judgment as to the best choice among three general possibilities: (1) adopt a simplified rule or rules; (2) adopt a more complex rule; or (3) do nothing because a simplified rule may do more harm than good, while a more complicated rule is too difficult to draft. Although the present muddle on some issues is something of a problem for lawyers who litigate in multiple circuits, there may not be much need to help any particular circuit out of any particular confusion it may have developed.

I Sketches

These sketches address several possible approaches, either alone or in some combination. One approach would be to adopt a rule that recognizes dismissal with prejudice but does not explicitly address conditional prejudice or dismissal without prejudice. Another approach would be to allow manufactured finality only on dismissal of everything that remains in the action with binding prejudice. If the orders that prompted the dismissal are reversed, the only things revived by reversal are those addressed by the reversed orders. That approach could include an explicit prohibition on manufacturing finality by dismissing any part of an action without prejudice or with conditional prejudice. Yet another approach would be to recognize conditional prejudice — the matters dismissed cannot be revived if the challenged orders are affirmed, but can be revived as a matter of right if any of the challenged orders is reversed.

As noted at the outset, none of these sketches takes account of consent by other parties. The party who wishes to manufacture finality has to accomplish dismissal of everything that remains in the action; if that can be accomplished without the consent of other parties, so it will be done. Nor do the sketches require consent of either the trial court or the court of appeals. Accordingly there is no room to recognize judicial discretion at either level.

(1) ADOPT ONLY ABSOLUTE PREJUDICE

Almost all courts recognize a plaintiff's ability to achieve finality by a voluntary dismissal with prejudice that preserves the right to appeal pre-dismissal orders. This approach could be memorialized in a rule. The rule might say nothing more, leaving it to developing practice to work through the practice of "conditional prejudice" that allows abandoned matters to be resurrected if the plaintiff wins on appeal. Or the rule might attempt to kill off the conditional prejudice opportunity. The possibilities are illustrated here and in item (2):

Rule X. A party asserting a claim for relief can establish a final judgment by voluntarily dismissing with prejudice all claims and parties remaining in the action.

This sketch is not limited to dismissal by "A plaintiff." If only counterclaims remain in the action, for example, a defendant could invoke it. It says nothing about conditional prejudice. It is not clear where it would best fit in the rules. The most likely place may be as a new Rule 41(a)(2), renumbering present (2) as (3). But it might be better to add it to Rule 54, either as a new paragraph

in subdivision (b) or as a separate subdivision (c). A place might instead be found in the Appellate Rules, but that could be confusing without a large-scale reconsideration of the ways in which the Civil and Appellate Rules have been integrated. Rules 54 and 58 are the most prominent examples, but not the only ones.

An alternative approach might add something to provide reassurance that the plaintiff, having voluntarily dismissed, still can appeal. Among the possibilities, this sketch focuses on dismissing all the plaintiff's claims, or perhaps all the plaintiff's claims against fewer than all remaining parties. It is limited to a plaintiff, rather than "a party asserting a claim for relief," but that choice is easily reversed. And it offers an alternative that anticipates more complicated rules by allowing dismissal of all claims against a particular adverse party.

RULE 54.1. FINALITY BY DISMISSAL. On request by a plaintiff who specifies orders [or other matters] that it wishes to appeal, the court must enter final judgment with prejudice dismissing all claims by the plaintiff [version 1: against all parties]{version 2: against one or more adverse parties}.

(2) EXPRESSLY ELIMINATE CONDITIONAL PREJUDICE

It is not easy to draft a rule that unambiguously eliminates the "conditional prejudice" approach. The difficulty is that a simple model like the one below does not say explicitly that the "prejudice" cannot be subject to a condition subsequent that reversal of a pre-dismissal ruling will revive the matters dismissed. The Committee Note would say that the rule is intended to eliminate the concept of conditional prejudice, but there are good reasons to avoid substituting Note observations for rule text.

The simple model simply rearranges the draft that refers only to dismissal with prejudice:

Rule X. A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action.

An attempt to extirpate conditional prejudice might be included in Rule 41. One possibility:

(B) *Effect.* (i) Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(ii) **A notice or stipulation may not provide that a dismissal with prejudice as to a claim or party is conditioned on affirmance on appeal as to other claims or parties or on the failure of any party to appeal.**

(3) CONDITIONAL PREJUDICE

Rule X. A party asserting a claim for relief can achieve a final judgment by a notice [or stipulation] that specifies orders the party wishes to appeal and that [conditionally] dismisses with prejudice all claims and parties remaining in the action. The party may appeal as to the specified orders.¹ If the judgment is

¹ **Should there be a provision for separate appeals by other parties? "Any party may appeal as to the specified orders"?**

reversed the party may reinstate the claims and parties included in the [conditional] dismissal.²

This provision might be fit into Rule 54(b) rather than a new Rule 54.1. Rule 41(a) also might be a suitable location. Clarity would be advanced by dividing the present rule into paragraphs and adding this as a separate paragraph.

(4) RULE 41(A)(1) ALTERNATIVE, REAL OR CONDITIONAL PREJUDICE:

A somewhat different drafting approach could work with real prejudice or with conditional prejudice. This version does that by requiring that a dismissal aimed at appeal be with prejudice in item (ii), but then adds an optional provision in (B) making the prejudice conditional.

(1) *By the Plaintiff.*

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a notice of dismissal with [conditional] prejudice that specifies orders [or other matters] the plaintiff wishes to appeal;³ or

(iii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect.*

(i) Unless a notice **under Rule 41(a)(1)(A)(i)** or stipulation **[under Rule 41(a)(1)(A)(iii)]** states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed * * * .

(ii) A notice under Rule 41(a)(1)(A)(ii) [is with prejudice, but the notice] must be vacated if any of the specified orders is reversed {on appeal}.

For that matter, need there be an express recognition of separate appeals — some other party may have lost on some other order, and want to appeal. For example, the court dismisses one of the plaintiff's claims, and also dismisses the defendant's counterclaim: "Any party may appeal as to the specified orders, and any other party may appeal as to any other order [made before the dismissal]"?

² **Need the rule text say that the party cannot reinstate as to any order affirmed on appeal? That is the intent. Perhaps a statement in the Committee Note will do the job.**

To make assurance doubly sure, something like this could be woven into the rule text: "The dismissal becomes an unconditional dismissal with prejudice if the judgment is affirmed; the dismissal must be vacated if the judgment is vacated or reversed."

³ **This could be "a notice of dismissal that reserves the right to appeal specified orders." Several courts have addressed the question as one of appeal standing, generally concluding that consent to dismissal does not waive the right to appeal when the would-be appellant expressly reserves the right to appeal. E.g., *McMillian v. Sheraton Chicago Hotel & Towers*, 567 F.3d 839 (7th Cir.2009).**

(5) COMBINATION: ELIMINATE WITHOUT PREJUDICE, ALLOW CONDITIONAL

The Rule 41 draft sketched above is intended to eliminate dismissal without prejudice as a means of manufacturing finality. The dismissal must be with prejudice, or — if (1)(B)(ii) is adopted — with conditional prejudice. But if the rule text and Committee Note emphasis seem less than certain, an explicit statement might be adopted by rule. Rather than attempt to squeeze that into Rule 41 at the moment, this illustration simply copies one of the alternatives in sketch (2):

Rule X. A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action or by dismissing with conditional prejudice under Rule 41(a)(1)(B)(ii).

II Complications

A simplified rule has the advantage of simplicity. And it might accomplish some good. There are, after all, many cases that involve only one plaintiff and one defendant, whether with one claim or multiple claims.

But there are substantial costs in taking a simplified approach. What happens in more complex settings that do not fit within the rule? Is manufactured finality prohibited? Is it left to continuing evolution in the case law? Will the evolution be affected, perhaps in unpredictable ways, by analogy to the rule and its silences? A Committee Note might recognize that courts remain free to address situations not covered by the rule. A Note saying that the rule preempts all alternative approaches to manufactured finality might run the risks of legislating by Note rather than rule text.

The costs of moving beyond a simplified rule, however, are easy to identify. Manufacturing “finality” on terms that do not conclude all trial-court proceedings creates all the risks of interlocutory appeals. The trial court has a real interest in managing the whole litigation, and in determining when an appeal as to part of the action is compatible with — or perhaps a support for — effective case management. The Rule 54(b) model that uses the district judge as “dispatcher” reflects important values. The parties who remain in the action, and even the party who becomes appellee in the part severed by manufactured finality, have parallel interests. If all parties agree on the terms of manufactured finality, the district court’s role may be diminished even when the manufactured terms do not resolve all parts of the action.

The following brief reflection on these questions does not offer examples of rule text that might recognize the need for party consent or judicial control. Some sketches were provided in an earlier memorandum, and can be revived if interest moves in that direction.

PARTY CONSENT

Consent by another party does not seem important in the simple case that involves one plaintiff, one claim supported by various theories or forms of proof, and one defendant. The court might, for example, make a ruling in limine that excludes important evidence. Or it might dismiss several theories, but leave the claim alive as to a theory that — although viable — has little chance of success. Because there is only one “claim” within the meaning of Rule 54(b), the court cannot enter a final judgment. But if the plaintiff is willing to dismiss the entire action with prejudice, staking everything on appeal and reversal of the unfavorable rulings, it may make sense to allow unilateral finality. Many cases allow that now.

More complicated settings raise more important questions about party consent. Suppose there are two defendants. Unfavorable rulings greatly diminish the prospects of recovery against

one, but do not affect the other. Each defendant has interests of the sort underlying the final-judgment rule. If the plaintiff can achieve finality as to one defendant without the consent of either and without the court's control, appeal as to the one defendant raises the prospect of disrupted trial-court proceedings, or partial ongoing trial-court proceedings that may be undone by the eventual appeal ruling, or multiple appeals. These problems proliferate as the number of parties and claims expands.

Requiring consent of all parties would provide a substantial safeguard against these risks. It would be easy to draft a blanket requirement. It would not be so easy to attempt a more sophisticated version that requires consent of some parties but not all. If consent of all parties is required, however, there is a risk that some would seize the opportunity for strategic reasons, bargaining for collateral concessions that have nothing to do with the calculus of finality.

Party consent can be a means of achieving immediate appealability in some cases without need to amend the rules. A joint request to enter judgment under Rule 54(b) may be persuasive, although there is some constraint in the requirement that the court have finally decided at least one "claim," or all claims among a pair of parties. Or the parties may consent to a judgment, reserving the right to appeal, a tactic honored in several but not all circuits. More complicated strategies also may be available.

COURT CONSENT

The court may have interests in sound case management that depart from the parties' interests. These interests may not be important in the simple case. Although the court will be required to take up a stale case if its pre-dismissal rulings are reversed, that may be better than the most likely alternatives — completion of the case through trial, appeal, reversal, and remand; or surrender by a party afflicted by orders that would have been reversed if the opportunity for appeal were available without the burden of exhausting the trial-court process.

More complex cases increase the court's interests, perhaps greatly. A mandatory stay of all proceedings pending appeal by one party may impose great costs on the court and other parties. Plunging ahead pending appeal may impose equally grave, although different, costs. Allowing a party to create a right to appeal without any court control may be unwise.

As with party consent, court control may be managed to some extent without any rules changes. Section 1292(b) interlocutory appeals are constrained by conditions that may thwart some desirable appeals, but they are available. Rule 54(b) may be stretched a bit, allowing entry of judgment that a strict view of the rule would forbid. Inventive use may be made of Rule 41(a)(2), allowing dismissal by court order on terms that the court considers proper. Those possibilities bear on the need to pursue a "manufactured finality" rule, but do not provide a substitute for it. They also open up the possibility of sidestepping manufactured finality by seeking to expand Rule 54(b) or to revise § 1292(b). (Although not entirely clear, it seems likely that § 1292(e) authorizes adoption of court rules that in effect amend § 1292(b). But the potential confusion suggests statutory revision would be better.)

MULTIPARTY, MULTICLAIM CASES

The simplest situation is noted above. If a plaintiff can manufacture finality as to one of two defendants, the remaining defendant is exposed to the cost and risk of proceeding alone in the trial court while the appeal is pending, or to the multiple burdens imposed by a stay pending appeal. A comparably simple situation is presented by a case involving one plaintiff, one claim, one defendant, and one counterclaim. Rule 41(a)(2) may address that situation implicitly — the court can order dismissal over the defendant's objection only if the counterclaim can remain for independent

adjudication. But should the terms of dismissal include manufactured finality as to the plaintiff's claim?

More complex cases increase the threat to the values served by the final-judgment rule.

One approach would be to allow manufactured finality only by arranging final disposition of all claims among all parties. That result could be achieved by unilateral action only if the plaintiff is the only party asserting any claims and is willing to put them all at risk, or even to sacrifice all of those not involved in the adverse orders that prompt the urge to appeal. Once counterclaims, crossclaims, and third-party claims appear, the plaintiff often cannot unilaterally dispose of the entire action. It is likely possible to draft a rule that would enable the plaintiff to dispose of all claims as to one or more parties, but not all; drafting would be easier if consent were required of the parties exposed to finality and appeal. It is a fair question, however, whether other parties and the court should be held hostage to action by only some of the parties.

MEMORANDUM

DATE: March 27, 2009
TO: Advisory Committee on Appellate Rules
FROM: Catherine T. Struve, Reporter
RE: Item No. 08-AP-H

At its fall 2008 meeting, the Appellate Rules Committee discussed the possibility of amending the Rules to respond to the circuit split on the viability of “manufactured finality” as a means of securing appellate review. “Manufactured finality” describes instances when the district court dismisses with prejudice fewer than all of the plaintiff’s claims and the plaintiff then voluntarily dismisses the remaining claims in the hopes of achieving a final – and thus appealable – judgment.¹ The Appellate Rules Committee noted the importance of seeking the views of the Civil Rules Committee, and the two committees are now proceeding to address the issue jointly.

Part I of this memo briefly reviews the nature of the problem²; Part II discusses some possible ways of responding to it. The memo incorporates insights from the Appellate Rules Committee’s fall discussion and from discussions since then with Judge Kravitz and Professor Cooper.

I. The “manufactured finality” doctrine

28 U.S.C. § 1291 authorizes appeals from final decisions of the district courts, and the

¹ See Mark I. Levy, *Manufactured Finality*, Nat’l L.J., May 5, 2008; Laurie Webb Daniel, *Circuit Split Report: Appellate Jurisdiction When Claims Are Voluntarily Dismissed Without Prejudice*, *The Appellate Advocate*, Issue 2, 2008; Mark R. Kravitz, *Creating Finality*, Nat’l L.J., July 8, 2002, at B9.

A litigant’s desire to manufacture finality may also arise from events other than the dismissal of a claim. This might happen, for example, if the court denies a motion to strike a defense that the plaintiff fears will be dispositive, or grants summary judgment on a central fact without dismissing a claim, or denies the plaintiff’s motion for summary judgment. (As to the third of these examples, see the *Helm Financial Corporation* case cited in footnote 25.)

² A longer treatment of some points discussed in this memo can be found in the agenda materials for the Appellate Rules Committee’s fall 2008 meeting, which are available at <http://www.uscourts.gov/rules/Agenda%20Books/Appellate/AP2008-11.pdf>.

Supreme Court has defined final decisions as those that “end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment.”³ The policies behind the final judgment rule include the need to conserve appellate resources, avoid piecemeal appeals, and curb the delay that such piecemeal appeals could cause in the district court.

But there are costs to the final judgment rule, and thus both Congress and the rulemakers have adopted certain safety valves. Of most relevance here, 28 U.S.C. § 1292(b) permits interlocutory appeals – but only if both the district court and the court of appeals grant permission, and only if the district court certifies both that an immediate appeal “may materially advance the ultimate termination of the litigation” and that the challenged order “involves a controlling question of law as to which there is substantial ground for difference of opinion.” Civil Rule 54(b) only requires permission from the district court (not the court of appeals); it permits the district court (in cases involving multiple claims or parties) to “direct entry of a final judgment as to one or more, but fewer than all, claims or parties.” However, Rule 54(b) certification is only proper if the district court certifies “that there is no just reason for delay.” This determination lies within the district court’s discretion.

These safety valves may not always address a litigant’s concerns. If the court dismisses the plaintiff’s most important claims (“central claims”), leaving only claims about which the plaintiff cares less (“peripheral claims”),⁴ the continued pendency of the peripheral claims means there is no final judgment despite the dismissal of the central claims. The district court may not be willing to enter a final judgment on the central claims under Civil Rule 54(b); for example, the district court may not be convinced that there is “no just reason for delay” in entering the final

³ See, e.g., *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198, 204 (1999) (internal quotation marks omitted).

⁴ I borrow the terms “peripheral” and “central” from Rebecca A. Cochran, *Gaining Appellate Review by “Manufacturing” a Final Judgment Through Voluntary Dismissal of Peripheral Claims*, 48 *Mercer L. Rev.* 979, 982 (1997).

Distinct issues are posed when the district court dismisses the plaintiff’s federal-law claims with prejudice and dismisses supplemental state-law claims without prejudice under 28 U.S.C. § 1367(c). See, e.g., *Erie County Retirees Ass’n v. County of Erie, Pa.*, 220 F.3d 193, 202 (3d Cir. 2000) (“While the district court’s order in this case did permit appellants to reinstitute their dismissed state law claims, they could do so only in state court, as there would be no basis for the district court to exercise jurisdiction over such a reinstated action. Thus, we have jurisdiction over this appeal.”); *Amazon, Inc. v. Dirt Camp, Inc.* 273 F.3d 1271, 1275 n.4 (10th Cir. 2001) (“The district court’s decision to decline supplemental jurisdiction over the state law claims effectively excluded the remainder of Amazon’s suit from federal court through no action of Amazon, and the order is therefore final as to the federal court proceedings.”). I do not address these issues in this memo.

judgment.⁵ And, similarly, there may not be strong arguments that the order dismissing the central claims “involves a controlling question of law as to which there is substantial ground for difference of opinion” and that “an immediate appeal from the order may materially advance the ultimate termination of the litigation”; even if there are good arguments to this effect, a permissive appeal under Section 1292(b) requires both trial court and appellate court permission.⁶ But what if the plaintiff voluntarily dismisses the peripheral claims, thus leaving no claims in the suit? Can the plaintiff thereby “manufacture” a final judgment? It should first be noted that in many instances the plaintiff will need either the consent of all parties who have appeared or court permission in order to dismiss the remaining claims.⁷

Several scenarios might then result. Each scenario involves the district court’s dismissal of the plaintiff’s central claim, followed by the plaintiff’s dismissal of the remaining peripheral claims. The circuits vary in their treatment of these scenarios; what follows is not an exhaustive listing of the caselaw, but rather a survey of representative cases.

Peripheral claims dismissed with prejudice.⁸ In this scenario, most courts take the view that there exists a final, appealable judgment.⁹

⁵ Even if the district judge is willing to enter a Rule 54(b) judgment, there are some outer limits on the district judge’s discretion to do so. See, e.g., *Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431, 1434 (7th Cir. 1992).

⁶ For the transcript of a colloquy in which a district judge criticized the Seventh Circuit for its unwillingness to permit interlocutory appeals and Rule 54(b) appeals, see *Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431, 1437-39 (7th Cir. 1992).

⁷ The plaintiff may file a notice of dismissal without party consent or court order if the notice is filed “before the opposing party serves either an answer or a motion for summary judgment.” Civil Rule 41(a)(1)(A)(i). This might occur, for example, if the plaintiff’s most important claims were dismissed on a pre-answer motion to dismiss under Civil Rule 12(b)(6).

Even if all parties consent to the dismissal of the peripheral claims *and* to the plaintiff’s attempt to appeal the dismissal of the central claims, it is to be expected that the court of appeals will consider itself bound to raise the question of appellate jurisdiction. See, e.g., *Horwitz v. Alloy Automotive Co.*, 957 F.2d 1431, 1435 (7th Cir. 1992).

⁸ Courts of appeals have permitted the plaintiff-appellant (who had previously dismissed peripheral claims without prejudice) to stipulate on appeal that the dismissal of the peripheral claims is with prejudice – thus providing appellate jurisdiction. See, e.g., *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 776-77 (7th Cir. 1999).

⁹ See *John’s Insulation, Inc. v. L. Addison & Assoc., Inc.*, 156 F.3d 101, 107 (1st Cir. 1998); *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005);

However, one case from the Eleventh Circuit suggests a different view. In *Druhan v. American Mutual Life*, 166 F.3d 1324 (11 Cir. 1999), the district court denied plaintiff's motion to remand, holding that her claims were completely preempted by ERISA. The plaintiff then secured a voluntary dismissal of her "ERISA" claim with prejudice. See *id.* at 1325. The court of appeals held that the order denying remand was unreviewable; it stated both that there was no longer a case or controversy (because the plaintiff herself had requested the dismissal) and that Congress has not authorized appeals from orders denying remand. *Id.* at 1326. In so holding, the court of appeals recognized the existence of caselaw from other circuits stating "that allowing appeals from voluntary dismissals with prejudice 'furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end.'" *Id.* (citing *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 654 (2d Cir. 1996)). The *Druhan* majority refused to follow such precedents, reasoning that the decision to adopt such a view "rests in the hands of Congress, which, along with the Constitution, sets the boundaries of this court's jurisdiction." *Id.* at 1326. Judge Barkett concurred in the determination that the court of appeals lacked jurisdiction, on the ground that the plaintiff could have continued to press her claim under ERISA, and thus that authorities from other circuits (holding that a voluntary dismissal with prejudice of all remaining claims creates a final judgment) were inapposite. See *id.* at 1327 (Barkett, J., concurring).

More recently, an Eleventh Circuit panel majority held (over a dissent) that *Druhan* (and another similar case) did not govern the question of appealability in a case where the plaintiff suggested that the district court should dismiss its claims with prejudice after the district court issued an order excluding the testimony of plaintiff's expert witness: "Unlike the remand orders at issue in *Druhan* and *Woodard* that concerned only the forum where the cases would be heard, the sanctions order here excluding plaintiff's legal expert was case-dispositive because it foreclosed *Fitel* from presenting the expert testimony required to prove professional negligence, which was a core element in all of its claims." *OFS Fitel, LLC v. Epstein, Becker and Green, P.C.*, 549 F.3d 1344, 1357 (11th Cir. 2008). The *OFS Fitel* majority viewed *Druhan* as a case in which the plaintiff voluntarily dismissed her claims and was therefore not "adverse" to the judgment; that being so, the *OFS Fitel* court reasoned, the plaintiff could not challenge the judgment by appealing. By contrast, the court viewed the *OFS Fitel* plaintiff as adverse to the judgment and viewed the dismissal as not so much voluntary as invited out of a recognition that the court's prior sanctions order had effectively ended the case. See *OFS Fitel*, 549 F.3d at 1358.

Peripheral claims conditionally dismissed with prejudice – i.e., plaintiff dismisses the peripheral claims on the understanding that the dismissal is with prejudice *unless the court of*

Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996); *Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 688 (8th Cir. 1999).

*appeals reverses the dismissal of the central claims.*¹⁰ In this scenario, the Second Circuit has held that there is a final judgment:

[W]hen a plaintiff is completely free to relitigate voluntarily dismissed claims, the final judgment rule ordinarily precludes this court from reviewing any adverse determination by the district court in that case. However, where, as here, a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from this court, the finality rule is not implicated in the same way.... Purdy runs the risk that if his appeal is unsuccessful, his malpractice case comes to an end. We therefore hold that a conditional waiver such as Purdy's creates a final judgment.

Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003). However, the Third and Ninth Circuits have disagreed.¹¹

¹⁰ Judge Easterbrook has noted the possibility that the principle advocated by the plaintiff in such a case might be viewed as analogous to “the principle that allows a dispositive *issue* to come up, when the plaintiff is willing to stake the entire case on its resolution.” *First Health Group Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 802 (7th Cir. 2001). But the *First Health Group* court did not need to decide whether the analogy held, because the plaintiff decided to dismiss the relevant claims unconditionally, thus removing the jurisdictional question. *Id.*

¹¹ In the Third Circuit, see *Federal Home Loan Mortgage Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 440 (3d Cir. 2003) (“[T]he Consent Judgment preserved Freddie Mac's right to reinstate Counts Two and Three, if we were to reverse and remand the district court's ruling.... The Consent Judgment thus represented an inappropriate attempt to evade § 1291's requirement of finality.”). The original order had stated that the relevant counts were “dismissed, without prejudice, subject to the plaintiffs' right to reinstate Counts Two and Three if the March 19th Order should be vacated and this matter remanded for trial by the Third Circuit Court of Appeals based upon the appeal.” *Id.* at 437. After oral argument, Freddie Mac sought and obtained a district-court order dismissing Counts 2 and 3 “with prejudice,” and this rendered the judgment final. *Id.* at 442.

In the Ninth Circuit, see *Dannenberg v. Software Toolworks Inc.*, 16 F.3d 1073, 1076 (9th Cir. 1994) (stating that “stipulations to dismiss claims with the right to reinstate upon reversal ... implicate identical policy concerns” as dismissals without prejudice). See also *Cheng v. C.I.R.*, 878 F.2d 306, 311 (9th Cir. 1989) (“A plaintiff who has alleged several separate claims could conceivably appeal as many times as he has claims if he is willing to stipulate to the dismissal of the claims (contingent upon the affirmance of the lower court's judgment) the court has not yet considered.”). The Ninth Circuit later suggested that the presence of a stipulation permitting reinstatement of the peripheral claims in the event that the dismissal of the central claims is reversed on appeal shows intent to circumvent the final judgment rule, and thus indicates that appellate jurisdiction should be disallowed; in making this observation, the court

Peripheral claims dismissed without prejudice, and the statute of limitations has run out on the peripheral claims (or there is some other reason why the peripheral claims cannot be reasserted). This scenario ought to be functionally similar to a dismissal with prejudice. The statute of limitations, if it has run, would bar the plaintiff from reinstating the peripheral claims, assuming that the defendant properly asserts the statute of limitations bar in the future proceeding. Panels in the Second, Third and Tenth Circuits have approved such an approach.¹²

The Fourth Circuit took a somewhat similar approach in *GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170 (4th Cir. 2007). The *GO Computer* plaintiffs had asserted a number of antitrust claims, including claims for injuries to another company (Lucent). The district court, expressing serious concerns about the factual basis for the claims based on injuries to Lucent, struck the allegations relating to those claims from the complaint. Plaintiff obtained reconsideration of this order by “offer[ing] to voluntarily dismiss its federal claims for continuing antitrust injuries to Lucent, promising not to seek reinstatement of those claims or to file a new complaint raising them.” *Id.* at 174-75. Ultimately, the district court dismissed the other claims on statute of limitations grounds and permitted the voluntary dismissal without prejudice of the claims based on injuries to Lucent. See *id.* at 175. Oddly, when *GO Computer* appealed, its first contention on appeal was that the absence of a final judgment deprived the court of appeals of appellate jurisdiction. Taking a “pragmatic” approach to the final judgment rule, the court of appeals held that it had jurisdiction:

When the district court dismissed some of *GO*'s claims without prejudice, it was utterly finished with *GO*'s case. The claims in question, of course, are those based on injuries to Lucent that *GO* never had a right to allege *GO* escaped Rule 11 sanctions and won dismissal without prejudice by promising never to raise these claims in federal court again. And even if another district court by some chance did allow *GO* to file a new complaint for the Lucent claims, that case would be based on distinct facts from this one; in no sense would *GO* have saved this action by amending this complaint. The district court thus rendered a final judgment, and we have jurisdiction to consider it.

distinguished plain dismissals without prejudice, which the court said leave the plaintiff exposed to the risk that the peripheral claims will become time-barred. *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064, 1066 (9th Cir. 2002).

¹² See *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 654 n.3 (2d Cir. 1996); *Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1155 (3d Cir. 1986) (alternative holding, over a dissent); *Jackson v. Volvo Trucks N. Am., Inc.*, 462 F.3d 1234, 1238 (10th Cir. 2006). See also *Carr v. Grace*, 516 F.2d 502, 503 (5th Cir. 1975) (“Under the peculiar circumstances of this case, we have no difficulty in concluding that a dismissal even ‘without prejudice’ after the statute of limitations has run is a final order for purposes of appeal. The appealability of an order depends on its effect rather than its language.”). *Carr* is not directly on point, for present purposes, because in *Carr* the entire case had been dismissed.

GO Computer, 508 F.3d at 176.

Dismissal without prejudice of peripheral claims results in the complete removal of a particular defendant from the suit. In this context, two courts of appeals have held that the dismissal creates a final judgment. The Eighth Circuit panel majority, in so holding, reasoned that cases refusing to permit appeals from the dismissal of a plaintiff's central claim against a defendant where peripheral claims against the same defendant were later dismissed without prejudice "further the well-entrenched policy that bars a plaintiff from splitting its claims against a defendant. But this policy does not extend to requiring a plaintiff to join multiple defendants in a single lawsuit, so the policy is not violated when a plaintiff 'unjoins' multiple defendants through a voluntary dismissal without prejudice." *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1106 (8th Cir. 1999). The Ninth Circuit, reaching a similar conclusion in *Duke Energy Trading & Marketing, L.L.C. v. Davis*, 267 F.3d 1042 (9th Cir. 2001), felt the need to distinguish *Dannenberg v. The Software Toolworks Inc.*, 16 F.3d 1073 (9th Cir. 1994), which the *Duke Energy* court characterized as holding that the court of appeals "did not have jurisdiction under § 1291 over an order granting partial summary judgment where the parties stipulated to the dismissal of the surviving claims without prejudice, subject to the plaintiff's right to reinstate them in the event of reversal on appeal." *Duke Energy*, 267 F.3d at 1049. The *Duke Energy* court distinguished its ruling in *Dannenberg* on the ground that *Dannenberg* "did not involve the effect of the complete dismissal of a defendant pursuant to Rule 41(a)(1)(i) for appellate jurisdiction purposes." *Duke Energy*, 267 F.3d at 1049.

The peripheral claims are dismissed without prejudice and there is no reason to think that their reassertion would necessarily be barred by the statute of limitations or any other impediment. Panels in the Second,¹³ Third,¹⁴ Fifth,¹⁵ Seventh,¹⁶ Tenth¹⁷ and Eleventh¹⁸

¹³ See *Rabbi Jacob Joseph Sch. v. Province of Mendoza*, 425 F.3d 207, 210 (2d Cir. 2005); *Chappelle v. Beacon Communications Corp.*, 84 F.3d 652, 654 (2d Cir. 1996).

¹⁴ See *LNC Investments LLC v. Republic Nicaragua*, 396 F.3d 342, 347 (3d Cir. 2005). See also *Morton Int'l, Inc. v. A.E. Staley Mfg. Co.*, 460 F.3d 470, 477 (3d Cir. 2006).

¹⁵ See *Swope v. Columbian Chems. Co.*, 281 F.3d 185, 192 (5th Cir. 2002).

¹⁶ See *Horwitz v. Alloy Auto. Co.*, 957 F.2d 1431, 1435-36 (7th Cir. 1992).

¹⁷ See *Heimann v. Snead*, 133 F.3d 767, 769 (10th Cir. 1998). See also *Cook v. Rocky Mountain Bank Note Co.*, 974 F.2d 147, 148 (10th Cir. 1992).

¹⁸ In *State Treasurer of State of Michigan v. Barry*, 168 F.3d 8 (11th Cir. 1999), an Eleventh Circuit panel applied circuit precedent stating that "appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice," *id.* at 11. A panel member wrote separately to criticize that approach and to advocate *en banc*

Circuits have concluded that the judgment is not final for appeal purposes in this situation. It should be noted, however, that the Seventh Circuit caselaw on this question is in some disarray.¹⁹

reconsideration of it, see *id.* at 21 (Cox, J., specially concurring). The panel majority suggested that its ruling might be limited to cases involving “an appellant (1) who suffered an adverse non-final decision, (2) who subsequently either requested dismissal without prejudice under Rule 41(a)(2), or stipulated to dismissal without prejudice under Rule 41(a)(1), of the remaining claims.” *Id.* at 15 n.10.

The Eleventh Circuit subsequently followed *Barry*, observing that *Barry* followed this approach as “1. consistent with 28 U.S.C. § 1291; 2. followed by two other circuits; 3. allowing district courts, not litigants, to control when and what interim orders are appealed; 4. forcing litigants to make hard choices and to evaluate seriously their cases; and 5. circuit precedent for 25 years.” *Hood v. Plantation Gen. Med. Ctr., Ltd.*, 251 F.3d 932, 934 (11th Cir. 2001).

In a case decided the same year as *Barry*, the Eleventh Circuit refused to extend *Barry* to a situation in which the plaintiff first voluntarily dismissed certain claims, and the district court only later dismissed all other claims on the merits. In such a situation, the court explained, the danger of manipulation of appellate jurisdiction does not exist, and in addition there would be no opportunity, in such a situation, for the district court to enter a judgment under Civil Rule 54(b). *Schoenfeld v. Babbitt*, 168 F.3d 1257, 1265-66 (11th Cir. 1999).

¹⁹ A Seventh Circuit panel has narrowly interpreted *Horwitz* (discussed *supra* note 16), as a case that turned on the court’s view of the parties’ and the district court’s intent: “*Horwitz* did not announce a principle that dismissal of some claims without prejudice deprives a judgment on the merits of all other claims of finality for purposes of appeal. Rather, the court concentrated on the intent of the district court and the parties to bypass the rules.” *United States v. Kaufmann*, 985 F.2d 884, 890-91 (7th Cir. 1993). In *Kaufmann*, the court of appeals had dismissed the defendant’s prior appeal from a judgment of conviction on one count because other counts were unresolved. The district court then (on the government’s motion) dismissed the other counts without prejudice under Criminal Rule 48. The court of appeals took jurisdiction of this second appeal; it emphasized that its disposition of the prior appeal had explicitly contemplated such a mechanism, and it distinguished *Horwitz* by concluding that in *Kaufmann* that the parties were not attempting to manipulate the court’s jurisdiction. *Kaufmann*, 985 F.2d at 891.

On the other hand, a Seventh Circuit panel later followed *Horwitz* after noting the difficulty of reconciling the circuit’s divergent precedents: “The recent cases disallowing a sort of manufactured finality like that found in the present lawsuit are consistent with the fundamental policy disfavoring piecemeal appeals. Hence, West’s voluntary dismissal without prejudice is under current law insufficient to create a final judgment.” *West v. Macht*, 197 F.3d 1185, 1189-90 (7th Cir. 1999). The *West* court noted a relatively early case, *Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy*, 538 F.2d 1264, 1266 (7th Cir. 1976), in which the remaining claims had been voluntarily dismissed without prejudice and the court of appeals

By contrast, panels in the Sixth²⁰ and Federal²¹ Circuits have concluded that a voluntary dismissal of the peripheral claims produces a final judgment. Without explicitly considering the question of jurisdiction, panels in the First²² and D.C.²³ Circuits have reached the merits of appeals taken after peripheral claims were dismissed without prejudice.

The Eighth Circuit has taken varying approaches to this issue. In *Hope v. Klabal*, 457 F.3d 784, 789-90 (8th Cir. 2006), the Eighth Circuit panel noted some prior cases in which it had either recharacterized a dismissal without prejudice as a dismissal with prejudice²⁴ or had

rejected a challenge to its appellate jurisdiction. The court in *West* noted that “[s]ubsequent cases have, without mentioning *Division 241*, avoided that case's result, though *Division 241* has never been overruled.” *West*, 197 F.3d at 1188.

On still another hand, the Seventh Circuit yet more recently distinguished *West* and followed *Kauffman* in deciding that a prior judgment was final and appealable and thus eligible for res judicata effect. See *Hill v. Potter*, 352 F.3d 1142 (7th Cir. 2003). The *Hill* court rejected the contention that the prior judgment lacked finality because one of the claims had been voluntarily dismissed without prejudice. The court explained: “[A] litigant is not permitted to obtain an immediate appeal of an interlocutory order by the facile expedient of dismissing one of his claims without prejudice so that he can continue with the case after the appeal is decided... But, as in *United States v. Kaufmann*, 985 F.2d 884, 890-91 (7th Cir.1993), and *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064 (9th Cir.2002), that is not the proper characterization of Hill's motion to dismiss his claim of retaliation. The record is clear that the reason for the request to dismiss was to avoid two trials, by joining the claim to the EAS claims that had been dismissed for failure to exhaust, after exhausting those claims.” *Hill v. Potter*, 352 F.3d 1142, 1145 (7th Cir. 2003). As the court's citation to the *James* case suggests, it is possible to read this as endorsing a test that looks to the intent behind the dismissal of the claim without prejudice.

²⁰ See *Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987).

²¹ See *Doe v. United States*, 513 F.3d 1348, 1354 (Fed. Cir. 2008).

²² See *Rymes Heating Oils, Inc. v. Springfield Terminal R. Co.*, 358 F.3d 82, 87 (1st Cir. 2004).

²³ See *Stewart v. District of Columbia Armory Bd.*, 863 F.2d 1013, 1016 (D.C. Cir. 1988).

²⁴ “Following the district court's grant of partial summary judgment, MPB voluntarily dismissed all its remaining claims for the purpose of making the district court's profits ruling final and appealable. If MPB took this action assuming that it could later revive its claims for other relief, it has badly miscalculated. When entered, the district court's profits order did not resolve all of MPB's claims and therefore was not appealable absent a Fed.R.Civ.P. 54(b)

dismissed for lack of a final judgment. However, the court adhered to other circuit caselaw and held that the voluntary dismissal without prejudice created a final judgment.²⁵

The Ninth Circuit has injected an “intent” test into the analysis. In *James v. Price Stern Sloan, Inc.*, 283 F.3d 1064 (9th Cir. 2002), the court held that the district court’s grant of plaintiff’s request under Rule 41(a)(2) to dismiss the peripheral claims created a final judgment. The court distinguished cases where the district court had previously refused a Rule 54(b) request, reasoning that in *James* the district court’s grant of the Rule 41(a)(2) request evinced a judgment similar to that which a district court would make under Rule 54(b). See *id.* at 1069. “[W]hen a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate our appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291.” *Id.* at 1070. The Ninth Circuit’s intent-to-manipulate test seems somewhat unpredictable in application. For a decision holding – over a dissent – that manipulation foreclosed appellate jurisdiction, see *American States Insurance Co. v. Dastar Corp.*, 318 F.3d 881, 891 (9th Cir. 2003) (“[T]he parties appear to have colluded to manufacture appellate jurisdiction by dismissing their indemnity claims after the district court’s grant of partial summary judgment.”). For a case noting questions

determination. A Rule 54(b) determination would have been an abuse of the district court’s discretion—the rejection of one form of Lanham Act equitable relief, an accounting of profits, should not be appealed until the court has resolved whether MPB is entitled to Lanham Act injunctive relief... That being so, MPB may not evade the final judgment principle and end-run Rule 54(b) by taking a tongue-in-cheek dismissal of its remaining claims. Those claims must be deemed dismissed with prejudice.” *Minnesota Pet Breeders, Inc. v. Schell & Kampeter, Inc.*, 41 F.3d 1242, 1245 (8th Cir. 1994).

The Eighth Circuit has also suggested that the question could be approached from another angle, by reviewing the propriety of the Rule 41(a)(2) dismissal: “[W]hat Farmland presents as a jurisdictional issue is in fact the question whether the district court abused its discretion when it dismissed the remaining claims without prejudice for the purpose of allowing the class to appeal the court’s interlocutory summary judgment orders.” *Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.*, 198 F.3d 685, 689 (8th Cir. 1999). Accordingly, the court indicated, one response could be to review the propriety of the Rule 41(a)(2) order. (The court did not follow this course in *Great Rivers Co-op.*, however, because of the case’s “unique procedural posture” with respect to dismissal of claims by a plaintiff class. 198 F.3d at 690.)

²⁵ In another rather unusual situation, the Eighth Circuit held that it had appellate jurisdiction where the district court had denied summary judgment to the plaintiff on certain claims and the plaintiff had then dismissed all other claims (some with prejudice and some without). (The court reasoned that the denial of summary judgment to the plaintiff “had the effect of terminating any further consideration of the” claims on which the plaintiff had sought summary judgment.) *Helm Fin. Corp. v. MNVA R.R., Inc.*, 212 F.3d 1076, 1080 (8th Cir. 2000).

as to *James*' applicability to a multiple-defendant scenario, *see* Romoland School Dist. v. Inland Empire Energy Center, LLC, 548 F.3d 738, 750 (9th Cir. 2008) (“[T]his case presents such anomalous procedural issues that attempting to fit it within or outside the exception created by *James* – by deciding whether and under what circumstances the principle established in *James* applies to cases involving multiple defendants, for example – is neither necessary nor advisable”). The *Romoland* majority, employing a “pragmatic evaluation of finality,” decided to treat the voluntary dismissal of the plaintiffs’ claims against a particular defendant (by means of an order that did not state the dismissal was with prejudice) “as being with prejudice.” *Id.*

II. Possible rulemaking responses

At the Appellate Rules Committee’s fall 2008 meeting, the discussion elicited a variety of perspectives. A judge member questioned whether there is a real need for changes directed toward this issue; an attorney member responded by stressing the importance of clarity and uniformity on the question of appealability. Though members acknowledged statutory authority to engage in rulemaking on these matters,²⁶ some members expressed diffidence concerning the desirability of such a course, and a strong sense was expressed that it was necessary to seek the views of the Civil Rules Committee.

Since the time of the fall meeting, discussions with Judge Kravitz and Professor Cooper have helped to clarify the issues. Part II.A. below discusses general possibilities for responding to the divergent caselaw on manufactured finality; Part II.B. discusses some of the more specific drafting questions that might arise.

A. General possibilities

In contemplating a possible rulemaking response to manufactured-finality questions, it is useful first to consider the broad contours of such a response. The policy choices in this area vary in difficulty depending on the nature of the dismissal.

Dismissal with prejudice. Where the plaintiff dismisses the peripheral claims with prejudice, the best view is that this produces a final judgment that permits appellate review of the central claims. That conclusion makes sense, since there is no danger of a piecemeal appeal. As

²⁶ See 28 U.S.C. § 2072(c) (authorizing the promulgation of rules that “define when a ruling of a district court is final for the purposes of appeal under [28 U.S.C. §] 1291”). See also 28 U.S.C. § 1292(e) (“The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).”).

to the peripheral claims, no further litigation will result under any scenario.²⁷ To the extent that the Eleventh Circuit's decision in *Druhan* indicates that such a dismissal does not create an appealable judgment, the *Druhan* court's reasoning would not bar the adoption of a rule or statute that alters this approach.

Dismissal with de facto prejudice. Where the dismissal was nominally without prejudice but a time-bar or other impediment ensures that the peripheral claims can no longer be reasserted, one might argue that it would make sense to treat the dismissal the same as one that is nominally "with prejudice." This, however, seems less important to establish, assuming that the plaintiff can cure any problem by stipulating after the fact that the dismissal is with prejudice; in instances where the peripheral claim clearly cannot be reasserted, such a stipulation provides a way to make clear that the judgment is final. In instances where it is uncertain whether the peripheral claim can or cannot be reasserted, that uncertainty might provide a reason not to treat the dismissal as one with prejudice unless the plaintiff provides a stipulation (or the district court amends the order of dismissal) to that effect.

Conditional dismissal with prejudice. Where the peripheral claims are conditionally dismissed with prejudice, the plaintiff agrees to dismiss the peripheral claims and not to reassert them unless the central claim's dismissal is reversed on appeal. It would probably make sense to provide that this creates a final judgment. If the court of appeals affirms the dismissal of the central claim, the litigation is at an end. If the court of appeals reverses the dismissal of the central claim, the plaintiff can reassert the peripheral claims on remand.²⁸ But that arguably is efficient, since the litigation will continue in any event with respect to the now-reinstated central claim.²⁹ And if one pictures the alternative scenario (which would arise if the conditional dismissal with prejudice does not create an appealable judgment), that would be a scenario in which the plaintiff litigates the peripheral claims to final judgment; then appeals the dismissal of

²⁷ Because the dismissal of the peripheral claims is voluntary, the plaintiff would be unable to challenge that dismissal on appeal. See, e.g., *Chavez v. Illinois State Police*, 251 F.3d 612, 628 (7th Cir. 2001); *Hicks v. NLO, Inc.*, 825 F.2d 118, 120 (6th Cir. 1987).

²⁸ It is worthwhile to explore the possibility of treating the reassertion of the peripheral claims, on remand, as a situation in which the plaintiff is carrying forward those peripheral claims as they were originally asserted in the action – thus avoiding statute of limitations problems.

²⁹ It is possible to imagine instances when the judgment is reversed on appeal with respect to the central claims but no proceedings are required on remand with respect to those central claims. It may be worthwhile to consider whether resurrection of the peripheral claims should be permitted in that circumstance even though no further district-court proceedings are needed with respect to the central claims.

the central claim;³⁰ wins reversal of the dismissal of the central claim; and then litigates the central claim on remand. Either way, there may be more than one appeal; so it seems unclear that permitting conditional dismissals with prejudice to create an appealable judgment would be inefficient. It is true that the delay occasioned by the appeal from the central claim's dismissal might disadvantage the defendant, but an outer limit on the disadvantage posed by such delay would be provided by the duration of the appeal (if not by a statute of limitations on the peripheral claims).³¹ As to the other concern embodied in the final judgment rule – maintaining the district court's control over the progress of the litigation – one might argue that if the district court approves a conditional dismissal with prejudice, that indicates the district court's view that the proposed appeal will further efficient resolution of the matters in the district court. (Of course, if the district court holds such a view, then in many instances it may be possible for the district court to enter a partial final judgment under Civil Rule 54(b).)

Dismissal without prejudice. When the peripheral claims are dismissed without prejudice, it is much less clear that the resulting judgment should be considered final.³² Admittedly, the plaintiff runs the risk that the peripheral claims might be time-barred by the time the plaintiff attempts to reassert them; but reassertion (after disposition of the appeal from the dismissal of the central claim) seems in general to be a likely enough scenario that this permutation could be seen as an end run around the constraints of Civil Rule 54(b).³³ Not surprisingly, the circuits are split on this question and I will not attempt to argue here in favor of either side of the split. One thing that can be said is that the Ninth Circuit's approach – which in some instances has injected an inquiry concerning the intent behind the dismissal – may be unpredictable in its application.

Resolving these issues would entail difficult choices; and some of the choices would alter practice in a number of circuits. This memo does not attempt to suggest definitively which choices are best; instead, my goal is to sketch some of the relevant questions. Nor does this memo canvass all potentially related issues. For instance, this memo also does not address the related question of appealability that arises when an appellant's remaining claims are dismissed

³⁰ This assumes either that the plaintiff either has lost on the peripheral claim or failed to recover as much on the peripheral claim as the plaintiff expects to recover on the central claim.

³¹ On the question of limitations periods, see *supra* note 28.

³² It would, however, make sense to permit a plaintiff who sought such a dismissal without realizing that it would fail to produce an appealable judgment to stipulate that the dismissal of the peripheral claims is with prejudice, thereby rendering the judgment appealable.

³³ As noted above, the Eighth and Ninth Circuits take the view that a final judgment is created if the claims dismissed without prejudice are against a different defendant than the claims the dismissal of which the plaintiff seeks to appeal. The strength of such a distinction is not entirely clear.

for want of prosecution or as a sanction for failure to comply with court orders, and the appellant seeks to challenge on appeal prior orders dismissing other claims.³⁴

B. Logistics and particulars of a rulemaking response

If the decision were taken to amend the Rules to provide for appealability in the event of a conditional dismissal with prejudice,³⁵ a number of drafting and logistical questions would arise.

Coordination among Advisory Committees. In addition to the joint deliberations by the Civil and Appellate Rules Committees, consultation with other Advisory Committees also makes sense. *United States v. Kaufmann*, 985 F.2d 884 (7th Cir. 1993) (discussed in note 19) illustrates that similar questions of finality may sometimes arise in criminal cases. I lack any intuitions concerning the likelihood of similar questions arising in bankruptcy matters, but consultation with both the Bankruptcy and Criminal Rules Committees would be advisable as deliberations proceed.

Placement of a provision in the Civil Rules. Appellate Rules Committee members have suggested that a provision addressing manufactured finality might fit more comfortably in the Civil Rules than in the Appellate Rules. Professor Cooper notes that such a provision might be added either to Civil Rule 41 or to Civil Rule 54, and that alternatively the provision might be placed in a new Civil Rule 41.1 or a new Civil Rule 54.1. As he notes, the choice among these placements is best made after the nature of the provision is more precisely delineated.

Events that trigger the conditional dismissal. Professor Cooper points out that there will be a drafting choice concerning the triggers for a conditional dismissal: “It would be possible to specify that the right to dismiss on these terms arises only after a ‘claim’ has been ‘dismissed’ on motion under Rule 12 or Rule 56. Drafting might instead be more open-ended, all the way down to allowing use of this ploy after any district-court action that can merge in a final judgment and be reviewed on appeal.”

Complex cases and dismissal by agreement or court order. Professor Cooper’s comments suggest the intricacy of the situations that may require consideration:

³⁴ See, e.g., *John's Insulation, Inc. v. L. Addison & Assoc., Inc.*, 156 F.3d 101, 105 (1st Cir. 1998) (adopting the rule that “interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute, and are therefore unappealable”).

³⁵ If such a decision were taken, it presumably would logically entail as well a clarification (to the extent such clarification is necessary) that the *unconditional* dismissal with prejudice of all remaining claims results in an appealable judgment.

Things become more complex when there is a counterclaim, or more than one plaintiff, or more than one defendant (with different combinations of counterclaims and defendants and plaintiffs), third-party claims, and so on. If we were going to establish finality without court action, I suppose we would be looking for agreement by as many parties as required to establish dismissal with "conditional prejudice" of all claims and all parties. If we decide instead to open it up to achieving finality with the district court's consent, we might fall back closer to Rule 54(b). One out of many possible approaches would be to provide that in determining whether to enter a Rule 54(b) judgment the court may take account of (and approve?) a conditional dismissal with prejudice. That would be relatively clean as to a judgment that, subject to the condition, finally resolves all disputes between at least one identified party-pair. It would be a bit trickier as to different parts of a single "claim" as that term is (more or less) defined for Rule 54(b) purposes, but it would make sense.

Discretion in the court of appeals. Professor Cooper also notes that we should consider "whether the court of appeals should be able to reject the reservation of a right to revive the things dismissed with conditional prejudice." One approach might be to provide that the court of appeals' reversal of the district court's disposition of the central claims triggers an unconditional right to revive the conditionally-dismissed peripheral claims, "even in the unlikely event that reversal does not otherwise lead to remand." But it seems useful to consider whether there might "be circumstances in which -- most likely on arguments made by the appellee -- the court of appeals should be able to reject something conditionally preserved so as to focus proceedings on remand."

III. Conclusion

Though Part II does not exhaust the issues that may arise as the committees consider rulemaking responses to the question of manufactured finality, it sketches possible starting places for the discussion. As the input from Judge Kravitz and Professor Cooper demonstrates, collaboration with the Civil Rules Committee on these questions will be indispensable.

TAB 9



MEMORANDUM

TO: JUDGE MARK R. KRAVITZ, CHAIR, JUDICIAL CONFERENCE ADVISORY COMMITTEE ON FEDERAL RULES OF CIVIL PROCEDURE

FROM: JOSEPH D. GARRISON, NELA LIAISON TO THE ADVISORY COMMITTEE
REBECCA M. HAMBURG, NELA PROGRAM DIRECTOR

RE: PRELIMINARY REPORT ON PATTERN DISCOVERY REQUESTS IN EMPLOYMENT CASES PROJECT

DATE: OCTOBER 20, 2010

In October and November 2009, the Federal Judicial Center (FJC) administered a survey to members of the National Employment Lawyers Association (NELA) at the request of Judge Mark R. Kravitz, Chair of the Advisory Committee on Federal Rules of Civil Procedure for the Judicial Conference of the United States (Advisory Committee). The report describing the results of this survey was presented by NELA Program Director Rebecca M. Hamburg at the May 2010 Civil Litigation Conference at the Duke University School of Law (Duke Conference).

As part of that report, NELA adopted a recommendation made by Joseph D. Garrison, NELA liaison to the Advisory Committee, in his paper submitted for the Duke Conference, *A Proposal to Implement a Cost-Effective and Efficient Procedural Tool Into Federal Litigation Practice*, which advocates prescribing pattern discovery requests to be used in civil cases in addition to discovery mechanisms already available to litigants under the Federal Rules of Civil Procedure (Federal Rules).

As Judge Kravitz explained in his May 17, 2010 memorandum to the Standing Committee on Rules of Practice and Procedure (Standing Committee), many of the participants in the Duke Conference expressed concerns about the issues of cost and delay in the litigation process. The pattern discovery project reflects a commitment by members of the plaintiffs employment bar to engage in a collaborative process with other stakeholders in the civil justice system to find ways to inject some much needed efficiency

into the early stages of the litigation process, and we appreciate the Advisory Committee's recognition of our efforts to date in its September 2010 Report to the Chief Justice of the United States on the Duke Conference.

It is in this spirit of collaboration that we are pleased to announce the formation of an Employment Protocols Committee (Committee), comprised of NELA's Federal Rules Task Force (Task Force) and a group of management-side attorneys organized by the Institute for the Advancement of the American Legal System (IAALS). The Committee is co-chaired by Joseph D. Garrison and Chris Kitchel. The names and contact information for the Committee members can be found on the attached list.

Since the Duke Conference, the Task Force has been thinking carefully and candidly about precisely what types of information one may reasonably expect to acquire through the initial discovery process in a standard employment discrimination case. It is this type of information that the Task Force has sought to identify in the attached proposed Pattern Interrogatories and Pattern Requests for Production. These proposed interrogatories and document requests are focused on typical termination and other adverse action cases arising under Title VII of the Civil Rights Act of 1964 that do not involve harassment or retaliation. We hope to turn to harassment, retaliation and other employment claims (e.g., wage and hour, disability, and family and medical leaves), once we reach agreement on this first set. This set of pattern discovery requests has been sent to the Committee's management-side participants, and we are awaiting their feedback.

Using this initial proposal, the Committee will work together to identify the types of discovery requests that should not be vulnerable to reasonable objection from either plaintiffs or defendants, and refine the pattern requests accordingly.

In practice, the pattern discovery requests would be delivered to the defendant along with the complaint and the defense would have the opportunity to attach its own pattern discovery requests to the answer. As the pattern requests would be the product of a collaborative effort to identify that information that is usually exchanged, the pattern discovery requests would not generally be subject to objection. The pattern discovery requests are not meant to undermine the ability of the parties to seek additional discovery as necessary in any given case to obtain the information needed to succeed on the merits of the claims or defenses. These pattern requests are meant to serve as a baseline for the types of information that should be exchanged early in a typical employment discrimination case involving termination or other adverse action.

The Task Force believes that pattern discovery has the potential both to reduce costly law and motion practice and to narrow disputed issues for trial effectively. Carefully crafted pattern discovery at the beginning of a case may also reduce the need for the multiple rounds of motions during the pleading and discovery stages that have become almost *pro forma* in many civil actions.

Once the Committee has adopted a set (or sets) of agreed upon requests, it is our hope that district courts will be invited to implement pattern discovery through pilot projects. Mr. Garrison recommended that 20 such districts be identified for the initial pilot. The Committee envisions having an agreed upon set of discovery requests prepared for inclusion in the Advisory Committee's March 2011 report to the Standing Committee.

We appreciate the Advisory Committee's engagement and support for the pattern discovery project. We look forward to continued collaboration to improve the workings of the civil justice system.

Attachments:

1. Employment Protocols Committee Contact List
2. NELA's Proposed Pattern Interrogatories
3. NELA's Proposed Pattern Requests for Production

PATTERN INTERROGATORIES

(For cases involving adverse actions)

Pursuant to Rules [] of the [] Rules of Practice, the plaintiff,
_____, hereby requests that the defendant, _____, answer under
oath the following interrogatories within thirty days hereof and produce legible copies of all
requested documents in the defendant's possession, custody or control for inspection and/or
copying at the office of the undersigned counsel within thirty (30) days of the date hereof.

INTERROGATORIES (INSTRUCTIONS AND DEFINITIONS)

In answering these interrogatories, furnish all information available to the defendant
including information in the possession of its attorneys, investigators and all persons acting on
its behalf. If you cannot answer the interrogatories in full after exercising due diligence to
secure the information, so state and answer to the extent possible, specifying your inability to
answer the remainder and stating whatever information or knowledge you have concerning the
unanswered portions.

If the defendant refuses to answer and/or objects to any interrogatory or production
request in whole or in part, describe the basis for the refusal or objection in detail sufficient to
permit the Court to adjudicate the validity of such refusal or objection.

If more space is required for answers than is provided, please attach additional sheets of
paper and designate thereupon which interrogatory is being answered.

The interrogatories which follow are to be considered as continuing, and you are
requested to provide, by way of supplementary answers thereto, such additional information as
you or any persons acting on your behalf may hereafter obtain which will augment, clarify, or

otherwise modify the answers now given to these interrogatories. Such supplementary responses are to be filed and served upon counsel for the plaintiff within twenty (20) days after the defendant knows, or should know, of such information.

As used herein, the following terms shall have the meanings indicated below:

- a. "Person" means natural persons, agencies, unions, associations, federations, corporations, companies or any other kind of entity.
- b. When used in connection with any corporation, the word "personnel" means all employees, officers and directors of the corporation.
- c. "Document" or "records" means any printed, typewritten, handwritten, electronically or otherwise recorded matter of whatever character, including, but without limitation, files, correspondence, e-mails, contracts, logs, minutes of meetings, agreements, letters, purchase orders, memoranda, telegrams, notes, forms, catalogues, brochures, manuals, diaries, reports, calendars, interoffice communications, instructions, statements, jottings, announcements, photographs, tape recordings, motion pictures and any carbon or photographic copies of any such material if the defendant does not have custody of the original.
- d. "Identify" means, with respect to a natural person (1) his or her name; (2) his or her last known home address and telephone number; (3) his or her job title; (4) his or her business address and telephone number; (5) the name and address of his or her employer; and (6) his or her relationship, if any, to the plaintiff.
- e. "Identify" means, with respect to an agency, association, corporation, company or other entity (1) the legal name under which such entity is established; 2) the full business address and telephone number of such entity; and (3) the officers of such entity.

f. “Identify” means, with respect to documents, (1) the author thereof and the person or persons to whom the document(s) was/were originally directed; (2) the source from whom defendant obtained such document(s); (3) the date of such document(s); (4) the current custodian of such document(s); (5) the location at which the document(s) is/are situated; and (6) the subject matter of such document(s).

g. “The defendant” or “ ” means the defendant .

1. Please identify the person(s) answering these interrogatories. If more than one person is answering the interrogatories, please identify each person by the corresponding interrogatory number.

2. Please state all of the reasons for the plaintiff's [adverse action], and for each reason:

(a) identify all persons with material knowledge of that reason;

(b) state whether plaintiff was given any prior warning, and if so, the date of each such warning, and whether each such warning was written, oral or both;

(c) identify any witnesses to the conduct for which plaintiff was warned; and

(d) identify the individual who gave each warning.

3. In the three years before the plaintiff's [adverse action], for any type of alleged workplace misconduct allegedly committed by the plaintiff, please describe each incident of misconduct, and for each such incident please:

(a) identify all persons with material knowledge of that incident;

(b) state whether the plaintiff was given any warning(s), and if so, the date of each such warning and whether each such warning was written, oral or both;

(c) identify any witness to the conduct for which plaintiff was warned; and

(d) identify the individual who gave each warning.

4. Describe the procedures defendant followed with respect to the plaintiff's [adverse action] including whether the decision to take the adverse action was reached by one or more individuals (and if so, please identify each such individual); whether the decision was reviewed prior to implementation by one or more individuals or groups of individuals (and if so, please identify each such individual or group); and whether the decision was reviewed by legal counsel prior to implementation (and if so, please identify the legal counsel).

5. Please identify each individual whom defendant, any related entity, and/or any of its employees, agents or representatives has interviewed concerning the allegations in plaintiff's Complaint.

6. Please identify each individual from whom defendant, any related entity, and/or any of its employees, agents or representatives has obtained a written or recorded statement concerning the allegations in plaintiff's Complaint.

7. If some other person(s) [has/have taken over job functions previously performed by the plaintiff] following plaintiff's [adverse action], identify the person(s), the date the person(s) was first notified that he/she would [do those functions], the person(s) salary and any other elements of compensation, and any differences between the job description or duties of the person(s) and those of the position formerly held by the plaintiff.

8. Please identify all other employees [in the employer] [in the employee's work group] who, within the [_____] years preceding the adverse action in this case, engaged in the same or similar acts or omissions as those which led to the adverse action alleged in the Complaint and for each such employee please state what responsive action, if any, was taken by the employer, and identify each individual who played any role in the responsive action on behalf of the defendant.

9. Please identify all other employees [in the employer] [in the employee's work group] to whom, within the [_____] years preceding the adverse action in this case, the employer implemented the same, similar or comparable responsive action as occurred in the plaintiff's case, and for each such employee, please state all reasons for the responsive action and identify

each individual who played any role in the responsive action on behalf of the defendant.

10. With reference to each person the defendant expects to call as an expert witness at trial, please identify each expert, indicate the subject on which each expert is expected to testify, the substance of all facts and opinions to which such expert is expected to testify, and a summary of the grounds for each such opinion of each expert.

PATTERN REQUESTS TO PRODUCE

(In cases involving adverse actions)

REQUESTS TO PRODUCE (INSTRUCTIONS)

If the defendant refuses to answer and/or objects to any production request in whole or in part, describe the basis for the refusal or objection in detail sufficient to permit the Court to adjudicate the validity of such refusal or objection.

Where exact information cannot be furnished, estimated information should be supplied to the extent possible. Where estimation is used, the same should be so indicated, and an explanation given as to the basis upon which the estimate was made.

Each document produced must be labeled to indicate to which request for production it is responsive.

If a document responsive to any request has been lost, mutilated or destroyed, so state and identify such document, and state to which request(s) the document would have been responsive.

If there are no documents in the defendant's custody or control with respect to a particular request for production, so state.

If any document falling within the scope of any request for production is withheld under a claim of privilege, so state and identify such document, state to which request(s) it would have been responsive, and include information as to the date of the document, the name of the person or entity who drafted or authorized it, its title, the person or entity to whom it was addressed, sent or delivered, and state the ground(s) on which such document is considered to be privileged from production.

"Document" or "record" means any printed, typewritten, handwritten, electronically or otherwise recorded matter of whatever character, including, but without limitation, files, correspondence, emails, contracts, logs, minutes of meetings, agreements, letters, purchase orders, memoranda, telegrams, notes, forms, catalogues, brochures, manuals, diaries, reports, calendars, interoffice communications, instructions, statements, jottings, announcements, depositions, affidavits, negotiable instruments, photographs, tape recordings, motion pictures, e-mails and any carbon or photographic copies of any such material if defendant does not have custody of the original.

"Electronic Communications" means information in an electronic format, including correspondence, memoranda, notes, ledgers, work papers, e-mails, calendars, voice mail and text messages and saved instant messages, as well as drafts of such materials.

1. All company documents, including those portions of handbooks, policy manuals or company rules and regulations setting forth policies or guidelines [relevant to the adverse action] in effect during [the relevant time period].

2. Plaintiff's full personnel file and the full contents of any other file relating to plaintiff's job performance, whether kept in the human resources department, the corporate office, by a supervisor, or in any other place.

3. Any and all job descriptions applicable to any position held by the plaintiff with defendant from [the relevant date] through his last date of employment.

4. The plaintiff's complete compensation records, including W-2 and/or 1099 forms for each full or partial year of plaintiff's employment, from [the relevant date] through his last date of employment.

5. All evaluative documents pertaining to the plaintiff's work performance, including but not limited to evaluations, self-evaluations, reviews for any purpose, including all documents concerning commendations, praise or criticism.

6. All documents describing the value of defendant's fringe benefits for each full or partial year of claimant's employment from [the relevant date] through Plaintiff's last date of employment, including documents describing any premiums paid by defendant on behalf of plaintiff for any insurance coverage offered.

7. All documents describing defendant's performance review policy, or any other policy intended in whole or in part to improve employee performance, from [the relevant date] through the last date of plaintiff's employment.

8. All documents, including electronic communications, concerning plaintiff's proposed or actual [adverse action] including notes, e-mails, texts, other correspondence or memos concerning any communication by or to any company employees and/or supervisors referring in any way to the decision to [adversely affect] plaintiff's employment.

9. All documents, including electronic communications, reflecting, referring to or utilized in connection with the decision to [adversely affect] the plaintiff, or to recommend in favor of or against that decision.

10. All documents, including electronic communications, relating to any claims that plaintiff had any performance deficiencies in any aspects of his/her employment, including all documents comprising any investigations of any such deficiency.

11. All documents, including electronic communications, written statements, interview notes, correspondence of any nature, recordings or reports of any investigations of complaints

made by any employee or non-employee about plaintiff, from [relevant date] through the date of [adverse action].

12. All documents, including electronic communications, comprising any investigation of any complaint made by the plaintiff [in the relevant time period].

13. With reference to interrogatory number 7, all documents concerning or referring to the decision to replace the plaintiff with the person(s) identified in the interrogatory, including all documents relating to the qualifications of the person(s).

14. All documents concerning the reasons for, and the process by which, the employer made the decision to impose, or not to impose, responsive action in each instance identified in your response to interrogatories 8 and 9.

EMPLOYMENT PROTOCOLS COMMITTEE CONTACT SHEET

NELA Federal Rules Task Force

Joseph D. Garrison (co-chair)

Garrison, Levin-Epstein, Chimes,
Richardson & Fitzgerald, P.C.
405 Orange Street
New Haven, CT 06511
Tel.: (203) 777-4425, ext. 306
Fax.: (203) 776-3965
Email: jgarrison@garrisonlaw.com

Kathryn Burkett Dickson

Dickson Levy Vinick Burrell Hyams LLP
180 Grand Avenue
Suite 1300
Oakland, CA 94612
(510) 318-7700 - Ph.
Email: kathy@dicksonlevy.com

Herbert Eisenberg

Eisenberg & Schnell LLP
The Woolworth Building
233 Broadway, Suite 2704
New York, New York 10279
Tel.: (212) 966-8900
Email: heisenberg@eisenbergschnell.com

Margaret A. Harris

Butler & Harris
1007 Heights Boulevard
Houston, Texas 77009
Tel.: (713) 526-5677
Email: margie@butlerharris.com

Jocelyn Larkin

The Impact Fund
125 University Avenue, Suite 102
Berkeley, California 94710
Tel.: (510) 845-3473
Email: jlarkin@impactfund.org

Jonathan J. Margolis

Rodgers, Powers & Schwartz, LLP
18 Tremont Street
Boston MA 02108
Tel.: (617) 742-7010
Email:
jmargolis@TheEmploymentLawyers.com

Ellen J. Messing

Messing, Rudavsky & Welicky, P.C.
50 Congress Street, Suite 1000
Boston, Massachusetts 02109
Tel.: (617) 742-0004
Email:
emessing@mrwemploymentlaw.com

Management-Side Participants

Chris Kitchel (co-chair)

Stoell Rives
900 SW Fifth Ave., Suite 2600
Portland, OR 97204
Tel.: (503) 294-9429
Fax: (503) 220-2480
Email: ckitchel@stoel.com

Bettina (Betsy) Plevan

Proskauer Rose
1585 Broadway
New York, NY 10036-8299
Tel.: (212) 969-3065
Email: bplevan@proskauer.com

Fred Alvarez

Wilson Sonsini Goodrich & Rosati
650 Page Mill Road
Palo Alto, CA 94304
Tel.: (650) 493-9300
Email: FAlvarez@wsgr.com

Felix J. Springer

Day Pitney LLP
242 Trumbull Street
Hartford, CT 06103
Tel.: (860) 275-0184
Email: fjspringer@daypitney.com

John Jansonius

Akin Gump Strauss Hauer & Feld LLP
1700 Pacific Avenue, Suite 4100
Dallas, TX 75201-4675
Tel.: (214) 969-4770
Email: jjansonius@akingump.com

EMPLOYMENT PROTOCOLS COMMITTEE CONTACT SHEET

**INSTITUTE FOR THE ADVANCEMENT OF THE AMERICAN LEGAL SYSTEM
(IAALS)**

Rebecca Love Kourlis Executive Director 2044 E. Evans Avenue Denver, CO 80208-2101 Tel.: (303) 871-6600 Email: Rebecca.Kourlis@du.edu	Jenifer Ross-Amato Senior Research Analyst 2044 E. Evans Avenue Denver, CO 80208-2101 Tel.: (303) 871-6607 Email: Jenifer.Ross-Amato@du.edu
---	---

NATIONAL EMPLOYMENT LAWYERS ASSOCIATION (NELA)

Rebecca M. Hamburg Program Director National Employment Lawyers Association 44 Montgomery Street, Suite 2080 San Francisco, CA 94104 Tel: (415) 296-7629 x103 Email: rhamburg@nelahq.org	Matthew C. Koski Paul H. Tobias Attorney Fellow The Employee Rights Advocacy Institute For Law & Policy 44 Montgomery Street, Suite 2080 San Francisco, CA 94104 Tel: (415) 296-7629 Email: pht_fellow@employeeightsadvocacy.org
---	--

TAB 10

Holidays and Observances:		
Jan 1 New Year's Day	May 30 Memorial Day	Nov 11 Veterans Day
Jan 17 Martin Luther King Day	Jun 19 Father's Day	Nov 24 Thanksgiving Day
Feb 14 Valentine's Day	Jul 4 Independence Day	Dec 24 Christmas Eve
Feb 21 Presidents' Day	Sep 5 Labor Day	Dec 25 Christmas Day
Apr 24 Easter Sunday	Oct 10 Columbus Day (Most regions)	Dec 26 'Christmas Day' observed
May 8 Mother's Day	Oct 31 Halloween	

October 2011						
Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
						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 2011						
		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			
Sep-Oct 2011	Printfree.com Printable Calendars					Nov-Dec 2011