ADVISORY COMMITTEE
ON
CIVIL RULES

Washington, DC
October 8-9, 2009

Agenda
Civil Rules Advisory Committee
October 8-9, 2009

1. Introductory remarks by the Chair and Reporter

   (a) Welcome

   (b) Report on the June Standing Committee and September Judicial Conference Meetings

2. **ACTION ITEM**: Approval of the minutes for the April 2009 Civil Rules Advisory Committee meeting

3. Report on the 2010 Conference

4. Report of Rule 45 Subcommittee

5. Report of the Civil Rules-Appellate Rules Committee

6. Protective Orders

   (a) Report on the Sunshine in Litigation Act

   (b) Possible revisions to Rule 26

7. Pleading Standards – *Iqbal/Twombly*

   (a) Sen. Specter's bill

   (b) Discussion of next steps

8. Forms

9. Rule 6(d): 3 days are added

10. Service on governmental employees/judges

11. Class Actions

12. Next Meeting: **March 18-19, 2010 Atlanta, Georgia**

ADVISORY COMMITTEE ON CIVIL RULES

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Appellate:	
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Bankruptcy:	
Judge James A. Teilborg	(Standing Committee)
Civil:	
Judge Eugene R. Wedoff	(Bankruptcy Rules Committee)
Judge Diane P. Wood	(Standing Committee)
Criminal:	
Judge Reena Raggi	(Standing Committee)
Evidence:	
Judge Judith H. Wizmur	(Bankruptcy Rules Committee)
Judge Michael M. Baylson	(Civil Rules Committee)
Judge John F. Keenan	(Criminal Committee)
Judge Marilyn Huff	(Standing Committee)

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ADVISORY COMMITTEE ON CIVIL RULES

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

Principal Staff:

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JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

PRELIMINARY REPORT
JUDICIAL CONFERENCE ACTIONS
September 15, 2009
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All the following matters requiring the expenditure of funds were approved by the Judicial Conference *subject to the availability of funds* and to whatever priorities the Conference might establish for the use of available resources.

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

EXECUTIVE COMMITTEE

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

COMMITTEE ON THE ADMINISTRATION OF THE BANKRUPTCY SYSTEM

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

COMMITTEE ON THE BUDGET

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

COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

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

With regard to bankruptcy procedures:

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

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

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

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

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

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

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 1-2, 2009
Washington, D.C.
Draft Minutes

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ATTENDANCE

The Judicial Conference Committee on Rules of Practice and Procedure met in Washington, D.C., on Monday and Tuesday, June 1 and 2, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

Deputy Attorney General David Ogden attended part of the meeting for the Department of Justice. The Department was also represented throughout the meeting by Karyn Temple Claggett, Elizabeth Shapiro, and Ted Hirt.

Also participating were the committee's consultants: Joseph F. Spaniol, Jr.; Professor Geoffrey C. Hazard, Jr.; and Professor R. Joseph Kimble. Professor Nancy J. King, associate reporter to the Advisory Committee on Criminal Rules, participated in part of the meeting by telephone.

Judge Anthony J. Scirica, former chair of the committee and current chair of the Judicial Conference's Executive Committee, participated in portions 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
Andrea Kuperman	Judge Rosenthal's rules law clerk

Representing the advisory committees were:

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

INTRODUCTORY REMARKS

Changes in Committee Membership

Judge Rosenthal noted that several membership changes had taken place since the last meeting. She pointed out that Professor Daniel Meltzer had resigned from the committee to accept an important position in the White House. She emphasized that he had been a superb member and would be sorely missed at committee meetings. She noted, though, that Professor Meltzer had stayed in touch with the committee and would attend its group dinner.

She reported that this was the last official meeting for Judge Hartz and Mr. Beck, whose terms will expire on October 1, 2009. She pointed out that both would be honored at the January 2010 meeting.

In addition, she noted that this was Judge Stewart's last meeting as chair of the Advisory Committee on Appellate Rules. She pointed out that Judge Stewart was truly irreplaceable as a judge, friend, and colleague. She noted that he had been a remarkable chair, and the Chief Justice had extended his term for a year. The new chair, Judge Jeffrey S. Sutton, will represent the advisory committee at the next Standing Committee meeting.

Judge Rosenthal reported, sadly, the recent death of Mark I. Levy, a distinguished attorney member of the Advisory Committee on Appellate Rules. A resolution honoring him had been prepared and would be sent to his widow by Judge Stewart. Judge Rosenthal extended the committee's sympathies and gratitude to his family for his many contributions.

Recent Actions Affecting the Rules

Judge Rosenthal reported that little action at the March 2009 session of the Judicial Conference had directly affected the rules committees, although several items on the Conference's consent calendar indirectly affected the rules. She noted, for example, that the Court Administration and Case Management Committee had recommended that courts provide notice on their dockets of the existence of sealed cases. Also, she said, the Court Administration and Case Management Committee had proposed guidelines for filing and posting transcripts that are designed to safeguard privacy interests, including matters arising during jury voir dire proceedings. She noted that the Standing Committee's privacy subcommittee, chaired by Judge Raggi, would meet to discuss a wide range of privacy and security matters immediately following the committee meeting.

Judge Rosenthal reported that the Supreme Court had approved all the rules recommended by the committee and had sent them to Congress on an expedited basis. She noted that the committee had successfully pursued legislative changes to 28 statutes that specify time limits and would be affected by the time-computation rules. The legislation had just passed both houses of Congress and been enacted into law. The statutory changes will take effect on December 1, 2009, the same time that the new time-computation rules take effect. She added that coordinated efforts were also underway to have all the courts update their local rules by December 1 to harmonize them with the new national time-computation rules.

Judge Rosenthal thanked Judge Thomas W. Thrash, Jr., former committee member, for his assistance in promoting the recent legislation, and Congressman Hank Johnson, who introduced it and was very helpful in shepherding it through Congress. On behalf of the committee, Professor Coquillette expressed special thanks to Judge Rosenthal for leading the concerted and challenging efforts to get the legislation enacted.

On behalf of the Executive Committee, Judge Scirica extended his appreciation to the committee for its excellent work. He noted that the Chief Justice continues to praise Judge Rosenthal for her work, including her impressive legislative accomplishments.

Legislative Report

Judge Rosenthal reported that Judge Kravitz would testify again in Congress on behalf of the Judicial Conference in opposition to the proposed Sunshine in Litigation Act. The legislation, she explained, would impose daunting requirements before a judge could issue a protective order under FED. R. CIV. P. 26(c). The judge would have to first find that the proposed protective order would not affect public health or safety – or if it would, that the protection is needed despite the impact on public health and safety. All of this would occur even before discovery begins.

Judge Kravitz noted that the American Bar Association opposed the legislation, and other bar associations were likely to follow. In addition, he said, the hope is that the Department of Justice would formally oppose the legislation. He pointed out that the bill was well-intentioned in trying to protect public health and safety, but the mechanism it uses to do so was not at all practical. He noted that he was the only witness to be invited by the sponsors to testify against the bill.

Judge Rosenthal explained that the Judicial Conference opposes the legislation it would amend the federal rules outside the Rules Enabling Act process. She noted that empirical evidence demonstrates clearly that judges are doing a good job in dealing with protective orders and in balancing private and public interests. The Sunshine in Litigation Act, though, would impose significant burdens on judges, requiring them to make findings when they have little information on which to base those findings.

Judge Kravitz added that if there is a problem in some cases with protective orders, it arises largely at the state level, not in the federal courts. He noted that there is also little understanding by the legislation's sponsors of how the civil litigation process actually works. The thought, he said, that a federal judge would be able to read through all the documents that could be discovered in order to find a smoking gun is truly misguided.

Mr. Rabiej reported that the Judiciary's implementation of the new privacy rules had been questioned by a special-interest group seeking to make all government information available to the public on the Internet without restrictions and without cost. He noted that the group had discovered that some documents filed by parties and posted on the courts' electronic PACER system contained unredacted social security numbers. He added that the privacy subcommittee would consider the matter and address a number of other privacy issues at its upcoming meeting immediately following the Standing Committee meeting.

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 12-13, 2009.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Stewart and Professor Struve presented the report of the advisory committee, as set forth in Judge Stewart's memorandum and attachments of May 8, 2009 (Agenda Item 6).

Amendments for Final Approval

FED. R. APP. P. 1

Judge Stewart reported that the proposed amendment to Rule 1 (scope of the rules, definition, and title) was straightforward. It would define "state" for purposes of the appellate rules to include the District of Columbia and any U.S. commonwealth or territory.

Professor Struve added that, after the public comment period had ended, the advisory committee received a letter from an attorney in New Mexico asking it to expand the rule's definition of a "state" to include Native American tribes. She noted that the committee had discussed the request at length at its April 2009 meeting and had decided that the matter merited more time to develop because it implicates a number of different

rules and issues. Accordingly, the matter had been added to the advisory committee's study agenda. At the same time, though, the committee urged immediate approval of the proposed amendment to Rule 1.

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

FED. R. APP. P. 29

Judge Stewart reported that the proposed amendments to Rule 29(a) and (c) (amicus curiae brief) would add a new disclosure requirement on authorship and funding support received by an amicus in preparing its brief. The amendments had been modeled after the Supreme Court's recently revised Rule 37.6, although the advisory committee had to make a few adjustments because of differences in practice between the Supreme Court and the courts of appeals. Professor Struve added that the proposed amendment to Rule 29(a) would simply conform the rule to the proposed new definition of a "state" in Rule 1(b).

She noted that the advisory committee had received seven sets of public comments on the proposed amendments and had also considered the comments that had been submitted when the proposed revision to Supreme Court Rule 37.6 was published for comment. The comments, she said, had been very helpful, and the advisory committee had made two changes in the rule following publication. First, it reordered the subdivisions to place the authorship and disclosure provision in a new paragraph 29(c)(5).

Second, it revised subparagraph 29(c)(5)(C) to remove a possible ambiguity in the published language. The revised language would require an amicus to include in its brief a statement that "indicates whether . . . a person – other than the amicus curiae, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person." The revised language makes it clear that, if no such person has provided financial support for the brief, the amicus must state that fact expressly, rather than simply say nothing about funding. Professor Struve also pointed out that some public comments had suggested imposing a complete ban on funding amicus briefs, rather than merely requiring disclosure. But, she said, other commentators suggested that a ban would raise constitutional issues.

Professor Struve added that a suggestion had been received to delete the words "intended to fund." But, she explained, the advisory committee did not adopt it because the proposed alternative language — "contributed money toward the cost of the brief" — was too broad. Similar breadth in the version of Supreme Court Rule 37.6 published for comment had attracted vigorous opposition. It was later revised by the Court to use "intended to fund." She explained that without the "intended to fund" language, the disclosure requirement could require disclosure of membership dues and other indirect

financial support. Therefore, both the Supreme Court rule and the proposed appellate rule use the words "intended to fund" to make clear that the rule does not cover mere membership dues in an organization. Rather, the funding disclosure applies only when a party or counsel has contributed money with the intention of funding preparation or submission of the brief.

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

FED. R. APP. P. 40

Judge Stewart reported that the proposed amendments to Rule 40 (petition for a panel rehearing) had been presented to the Standing Committee before. They would clarify the time limit for filing a petition for rehearing in a case where an officer or employee of the United States is sued in his or her individual capacity for an act or omission occurring in connection with official duties. Originally, he explained, the Department of Justice had also sought a companion change in Rule 4 (appeal) to clarify the time limit for filing an appeal in a case where an officer or employee is sued individually for acts occurring in connection with official duties.

But, he said, the Supreme Court's decision in *Bowles v. Russell,* 551 U.S. 205 (2007), had seriously complicated any attempts to amend Rule 4. In essence, *Bowles* held that appeal time periods established by statute are jurisdictional in nature. Since the 60-day time limit for filing an appeal under Rule 4(a)(1)(B) is also established by statute, 28 § U.S.C. § 2107, there was a question whether the time period should be changed by rulemaking rather than legislation. Therefore, the Department decided to abandon the effort to amend Rule 4.

Rule 40, however, is not covered by statute. So the Department continued to seek the proposed amendments to that rule. Nevertheless, the advisory committee asked the Department to consider whether it preferred to pursue a legislative solution to deal with both situations.

Judge Stewart pointed out that a case currently pending before the Supreme Court raises the question of the application of the Rule 4 deadline in a qui tam action. *United States ex. rel. Eisenstein v. City of New York,* 129 S.Ct. 988 (2009). In view of the pendency of the case, the Department had asked that the Rule 40 proposal be held in abeyance (along with the Rule 4 proposal) to give it time to consider whether a single statutory fix might be a better approach. In addition, the Department was concerned that there could be a trap for the unwary if Rule 40 were to be amended before Rule 4 catches up. Therefore, even though the advisory committee had voted unanimously to proceed with amending Rule 40, it had decided to defer seeking final approval until the Supreme Court has acted in *Eisenstein.*

The committee without objection by voice vote approved remanding the proposed amendment back to the advisory committee.

FORM 4

Judge Stewart reported that Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) would be amended to conform to the new privacy rules that took effect on December 1, 2007, by removing the request for full social security numbers and other personal identifier information. He noted that the Administrative Office had already made interim changes to the version of Form 4 that it posts on the Judiciary's website. Nevertheless, the official form needs to be changed to ratify those interim changes.

A member asked why a court needs all the information now required on Form 4, such as the street address, city, or state of the applicant's legal residence. Some of that information, for example, may be available from other documents, such as the pre-sentence investigation report. Other information, such as the applicant's years of schooling, may be of little use to the court.

Professor Struve explained that the advisory committee at this time was merely attempting to conform the form to the new privacy rules. It had not yet considered matters of substance. In fact, she said, the advisory committee planned to take up these issues later, and it may decide to draft two separate versions of the form to address the requests of judges for both a short version and long version of the form. Judge Stewart added that the advisory committee had a number of questions about the form and had asked its circuit-clerk liaison, Fritz Fulbruge, to survey his clerk colleagues on how the form is used in the courts.

A participant cautioned that the advisory committees should be careful not to let the privacy rules reach too far. At some point, he said, a court needs to have full information about certain matters. Another participant stated that the other parties in a case are entitled to review the petitioner's in forma pauperis application. But the applications are generally not placed in the official case file or posted on the Internet for public viewing.

The committee without objection by voice vote approved the proposed changes in the form for approval by the Judicial Conference.

Informational Items

Judge Stewart reported that the appellate and civil advisory committees had created a joint subcommittee to study a number of issues that intersect or overlap both

sets of rules, including "manufactured finality," the impact of tolling motions, and the impact of the Supreme Court's ruling in *Bowles v. Russell.*

Judge Stewart emphasized the advisory committee's shock and sadness at learning of the death of Mark Levy. He noted that Mark had participated actively in the advisory committee's April 2009 Kansas City meeting and had been responsible for a number of important proposals. He said that the advisory committee will present a resolution of remembrance and gratitude to Mrs. Levy. In addition, he had sent her some photographs that he had taken of Mark at recent advisory committee meetings in Charleston and Kansas City. She, in turn, had sent him a very nice note of appreciation.

Judge Stewart thanked the Standing Committee for its support of him personally and the advisory committee during his four years as chair. He also extended his special thanks to Professor Struve for her tireless, thorough, and uniformly excellent work.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Swain and Professor Gibson presented the report of the advisory committee, as set out in further detail in Judge Swain's memorandum and attachments of May 11, 2009 (Agenda Item 7).

Amendments for Final Approval

FED. R. BANKR. P. 1007, 1014, 1015, 1018, 1019, 4004, 5009, 5012, 7001, 9001

Professor Gibson reported that the advisory committee was seeking final approval of all but one of the proposed changes it had published for comment in August 2008. The committee, she said, would republish proposed new Rule 1004.2 for further comment because it had made a significant change in response to the first round of comments.

The amendments and proposed new rules, she explained, fall into several categories. Six of the provisions principally implement new chapter 15 of the Bankruptcy Code, governing cross-border insolvencies: FED. R. BANKR. P. 1014 (dismissal and change of venue), FED. R. BANKR. P. 1015 (consolidation or joint administration of cases), FED. R. BANKR. P. 1018 (contested petitions), FED. R. BANKR. P. 5009(c) (closing cases), new FED. R. BANKR. P. 5012 (agreements concerning coordination of proceedings in chapter 15 cases), and FED. R. BANKR. P. 9001 (general definitions).

Professor Gibson said that amendments to two rules would change the procedure for seeking denial of a discharge on the grounds that the debtor has received a discharge

within the prohibited time period to get a second discharge. She explained that all objections to discharge are currently classified as adversary proceedings and must be initiated by complaint. But, as revised, FED. R. BANKR. P. 4004 (grant or denial of discharge) and FED. R. BANKR. P. 7001 (scope of the Part VII adversary proceeding rules) would allow certain objections to discharge to be initiated by motion, rather than complaint. The advisory committee, she added, had received some helpful technical comments on the amendments and had decided as a result to make changes in the placement of the provisions. Originally, the proposal would have set forth the principal change in Rule 7001. But a former member pointed out that since Rule 7001 introduces the Part VII adversary proceeding rules, it should not begin by referring to a contested matter. Therefore, the advisory committee had moved the key provision to Rule 4004(d). The change, she said, would not require republishing.

Three of the rules, she said, deal with the statutory obligation of individual debtors to file a statement that they have completed a personal financial management course. Amended FED. R. BANKR. P. 1007(c) (lists, schedules, statements, and time limits) would extend the deadline for filing the statement from 45 to 60 days after the date set for the meeting of creditors. This would allow the clerk of court, under proposed new FED. R. BANKR. P. 5009(b) (notice of failure to file the statement), to send a notice within 45 days to anyone who has not filed the required statement that they must do so before the 60-day period expires. Rule 4004(c)(4) (grant of discharge) would be amended to direct the court to withhold the discharge until the statement is filed.

Professor Gibson stated that the advisory committee had received one comment from a bankruptcy judge that the noticing obligation would place an undue burden on the clerks of court. But a survey taken of the clerks by the committee's bankruptcy-clerk liaison, James Waldron, had shown that many send out the notice now, and it would not impose a major burden to require it.

Professor Gibson said that FED. R. BANKR. P. 1019 (conversion of a case to chapter 7) would provide a new period to object to exemptions when a case is converted from chapter 11, 12, or 13 to chapter 7. The amendment would give creditors a new period to object – unless the case had previously been in chapter 7 and the objection period had expired, or it has been pending more than a year after plan confirmation. The advisory committee had received one comment on the rule from the National Association of Bankruptcy Trustees supporting the rule but not supporting the one-year provision.

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

FED. R. BANKR. P. 4001

Professor Gibson reported that the advisory committee recommended approval of two changes to Rule 4001 (relief from the automatic stay and other matters) without

publication because they are simply conforming amendments. Rule 4001 contains two time-period adjustments that had been overlooked and not included in the package of time-computation rules that will take effect on December 1, 2009.

OFFICIAL FORM 23

The advisory committee would also make a change in Official Form 23 (debtor's certification of completing a financial management course) without publication to conform to the change being made in Rule 1007. It would revise the instructions regarding the time for consumer debtors to file their certificate of having completed a personal financial management course. The proposed change in the form would become effective on December 1, 2010, at the same time that the proposed amendment to Rule 1007 takes effect.

The committee without objection by voice vote approved the proposed amendments to Rule 4001 and Official Form 23 without publication for approval by the Judicial Conference.

Amendments for Publication

FED. R. BANKR. P. 1004.2

Professor Gibson explained that the advisory committee would republish proposed new Rule 1004.2 (petition in a chapter 15 case) because it had made a substantive change in subdivision 1004.2(b) in response to public comments following the August 2008 publication.

An entity filing a chapter 15 petition to recognize a foreign proceeding must state in the petition the country where the debtor has the "center of its main interests." A party may challenge that designation. A commentator argued, persuasively, that the proposed 60-day time period allowed in the August 2008 version of the rule for a party to challenge the designation was simply too long. Therefore, the advisory committee would now set the deadline to file a challenge at 7 days before the hearing on the petition unless the court orders otherwise.

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

FED. R. BANKR. P. 2003, 2019, 3001, 3002.1, 4004

Professor Gibson highlighted some of the other proposed changes to be published, focusing on two that she said were likely to attract a good deal of attention.

Rule 2019 (representation of creditors and equity security holders in Chapter 9 and 11 cases), she explained, is a long-standing rule that requires disclosure of interests by representatives of creditors and equity security holders. She noted that the advisory committee had received suggestions from trade associations that the rule be deleted on the grounds that it is unnecessary and over-inclusive.

On the other hand, the advisory committee had received comments from the National Bankruptcy Conference, the American Bar Association's Business Bankruptcy Committee, and two bankruptcy judges in the Southern District of New York that the rule should not be eliminated. Rather, it should be rewritten and expanded in scope, both as to whom it applies and what information they must disclose. In response, the advisory committee added a broader definition to the rule to require disclosures from all committees and groups that consist of more than one creditor or equity security holder, as well as entities or committees that represent more than one creditor or equity security holder. The court would also have discretion to require an individual party to disclose.

In addition, the amended rule would expand the type of financial disclosure that must be made beyond just having a financial interest in the debtor. As revised, a party in interest would have to disclose all "disclosable economic interests," defined in the rule as all economic rights and interests that establish an economic interest in a party that could be affected by the value, acquisition, or disposition of a claim or interest.

The purpose of the expanded rule, she said, was to provide better information on the motive of all parties who assert interests in a case to help the court ascertain whom they represent and what they are trying to do. In addition, the advisory committee had reorganized the rule to clarify the requirements and specify the consequences of noncompliance.

Professor Gibson explained that the proposed amendments to Rule 3001(c) (proof of claim based on a writing) and new Rule 3002.1 (notice relating to claims secured by a security interest in the debtor's principal residence) would govern home mortgages and other claims in consumer cases. Rule 3001(c) specifies the supporting information that must be attached to a proof of claim. She pointed out that claims today are often filed by financial entities that the debtor has never heard of because they are bought and sold in bulk freely on the market. Amended Rule 3001(c) would tighten up the documentation requirements to allow the debtor to see what claims are legitimate, what fees are being charged, and what defaults are alleged. Proposed subdivision 3001(c)(2)(D) specifies the consequences for a claim holder of not complying with the rule.

Professor Gibson explained that new Rule 3002.1 would work in tandem with the Rule 3001(c) changes and would govern mortgage claims in chapter 13 cases. It is common for debtors to attempt to cure their mortgage defaults and maintain their payments under the chapter 13 plan in order to keep their home. But problems arise with mortgage securitization, as holders of the mortgages change. The amounts of arrearages

claimed on the mortgage, as well as various penalties and fees, are not clear to either the debtors or the trustees. Debtors, for example, often believe that they have cured the default, but after the plan is completed and the case closed they face a new default notice with a variety of new fees added on. Accordingly, the proposed rule would require full disclosure by the mortgage holder of both the amounts needed to cure and any fees and charges assessed over the course of the plan. The proposed rule also provides for a final cure and sanctions for not following the prescribed procedures.

Professor Gibson reported that some bankruptcy courts have been following a similar procedure on a local basis with considerable success. The bankruptcy system, she said, should benefit from the national uniformity that the rule will bring.

One member questioned the wisdom of adding new sanctions provisions to the rules. He suggested that it is unusual to have sanctions set forth in separate rules, rather than in a general sanctions provision, such as those in FED. R. CIV. P. 11 and FED. R. BANKR. P. 9011.

Professor Gibson explained that the two proposed amendments are very different from the other rules because they deal with the specific requirement that a creditor give a debtor information about the amount of the mortgage or other consumer claims. Judge Swain added that there are very few other sanctions provisions in the bankruptcy rules, and they tend to deal with very practical disclosure issues. FED. R. BANKR. P. 2019 (representation of creditors and equity security holders in chapter 9 and 11 cases), for example, authorizes a court to refuse to hear from a party that has failed to disclose. Proposed Rules 3001(c) and 3002.1, she said, attempt to have the creditor focus specifically on fees and charges tacked onto mortgages.

OFFICIAL FORMS 22A, 22B, 22C

Professor Gibson reported that the proposed changes in the means test forms were designed to conform the forms more closely to the language and intent of the 2005 bankruptcy legislation. Judge Swain explained that the revisions would replace the term "household size" in several places on the forms with "number of persons" in order to count dependents in a way that is consistent with Internal Revenue Service nomenclature.

The committee without objection by voice vote approved the proposed amendments to the rules and forms for publication.

Informational Items

Judge Swain reported that the advisory committee was working on two major projects that would have a major impact on the bankruptcy rules and forms.

REVISION OF THE BANKRUPTCY APPELLATE RULES

First, Judge Swain said, the advisory committee was reviewing comprehensively Part VIII of the Federal Rules of Bankruptcy Procedure, governing appeals from a bankruptcy court to a district court or bankruptcy appellate panel. The current rules had been modeled on the Federal Rules of Appellate Procedure (FRAP) as they existed more than 20 years ago. Since that time, though, the FRAP have been amended several times and restyled as a body. The Part VIII bankruptcy rules, she said, are no longer in sync with them.

She pointed out that Eric Brunstad, a former advisory committee member and distinguished appellate attorney, had drafted for the committee a revised set of rules to bring the Part VIII rules up to date. The two principal goals that the advisory committee would try to achieve are:

1. to clarify the rules – because the current rules are obscure and difficult in many respects; and

2. to eliminate the "hourglass" effect, under which page limits imposed on appeals from the bankruptcy court to the district court later undercut a party's further appeal to the court of appeals.

Judge Swain reported that the advisory committee had convened a very successful special subcommittee meeting in March 2009, to which it had invited a variety of interested parties to discuss their experience with the current rules and suggest how the rules might be improved. She said that the meeting had demonstrated that there is a great deal of support for pursuing the project to revise the part VIII rules.

On the other hand, concern had been expressed by several participants that it would not be advisable to pattern the bankruptcy rules strictly after the current Federal Rules of Appellate Procedure because the bankruptcy courts have made enormous progress in taking advantage of technology. Since most bankruptcy courts and courts hearing bankruptcy appeals now operate with electronic case files and electronic filing, several of the current appellate rules are outdated or immaterial. For example, she said, courts using electronic records are no longer concerned with the colors of briefs or with many of the other requirements devised for a purely paper world. She said that the advisory committee would attempt to draft new appellate rules that take electronic record-keeping fully into account. She added that the committee will conduct another special subcommittee meeting in the fall and is grateful for Professor Struve's collaboration in its work on the bankruptcy appellate rules.

BANKRUPTCY FORMS MODERNIZATION

Second, Judge Swain reported that the advisory committee had made a good deal of progress on its major project to update and modernize the bankruptcy forms. She noted that its forms subcommittee had conducted an extensive analysis and

deconstruction of all the information contained in the forms currently filed at the commencement of a bankruptcy case. It had also obtained the services of a professional forms consultant who has worked for the Internal Revenue Service and the Social Security Administration in formulating questions for the general public and making forms more user-friendly and effective in eliciting required information.

She added that the advisory committee's forms subcommittee was also working closely with the group designing the "Next Generation" electronic system that will replace CM/ECF with a new system that will take full advantage of recent advances in electronics and add new functionality. She pointed out that several individuals and organizations had asked the judiciary to build a greater capacity into the new system to capture, retrieve, and disseminate individual data elements provided by filers on the standard bankruptcy forms. She noted that the forms modernization subcommittee will meet again on June 26, 2009, at the Administrative Office.

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 attachments of May 8, 2009 (Agenda Item 5).

Amendments for Final Approval

FED. R. CIV. P. 8(c)

Judge Kravitz reported that the advisory committee in August 2007 had published a proposal to eliminate discharge in bankruptcy as an affirmative defense that must be asserted under Rule 8(c) (pleading affirmative defenses) to avoid waiver. He noted, though, that the Department of Justice had objected to the change.

Judge Eugene R. Wedoff, a member of the Advisory Committee on Bankruptcy Rules, had acted as the civil advisory committee's liaison with officials in the Department on the matter, but had been unable to reach an agreement with them. The civil advisory committee then asked the Advisory Committee on Bankruptcy Rules formally to consider the proposed amendment. That committee too supported eliminating the bankruptcy-discharge defense from Rule 8. The civil advisory committee met again in April 2009 and invited both Judge Wedoff and the Department to make presentations.

After a lengthy discussion, the advisory committee voted unanimously, except for the Department, to proceed with the proposed change to Rule 8. Judge Kravitz explained that the advisory committee was convinced that inclusion of a bankruptcy discharge as an affirmative defense is simply wrong as a matter of law because the Bankruptcy Code for

years has made all debts discharged in bankruptcy legally unenforceable. They cannot be asserted in any judicial proceedings. Nevertheless, the current rule has misled some courts into finding waiver when a party fails to assert bankruptcy as an affirmative defense. The advisory committee, he said, believed that it was important to eliminate a rule that is continuing to lead some judges to err.

Judge Swain added that the Advisory Committee on Bankruptcy Rules was in complete agreement with those views. Professor Gibson added that the only complication in the matter was that even though a debtor may obtain a discharge in bankruptcy, there are certain statutory exceptions to the discharge. A question might arise in future litigation, for example, over whether a particular type of debt excluded from the discharge in the bankruptcy litigation may still be enforced legally. She explained that this issue is what had caused the Department's concerns. Nevertheless, she said, the proposed amendment to Rule 8 was needed because it will eliminate a trap.

Judge Kravitz reported that Judge Wedoff had prepared some language that might be added to the committee note to reinforce Professor Gibson's point. Ms. Shapiro said that the Department of Justice rested on the statements that it had already made on the matter. She added, though, that the proposed additional language for the committee note will go a long way to easing the Department's concerns.

The committee without objection by voice vote approved adding the proposed, bracketed language to the committee note.

The committee, with one objection (the Department of Justice), by voice vote approved the proposed amendment to Rule 8(c) for approval by the Judicial Conference.

FED. R. CIV. P. 26

Judge Kravitz expressed his gratitude to Judge David G. Campbell and Professor Richard L. Marcus for serving superbly as chair and reporter, respectively, of the advisory committee's Rule 26 project. He noted that the project had been very thorough and had produced a set of balanced, well-crafted amendments that will reduce discovery costs and make a practical, positive difference in the lives of practicing lawyers.

Judge Kravitz reported that the proposed amendments to Rule 26 (disclosures and discovery) enjoyed wide support among bench and bar, and among both plaintiff and defendant groups. Among the supporters were the American Bar Association, its Section on Litigation, the American College of Trial Lawyers, the Association of the Bar of New Jersey, the Federal Bar Council of the Second Circuit, the Federal Magistrate Judges Association, the American Association for Justice, the Lawyers for Civil Justice, the Federation of Defense and Corporation Counsel, the Defense Research Institute, the American Institute of Certified Public Accountants, and the Department of Justice. The amendments had been opposed only by a group of law professors. Their concerns, he said, had been carefully considered, but not shared, by the advisory committee.

Judge Kravitz explained that the amendments would accomplish two results. First, they will require lawyers to disclose a brief summary of the proposed testimony of non-retained expert witnesses whom they expect to use. This change should eliminate the confusion that now exists regarding the testimony of treating physicians, employees, and other non-retained experts.

Second, the rule will place draft reports of retained experts and communications between lawyers and their retained experts under work-product protection. In doing so, it will reduce costs, focus the discovery process on the merits of an expert's opinion, and channel lawyers into making better use of experts. At the same time, though, the amendments will not eliminate any valuable information that may be elicited during the discovery phase of a case. Judge Kravitz explained that little useful information is available today under the current rule because lawyers use stipulations and a variety of other practices to prevent discoverable information from being created in the first place.

These other practices are unnecessary and wasteful. One common practice is to hire two sets of experts – one to testify and the other to consult with the litigation team. In addition to being inefficient, the practice gives a tactical advantage to parties with financial resources. Another artificial discovery-avoidance tactic involves using experienced experts who make extraordinary efforts not to record any preliminary draft report in order to prevent discovery.

He noted that the advisory committee had made a few changes in the draft following publication of the amendments. It had eliminated the last paragraph of the committee note, referring to use of information at trial, and added a new sentence in the

note. Both emphasize that the rule does not undercut the gate-keeping role and responsibilities of judges under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The advisory committee had also changed the wording of Rule 26(b)(4) from "regardless of the form of the draft" to "regardless of the form in which the draft is recorded" to better capture the idea of drafts recorded electronically, while precluding the concept of an "oral" draft report.

The advisory committee, however, had decided not to extend the protection against disclosure enjoyed by retained expert witnesses to non-retained experts. There had been, he said, public comments recommending that the protection be extended at least to employees. The advisory committee, he said, may do so in the future. But for now, it had decided to defer the issue for a number of reasons. Most importantly, the committee believed that it could not proceed with a change because it had not signaled it sufficiently to the public and would have to republish the proposal. In addition, he explained, drafting a provision to extend the protection would be very tricky, as many employees are both fact witnesses and experts. There are also questions regarding former employees vis-a-vis present employees. Moreover, if the provision were limited to employees, it may be seen as tilting more towards defendants, rather than plaintiffs, and the advisory committee wants to be scrupulously neutral on the issue.

Several members praised the work of the advisory committee and said that the proposed amendments would eliminate the need for stipulations and artificial devices now used to avoid the rule. They suggested that the amendments will allow discovery of witnesses to proceed more openly and honestly. Members said that the advisory committee had done an excellent job of working through and accommodating the various public comments. Judge Kravitz added that Judge Campbell and Professor Marcus deserved the lion's share of the credit for the work.

The committee without objection by voice vote approved the proposed amendments to Rule 26 for approval by the Judicial Conference.

FED. R. CIV. P. 56

Judge Kravitz reported that the major project to revise Rule 56 (summary judgment) had been an exercise in rule-making at its very best. The advisory committee, he said, had taken full advantage of empirical research by the Federal Judicial Center (Joe Cecil), the Administrative Office (Jeffrey Barr and James Ishida), and Judge Rosenthal's staff (Andrea Kuperman). It had prepared and circulated several different drafts and had conducted three public hearings and two mini-conferences with lawyers, judges, and professors. The advisory committee, he said, had listened carefully to the views of people with very differing ideas, and it had made several changes in the proposed rule as a result of the public hearings and written comments.

The rules process, in short, had worked exactly as it should. He offered his special thanks to Judge Michael M. Baylson, chairman of the Rule 56 subcommittee, for his dedication and leadership in producing a greatly improved rule governing a central component of the civil litigation process. He also thanked Professor Cooper, the committee's reporter, for his enormous assistance and wise counsel during the project.

Judge Kravitz reported that the advisory committee had announced two overarching goals for the project at the outset. First, it did not want to change the substantive standard for summary judgment in any way. Second, it did not want the rule to tilt in either direction, towards plaintiffs or defendants. Both goals, he said, had been achieved.

The advisory committee also had two other goals in mind. First, it had set out to bring the text of the rule in line with the way that summary judgment is actually practiced in the courts today. Second, it wanted to bring some national uniformity to summary judgment practice. The committee, Judge Kravitz said, had accomplished the first goal. The second goal, he said, had been accomplished in part.

Judge Kravitz reported that the advisory committee had made three changes in the rule from the version that had been published.

First, it had eliminated from the rule the requirement of a point-counterpoint procedure based on the comments of several judges and lawyers who have used the procedure and believe that it imposes unnecessary expense. Several judges who testified at the public hearings, including Judges Holland, Lasnik, Wilken, and Hamilton, had been articulate in opposing the point-counterpoint procedure on the basis of their personal experience. But, he said, many other judges and lawyers, including the chair and several members of the advisory committee, believe that the procedure is quite effective.

Judge Kravitz emphasized, though, that all sides agree that, regardless of the specific procedure used to handle summary judgment motions, it is essential that lawyers provide pinpoint citations to the record to back up their assertions. Therefore, the advisory committee had decided to allow districts to continue with their own procedures for eliciting the facts, but uniformly to require pinpoint citations. He added that, even without the prescribed point-counterpoint procedure, the revised rule embodies a number of other good new features, such as specifically acknowledging partial summary judgment, limiting motions to strike, and addressing non-compliance.

The second significant change made following publication was to re-introduce the word "shall" into the text of the rule. As revised in new Rule 56(a) it would specify that: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

"Shall," he said is an ambiguous term and should not normally be used in drafting. But the dilemma that the advisory committee faced was that the word "shall" had acquired a substantive meaning in former Rule 56(c).

"Shall" had been used in the rule for decades until replaced with "should" as part of the 2007 general restyling of the civil rules. But in revisiting the matter in depth, Judge Kravitz said, the advisory committee simply could not find an appropriate replacement term for "shall," based on the pertinent case law. Neither "should" nor "must" are completely accurate. Many public comments, moreover, had asserted that selecting one or the other term would be viewed as making a change in substance and tilting the playing field. The advisory committee, he said, had even tried to formulate a revision using the passive voice, but decided that the alternative might inflict even more damage.

After hearing all the arguments, Judge Kravitz said, the advisory committee had returned to the vow that it had made at the outset of the project – not to change the substantive standard for granting summary judgment as developed in each circuit under the historical term "shall." Therefore, it decided to return to "shall" and allow the case law to continue to deal with that term. If, however, the Supreme Court were to change the substantive standard in the future, the advisory committee could later adjust the language of the rule. In essence, he said, the advisory committee does not advocate use of the term "shall" in drafting, but it had faced an unsolvable problem. The ambiguity in Rule 56 was so intractable that it could not be changed without affecting substance.

The third change made following publication was to eliminate the national rule's proposed time schedule for filing motions for summary judgment, responses to those motions, and replies to the responses. With elimination of the point-counterpoint procedure, there was no longer a need to retain all the deadlines. The advisory committee had been unanimous in deciding to specify only the deadline for filing a summary judgment motion and not to prescribe a schedule for further filings and responses. He noted that there is, for example, no other place in the Federal Rules of Civil Procedure where the rules fix briefing schedules, and it would not be appropriate to specify them for just one category of motions. In addition, he said, some lawyers recommended that the rule provide for sur-replies, which would have complicated the rule further.

The advisory committee had also been concerned about the time-computation rules that take effect on December 1, 2009. They will incorporate the time periods to respond and reply in the existing Rule 56, only to have a completely revised rule delete those time periods on December 1, 2010, when the new Rule 56 would take effect. The advisory committee concluded, however, that it needed to produce the best rule possible for the future, even though there might be some confusion for a year.

Finally, Judge Kravitz explained that the advisory committee had considered at length whether to republish the rule, since several changes had been made following the August 2008 publication. But it decided unanimously not to do so because, at the Standing Committee's direction, it had already solicited the public's comments on a number of specific issues. The revised rule, he said, does not add any provision not fully noticed to the public. Rather, the advisory committee merely eliminated some provisions of the published rule.

Several committee members agreed that the rules process had worked at its best to facilitate a healthy public debate on summary judgment practice and to produce a very workable new rule. Several noted that legitimate differences of opinion had been expressed on some of the major issues, and the advisory committee had accommodated the differing views as well as possible. Some pointed out that they personally favored the point-counterpoint procedure, but recognized that it could not be forced on all the courts, particularly those that have tried and rejected it. They noted, though, that individual judges and districts that have adopted the procedure will be free to continue using it.

Support was voiced for the advisory committee's decision to return to use of the word "shall' in Rule 56(a) on the grounds that it preserves the substantive standard for granting summary judgment. A few members went further and suggested that "shall" is an appropriate term to use in drafting, despite the style conventions. The committee's style consultant, Professor Kimble, though, disagreed and asserted that "shall" is never appropriate. He suggested that a different formulation might still be developed to maintain the substantive standard.

Judge Rosenthal emphasized that the advisory committee's dilemma had been to resolve a conflict between two competing principles. First, as part of the restyling process, all the advisory committees have consistently eliminated the word "shall." But the higher principle that prevailed was avoiding making any change in the substantive standard for summary judgment. She noted that, in the interests of improving style by changing "shall" to "should" in the 2007 restyling amendments, the committee had actually changed the substantive law in some circuits.

A member suggested adopting a public comment to replace "as to" with "about" in proposed Rule 56(a)(2). The style consultant agreed that the change was better stylistically, but several members urged that the change not be made since it was not essential. One member added that the current language is almost a sacred phrase and should not be tinkered with.

The committee without objection by voice vote agreed not to make the proposed additional change in the language of Rule 56(a)(2).

Another member expressed concern over the language in proposed Rule 56(c)(2) authorizing a party to assert in its response or reply that the other party's material cited to

support or dispute a fact "cannot be presented in a form that would be admissible in evidence." He suggested that the language had been revised from the formulation presented to the public for comment, *i.e.*, that the material "is not admissible in evidence." The revised language, he said, appeared to require the judge to make a ruling on the potential future admissibility of evidence.

Judge Kravitz explained that affidavits and other materials submitted as part of the summary judgment process are not evidence. Professor Cooper added that the published language was too broad because it cannot be known until trial what evidence will be admissible. Some public comments, he said, had suggested alternative language, such as "would not be admissible" or "could not be put in a form that would be admissible." The specific language added after publication was intended to show that something more than an affidavit is needed. There is no need for the objecting party to make a separate motion to strike. In addition, failure to challenge the material during summary-judgment proceedings does not forfeit the party's right to challenge its admissibility at trial.

Other members suggested that the change in language was helpful because it lays out an option for parties to deal with an issue that arises often as part of summary-judgment practice, though not specified in the current rule. When a party objects that a submission cannot be produced in any admissible form, it allows the judge to cut through the issues and remedy any technical problems as part of the summary-judgment motion itself, rather than wasting time on motions to strike. Judge Kravitz pointed out that the revised rule gives the judge flexibility to tell a party that it has not presented the material in an admissible form, to give the party an additional opportunity to correct the defect, and to fashion an appropriate remedy.

One member suggested that the problem with the language may be that it could be construed as requiring the moving party to carry some burden, such as to show that the other party cannot present evidence in an admissible form. The word "cannot" appeared to be the problem. She suggested that it be changed to "could not." It was also suggested that the chair and reporter of the advisory committee consider possible modifications in the language.

Judge Kravitz recommended, alternatively, that an explanatory sentence be added to the committee note. He pointed out that in the situation covered by the provision, there is no doubt that the party has not properly presented the pertinent material, but it is difficult to say that it "cannot" be so presented. He suggested adding language to the note to explain that an assertion that the opponent could not produce material in admissible form functions like an objection at trial. The proponent of the material can then either show that it is admissible or explain the admissible form that is anticipated.

A member stated that the text of the rule was perfectly appropriate. An objector only has to assert that the material cannot be presented. The moving party then has the burden of showing that it can.

Another member suggested that the rule might be rephrased to say something like: "If an objection has been made that the material has not been presented in a form that can be admissible at trial, the court may require (or allow) the proponent of the material to show that it can be presented in an admissible form." Judge Kravitz pointed out, though, that the advisory committee was trying to get away from motions to strike. It would prefer to have parties address the matter in their summary-judgment briefs.

Other members said that the language of the rule, as modified after publication, was correct. One pointed out that proposed Rule 56(c)(2) must be read together with proposed Rule 56(c)(4), which states that an affidavit used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. The trial judge can easily handle any problems that arise. A member declared that it is a very interesting issue in theory, but will not be a real problem in practice.

A member suggested substituting the word "object" for "assert." "Assert" requires the opponent to know, or allege, that the material cannot be presented in admissible form. "Object" makes it clear that the opponent is only raising the point, placing the burden on the proponent. Judge Kravitz explained that the advisory committee had used the word "assert" because it is a word commonly used to refer to a point mentioned in a brief. He agreed to change it to "object."

The committee with one objection by voice vote approved changing "assert" and "asserting" in proposed Rule 56 to "object" and "objecting."

The committee without objection by voice vote then approved the proposed amendments to Rule 56 for approval by the Judicial Conference.

The committee without objection by voice vote further approved the proposed amendments without republication.

A member suggested adding language to the committee note to alert the reader that the revised rule places the burden on the parties to raise the point that the submitted material cannot be presented in an admissible form.

The committee by a vote of 7 to 3 approved making the suggested addition to the committee note.

Amendment for Publication

SUPPLEMENTAL RULE E(4)(f)

Professor Cooper noted that Rule E(4)(f) (in rem and quasi in rem actions – procedure for release from arrest or attachment) would be amended to delete the last sentence because it has been superseded by statutory and rule developments. The statutes cited in the rule, 46 U.S.C. §§ 603 and 604, were repealed in 1983. Deletion of the reference to them seems entirely appropriate, and publishing the amendment for public comments might also flush out any arguments that other statutes should be invoked.

Deletion of the reference to forfeiture actions, though, is more complicated. Rule G, which took effect in 2006, governs forfeiture actions in rem arising from a federal statute. It also specifies that Supplemental Rule E continues to apply to the extent that Rule G does not. The problem, he said, is how best to integrate Rule G with Rule E(4)(f). The proposed amendment would strike the last sentence of Rule E(4)(f) and let courts figure it out on a case-by-case basis. The Department of Justice, he said, had suggested adding a sentence stating that Rule G governs hearings in a forfeiture action.

Professor Cooper added that the advisory committee recommended publishing the rule for comment. But since the proposed changes are relatively minor, the publication should be deferred until other amendments to the civil rules are proposed and the proposed amendment to Supplemental Rule E(4)(f) can be included in the same publication.

The committee without objection by voice vote approved the proposed amendment for publication at an appropriate future time.

Informational Items

Judge Kravitz reported that the advisory committee would convene a major conference on the state of civil litigation to be held at Duke Law School in May 2010. He noted that Judge John G. Koeltl would chair the conference, and the Federal Judicial Center was helping him compile empirical data for the program. He pointed out that Judge Koeltl was working with the Litigation Section of the American Bar Association on a survey of its members. In addition, Judge Koeltl had persuaded RAND and others to produce papers and other information for the conference. He had put together a comprehensive agenda and was now securing moderators and panel members. The Chief Justice will deliver a taped message. The program may be broadcast by Duke, and the Duke Law Review is expected to publish the proceedings.

Judge Kravitz reported that a special subcommittee chaired by Judge Campbell and assisted by Professor Marcus was considering a range of potential changes to Rule 45 (subpoenas). The subcommittee was in the process of seeking input and planning for mini-conferences with the bench and bar.

Judge Kravitz reported that a joint subcommittee comprised of members of the civil and appellate advisory committees had been appointed and will begin studying several issues that intersect both sets of rules. In addition, the civil advisory committee was examining issues arising when judges are sued in their individual capacities, including service in those cases. One suggestion is to require that service be made on the clerk of the court where the judge sits.

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 11, 2009 (Agenda Item 9).

Amendments for Final Approval

VICTIMS' RIGHTS AMENDMENTS

FED. R. CRIM. P. 12.3

Judge Tallman reported that the proposed amendment to Rule 12.3 (notice of public-authority defense) would conform the rule with a similar amendment made recently in Rule 12.1 (notice of alibi defense). He noted that the change was appropriate, even though the public-authority defense arises rarely.

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

A member pointed out that proposed Rule 12.3 and Rule 12.1 both permit the district court in certain circumstances to order the government to turn over to the defendant the names and telephone numbers of victims, which would otherwise be protected. She recommended that both rules require the Government to inform the protected persons that their names and numbers are being disclosed. Judge Tallman replied that proposed Rule 12.3(a)(D)(ii) explicitly authorizes a court to fashion a reasonable procedure to protect the victims' interests.

FED. R. CRIM. P. 21

Judge Tallman reported that the proposed amendment to Rule 21(b) (transfer for trial) would allow a court to consider the convenience of any victim in making a decision to transfer a case for trial.

A member questioned the need for the rule since it is not required by the Crime Victims' Rights Act. Judge Tallman pointed out that the advisory committee has been

concerned over criticism that it has not been expansive enough in making changes to the rules to implement the Act. Professor Beale added that this was one of the few rules where the advisory committee had made changes that go beyond what is mandated by the Act. She explained that the advisory committee wants to incorporate victims' rights as fully as possible without doing damage to the carefully balanced criminal justice system. Victims' rights groups, she said, have expressed a particularly strong interest in victims being able to attend court proceedings, and the proposed amendment to Rule 21 would further that interest. She pointed out, though, that the committee had made several other, more significant changes in the rules for victims at earlier meetings.

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

FED. R. CRIM. P. 5

Judge Tallman reported that the advisory committee had withdrawn its proposed change to Rule 5 (initial appearance) because it felt the current language adequately referenced the statutes providing consideration of the safety of victims and the community. The proposal would have required a court, in making the decision to detain or release a defendant at an initial appearance, to consider the right of any victim to be reasonably protected from the defendant.

Professor Beale explained that the advisory committee had been concerned that by singling out one situation, it had put its finger on the scales and changed the substantive law. The proposed amendment, moreover, was redundant and unnecessary. The Bail Reform Act, she said, is a carefully balanced and nuanced law, and just singling out one factor in support of victims could cause more damage than good. But in light of the politics of the situation, the decision to withdraw the amendment had not been an easy one for the committee.

A member agreed that many of the victims' rules amendments were not necessary, but clear political implications counsel in favor of including them. The Crime Victims' Rights Act, he said, emphasizes particularly the safety of victims. Therefore, this may be one area where a rule amendment may be advisable. Victims are particularly vulnerable to being harmed by defendants who have been released. He said, moreover, that he had not been persuaded by the argument that the proposed amendment would change the substantive law.

Judge Tallman pointed out that the Federal Magistrate Judges Association, whose members apply the rule every day, oppose changing the rule because they view the Bail Reform Act and the Crime Victims' Rights Act as sufficient, and changing the rule would upset the careful balance of the statutes. Judge Rosenthal added that the rule already

speaks of detention or release "as provided by statute," which covers both the Bail Reform Act and the Crime Victims' Rights Act.

Members questioned whether the Standing Committee is authorized to initiate its own rules proposals or to forward to the Judicial Conference a proposed amendment that has been withdrawn or rejected by an advisory committee. Professor Coquillette suggested that the Rules Enabling Act appears to contemplate the Standing Committee confining itself to reviewing the recommendations of the advisory committees.

A member recommended sending the matter back to the advisory committee for further consideration. But Judge Tallman pointed out that the advisory committee had already published the rule for comment, had then discussed it thoroughly, and had voted unanimously not to proceed with the amendment. He said that he was not sure that returning the matter to the committee would change the result.

A participant suggested, though, that other statutory changes may be made in the future. Sending the rule back to the advisory committee, rather than rejecting it, would keep the matter alive and be advisable as a matter of policy. A member added that the advisory committee might be asked to include the matter as part of its ongoing study of how the courts are implementing the Crime Victims' Rights Act. Professor Beale added that there is a careful balance between that statute and the Bail Reform Act, and the advisory committee will continue to monitor the situation closely to make sure that any problems are addressed.

The committee unanimously by voice vote returned the proposed amendment to the advisory committee with instructions to further study proposed amendments to Rule 5 as part of its ongoing study of the courts' implementation of the Crime Victims' Rights Act.

OTHER AMENDMENTS

FED. R. CRIM. P. 15

Judge Tallman reported that the advisory committee had briefed the Standing Committee before on the proposed amendments to Rule 15 (depositions). Recommended by the Department of Justice, they would allow the government – under certain limited conditions – to take a deposition in a criminal case outside the United States and outside the physical presence of the defendant, with the defendant participating by electronic means. Before allowing the deposition to proceed, the trial court would have to make case-specific findings on the following six factors:

1. the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

2. there is a substantial likelihood that the witness's attendance at trial cannot be obtained;
3. the witness's presence for a deposition in the United States cannot be obtained;
4. the defendant cannot be present because: (I) the country where the witness is located will not permit the defendant to attend the deposition; (ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or (iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing;
5. the defendant can meaningfully participate in the deposition through reasonable means; and
6. for the deposition of a government witness, the attorney for the government has established that the prosecution advances an important public interest.

Judge Tallman explained that the Fourth Circuit had already approved procedures similar to those set forth in the proposed amendment and had held that the Confrontation Clause did not prohibit the introduction of deposition testimony taken under those procedures. *United States v. Ali,* 528 F.3d 210 (4th Cir. 2008), *cert. denied,* 129 S. Ct. 1312 (2009).

Judge Tallman pointed out that an analogous proposal for a change to Rule 26 (taking testimony) had been forwarded to the Supreme Court in 2002, but the Court rejected it on Confrontation-Clause grounds in an opinion by Justice Scalia. The advisory committee, he said, recognized fully that there may also be confrontation issues with the new proposal. But it also recognized that the practical need for the amendment is substantial, and it had been carefully crafted to address the Confrontation-Clause factors considered by the Supreme Court in 2002. He added that, unlike the proposed amendments to Rule 26, the proposed amendment to Rule 15 deals only with the taking of depositions and not the later admissibility of their contents at trial, which is where the Confrontation Clause issue arises.

Judge Tallman noted that there had been opposition to the proposed rule, as expected, from the defense bar. As a result, the advisory committee had limited the rule's reach to make sure that a deposition is restricted to evidence necessary to the government's case. But the committee did not adopt three other suggestions made by the defense bar during the comment period: (1) to limit the rule to government witnesses; (2) to require the government to show that the deposition would produce evidence "necessary" to its case; and (3) to require the government to show that it had made diligent efforts to secure the witness's testimony in the United States.

Deputy Attorney General Ogden thanked the committee for its attention to the matter and emphasized that the proposed rule is of substantial importance to the Department of Justice. It would be needed only in a few cases, but the depositions would

be very important in those cases. The detailed procedures will require the Department to go to a great deal of trouble and expense to obtain the testimony. Arranging for a foreign deposition is costly and difficult, so it will not be pursued lightly, and the rule will be used only in cases that are vitally important to the United States.

Mr. Ogden said that the Department fully recognizes the importance of the issues under the Confrontation Clause. But, he said, the careful conditions that the rule specifies go a long way to shield the proposal from constitutional infirmity. The rule, he assured the committee, will not be taken lightly. Using the rule will be expensive because the government will likely also have to pay for defense counsel. And it will have to get the cooperation of the State Department and the approval of the foreign country involved. Moreover, the trial court has to approve taking the deposition, and it can do so only after having made all the requisite findings specified in the rule.

A member pointed out that subparagraph 15(c)(3)(F) is the only part of the rule that refers to the government. The rest of the rule would also apply to defendants. Professor Beale explained that the federal defenders had wanted to limit the rule to government witnesses, but the advisory committee did not agree. In fact, the committee had been surprised that the suggestion had come from the defenders. The defenders, she said, had suggested that they would very rarely use the device. As a matter of policy, though, the advisory committee believed that the rule should not be just a one-way street.

A participant suggested that the proposed amendments will have an impact on the admissibility of declarations against penal interest under FED. R. EVID. 804(b)(3). To admit evidence under Rule 804, he said, a party must show that the declarant was not only absent from trial, but cannot be deposed. Under proposed Rule 15, and its expanded possibilities to conduct depositions, declarations against penal interest will be admissible less often.

A member expressed strong opposition to the proposed amendments, asserting that they were directly contrary to the Confrontation Clause. He said that the committee should not recommend rules that are constitutionally debatable. That alone, he said, should be grounds for not proceeding further.

In addition, he said, there was no empirical support for the rule. Normally, he said, the advisory committee asks for data and background information. In this case, the procedures differ widely from country to country. The advisory committee needs to have a clearer understanding of the different procedures and requirements imposed around the world. It also needs to know more specifically how big a problem the government actually faces without the rule. In addition, he said, many additional procedural safeguards required by the developing case law had not been included in the proposed amendments, including some of the requirements set forth in the *Ali* case. The key question, he said, is not how rarely the proposed authority will be exercised, but whether it is fundamentally sound.

He noted that subparagraph 15(c)(3)(F) specifies that the procedure may only be invoked if there is "an important public interest." But, he noted, the government claims an important public interest in every prosecution. The provision, consequently, is not meaningful. Subparagraph 15(c)(3)(E) requires that the defendant be able to participate in the deposition by "reasonable means," but that standard is too vague. In addition, it is unclear how the government will show that the witness cannot be obtained. He concluded that if this rule were so important to the country, it should be enacted by legislation, rather than by rule.

A member pointed out that the Confrontation Clause can still be used to prevent any testimony elicited at the foreign deposition from being used in court. Mr. Ogden agreed that admissibility questions must still be addressed in each case, but said that courts are competent to make the case-by-case decisions that the rule requires.

A member suggested that the rule would be very helpful because it would provide national uniformity on a matter that individual courts currently have to struggle with. She said that trial courts need guidance and a framework for dealing with foreign depositions. Another participant said, however, that it may be premature for the committee to bless the specific proposed procedure and suggested that the Department might consider adopting an internal guide rather than seeking a rule.

Professor Beale said, though, that the proposed rule would create a desirable template to guide the Department and the courts on taking depositions. She pointed out that the rule is procedural in nature. She emphasized that the evidence produced at the deposition still must face other obstacles under the Confrontation Clause and the Federal Rules of Evidence when the government tries to admit the testimony.

Another member expressed concern about proceeding by rule at this point and questioned whether the advisory committee had pinned down all the procedures correctly. Perhaps some additional flexibility may be needed. Moreover, she suggested, the advisory committee may be underestimating how often the defense might want to invoke the rule. The principal justification for the rule is that the courts need some procedural guidance on taking foreign depositions. But in light of the lack of definitive information at this point, it might be better to defer on a rule and consider providing other kinds of guidance to the courts, such as memoranda, white papers, or studies.

A participant asked whether the Department of Justice had considered proceeding with an internal Department memorandum based on the existing case law, rather than seeking a controversial rule. Mr. Ogden responded that the Department had conducted an extensive review of the matter and had taken an official position that seeking a federal rule is the best way to proceed.

A member added that the government faces many thorny problems in meeting the requirements and restrictions of other countries' laws. The federal courts, therefore, may

need more advice on how to deal with these problems as a practical matter. Mr. Ogden responded that the Department would not even proceed if there were legal impediments in a particular country. He pointed out that the rule is based on the actual cases that had arisen to date and reflects the current case law.

A member responded, though, that it would be very difficult to obtain additional relevant information without actually having a rule in place. A procedural rule is needed, he said, and the Confrontation Clause and rules of evidence are in place to protect against constitutional violations. The Department of Justice, he said, still has obstacles to face, even if it follows the procedures specified in the rule. He recommended proceeding with the rule and monitoring how it works in practice.

Mr. Ogden noted that the Department had some concern about proposed subparagraph 15(c)(3)(F), which requires the government to establish that the prosecution advances "an important public interest." He pointed out that the requirement would lead to a determination by the court as to what is important, and what is not. The Department, he said, was prepared instead to have the certification made internally by a high-level Department official, at least as high as the Assistant Attorney General level.

Judge Tallman explained that the reason for including the provision was to respond to criticisms by the defense community that it would be too easy for a prosecutor to use the foreign deposition procedure without some greater level of accountability. The defense bar had argued for a certification by the Attorney General. He suggested that the committee might strike subparagraph (F) entirely upon assurance that the Department will impose an internal requirement of high-level approval.

A participant suggested that it is misleading to say that only a few cases will be brought under the rule because there are in fact many cases in this area. The key issue, he said, is preserving the defendant's right to face-to-face confrontation. The situations presented by the rule are similar in ways to those involved in confrontation of child witnesses. He suggested that the advisory committee was, in effect, trying to apply *Maryland v. Craig,* 497 U.S. 836 (1990), and the various statutes that implement it.

Judge Rosenthal concluded that members had expressed discomfort on two levels:

1. Whether the case had been made that the rule is needed.

2. Whether the committee knows enough about how the rule might be applied, even though it would be difficult to obtain that information in advance without having a rule in place.

She added that the advisory committee also needed to decide whether subparagraph 15(c)(3)(F) was needed, and whether the committee was confident enough to let the rule go forward in final form to the Judicial Conference and the Supreme Court.

She noted that the advisory committee had drafted the rule very carefully to respond to all the expressed concerns. She pointed out that Justice Scalia's 2002 opinion was specific in setting forth the minimal requirements for a rule, and the rule that the advisory committee had drafted appeared to respond well to the concerns he had articulated. One member suggested that although the draft rule contained all the minimal requirements, it might also specifically state that a judge may imposed other requirements.

A participant noted that FED. R. EVID. 804(b)(1) (hearsay exceptions – declarant unavailable) deals with admissibility and has its own standard that requires a party to be afforded a trial-like "opportunity" to examine the witness before the witness's testimony may be admitted. He suggested that the criminal provision be dovetailed with the evidence rule or use the language of the evidence rule. Admissibility of the deposition evidence at trial is governed by the standards of FED. R. EVID. 804(b)(1), so a different standard is not needed in proposed FED. R. CRIM. P. 15(c). In fact, if the evidence is admissible under FED. R. EVID. 804(b)(1), it will probably also satisfy the Confrontation Clause under the pertinent case law. But for the evidence to meet the Rule 804(b)(1) standard, the defendant needs a "trial-like" opportunity to confront the witness.

A member moved to adopt the proposed amendments to Rule 15 with two changes:

1. delete proposed subparagraph 15(c)(3)(F) – on the representation of the Department of Justice that before invoking the revised Rule 15, it will require internal approval by an Assistant Attorney General; and

2. amend subparagraph 15(c)(3)(E) to conform it to the provisions of FED. R. EVID. 804(b)(1).

Professor Beale reported, though, that the advisory committee had been persuaded not to import the standard of FED. R. EVID. 804(b)(1) into the revised criminal rule. She explained that the district court evaluates motive and opportunity under Rule 804(b)(1) after the deposition has been taken, while ruling on admissibility of the evidence at trial. The standard in proposed FED. R. CRIM. P. 15(c), however, is different. It articulates the requirements that must be met for approving taking the deposition in the first place.

The member restated his motion to approve the proposed amendments with just one change – elimination of subparagraph 15(c)(3)(F).

The committee by a vote of 9-1 approved the motion and voted to forward the proposed amendments to Rule 15 for approval by the Judicial Conference.

FED. R. CRIM. P. 32.1

Judge Tallman reported that the proposed amendments to Rule 32.1(a)(6) (revocation or modification of probation or supervised release) had been requested by the

Federal Magistrate Judges Association. They would resolve ambiguities and clarify in two ways the burden of proof for obtaining release in revocation and modification proceedings.

First the amended rule would specify the precise statutory provision that governs the revocation proceeding – 18 U.S.C. § 3143(a)(1), rather than all of 18 U.S.C. § 3143(a), which contains other provisions that do not apply and have caused some confusion. Second, the current rule places the burden of proof on the person seeking release, but it does not specify the standard. The revised rule specifies that the person facing revocation or modification must establish by "clear and convincing evidence" that he or she will not flee or pose a danger to any other person or the community.

He noted that an additional change to the rule, to allow video conferencing of these proceedings, was pending separately before the advisory committee for approval to publish as part of the package of technology-related amendments.

A member pointed out that the proposed committee note stated that the amendment reflected established case law. But only a single Ninth Circuit case and a district court case had been cited. She questioned whether the case law was in fact uniform across the country and expressed some concern that the committee may be making a substantive change in the law in some circuits. Professor Beale responded that the case law is, in fact, clear, as is the statute itself. She added that the defense bar did not object to the rule specifying the standard of "clear and convincing evidence."

Professor Coquillette recommended that the case references and the last sentence of the note be eliminated. He pointed out that case law is subject to change. Judge Tallman agreed with the suggestion.

The committee unanimously by voice vote approved the proposed amendments to the rule for approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 12 and 34

Judge Tallman reported that the proposed amendments to Rule 12 (pleadings and pretrial motions) would conform the rule to the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625 (2002). They would also save judicial resources by encouraging defendants to raise all objections to an indictment before trial. Rule 12(b)(3)(B), he said, sets forth the general rule that a defendant must raise before trial any claim alleging a defect in the indictment or information. But it also specifies that the particular objection that the indictment fails to state an offense may be raised at any time. This exception was justified originally on the ground that the latter claim is jurisdictional in nature and therefore may be raised at any point.

In *Cotton*, however, the Supreme Court abandoned that justification by holding that a defective indictment does not deprive a court of jurisdiction. A claim that the indictment fails to allege an essential element of an offense does not raise jurisdictional issues. The claim can be forfeited if not timely raised. Judge Tallman explained that the Department of Justice had asked the advisory committee to amend Rule 12 to require explicitly that a claim that an indictment fails to state an offense be raised before trial.

The proposed amendment would do so. But it also contains a fail-safe provision in proposed Rule 12(e)(2), which states that a court may grant relief from the waiver either: (1) for good cause; or (2) if the indictment's omission of an element of the offense has prejudiced a substantial right of the defendant. The proposed amendment to Rule 34 (arresting judgment) would conform that rule to the proposed amendment to Rule 12(b).

Judge Tallman explained that the advisory committee had wrestled with whether to require a defendant to show both good cause and prejudice to obtain relief from the waiver, but it had concluded that only one or the other should be required. Professor Beale added that the advisory committee wanted to provide judges with greater leeway in dealing with this specific type of error and noted that it is a different standard from that required for relief from other errors.

Several members suggested that "forfeiture" would be a better choice of words than "waiver" because the context makes clear that Rule 12 deals with forfeiture. Moreover, the Supreme Court used the term "forfeiture" in *Cotton.* Judge Tallman replied that "waiver" has always been used in the text of Rule 12, even though "forfeiture" might be a better term if the advisory committee were writing the rule on a clean slate. He suggested that the proposed rule could be published using the term "forfeiture," and the advisory committee could solicit public comments regarding the appropriate choice. It was also suggested that both terms could be used in the publication and placed in brackets to solicit comments from bench and bar.

Some members questioned whether the proposed amendments were completely consistent with *United States v. Cotton* and suggested that there are alternative possible readings of the holding. Judge Rosenthal noted that revising the remedy provision of the rule, Rule 12(e)(2), would pose many drafting difficulties. Professor Beale explained that the advisory committee had struggled with drafting that portion of the rule and suggested that it might be advisable, in light of the comments of the members, for the advisory committee to explore the issues further and consider additional adjustments in the rule. A member suggested that the advisory committee also take a fresh look at all the criminal rules that use the term "waiver," rather than "forfeiture."

Due to the many issues surrounding the provision, Judge Rosenthal suggested that the best course of action might be for the matter to be returned to the advisory committee for further study.

The committee without objection by voice vote approved returning the proposed amendments to Rules 12 and 34 to the advisory committee for further study.

TECHNOLOGY RULES

Judge Tallman reported that the proposed amendments started with a commission given to Judge Anthony J. Battaglia and his subcommittee to review all the Federal Rules of Criminal Procedure with a view towards improving them to take account of technology changes. He added that technology has now reached the stage of high reliability and accessibility that the rules should take specific account of it and make it easier for prosecutors, law enforcement officers, judges, and others to use the system. The proposed changes deal largely with the issuance of arrest and search and seizure warrants, and with the use of video conferencing to avoid having to bring people into court.

FED. R. CRIM. P. 1

Judge Tallman reported that the proposed amendment to Rule 1 (scope of the rules and definitions) would broaden the definition of "telephone," "telephonic," or "telephonically" to include any form of live electronic voice communication. The definition is intended to be sufficiently broad in order to cover both recent changes and future changes in technology. The committee note, moreover, also speaks of services for the hearing impaired.

Judge Tallman emphasized that use of the technological options is discretionary. Judges, prosecutors, and officers may continue to handle proceedings in the traditional way. But he pointed out that there are many areas in the country where the distance between a judicial officer and a law enforcement officer is great. The proposed rules authorize the use of technology to close the distance gap and improve enforcement of the law.

Professor Beale pointed out that live communication will continue to be required for taking an oath. Under proposed new Rule 4.1, "[t]he judge must place under oath — and may examine — the applicant and any person on whose testimony the application is based." The proposed rules preserve live communication in person by video or telephone.

FED. R. CRIM. P. 3

Judge Tallman reported that Rule 3 (complaint) would be amended to require that a complaint be made under oath before a magistrate judge "except as provided in Rule 4.1."

FED. R. CRIM. P. 4

Judge Tallman explained that Rule 4 (arrest warrant or summons on a complaint) sets forth the procedure for obtaining a warrant on a complaint. The amended rule adopts the concept of a "duplicate original" that has been in Rule 41 for years, dealing with issuance of search warrants by telephone. The term will now be used for other kinds of process besides search warrants. Under proposed Rule 4(d), all warrant applications may be presented to a magistrate judge by telephone or other reliable electronic means.

FED. R. CRIM. P. 4.1

Judge Tallman explained that new Rule 4.1 (complaint, warrant, or summons by telephone or other reliable electronic means) was the heart of the technology amendments. It would place in one rule the procedure for obtaining electronic process of all kinds. The new rule extends the Rule 41(e)(3) procedures governing the issuance of a warrant on information transmitted by reliable electronic means to the issuance of a complaint and summons. Testimony taken by electronic means must be recorded in writing, but a written summary or order suffices if the testimony is limited to attesting to the contents of a written affidavit submitted by reliable electronic means. The applicant must prepare a "duplicate original" of a complaint, warrant, or summons and must read or otherwise transmit its contents verbatim to the judge. When approved by the judge, the duplicate original may serve as the original. The officer, who may be many miles away, may use the duplicate original as an original.

The judge always has discretion to require that the oath be taken in person. In addition, the judge may modify the complaint, warrant, or summons, and transmit the modified version to the applicant electronically, or direct the applicant to modify the proposed duplicate original. The judge, for example, might require more facts or alter the warrant to specify clearly what the agent is authorized to search and seize. The officer at the other end makes the changes and sends them to the judge.

Rule 4.1 also contains a provision in subsection (c), using language now found in Rule 41, specifying that "absent a finding of bad faith, evidence is not subject to suppression." This is derived from the decision of the Supreme Court in *United States v. Leon*, 468 U.S. 897 (1984).

Professor Beale pointed out that the new Rule 4.1 has a number of innovations not found in the current Rule 41. The oath, for example, would be broken out from the rest of the conversation between the law enforcement officer and the magistrate judge. She noted that many judges interpret the current rule to require the judge to write down everything said during the conversation. The new rule allows the judge to prepare only a summary or a brief order (rather than a verbatim record of the conversation) if the conversation was limited to an oath affirming a written affidavit. The rest of the conversation may be recorded. Judge Tallman added that the rule should produce a better record of all the proceedings from start to finish. It may also encourage greater use of the warrant process by law enforcement officers, which is good as a matter of public policy.

A member questioned the numbering of the new rule as FED. R. CRIM. P. 4.1, asking why it should not be placed later in the body of rules. Judge Tallman responded that the advisory committee had considered the matter and had decided to set forth the procedures immediately following the first place in the rules where they could be invoked – after Rule 4, governing issuance of arrest warrants. He suggested that the rule could easily be moved to a later position in the rules. A member suggested soliciting comments from the public on the appropriate numbering of the rule.

FED. R. CRIM. P. 9

Judge Tallman reported that amended Rule 9 (arrest warrant or summons on an indictment) would allow an arrest warrant on an indictment or information to be issued electronically.

FED. R. CRIM. P. 40

Rule 40 (arrest for failing to appear in another district or for violating conditions of release set in another district) would be amended to permit the use of video conferencing to conduct a Rule 40 appearance, with the defendant's consent. The procedure would be discretionary with the court.

FED. R. CRIM. P. 41

Rule 41 (search and seizure) would be substantially reduced in size because its provisions for issuing a telephonic warrant would be moved to the new Rule 4.1. In addition, the revised rule provides that electronic means may be used for the return of a search warrant or tracking warrant.

FED. R. CRIM. P. 43

Rule 43 (defendant's presence) would be amended to include a cross-reference to Rule 32.1. In addition, the court may permit misdemeanor proceedings to be handled by video conferencing.

A member noted that Rule 43 specifies that the entire proceedings in misdemeanor cases could be conducted without the defendant's presence. It would be possible, for example, for the arraignment, plea, and sentencing all to be conducted without the judge verifying in person that the defendant is the correct person before the court. But, she noted, that is already the case under the current Rule 43.

Judge Tallman explained that waiver of the defendant's presence should normally be used only for traffic cases and other low-penalty offenses, even though the language of the rule is broad enough to cover more serious offenses. He said that the system has to rely on the sound judgment of magistrate judges to determine which cases to apply the

rule in. He observed, for example, that the advisory committee had heard of several cases where prison inmates want to get rid of cases outstanding against them to avoid negative effect on their prison condition and opportunities. Professor Beale added that the proposed rule is an improvement over the current rule because it adds the alternative of conducting the proceedings by video conferencing to the current option of proceeding without the presence of the defendant at all.

FED. R. CRIM. P. 49

Rule 49 (serving and filing papers) would be amended to conform the criminal rules with the civil rules regarding electronic filing of documents. It is derived from FED. R. CIV. P. 5(d)(3), and makes clear that a paper filed electronically in compliance with a court's local rule is a written paper.

A participant stated that in the recent restyling of the evidence rules, the term "telephone" had been changed to "phone" in order to capture cell phones. It was recommended that the terminology in the criminal rules and the evidence rules be consistent. During a break in the proceedings, representatives of the criminal and evidence advisory committees and the Style Subcommittee conferred and agreed to change the references in the proposed restyled evidence rules back from "phone" to "telephone."

Professor Beale added that the package of technology amendments also included an amendment to Rule 6(e) (recording and disclosing grand jury proceedings), previously approved by the Standing Committee for publication. It would authorize the taking of a grand jury return by video conferencing.

FED. R. CRIM. P. 32.1

Judge Tallman pointed out that the amendments to Rule 32.1 (revocation or modification of probation or supervised release) were somewhat different from the other technology amendments. They deal with defendants who are subject to revocation or modification of probation or supervised release. At the defendant's request, the court would be able to allow the defendant to participate in the proceedings through video conferencing. The advisory committee, he said, had reviewed the case law and had seen no suggestion that the defendant's waiver would be inconsistent with the Sentencing Reform Act.

A participant suggested that the revised rule appeared to carry the negative implication that a judge may not modify conditions by telephone. In revocation cases where a defendant is far away, a judge may simply telephone the defendant and the probation officer to resolve a matter without the need for a hearing. The rule, he said, should not imply that the judge cannot continue to resolve matters in this manner. As written, though, it appears to apply to all modifications of probation or supervised release.

It should, instead, provide that in appropriate cases a judge may simply use the telephone to resolve problems.

Professor Beale stated that the situation posed is different from that contemplated in the proposed amendments to Rule 32.1. In the former, the defendant is waiving a hearing altogether. The judge then chooses to speak personally with the defendant and the probation officer by telephone and be assured that the defendant's waiver is voluntary and knowing. The proposed amendments to Rule 32.1, by contrast, address holding a hearing – which the defendant has not waived – by video conferencing at the defendant's request.

Another participant suggested that there may be a potential conflict between Rule 32.1(c)(2)(A), specifying that a hearing is not required if the person waives it, and the proposed new Rule 32.1(f) because the latter applies to the entire rule and could be construed as replacing Rule 32.1(c)(2)(A). Another participant recommended adding a heading to Rule 32.1(f).

Professor Beale reported that Rule 32.1 was the only rule in the technology package that had produced any controversy during the advisory committee's deliberations. Some members, she said, had expressed concerns over a judge being able to revoke release by video conference. A member added that the appropriate procedure depends in large measure on what the judge is going to do. Sometimes the modifications will be very minor in nature, but other times they may be more serious. She pointed out that before video conferencing became widely available, judges simply used the telephone to handle many different circumstances. Video conferencing is easier to use than in the past, but it is still a big step to take and is more difficult and inconvenient than using the telephone.

A participant suggested adding a sentence to the committee note to address the issue. Another suggested that the note state that whenever a defendant is entitled to waive a hearing completely, the proceeding may be conducted by telephone. Others agreed that additional language would be helpful.

A participant pointed out that use of the word "proceedings" in Rule 32.1(f) may create some ambiguity. In reality, the rule should refer to a "hearing" conducted by video conference. That term, she said, is used several other places in the rule.

A participant questioned the need for the rule because a defendant may waive the hearing altogether. Professor Beale explained that the rule sets forth alternatives. The advisory committee had decided to exempt Rule 32.1 proceedings from the requirements of Rule 43 because there had been some uncertainty among the members as to whether Rule 43 applied to revocation and modification proceedings.

The committee without objection by voice vote approved Rule 32.1 for publication with additional language to be included in the committee note

emphasizing that use of a telephone is still a permissible alternative to video conferencing in appropriate circumstances.

The committee then without objection by voice vote approved all the other proposed technology-related amendments for publication, including the amendments to Rule 6 approved for publication by the committee in June 2008.

Judge Tallman pointed out that proposed amendments to Rule 47 (motions and supporting affidavits) had been withdrawn by the advisory committee.

Judge Rosenthal extended special thanks to Judge Battaglia for spearheading the technology project and producing a superb package of amendments.

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 6, 2009 (Agenda Item 8).

Amendments for Final Approval

FED. R. EVID. 804(b)(3)

Judge Hinkle reported that the proposed amendment to Rule 804(b)(3) (statement against interest) would change the hearsay exception regarding the statement against penal interest of an unavailable witness. The existing rule, he said, requires a defendant in a criminal case to show "corroborating circumstances" in order to have the statement admitted. But the government introducing a statement does not have the same requirement. The amended rule, he said, would apply the corroborating circumstances requirement to the government as well. The Department of Justice, he said, did not object to the amendment, and there had been no written comments objecting to its substance. One comment from a defense lawyer had recommended that corroborating circumstances be deleted as a requirement for a defendant, but the committee did not consider that course appropriate as a substantive matter. The public hearings had been cancelled because no witnesses had asked to testify on the rule.

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

Amendments for Publication

RESTYLED FED. R. EVID. 101-1103

Judge Hinkle reported that the written agenda materials provided background information about the restyling project. The effort to restyle the federal rules started back in the early 1990s under the leadership of committee chair Judge Robert Keeton and committee member Professor Charles Alan Wright. It has been a long and successful process over several years, though not without controversy. Some had thought that it would not be worth the effort to change the rules, even if the end product were improved. But, in fact, the four restyling projects have been very successful, and the rules are clearly much better than before.

He pointed out that accuracy and clarity are the most important values in the restyling effort. It is important, he said, for a judge or a lawyer to be able to look at an evidence rule and know immediately what it means. Consistency is also important, but it does not rise to the same level as the other two values.

The process used to restyle the Federal Rules of Evidence, he said, had started with Professor Kimble rewriting each of the rules in the first instance. Then Professor Capra made his changes. The drafts were then sent to the advisory committee and the style subcommittee of the Standing Committee for comment. The rules were reviewed carefully several times and at several levels. In addition, some members of the Standing Committee had already made specific comments on the proposed rules.

But, he said, that will not be the end of the process. The advisory committee was only asking for authority to publish the rules for comment. It should receive a number of public comments, each of which will be reviewed in 2010. He thanked Judge Hartz for spotting inconsistencies, and he thanked Jeffrey Barr and Stacey Williamson of the Administrative Office for great staff support in getting the package completed.

Judge Hinkle reported that the advisory committee was presenting Rules 801-1103 to the Standing Committee for the first time. All the other rules in the restyling package had been presented to the committee at earlier meetings. The advisory committee was now seeking authority to publish the entire set of evidence rules for comment. It would also like authority to make further corrections before publication.

Judge Hinkle noted that several changes had been made in the restyled hearsay rules from "offered to prove" to "admitted to prove," and the advisory committee will highlight the terminology in the publication. Professor Capra explained that the change had started with the restyling of Rule 803(22). There, it would be a substantive change from the current rule to use "offered to prove" because the judge plays a fact-finding role and so admissibility is not controlled by the purpose of the proffering party. Once the advisory committee had made the change from "to prove" to "admitted to prove", he said,

it decided to change all the instances of "offered to prove" to "admitted to prove" because the judge has some role as to each piece of evidence offered. What is determinative is not what the lawyer states the evidence is offered for, but what the judge admits it to prove. He said that the advisory committee wanted to hear from the public on the use of the terminology so that it can make a reasoned choice on it.

A member questioned the use of unnumbered bullet points, rather than numbers, noting that bullet points cannot be cited. He added, though, that it is not a big problem because a whole rule may be cited. Professor Kimble explained that the style guidelines call for using bullet points where there is no preferred rank order in a list. In Rule 407 (subsequent remedial measures), for example, there is no way to cite each of the measures listed. In addition, he pointed out that when a list is created with numbered divisions, a dangling paragraph may follow. That dangling paragraph cannot be effectively cited. Where a list is created within a rule, with text before the list and more text after the list, bullets work better than numbers. The member pointed out, though, that not every series in the restyled rules appeared to have been broken out and expressed a strong preference for breaking out and numbering all series and lists.

The member also questioned the use of dashes, rather than commas. In some cases, he pointed out, dashes are used to set off an aside, which is an appropriate usage. But often what appears within the dashes follows from what is said before the dash, which is inappropriate usage. Professor Kimble responded that dashes may properly be used for both purposes. They are often more successful than commas, especially if there are other commas in a sentence. One member emphasized that dashes make the text easier to read, and that is the key objective of the restyling effort.

The committee without objection by voice vote approved the proposed amendments for publication, subject to the advisory committee making additional, minor style changes.

Professor Capra thanked Professor Kimble for truly excellent work. He also said that the style subcommittee had accomplished amazing work with a very fast turn around time. In short, he said, the process had been fantastic. Judge Hinkle added that very special thanks are due to Professor Capra for his major, indispensable role in the restyling project.

GUIDELINES ON STANDING ORDERS

Judge Rosenthal reported that the primary changes made in the text of the proposed guidelines since the last meeting had been to strike just the right balance between concerns that the draft guidelines had placed insufficient limits on individual-judge orders and countervailing concerns that individual-judge orders are entirely

appropriate and useful. She thanked Judge Raggi for her help in improving the product to address those competing concerns.

Judge Rosenthal pointed out that the revised guidelines distinguish between substantive rules of practice, on the one hand, and rules of courtroom conduct, on the other. The former should clearly be set forth in local rules of court. But rules of courtroom conduct are appropriate for orders by individual judges. The revised second paragraph of Guideline 4, she said, now makes that distinction clear. In addition, at the request of the Department of Justice a new bullet point had been added to the internal administrative matters listed in Guideline 1 to suggest that standing orders are appropriate to deal with courthouse or courtroom access for individuals with disabilities. In addition, Guidelines 7 and 8 had been supplemented.

Judge Rosenthal reported that a reference had been added to Bankruptcy Rule 9029. She noted that the Advisory Committee on Bankruptcy Rules had suggested that the guidelines address some special needs of the bankruptcy courts. The bankruptcy courts, for example, sometimes need greater flexibility to use standing orders to effect urgently needed changes during the time that it takes for local rules to be put into effect. The recent implementation of the massive 2005 bankruptcy reform legislation demonstrated the value of operating under standing orders.

The committee, she said, planned to send the guidelines to the Judicial Conference with a request that they be distributed to the courts for consideration as non-binding guidance. But Mr. Rabiej suggested that it might be more effective to have the Judicial Conference actually adopt the guidelines. Some members agreed and said that it would be easier to get courts to adopt them if they are approved by the Conference itself. Judge Rosenthal added that the Conference might also be informed that the committee is considering bankruptcy guidelines and may return with additional recommendations.

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

SEALED CASES

Judge Hartz reported that the sealing subcommittee would meet again immediately following the Standing Committee meeting. He pointed out that the subcommittee included a representative from each advisory committee, a Department of Justice representative, and a clerk of court. He noted that the subcommittee was only addressing cases that are entirely sealed, not sealed documents within a case.

He reported that Tim Reagan of the Federal Judicial Center had completed a good deal of work on sealed cases, having examined all the cases filed in 2006 at both the district and appellate levels. He had found no bankruptcy cases in which an entire case

had been sealed by a court. He added that roughly 10,000 magistrate-judge and miscellaneous cases had been found, and a few will be sampled from each court. Most of these matters involve initial proceedings pending formal initiation of a criminal prosecution.

Judge Hartz pointed out that no indications of abuse had been found. In fact, he said, he had only seen one case that he thought might have been sealed improperly. The decisions of courts to seal cases, he said, appear to be reasonable. Nevertheless, there may be some other issues that should be addressed, such as how long cases should remain sealed. Apparently, there is a problem in that some courts appear to overlook the task of unsealing cases.

He noted that the subcommittee would consider whether there should be standards on when cases should be sealed. The subcommittee would also consider whether there should be procedural requirements for sealing, who should order the sealing, whether there should be notice of sealing, whether a record should be made of the reasons for sealing, and whether there should be time limits on the length of sealing. He pointed out that the subcommittee would also look at whether certain administrative measures should be pursued, such as adding special prompts to the courts' electronic case management and filing systems. Finally, the subcommittee would consider whether there is a need for additional empirical research or public hearings.

Judge Hartz pointed out that the subcommittee had contemplated at the start of the project that it would discover that most sealed cases might be national security cases. But, in fact, very few involve national security. The biggest group of sealed cases, he said, are criminal cases that involve danger to witnesses and victims. There are also a number of qui tam civil cases.

He thanked Professor Richard Marcus for participating in all the meetings and working exceptionally hard on the project. Judge Rosenthal added that Professor Marcus is a recognized national authority on sealing.

LONG-RANGE PLANNING

Judge Rosenthal pointed out that the rules committees have been deeply involved in long-range planning for several years. Some examples of current activities include the ongoing work of the privacy subcommittee, the convening of the upcoming conference at Duke Law School on the state of civil litigation, and the major projects of the Advisory Committee on Bankruptcy Rules to reformulate the appellate bankruptcy rules and modernize the bankruptcy forms. She invited all the participants to send the Administrative Office staff any additional ideas for long-range planning that the committees should consider.

REPORT OF THE PRIVACY SUBCOMMITTEE

Judge Raggi reported that she had been asked to chair the special subcommittee to examine implementation of the new privacy rules. The subcommittee, she said, would hold its first meeting immediately following the Standing Committee meeting. She pointed out that the subcommittee included several colleagues from the Court Administration and Case Management Committee, which had established the original Judicial Conference privacy policies later incorporated into the 2007 amendments to the w1federal rules. She added that Professor Capra will be the reporter for the subcommittee, and Judge Hinkle will participate. She said that the subcommittee would address the following areas:

1. Are amendments needed to the national privacy rules?

2. Are there problems in criminal cases and sealed cases that need to be addressed further? Should, for example, the Judicial Conference policy that certain documents not be included in the public case file be stated expressly in the national rules? If so, should the list of documents be expanded or contracted?

3. Should the policy of placing the burden on the parties to redact sensitive information be reviewed with an eye towards simplification? Are there viable alternatives that will assure protection of private information without imposing undue burden on the courts? Is more public education needed to inform the parties of their obligations to redact private information from transcripts?

4. Are additional efforts needed to implement the existing rules, especially in response to Congressional concerns that personal information still appears in some court case files?

NEXT MEETING

The committee agreed to hold the next meeting in January 2010, with the exact date to be set after the members have had a chance to consult their calendars. By e-mail, the committee later decided to hold the meeting on Thursday and Friday, January 7-8, 2010, in Phoenix, Arizona.

Respectfully submitted,

Peter G. McCabe
Secretary

DRAFT MINUTES

CIVIL RULES ADVISORY COMMITTEE

APRIL 20-21, 2009

1 The Civil Rules Advisory Committee met in Chicago at the Northwestern Law School on
2 April 20 and 21, 2009. The meeting was attended by Judge Mark R. Kravitz, Chair; Judge Michael
3 M. Baylson; Judge David G. Campbell; Judge Steven M. Colloton; Professor Steven S. Gensler;
4 Daniel C. Girard, Esq.; Judge C. Christopher Hagy; Hon. Michael F. Hertz; Peter D. Keisler, Esq.;
5 Judge John G. Koeltl; Chief Justice Randall T. Shepard; Anton R. Valukas, Esq.; Chilton Davis
6 Varner, Esq.; and Judge Vaughn R. Walker. Professor Edward H. Cooper was present as Reporter,
7 and Professor Richard L. Marcus was present as Associate Reporter. Judge Lee H. Rosenthal, Chair,
8 and Judge Diane P. Wood represented the Standing Committee, along with Professor Daniel R.
9 Coquillette, Standing Committee Reporter. Judge Eugene R. Wedoff attended as liaison from the
10 Bankruptcy Rules Committee. Laura A. Briggs, Esq., was the court-clerk representative. Peter G.
11 McCabe, John K. Rabiej, James Ishida, and Jeffrey Barr represented the Administrative Office.
12 Thomas Willging represented the Federal Judicial Center. Ted Hirt, Esq., Department of Justice,
13 was present. Andrea Kuperman, Rules Clerk for Judge Rosenthal, attended. Observers included
14 Alfred W. Cortese, Jr., Esq.; Joseph Garrison, Esq. (National Employment Lawyers Association
15 liaison); Jeffrey Greenbaum, Esq. (ABA Litigation Section liaison); Chris Kitchel, Esq. (American
16 College of Trial Lawyers liaison); Ken Lazarus, Esq. (American Medical Association); Professor
17 James Pfander; Lorna Schofield, Esq. (ABA Litigation Section); and John Vale, Esq. (American
18 Association for Justice).

19 Judge Kravitz opened the meeting by expressing thanks to Anton Valukas for helping to
20 make the arrangements for this meeting and to Northwestern Law School, particularly Dean David
21 Van Zandt, for providing the facilities and hospitality for the meeting. He noted that the Law School
22 has made wonderful progress under Dean Van Zandt's leadership. He also noted that Professors
23 Redish and Pfander are among the eminent proceduralists here, and quoted from an article by
24 Professor Redish about the Rules Enabling Act. Dean Van Zandt welcomed the Committee, invited
25 Committee members to explore the school, and noted that the litigation program is one of the
26 sources of special pride at the Law School.

27 Judge Kravitz welcomed Acting Assistant Attorney General Michael Hertz, noting that
28 confirmation hearings for Tony West were to be held on this first day of the meeting.

29 Judge Kravitz also noted that this is the last official meeting for Judge Hagy, who is
30 completing his second term as a member. Judge Hagy has been an enthusiastic participant and
31 contributor whose thoughtful advice has made a difference at many points, most recently in his work
32 with the Rule 56 Subcommittee. Judge Rosenthal added that from his first meeting with the
33 Committee, Judge Hagy has provided helpful comments that are a fine blend of practical experience
34 with conceptual understanding. Judge Hagy responded that it has been an honor to work with the
35 Committee.

36 Judge Kravitz recalled that the January Standing Committee meeting had been described at
37 this Committee's February meeting in San Francisco. In March he and Judge Rosenthal addressed
38 the district-judge members of the Judicial Conference; the judges seemed relieved that the "point-
39 counterpoint" part of the current Rule 56 proposal is likely to be withdrawn from the
40 recommendation for adoption.

41 Judge Kravitz also noted that the Sunshine in Litigation Act has been introduced again in
42 Congress. The ABA has written a strong 3-page letter opposing enactment, urging that judges in
43 fact are acting appropriately in entering and supervising discovery protective orders. The Supreme
44 Court has adopted the Time Computation Rules, along with the other Civil Rules amendments
45 recommended by the Judicial Conference, and has sent them to Congress. Judge Rosenthal said that
46 legislation has been introduced to make the statutory changes recommended to complement the

47 Time Computation rules changes. The legislation seems to be making good progress. Congressional
48 staff are fully supportive.

49 *Minutes*

50 The Committee approved the draft Minutes for the November 2008 and February 2009
51 meetings, subject to correction of typographical and similar errors.

52 *Rule 56*

53 Judge Kravitz introduced Rule 56 by suggesting that this meeting may be the last session on
54 the current Rule 56 project. It has been a long and thorough inquiry. The issues have been clearly
55 focused with the help of extensive comments and testimony.

56 Judge Baylson began discussion by noting that the Rule 56 Subcommittee met twice by
57 conference call after the February Committee meeting. The Subcommittee reached
58 recommendations on some of the open issues and presented other issues for discussion without
59 recommendations.

60 Subdivision (a): "Fact": The recommendation to delete the "point-counterpoint" aspect of published
61 Rule 56 led to transferring part of proposed (c)(2)(A)(i) to subdivision (a) — "A party may move
62 for summary judgment, identifying each claim or defense — or the part of each claim or defense —
63 on which summary judgment is sought * * *." Subcommittee discussion raised the question whether
64 "fact" should be included in the list: "each claim, fact, or defense * * *." "Fact" is easily
65 encompassed as "part" of a claim or defense, and the Committee Note can comment on that. But
66 some Subcommittee members thought it desirable to call attention in rule text to the value of
67 summary judgment on even a single fact. A judge observed that it is not unusual to encounter a
68 motion for summary judgment on a single fact when the parties are unable to agree to it; the local
69 rules in the Central District of California provide for this. At the same time, several courts have
70 ruled that while present Rule 56(d) recognizes authority to establish a single fact in ruling on a
71 motion for summary judgment, it does not authorize a motion to establish a single fact. It may
72 suffice to say in the Note that a part of a claim or defense may be as simple as a single fact.

73 Further discussion observed that "fact" is used to signify different things. It can refer to a
74 historic fact. It also can refer to legal constructs — "negligence" and "intent" are often referred to
75 as questions of fact. So the question may be more elaborate — the question whether a defendant is
76 a statutory "employer," for example, may turn on determining who is an "employee" for purposes
77 of determining whether there are fewer than 15 employees.

78 An alternative was suggested — the Committee Note could refer to determination of an
79 "element" of a claim or defense, rather than a "fact." But again it may be asked what is an element?
80 Is it an element that the driver was negligent? That the defendant was the driver? That the vehicle
81 was driving 50 miles per hour in a 25-mile-per-hour zone, or only that it was driving faster than 25
82 miles per hour? Referring to an "element" may lead to conceptual wrangling that does nothing to
83 advance useful summary-judgment practice.

84 A different alternative was suggested — allow a motion on an "issue."

85 Arguments were advanced to delete "fact" both from rule text and from the Committee Note.
86 Present Rule 56(d), revised as proposed Rule 56(g), authorizes disposition of a single fact when the
87 court does not grant all the relief requested by the motion. But Rule 56 should not invite motions
88 to establish a single fact. If it does that, lawyers may feel compelled to make motions they would
89 not now make. It is better to avoid motions on "Claim 1 and the following 36 facts * * *." And if

90 "fact" is not in rule text, it may be better to leave it out of the Note for fear of encroaching on the
91 practice that a Note should not become an operational part of the rule.

92 A motion to insert "fact" in the rule text and Committee Note was defeated, 1 yes and all
93 others no.

94 Subdivision (a): "Shall": In February the Committee concluded that "shall" should be restored,
95 despite the general style convention prohibiting any use of this word. Multiple comments on the
96 published proposal, which carried forward with "should" from the Style Project, show unacceptable
97 risks that either of the recognized alternatives, "must" or "should," will cause a gradual shift of the
98 summary-judgment standard. Brief discussion reconfirmed by unanimous vote the recommendation
99 to restore "shall".

100 Subdivision (a): "Identifying each claim, defense, or the part of each claim or defense — on which
101 summary judgment is sought": An observer asked whether it was necessary to transfer this provision
102 into subdivision (a). It was drafted as part of the point-counterpoint procedure, to help focus the
103 motion. If point-counterpoint procedure is abandoned, as now proposed, it may invite more partial
104 motions. Perhaps the rule should fall back on the form as published: "A party may move for
105 summary judgment on all or part of a claim or defense." A motion was made to take this step.

106 Referring to part of a claim or defense was defended on the ground that in practice there are
107 many motions for partial summary judgment. It is better to provide clear authority in the rule text.
108 To be sure, Rule 7(b)(1)(B) requires that any motion must "state with particularity the grounds for
109 seeking the order." Added language in Rule 56 could be seen as redundant. But the emphasis is
110 different, and the reminder may be useful. If not here, where else would the incentive to brevity
111 appear?

112 Again it was suggested that the rule text could be shortened and supplemented by the
113 Committee Note, and again it was responded that anything that is important should be in the rule
114 text.

115 A judge observed that with some motions it is difficult to know what the movant is
116 requesting. "It will be useful to have something to point to in the Rule" when directing that the
117 motion be presented more clearly. Another judge agreed that such motions do appear. The direction
118 to correct the motion is to make it more specific.

119 An alternative was proposed: "identifying the basis on which summary judgment is sought."
120 This alternative was resisted on the ground that "basis" is unclear, and can easily invite the movant
121 to make its arguments as part of the motion.

122 Another alternative was proposed: rearrange the same words, to read "A party may move for
123 summary judgment on all or part of a claim or defense, identifying each claim or defense — or the
124 part of each claim or defense — on which summary judgment is sought."

125 The fear was again expressed that the focus on part of a claim or defense will invite more
126 motions on subparts of parts. A judge responded that summary judgments are sought so frequently
127 that it does not seem likely that a revised rule will lead to still more motions. Another judge offered
128 employment discrimination cases as an example. The employer, as defendant, "usually moves on
129 everything. Does it have to identify each piece"? Yet another judge observed that it is more likely
130 to be a plaintiff who moves for summary judgment on only part of a claim. Two other judges agreed
131 that a defendant is likely to move both for summary judgment on the entire action and also on
132 separate parts. The employer in a discrimination case, for example, is likely to argue that the

133 plaintiff has failed to make a prima facie case, that the employer has articulated nondiscriminatory
134 grounds for the challenged action, and that the plaintiff has not shown pretext.

135 The subcommittee proposal was again supported on the ground that it avoids the motion that
136 "throws it all up against the wall." The proposal requires the movant to identify clearly the basis
137 for the motion.

138 A motion to delete the reference to part of the claim or defense failed, 3 yes and 9 no. The
139 text will remain as proposed, minus "fact."

140 Subdivision (a): "Shows": The Subcommittee proposes that "show" be restored to the rule text. The
141 proposal focuses on the movant: the court shall grant summary judgment "if the movant shows"
142 there is no genuine dispute. Present Rule 56 directs that summary judgment be rendered if the
143 summary-judgment materials "show" that there is no genuine issue. "Show" has been in Rule 56
144 from the beginning. It helps to make clear that the movant has a summary-judgment burden. The
145 Celotex opinion requires even a movant who does not have the burden of production at trial to
146 "show" — that is, to point out — that there is no genuine issue.

147 It was pointed out that the emphasis in current Rule 56 is on what "the pleadings, the
148 discovery and disclosure materials on file, and any affidavits show." That may seem at odds with
149 the decisions ruling, as proposed subdivision (c)(3) provides, that the court need consider only
150 materials called to its attention. It helps to focus on the showing made by the movant.

151 The question whether anything would be lost by deleting "the movant shows" was answered
152 by urging that this part of the Celotex opinion has acquired such meaning that it should be carried
153 forward in rule text.

154 It was agreed to retain "the movant shows." It is useful as a reminder of the movant's
155 burden.

156 Subdivision (a): Committee Note: Discussion turned to the draft Committee Note. Professor
157 Coquillette sounded a familiar theme with a reminder of the constraints imposed by the rule that a
158 Committee Note cannot be changed unless the rule is amended. It is important to avoid observations
159 that may become obsolete before there is any justification for changing the rule. One particular
160 manifestation of this constraint arises whenever specific cases are cited. Using cases as illustrations
161 is risky enough, but at times may be a permissible way of explaining a point. Using cases as
162 authority is riskier still. They may be modified or overruled. So the Note to subdivision (a) refers
163 to the three 1986 Supreme Court decisions as the source of contemporary summary-judgment
164 standards. That is accurate so long as "contemporary" is properly understood — it refers to the time
165 of the Committee Note. But if the Supreme Court expresses different approaches in later decisions,
166 there may be some confusion. The Note also quotes from two Supreme Court decisions in
167 explaining the change from "should" to "shall." The very uncertainty of the debates about discretion
168 to deny summary judgment when there is no apparent genuine dispute of material fact suggests that
169 these opinions are likely to change.

170 The value of quoting the decisions on discretion to deny summary judgment was explained
171 by pointing to the Committee Note on the Style Project decision to substitute "should" for "shall."
172 The Note cited the Kennedy case that is cited here in the quotation from Anderson v. Liberty Lobby.
173 It is important to provide a full explanation of the recommendation to restore "shall." Further
174 support was expressed for this view, at the same time as further doubts were expressed about citing
175 the 1986 cases as the source of contemporary summary-judgment standards. But there also was

176 support for retaining the citations as the most important touchstone of current practice. "The most
177 important audience is today."

178 A motion to delete citations of the three 1986 decisions as the source of contemporary
179 standards passed, 7 yes and 5 no. The quotations bearing on discretion will be retained.

180 On a finer point, it was thought awkward to refer to the Supreme Court decisions that seem
181 to touch on discretion — or perhaps to deny discretion — as "ambiguous and conflicting." One
182 alternative might be "apparently ambiguous." Further discussion led to deletion of "ambiguous and
183 conflicting." The Note will explain that restoration of "shall" is suitable "in light of the case law
184 on whether the district court has discretion * * *."

185 A final suggestion was to delete the part of the first sentence of the Committee Note stating
186 that Rule 56 is revised "to make the procedures more consistent with those already used in many
187 courts." The suggestion was resisted on the ground that the current text of Rule 56 "little resembles
188 practice." The proposal does improve the procedures, but it is even more about making them
189 consistent with common and better practices.

190 Subdivision (b): Time to Respond and Reply: As published, subdivision (b) set times to move, to
191 respond, and to reply. These times were an integral part of the point-counterpoint procedure in
192 proposed subdivision (c), which specified the separate steps of motion, response, and reply. As the
193 Time Project moved toward completion the Committee decided to take a chance on eventual
194 adoption of the point-counterpoint procedure by incorporating parallel time provisions in Rule 56.
195 If Congress does not act, on December 1, 2009, Rule 56 will include the times for response and
196 reply. The question is whether it is better to delete these times if, as proposed, the point-
197 counterpoint procedure is deleted from the national rule.

198 Deletion of national rule provisions on response and reply may alleviate the possibility of
199 confusion arising from setting times for steps that are not themselves specified in the rule. Although
200 subdivision (b) allows change by local rule, there still may be some interference with various
201 methods of presenting the motion. A court may, for example, direct simultaneous presentation of
202 motion and response in a form that facilitates identification of the fact contentions and
203 corresponding record materials. The rules do not generally reach this level of detail — times are set
204 for some motions, though not others, and times for response and briefing are left for other devices.
205 Deletion also will avoid the difficult question whether provision should be made for surreplies.

206 Deletion of these provisions, however, may be strategically unwise. There are constant
207 complaints that the rules are changed too often. Acting one year later to retract amendments the bar
208 has barely had time to master will add support for these complaints. The recommendation to restore
209 "shall" in subdivision (a), shortly after the Style Project adopted "should," will add to a possible
210 sense the Committee is vacillating.

211 Several reasons were offered to show that retaining the times for response and reply will do
212 little harm. The proposal allows local rules to set different times. There are lots of local rules; if
213 the national-rule periods are incompatible with local summary-judgment practice, we can count on
214 local rules committees to set appropriate alternative periods. Case-specific orders also will be used
215 when needed. The times proposed in subdivision (b), moreover, are consistent with common local-
216 rule periods. And reactions to the rule as published did not reflect any significant anguish about
217 setting times for response and reply — most of the concerns that were expressed went to the time
218 for making the motion.

219 Discussion continued with the Subcommittee's suggestion that the Committee Note can
220 explain the reasons for the Time Project change and for retracting it. At the same time, there may
221 be little harm done by setting a 21-day period to respond. The time to "reply" may generate more
222 confusion, particularly in districts that do not follow a point-counterpoint procedure. In those
223 districts, this might seem to be a time for reply briefs.

224 The problem of surreplies was brought back. Many of the plaintiff-side lawyers who
225 commented argued forcefully that they should have a right of surreply. They note that at trial the
226 plaintiff has the right to open and close. When a defendant moves for summary judgment, it is
227 unfair to reverse the order so that the defendant gets to open and then to close by a reply that admits
228 of no surreply. Some of the comments reflected concern that defendants at times deliberately make
229 vague motions that elicit a clear response, only to follow up with a reply that for the first time
230 presents new facts and arguments that the plaintiff cannot respond to. Early drafts of the present
231 proposal included a time to surreply. The provision was deleted, however, out of concern that it
232 would invite undesirable proliferation of papers in cases that do not need so many steps.

233 One possible approach would be to provide that the time for steps after the motion must be
234 set by the court. But that would impose a specific scheduling order obligation for every case. Times
235 for motions are set in many courts by local rule; it would be undesirable to require case-specific
236 orders. One judge responded that his court has a local rule that sets times, but that he always
237 requires the parties to appear before a summary-judgment motion is made, and sets times for the
238 steps "irrespective of the local rule."

239 Support was offered for deleting the times for response and reply. In part, it was urged that
240 if there is a reply, the Committee must determine whether there should be a general provision for
241 surreplies. Further discussion led to an apparent consensus that it is better to delete the proposed
242 times for response and reply.

243 Weighing the values of adopting the better rule against the perception that the Committee
244 has fallen down in this particular recommendation is important. The balance seems clear to the
245 Committee. Part of the gain in simplicity is avoiding the need to confront the surreply question. A
246 rule that mandates a surreply opportunity is likely to elicit strong protests. The simple version
247 avoids that. And the perception of vacillating may not be much of a problem. The proposal
248 completely rewrites Rule 56. This change is one among many, tracing back to different times in the
249 life history of Rule 56. The Time Project, moreover, required coordination of all five advisory
250 committees. It could not be held back to match the uncertain but inevitably slower progress of the
251 Rule 56 proposal. It made sense to make the best prediction possible as part of the Time Project,
252 but to leave the way open to draft the best possible Rule 56. It took 40 years to consider serious
253 revision of Rule 56. It may be many years before it is again taken up. Memory of the short-lived
254 provisions added by the Time Project will fade away quickly. It is better to draft for the long run.

255 The Committee was reminded that the Department of Justice is concerned about losing the
256 specific part of published (b)(2) that set the time for response at "21 days after the motion is served
257 or that party's responsive pleading is due, whichever is later." The United States commonly has 60
258 days to answer. Absent a specific provision deferring the time to respond to a summary-judgment
259 motion, the summary-judgment response may be due well ahead of the answer. The Committee
260 Note might help, and most judges understand the problem, but the explicit rule text is desirable.

261 A motion to retain the response and reply time provisions in Rule 56(b) as publish failed, 1
262 yes and 10 no. The tag line will be shortened: "Time to File a Motion~~, Response, and Reply~~."

263 Subdivision (b): Committee Note: The draft Committee Note on subdivision (b) includes in brackets
264 two sentences designed to explain the brief appearance and subsequent removal of provisions
265 governing the time for response and reply. The first suggestion was that there should be some
266 explanation of "the Time Project" if these sentences are retained. But it was suggested that the
267 sentences be deleted. All agreed. The explanation for the change can be set out in the Report to the
268 Standing Committee.

269 Subdivision (c)(1): The decision at the February meeting to omit the point-counterpoint provisions
270 in Rule 56(c)(1) and (2) as published leads to reorganizing the paragraphs in subdivision (c). The
271 reorganization begins by bringing the "pinpoint citation" requirements published as (c)(4) up to
272 become (c)(1). There was a broad consensus to carry this provision forward.

273 The Subcommittee divided on a suggestion that greater clarity would be achieved by adding
274 a few words: "An assertion in supporting or opposing a motion * * * must be supported by * * *."
275 Others thought these words add little, unless it is to generate some confusion whether the support
276 or opposition is to be made part of the motion or part of a brief. Some districts now require that
277 citations to the record be made as part of a statement of undisputed facts. Other districts require that
278 citations be in the brief. The requirement might be made part of the motion itself. "We do not want
279 to preempt local practice."

280 This question relates, if only as a matter of drafting, to a second suggestion that the language
281 should be made active. The passive voice is permitted when it works better, but the active voice can
282 emphasize that parties' responsibilities.

283 A motion to substitute an alternative suggested in the agenda materials passed without
284 opposition: "A party asserting that a fact cannot be genuinely disputed or is genuinely disputed must
285 support the assertion by: * * *."

286 An observer suggested that it would be helpful to add a requirement of admissibility to the
287 citation requirement, something like; "citation to particular parts of the materials in the record that
288 would be admissible in evidence." This is better than the negative in proposed (c)(2), allowing an
289 opposing party to challenge the admissibility of supporting or disputing evidence. A judge
290 responded that it is better to wait for objections, just as at trial. The parties may have good reasons
291 for not raising potential objections. Another judge added that some readers might be misled into
292 confusion about the role of affidavits, declarations, and depositions in summary-judgment practice.

293 Subdivision (c)(2): Admissibility Challenges: All agreed that there is no controversy about the
294 revised form of (c)(2), recognizing an assertion that the material cited to support or dispute a fact
295 cannot be presented in a form that would be admissible in evidence.

296 Subdivision (c)(3): Materials not Cited: The provision published as subdivision (c)(4)(B) has
297 become (c)(3). It provides that the court need consider only materials called to its attention under
298 Rule 56(c)(1). It further provides that the court may consider other materials in the record. The
299 published version required that the court give notice under Rule 56(f) before granting a motion on
300 the basis of record materials not cited by the parties, but did not require notice before denying a
301 motion on this basis. The American Bar Association recommended that notice be required before
302 granting a motion on this basis as well as before denying a motion. Discussion of this
303 recommendation led the Subcommittee to conclude that notice should not be required either for a
304 denial or for a grant. It was recognized that a court may err by relying on uncited materials while
305 failing to find still other materials that dispel the seeming effect of the materials it has found. But
306 there are common situations in which the court should not feel required to give notice. A party may

307 file an entire deposition transcript, for example, while citing to only part of it. The court should be
308 free to read the entire transcript and to evaluate the parts cited in light of the whole.

309 It was noted that proposed Rule 56(f) requires notice and a reasonable time to respond before
310 granting a motion on grounds not raised by the parties. Notice is not required only if the court relies
311 on uncited materials in the record to act on a ground that has been raised by the parties.

312 The Committee agreed to drop any notice requirement from subdivision (c)(3).

313 Subdivision (c)(4): Positions for Purposes of Motion Only: As published, proposed subdivision
314 (c)(4) provided that "A party may accept or dispute a fact either generally or for purposes of the
315 motion only." Thoughtful comments suggested that there should be a "default" provision that
316 governs when a party fails to state whether its position is general or is limited to purposes of the
317 motion. The Subcommittee initially concluded that the rule should provide that the position is taken
318 for purposes of the motion only "unless the party expressly states that it is made generally." But
319 doubts were expressed. One question was whether it would often happen that a party would
320 unilaterally agree to take a position for all purposes in the action. The first question put for
321 discussion was whether paragraph (4) should be omitted entirely.

322 The first comment was that there should be some provision recognizing the right to take a
323 position for purposes of the motion only. Litigants fear that "it will come back to bite me." The rule
324 provision provides reassurance that a limitation on an acceptance is effective. "It's a comfort
325 provision." The reassurance also is valuable to protect against a ruling that taking a position for
326 purposes of the motion only authorizes the court to enter a subdivision (g) order that the fact is
327 established in the action.

328 The rejoinder was that elimination of the point-counterpoint provision removes the need for
329 an express limited-position provision. The original concern was that a party faced with a long
330 statement of undisputed facts may believe that many of the facts are not material, and find it better
331 to accept them for purposes of the motion than to face the time-consuming and expensive task of
332 offering a full pinpoint-citation response. The provision, moreover, will encourage parties to take
333 positions in motion practice that are fundamentally different from the positions that will be taken
334 at trial. A limited acceptance often will be followed by hot dispute at trial.

335 Elimination of this provision was further supported by noting that it is not necessary to
336 enable a party to both deny an asserted fact and to argue that it is not material. The problem of
337 overlong statements of facts in point-counterpoint practice has been described by many plaintiff-side
338 lawyers in employment cases. The same lawyers said that they would not accept a fact for purposes
339 of the motion only, that they cannot seem to accept a fact that they may want to dispute. Another
340 judge seconded this observation — a party can always respond "I deny, but even if true the fact
341 makes no difference." The rule is cleaner without this provision.

342 Without a provision in rule text, it remains fair to recognize the limited position practice in
343 the Committee Note to subdivision (g). The Note can say that accepting a fact for purposes of the
344 motion only does not authorize the court, after refusing to grant all the relief requested by the
345 motion, to order that the fact is established in the case.

346 A motion to delete proposed subdivision (c)(4) passed, 10 yes and 1 no. A later motion to
347 reconsider failed for lack of any support.

348 Subdivision (c)(5): Affidavits or Declarations: This provision is drawn from present Rule 56(e)(1).
349 It has drawn no substantial criticism. It will be renumbered as subdivision (c)(4) to reflect deletion
350 of what had become (c)(4).

351 Subdivision (c) Committee Note: The Subcommittee brought up for discussion a tentative new
352 paragraph in the Committee Note. This paragraph observes that the pinpoint citations required by
353 subdivision (c)(1) can be provided by various methods. It may be asked whether any purpose is
354 served by reminding litigants and courts of this freedom. It was generally agreed that the reminder
355 serves a purpose. The alternatives may not be apparent to those who are familiar with only one
356 practice. They should, however, be framed as examples: "Different courts and judges have adopted
357 different procedures. Examples include providing citations in the motion, in a separate statement
358 of facts, in the body of a brief or memorandum, or in a separate statement of facts included in a brief
359 or memorandum." The proviso that the court must give clear notice of its expectations was deleted
360 — it is no more than a nagging reminder of the requirements of Rule 83(b).

361 The next paragraph of the Note recognizes that a court may require preparation of an
362 appendix of the materials cited on the motion, and may require citation to the appendix rather than
363 other parts of the record. This paragraph will be integrated with the paragraph that gives other
364 examples of the methods of citation. The ordering of these two paragraphs will be considered
365 further.

366 The paragraph of the Note reflecting the limited-position provision of proposed subdivision
367 (c)(4) will be deleted, reflecting the decision to delete (c)(4).

368 Subdivision (d): "When Facts are Unavailable": Proposed subdivision (d) carries forward present
369 Rule 56(f) with little change. It has drawn few comments and no changes are recommended.

370 Some of the comments urged that the rule should permit an alternative response: "summary
371 judgment should be denied on the present record, but if the court concludes that summary judgment
372 should be granted I should be allowed time for additional investigation and discovery." This
373 provision would respond to the dilemma faced by a party who believes that it can defeat the motion
374 without further investigation or discovery, but who also believes that it can find facts that clearly
375 defeat the motion if need be. The difficulty, however, is that this alternative response essentially
376 asks the court both to decide the motion and then — if the decision is to grant the motion — to undo
377 its own decision by allowing more time, a further response, and then reconsideration. As one
378 comment put it, "No one wants seriatim Rule 56 motions." The alternative-response suggestion was
379 rejected.

380 Subdivision (d): Committee Note: The Note includes a bit of practice advice — a party seeking time
381 to obtain affidavits or declarations or to take discovery may seek an order deferring the time to
382 respond to the summary-judgment motion. This brief sentence presents the common question
383 whether a Committee Note should include practice advice. The advice was defended on the ground
384 that it serves as a gentle reminder to the court that a party often should be spared the burden of
385 preparing a response while the time to respond winds down and it remains uncertain whether
386 additional time will be granted. But it was questioned by asking whether it is possible to ask for
387 additional time for investigation or discovery without also at least implicitly asking for additional
388 time to respond. This question was answered by judges who agreed that a good lawyer will
389 recognize the need to ask for more time to respond, but too many lawyers seem to assume that there
390 is an automatic extension. The advice is right, and will be helpful. It will remain in the Note.

391 Subdivision (e): Failing to Properly Support or Properly Respond: Subdivision (e) began as part of
392 the point-counterpoint proposal. It recognized that one of the proper responses to a failure to

393 comply with the requirements of pinpoint response or pinpoint reply can be that the court deems a
394 fact admitted. It generated little comment, and has been carried forward in part to ensure that local
395 rules providing for "deemed admission" — rendered as "consider the fact undisputed for purposes
396 of the motion" — are not invalid.

397 Deletion of the point-counterpoint provision has had the effect of somewhat broadening the
398 reach of subdivision (e). It now applies when a party "fails to support an assertion of fact or fails
399 to properly address another party's assertion of fact." Failure to support an assertion can occur in
400 a motion as well as in later stages. The failure in a motion will not support an order granting
401 summary judgment, nor will it support an order considering the fact undisputed as asserted by the
402 motion. But it will support an order affording an opportunity to correct the deficiency or another
403 appropriate order.

404 The "consider undisputed" provision is permissive; it says only that the court "may" consider
405 a fact undisputed for want of a proper response.

406 The initial rule text will be rearranged to read: "If a party fails to support an assertion of fact
407 or fails to properly address another party's assertion of fact as required by Rule 56(c)(1) the court
408 may: * * *."

409 The tag line will be revised to reflect the rule text: "Failing to Properly Support or Respond."

410 Rule 56(e) Committee Note: The first paragraph of the proposed Committee Note includes a
411 statement that summary judgment cannot be granted by default. It was observed that the balance
412 of the Note makes the meaning clear, but agreed that it would help to begin: "As explained below,
413 summary judgment cannot be granted by default." Other minor changes also were made.

414 Rule 56(f): Judgment Independent of Motion: Rule 56(f) reflects decisional law recognizing the
415 court's authority to grant summary judgment without a motion or outside a motion. It drew few
416 comments.

417 Subdivision (f)(2) recognizes that a court may deny a motion on grounds not raised by a
418 party. That seems fine. But why require that the court give notice and a reasonable time to respond?
419 Why not limit this paragraph to granting the motion?

420 The first response was that it is useful to give notice because the parties often understand the
421 record better than the court does. Materials that seem to the court to require denial of the motion
422 may not mean what they seem to mean.

423 But it was asked what effect this provision has on denying a motion for procedural reasons.
424 Suppose the motion is filed after the deadline set by a scheduling order. The court should be able
425 to deny the motion without having to give notice. Or the motion may fail to comply with Rule 56(c).
426 Or the motion may be ridiculously overlong — the court should be able to deny it with directions
427 to submit a new and proper motion. And to whatever extent there is discretion to deny a motion
428 despite the apparent lack of any genuinely disputed fact, why should notice be required? How, in
429 short, should case-management problems be reflected here?

430 It was suggested that the rule might be limited to denying a motion "on the merits." But it
431 was asked whether it is denial on the merits when the court concludes that information supporting
432 the motion would not be admissible in evidence?

433 One possibility is to leave the rule text as it is, addressing case-management authority in the
434 Committee Note. The Note might say that subdivision (f)(2) does not limit authority to enforce Rule
435 56 procedures and court orders.

436 Another possibility would be to delete subdivision (f). It can be seen as advisory in the sense
437 that courts do the things it describes and will continue to do them whether or not the rule describes
438 them. But it is helpful to give notice of these practices — lawyers may not be aware of them, and
439 may frame motions and responses differently when they are aware.

440 It was suggested that "deny" be omitted from (f)(2). The court should not be required to give
441 notice before denying, whether denial rests on procedural failure or on failure to carry the summary-
442 judgment burden.

443 Examples were given to illustrate the importance of notice before granting a motion on
444 grounds not stated. One judge granted a motion on limitations grounds, only to be informed of facts
445 that defeated the limitations defense. A parallel might arise when the judge suspects there may be
446 grounds for equitable tolling and denies a motion despite an apparently good limitations defense.

447 Another perspective was offered. There are many pro se cases in which the court should be
448 able to deny a clearly inappropriate motion for summary judgment without having to give notice.

449 It was suggested that if "deny" is deleted, the Committee Note might include a reminder that
450 the court is of course free to give notice before denying the motion.

451 An observer urged that lawyers want the rule to be balanced as between grant and denial.
452 They fear that denial is the easy way out for the judge. Deletion of "deny" may seem to tip the scale
453 in favor of denial. Another observer suggested that "deny" should be kept "for transparency." A
454 committee member responded that "this is not a problem of balance." The case is not over — the
455 case continues after denial. "Deny" should be deleted.

456 Another alternative was suggested: the rule text might distinguish the grounds of denial,
457 omitting any notice requirement if denial rests on failure to satisfy the requirements of Rule 56, a
458 local rule, or a court order. On the other hand, the movant may benefit from notice no matter what
459 the reason for denial. The motion is the chance to avoid trial, or to shift the terms of settlement. It
460 is important. A committee member responded that "this is where a motion to reconsider makes
461 sense." Another noted that "we cannot legislate against arbitrary action." Two others suggested that
462 the main concern is with granting a motion on grounds not raised by the parties — the grant is more
463 serious. Notice protects against the risks of acting on a ground that a nonmovant can show is wrong.

464 A motion to delete "deny" from subdivision (f)(2) passed, 7 yes and 5 no.

465 Subdivision (f) Note: The Note will be amended to delete the reference to "deny" in subdivision
466 (f)(2).

467 The earlier suggestion that the Note might include a reminder that if it wishes to do so the
468 court can give notice before denying a motion on grounds not raised by the parties was renewed.
469 The suggestion was rejected as providing gratuitous advice. Courts are well aware of the authority
470 to give notice before acting.

471 Subdivision (g): Order Fact as Established: The tag line will be changed to better reflect the rule
472 text: "Failing to Grant all Relief." It was noted that not granting all relief includes complete denial.

473 It was observed that the final line of subdivision (g) "is clunky." It might be revised by
474 making two sentences. " * * * stating any material fact * * * that is not genuinely in dispute. ~~and~~

475 ~~treating the fact~~ A fact so stated must be treated as established in the case." A motion to make this
476 change failed, 3 yes and 9 no.

477 Subdivision (g) Note: The decision to delete subdivision (c)(4) requires revision of the draft
478 Committee Note to remove references to (c)(4). Judge Baylson proposed substitution of these
479 sentences: "The court must take care that this determination does not interfere with a party's ability
480 to accept a fact for purposes of the motion only. A nonmovant, for example, may feel confident that
481 a genuine dispute as to one or a few facts will defeat the motion, and prefer to avoid the cost of
482 detailed response to all facts stated by the movant. This position should be available without
483 running the risk that the fact will be taken as established under subdivision (g) or otherwise found
484 to have been accepted for other purposes."

485 Judge Baylson explained that the Note would ensure that it is safe to accept a fact for
486 purposes of the motion only. It will work in the point-counterpoint setting as well as in others.

487 Discussion returned to deleted subdivision (c)(4). The intent of this Note is to make clear
488 that a subdivision (g) order cannot be based on acceptance of a fact only for purposes of the motion.
489 Why, then, not retain (c)(4)? A response was that as drafted, (c)(4) has not said whether acceptance
490 for purposes of the motion only includes acceptance for purposes of a subdivision (g) order.

491 It was noted that subdivision (c)(1)(A) specifically notes the possibility of stipulations made
492 for purposes of the motion only, and includes "admissions." It might be possible to find two
493 meanings in "admissions" — not only a Rule 36 admission, but less formal admissions that could
494 be limited to purposes of the motion. But it was thought better to read "admissions" in (c)(1)(A) as
495 referring only to Rule 36 admissions. Parties do stipulate facts for purposes of the motion,
496 particularly when the real dispute goes to the law rather than the facts.

497 The question whether the reassurance provided by the Note is useful was renewed. Would
498 a lawyer ever turn around after denial of the motion and argue that an adversary's acceptance for
499 purposes of the motion was an admission that supports a subdivision (g) order that the fact is
500 established in the case? Would a court accept the argument?

501 The motion to add the language quoted above passed, 10 yes and 2 no.

502 Consideration will be given to adding a sentence in the Note stating that denial of a motion
503 is included in "does not grant all the relief requested."

504 Subdivision (h): Sanctions: Discussion began with an observation that many sanctions rules include
505 "or other appropriate sanction." Adding those words to subdivision (h) "could increase options."
506 This suggestion was elaborated by noting that it is useful to provide a reminder that other sanctions
507 may be considered in lieu of contempt.

508 The first response was that subdivision (h) is present subdivision (g), changed only to reduce
509 from "must" to "may," and to require notice and a reasonable time to respond. The next response
510 was that Rule 11 is available to support sanctions for inappropriate Rule 56 practice.

511 Adding a reference to other sanctions won further support. Contempt is an extraordinary
512 sanction. The FJC study of present Rule 56(g) shows that contempt is almost never invoked. This
513 observation was turned back by a suggestion that adding a reference to alternative sanctions will
514 support arguments that the change shows an intent to further diminish resort to contempt sanctions.

515 A motion to add "or subject to other appropriate sanctions" at the end of subdivision (h)
516 passed, 11 yes and 1 no.

517 It was suggested that authorizing other sanctions makes it possible to delete the reference to
518 expenses and attorney fees. No action was taken on this suggestion.

519 Subdivision (h) Committee Note: The Note will be expanded to reflect that three changes have been
520 made from present Rule 56(g) and to refer to the new "other appropriate sanctions" language.

521 Rule 56: Republication Not Needed: Judge Kravitz raised the question whether the changes made
522 since publication warrant republication of the revised proposal for further comment. The revised
523 proposal looks quite different. It has been stripped down. But the request for comments squarely
524 invited comments on all of the issues that have proved important. The most significant changes
525 involve deletion of the point-counterpoint provisions and restoration of "shall" to displace "should"
526 grant in the Style Project version of what is to become Rule 56(a). Those questions were developed
527 at length in the request for comments.

528 Judge Baylson thought that republication is not necessary. All the concepts in the Rule as
529 revised were in the published rule.

530 This theme was developed further. The request for comments was more detailed than past
531 requests, including requests on complex and controversial proposals. This elaboration responded
532 to many questions raised by the Standing Committee. It worked well. The testimony and comments
533 were clearly focused, and addressed all of the central issues. This model is one that will be emulated
534 in future requests for comment on important and complex proposals.

535 A committee member suggested that it is "hard to imagine anything new." Comments in
536 response to republication could only rehash the same themes that have been thoroughly developed
537 in the original comment period.

538 It was noted that the only issue that might be thought to warrant republication is withdrawal
539 of the mandate for point-counterpoint procedure. But courts that want to use this procedure remain
540 free to adopt it, as many have. What is lost is standardization, pursuit of nationwide uniformity. But
541 this goal was abandoned in large measure because many people, and particularly many courts, want
542 to shape presentation of Rule 56 motions in many different ways. And uniformity did not seem to
543 be as important as the Committee had thought it would be. Republication is not required on this
544 score.

545 Discussion of republication concluded with the observations that the Committees had given
546 sufficient notice of all the features that will go forward in the revised proposal, and that the
547 comments and testimony have provided sufficient guidance on what should be done. It would be
548 different if the Committee were recommending provisions that were not published. The path here,
549 however, has been away from a more prescriptive rule and toward a less prescriptive rule. That is
550 OK.

551 The Committee agreed unanimously that republication is not needed.

552 Rule 56: Recommendation to Adopt: The Committee voted unanimously to recommend that the
553 Standing Committee approve the revised Rule 56 proposal for adoption by the Judicial Conference
554 and the Supreme Court.

555 Judge Kravitz concluded the discussion of Rule 56 by praising the work as deliberative in
556 the highest traditions of the rulemaking process. The Committee listened to the comments and
557 testimony. The comments and testimony have had a significant impact on the proposal that is going
558 forward. Additional help was provided by Andrea Kuperman's research and by the Federal Judicial
559 Center's research. Judge Baylson provided outstanding leadership of the Rule 56 Subcommittee.

560 Judge Baylson noted that appreciation is due Judge Rosenthal for her support and guidance from the
561 beginning of the project.

562 **Rule 26: Expert Witnesses**

563 Judge Campbell launched the discussion of the expert-witness discovery proposals by
564 observing that a number of issues were raised by the public comments and testimony, even though
565 the total volume of comments and testimony was less than for Rule 56.

566 At the February meeting after the San Francisco hearing the Committee decided that the Rule
567 26 proposals should carry forward, subject to any improvements that may be found in light of the
568 comments and testimony. The Subcommittee has not reconsidered that decision. Among the issues
569 that remain to be explored, four are most prominent.

570 First is whether work-product protection should be extended to communications between an
571 attorney and an employee expert trial witness who is not required to give a disclosure report under
572 Rule 26(a)(2)(B). The Subcommittee decided not to extend the protection, but the question drew
573 many comments and deserves the Committee's attention. Practical problems in litigation prompted
574 the proposal to protect communications with an expert who is required to provide a Rule 26(a)(2)(B)
575 disclosure report because the expert is specially retained or employed to give testimony in the case
576 or is one whose duties as a party's employee regularly involve giving expert testimony. Lawyers
577 and experts avoid creating discoverable drafts and communications. Lawyers retain second sets of
578 "consulting" experts who are nearly immune from discovery. Other practical problems follow. The
579 proposal has been crafted with an eye on the New Jersey experience, which has been a real help.
580 The Committee had not talked about in-house experts, and was not informed about possible
581 inefficiencies arising from discovery of communications with them. And there are non-employee
582 experts that are not required to provide (a)(2)(B) reports. The Committee did not want to protect
583 communications by one party's lawyer with treating physicians, accident investigators, and the like.
584 An employee expert, moreover, may also be an important fact witness. Drawing suitable lines to
585 achieve an appropriate level of protection for communications with employee experts could prove
586 difficult. Finally, it seems likely that much of the interest in shielding communications with
587 employee experts arises from concern with the limits placed on attorney-client privilege by states
588 that employ a "control group" test to identify who is a client. It is not desirable to create even an
589 appearance of attempting to expand a privilege rule by way of a civil rule.

590 Second is how to express the intention to protect communications between a lawyer and the
591 expert trial witness's staff. The Subcommittee agreed that it suffices to provide a reminder in the
592 Committee Note.

593 Third is the problem arising from the published proposal that extends work-product
594 protection to drafts of any report or disclosure required by Rule 26(a)(2) "regardless of the form of
595 the draft." The Committee Note explained that this language included oral, written, electronic, and
596 other forms. But referring to oral drafts may create a problem — a party might seek to defeat
597 discovery of the attorney-expert communications that are not protected by proposed Rule
598 26(b)(4)(C) by arguing that the communications are oral drafts of the expert's report. The
599 Subcommittee proposed revising the rule text so that it protects only "written or electronic drafts."

600 Fourth is the next-to-last paragraph of the proposed Committee Note. This paragraph
601 recognizes that the proposed rule focuses only on discovery, but expresses an expectation "that the
602 same limitations will ordinarily be honored at trial." This paragraph drew protests that the
603 Committee Note was being used to accomplish changes in the Rules of Evidence, and perhaps even
604 to test the lines that require special procedures to adopt a rule that creates, abolishes, or modifies an

605 evidentiary privilege. The Subcommittee recommends that this paragraph be deleted. It is hoped,
606 as many comments have suggested, that protection in discovery will have the desired practical effect
607 of ending the cumbersome practices that now effectively defeat any effective discovery of draft
608 reports and attorney-expert communications.

609 Professor Marcus noted that the proposals drew broad support from many professional
610 organizations, representing lawyers on all sides of practice. What remains for debate is more a
611 matter of detailed implementation than broad concept.

612 Subdivision (a)(2)(C): Disclosure of "Non-Report" Expert: Some comments expressed a fear that
613 the proposed disclosure summarizing the facts and opinions that a "non-report" expert is expected
614 to testify to will override otherwise applicable attorney-client privilege and work product. That
615 concern seems rooted in the effects of adding the (a)(2)(B) report in 1993, but the situation is quite
616 different. The 1993 Committee Note seemed to expressly provide that privilege and other
617 protections do not apply to information considered by an expert required to provide an (a)(2)(B)
618 report. There is nothing like that in the present Committee Note. For that matter, the purpose of
619 adding proposed (b)(4)(B) and (C), and changing to "facts or data" in (a)(2)(B)(ii), is to supersede
620 the effects of the 1993 Note. There is no basis for the fear of waiver. This explanation was accepted
621 without further discussion.

622 Subdivision (a)(2)(C): Committee Note: The Note to (a)(2)(C) has been changed in a couple of
623 respects. It emphasizes that the disclosure is to include a summary of the facts supporting the
624 expert's opinions. This emphasis responds to fears that things left out of the disclosure might be
625 excluded at trial. A lawyer preparing the disclosure may find that an expert such as a treating
626 physician or accident investigator will not cooperate fully in preparing the disclosure. It seems
627 useful to emphasize that only a summary is required. And separate new language is added to
628 emphasize that the disclosure obligation does not include facts unrelated to the expert opinion.

629 Subdivision (b)(4)(B): Draft Reports or Disclosures — Form: Rule 26(b)(4)(B) invokes work-
630 product protection for drafts of expert reports required by Rule 26(b)(2)(B) and expert disclosures
631 required by Rule 26(b)(2)(C). The Subcommittee recommends that the description of protected
632 drafts be changed from "drafts * * * regardless of the form of the draft" to "written or electronic
633 drafts." The drafting problem arises because drafts often are electronic, while Rule 26(b)(3) itself
634 extends protection only to "documents and tangible things." And the Committee Note referred also
635 to "oral" drafts. (A similar question arises under proposed subdivision (b)(4)(C), which refers to
636 communications "regardless of the form of the communication.")

637 Several comments asked what is an "oral draft." Is every interaction with the expert an oral
638 draft of the eventual report? Can the rule text, along with the Note, be read to destroy the provisions
639 in proposed (b)(4)(C) that except three categories of communications from work-product protection?
640 The Subcommittee thought it better to draw back to "written or electronic drafts." The reference
641 to "oral" drafts will be stricken from the Note.

642 An observer began by praising the proposed expert-discovery amendments as "very careful
643 work." It is good to protect drafts regardless of form. Many lawyer organizations and other
644 organizations have supported the proposal. The proposal to draw back to protecting only written
645 or electronic drafts will generate arguments about oral drafts. Three of the observers each
646 independently had this same reaction. It is a mistake to narrow the protection; "regardless of form"
647 had it right. "Oral report is a concept that had life"; interrogatories inquiring about oral reports had
648 to be answered in New Jersey until the 2002 New Jersey rule amendments. Protecting oral draft
649 reports will not impinge on the discovery of attorney-expert communications allowed by (b)(4)(C).

650 A committee member asked why is an oral report not a communication with an attorney,
651 subject to the provisions that allow discovery of communications on three subjects? The response
652 was that creative lawyers will argue that an oral draft report is fully discoverable because it is
653 excluded from the protection of proposed (b)(4)(B); the protections for communications do not
654 apply. "Using words of limitation on the drafts that are protected will imply there is no protection
655 for others." The committee member rejoined that a report not in writing is a communication, and
656 thus protected by (b)(4)(C). Another member agreed that "communications" is broader than draft
657 reports, but asked why draft reports are not all protected as communications? A response was that
658 draft reports are a species of communication that should be protected by work-product principles
659 even when they address the topics that are excepted from work-product protection when addressed
660 by other forms of attorney-expert communication. And beyond that, there can be draft reports that
661 do not involve communication with the attorney. But anything oral will be a communication. The
662 draft report and communications categories overlap, but each also has independent meaning.

663 It was suggested that "written" is imprecise — does it mean anything that is "hard copy"?
664 The Subcommittee was worried about written reports, including the modern electronic equivalent
665 of writing.

666 A committee member recalled the "documents and tangible things" scope of Rule 26(b)(3)
667 and noted that proposed (b)(4)(B) seems to refer to something to be physically provided in
668 discovery. How do you turn over something that is not physical? A response was that inquiry at
669 deposition can achieve the same result. But it was protested that the deposition inquiry is
670 objectionable because it seeks a communication with the lawyer. And it was responded that there
671 can be oral discussions between expert and others who are not the lawyer — common examples are
672 the client, or the expert's staff. These communications might well address the form of the report the
673 expert will eventually reduce to written or electronic form.

674 An observer offered an example. Suppose the dispute involves valuation. The expert
675 initially thought $1,000,000 was an appropriate value, but then raised it to $2,000,000. Discovery
676 can appropriately inquire into the process that led to the $2,000,000 valuation, including questions
677 whether different figures were considered and what process was followed in reaching the eventual
678 figure. There is no need to allow questions about what the expert witness said in developing the
679 report.

680 A committee member responded that this argument proves too much. The distinction
681 between work papers and draft reports will be blurred. The danger is too great — it invites endless
682 debates over the line between a protected draft of a report and working papers.

683 It was suggested that the rule might simply protect "drafts" without any further elaboration.
684 But concern was expressed that this might not protect electronic drafts because they are not
685 documents or tangible things.

686 It was asked whether sufficient guidance could be provided by saying in the Note that
687 proposed (b)(4)(B) does not restrict the exceptions in (b)(4)(C) — attorney-expert communications
688 about compensation, identifying facts or data the expert considered, or identifying assumptions the
689 expert relied upon, are not protected as draft reports. The response was that this advice is not so
690 much needed if the rule text is limited to written or electronic drafts. But it was noted that the Note
691 says that (b)(4)(C) protects an oral communication. "I think it's worth $100,000,000" is protected.

692 A motion to restore "regardless of form" failed, 3 yes to 9 no.

693 Discussion returned to the suggestion that the rule text refer only to "drafts." The
694 "documents and tangible things" limit of Rule 26(b)(3) was recalled again, observing that work
695 product in other forms is protected by the continuing "common-law" effects of Hickman v. Taylor,
696 not Rule 26(b)(3). Could the problem be solved by referring to "documentary or electronic drafts?

697 An observer suggested that if the rule text is limited to "drafts," "no lawyer will argue that
698 electronically stored information is not protected." That can be said in the Note.

699 A motion to delete "written or electronic" passed, 9 yes and 4 no.

700 Continued concern was expressed about drawing the line between unprotected work papers
701 and protected drafts. Lawyers will not ask for oral drafts. Perhaps the rule could refer to drafts "in
702 some recorded form"?

703 The problem of redefining rule text in a Committee Note was brought into the discussion.
704 It is not a useful thing. It is important to make the rule text as clear as it can be. But the words to
705 use are not yet apparent. If lawyers fear that electronic drafts are not protected, rule language should
706 make sure the protection is provided. The need for some form of guidance was underscored by
707 suggesting that lawyers will seek to exploit any opportunity to go back to the regime that allows
708 discovery of draft reports, no matter how unproductive it has been.

709 It was suggested that "document" carries forward into many rules the Rule 34(a) reference
710 to electronically stored information. The 2006 Committee Note observes that "References to
711 'documents' appear in discovery rules that are not amended * * *. These references should be
712 interpreted to include electronically stored information as circumstances warrant." This suggestion
713 drew attention to language proposed for the Committee Note: protection applies to a draft "without
714 regard to whether it would be considered a 'document or tangible thing' within Rule 26(b)(3)(A)."
715 It was suggested that this Note seems to expand the meaning of (b)(3)(A), making it necessary to
716 expand the text of (b)(4)(B).

717 It was suggested that the problem might be solved by viewing Rule 34 as a somewhat
718 circular provision that defines "document" to include electronically stored information. Then Rule
719 26(b)(3) would itself apply to electronically stored information; this is an interpretation that
720 "circumstances warrant" within the intent of the 2006 Committee Note.

721 This suggestion was elaborated in different directions. The statement in proposed (b)(4)(B)
722 that Rule 26(b)(3)(A) and (B) protect drafts can be read to settle the matter, no matter what Rule
723 26(b)(3) might mean independently. (b)(4)(B) extends (b)(3), just as surely as if it were written in
724 pre-Style form: "Rule 26(b)(3) is hereby extended to protect drafts," and so on. The Committee
725 Note can explain that this is the meaning of the rule text. Alternatively, there are compelling reasons
726 to read Rule 34(a) to include electronically stored information in the definition of "documents."
727 Documents or electronically stored information are defined to include many things that may exist
728 either in hard form or in electrons; the examples conclude with "stored in any medium from which
729 information can be obtained either directly or, if necessary, after translation by the responding party
730 into a reasonably usable form." One illustration of the importance of this approach is provided by
731 Rule 34(b)(2)(E)(i), which directs that a party produce documents "as they are kept in the usual
732 course of business or must organize and label them to correspond to the categories in the request."
733 It will not do to reorder electronically stored information before producing it so as to make it more
734 difficult to use.

735 This discussion was summarized by a flat statement that electronically stored information
736 is protected as "documents or tangible things" within the meaning of Rule 26(b)(3).

737 But it was protested that the rule texts do not say that documents and tangible things include
738 electronically stored information. The Committee should not rely on a Committee Note to an
739 amended Rule 26(b)(4) to accomplish an amendment of Rule 26(b)(3). Nor does it seem appropriate
740 to propose that Rule 26(b)(3) be amended to include electronically stored information on a schedule
741 that could take effect at the same time as the proposed (b)(4) amendments only if public comment
742 is bypassed.

743 It also was observed that whatever is made of "oral drafts," it is essential to protect oral
744 communications between attorney and expert witness in proposed (b)(4)(C).

745 The question was attacked from a different angle by asking whether electronically stored
746 information is a tangible thing. Then protecting "drafts" will provide the desired protection.

747 The question was renewed again: if the rule text refers only to "drafts," should the discussion
748 of electronically stored information be withdrawn from the Committee Note? One answer was that
749 the Note can say that (b)(4)(B) applies to any draft, whether in written or electronic form. We are
750 determining by this rule what is protected. The Note can say simply that protection "applies to any
751 draft report or disclosure, in written or electronic form."

752 A different suggestion was that the Note might say "regardless of the form in which the draft
753 is recorded."

754 The need for explicit Rule text was again expressed. There is a long history of fighting over
755 discovery of expert reports. We need to foreclose entirely any argument that electronically stored
756 drafts are not protected. Referring to "recorded" in rule text would help. An observer suggested,
757 though, that it would be better to leave this in the Note, referring only to "drafts" in the rule text.
758 But a committee member who voted to reduce the text to "drafts" protested that he had assumed the
759 Note would cover this. At the same time, it would be better to address this in the rule text. Another
760 member agreed. "Rule text is better to make it as clear as possible. Rewriting Rule 26(b)(3) in this
761 Committee Note is not a good idea."

762 A motion to amplify the rule text reference to drafts passed by unanimous approval. Subject
763 to further consideration, the rule text will read: "protect drafts of any report or disclosure required
764 under Rule 26(a)(2), regardless of the form in which the draft is recorded." The Note can be revised
765 by the Subcommittee.

766 Subdivisions (b)(4)(B), (C): Combined?: Professor Kimble's style comments included a suggestion
767 that words could be saved by combining subparagraphs (B) and (C). The Subcommittee and
768 Committee had already struggled long and hard in attempts to combine them and concluded that it
769 works better to set them out separately. It is difficult to draft an integrated provision in a way that
770 clearly limits to communications, and not drafts, the exceptions for discovery of exchanges about
771 compensation, facts or data provided by the attorney and considered by the expert, and assumptions
772 provided by the attorney and relied upon by the expert. The two subparagraphs use different
773 formulas to address the forms of draft reports and communications that are protected. All agreed
774 that it is better to keep the two subparagraphs separate.

775 Subdivision (b)(4)(C): Communications with "non-Report" Experts: The proposed protection for
776 attorney-expert communications is limited to expert trial witnesses who are required to provide
777 disclosure reports under Rule 26(a)(2)(B). The testimony and comments provided many suggestions
778 that the protection should extend to some or all of the expert trial witnesses who are not required to
779 give these reports. Some comments wanted to extend the protection to all. Other comments sought
780 to protect only communications with experts who also are a party's employees. Drafting is easy if

781 we want to include all experts that must be identified by a Rule 26(a)(2)(A) disclosure. It will
782 present more difficult line-drawing problems if we stop short of that. What of communications
783 between employee and in-house counsel? With former employees? Contract "employees"? The
784 Subcommittee decided not to expand protection along any of these lines.

785 An observer noted that this question is very important to corporate defense counsel. They
786 strongly favor extending protection to communications with corporate employees. That will
787 reinforce protection for their work product. And all of the problems that have been expressed with
788 respect to experts retained or specially employed apply here. The problems were not as obvious
789 during the initial stages of this project because they are encountered by in-house counsel more often
790 than outside counsel, but they are just as severe. There is no reason to make this distinction. The
791 ABA Litigation Section supports extending the protection to communications with corporate
792 employees.

793 This observer continued that the arguments against extending the protection do not hold up.
794 The protection need not include retired employees or independent contractors. The hybrid fact
795 witness is interesting, but these problems are solved all the time — the facts the employee knows
796 are not protected simply because they have been communicated to counsel. The lawyer will not
797 designate as an expert witness an employee whose facts he wants to protect. The Note can say that
798 communications with an employee's assistants are not protected. Nor need the drafting be tricky.
799 The protected communications can be those with an expert retained or employed by a party. The
800 timing of disclosure will not be a problem.

801 A committee member suggested that addressing communications with corporate employees
802 will stir concerns that the rule is intruding on the realm of attorney-client privilege, and intruding
803 for the purpose of expanding protection in states that limit privilege to communications with a
804 "control group."

805 This comment led to the observation that the Subcommittee did think there was a danger that
806 extending protection this far would seem to be creating or extending a privilege. It also was noted
807 that a party anxious to protect attorney-expert communications might think about retaining the
808 employee expert on terms that come within the report requirements of (a)(2)(B) — at the cost of
809 disclosing a report, the result would be protection under (b)(4)(C) as proposed. Going further down
810 the road to protect communications with employee experts might engender greater resistance to the
811 proposed rule.

812 Turning away from employee experts, it was observed that a plaintiff can talk to the treating
813 physician. The defendant cannot. It is possible to argue that communications between the plaintiff's
814 attorney and a treating physician should be protected. That is a tough issue, with good arguments
815 on both sides.

816 Returning to employee experts, a member noted that "this has been a balanced proposal from
817 the outset. Adding protection for communications with employee experts benefits one particular
818 constituency." The addition could make the package vulnerable.

819 An observer suggested that the Committee specifically invited comment whether
820 communications with all witnesses expected to testify as experts should be protected. Extending
821 the protection would not depart from what was published. Lots of changes are being made; this one
822 could fit in readily. Juries view corporate employees with suspicion, as aligned with their
823 employers. Treating physicians are regarded as neutral.

824 Another observer noted that the ABA recommended splitting the difference. The purpose
825 is to focus on the quality of the testimony, not the process of developing it. New Jersey, however,
826 does not provide a model — it has not addressed the employee expert.

827 A third observer suggested there are obvious opportunities for mischief if communications
828 with employee experts are protected. Suppose a product case. An employee engineer participated
829 in all design decisions. How can we separate the sense impressions leading up to the final design
830 from the expert opinion at trial, and distinguish attorney-expert communications about one from
831 communications about the other? This is a big issue that requires more consideration that it can be
832 given now.

833 Discussion concluded with the observation that the Committee had devoted long
834 consideration to the question of employee experts. That is why the question was flagged in the
835 request for comments. The Subcommittee has reconsidered the question carefully, and rejected it
836 for fear of unintended consequences. No member responded to an invitation for a motion to extend
837 work-product protection to communications with employee experts.

838 Subdivision (b)(4)(C) Note: The proposed Note includes new language stating that communications
839 between a party's attorney and assistants to the expert witness are protected. "Assistants" seemed
840 a better word than "agents." No case law has been found on this topic. One witness at the San
841 Antonio hearing did address efforts to discover a lawyer's communications with an expert's
842 assistants. This language was approved without further discussion.

843 Other new language addresses the concern expressed by some comments that protecting
844 attorney-expert communications will impede implementation of the Daubert decision. This language
845 has been explored with Professor Capra, Reporter for the Evidence Rules Committee. It was agreed
846 that it is better to avoid elaborating on the topic. Simple is better. Thus there is a single sentence
847 stating that these discovery changes do not affect the gatekeeping functions called for by Daubert.
848 This change also was approved without further discussion.

849 The published Note included a paragraph recognizing that Rule 26(b)(4) focuses only on
850 discovery, but expressing an expectation that "the same limitations will ordinarily be honored at
851 trial." This paragraph was discussed at some length at the January Standing Committee meeting.
852 The Subcommittee recommends that this paragraph be deleted. It does not seem an orderly exercise
853 of the rulemaking process to address trial evidence rules by a Committee Note to a civil discovery
854 rule.

855 Other: Judge Campbell noted that the Federal Magistrate Judges Association's comment suggested
856 that Rule 26 might address the questions whether or when draft reports must be retained and whether
857 they must be included in privilege logs. The Subcommittee recognized that retention and log
858 requirements are important issues, but concluded that they are outside the scope of the current
859 project.

860 Committee Note: Length: It was observed that the draft Committee Note is rather long, and asked
861 whether it might be shortened. These amendments are trying to shut down unproductive forms of
862 discovery that have been widely indulged. We need to be very clear on how firmly we are closing
863 it down. Notes to the discovery rules generally tend to be longer than other Notes because they
864 address intensely practical issues that stir lively concern and great ingenuity.

865 Approval: The Committee unanimously approved the Rule 26 amendments with a recommendation
866 that the Standing Committee approve them for adoption by the Judicial Conference and the Supreme
867 Court.

868 Judge Kravitz thanked the Subcommittee for its great work, noting that Committee
869 discussions have followed the high tradition of "leaving clients at the door." He expressed particular
870 thanks to Judge Campbell and Professor Marcus for their great effort and fine results.

871 *Rule 8(c)*

872 Judge Kravitz noted that in August 2007 the Standing Committee published for comment a
873 proposal to remove "discharge in bankruptcy" from the list of affirmative defenses offered as
874 illustrations in Rule 8(c). Only the Department of Justice expressed opposition. At the
875 Department's request the Committee decided not to press ahead for adoption. The issues raised by
876 the Department seemed obscure and it was important to reach a full understanding. Judge Wedoff
877 discussed the questions with Department lawyers through the summer of 2008. The Department
878 provided memoranda to supplement its comment and suggested it might help to solicit the views of
879 others. It seemed better to instead ask the Bankruptcy Rules Committee for its views. The
880 Bankruptcy Rules Committee recommends that "discharge in bankruptcy" be removed from Rule
881 8 (c). The question is thus clearly framed: should the proposal now be recommended for adoption,
882 perhaps with some changes in the Committee Note, or should it be deferred a while longer to pursue
883 further dialogue?

884 Judge Wedoff described the Bankruptcy Rules Committee's deliberations, based on a report
885 he prepared for their discussion. The recommendation to delete "discharge in bankruptcy" from
886 Rule 8(c) was nearly unanimous — only the Department of Justice representative dissented.

887 Section 524(a) of the Bankruptcy Code is inconsistent with Rule 8(c). A discharge enjoins
888 all sorts of efforts to enforce personal liability on a discharged debt. If an action goes to judgment
889 on a discharged debt, the judgment is void. Waiver by the debtor has no effect. Rule 8(c) creates
890 a real tension with the statute because the ordinary effect of failure to plead an affirmative defense
891 is that the defense is waived.

892 The plain language of the statute prevents treating discharge in bankruptcy as an affirmative
893 defense. But if there is any room to find ambiguity in the language, the history of statute and rule
894 make the result inescapable.

895 The 1898 bankruptcy statute made discharge an affirmative defense. When Rule 8(c) was
896 adopted in 1938 it reflected that reality. Then, in 1970, the 1898 statute was amended. Discharge
897 was transformed from a personal right to become an injunction, and any judgment on a discharged
898 debt was made void. The House Report, quoted in the agenda materials, notes that often a debtor
899 who has been discharged fails to appear in a subsequent action on the discharged claim, and suffers
900 entry of a default judgment that is then used to enforce the discharged claim. "All this results
901 because the discharge is an affirmative defense which, if not pleaded, is waived." The purpose of
902 the statute was to change this result. This result was reconfirmed in the House Report describing
903 the 1978 amendments. The discharge injunction "is to give complete effect to the discharge and to
904 eliminate any doubt concerning the effect of the discharge as a total prohibition on debt collection
905 efforts." The discharge extinguishes the debt. The language added to § 524 stating that the
906 injunction operates "whether or not discharge of such debt is waived" "is intended to prevent waiver
907 of discharge of a particular debt from defeating the purposes of this section."

908 Courts have been clear in facing the statute and rule. Every decision that considers both §
909 524(a) and Rule 8(c) has ruled that discharge is not an affirmative defense that is lost by failure to
910 plead. The most recent decision is In re Hamilton, 540 F.3d 367, 373 (6th Cir.2008). Courts that
911 do not consider § 524(a), on the other hand, are misled by Rule 8(c). The very cases cited by the
912 Department of Justice are all cases that looked only to Rule 8(c) without considering § 524(a),

913 demonstrating that Rule 8(c) has misled them. And a debtor who failed to appear and plead also
914 might be misled into thinking that the effect of the discharge was forfeited by failure to appear and
915 plead.

916 The Department has pointed out that under § 523(a) there are debts that are not discharged.
917 These include a variety of things, including a debt to a creditor who was not notified of the
918 bankruptcy proceeding. Section 524 does not apply to questions of dischargeability — there are a
919 few questions of dischargeability that can be determined only by the bankruptcy court, but most can
920 be determined by another court. If a creditor seeks a determination whether a debt was discharged,
921 either by an adversary proceeding in the bankruptcy court or in an action to enforce the claim, the
922 debtor should respond. It will not often happen that a creditor who does not know of the bankruptcy
923 proceedings will sue on the claim and the debtor does not raise the discharge — the debtor has a
924 great incentive to raise the discharge. But even if that happens, § 524(a) controls. "There cannot
925 be a judgment as a result of failure to plead discharge as an affirmative defense" of the debt was in
926 fact discharged.

927 The Department responded that the Rule 8(c) treatment of discharge in bankruptcy as an
928 affirmative defense "has not caused much of a problem." The Seventh Circuit has ruled, albeit in
929 an unpublished opinion that does not consider § 524(a), that failure to plead discharge loses the
930 defense. A creditor may file an action on a claim because it had no notice of the bankruptcy
931 proceeding or because it thinks the debt was not discharged. The debtor's failure to plead the
932 discharge may be not a "waiver" in the true sense of knowing and voluntary surrender of a right; it
933 is more a matter of procedural forfeiture. The conclusion depends on what meaning should attach
934 to "waiver" in § 524(a).

935 Deleting "discharge in bankruptcy" from Rule 8(c) would "send the wrong message to
936 debtors who might fail to appear."

937 The reference to the Seventh Circuit opinion was expanded by noting that it did cite to
938 another case that did include some discussion of § 524. The case involved a counterclaim against
939 a plaintiff who had been discharged in bankruptcy. (A later comment noted that the Seventh Circuit
940 really means its rule that a nonprecedential opinion is not precedent for anything.)

941 It was asked how these questions arise for the Department. Suppose the debtor appears,
942 pleads without raising discharge as a defense, no one inquires about discharge in discovery, and the
943 action goes through to judgment on the merits. It was answered that a creditor who has notice of
944 the bankruptcy will sue only if it thinks there is no discharge. But the question was put again: how
945 likely is it that the creditor will not be told, somehow, of the discharge? It was pointed out that the
946 likelihood may be substantially diminished by access to PACER to find the bankruptcy record of
947 a defendant. But it was responded that this problem can affect creditors who do not have the same
948 investigative resources as the Department. Some of the cases that consider § 524 together with Rule
949 8(c) involve egregious creditors who know of the bankruptcy and had no reason to think their claims
950 had not been discharged.

951 Further explanation of the procedures for determining whether a claim was discharged was
952 requested. Suppose an action on the claim: can the court where the collection action is filed
953 determine the discharge question? Judge Wedoff answered that the most common method to
954 determine discharge is by an adversary proceeding in bankruptcy. The bankruptcy proceeding can
955 be reopened for this purpose. It is better to get a determination of dischargeability before addressing
956 the merits. As compared to bringing an action on the claim, including a request for a determination
957 of dischargeability, resort to the bankruptcy court has the advantage of avoiding contempt of the

958 discharge injunction if the debt in fact has been discharged. This procedure is different from making
959 discharge an affirmative defense. If the debtor defaults the proceeding to determine dischargeability,
960 or litigates and loses on the merits of dischargeability, the debtor is bound.

961 It was asked why, if this problem has been around for 39 years, it is only being addressed
962 now? It was noted that there are other illustrations of failures to keep the Civil Rules in tune with
963 changes in substantive law. Rule 8(c), for example, continues to refer to "contributory negligence,"
964 despite the widespread substitution of comparative responsibility in its place. Rule E(4)(f), to be
965 discussed later at this meeting, is another example. Statutory changes are not always brought
966 promptly to the Committee's attention.

967 The argument that it is misleading to characterize discharge as an affirmative defense was
968 countered by observing that it also is misleading to omit any warning that there are times when the
969 debtor really needs to appear.

970 The possibility of abuse came back into the discussion. Many bankruptcy debtors are
971 unsophisticated. The statutory provisions were adopted to prevent unscrupulous creditors from
972 attempting to recover on claims they know were discharged. Beyond that, how many tools should
973 any creditor have? No one is arguing that a debt not discharged is discharged. The question is how
974 the creditor should go about collecting a claim that has not been discharged. It is not at all clear that
975 discharge should be made an affirmative defense to afford another tool to creditors, given the
976 policies enacted in § 524.

977 In response to a question whether a discharge can be effective when the creditor has not been
978 notified of the bankruptcy proceeding, it was stated that in a "no-asset" case a discharge often is
979 effective even as to a creditor that had no notice. Lack of notice in a no-asset case makes a
980 difference only when dischargeability must be determined in bankruptcy court.

981 A committee member asked the Department of Justice member why it cares about
982 characterizing discharge as an affirmative defense when it only means to sue on claims that have not
983 been discharged. The answer was that the Department is most likely to be pursuing a "client
984 agency's" claims that cannot be discharged. If it does not know of the bankruptcy proceeding, gets
985 a judgment, and then sues on the judgment, the judgment is void under a "so literal" reading of §
986 524. This answer was summarized by another member as suggesting that the Department wants "a
987 negative consequence to the debtor for failing to put on notice."

988 It was suggested that Rule 8(c) seems in tension with § 524, but § 524 has nothing to do with
989 exceptions to discharge. Rule 8(c) requires pleading of "any avoidance or affirmative defense." The
990 list of examples is only that — a list of examples. Deleting discharge from the list of examples does
991 not really change the arguments or the outcome. This suggestion met the objection that deleting
992 discharge would clearly be intended to reflect a judgment that it is not an avoidance or affirmative
993 defense. In any event, it is wrong to list it as an affirmative defense if it is not. It may be that
994 discharged debtors will not be aware of the many years of including discharge as an affirmative
995 defense, nor of its deletion, but that is no reason to keep it in.

996 Bringing the discussion toward a conclusion, it was observed that the Committee had no
997 sense of urgency about this question when it was first raised — "discharge in bankruptcy" had
998 persisted in Rule 8(c) for many years after 1970 without causing any apparent problems. But the
999 Bankruptcy Rules Committee makes the point that courts in fact are being misled. That changes the
1000 urgency calculation. A sophisticated creditor can search for information about discharge outside a
1001 collection action, or by many means in a collection action, including a Rule 26(f) conference,
1002 pretrial conferences, and discovery.

1003 This summary was seconded by observing that courts are being misled by relying on Rule
1004 8(c). That is not right. A discharge defense is not lost for failure to plead it.

1005 A motion to recommend that the Standing Committee approve deletion of "discharge in
1006 bankruptcy" from Rule 8(c) for adoption by the Judicial Conference and the Supreme Court passed
1007 11 yes, 1 no.

1008 Discussion turned to the Committee Note. Judge Wedoff presented a draft. Changes were
1009 discussed. As revised, the Note would carry forward the first three sentences of the Note as
1010 published, delete the final two sentences, and add:

1011 For these reasons it is confusing to describe discharge as an affirmative defense. But
1012 § 524(a) applies only to a claim that was actually discharged. Several categories of
1013 debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether
1014 a claim was excepted from discharge may be determined either in the court that
1015 entered the discharge or — in most instances — in another court with jurisdiction
1016 over the creditor's claim, and in such a proceeding the debtor is required to respond.

1017 A Committee member asked whether it is desirable to explain at such length. Why not make
1018 it much simpler? One simplifying suggestion was that the Note could say simply that the change
1019 does not affect the methods for determining discharge.

1020 It was agreed that Judge Wedoff, the Reporter, and the Department representatives would
1021 work toward a suitably brief Note.

1022 *Supplemental Rule E(4)(f)*

1023 A working group of the Maritime Law Association has suggested that the time has come to
1024 eliminate the final sentence of Supplemental Rule E(4)(f). Rule E(4)(f) establishes the right to a
1025 hearing on a claim of interest in property that has been arrested or attached. The final sentence says
1026 that "this subdivision" does not apply to suits for seamen's wages under 46 U.S.C. §§ 603 and 604,
1027 "or to actions by the United States for forfeitures for violation of any statute of the United States."
1028 The two statutes were repealed in 1983. Supplemental Rule G, adopted in 2006, now governs
1029 forfeiture proceedings.

1030 The Department of Justice has expressed concern that simply deleting the reference to
1031 forfeiture proceedings may lead to arguments that Rule E(4)(f) has come to provide a right to a
1032 hearing in forfeiture actions. Rule G(1) provides that Supplemental Rules C and E also apply to
1033 forfeiture actions "[t]o the extent that this rule does not address an issue." Rule G does not expressly
1034 address the question whether a hearing should be provided when an interest is claimed in property
1035 held for forfeiture. Rule E never has created a right to a hearing in forfeiture proceedings, and we
1036 should make certain that no new right is created inadvertently. The Department proposes
1037 substitution of a new sentence at the end of Rule E(4)(f): "Supplemental Rule G governs
1038 proceedings regarding property subject to a forfeiture action in rem." This language is better than
1039 the suggested alternative: "Supplemental Rule G governs the right to a hearing in a forfeiture
1040 action." That alternative implies that there is a right to a hearing under G.

1041 Doubts were expressed about the Department's drafting. It could be read to undermine the
1042 part of Rule G(1) that invokes Rule E to fill in gaps in Rule G. Perhaps more to the point,
1043 supplemental Rule G(8)(f) provides that a person who has filed a claim to property may petition for
1044 its release if the property is held for forfeiture under a statute governed by 18 U.S.C. § 983(f). That
1045 clearly implies a right to a hearing. Rule G(5) establishes a procedure to assert an interest in the

1046 defendant property and contest the forfeiture. That too implies a right to a hearing. The
1047 Department's concern, moreover, may be addressed by simplifying the final sentence to read:
1048 "Supplemental Rule G governs hearings in a forfeiture action."

1049 It was asked whether it would be better simply to delete the present final sentence without
1050 any proposed replacement. Comments could be invited. The discussion concluded by
1051 recommending that the proposal be published by including a new final sentence in brackets, inviting
1052 comment on the need to have any reference to Rule G and the form of the reference: "[Supplemental
1053 Rule G governs hearings in a forfeiture action.]"

1054 The recommendation will include the suggestion that publication be deferred to a time when
1055 other Civil Rules also are published for comment. There is no urgency about fixing this residual
1056 anomaly in Rule E.

1057 *Rule 4(i)(3)*

1058 Rule 4(i)(3) governs service on a United States officer or employee sued in an individual
1059 capacity for an act or omission occurring in connection with duties performed on the United States'
1060 behalf. Service must be made on the United States. The employee also must be served under Rule
1061 4(e), (f), or (g). Rule 4(e) is the provision most likely to be invoked. Rule 4(e)(1) adopts state-law
1062 methods of service. (e)(2) allows service by personal delivery to the defendant, leaving a copy at
1063 the defendant's dwelling or usual place of abode with a suitable person who resides there, or
1064 "delivering a copy * * * to an agent authorized by appointment or by law to receive service of
1065 process."

1066 Judge Kravitz opened the discussion by describing the concerns that have grown up around
1067 this provision. It has been asked whether service on the United States should suffice. Alternatively,
1068 it has been asked whether it is possible to avoid the upset and occasional danger that accompany
1069 service at home, while walking down the street, and the like. These questions arise frequently in §
1070 1983 actions against state and local employees. Plaintiffs often want the government to accept
1071 service on behalf of an employee, particularly when the plaintiff cannot readily find the employee.
1072 A common example is an action by a prison inmate against a prison guard. The government
1073 commonly balks. But it often agrees to accept service when discovery of the employee's address
1074 is suggested. At the same time, the government may refuse to accept service because it may decide
1075 not to provide a defense for the employee, or may even plan to prosecute the employee. Apart from
1076 these problems, making the government accept service on behalf of a former employee would create
1077 other difficulties.

1078 The first response was that different approaches may be appropriate, distinguishing between
1079 the executive branch and the judiciary. This speaker, a former executive branch officer, said that
1080 there was not much visible concern about these questions during the time of his government service.
1081 He was personally served once while going to his car at home; "it was unpleasant." That was a case
1082 in which harassing individual government officials was part of the plaintiff's strategy. In most cases
1083 the plaintiff and the defendant have allied interests — the defendant authorizes the government to
1084 accept service, and the plaintiff easily accomplishes service. "This is routine for those who are
1085 automatic targets of suits" — they authorize an agent to receive service. And normally the plaintiff
1086 calls the Department of Justice and asks how to go about serving the defendant; "we work it out."
1087 At the same time, there would be problems if service could be made only on an agent and by
1088 requiring the employee to accept the government as agent. There may be risks of actual individual
1089 liability. And the problems with former employees may be mirrored by problems with employees
1090 who move from one agency to another. There may be conflicts of interest. And another member

1091 noted that in actions against low-level employees the Department often does not find out about the
1092 action.

1093 One possible approach, whether by court rule or by statute, would be to require service on
1094 the government in the first instance. The government would then have a period — perhaps 10 days
1095 — to provide the employee's acknowledgment of service or appointment of a general agent for
1096 service. This could work in cases that do not involve a request for urgent, immediate relief.

1097 Court employees may face greater problems of security and harassment. And as compared
1098 to some executive branch agencies, there may be a higher level of trust among courts, judicial
1099 branch employees, and the Administrative Office. It might work to make the judge's court the agent
1100 for service on the judge.

1101 An immediate question asked whether the Administrative Office would be comfortable
1102 accepting service for a judge in an action claiming direct, personal harassment by the judge?
1103 Administrative Office practice was described in response. The Office encourages courts to call
1104 immediately when a court official is sued. The office determines whether the Department of Justice
1105 will provide representation, and if not may retain a lawyer for the defendant.

1106 The next observation was that if harassment is part of a plaintiff's tactics, protecting judges
1107 will work only if service on the court or the Administrative Office is made the exclusive means of
1108 service.

1109 It was noted that in many tort claims against government employees the government has to
1110 accept the burden of providing a defense. But it is difficult for the government to do much of
1111 anything within 10 days, such as finding the employee and securing an authorization to accept
1112 service. The problem is difficult. This observation was seconded in part by another Committee
1113 Member, who observed that he had often been sued while in government service. "The idea that the
1114 government can do anything in 10 days is ludicrous." But this member continued to ask whether
1115 there is a real problem, and to wonder whether it is seemly to separate out government officials for
1116 special treatment. Why go into this?

1117 Another observation was that officials, including judges, may be sued in courts that
1118 manifestly lack personal jurisdiction. It is convenient to get rid of the case for lack of personal
1119 service. This observation led to a more general question: care should be taken to consider the
1120 consequences of any new rule for personal jurisdiction. Making the government an agent for service
1121 might seem to create nationwide personal jurisdiction.

1122 It was suggested again that judicial branch employees might be separated out, recognizing
1123 the greater security and privacy concerns they may face. The broad scope of judicial immunity,
1124 moreover, means that many actions against judges will be either frivolous or deliberately harassing.
1125 One possibility would be to make the United States Attorney or the clerk of court the judge's agent
1126 for service.

1127 These views were supported by suggesting that the Committee should work on this. "There
1128 is an opportunity for harassment, and perhaps physical risk." It needs to be determined whether
1129 service on the United States alone should suffice.

1130 Another committee member suggested that a low-level employee would worry about the risk
1131 of personal liability without personal service. There often are disputes whether an individual
1132 defendant's conduct was in connection with duties on the United States' behalf. Suppose the

1133 plaintiff does not serve the defendant personally — does the plaintiff lose the right to hold the
1134 defendant personally liable?

1135 The Committee agreed to carry this topic forward for further investigation. An initial focus
1136 will be on actions against judges for official acts. These actions tend to be brought by pro se
1137 plaintiffs. An effort will be made to find out from security agents and marshals how often they
1138 encounter problems arising from service of process.

1139 *Appellate-Civil Rules Questions*

1140 Judge Kravitz noted that the Appellate Rules Committee is working on projects that are
1141 likely to involve the Civil Rules. One of them raises the question whether Rule 58 should be
1142 amended to require entry of judgment on a separate document when the original judgment is altered
1143 or amended on one of the five post-judgment motions enumerated in Rule 58(a). Another asks
1144 whether the Civil Rules, the Appellate Rules, or both should be expanded to include some provisions
1145 for "manufactured finality." Several past packages of amendments have demonstrated the
1146 advantages of coordinated work. The chairs of the Appellate and Civil Rules Committees have
1147 agreed that it will be useful to appoint a joint Subcommittee to work on these questions, and perhaps
1148 additional questions that may arise while the work continues. Three members from each Committee
1149 have been appointed. The Civil Rules Committee members are Judge Colloton, who will chair the
1150 Subcommittee, Judge Walker, and Peter Keisler.

1151 Judge Wedoff noted that the Bankruptcy Rules Committee is examining the Bankruptcy
1152 Rules provisions on appeals. There are likely to be fairly extensive revisions. They will coordinate
1153 with the Appellate Rules Committee. To the extent that Bankruptcy Rules issues overlap with issues
1154 being considered by the joint Subcommittee, the Bankruptcy Rules Committee will seek to
1155 coordinate on those issues as well.

1156 *Rule 45*

1157 Judge Campbell, reporting for the Discovery Subcommittee, noted that a year ago the
1158 Subcommittee was asked to begin studying Rule 45. The study has included a long memorandum
1159 by Andrea Kuperman surveying the secondary literature — much of it in bar-oriented publications
1160 — and communications with a number of bar groups.

1161 It is clear that Rule 45 is a long and complicated rule. "You have to work hard to find what
1162 it means." Many judges say that it is a perfectly fine rule, that the problem is that lawyers do not
1163 understand it. A fine rule that lawyers cannot understand may deserve some clarification.

1164 Two issues have figured prominently in recent experience. Some courts have concluded that
1165 because the 100-mile limit in Rule 45(c)(3)(A)(ii) addresses only a person who is neither a party nor
1166 a party's officer, a trial subpoena can command a party's officer to appear anywhere in the country.
1167 That reading seems contrary to Rule 45(b)(2), but it continues to have real influence. Another
1168 problem arises when a deposition subpoena for a nonparty witness issues not from the court where
1169 the action is pending but from another court where the witness is. Rule 26(c)(1) allows the witness
1170 to apply to the main-action court for a protective order, but a motion to compel compliance can be
1171 filed only in the court that issued the subpoena. The resulting questions may be better suited to
1172 resolution in the court where the main action is pending, but the cases have divided on the power
1173 to transfer the question, and transfer may be a burden for the witness.

1174 Many other issues have been identified as well, including the contemporary wisdom of the
1175 100-mile limit that has remained in place from times before mechanized transportation was invented.

1176 For all of the questions, what Rule 45 does is remarkable. It covers most third-party
1177 discovery in the federal system. "There are many moving parts." An attempt to address some of
1178 the issues that seem to present problems might create more problems than it solves. How broad
1179 should the Subcommittee's inquiry be?

1180 Judge Kravitz seized the opportunity to express thanks to the American Bar Association
1181 Litigation Section, the American College of Trial Lawyers, Gregory Joseph, and others who
1182 provided thoughtful and helpful responses to Subcommittee inquiries.

1183 Professor Marcus introduced the list of possible Rule 45 issues by suggesting that a complete
1184 overhaul may be an overwhelming task. Rule 45 has been something of a stepchild. It is a very
1185 important part of private enforcement of the law in this country. It is not just a discovery tool. It
1186 applies at trial as well.

1187 The agenda memorandum lists 17 possible issues that emerged from reviewing two leading
1188 treatises. Andrea Kuperman's survey of secondary literature discovered that Rule 45 has prompted
1189 a lot of writing, including additional issues. For purposes of introduction, the possible topics can
1190 be grouped.

1191 One set of issues involves cost and burden. The more aggressive position is that a nonparty
1192 must be compensated for every penny spent in complying, including attorney fees to review
1193 potentially responsive materials. This position may be qualified by arguing that reimbursement of
1194 anything is required only if the nonparty objects to the subpoena. Rule 45 does not really say either
1195 of these things. There may be something awkward in requiring reimbursement for the costs of
1196 weeding out materials that are not produced in response to the subpoena: "I have to pay for things
1197 I don't even get to see?" These questions may raise the issue whether e-discovery should be treated
1198 differently from hard-copy discovery.

1199 A second set of issues asks whether Rule 45 should address preservation by a nonparty.

1200 A third set involves notice. Rule 45 was amended in 1991 to require notice to all parties
1201 before a document subpoena is served. It is not clear whether that has proved a good idea.
1202 Observers have raised the question whether the party who served the subpoena also should be
1203 required to notify other parties when documents are produced.

1204 A fourth set of questions go to location. Should the reach of a trial subpoena be different
1205 from the reach of a deposition subpoena? Should document subpoenas be treated separately? Is the
1206 100-mile limit still appropriate — and if there is a distance limit, should it be measured by air miles,
1207 most convenient route miles, shortest route miles, or something else?

1208 A fifth set goes to timing. Can Rule 45 be used to circumvent a discovery cut off? What
1209 should be the time to respond — Rule 45(c)(2)(B) may imply that the time to respond can be set at
1210 less than 14 days by requiring that objections be served before the earlier of the time specified for
1211 compliance or 14 days after the subpoena is served. And when must a privilege log be filed in
1212 relation to the time allowed to object?

1213 A sixth issue goes to sanctions for disobedience. The only sanction specified in Rule 45 is
1214 subdivision (e), which provides for contempt. Should there be other sanctions?

1215 A seventh issue asks whether a government agency is a "person" subject to subpoena. It may
1216 be that this issue has been generally resolved by the Court of Appeals for the District of Columbia
1217 Circuit.

1218 An eighth set of issues addresses subpoenas in aid of arbitration proceedings.

1219 Finally, is it possible to shorten and simplify Rule 45? To the extent that it may be
1220 ambiguous now, the goal of resolving ambiguities may conflict with the desire to shorten the rule.
1221 Ambiguities often are resolved by adding words.

1222 Globally, the question is whether Rule 45 needs a major overhaul. Gregory Joseph has
1223 advised that it is not generally a problem. Is that right?

1224 Discussion began with the reminder that Rule 45 is the only discovery rule that directly
1225 addresses nonparties. It is so complex that the recipient of a subpoena virtually has to consult a
1226 lawyer. But third-party discovery often makes the difference between winning and losing the case.
1227 A simpler and shorter rule would be better. Four concepts that can be covered in plain English may
1228 do the job. They will be elaborated as the work goes on. Agreement was expressed. The subpoena
1229 itself should include clear directions on what is required. Simply setting out the text of Rule 45(c)
1230 and (d), as required by 45(a)(1)(A)(iv), is no real help.

1231 The choice of court for resolving discovery issues was identified as an important issue. The
1232 court where the action is pending has a real interest. But there is a real tension when the dispute
1233 involves a nonparty subpoenaed in a different court. The nonparty may deserve protection against
1234 being sent elsewhere. An Illinois nonparty does not want to have to litigate objections or questions
1235 of compliance in California. Flexibility is important. Perhaps a system could be worked out for
1236 referring the issues to the court of the main action without sending the nonparty there. Arguing by
1237 remote communication systems may be a good compromise.

1238 The next observation was that "there is more control over discovery than is sometimes
1239 thought." Discovery often does not start until the judge thinks the case is ready to go ahead. The
1240 court where the action is not pending may overemphasize the burden of compliance because it is not
1241 sufficiently familiar with the case and the importance of compliance. It may make sense to resort
1242 first to the main court, particularly as to disputes between the parties. After the main court has
1243 resolved any disputes between the parties, issues raised by the nonparty may be resolved in the court
1244 that issued the subpoena. The CM/ECF system can be used to send important file records to the
1245 court that issued the subpoena.

1246 Observers were invited to comment. One said that there are shortcomings in Rule 45. There
1247 should be a provision for notifying other parties that documents have been produced. It is important
1248 to address which court decides disputes. It may be possible to identify at least some of the factors,
1249 like costs to the person subpoenaed, to be weighed in determining what should be required.
1250 Privilege logs can be very burdensome. But generally the rule works well. Another said that the
1251 American College Civil Rules Committee has similar views. Rule 45 works well in most ways, but
1252 it might be improved. There is no sense of urgency about this. A third said that many employment
1253 lawyers feel that there are abuses in employment cases by subpoenas issued by employer defendants
1254 to former employers without giving plaintiffs the notice required by Rule 45. Another observer
1255 responded that in the types of cases he litigates the parties do comply with the Rule 45(b)(2) notice
1256 requirement. The second observer added that the problem of notice after documents are produced
1257 can be addressed in part by making a Rule 34 request to produce documents provided in response
1258 to a subpoena.

1259 A different set of questions was raised. The party who issued the subpoena may negotiate
1260 privately with the person served to determine what documents will be produced, without giving
1261 notice to other parties. A case-management order might address this, but it might be better to

1262 address the question in Rule 45 rather than depend on including these terms in a management order
1263 in every case.

1264 A judge noted that he simply orders parties to give to other parties the documents received
1265 under subpoenas. Otherwise Rule 34 requests are made.

1266 It was asked whether the Committee should venture into the problems and uncertainties
1267 arising from prehearing subpoenas issued by arbitrators. It was noted that these questions affect
1268 many constituencies in addition to the courts. The circuits have generated conflicts on some of the
1269 questions. These are not the kinds of issues that should be addressed by the Civil Rules.

1270 It also may be that preservation issues should not be addressed. There were many requests
1271 that the e-discovery rules address preservation, and the requests were resisted from concern that
1272 preservation is not a topic appropriate for the rules.

1273 Other issues may be put aside because there are workable pragmatic resolutions. The
1274 question whether a government agency is a "person" within Rule 45 is a good illustration.

1275 It was agreed that the Subcommittee should consider the question of trial subpoenas issued
1276 to officers of a corporate party. The problem "arises from different readings of the rule we wrote."

1277 It was agreed that there seem to be enough issues that present practical problems in real
1278 practice to justify putting aside other possible issues that do not present practical problems. The
1279 Subcommittee will forge ahead with its Rule 45 project.

1280 *2010 Conference*

1281 Judge Kravitz introduced discussion of planning for the 2010 conference by boasting that
1282 it had been a terrific decision to ask Judge Koeltl to chair the planning committee. He also noted
1283 that the ABA Litigation Section has been a big help.

1284 Judge Koeltl confirmed that the conference will be held May 10 and 11, 2010, at the Duke
1285 University Law School. The purpose will be to explore the costs of litigation, especially discovery
1286 and e-discovery. Are there problems with the system? What are the possible solutions — new rules,
1287 judicial education, best practice advice for lawyers?

1288 Part I of the conference, focusing on empirical research, will be a cornerstone. The study
1289 by the American College of Trial Lawyers and the Institute for the Advancement of the American
1290 Legal System found widespread dissatisfaction with the federal discovery system. There are
1291 significant problems. That seems to be different from the results of the 1997 FJC study, which
1292 found that most lawyers did not have problems with the scope of discovery or proportionality. The
1293 FJC study did find problems in complex, high-stakes cases where relations between the lawyers
1294 were not as good. We need to find the current state of the system, measuring satisfaction and
1295 dissatisfaction. Is dissatisfaction limited to certain areas? Do we need systemic responses? More
1296 focused responses?

1297 The FJC will survey some 5,700 lawyers in more than 2,800 federal cases terminated in the
1298 last quarter of 2008. The survey will include e-discovery questions that were not asked in the 1997
1299 survey. The survey will be distributed in May; it is hoped that preliminary results will be available
1300 in the fall. There will be follow-up interviews with 20 or 30 lawyers to obtain responses at deeper
1301 levels.

1302 The ABA Litigation Section will, with some improvements, send the American College -
1303 IAALS survey to all its members. The survey will go out in June. Results are expected in
1304 November.

1305 It is not too early to express thanks for the work already done by the FJC and the Litigation
1306 Section.

1307 RAND has been working on e-discovery. Nick Pace is on the 2010 Conference planning
1308 committee. He has encountered some difficulty in getting the kinds of information he wants because
1309 there are proprietary concerns that make lawyers and clients reluctant to respond. Efforts are under
1310 way to persuade them that empirical research is important if they hope to support their complaints
1311 about the costs of e-discovery.

1312 Professor Theodore Eisenberg of Cornell has been asked to help. One possible topic for
1313 research would be whether fact-based pleading under the PSLRA actually streamlines litigation and
1314 reduces costs.

1315 It has been noted that California state court data seem to show a significantly higher rate of
1316 trials than found in federal courts in California. If that proves out, it would be interesting to explore
1317 the reasons. Is this due to federal pretrial procedures?

1318 These empirical inquiries can fill most of the morning of the first day.

1319 A second important part of the conference will be the overview papers. Great people already
1320 have agreed to produce some of these papers. They will be available relatively soon to help further
1321 development, but the authors will be free to revise them up to the time of the conference. Elizabeth
1322 Cabraser will address discovery. Gregory Joseph will address e-discovery. Arthur R. Miller will
1323 address pleadings and dispositive motions. Judge Patrick Higginbotham will address judicial
1324 perspectives. Justice Andrew Hurwitz will address state discovery — Arizona has rejected
1325 Twombly pleading, and has adopted expansive disclosure.

1326 Then there will be a series of panels on the papers. And a panel by users of the system,
1327 including representatives of general corporate counsel, the plaintiffs' bar, the Department of Justice,
1328 and public-interest firms. There also will be a panel of representatives from organized bar groups.
1329 They will be invited to spend the next year developing their views for presentation. And we hope
1330 to have a panel of alumni of the Rules process — Professor Miller, Judge Higginbotham, and
1331 perhaps two of the Duke faculty, Professor Carrington and Dean Levi.

1332 Thomas Willging described the nature of the FJC survey. The sampling design will include
1333 2865 cases. More than 5,700 attorneys will receive the survey. The sample will be selected at three
1334 levels, principally designed by Emery Lee. The sample will include every case that went to trial in
1335 the fourth quarter of 2008, October through December; that is 529 cases. It will include every long-
1336 pending case that took more than four years to be terminated; that is 321 cases. The rest is a random
1337 sample of 2,000 cases after filtering out cases not likely to have discovery — cases closed
1338 administratively, cases related to bankruptcy, and the like. Other excluded categories include social
1339 security cases, student loans, bankruptcy, condemnation, drug-forfeiture, asbestos, and cases
1340 transferred by the MDL panel.

1341 The final draft of the survey instrument has been prepared. Many people provided comments
1342 on initial drafts. The process is like a freight train — everyone wants to put something on board as
1343 it passes. Half of the questions address factors of the individual cases: what was discussed in the
1344 Rule 26(f) conference, and so on. (There are 28 possible responses to that question).

1345 It was noted that as compared to the American College survey, this instrument is very
1346 specific in terms of how many depositions, interrogatories, requests for documents, requests for
1347 admission, and so on. This specificity may help to flesh out the question whether there are problems
1348 with e-discovery.

1349 The FJC hopes the questions are engaging enough, and the topic important enough, that
1350 lawyers will make the effort to respond. The introduction is designed to make clear that the survey
1351 is important. The questions include what the judge did, what the costs were, and what were the
1352 stakes. Case characteristics and attorney characteristics are covered next. Then come questions
1353 addressed to reform proposals and "rules." The reform proposals focus on ADR; on when the issues
1354 were narrowed in this case, and when are they narrowed in most cases. There also is a one-
1355 paragraph description of the simplified procedure model once developed for this Committee, asking
1356 whether the attorney would recommend such a system to a client. Other questions look to a
1357 comparison of costs in federal courts to costs in state courts, and to the desirability of changes in the
1358 rules to reduce all discovery or e-discovery or to increase case management.

1359 Lorna Schofield thanked Judge Rosenthal and Judge Kravitz for the productive relationship
1360 between the Committee and the Litigation Section, and to Judge Koeltl for including the Section in
1361 the program. Their encouragement for the survey has been welcome. The Section has e-mail
1362 addresses for 55,000 section members, who will receive the survey. A task force is being formed
1363 to explore problems of civil procedure, including not only topics that might be addressed by the
1364 Civil Rules but also topics that can be addressed only by other means.

1365 Judge Koeltl urged suggestions for people who would be good panelists. We should have
1366 a broad dispersion in terms of geography, youth and experience, plaintiffs and defendants.

1367 Judge Kravitz said that the Conference will be a big help for the Committee's work. He
1368 expressed the Committee's deep appreciation and thanks to Judge Rothstein for supporting the great
1369 help we are getting from the FJC.

1370 It was noted that individual responses to the FJC survey will not be made public.

1371 It also was noted that the spring 2010 Committee meeting probably will not be held in
1372 conjunction with the Conference. The Conference will be a lot of work on its own.

1373 Judge Koeltl expressed hope that the conference would result in directions for change. How
1374 specific recommendations for rules changes can be remains to be seen. We do need to guard against
1375 discussion that is too theoretical or too anecdotal to help advance specific reform responses.
1376 Concrete suggestions will be important, even when they involve things that can be done only by
1377 statute.

1378 The approaches taken by state courts will be part of the program. Judge Kourlis is working
1379 on this with the IAALS, and the work will be part of the program.

1380 Invitations will be extended to people who are not panelists, but there will be physical limits
1381 on the number of people who can be accommodated. The Conference will be public, as everything
1382 the Committee does. It was noted that the Seventh Circuit Bar Association recently arranged a
1383 relatively low-cost web cast of a program celebrating Lincoln's 200th birthday. A DVD also was
1384 made. And it was suggested that the federal judiciary TV network might be hooked up. It also may
1385 be possible to create a camera link to screens in a room adjacent to the meeting room.

1386 One judge commented on the common tendency of lawyers at Committee hearings to testify
1387 to how things are done where they practice. Lawyers may respond to research questions in two

1388 ways, either by reacting on a hypothetical basis or by thinking of actual experiences. We do not
1389 want to be entirely self-referential. We aim get new data and to hear from new voices. And to be
1390 concrete about getting suggestions for things that can be accomplished in a lifetime.

1391 *Other Matters*

1392 A new Privacy Subcommittee has been formed with representatives from the Advisory
1393 Committees. Judge Raggi will chair the Subcommittee. Judge Koeltl is the Civil Rules nominee.
1394 Problems of the sort addressed by Civil Rule 5.2 persist, and new ones have arisen. Some court
1395 filings still have social security numbers and other personal identifiers. Identifiers not listed in Rule
1396 5.2 might be added to the list — alien registration numbers are often suggested. Current methods
1397 of implementing the rules are open to review. In criminal proceedings, questions arise about plea
1398 hearings and cooperation agreements; those questions are complicated. Maintaining public access
1399 to court records and protecting legitimate privacy concerns will be a problem for a long time. The
1400 problems will be exacerbated if PACER is made generally available without charge. The time to
1401 revisit these questions is upon us.

1402 The FJC continues to work on its CAFA study. Present work is focused on completing the
1403 coding of pre-CAFA case information. They hope to have a report in the fall. California has
1404 published information on class-action filings in both California state courts and federal courts in
1405 California. The data show a temporary decrease in filings after CAFA, and then a return.

1406 The Sealed Case Subcommittee continues its work. The analysis is very thorough. Quite
1407 a few sealed cases have been found. But many of them are magistrate-judge cases involving search
1408 warrants, applications for pen registers, and the like. There also are sealed appeals and sealed
1409 criminal cases. When courts are approached for information about cases that cannot be found in the
1410 docket, they often express surprise to discover that the cases remain sealed. As the information
1411 becomes complete, the Subcommittee will begin the task of considering what to make of it.

1412 *Next Meeting*

1413 The next meeting will be held on October 8 and 9 in Washington. The spring meeting in
1414 2010 may be held in Atlanta. Chilton Varner will explore the possibility of meeting at Emory
1415 University School of Law.

1416 Judge Rosenthal said that the meeting had been a real pleasure. It marks the apparent
1417 conclusion of the Committee's work on two important and difficult projects, summary judgment and
1418 discovery of expert trial witnesses. It has been a remarkable example of the rules process working
1419 very well. She also repeated her thanks to Judge Hagy for six years of fine work with the
1420 Committee.

Respectfully submitted,

Edward H. Cooper
Reporter

Agenda

2010 Litigation Review Conference

Duke Law School

May 10-11, 2010

Monday, May 10, 2010

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

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

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

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

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

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

10:15-10:30 BREAK

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

Moderator: Justice Kourlis (IAALS)

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

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

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

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

Moderator: Prof. Arthur Miller (NYU)

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

1:00-2:30 LUNCH (Speaker TBA)

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

Moderator: Elizabeth Cabraser (Lieff, California)

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

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

Moderator: Judge Patrick Higginbotham (5th Circuit)

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

6:30-9:30 Reception and dinner

Tuesday, May 11, 2010

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

Moderator: Greg Joseph (Joseph, New York)

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

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

Moderator: Judge Brock Hornby (D. ME)

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

10:30-10:45 BREAK

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

Moderator: Judge Koeltl

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

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

Moderator: Justice Andrew Hurwitz (Arizona)

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

1:00-2:00 LUNCH

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

Moderator: Lorna Schofield

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

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

Moderator: Dean Levi (Duke)

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

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

Rule 45 Issues

The Discovery Subcommittee has spent a considerable amount of time studying Rule 45 since the last Advisory Committee meeting. It held conference calls on July 30, Aug. 11, and Sept. 16. Copies of the notes on those conference calls should be included in the agenda book. In addition, individual members of the Subcommittee sought out comments from other experienced lawyers about specific issues that had been identified as potential subjects of rule amendment, as well as inviting those lawyers to identify any additional issues they regarded as important.

Based on this consideration, the Subcommittee is bringing forward several tentative topics on which rule-amendment activity could focus. To make the discussion concrete, this memorandum includes some sketches possible tentative draft rule-amendment language as tentative recommendations for discussion. The Subcommittee is not presently suggesting that these rule amendments be recommended for any further action; rather, the goal is to stimulate discussion by the full Committee of these topics. It must be emphasized then that **the preparation of sketches of amendment ideas in no way indicates that the Subcommittee -- much less the full Committee -- currently endorses or will propose proceeding with such rule amendments.**

The following memorandum discusses each of the issues the Subcommittee intends to raise with the full Committee. Any other Rule 45 issue a Committee member wishes to raise would of course be welcomed. For purposes of introduction, the issues discussed below are:

(1) Notice of impending service of a subpoena and of the receipt of materials produced pursuant to a subpoena: Since 1991, Rule 45 has directed that notice of service of document-only subpoenas be given to all other parties, but lawyers frequently fail to comply with this requirement. In addition, there is no provision presently in the rule directing parties who obtain documents by subpoena to notify the other parties that they have done so. The proposal below would relocate the current notice requirement to make it more apparent, and add a requirement that another notice be given after production in response to a subpoena affording the other parties an opportunity to inspect or copy the materials obtained.

(2) Trial subpoenas on party witnesses: There is a division of authority presently on whether a party witness can be compelled by subpoena to travel more than 100 miles to testify at trial. The question whether there should be such authority involves a policy decision that the Subcommittee intends to raise

with the full Committee. At least three possible resolutions are possible: (a) permitting nationwide service of subpoenas for trial testimony of party witnesses; (b) making it clear that subpoenas for trial testimony of party witnesses are subject to the same geographic limitations as subpoenas for other testimony from other witnesses; or (c) creating a mechanism by which a party desiring to subpoena a party witness for trial may seek court authorization to do so if the testimony would require travel over a greater distance than authorized under Rule 45. For purposes of discussion, tentative draft language that could be used to accomplish purpose (b) is included in the discussion below.

(3) Place of resolution of disputes about enforcement of discovery subpoenas: Although a trial subpoena issues from the court where the action is pending, Rule 45 directs that a discovery subpoena is to issue from the court where the discovery is to take place. If there is a dispute about enforcement of a discovery subpoena, that may be submitted to a court in one of three ways. First, it could be by motion for protective order to either the court where the action is pending or the court where the discovery is to occur. Alternatively, it could be by either a motion to quash or a motion to enforce, which currently must be filed in the court where the discovery is to occur. Many lawyers report that resolution by the court where the discovery is to occur causes undesirable costs and delays, and it may also impose burdens on courts required to resolve matters that largely depend on the merits of actions pending before other courts. A solution to this problem would be to authorize the court where the discovery is to occur to "transfer" or "remit" the matter to the court where the action is pending. Tentative draft language to accomplish that result is presented below.

(4) More aggressive reconsideration of the treatment of geographic limitations on the subpoena power: Partly because an objective the Subcommittee has considered is simplifying and shortening the rule, the Subcommittee has discussed the present handling of geographic limitations on service of subpoenas. The issue of possible nationwide service for trial testimony by trial witnesses (Issue (2) above) arose in part because the rule includes two provisions about geography, one focused on where a subpoena can be served and another on where performance in response to a subpoena can be commanded. A traditional explanation for this treatment is that the "jurisdiction" of a court to

enforce a subpoena is geographically limited, but Fed. R. Crim. P. 17(e)(1) (permitting nationwide service for testimony at a trial or hearing in criminal cases) shows that there is no inherent constraint on nationwide service if authorized by rule. That would potentially simplify Rule 45, and could -- as with service of a summons and complaint -- separate place or manner of service from the question where compliance is required. At the same time, the rule could specifically confine the area in which a party served with a subpoena is required to comply, providing (if desirable) different geographic perimeters for deposition testimony, testimony at trial, and document production. This rearrangement would correspond to the apparent actual functioning of Rule 45 and could avoid "jurisdictional" issues that might arise from the issues present in Item (3) above. It also seems the only presently promising way to shorten or simplify the rule, but would likely require considerable Committee effort because there would be extensive redrafting. The Subcommittee is bringing the question whether such a recasting of the rule should be considered to the full Committee.

(5) Cost allocation: Rule 45 presently directs attorneys issuing subpoenas to avoid imposing "undue burden or expense" on those served with them, and directs the court to protect nonparties served with subpoenas "from significant expense resulting from compliance" if it orders compliance. Protective orders or motions to quash can similarly raise the cost issue. Some secondary materials suggested there might be reason to consider rule revisions to change the treatment of cost allocation. To date, attorneys consulted have not suggested that there is a serious problem, or that changing the rule would improve matters. One concern that has emerged is that nonparties sometimes present very high bills for compliance without advance warning, but a change to Rule 45's provisions regarding cost allocation does not seem likely to solve those problems. Most lawyers consulted seem to be averse to providing by rule that attorney time complying with a subpoena should be treated as per se recoverable. The Subcommittee brings this issue forward for discussion by the full Committee.

(6) In-hand service of subpoenas: Some comments received by the Committee raised questions about Rule 45(b)(1)'s directive that service be by "delivering a copy to the named person" be clarified or changed. The clarification suggestion relies on the existence of some difference in the cases on whether in-hand

delivery is required by the rule as presently written. The proposed alternative is to permit service of a subpoena in some or all the alternative ways Rule 4 authorizes for service of summons and complaint. One consideration that may bear on this question is that, unlike a defendant served with a summons and complaint, a person served with a subpoena may be commanded to take action quite quickly on pain of contempt. The Subcommittee brings this issue forward for discussion by the full Committee.[1]

Appendix -- Possible clarification or shortening of Rule 45: As an Appendix, some very preliminary and limited ideas about possibly shortening or clarifying Rule 45 are presented. But as noted in item (4) above, unless the rule is significantly recast it is likely that more aggressive simplification will be problematical. Beyond that, because much of the detail in Rule 45 is parallel to detail regarding party discovery contained in Rules 26-37 it will be difficult to shorten Rule 45 without revisiting those (fairly recent) changes to the party discovery rules.

(1) Notice of impending service of a subpoena and of the receipt of materials produced pursuant to a subpoena

The 1991 amendments to Rule 45 introduced the formal

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[1] Another issue that the full Committee has discussed and the Subcommittee has investigated is whether the 100-mile limitation presently in the rule should be changed. That limitation dates to 1793, surely a time when the difficulties of travelling 100 miles were much greater than they presently are. Nonetheless, attorneys consulted to date have frequently resisted removing all geographic limitations. Issue (2), for example, is only about trial testimony, and presently only of issue with regard to party witnesses. One might urge that nationwide service authorization or performance obligations could be appropriate for document-only subpoenas, because in reality the usual experience is that the nonparty's lawyer delivers copies of the materials in question to the lawyer for the party that served the subpoena. Changing the rule could, therefore, correspond to actual practice. For deposition testimony, however, some suggestions have been to change 100 miles to a larger number (200 or 250 miles, for example), illustrated with specific examples such as the distance from New York to Boston, or from Phoenix to Tucson. Given this discussion, the Subcommittee is not bringing forward the 100-mile issue for further discussion by the full Committee at this time.

possibility of a documents-only subpoena, making something much like the Rule 34 process available to obtain information from nonparties. Rule 45(a)(1)(A)(iii) permits a subpoena commanding a person to "produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises." Rule 45(a)(1)(C) makes it explicit that a command to produce documents "may be set out in a separate subpoena." Rule 45(a)(1)(D) adds that a command to produce "requires the responding party [person?][2] to permit inspection, copying, testing, or sampling of the materials." Rule 45(c)(2)(A) says further that a person commanded to produce materials but not to testify "need not appear in person at the place of production or inspection."

Before 1991, something like what the amendments authorized could be accomplished by a deposition of a custodian of documents. But Rule 30 provided notice provisions that assured the other parties of an opportunity to attend the deposition and receive the fruits of that discovery activity. When no deposition is contemplated under the new procedure adopted in 1991, however, nothing in Rule 30 requires any notice to other parties. The addition of Rule 45(b)(1)'s provision regarding notice to other parties was the result, as the 1991 Committee Note explained:

> A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

When restyling was done, one concern was whether the notice requirement meant that the other parties had to be given notice before the subpoena was served, a topic on which there seemed to be some disagreement -- or at least some uncertainty -- in the cases. The restyling produced the directive at the end of current Rule 45(b)(1) that "before it [the subpoena] is served, a notice must be served on each party." The Committee Note accompanying the restyling explained:

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[2] It seems that this should be "person." We know that a subpoena to a party is permitted. There seems to be no reason to say that the obligation to permit copying, testing, or sampling applies only when the person subpoenaed is a party.

Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

We cannot be certain what the 1991 drafters expected practice to become after the introduction of the documents-only subpoena. It is unclear from their explanation whether they expected the notice to be prior to service of the subpoena on the nonparty, the interpretation adopted in 2007. That interpretation would make it easier for other parties to serve a timely demand for production of additional materials. It might also be useful for resolution of disputes raised by the other parties about the propriety of production sought from the nonparty. Concern about nonparties who possessed materials subject to a privilege held by a party would be one example of this sort of problem. That concern lies behind the use of the passive voice in Rules 45(d)(2)(B), which says that "[i]f information produced in discovery is subject to a claim of privilege" the privilege-holder may make a claim of privilege and thereby invoke the provisions of the rule regarding return of the information, etc.

What the drafters said in 1991 suggests, however, that they meant to enable meaningful pre-production notice, and possibly involvement of the other parties in the process of negotiating production. One thing they intended to enable was that the other parties could "serve a demand for additional documents or things." With the arrival of E-Discovery since 1991, one could add to that the possibility that other parties may have strong views on form of produced information. Moreover, the possibility that the nonparty would take the position that certain electronically stored information is not reasonably accessible (see Rule 45(d)(1)(D)) means that interaction with the nonparty before production may be more important in the past. Even among the parties, the 2006 amendments foresaw that advance consultation would be important in sensible management of discovery of electronically stored information. Thus, the 2006 amendments to Rule 26(f) encouraged early discussion among the parties about their electronic information systems and the forms in which they could readily produce electronically stored information through discovery.

The 1991 drafters also said that "other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced." It is unclear how the other parties were to "monitor the discovery."

One possibility is that the drafters assumed that the party serving the subpoena would provide the other parties access to what it had obtained. That would surely be consistent with the drafters' goal of providing enhanced protections for nonparties subjected to subpoenas, one of the main objectives of the 1991 revision of the rule. Repeated demands for the same information would cut the other way. Interpreting the Committee Note to assume that there is routine access to the produced materials is reinforced by the Note's reference to other parties "pursu[ing] access to any information that may or should be produced." That seems to be addressed to the possibility the party who served the subpoena might not have requested all the information that should have been sought, or that it might during negotiations with the subpoena target back off requests it had made. There is accordingly at least a hint that the 1991 drafters thought that the other parties, having received notice of the impending service of the subpoena, could play a role in that negotiation process.

What we have heard about the actual operation of the rule since 1991 is that it has not always lived up to the drafters' apparent intentions. Responding to our request for input on the rule, for example, the ABA Section of Litigation focused on the notice provision in Rule 45(b)(1), and observed that it seemed to contemplate informal inspection but was silent on whether the subpoenaing party must advise other parties of receipt of materials from the nonparty. In its letter in March, 2009, it suggested:

> The Committee may wish to consider amending the Rule to provide that, upon receipt of subpoenaed materials, at other than a deposition, hearing or trial, the subpoenaing party must (a) give notice within seven days (or some other reasonable period) of receipt of the materials, (b) provide a description of the subpoenaed materials that will inform the other parties of the type, volume and size of the received materials, and (c) permit inspection on reasonable notice and/or copying of the materials upon a party's agreement to pay reasonable costs of copying.

Other commentary has suggested that even the bare minimum notice required by Rule 45(b)(1) is often overlooked; parties sometimes serve document subpoenas and obtain materials from nonparties without ever giving any notice whatsoever to the other parties. One reason for this failure to comply with the rule may be that the rule provision is somewhat buried in Rule 45(b), which is about service, and then in subsection (1), which is mainly about other things. Below, relocation of the existing provision is suggested, along with a possible additional directive to address concerns like the one raised by the ABA

Section of Litigation.[3]

Another concern with such notice requirements might be to distinguish between "discovery" subpoenas and "trial" subpoenas. As the ABA Section of Litigation comments above note, the primary focus for this notice provision is discovery, not production of material for possible use at a hearing or trial. But is there a meaningful difference between using Rule 45 for discovery and for trial? We have previously considered whether Rule 45 might be a method of circumventing discovery cutoffs, and the same sort of question could arise on this subject. Perhaps any notice provisions should exclude subpoenas for production of evidence at a hearing or trial. Rule 30 does not require notice when a subpoena is used for that purpose, and the addition of a notice requirement for the new document production power might be similarly limited. But there are cases dealing with the question whether subpoenas purportedly for trial are really improper belated discovery efforts,[4] and it seems this concern has not

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[3] One might attempt to be more ambitious in requiring notice regarding subpoenas. The Sedona Conference's Commentary on Non-Party Production & Rule 45 Subpoenas (April 2008) endorsed "best practices" of attempting to confer with the nonparty before production. The Subcommittee considered whether some such notice provision might be inserted into the rule (not something the Sedona Conference seemed to be endorsing) and concluded that such a provision could produce difficulties of far greater consequence than any advantages. It is not bringing this idea forward to the full Committee.

[4] For example,in Mortgage Information Services, Inc., v. Kitchens, 210 F.R.D. 562 (W.D.N.C. 2002), the court noted that Rule 45 document subpoenas may sometimes not constitute discovery. Examples include a subpoena to ensure the production at trial of originals of documents previously obtained in copy form during discovery, or to secure production at trial of documents to be used to refresh the memory of witnesses expected to be called during trial. It then held that a Rule 45 subpoena served by plaintiff five days before trial constituted "discovery," and therefore was not enforceable due to the discovery cutoff:

> After a careful review of the document request submitted in conjunction with Plaintiff's subpoena duces tecum in this case, the Court finds that the documents requested are unquestionably sought for discovery purposes and therefore do not fall within any of the exceptions described above. In reaching this conclusion, the Court notes the broad language used in the document request, which seeks the production of entire categories of documents rather than itemizing specific documents necessary for use

created serious problems under the current provisions. The prospect of improving things with further rule provisions is slight.

Therefore, solely for discussion purposes, the Subcommittee tentatively recommends consideration the following possible amendments:

Rule 45. Subpoena

(a) In General.

* * * * *

(4) ***Notice to other parties.*** If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then the following rules apply:

(i) Before the subpoena is served, a notice including a copy of the subpoena must be served on each party;[5]

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as exhibits at trial. Furthermore, the Court also notes as significant the fact that the documents sought in the subpoena were requested -- but not produced -- during the course of discovery. Plaintiff nevertheless failed to seek to compel the production of these documents prior to the close of discovery. It therefore waived its right to obtain access to them. Finally, Plaintiff, through its submission with respect to this issue, conceded that it seeks these documents "because it believes the documents will corroborate its damages evidence," thereby indicating that the documents are clearly sought for discovery rather than for any of the legitimate trial preparation purposes outlined above.

See also, e.g., Williamson v. Horizon Lines, LLC, 248 F.R.D. 79 (D.Me. 2008) (use of a Rule 45 subpoena to obtain production of documents that could and should have been obtained during discovery constituted discovery and was improper); Alper v. U.S., 190 F.R.D. 281 (D. Mass. 2000) (court quashed Rule 45 subpoena requiring doctor to appear as a witness at trial to the extent it required him to bring documents with him because to that extent it constituted discovery after the discovery cutoff); 9A Fed. Prac. & Pro. § 2452 at 393 (3d ed. 2008) (asserting that "parties should not be allowed to employ a subpoena after a discovery deadline to obtain materials from third parties that could have been produced before [during] discovery").

[5] Proposed (i) goes beyond what is in the current rule because says that the notice should "includ[e] a copy of the

(ii) After production in response to the subpoena, the party serving the subpoena must within 7 days serve notice on each other party offering on reasonable notice to permit inspection or copying of the produced materials.[6]

(b) Service.

(1) ***By Whom; Tendering Fees; ~~Serving a Copy of Certain Subpoenas~~.*** Any person who is at least 18 years old and not a party may serve a subpoena. Serving a subpoena requires delivering a copy to the named person and, if the subpoena requires that person's attendance, tendering the fees for 1 day's attendance and the

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subpoena." That idea of serving a copy of the subpoena is contained in the tag line for Rule 45(b)(1) now, but not in the rule itself (except to the extent implicit in the word "notice"). Before restyling, Rule 45(b)(1) said: "Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b)." It seems worth insisting that the subpoena be included in the notice; "Please be notified that plaintiff will serve a subpoena for production of documents on XYZ Corp." seems to comply with the current rule but not to accomplish the objectives the 1991 Committee Note sought to accomplish.

[6] The Subcommittee considered, but decided not to include, additional language as indicated below:

> (iii) After production in response to the subpoena, the party serving the subpoena must within 7 days serve notice on each other party describing the type and volume of the produced materials and offering on reasonable notice to permit inspection or copying of the produced materials.

Although information about the nature and amount of produced material would likely be useful to the other parties, putting a requirement into the rule about providing it could produce difficulties. Notice alone should enable the other parties to inquire about these subjects. Indeed, the process of arranging "on reasonable notice to permit inspection or copying of the produced materials" would seem to include some discussion of what they are and how voluminous they are. Adding the underlined language to the rule could produce objections later that insufficient detail was provided, with the result that the other parties did not obtain copies and the party that served the subpoena should be denied use of the materials in the case because it failed to provide sufficient detail about them.

mileage allowed by law. Fees and mileage need not be tendered when the subpoena issues on behalf of the United States or any of its officers or agencies. ~~If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.~~

(2) Trial subpoenas on party witnesses

There is a division among the courts about whether the 1991 amendment created what all seem to concede was not an intended result -- that party witnesses can now be compelled to travel more than 100 miles to attend trial in another state. In part, this dissonance results from the existence of both a limitation on where service of a subpoena can be made and a provision requiring quashing the subpoena if it calls for performance more than 100 miles from where the witness works or lives (even though the witness was served within 100 miles). In part, it results from the change in 1991 to treat party witnesses differently. Because the "nationwide service" conclusion (reportedly the "majority rule") seems contrary to what the rulemakers were intending to do in 1991, there may be a strong justification for amending the rule. Because there is a division of authority -- with both sides invoking the "plain meaning" of the current rule -- there is an additional reason to consider amending the rule. Because the question whether the 100-mile figure should be reexamined is also under review, there may be yet another reason for looking at this question, which nullifies the 100-mile limitation in some situations.

As might be expected when there is a division among the courts, there are arguments on both sides. They can be illustrated with perhaps the two leading cases, both from the E.D. La. and reaching contradictory conclusions about the proper interpretation of Rule 45, but in very different situations.

In In re Vioxx Products Liability Litigation, 438 F.Supp.2d 664 (E.D. La. 2006), Judge Fallon found that the 1991 amendments empowered him to order that a high officer of Merck & Co. attend and testify at trial in the MDL litigation before him. The witness was Merck's President of Human Health during the relevant period, and resided in New Jersey. The Plaintiffs' Steering Committee wanted him to testify at trial of a Vioxx case in New Orleans. After negotiations, Merck's Chicago lawyer agreed to accept service of the subpoena on behalf of the president, providing that he reserved all Rule 45 objections to the subpoena. The lawyer was served in Chicago via email with a subpoena saying it was issued by both the E.D. La. and the D.N.J. Thus, it appears that there was never any service that complied with the geographical limitations in Rule 45(b)(2)(B).

Judge Fallon nevertheless found that Rule 45(c)(3)(A)(ii) authorized him to require the president to come to New Orleans to testify, emphasizing that Rule 45(b)(2)(B) said it was "[s]ubject to the provision of" Rule 45(c)(3)(A)(ii), which does not command that a subpoena be quashed for a party witness required to travel more than 100 miles to testify at trial. He acknowledged that his interpretation was contradicted by the Committee Note accompanying the 1991 amendment,[7] but said that he could not consider the Note because the rule "is plain and unambiguous on its face." Moreover, he emphasized, he regarded the 100-mile rule as antiquated (id at 668):

> Realistically, the purposes behind the 100 mile rule no longer justify its existence. While a cross-country trip may have been deemed impossible in 1793 or harassing and economically burdensome in 1964, it is now commonplace and a necessary incident to multi-district litigation. Additionally, the current costs borne by a witness travelling cross-country to testify at trial are generally much less than the costs incurred by an army of attorneys and their respective entourages travelling cross-country to depose the very same witness. Moreover, in the present case the PSC will bear [the president's] travel expenses eliminating any case-specific value to the rule's second goal. While these twin rationales were laudable in 1793, they are now questionable, if not anachronistic. Modern day litigation should not be restrained by antiquated relics of a bygone era.
>
> Certainly, our founding fathers could not have envisioned a world of superhighways, commercial jet airplanes, or high speed commuter trains, just as they most likely could not have envisioned a single, consolidated lawsuit consisting of thousands of parties seeking billions of dollars in damages allegedly caused by an allegedly defective prescription drug prescribed to millions of patients across the country and world. Yet, while superhighways, jet airliners, and commuter trials have provided access to the vast expanses of our nation and beyond and allowed the United States to flourish socially and economically, our federal court system's subpoena power is still bound by a 100 mile colonial leash.
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> Not only does the 100 mile rule perpetuate obsolete notions of fairness, it actually inhibits the truth seeking purpose of litigation. * * * As an alternative to live trial

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[7] Indeed, on the specifics of this case -- with the only service being by email to a lawyer in Chicago -- it seems difficult to see how one even gets to the question of the application of Rule 45(c).

> testimony, this Court, the parties, and, most importantly, the jury is left with the deposition -- a "second best."

Certainly, one could make a strong argument on policy grounds that, when confronting a trial in an MDL proceeding after which very serious settlement negotiations might occur (as we now know they did), a judge should have some authority to command the attendance at trial of a high corporate official whose testimony would be important.

Judge Vance faced a very different situation in Johnson v. Big Lots Stores, Inc., 251 F.R.D. 213 (E.D. La. 2008), an opt-in FLSA action in which defendant issued subpoenas requiring attendance at trial of nine plaintiffs who lived in other states and more than 100 miles from the courthouse. Defendant relied on Judge Fallon's Vioxx decision to support its subpoenas. Even though she characterized Judge Fallon's view as the majority rule (id. at 215), Judge Vance reached a contrary conclusion, also on the basis of the plain language of the rule. In her view, Judge Fallon's analysis meant that a subpoena on a party witness could be served anywhere in the country, although Rule 45(b)(2) clearly says there are geographical limits on such service. Thus, she thought that Judge Fallon's reading of the "subject to Rule 45(c)" language in Rule 45(b)(2) would "turn a clause intended as a limiting clause on its head and ignore the territorial restrictions on where a trial subpoena may be properly served." Id. at 217. Authorizing nationwide service of subpoenas without saying so under the heading "protecting a Person Subject to A Subpoena" (the tag line for Rule 45(c)) makes no sense (id. at 218):

> The better reading of subdivisions (b)(2) and (C)(3)(A)(ii) of Rule 45 is that the territorial scope of a court's subpoena power is defined by subdivision (b)(2), subject to the limitations spelled out in subdivision (c)(3)(A)(ii).[8]

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[8] Judge Vance capably explained how the divergent treatment of party witnesses under the rule should work:

> Thus, to compel a person to attend trial, the person must be served with a subpoena in one of the places listed in Rule 45(b)(2) *and* not be subject to the protection of Rule 45(c)(3)(A)(ii), which protects nonparty witnesses who work or reside more than 100 miles from the courthouse, but not parties or party officers. Thus, for example, if both a nonparty witness and a party, both residents of Texas, in a case before this Court were served with trial subpoenas at their depositions in New Orleans, the Court would have to grant the nonparty witness's motion to quash under Rule 45(c)(3)(A)(ii) but under the same rule, the party could be

Under these circumstances, it seems that the policy question whether to authorize nationwide subpoena of party witnesses for trial should be authorized has been amply introduced. The Subcommittee is bringing this policy question forward for discussion by the full Committee. The Subcommittee's discussion identified various considerations. One is that a judge in the position of Judge Fallon understandably may feel strongly that live testimony from a party witness who played an integral role in the matter in controversy should be available, particularly when the trial could be a bellwether that could provide guidance in the resolution or settlement of many other cases, and particularly where the judge is the MDL transferee judge. But the risk that some corporate adversaries would abuse the subpoena power seems significant. Must the CEO of General Motors appear and testify in every case in which GM is a party? To require that could put a fearsome weapon in the hands of those who litigate against GM. The Subcommittee's discussion of these policy issues is reflected in the notes of its Sept. 16 conference call.

In the abstract, at least three general approaches seem possible:

(1) The rule could authorize any party to subpoena any party witness for trial no matter where the witness lives and works. (This seems to be Judge Fallon's view.)

(2) The rule could limit subpoenas for testimony by party witnesses in the same way subpoenas for testimony by nonparty witnesses is limited. (This seems to be Judge Vance's view.)

(3) The rule could authorize trial judges to authorize nationwide service of a subpoena based on a showing that requiring the testimony of a given individual is

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> compelled to appear at trial. A similar situation was presented in this case. A number of opt-in plaintiffs traveled to New Orleans to give videotaped depositions for perpetuation purposes. Even though Big Lots could have issued subpoenas to those individuals at their depositions to compel their attendance at trial, it did not. Had it done so, the Court would have no trouble in denying plaintiffs' motions to quash.

Id. at 218-19. Although Judge Vance's example is interesting, one is tempted to question whether Big Lots could have known enough about when trial would occur at the time of the depositions to use the depositions as occasions to subpoena the plaintiffs for trial.

justified. (This approach might address Judge Fallon's concerns but reduce the risks of abuse. Whether judges could adequately resist efforts at abuse could be debated, however.)

For purposes of discussion only, the following might be a way to accomplish something like option (2) mentioned just above:

Rule 45. Subpoena

* * * * *

(c) Protecting a Person Subject to a Subpoena.

* * * * *

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena <u>properly served under Rule 45(b)(2)</u> that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.[9]

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[9] This change might be accompanied by the following additional change:

Rule 45. Subpoena

* * * * *

(b) Service.

(2) ***Service in the United States.*** ~~Subject to Rule 45(c)(3)(A)(ii), a~~<u>A</u> subpoena may be served at any

(3) Place of resolution of disputes about enforcement of discovery subpoenas

Under the next heading, there is a discussion of the seemingly current reality of effectively "national" subpoena practice and the fact that Rule 45 continues to adhere to what might be called a "localism" attitude. That attitude favoring localism is embodied in rules that say discovery subpoenas must issue from the court where the discovery is to occur, and that the issuing court must be approached to enforce the subpoena. As detailed in item (4) below, that seems a rather artificial holdover. But it does mean that "issuing" courts can be called upon to decide issues related to enforcement of a subpoena that are closely related to the issues raised by the underlying case, or that have already been addressed by the judge presiding over that case in connection with other discovery, or that will likely arise before other "issuing" courts in other districts due to other discovery sought in relation to the underlying case. For purposes of simplicity and consistency, there is much to be said in favor of having these issues resolved by the court presiding over the underlying case.

Lawyers consulted by Subcommittee members have regularly cited the substantial problems caused by distant enforcement of subpoenas. Judges in "issuing" courts may not have the level or interest or commitment to the case that is true of the judge presiding over it on a regular basis. Getting matters set for hearing before these distant judges can prove difficult, and rulings may be delayed more than the probably would if the same matter were presented to the judge presiding over the underlying case. Many lawyers regard submitting subpoena issues to the judge presiding over the underlying case as desirable. They also

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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.

point out that telecommunications advances permit local lawyers to "argue" the matter in the distant court presiding over the underlying case without significant difficulty or expense.

But there are countervailing considerations. Local nonparty witnesses may understandably recoil from having to present their objections to a subpoena to a distant judge preoccupied with the overall management of the case. And the issues raised may often be distinct from any involved in the underlying case. But it could happen that the local nonparty actually wants the issue resolved by the court presiding over the underlying case, particularly if that court has already addressed related issues and resolved them in a way the nonparty finds congenial. And the party to the underlying case might be the one resisting submitting the issue to the presiding judge due to that judge's known "track record" on the issue in question. No rigid rule requiring resolution in either the "issuing" court or the court presiding over the underlying case could adequately account for all the permutations.

Besides these circumstantial distinctions, there is some disagreement among courts on whether, and how, "transfer" or "deferral" of motions can bring the matter to decision before the court presiding over the underlying action. To begin with a strong statement of the view that such power does not now exist, consider In re Sealed Case, 141 F.3d 337, 341 (D.C. Cir. 1998), which granted a writ of mandamus when a D.C. district judge tried to transfer a motion to quash a subpoena from D.C. to Arkansas:

> The text [of Rule 45] offers no authorization to transfer a motion to quash and seems at least implicitly to forbid it. The rule permits, and in some circumstances requires, "the issuing court" to quash or modify a subpoena. See Fed.R.Civ.P. 45(c)(3)(A). It allows enforcement of a subpoena following objections only "pursuant to an order of the court by which the subpoena was issued." Fed.R.Civ.P. 45(c)(2)(B). It provides that failure to obey a subpoena may be deemed contempt "of the court from which the subpoena issued." Fed.R.Civ.P. 45(e). All of this language suggests that only the issuing court has the power to act on its subpoenas. Subpoenas are process of the issuing court, and nothing in the Rules even hints that any other court may be given the power to quash or enforce them.
>
> There are other textual difficulties with transfer of motions to quash. Rule 45(c)(3)(A)(ii) directs the issuing court to quash or modify a subpoena that requires a nonparty to travel more than 100 miles from the place where the nonparty "resides, is employed, or regularly transacts business in person." This restriction is obviously hard to square with a principle that allows the issuing court to transfer the motion to quash to another district -- in this

case, the parties tell us, a district 892 miles away. Perhaps more significant, not only would a transferee court lack statutory authority to quash or enforce another court's subpoena, it would often lack personal jurisdiction over the nonparty. The principle that courts lacking jurisdiction over litigants cannot adjudicate their rights is elementary, and cases have noted the problem this creates for the prospect of transferring nonparty discovery disputes.

More generally, the rules governing subpoenas and nonparty discovery have a clearly territorial focus. Application for orders compelling disclosure from nonparties must be made to the court in the district where the discovery is to be taken; failure to comply with such an order is a contempt of that court. Fed.R.Civ.P. 37(a)(1); 37(b). Subpoenas for attendance at a trial must issue from the court for the district in which the trial is held; for attendance at a deposition, from the court for the district in which the deposition is to be taken. Fed.R.Civ.P. 45(a)(2). It may well be true, as respondent suggests, that the trial court will be better able to handle discovery disputes. But Congress in the Rules has clearly been ready to sacrifice some efficiency in return for territorial protection for nonparties.[10]

One significant concern highlighted by this ruling is the

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[10] Judge Henderson concurred, reasoning as follows (id. at 343):

> I stop short, however, of deciding, as does the majority, that a district court lacks authority to order a transfer. Assuming such authority exists, it should be reserved for the extraordinary, complex case in which the transferee court is plainly better situated to resolve the discovery dispute. This is not that case. The respondent has made no showing that the reasons cited for quashing the subpoena -- that it is overbroad and covers information that is privileged, not relevant to the underlying lawsuit and sought "for improper purposes" -- cannot be readily assessed by the district court there as such arguments routinely are. In any event, I believe the court abused its discretion in attempting to transfer the motions here without inquiring into the personal jurisdiction of the transferee court over the petitioner, a sine qua non for deciding the discovery motions. See In re Sealed Case, 832 F.2d 1268, 1270 (D.C. Cir. 1987) (reversing district court order completing production of companies' records where Independent Counsel failed to make "the requisite showing" that district court "has personal jurisdiction over each of the companies whose records its seeks").

question of jurisdiction of the court presiding over the main action to enforce a subpoena against a distant nonparty. That problem can probably be solved by rule provision, but it is one that must be borne in mind. And it is also evident that the main basis for this ruling was what the rules now say.

Other courts have interpreted the power to transfer more flexibly. In In re Digital Equipment Corp., 949 F.2d 228 (8th Cir. 1991), two lawyers in Portland, Ore., were served with subpoenas issued from the District of Oregon seeking testimony and production of documents in Portland. They filed objections to the subpoenas, and the party who served them then moved to enforce in South Dakota. The judge there held a telephone hearing during which the two attorneys objected to jurisdiction, but the South Dakota judge granted the motion to enforce the subpoena anyway. The Eighth Circuit granted a writ of mandamus on the ground the district court did not have jurisdiction to rule on the objections, but added that action by the Oregon court could change that (id. at 231):

> While the Oregon district court initially has exclusive jurisdiction to rule on the objections, it may in its discretion remit the matter to the court in which the action is pending. Absent such transfer, however, the District Court for the District of South Dakota lacks jurisdiction to rule on Dean and Hovemann's objections, including their claims of privilege.[11]

Somewhat similarly, the Tenth Circuit upheld a sua sponte transfer by a magistrate in Kansas to the court in Nebraska before which the main action was pending in Peterson v. Douglas County Bank & Trust Co., 940 F.2d 1389, 1391 (10th Cir. 1997):

> Nothing in Rule 45 or of the commentary thereto and no case cited to us, however, compels us to conclude that only the

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[11] In somewhat the same vein, the Seventh Circuit in In the Matter of Orthopedic Bone Screw Products Liability Litigation, 79 F.3d 46 (7th Cir. 1996), refused to issue a writ of mandamus to overturn a decision by a district judge in Wisconsin transferring a motion by nonparty witnesses to quash subpoenas to the MDL court in Philadelphia. While acknowledging that "[i]t is not clear to us that any provision of the Judicial Code or the Rules of Civil Procedure allows a district judge to transfer a particular motion for decision elsewhere," the court found that mandamus is not an appropriate device to correct what it called a "mistake of nomenclature." Since 28 U.S.C. §1407(b) seemed to vest the Philadelphia MDL court with authority to act as a judge of the District of Wisconsin, the "transfer" order might be viewed as simply inviting him to do so in this matter. Id. at 48.

> Kansas magistrate had the authority to rule on a motion to quash, effectively prohibiting him from transferring the motion to Nebraska. Accordingly the transfer was not improper simply because the transferred matter involved a motion to quash under Rule 45.

Other courts have entertained similar requests.[12]

As noted above, 28 U.S.C. §1407(b) has regularly been invoked to authorize decision by the MDL court. For example, in In re Clients and Former Clients of Baron & Budd, P.C., 478 F.3d 670 (5th Cir. 2007), petitioners sought a writ of mandamus to compel a district court in Texas to rule on their objections to subpoenas it issued and served there in service to MDL litigation pending in Philadelphia. The district court in Texas directed them to file their papers in the MDL court. Petitioners relied on Rule 45's directives that the issuing court rule on motions challenging the subpoenas, and the parties who served the subpoenas relied on §1407(b). The Fifth Circuit's resolution (id. at 671):

> The question of law that we must decide to evaluate the mandamus petition is whether the authority conferred on the MDL court by §1407(b) extends beyond depositions so as to embrace the instant subpoenas.
>
> Based on the overwhelming weight of authority, we answer in the affirmative.

It thus appears that the focus for possible rule provisions should be on providing authority outside the MDL arena for issuing courts to defer to the court presiding over the main action. Doing so would be consistent with the Committee Note to the 1970 amendment to Rule 26(c):

> The subdivision recognizes the power of the court in the district where the deposition is being taken to make protective orders. Such power is needed when the deposition is being taken far from the court where the action is pending. 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.

For purposes of discussion, the following might be a way of providing desired flexibility while adhering to the existing commitment to relying initially on the "issuing" court to enforce

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[12] In one of these cases, the nonparty served with the subpoena and requesting a transfer to the court presiding over the main action was one Anton R. Valukas. See Kearney v. Jandernoa, 172 F.R.D. 381 (N.D. Ill. 1997).

the subpoena:

Rule 45. Subpoena

* * * * *

(c) Protecting a Person Subject to a Subpoena.

* * * * *

(2) ***Command to Produce Materials or Permit Inspection.***

* * * * *

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(iii) If the action is pending in a court different from the issuing court, the issuing court may, [for the convenience of the person subject to the subpoena and the parties and] in the interests of justice, [transfer the motion to the court in which the action is pending] {remit the parties to the motion to present the motion to the court in which the action is pending}.

* * * * *

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person—except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be

reasonably compensated.

(D) *Referring Motion to Court in Which Action Pending.* If the action is pending in a court different from the issuing court, the issuing court may, [for the convenience of the person subject to the subpoena and the parties and] in the interests of justice, [transfer the motion to the court in which the action is pending] {remit the parties to the motion to present the motion to the court in which the action is pending}.

The goal here is to adopt a discretionary calculus modeled on the one already provided in 28 U.S.C. §§ 1404(a) and 1407(a) for the issuing court to use in making a decision about whether to "transfer" the motion or "remit" the parties to proceeding before the court in which the main action is pending. In the above formulations, the phrase "for the convenience of the person subject to the subpoena and the parties and" has been put in brackets because it may place undue emphasis on those concerns. It might be more accurate to say that the "interests of justice" are the sole rule-based determinant whether to resolve the subpoena issues locally. On the other hand, §§ 1404(a) and 1407(a) both include party interests. Indeed, some commentators have argued that the Judicial Panel on Multidistrict Litigation sometimes undervalues litigant interests in making transfer decisions, so removing such considerations altogether might be criticized on similar grounds.

Myriad considerations may apply in differing cases, and the decided cases (one of them decided by Dave Campbell) include many criteria that might be mentioned in a Committee Note accompanying a changes like the ones suggested above. Here are some examples:

(1) In keeping with § 1404(a), it would probably be appropriate for such a Note to begin by recognizing the strong interest of a genuinely local nonparty in having its subpoena obligations resolved close to home. On the other hand, if the subpoena is served on a party that preference might be much weaker.

(2) If a subpoenaed nonparty is somehow linked to the parties to the litigation, that might be a ground for a less forceful preference for the local nonparty.

(3) If the one seeking transfer to the district where the action is pending is the local nonparty, the desire of the party to that action to have the subpoena dispute decided locally would seem unimportant; it appears to be seeking to escape the authority of the pending judge who has responsibility for the underlying action. The risk of circumventing forum court rulings would be a serious factor

in favor of transfer. So any relevant discovery (or other) rulings by the forum court would be important.

(4) The greater familiarity of the forum court with the issues involved in the subpoena dispute would similarly argue in favor of transfer. By the same token, if the issues are primarily "local" in nature (for example, the health of a witness served with a subpoena to testify at a local deposition), the local court has a considerable advantage.

(5) The need for consistency in rulings could also play a role. If essentially the same discovery issue is likely to arise in a number of places due to discovery by subpoena, it seems best to have that issue resolved once and for all by the forum court.

(6) The distance between the local court and the forum court. If, for example, one is in Manhattan and the other in New Haven (less than 100 miles away), that seems much less significant than requiring the Manhattan witness to litigate the subpoena issues in San Francisco.

The alternative "transfer" and "remit" locutions takes account of the fact that the latter is already in the 1970 Committee Note to Rule 26(c) and has received favorable commentary in some cases, and the fact that "transfer" may do the job better. The D.C. Circuit rejected an argument premised on the Rule 26(c) Note, partly on the ground that "remit" means only to invite the nonparty moving to quash to make a motion in the court in which the action is pending. At least as things stood then, however, that would be entirely at the option of the nonparty:

> The rules may well allow similar abstention on a motion to quash, followed by deference to the trial court's decision on a motion for a protective order. * * * But if the nonparty deponent fails to take the bait and move for a protective order in the trial court, the issuing court must make the decision whether discovery may be had, and its scope, since it is the only court with the power to order enforcement.

In re Sealed Case, 141 F.3d 337, 342 (D.C. Cir. 1998). Although a new rule provision should solve this problem, the argument may show that "transfer" is a better way to put it.

(4) <u>More aggressive reconsideration of the treatment of geographic limitations on the subpoena power</u>

Consideration of the issues (2) and (3) -- nationwide

service for trial testimony and place of resolution of subpoena disputes -- has prompted a more basic reflection on the cast of the current subpoena rule contrasted with its actual operation. The cast of the rule emphasizes the place of service of the subpoena, and requires that it issue from the court where the commanded action is to occur. Whether this orientation is necessary, or even realistic, has emerged as worthy of discussion. The Subcommittee has discussed the question and seeks input from the full Committee.

As detailed below, a significantly revised approach to the subpoena power would correspond to the way personal jurisdiction issues are now handled by focusing on where performance is required rather than where service occurs. It could produce a simpler and shorter Rule 45, although the process of drafting that simpler and shorter rule might itself be a good deal longer than addressing specific problems in the ways suggested in items (1), (2), and (3) above. And it is not clear whether recasting the rule would be a significantly more effective way of handling those issues than more modest changes, although it could more easily provide flexibility for such things as different treatment of document-only subpoenas and deposition subpoenas.

Such recasting of the rule involves stepping back and reexamining the current rule provisions. One major theme is akin to jurisdiction. Certainly a subpoena is an exercise of the court's power, and that power seemingly should be subject to some sort of jurisdictional limit. Our longstanding attitude with regard to a summons and complaint was that the exercise of personal jurisdiction over a defendant depended on service within the forum. That's the old "power" theory of jurisdiction from Pennoyer v. Neff, which said: "Process from the tribunals of one State cannot run into another State and summon parties there domiciled to leave its territory and respond to proceedings against them."

With regard to compelling defendants to respond to a complaint, we've moved far beyond that concept in the post-International Shoe world. Actual personal service within the forum is hardly necessary. Under Cal. Code. Civ. Proc. §415.40:

> A summons may be served on a person outside this state * * * by sending a copy of the summons and of the complaint to the person to be served by first-class mail, postage prepaid, requiring a return receipt. Service of a summons by this form of mail is deemed complete on the 10th day after such mailing.

That does not, of course, mean that proper service suffices to justify exercise of jurisdiction; the defendant can easily challenge jurisdiction after being served that way. The propriety of the exercise of jurisdiction would depend on

defendant's pertinent contacts with the forum. Similarly with a subpoena, there need be no intrinsic link between place of service and whether the person served can be required to comply at a given location.

In relation to Rule 45, the more interesting aspect of jurisdiction might be whether actual service of a summons in the forum should suffice without regard to contacts. To use a famous example, should service of a summons on a passenger in a Braniff Air Lines flight when it was over Pine Bluff, Ark., suffice to uphold jurisdiction in the court in Pine Bluff?[13] Without addressing such an oddball situation, the Supreme Court held in Burnham v. Superior Court in 1991 that service of a summons within a state ordinarily still suffices without regard to why the person was in the state, whether the suit has anything to do with the person's presence within the state, or whether the person has any other contacts with the state. Why? In the words of the opinion of the Court (authored by Justice Scalia) -- Tradition!

The point relevant here is that one can certainly see the place of service and the propriety of exercise of jurisdiction as separate from one another.

There is also a tradition of treating service of a Rule 45 subpoena as similarly constrained to geographical limits. The Judiciary Act of 1793 provided that "subpoenas for witnesses who may be required to attend a court of the United States, in any district thereof, may run into any other district: Provided, That in civil causes, the witnesses living out of the district in which the court is holden, do not live at a greater distance than one hundred miles from the place of holding the same." Act of March 2, 1793, Ch. 22, §6, 1 Stat. 333, 335.

As a matter of form, Rule 45 still adheres to that tradition. First, Rules 45(a)(2)(B) and (C) say that discovery subpoenas should issue from the court where the discovery is to occur. Second, Rule 45(b)(2) sets out geographical limits for service of a subpoena. Rule 45(b)(2)(C) embodies pretty much what the 1793 statute said, including the 100 mile limit. Meanwhile, Rule 45(c)(3)(A)(ii) requires that the court quash a subpoena if it requires a person to show up more than 100 miles from place of residence or work. Rule 37(a)(2) is consistent, requiring that a motion to compel a nonparty to provide discovery be made in the court where the discovery is to occur.

But in a real sense this formalistic adherence is undercut by the actual operation of the amended rule. Perhaps before 1991

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[13] See Grace v. McArthur, 170 f.supp. 442 (E.D. Ark. 1959) (involving service of process in a commercial airliner).

it was meaningful to say that the subpoena was issued by the court where the discovery was to take place. Perhaps it was once necessary to hire local counsel there to obtain an actual physical subpoena from the clerk of the local court. Perhaps the clerk of that local court even opened a file upon issuing the subpoena. Doing so would provide a case number for further proceedings, were they necessary to enforce the subpoena, and also might permit the clerk to report another "case" on the court's docket to the A.O. In such a world, localism was a reality.

Whatever the pre-1991 reality, the trappings of localism are pretty much hollow under the current rule. Pursuant to Rule 45(a)(3), an attorney can issue a subpoena without making any contact with the clerk of the local court. Sometimes, attorneys purport to issue subpoenas "from" multiple district courts. The attorney need not be admitted to practice in any of these local courts, but only in the court where the action is pending. In the great majority of situations, the local court never learns that "its" subpoena has been used to obtain discovery. And the discovery itself may not occur locally. If only production of documents is sought, it seems that counsel for the person served with the subpoena (who may be located in yet another state different from the residence of the client served with the subpoena) merely sends the information to counsel for the party that served the subpoena. The local court learns about the subpoena only if there is a dispute. Then the parties may be required by the rule to find a way to submit this dispute to the "issuing" court. As suggested by the fact that providing guidance for counsel who have to make such arrangements was one of the questions we initially collected as a possible focus of rulemaking,[14] there can be real challenges in finding a way to do so. Those challenges underscore the current reality that localism in Rule 45 practice is more formal than real.

This operating reality seems much more like a system that effectively has nationwide service of subpoenas under the control of attorneys conducting litigation in the district where the case is pending. That hardly means that all subpoena disputes should be resolved by that court. In many situations, particularly involving local nonparty witnesses, there are very strong reasons

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[14] Issue (10) on our list of 17 issues was as follows: Whether the rule should provide some directions about how motions to quash or compel compliance with a subpoena can be brought before the court when the subpoena is issued by a court other than the one in which the underlying case is pending. (This issue was promoted by an article in the S.F. Recorder discussing the problems that face lawyers who want to get a dispute about a subpoena before a judge in the N.D. Cal. but have no direction from the rules on how to do so.)

why those issues should be resolved by local courts where the nonparty is located. Making those nonparties litigate these issues on the other side of the country would usually be unjustified. But it seems a significant step beyond that point to say also that it is basic to the entire arrangement that the local court must resolve all subpoena discovery disputes because it is the "issuing" court.

Insisting on localism can also be obviously harmful in a number of situations. Consider, for example, the possibility that the parties to a case have litigated a discovery issue before the court in which the action is pending and that court has resolved the issue in favor of the party seeking discovery, say the plaintiff. Assume further that plaintiff serves subpoenas on ten suppliers of the defendant seeking discovery of information related to the information that was the subject of the initial discovery dispute before the forum court. Assuming the suppliers will resist the subpoenas at defendant's urging, should our commitment to localism mean that ten other judges have to revisit these same issues that the court where the case is pending has already resolved because they are "issuing" courts? At least as a matter of policy, it seems that there are many reasons for more flexibility.

Although the foregoing focuses mainly on the place-of-resolution issue, similar issues arise in relation to compelling testimony at a hearing or trial. There, the perplexity is that there are dual and arguably inconsistent protections for the basic geographical concern. Rule 45 continues to anchor its geographical protections in place of service, something personal jurisdiction analysis left behind long ago. Like a defendant, a witness could theoretically be served with a subpoena in an airplane over the forum, and thus entirely properly under Rule 45(b)(2), but neither reside nor work in the forum state or within 100 miles of the courthouse. Then the requirement that the subpoena be quashed despite nearby service would serve a purpose.

But the focus on place of service could produce bizarre results in some situations. Consider, for example, an academic from San Francisco who is a visiting professor in New York for a year. If he is a party to a case pending in San Francisco, should obtaining his presence at trial depend on serving him with a subpoena in California? Maybe he's not going to be back in California until after the trial, but California continues to be his primary residence, and he will almost certainly try to persuade the New York taxing authorities that he is not a New Yorker for purposes of paying taxes there. Certainly he is still subject to suit in San Francisco even though not personally served with a summons there. Under Cal. Code Civ. Proc. §415.40, he could be served with a summons by first-class mail. Should his temporary presence in New York nonetheless protect him

against being required to testify at the trial in San Francisco?

There seems considerable reason to say that, under Rule 45 as in the personal jurisdiction situation, the real focus should be on where performance is required, not on where or how service occurs; if the command is geographically limited (perhaps in Rule 45(a)(1)), it would not seem that restrictions on the ambit of service in Rule 45(b) or requirements for protecting witnesses in Rule 45(c) would be necessary. Although relaxing the majority rule that a subpoena must be hand delivered to accomplish effective service (another of our issues) might affect the handling of the visiting professor in New York, if he has rented out his San Francisco house it might be difficult to comply with Rule 4's authorization to leave the subpoena there with his tenant. We might well stop short of authorizing service of a subpoena by mail.

The 1991 amendments introduced a further twist. Before then, the protections in what became Rule 45(c) did not attend to whether the person subpoenaed was a party. The 1991 amendment introduced that status into the rule in what are now Rule 45(c)(3)(A)(ii) and 45(c)(3)(B)(iii), which treat differently "a person who is neither a party nor a party's officer." The question that has divided the courts, as described below using the example of the E.D. La., is whether this distinction in treatment overrides the basic idea that the reach of a subpoena is limited by Rule 45(b)(2) based on where it is served.

For purposes of compelling attendance at a trial or a hearing, it need not be so. As the 1793 statute suggested could be done, Fed. R. Crim. P. 17(e)(1) says: "A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States." Certainly state lines do not limit the effectiveness of rules that authorize a subpoena requiring a witness to come from outside the state to testify at a trial or hearing. Rule 45(b)(2)'s contemplation that service may be made within 100 miles of the courthouse shows that can occur. And a rule can establish a basis for personal jurisdiction based on service outside a given state, as Rule 4(k)(1)(B) demonstrates. Rule 4(k)(2) even establishes a basis for jurisdiction over people not served within this country.

It would thus be possible to recast Rule 45 in a way that would substantially address at least the two problems to which this memorandum will shortly turn as follows:

(1) The subpoena could be issued by the court where the action is pending.

(2) The person to whom the subpoena is directed could be served wherever found (and by whatever means we deem suitable).

(3) The geographical range of performance obligations could be tied to the place where the person works or lives, not the place of service.

(4) The geographical range of performance obligations could be calibrated for the nature of the response required -- to testify at a trial or hearing, to testify at a deposition, to produce documents or the like, or to permit inspection of tangible items or premises. The treatment of parties and officers of parties could be part of such a provision.

(5) The enforcement of a subpoena could be calibrated also. One starting point would be to assume (absent "transfer") that enforcement regarding nonparty discovery should occur where the discovery is to occur, and concerning party discovery where the action is pending. For testimony at a trial or hearing, enforcement would be by the court holding the trial or hearing.

Such a revision would probably entail a fairly thorough rewriting of the rule, but might result in considerable simplification of the rule. It would involve abandoning the time-honored notions that place of service is important in determining whether the subpoena has to be honored.

As already suggested above, such a revision would also raise a different sort of jurisdictional issue that has been mentioned in some cases addressing "transfer" of motions to quash or enforce. It may be said that one court does not have jurisdiction to enforce a subpoena issued by another court. See, e.g., In re Sealed Case, 141 F.3d 337, 343 (D.C. Cir. 1998) (Henderson, J., concurring) (asserting that the district court's purported "transfer" of motion to quash was an abuse of discretion because the district court did not inquire into the personal jurisdiction of the transferee court over the nonparty, "a sine qua non for deciding the discovery motion"). But if the rules could authorize the court in which the action is pending to issue a subpoena requiring attendance at trial in the forum, it is not clear why it could not require the much less burdensome action of testifying in a deposition near home.

Perhaps the "jurisdictional" issue is more one of something like subject matter jurisdiction -- one court has no jurisdiction to enforce another court's subpoena. The MDL statute has been widely interpreted to solve any such concerns because it provides that the transferee judge "may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings." Likely something of the sort could be devised to overcome any jurisdictional problem of this sort.

In sum, there seems no impenetrable barrier to recasting

Rule 45 along the lines mentioned above, and considerable promise of resolving the problems of "nationwide service" and place of resolution of disputes about enforcement. And such a revision might indeed produce simplifications in the rule.

Absent such a recasting of the rule, it is not presently obvious how major shortening or simplification could be done. To date, little time has been spent on shortening the rule. For purposes of reference, the Appendix to this memorandum includes the current rule with some notations about where simplification or clarification might occur. But it is worth noting that the possible changes to the rule discussed in items (1), (2), and (3) above would not shorten the rule, and that many provisions of the rule are based on provisions applicable to party discovery under Rules 26-37. Changing those things only in Rule 45 is a dubious undertaking.

(5) Cost allocation

Discovery is expensive for parties, and Rule 45 seeks to minimize the expense for nonparties. The 1991 amendments were designed in part to broaden protections for nonparties. They introduced the duty in Rule 45(c)(1) that an attorney or party issuing a subpoena "avoid imposing undue burden or expense on a person subject to the subpoena." The court must punish violation of this duty with sanctions. It does not appear that sanctions are frequently imposed.

Rule 45(c)(2)(B) permits the person served with the subpoena to object, thereby formally halting the process in its tracks until an agreement is reached or the court enters an order enforcing the subpoena, and subdivision (ii) says further that an order enforcing an subpoena "must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance." Regarding that provision, the Committee Note suggested flexibility on implementation:

> The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party.

It is thus apparent that the framers of the 1991 amendments appreciated that cost awards could be a two-edged sword. On the one hand, undue reluctance to protect nonparties against costs could unfairly impose the costs of somebody else's litigation on them. The fact that subpoenas can be served on nonparties shows that some burden can be imposed on them, and the rule itself

protects only against "significant" expense. On the other hand, as suggested by the Committee Note, open-ended liability for all costs incurred by a nonparty could unfairly burden the party that served the subpoena. Fair though it may be to require it to pay for what it demands, it is not necessarily fair when it is not aware of the likely costs and the time it goes forward with the discovery.[15]

Secondary literature described in the materials for the April meeting contained some assertions that made the operation of the current rule appear possibly unduly rigid. Thus, it was said that no protection existed for nonparty costs unless a motion to quash, or at least an objection, were made. On the other hand, it was also said that as soon as the nonparty made that move it was guaranteed full reimbursement of all costs incurred, possibly including attorney fees incurred in reviewing the materials, perhaps even for review that led to withholding of materials on grounds of privilege or other grounds.

Experienced lawyers who have provided commentary to the Subcommittee have not borne out these concerns. Instead, they generally have reported that costs are normally negotiated in advance of production and that they rarely present significant difficulties. There was some concern about the "predatory nonparty" -- typified perhaps by the one mentioned by one of the lawyers who had, after production, presented an $800,000 bill for production costs without any forewarning that a demand of this dimension might be forthcoming.

Limited examination of case law indicates that it appears to exhibit the sort of flexibility in addressing costs concerns that one would normally favor. One feature of the caselaw is that it declines to impose costs in favor of a nonparty who never raised the topic before production. See Angel v. Kelly, 224 F.R.D. 135 (M.D.N.C. 2004) (declining to impose attorney fees allegedly incurred in production when there was no objection and there was no agreement that the party seeking discovery would pay those fees); McCabe v. Ernst & Young, LLP, 221 F.R.D. 423 (D.N.J. 2004) (nonparty who did not raise attorney fees before production could not claim them afterwards). These cases protect the party serving the subpoena against being sandbagged by surprisingly high compliance costs. Compare In re Letters Rogatory Issued by the National Court of First Instance of Commercial Matters of the Argentinean Republic, 144 F.R.D 272, 278 (E.D. Pa. 1992) (nonparty's representations about potential costs of production provided adequate notice and satisfied the concerns addressed in

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[15] Concerns like these might underlie the best practices recommendation of the Sedona Conference that there be conferences with the nonparty before production, as discussed above in relation to item (1).

the Committee Note); see also In re Automotive Refinishing Paint Antitrust Litigation, 229 F.R.D. 482, 496 (E.D. Pa. 2005) (nonparty's legal fees can be shifted under Rule 45 if they are a cost of compliance with a subpoena).

Recoverable costs turn out in actuality often to be quite modest. See, e.g., Broussard v. Lemons, 186 F.R.D. 396 (W.D. La. 1999) (court orders advance payment of $43.00 for costs of color reproduction of materials sought through subpoena). Where appropriate, however, courts may be expansive in determining what costs should be recoverable. Thus, in In re First American Corp., 184 F.R.D. 224 (S.D.N.Y. 1998), the court held that the nonparty could recover its legal fees for conducting litigation in the courts of the United Kingdom and Cayman Islands to obtain permission to release the materials sought through the subpoena.

Similar flexibility seems to exist on whether to order payment of large amounts. For one thing, the court always can review the reasonableness of the amount claimed and reduce the cost shifting on that ground. As noted above, the 1991 Committee Note expressed concern about whether the party seeking discovery was adequately apprised of the dimensions of such cost; at least it should expect that the costs incurred would be reasonable.

But reasonableness alone is not sufficient to guarantee cost shifting; the courts do not seem to indulge knee-jerk cost shifting. Shortly after the 1991 amendments went into effect, for example, a court was presented with a request for reimbursement from the American Petroleum Institute for costs it incurred complying with a subpoena from plaintiffs suing for damages caused by the spillage of oil from the Exxon Valdez. While noting the "mandatory language" of amended Rule 45(c) as a change from the former rule, the court rejected the argument that there was an absolute right to full reimbursement:

> However, "protection from significant expense" does not mean that the requesting party necessarily must bear the *entire* cost of compliance, particularly where, as here, doubt has been cast on the subpoenaed party's status as a nonparty. While the drafters of new Rule 45 clearly intended to expand the protection for nonparties such as disinterested expert witnesses, there is no indication that they also intended to overrule prior Rule 45 case law, under which a nonparty can be required to bear some of or all of its expenses where the equities of a particular case demand it. Under that case law, it is relevant to inquire whether the putative nonparty actually has an interest in the outcome of the case, whether it can more readily bear its costs than the requesting party, and whether the litigation

is of public importance.[16]

In re Exxon Valdez, 142 F.R.D. 380. 383 (D.D.C. 1992). Noting that API had a net worth of $17 million and in a recent year had posted gross receipts of $58 million, id. at 384, and also that defendants in the case were important members of this industry association, the court declined to impose the full cost of compliance on plaintiffs. Similarly, in In re First American Corp., 184 F.R.D. 224 (S.D.N.Y. 1998), the case involving the legal cost of proceedings in the U.K. and Cayman courts, the court required reimbursement for about one-third of the costs incurred.

The examination of case law has been limited, but it has not shown any reason for concern about the courts' handling of costs of compliance with subpoenas under the current rule provisions. Against this background, the Subcommittee brings forward the issue of cost shifting, but without any recommendation that rule changes be pursued to modify the handling of this important issue.

(6) In-hand service of subpoenas

Rule 45(b)(1) says that "[s]erving a subpoena requires delivering a copy to the named person." A lengthy submission to the Committee detailed conflicting decisions among various courts on whether this requires in-hand service. See 05-CV-E (from the N.Y. State Bar Ass'n). This submission argued in favor of an interpretation of the current rule not requiring in-hand service and suggested an amendment to the rule permitting alternative service in some of the ways service of a summons and complaint is authorized under Rule 4. In addition, at least one process service company has submitted comments urging that the manner of service of subpoenas be expanded to include at least some alternative means authorized under Rule 4.

Attorneys contacted by the Subcommittee did not report that the current service method had created problems, but some expressed some support for broadening the method of service.

The Subcommittee brings this issue forward to the full Committee for discussion. Some simplification, and perhaps cost savings, probably would result from authorizing a method of service other than in-hand service (assuming that is what is now required). But it may be that there are significant differences between the consequences of failed service of a complaint and failed service of a subpoena. With the former, a default can

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[16] For similar holdings, see In re Honeywell Intern. Inc. Securities Litigation, 230 F.R.D. 293, 302-03 (S.D.N.Y. 2003); Linder v. Calero-Portocarrero, 180 F.R.D. 168, 177 (D.D.C. 1998).

ensue, but courts are relatively forgiving about setting aside a default. With the latter, there may be short fuse for compliance leading to contempt if compliance is not forthcoming, although it would seem unlikely that many courts would impose contempt when a nonparty did not receive actual notice of the subpoena. In addition, the time to object to the subpoena is a fairly short time, with possible issues of waiver of grounds for resisting enforcement.

If Rule 45 is to be modified to make it resemble Rule 4, there would be questions about how many methods of service recognized by Rule 4 should also be valid for subpoenas. Rule 4 authorizes waiver of service, which might be useful also with subpoenas. It also has a variety of provisions for actual service depending on who is to be served, or where the person is served (inside or outside the country). See Rule 4(e) - 4(j). Some provisions authorize service in any manner authorized by state law. In California, as noted above, that includes service by first class mail with a return receipt requested. A decision to pursue expanding service of Subpoenas to correspond to Rule 4 service of a summons and complaint would entail deciding whether or how to adapt all of these provisions to subpoenas.

APPENDIX

Possible ideas for shortening or clarifying Rule 45

As noted in Item (4) above, Rule 45 might be recast to recognize more clearly what seems to be modern reality of subpoena practice. If so, it is possible that this revision would also reduce its length and complexity.

If this sort of revised orientation is not adopted, the options for shortening or simplifying Rule 45 are probably limited. The suggestions above of ways to address the problems of notice to the other parties, the court's power to require parties to travel across the nation to testify at trial, and the problem of enforcement in a remote court when the issues overlap importantly with the main action appear more likely to lengthen than shorten the rule.

Besides that prospective reality, another reality that we have discussed is that Rule 45 gathers together in one place provisions relating to nonparty discovery that somewhat duplicate what's in Rules 26-37 for party discovery. Making it really short and sweet is probably not possible. Moreover, to the extent we try to trim portions of Rule 45 that are parallel to portions of Rules 26 to 37, we would probably need to look at changing the parallel provisions in Rules 26-37. Not only would our changes to Rule 45 seem to imply that we have found a better way to do the same thing, we would likely also want to avoid arguments that the Rule 45 provision is meant to be different in operation from party discovery provision in Rules 26-37.

With that background, the following very lightly tries to identify some places where changes could be made in Rule 45, and also to note where changing Rule 45 might imply a need to change something in Rules 26-37. In the process, it also identifies some uses of language in Rule 45 that might be questioned and therefore adjusted if rewording is undertaken. Although it does not offer much in the way of shortening and simplifying, it may be a start.

Rule 45. Subpoena

(a) In General.

(1) *Form and Contents.*

(A) *Requirements-In General*. Every subpoena must:

(i) state the court from which it issued;

(ii) state the title of the action, the court in which it is pending, and its civil-action

number;

(iii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody, or control; or permit the inspection of premises;[17] and

(iv) set out the text of Rule 45(c) and (d).[18]

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[17] Although not shorter, it might be preferable to break up this paragraph somewhat as follows:

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

[18] Although it would not make the rule shorter, it might make the subpoena process simpler and more understandable for nonparties by changing this directive. Rules 45(c) and (d) are not short, and probably have to be about the length they are to set forth in rule form the things they need to specify. Many parts are parallel to provisions in Rules 26-37; as suggested above, they probably should be provided in parallel detail. Presumably the directive to include (c) and (d) in the subpoena was designed to make sure that the nonparty is immediately made aware of the protections that are in the rule.

All that detail is probably overwhelming to nonlawyers served with subpoenas, however. Could the rule specify that the subpoena contain instead something more likely to make sense to a nonlawyer? One analogy is the attention given to class action notices; the Federal Judicial Center drafted exemplars of how that sort of notice could be given in a manner that might be understood by nonlawyers (e.g., in question and answer format). One of the questions might be "Do I need to hire a lawyer to respond to this subpoena?" The lawyer would have the full text of Rules 45(c) and (d). Presumably, the nonlawyer could be directed to the www.uscourts.gov web site for the text of those rule provisions.

(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 party[19] to permit inspection, copying, testing, or sampling of the materials.

(2) ***Issued from Which Court.*** A subpoena must issue as follows:

(A) for attendance at a hearing or trial, from the court for the district where the hearing or trial is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken; and

(C) for production or inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) ***Issued by Whom.*** The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service. An attorney also may issue and sign a subpoena as an officer of:

(A) a court in which the attorney is authorized to practice; or

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[19] As suggested above, this probably should be "person."

(B) a court for a district where a deposition is to be taken or production is to be made, if the attorney is authorized to practice in the court where the action is pending.[20]

(b) Service.

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

(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

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[20] Would it be clearer (if not shorter) to reorganize this material somewhat as follows:

(3) ***Issued by Whom.***

(A) The clerk must issue a subpoena, signed but otherwise in blank, to a party who requests it. That party must complete it before service.

(B) An attorney also may issue and sign a subpoena as an officer of:

(i) a court in which the attorney is authorized to practice; or

(ii) 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.

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.[21]

(3) ***Service in a Foreign Country.*** 28 U.S.C. § 1783 governs issuing and serving a subpoena directed to a United States national or resident who is in a foreign country.

(4) ***Proof of Service.*** Proving service, when necessary, requires filing with the issuing court a statement showing the date and manner of service and the names of the persons served. The statement must be certified by the server.

(c) Protecting a Person Subject to a Subpoena.

(1) ***Avoiding Undue Burden or Expense; Sanctions.*** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense[22] on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) ***Command to Produce Materials or Permit Inspection.***

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[21] The "and for good cause" clause may be redundant. One continuing restyling debate was whether we assume courts only do things for good cause, and therefore do not need to say so. Another point here is that if a statute provides for service at some place, it might seem odd for a judge to say "I won't follow the statute unless you persuade me good cause justifies doing so."

[22] The use of "undue burden or expense" here can be contrasted with the use of "significant expense" in Rule 45(c)(2)(B)(ii). Just looking at the words, it seems that the obligation on the party or attorney issuing the subpoena would be higher if the rule said "significant expense" here. And in 45(c)(2)(B)(ii), it might be inappropriate to change to "undue burden or expense." The protections of Rule 26(b)(2)(C) would seem to ensure judicial constraint at least to that extent. It seems the limitation on orders requiring compliance with a subpoena are meant to be more protective of the nonparty.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) ***Quashing or Modifying a Subpoena.***

(A) *When Required.* On timely motion, the issuing court 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;[23] or

(iv) subjects a person to undue burden.[24]

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information;

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

(iii) a person who is neither a party nor a party's officer to incur substantial expense[25] to travel more than 100 miles to attend trial.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a

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[23] 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 is nonetheless probably worthwhile to retain this recognition that a motion to quash must be granted on this ground when a privilege applies.

[24] Here we have again the "undue burden" criterion, but without "or expense," as appears in Rule 45(c)(1). Does that mean that "or expense" could be removed from Rule 45(c)(1)? Is this protection narrower than the requirement that the attorney issuing the subpoena avoid imposing "undue burden or expense"? If the court quashes the subpoena under Rule 45(c)(3)(A)(iv), does that automatically mean that the attorney who issued the subpoena is subject to sanctions? Rule 45(c)(1) says that the issuing court must impose a sanction on an attorney who violates the rule set forth there.

[25] Here again, it seems that the "significant expense" protection is deemed more stringent than the "undue expense" protection of Rule 45(c)(1), and again this protection excludes party witnesses.

subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.[26]

(d) Duties in Responding to a Subpoena.

(1) ***Producing Documents or Electronically Stored Information.*** These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

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[26] One might argue that Rule 45(c)(3)(C) is unnecessary because the court surely has implicit or "inherent" authority to condition compliance with discovery or attendance at trial on compensation for imposition. But retaining the rule provision probably has value. For one thing, it reminds the parties and the court of this option. In addition, it makes it clear that the court may provide this protection. Finally, it specifies in (i) the criteria for deciding whether to enforce the subpoena subject to conditions.

On the other hand, the rule provision only applies "[i]n the circumstances described in Rule 45(c)(3)(B)," so maybe it could be argued that paragraph (C) undercuts arguments that the court could ever conditionally order partial compliance with a subpoena found subject to Rule 45(c)(A). In 1998-2000, there was quite a rulemaking donnybrook about whether to make explicit the court's presumed authority to order discovery in excess of the limitations of Rule 26(b)(2) on condition that the party seeking the discovery compensate the party asked to provide it for the resulting dislocation.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost.[27] On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.[28]

(2) ***Claiming Privilege or Protection.***

(A) ***Information Withheld.*** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the

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[27] Here we have the phrase "undue burden or cost," which is borrowed from Rule 26(b)(2)(B) but differs from "undue burden or expense," used elsewhere in Rule 45. It might be argued that these were intended to mean something different, but that almost surely was not the intent.

[28] Rule 45(d)(1) is based on parallel provisions adopted in 2006 to deal with discovery of electronically stored information. If it were changed, the parallel provisions probably should be reexamined.

claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.[29]

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).

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[29] Rule 45(d)(2) attempts to provide in Rule 45 directives parallel to Rule 26(b)(5). If the Rule 45 provisions are modified, it would seem that the Rule 26(b)(5) provisions should probably be reexamined as well.

Notes of Conference Call
Discovery Subcommittee
Advisory Comm. on Civil Rules
Sept. 16, 2009

The Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call on Sept. 16, 2009. Participating were Judge David Campbell (Chair of the Subcommittee), Daniel Girard, and Anthony Valukas (members of the Subcommittee), Prof. Edward Cooper (Reporter of the Advisory Committee), and Prof. Richard Marcus (Reporter of the Subcommittee). Judge Mark Kravitz (Chair of the Advisory Committee) and Chilton Varner (member of the Subcommittee) were unable to participate.

Judge Campbell introduced the call by suggesting that the objective should be to determine whether the Subcommittee was in a position to make a tentative recommendation for discussion purposes of any rule-amendment ideas during the discussion at the October meeting, and to determine what issues should be brought forward for discussion during the October meeting. No firm recommendations for Advisory Committee action would be forthcoming. In addition, the Subcommittee could discuss the reactions obtained from experienced lawyers invited to express views since the Aug. 11 conference call.

Requiring Notice of Service of Subpoena, Conferences About Enforcement, and Receipt of Fruits

The first topic arose from a number of expressions of concern about failure to comply with the current requirement of Rule 45(b)(1) that the party serving a subpoena solely for production of documents give "prior" notice to the other parties. As restyled, the rule provision makes clear that "prior" means before service of the subpoena.

The first problem with this notice requirement is that lawyers too often are not complying with it. One seeming reason is that it is somewhat buried in a provision otherwise about service of the subpoena on the person subpoenaed, and tendering fees to that person along with the subpoena. It was quickly agreed that the provision should be relocated to make it more apparent to the reader.

A second question was where it should be relocated. The materials for the call had suggested that it could be moved into Rule 45(a) or moved to a later point in Rule 45(b) where it could be set out separately. Rule 45(a) contains general directions for using subpoenas, and Rule 45(b) is entitled "service." The resolution was that inserting the provision in Rule 45(a) seemed a better choice.

The question of notice had three attributes; the materials for the conference call included three possible provisions, only

one of which corresponds to what is currently in Rule 45(b)(1) as a mew Rule 45(a)(4):

> ***(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 the following rules apply:
>
> (i) Before the subpoena is served, a notice including a copy of the subpoena must be served on each party;
>
> (ii) Before production or inspection in response to the subpoena, the party serving the subpoena must attempt to confer with the person served about any issues concerning production of the requested materials, and must provide notice to the other parties of any such conference;
>
> (iii) After production in response to the subpoena, the party serving the subpoena must within 7 days serve notice on each other party describing the type and volume of the produced materials and offering on reasonable notice to permit inspection or copying of the produced materials.

The three possible provisions were discussed separately.

Romanette (i): The first provision reproduces what is in current Rule 45(b)(1), with the addition that it requires that the notice include a copy of the subpoena. A notice without the subpoena itself might be insufficient. For example, "We are going to serve a documents subpoena on XYZ Corp." does not tell the other parties anything about what will be requested by that subpoena. This provision was approved, including the specific requirement that the subpoena be provided.

Romanette (ii): This possible provision was introduced as having been included because it was prompted by commentary from the Sedona Conference regarding subpoena practices, particularly as they involve electronically stored information. The Sedona Conference did not endorse making rules requiring conferences regarding compliance with a subpoena, but only endorsed conferring as good practice. Requiring such activity might complicate or delay compliance with a subpoena. A nonparty might delay until all other parties were certainly consulted, and the other parties might make it difficult to arrange such consultation. In addition, this requirement might tend to foment objections and obstruction in some cases.

An initial reaction was that perhaps a middle ground could be found. In many cases, a requirement of this sort would seem wasteful. Perhaps a rule could say that if any party does confer

with the nonparty served with the subpoena it should promptly advise the other parties of that fact and the results (i.e., any arrangements for production of the materials sought).

Another participant expressed considerable concern about this consultation requirement. There is a general duty to cooperate. The worry is that this sort of provision could be used as a device to obstruct the gathering of evidence using a subpoena. Something like this could often tie things up. Suppose the nonparty just wants to produce the documents and get the process over with. Then involving the other parties could complicate that process, particularly if one of the other parties is tempted to make the litigation more costly or take up time. On the other hand, there is also the risk of the "predatory nonparty" that submits a bill for $800,000 after providing production, saying that this was the cost of doing so.

Another participant agreed that conferring with the nonparty is a good idea, but believed that requiring a conference with the other parties is a bad idea. That notice will lead to wasting time and obstruction. There will be repeated reactions like "I insist on being involved, but I'm not available until the end of next week." Giving notice of the service of the subpoena under (i) should accomplish everything we could do with this provision. Anyone who wants to be involved in the terms of the subpoena, or to obtain additional materials, can then take the initiative. Burdening the party seeking information via subpoena with orchestrating this sort of conclave is "like herding fleas." Much as there is merit to contacting the nonparty to work things out, there should be no rule provision mandating contact with the other parties.

Another participant responded that nonparties are not shy about picking up the phone either. Making it a rule requirement to "confer" with them could unduly complicate matters -- even in the absence of any duty to involve the other parties -- particularly if another party has ties to the nonparty.

The emerging consensus was that no provision modeled on (ii) would be proposed for active study by the full Committee. Nonetheless, the question whether some rule provision along these lines would be useful could be discussed during the October meeting.

In that vein, it was suggested also that the phrase "Before production or inspection in response to the subpoena" might be deleted so as not to delay matters. To this, it was responded that the objective is to begin concrete discussion of problems before extensive efforts to produce have begun. For example, if one is worried about the $800,000 bill, it would not be useful to confer only after the costs have been run up.

Romanette (iii): Because (ii) has been dropped, this proposal would be renumbered (ii). It was introduced as being in part an effort to respond to a suggestion from the ABA Section of Litigation. Consistent with that suggestion, various attorneys asked for reactions about problems with subpoena practice had raised similar concerns. Too often, it seems, there is no follow up on what is produced in response to the subpoena and issues of surprise arise when that material surfaces close to trial. The goal of the draft was to ensure that some opportunity to inspect and copy is provided in a timely fashion.

A first reaction was that the ABA Section of Litigation's proposal had also raised concerns about a related topic. That is, the handling of an agreement to withdraw portions of the subpoena that the other parties don't know about until after it has become a fait accompli. That drew the response that the second discussion item -- concerning conferring with the nonparty and the other parties -- came closer to addressing that sort of concern.

Another concern that was raised was the cost implication. Would it be desirable to include provisions about how much the party that served the subpoena could charge the other parties for copies of the material. Is this a profit center?

A reaction was that the notice requirement in proposed (i) would address the great majority of problems of this sort; having been advised of the receipt of the materials the lawyers can work out a reasonable arrangement. Another participant agreed; copying costs are a separate issue. Modifications of the subpoena and costs are not the same thing.

This discussion produced the reaction that one thing that could be put in a rule is a requirement that modifications of the subpoena must be in writing and served on the other parties. Otherwise, even with a copy of the subpoena one would not know what was to be produced. But it was objected that this could rigidify the process of negotiating modifications of the subpoena. It might be best to leave it to the other parties to inquire about any changes and communicate their concerns if they want those concerns considered. Again, there is no reason to expect them to be shy about their interests. Once the other counsel have been notified, the burden is on them to protect their clients' interests.

A separate concern was raised about the directive in draft (iii) that the party serve a notice "describing the type and volume of the produced materials." How much detail should that include? What would happen if recipients did not seek to obtain copies and then objected to use of the evidence at trial on the ground that the description had been incomplete or inaccurate? Perhaps it is asking for trouble to include this as a

requirement. Any reasonable lawyer receiving a notice that the materials have been received will inquire about what was obtained; no rule provision is needed to require a detailed decription of that information. Making it a rule requirement creates potential difficulties. The resolution was to take the quoted phrase out of this draft provision.

Another question about Rule 45(b)(1) notice was raised by a comment from one of the lawyers invited to comment on Rule 45 practice: This lawyer argued that the notice requirement should be expanded to apply to all subpoenas, not only those seeking only production. The concern is that the notice of a deposition required by Rule 30(b)(1) may not happen until after the subpoena is served, and that it would be preferable to insist that it be given -- as with the Rule 45(b)(1) notice under the restyled rule -- before service of the subpoena. A response was that this is not really a Rule 45 issue, or at least it expands the decision in 1991 to add a notice requirement to Rule 45 only because the Rule 30 notice requirement did not apply. In addition, there seems no reason to require different notice for nonparty depositions than for party depositions (which do not involve subpoenas). Accordingly, it seemed unnecessary to consider changing the subpoena rule to require an additional notice besides the notice required by Rule 30(b)(1), or to substitute a new Rule 45 notice for the one heretofore required by Rule 30(b)(1).

Nationwide Subpoena for Trial With Party Witnesses

The issue was introduced as resulting from dual provisions about geography in Rule 45. Rule 45(b)(2) provides geographical limitations on where service may be made, and Rule 45(c)(3)(ii) requires quashing any subpoena that directs the person served to travel more than 100 miles unless the person is a party or a party's officer. The different treatment of parties and party officers was introduced in 1991, when the mandatory protection was added to Rule 45(c). The service provision in 45(b)(2) says it is "subject to" the Rule 45(c) provision. Under what is reportedly the majority rule, courts treat the Rule 45(c) provision as authorizing nationwide service to compel parties and party officers to attend trial. Leading examples of the handling of this issue come from the E.D. La.; in a Vioxx case Judge Fallon commanded a Merck officer to testify at trial even though he had not been served in the district and lived and worked in New Jersey. In another case, Judge Vance acknowledged that Judge Fallon's decision represented the "majority rule," but refused to require out-of-state plaintiffs in an FLSA opt-in action to attend trial when they were not served with subpoenas within the district.

A starting point was to address the policy issue: Should

there be a subpoena power to command party witnesses to attend trial? If not, the task would be to "overrule the Vioxx line of cases by rule amendment."

One possible argument for such a power could be modeled on the Vioxx litigation. It was an MDL proceeding with thousands of cases possibly to be settled on the basis, partly, of the outcomes of a few trials that might be viewed as bellwether trials. Under those circumstances, given the reality that corporate executives travel frequently on business, it seems unrealistic to say that this important corporate task would not justify requiring them to attend trial and testify before the jury. The importance of having live testimony has been debated, it is true, but it remains the preferred mode of presenting testimony under the Civil Rules. To use the deposition testimony of the corporate officer, for example, the corporate defendant would have to show that the witness is unavailable under Rule 32(a)(4), which would probably be difficult for the corporate party to demonstrate. Shouldn't the judge in such a situation have the authority to insist that the officer attend?

A further point along the same lines was that this argument for such authority is strong only in instances where the corporate officer actually has important information. Consider, for example, the corporate officer in charge of developing a drug that is alleged to have injured many people. It may be that this is the person best equipped to describe the process by which the drug was developed. It is likely that this person travels frequently for work. Shouldn't the judge have authority to order the person to travel to trial? Perhaps the solution would be to empower the court to subpoena the officer based on a showing of such circumstances, which could be defined with care.

Another reaction was that with corporate parties, this judicial authority could be recognized as one of the consequences of the privilege of doing business in the corporate form. Some corporations do business in every district in the nation. They can obviously arrange to have any of their employees attend trial anywhere if it is to their advantage. Under Fed. R. Evid. 615, the corporate party also may insist that its employee be permitted to hear the trial testimony of all the other witnesses. Is it asking too much to say that the corporation can be required to produce at trial a person with crucial personal knowledge. Requiring a threshold showing of need for the testimony could protect against abuse.

These comments drew a strong statement of disagreement. To take an example, G.M. does business in every district in the country. Does this mean that Fritz Henderson has to travel to every trial in which G.M. is a party? Authorizing subpoenas for such purposes will permit endless mischief. Every adverse attorney will conjure up reasons why Henderson's testimony is

important. That will put extreme and unjustified pressure on G.M. to settle just to avoid tying up its CEO. Even getting on the CEO's schedule for a 30-minute meeting is extremely difficult for the outside lawyers hired to represent the company. But this would enable adverse lawyers to tie up the CEO for days. This will lead to greenmail. If the CEO's testimony is really needed, modern technology provides very good substitutes for personal appearance at trial. Video depositions are close enough to live testimony at trial. The temptation for judges in remote places to grant a local plaintiff's counsel the right to examine the CEO before the local jury will be too strong.

It was also noted that the Criminal Rules have nationwide subpoena power. Obviously it can be used with certain important matters. This drew the response that criminal cases are different. For one thing, there is the Confrontation Clause and the right to compulsory process; neither of those applies in a civil case.

It became apparent that the policy issue could be debated and that the debate should be presented to the entire Advisory Committee. Accordingly, the issue should be carried forward to for discussion during the October meeting. If the decision were to overrule the Vioxx line of cases authorizing nationwide subpoena power for party witnesses, the materials for the conference call presented a relatively straightforward method of doing that and that should also be brought to the Advisory Committee. If the decision is to design a nationwide subpoena provision subject to advance approval by the judge, that would have to be done after the October meeting. For purposes of the discussion, it might be that there are really three choices to be addressed by the Advisory Committee in October:

(1) Any party may have nationwide subpoena power for a party witness to attend trial, or

(2) All witnesses -- including party witnesses -- are subject to the same distance provisions, or

(3) All witnesses are subject to the same distance provisions, except that -- based on a satisfactory showing of need and witness knowledge -- a judge may subpoena a party witness to attend trial from anywhere in the country.

Another possibility was mentioned: Would it be useful to try to design a Rule 30(b)(6) analogy in Rule 45: A party may be required to produce something like the "most knowledgeable person" to testify on specified topics? Then G.M. gets to choose the witness. One reaction was that this would create endless fights and problems. Already, there are frequent fights about whether 30(b)(6) witnesses are suitably prepared. Having such a fight in the middle of a trial could be very disruptive. At

least with 30(b)(6) depositions the corporation can be directed to prepare and supply a substitute witness. Suspending a trial while that is done would not work.

Place of Resolution of Subpoena Disputes

This issue was introduced with the observation that the almost universal reaction of the lawyers we had canvassed was that having disputes decided by the judge presiding over the underlying case is superior. A few comments emphasized the interest of the nonparty in a local resolution, but almost all recognized the difficulty of getting the matter before the local court and getting a resolution from that court. Many cited uncertainties and delays resulting from having to introduce the issues to a judge not previously familiar with them. Some also mentioned the reduced incentive such a judge would have to resolve issues promptly compared to the judge presiding over the underlying case. There was unanimity that this topic should be brought to the full committee.

The draft rule language suggested for discussion provided as follows:

> If the action is pending in a court different from the issuing court, the issuing court may, for the convenience of the person subject to the subpoena and the parties and in the interests of justice, [transfer the motion to the court in which the action is pending] {remit the parties to the motion to present the motion to the court in which the action is pending}.

This language was introduced as being modeled on the transfer provisions of 28 U.S.C. §§ 1404(a) and 1407. It adds the convenience of the person subject to the subpoena to the standard used in those statutes. The concept is that the application would first be made to the judge for the district in which the proposed discovery is to occur, and that judge would make a determination whether the dispute should be resolved by the judge presiding over the underlying action. At least it would clearly address cases in which the nonparty urges transfer and it is the party to the underlying action who insists on a decision instead by the judge in the district where the discovery is to occur. In that situation, it almost seems that the party to the case is trying to avoid a ruling by the presiding judge in the case.

An initial reaction was that the language "for the convenience of the person subject to the subpoena and the parties and" might be removed, leaving the standard limited to "in the interest of justice." It seems unnecessary to put that into the rule, and might seem to curtail the judge's authority to do what will work best for the case. The Committee Note could be clear enough that the reason the decision is initially presented to the

court where the discovery is to take place is to afford the potential of local treatment to the local nonparty. It could also say that the presumption should be in favor of local resolution unless the interests of justice favor (perhaps strongly favor) resolution instead in the court where the underlying action is pending. The questionable language should be in brackets in the presentation to the full Committee.

Another issue that should be raised with the full Committee is problem of jurisdiction -- are we certain that the court presiding over the main action has jurisdiction to enforce a subpoena against the local nonparty? It may be important that the subpoena is technically issued by the court where the discovery is to take place. How then can another court enforce a subpoena? This would be different were the nonparty to file a motion for a protective order before the court where the action is pending; then it would be submitting to the jurisdiction of that court.

Finally, another question was whether there is an important difference between the "transfer" version and the "remit" version. One answer is that the Committee Note to the 1970 adoption of Rule 26(c) used "remit" as a way of describing the possibility that the court where the discovery is to occur might defer to the court presiding over the action. So that locution has some background. On the other hand, the D.C. Circuit has said that the "remit" approach won't work unless the nonparty "takes the bait" and files a protective order motion in the court where the action is pending; otherwise, it says, under the current rules the issuing court must proceed to decide the objection. The use of "transfer" seems to resolve that issue; the issuing court itself does the transfer, rather than awaiting a further move by the nonparty or the litigant that served the subpoena. It was resolved to bring both the "transfer" and the "remit" versions to the full Committee, with a tentative recommendation to use the "transfer" formulation.

Recasting Rule 45 to Authorize The Court Presiding Over The Action To Issue Subpoenas for Discovery Elsewhere and Simplifying the Rule

The materials for the conference call contained a lengthy discussion of another approach to Rule 45 that could lead to recasting the rule substantially, and also a very limited initial effort to identify ways in which the rule might be clarified or shortened. These two topics were combined for discussion because it may be quite difficult to shorten or simplify the rule very much unless there is some considerable recasting of it.

The recasting idea was introduced as reflecting what seems to be the de facto reality nowadays (at least since the 1991

amendment) that we have nationwide service of subpoenas driven by the underlying action rather than local subpoena efforts actually controlled and monitored by local courts with regard to discovery within their districts. In reality, lawyers acting in relation to the underlying litigation issue subpoenas by filling in the names of the "issuing" courts without any actual contact with those courts, and the "issuing" courts find out about the discovery occurring under their auspices only if there is a dispute that leads either to a motion to enforce or a motion to quash. In part, this vestigial adherence to the form of local issuance of subpoenas is tied to the idea that the main geographical limitations on subpoenas look to the place of service, and only as a backup to the place of commanded performance. In part, that dual focus on geographical limitations produced the ambiguity that created a split among the courts on nationwide service for testimony at trial. Making such a change would -- as with personal jurisdiction -- detach the place of service from the place where the action (providing discovery or defending a suit) must occur.

It was also noted that recasting the rule could make it easier to deal separately and sensibly with different kinds of commands. For example, for a document-only subpoena, it might make sense to remove any geographic connotations. For a deposition subpoena, the same provisions as at present could be installed. For trial testimony, the same provisions as presently in the rule could be adopted, perhaps with the possibility of a showing to the judge to authorize a subpoena requiring travel over a longer distance for party witnesses. It might be that the biggest problem would be contempt enforcement powers for the court presiding over the main action. On the one hand, that should be in a convenient location. On the other hand, as a matter of power, the fact that the Criminal Rules authorize nationwide subpoena power shows that rulemaking can authorize such a thing.

One participant said this set of ideas is intriguing. The retention of the form of an "issuing" court is a vestigial remnant of a time when that meant something, but it is not really consonant with contemporary practice. Another expressed concerns on whether there might be practical problems we have not foreseen with such an outwardly dramatic recasting of the rule.

It was asked whether this recasting would make much practical change. It is good to get rid of archaic detail, but if there are possibilities of complications it might be worth asking whether more modest changes like the ones discussed already could, as a practical matter, do just as much as these more dramatic changes.

One answer was that a simpler and cleaner set of changes to deal with the problems of nationwide service under the "Vioxx

rule" and the problem of place of resolution of disputes might actually be more effective. Another was that -- absent some sort of change like this -- considerable simplification or shortening of Rule 45 is unlikely to work. Presently, for example, the suggested cures to the various problems addressed above are likely to add to the length of the rule, not to shorten it. In addition, this revision idea might make it easier to handle document-only subpoenas in a sensible way that corresponds to how they reportedly are actually handled today. At some point, a rule that describes and addresses how things are actually done may have practical advantages.

The discussion was summed up with the question: Is it worth the candle? It might cause consternation in some parts of the bar. Doing this recasting would take considerable time and effort, and is a matter that should be discussed with the full Committee. The goal for the October meeting should be have an open discussion of the issues raised and to evaluate whether the undertaking of recasting the rule seems worthwhile.

The discussion then turned briefly to three other issues that had been the subject of outreach to experienced lawyers.

Recovery of Costs

Rule 37(c)(1) says that a lawyer who issues a subpoena "must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." The person served may object to the subpoena on grounds of burden or cost. Rule 45(c)(2)(ii) says that if there is such an objection the court, in enforcing the subpoena, should protect the person compelled to comply from "significant expense resulting from compliance."

Andrea Kuperman's broad research effort turned up a number of articles making potentially troubling assertions about cost allocation, such as that no cost recovery is possible unless a nonparty objects to the subpoena on this ground, and that if it does object all costs are recoverable. Most of the experienced lawyers from whom comments were obtained by the Subcommittee, however, said that the issues of cost were usually worked out reasonably easily. The principal exception to that was the concern that a nonparty might come in with a huge bill far out of proportion with what was expected and without any warning of the problem.

The issue was introduced with a brief report on brief research revealing that the actual case law seems to treat costs issues with considerable flexibility and dexterity. If the nonparty never raises costs at all and then submits an $800,000 bill, a court is almost certain not to require that it be paid. Indeed, if there has been no objection or order to comply, it may well say that Rule 45 provides no basis for imposition of costs,

although the court may enforce an explicit or implicit agreement about cost allocation. If there is an objection, that does not automatically mean that all costs -- in particular attorney fees for reviewing documents -- are automatically recoverable, or recoverable at all.

Against this limited background of case law, therefore, it is not at all clear that a rule change from the current provisions would produce desirable results. One suggestion was that the discussion of Rule 45 costs is reminiscent of the discussion of Rule 30(b)(6). With that rule, there were some who made strong arguments that it should be weakened or strengthened, and the ultimate conclusion was that it probably is about right. Resolution of duties in individual cases would sometimes present difficult choices, but changing the rule was not likely to improve matters. The Rule 45 costs issues may present the same sort of question.

It was agreed, however, that the costs issues should be discussed with the full Committee during the October meeting.

Personal Service of Subpoenas

The reaction of the lawyers canvassed about Rule 45 issues was that the in-hand service question was not a problem. One participant expressed some surprise at that nearly unanimous conclusion. One participant's reaction was "Why not do it by mail?" The issue should be brought forward to the full Committee.

100 Mile Limit

The 100-mile limit has been with us since 1793. Travel has become enormously easier. One suggestion was that a 100-mile journey in the 18th century was expected to take five days (each way). But it is not clear whether some other number would now be a better choice. Perhaps this should be tied in with recasting the full rule if that is to be done. Some suggested raising to 200, or 250, often with specific examples in mind (e.g., the distance from New York to Washington). This issue need not be brought forward at present to the full Committee.

Notes of Conference Call
Discovery Subcommittee
Advisory Comm. on Civil Rules
Aug. 11, 2009

The Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call on Aug. 11, 2009. Participating were Judge David Campbell (Chair of the Subcommittee), Judge Mark Kravitz (Chair of the Advisory Committee), Chilton Varner, Daniel Girard, and Anthony Valukas (members of the Subcommittee), Prof. Edward Cooper (Reporter of the Advisory Committee). and Prof. Richard Marcus (Reporter of the Subcommittee).

Judge Campbell introduced the call as designed to reflect on the list of issues remaining for consideration and methods of addressing them. Some issues seemed clearly enough deserving of serious attention so that some initial sketching of possible draft amendment ideas by Prof. Marcus. That drafting exercise would permit more concrete discussion and consideration of these issues during the October, 2009, Advisory Committee meeting. The Subcommittee had reached no consensus on whether any rule changes should be pursued to deal with these issues, but consideration of them would be facilitated by focusing on what sorts of rule language might be employed to address them.

It seems that the issues on which this sort of sketching of rule-amendment ideas could be productive includes the following:

(3) -- Place of resolution of disputes

(7) -- Use of Rule 45 to compel attendance at trial of officers of a corporate party

(8) -- Reducing the length and/or intricacy of Rule 45

(15) -- Notice requirements for other parties regarding document subpoenas

Other issues, however, presented significant unanswered questions about whether there are problems in practice that warrant serious consideration by the Subcommittee. It was suggested that changes to Rule 45 depend peculiarly on experience in practice; if the bar does not see a difficulty with the rule as presently written, changes do not appear to be warranted. It is important that any amendment ideas be based on practical considerations. Subpoenas can affect a lot of people. Increasing burdens on nonparties is a serious consideration. For several issues, additional canvassing of the bar by Subcommittee members would be very helpful. An initial list of those issues included:

(3) -- Place of resolution of disputes

(6) -- 100-mile radius for service or appearance

(11) -- Hand delivery of subpoena

(17) -- Handling of cost issues resulting from compliance with subpoenas

There was some discussion about whether all of these issues presented real problems. For example, is the hand delivery for personal service a real problem? Certainly process servers would like this task to be easier. But would that harm the interests of nonparties, who might be less likely to receive actual notice and to face contempt for failure to comply? In somewhat the same vein, the question was asked whether it makes sense to have separate provisions about where service is permitted (sometimes outside the state in which the issuing court sits) and place of appearance or performance to satisfy the subpoena. Presently an arguable divergence between provisions dealing with those two topics has produced disagreements among courts on whether it is permissible to require corporate officers to appear at trial although they reside and work outside the state and more than 100 miles from the courthouse.

It was emphasized that all this discussion is preliminary and that any decisions about actual rule amendment topics, if any, have yet to be made. Those decisions would be much aided by additional information to make policy judgments about what rule changes could prove beneficial.

The question of how best to gather such information was discussed. One idea would be to post inquiries on the Committee's website. Another was a reminder that in the past the Committee had invited input by use of "Dear Fans" letters addressed to lawyers across the country identified as interested in given topics, inviting reactions to topics or issues or rule change concepts being considered by the Committee. Usually those letters had come from the Reporter; it is not clear that very many people check the website. Another idea would be to go to groups and individuals who have provided guidance or expressed interest in the past. At the same time, it was stressed that it must be apparent that "the train has not left the station." These inquiries -- like the sketches of possible rule-change ideas mentioned above -- delve into topics that may very well never see the light of day as amendment proposals.

At the same time, it was also emphasized that this outreach idea is not so formal as inviting groups to offer "official" reactions. We already have had some reactions about Rule 45 from the ABA Section of Litigation, the American College of Trial Lawyers, the Magistrate Judges' Association, and others. The idea is not to cast the net toward the same group a second time.

The goal now is to get broader experience focused than is possible within the Subcommittee or the full Advisory Committee. Lawyer members of the Subcommittee who are part of large or multicity firms could, for example, survey other lawyers in their firms. They could also reach out to lawyers in other firms -- on both sides of the aisle -- who can provide useful information. Indeed, members of the Subcommittee have already been doing something like this. Another set of lawyers who have been helpful are the lawyer members of the Standing Committee. Their reactions should be sought with regard to the issues under study.

To do this sort of outreach in an organized fashion probably depends on having a template of what to ask about and (to some extent) how to ask about it. One way would be by letter, perhaps from the Reporter. But that seems overly formal, and might also lead to a longer turn-around time than suits current purposes. Asking pointed questions would be more likely to get pointed responses. "You've got to be specific." It could be effective to follow up some of these written inquiries with a phone call.

At the same time, it was noted that it is important to ask practicing lawyers to take a step back from the issues and reflect on where improvements are possible. Practicing lawyers don't ordinarily think about things that way. Instead, they are focused on how to accomplish what they need to do under the rules as written.

It was reported that one lawyers' group had already been consulted informally about the pending issues. Its representative had generally confirmed the Subcommittee's disposition of the various issues initially raised. In particular, they focused on problems of enforcement, and the importance of ensuring application of the decisions by the judge presiding over the main action.

On that score, one possible problem is a disjunction between Rule 26(c) and Rule 45. The general notion is that only the court issuing the subpoena can rule on objections under Rule 45. But there is flexibility under Rule 26(c) on who is best situated to resolve disputes. It may be that Rule 45 should be made parallel with Rule 26(c).

The resolution was that Prof. Marcus would try to draft a brief "template" for inquiries among practicing lawyers and circulate it for comments. Then, each of the lawyer-members of the Subcommittee could engage in outreach generally using the template for guidance. A copy of the "template" is attached to these notes as an Appendix.

In addition, Prof. Marcus would begin sketching rule-change ideas for issues (3), (7), (8), and (15). He will also attempt to determine by legal research whether the caselaw indicates

serious problems with the allocation of costs attending service of a subpoena.

The Subcommittee will have a follow-up conference call at 8:00 a.m. Pacific time on Wed., Sept. 16, 2009. Ideally, Prof. Marcus will circulate draft amendment ideas a week before that date. The call must not last more than 45 minutes.

APPENDIX

RULE 45 INQUIRIES
Aug. 11, 2009

Preface: I'm a member of the Discovery Subcommittee of the Advisory Committee on Civil Rules. We're looking at the Rule 45 subpoena process, hoping to improve it. We don't know whether changing the rule would lead to improvements, and certainly haven't determined that any specific improvements look promising. But we do want to try to get more information from experienced lawyers about how some aspects of the rule that might deserve attention have been working in practice. So I am hoping you can offer your reactions on several matters listed below.

(1) Cost of compliance with a subpoena: Have you found that allocation of the cost of compliance with a subpoena results in unfairness or causes disputes that must be resolved by the judge? Does/should recovery of costs include attorney time reviewing materials before production? Would rule changes improve the handling of these cost issues?

(2) Place of resolution of disputes: When a subpoena issues from a court not presiding over the main action, disputes about it may be submitted to a judge in the issuing court. Have you found that this method of resolving disputes has caused problems? Has resolution by other judges led to inconsistencies, or decisions by other judges that adversely affect resolution of the main action? Should resolution by the judge presiding over the main action be preferred? Would referring all enforcement issues to the judge presiding over the main action be unfair to subpoenaed nonparties located far from the court in which the main action is pending?

(3) 100 mile limit: Rule 45's 100-mile limit on where performance commanded by a subpoena must occur has been in place for a long time. Have you found that it causes problems? Would increasing this distance cause problems? Would a different limit for compliance with a document subpoena (as opposed to one requiring personal attendance by a witness) be appropriate? Would it cause problems to permit nationwide service of a subpoena for trial?

(4) Personal service: Currently the rule requires "delivering a copy [of the subpoena] to the named person." Has this personal delivery requirement caused problems? Would permitting service of a subpoena in the way a summons and complaint are served on a defendant cause problems?

(5) Other issues: Are you aware of other issues with subpoena practice or Rule 45 that could be improved by changes to the rule?

Notes of Conference Call
Discovery Subcommittee
Advisory Comm. on Civil Rules
July 30, 2009

The Discovery Subcommittee of the Advisory Committee on Civil Rules held a conference call on July 30, 2009. Participating were Judge David Campbell (Chair of the Subcommittee), Judge Mark Kravitz (Chair of the Advisory Committee), Chilton Varner, Daniel Girard, and Anthony Valukas (members of the Subcommittee), and Prof. Richard Marcus (Reporter of the Subcommittee). Prof. Edward Cooper (Reporter of the Advisory Committee) was unable to participate.

Judge Campbell introduced the call as designed to pare down the list of 17 issues identified in prior work of the Subcommittee and discussed during the full Committee's April, 2009, meeting. Then the next steps would be to have Prof. Marcus begin drafting to make more concrete the ways in which Rule 45 might be revised to address issues that seemed to warrant further consideration, and to have one or more members of the Subcommittee undertake to gather further information about the experience of the bar in dealing with the issues on which the Subcommittee has focused.

The method for the conference call would be to proceed through the issues, generally in the order presented to the full Committee in the agenda materials for the April meeting. Before this conference call, Judge Cambpell and Prof. Marcus had each ranked the issues using an A, B, and C rating system in which A meant that an issue clearly warranted further work, C meant an issue did not appear to warrant further work, and B meant that an issue might warrant further consideration. Those initial rankings were circulated to the other members of the Subcommittee before the call, and might provide a starting point for today's discussion.

(1) Use of Rule 45's 14-day objection deadline to get around the 30 days allowed in Rule 34 for producing documents. The initial ranking of this issue was B. The discussion started with the observation of a judge that this issue had never come up in that court. Various lawyers agreed that neither they nor any lawyers with whom they had talked had seen the issue as a problem. The consensus was that this should be dropped to the C category and taken off the table for current Subcommittee work.

(2) Use of Rule 45 to conduct discovery outside the discovery period. The initial ranking of this issue was B. The discussion began with the observation by a judge that this issue had never arisen. An attorney observed that this is usually covered in the scheduling order. In one New York case, a problem of this sort arose, and the judge disposed of it within about three minutes. Another lawyer said it had arisen a couple of times, but that the judges disposed of it quickly. Another judge

observed that you can't prevent lawyers from trying things, but that this should not be a problem. The consensus was that this issue should be dropped to the C category and taken off the table for current Subcommittee work.

The question was raised, however, whether the same attitude should prevail as to trial subpoenas. A subpoena for trial could be regarded as quite different from a discovery subpoena. Already Rule 45(c)(3)(ii) treats subpoenas for trial differently from subpoenas for discovery, and permits them to require attendance anywhere in a state if state practice permits subpoenas for that purpose in state court. Is there a problem with use of "trial" subpoenas in effect to obtain discovery outside the discovery period? There are, at least sometimes, custodians of documents who appear at trials in response to subpoenas.

A response was that the thorough pretrial practice required in most places avoids this difficulty. Rule 26(a)(3) requires extensive disclosure about the witnesses and exhibits to be used at trial, and in many courts the pretrial preparations required under Rule 16 amplify that disclosure and make the evidence to be presented concrete in a way that would make discovery after that point, by subpoena or otherwise, relatively pointless. These issues have to be hashed out during this pretrial preparation period, with the result that trial subpoenas do not present problems of belated or disguised discovery. Taking this issue off the table should not present difficulties.

The question raised an issue, however, about notice of service of the subpoena and/or of negotiation of the terms of the subpoena. That issue prompted the suggestion that discussion shift to no. 15 on the list of issues identified by the Subcommittee.

<u>(15) Whether there are adequate requirements that notice be given to the other parties of service of the subpoena before it is served.</u> The question of adequate notice to nonparties seems serious. The issue may arise in many guises. Several have heard the complaint: "The other side served a bunch of nonparty subpoenas for documents and I never heard about it." Alternatively, one party may serve a nonparty subpoena and give notice of service of the subpoena, but then the other parties hear nothing further. There are extensive negotiations with the nonparty producing a compromise about the what is to be produced, in what form, and where, and the other parties don't get to participate in those negotiations, to receive copies of the material produced or otherwise obtain any fruits of the enforcement of the subpoena. Should the rules do something about this?

This discussion was prefaced with background on the

emergence of the issues currently. Presently, the only rule provision is in Rule 45(b)(1), which says in its last sentence:

> If the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice must be served on each party.

This restyled provision replaced the following provision as it was before Dec. 1, 2007:

> Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

When this provision was added to Rule 45 in 1991 -- at the same time the rule was amended to permit a subpoena for production of documents alone without any accompanying deposition (which itself would require notice under rule 30), the Committee Note explained:

> A provision requiring service of prior notice pursuant to Rule 5 of compulsory pretrial production or inspection has been added to paragraph (b)(1). The purpose of such notice is to afford other parties an opportunity to object to the production or inspection, or to serve a demand for additional documents or things. Such additional notice is not needed with respect to a deposition because of the requirement of notice imposed by Rule 30 or 31. But when production or inspection is sought independently of a deposition, other parties may need notice in order to monitor the discovery and in order to pursue access to any information that may or should be produced.

The Committee Note accompanying the restyling of the rule said:

> Former Rule 45(b)(1) required "prior notice" to each party of any commanded production of documents and things or inspection of premises. Courts have agreed that notice must be given "prior" to the return date, and have tended to converge on an interpretation that requires notice to the parties before the subpoena is served on the person commanded to produce or permit inspection. That interpretation is adopted in amended Rule 45(b)(1) to give clear notice of general present practice.

On balance, it would seem that the rulemaking efforts have gone about as far as they can go to say that notice should be given to the other parties before the nonparty is served with the subpoena.

Despite this language, it is reported that parties who serve

nonparty document subpoenas often fail to give adequate notice -- or perhaps any notice -- of service and follow-up events. One symptom is that the Sedona Conference Commentary on Non-Party Production & Rule 45 Subpoenas (April 2008) urges that there be a meet and confer session before service of a subpoena and/or before a motion to compel compliance with a subpoena, or that there be consideration during the Rule 26(f) conference and provision in the court's Rule 16(b) scheduling order for nonparty discovery.

An initial reaction to this set of issues was that the current rule provision is often overlooked. Rule 45(b) is entitled "Service" and (b)(1) is entitled "By Whom; Tendering Fees; Serving a Copy of Certain Subpoenas." Although the last portion of that list in the title to the subdivision appears to refer to this provision, it is somewhat hidden. Perhaps it should at least be moved to a separate provision with a title like "Notice to other parties." This might be added to Rule 45(a), but the main point is to make it clear that this obligation to give notice exists.

Discussion ensued on this collection of issues. One set of issues has to do with protecting the nonparty against the cumulative effect of demands by the parties for production of information. If a deposition is involved, Rule 30(a)(2)(A)(ii) protects the nonparty against having to submit to a second deposition absent court order. Within Rule 45, the only protection of this sort is in Rule 45(d)(1)(C), which says that the nonparty (like a party) need produce the same electronically stored information in only one form. Making certain that the parties reach agreement about what to demand of the nonparty may be important to protect the nonparty against repeatedly being required to respond to subpoenas, but the rule now has no explicit protections directed exactly to this point.

Another way of looking at these issues is to view them as an invitation to additional litigation. The more participants there are in the resolution of issues about compliance with the subpoena, the more likely there will be disagreements that will require the court's intervention. It may sometimes happen that one of the parties will encourage the nonparty to be more resistant to production than it would be without the encouragement. On the one hand, it is important to the parties who did not serve the subpoena to have a say in what the nonparty produces to ensure that (a) their needs for evidence the nonparty posses are met, and (possibly) (b) to protect their rights (e.g., privilege, trade secret, etc.) with regard to that information. On the other hand, if these parties are adverse to the one that served the subpoena, they may be inclined to try to get the nonparty to make difficult for their adversary.

The meet-and-confer concept might be attractive as a way to

address these concerns. But it does not readily fit into the Rule 26(f) format. In many or most cases, the needs for nonparty discovery will not be clear enough at the early point in the case when the 26(f) meeting is to occur. Freezing them into the court's Rule 26(b) order could unduly constrict necessary activity later on. Meet-and-confer before service or production might be more workable.

At the same time, all meet-and-confer requirements impose burdens on the parties and raise litigation costs. To some extent, if the parties are required to jump through these hoops the nonparty may be spared some expense. There may be an inherent tension between the interests of the nonparties and parties. Trying to involve the nonparty in a meet-and-confer session might promote protection for the nonparty, or impose additional burdens and costs on the nonparty.

Another point is that it would be desirable that any resolution of such negotiations be made to "stick." Suppose, for example, that the parties confer and agree that they need certain information from the nonparty. What happens if (a) the nonparty resists, or (b) one of the current parties changes its mind about something it initially accepted during the meed-and-confer activity? Is there a way to ensure that the resolution in connection with the main action will be respected by the judge asked to enforce the subpoena in a distant court?

One answer might be to have any issues on which the parties do not agree presented to the judge in the underlying case for resolution before the subpoena is served. At least that would seem to provide a strong basis for saying that the parties are foreclosed from overtly diverging from what that judge says in a distant enforcement proceeding. But that goes some distance back toward the notion that a subpoena can only be issued by the court. It also might be urged that it compromises the nonparty's ability to raise issues later if it wants matters handled in a manner different from that settled upon by the judge in the main action.

As a summary, it was noted that there seem to be four discrete issues under this general heading:

(1) Should the notice provision now in Rule 45(b)(1) be moved to a separate place so that it will not be overlooked?

(2) Should there be notice of any modification (often through negotiation with the nonparty) of the subpoena?

(3) Should there be notice of receipt of the produced materials and/or a requirement that they be provided to the other parties?

(4) Should there be a meet-and-confer requirement (a) before service of the subpoena, (b) before final resolution of what is to be produced, or (c) before a motion to enforce the subpoena is filed?

The Subcommittee has not reached consensus on these issues, but it seemed apparent that they should at least be brought forward for further discussion by the full Committee.

(3) Place of resolution of a discovery dispute. A Rule 26(c) motion may be resolved either by the court presiding over the underlying case or the court that issued the subpoena, but a Rule 45 objection seemingly must be heard by the court that issued the subpoena. The initial rating of this issue was A.

An example of the complexities that can ensue was offered: In a Qui Tam action, 85 subpoenas were served on nonparty witnesses located in many states. About nine of those nonparties completely ignored the subpoenas. A majority of them produced some documents and send a letter saying that was all they would produce. About a dozen wrote letters to the lawyer who served the subpoenas saying that they objected and did nothing more. About six served formal objections on the lawyer who served the subpoenas. Three filed formal objections in the local court where the production was to occur. One filed an objection with the court presiding over the main action. What to do? "This will be resolved by phone calls."

This example prompted the observation that perhaps something like a de facto meet-and-confer situation presently exists. When something of this magnitude happens, it is unavoidable that the lawyers serving the subpoenas discuss compliance with the nonparties on whom they served the subpoenas.

The consensus was that this set of issues should be regarded as an A and should be carried forward for further work.

(4) Time for producing a privilege log in response to a subpoena. Is it only 14 days? This issue was initially rated a B. Several observed that this issue had never arisen in practice. The consensus was to take it off the table for current Subcommittee work.

(5) Whether a motion to quash must be filed within 14 days even if the return date for the subpoena is a longer time. This issue was initially rated a B. None on the call had seen it as a problem in actual litigation. The consensus was to take it off the table for current Subcommittee work.

(6) Whether Rule 45's 100-mile radius should be reconsidered. The consensus was that this issue should be a focus of ongoing Subcommittee work.

(16) Whether the 100 mile limit might be modified only for document subpoenas, which are likely to result in delivery of the responsive materials in a manner that makes a place of production irrelevant. The consensus was that this issue should be a focus of ongoing Subcommittee work, and that it was closely related to issue (6). The two should be combined.

(7) Use of Rule 45 to force corporate party witnesses to travel long distances to testify at trial. (In some recent instances, particularly with corporate parties located outside the district and more than 100 miles from the courthouse, judges have held that Rule 45 permits them to compel corporate officers to attend and testify at trial.) The initial rating of this issue was A.

This question has produced a split of authority in the E.D. La. It results from an arguable tension between Rule 45(b)(2)(B) on where a subpoena can be served and Rule 45(c)(3)(A)(ii) on quashing a subpoena for a witness who is "neither a party nor a party's officer."

By way of background, it was suggested that the questions presented by Issues (6) and (7) might be seen as involving several types of questions: (1) Should there be a different treatment of subpoenas for depositions and trials? Arguably attending trial is more important. (2) If the power to command attendance at trial is extended, should that be permitted only on order of the court rather than unilateral subpoena by a party? (3) Is it useful to have separate (and slightly different) provisions regarding place of service of a subpoena and place of performance in response to that subpoena? A judge in the District of Connecticut, for example, could issue a subpoena requiring a nonparty from Manhattan to appear for a deposition across the street from the courthouse in Connecticut, but not for that nonparty to appear across the street from his own house in Manhattan. Does this make sense?

The discussion started with a policy question: Taking the Vioxx case to say that the rule now permits a judge to require a party or an officer of a corporate party to appear to testify at trial, does anyone agree with that outcome as a matter of policy? It seems that the result was not intended by the drafters of Rule 45, and a change to the rule clearly rejecting that interpretation could solve the problem if that is the goal of the revision.

The initial reaction of several on the call were that this power to compel attendance at trial is undesirable as a matter of policy. Others were uncertain. One risk is that subpoenas to the CEO could become tactical weapons. Another is that ordinary people would be required travel long distances and wait around the courthouse until time for them to testify. If we limit this

to corporate officers, are we focusing on the right people? In big companies, how likely is it that the CEO really has useful information about the matter in dispute in the case. Won't it often be true that the person who does have that information is not a corporate officer? How about "managing agents?" Rule 32(a)(3) treats as admissible the deposition of a party's "officer, director, or managing agent" and also a 30(b)(6) designee. Should those people be subject to subpoena for testimony at trial without regard to distance?

Another way of looking at this issue is to appreciate that it is not solely a matter of big companies. Consider the U.S. Government. Can every person who sues the Government require the attendance at trial of Attorney General Holder or Secretary of State Clinton?

One perspective on these issues comes from existing caselaw on other discovery-related issues. There is a considerable body of law on quashing notices of deposition of high corporate officers or government officials when they can show that they have little or no personal knowledge of the matters in dispute and that others in the organization are better situated to answer questions about those matters. Courts have shown themselves alert to the risks of abuse of such notices.

Another body of law has to do with a different kind of required attendance by high officials -- Rule 16 settlement conferences. Presently, Rule 16(c)(1) says that the court can "require that a party or its representative be present or reasonably available by other means to consider possible settlement." The settlement conference issue has evolved over the years, and been addressed by cases. See, e.g., In re Stone, 986 F.2d 898 (5th Cir. 1993) (district court should not have required federal government to send a representative with "full settlement authority" from Washington for a settlement conference; in light of the "unique position" of the government the judge should have used "less drastic steps"); Shedden v. Wal-Mart Stores, Inc, 196 F.R.D. 484 (E.D. Mich. 2000) (in light of Wal-Mart's policy that it would not settle suits brought by customers, the court would require Wal-Mart's general counsel or some other Wal-Mart officer with litigation policy authority to attend trial because the officer should "have an opportunity to observe first-hand the effect of the company's policy both on the Court in general and in a particular case").

Yet another variant of the question is whether a plaintiff has to attend trial to "testify" at trial? It can happen that plaintiff will want instead to use her deposition to present her testimony. See Richmond v. Brooks, 227 F.2d 490 (2d Cir. 1955) (plaintiff from California could introduce her deposition at trial in New York rather than having to travel there to attend trial).

The consensus was to leave these issues on the table for further discussion by the full Committee. A starting point is probably that the Vioxx decision is not a correct reading of Rule 45 as presently written, but that the rule might be changed to adopt that approach. There is an important policy issue to be resolved, however, about whether that change should be made. In addition, the resolution of the 100-mile limit issue might affect one's attitude toward these issues because it would mean that the problem of subpoena power based on geography would be abated.

(8) Whether the length and intricacy of Rule 45 could be modified to simplify the task of using it. The initial recommendation on this point was something of a "hold" -- revisit the question after other issues had been addressed. There is still considerable appeal to the urge to simplify, but the discussion to date suggests that some of the desired changes might actually lengthen the rule. The resolution was to leave this issue in the B category -- on the table but not under immediate consideration.

(9) Issues raised during restyling process. There does not seem to be anything from the restyling process to warrant current attention except the "prior" notice issues discussed above. Except for those, this is to be taken off the table for current Subcommittee work.

(10) Whether the rule should provide some directions about how motions to quash or compel compliance with a subpoena can be brought before the court when the subpoena is issued by a court other than the one in which the underlying case is pending. (This issue was promoted by an article in the S.F. Recorder discussing the problems that face lawyers who want to get a dispute about a subpoena before a judge in the N.D. Cal. but have no direction from the rules on how to do so.) This was rated a C initially. It was also noted that the way that various clerk's offices handle "miscellaneous" or "magistrate judge" or other designations of such matters as enforcement of a subpoena is likely to differ sufficiently that significant administrative barriers would confront any effort to design a method nationwide.

The discussion started with assertions that this is not a problem. A reaction was that this sort of difficulty can prove very costly. The problem of finding out how to enforce a subpoena outside the district where the main action is pending is "like filing a new lawsuit." Using the 85-subpoena example mentioned earlier, the actual result was that discussions ensued during which many issues were worked out. Where resolution proved difficult or impossible, that was because these were "legitimate issues." Making it a bit difficult to get them before a judge may be desirable to avoid having people rush to court. Indeed, it was noted, this might be a de facto prompt to adopt a meet-and-confer approach even in the absence of a

requirement that be done before a motion to enforce is filed. Whether making such a motion easier to file is a good idea was questioned. A response was that recipients of subpoenas make a practice of trying to hold up the process and extract payment for the attorneys' fees to review and prepare for production. If it seems too costly or difficult to present the dispute about the subpoena to the distant court, that increases the leverage of the nonparty to extract such payment.

The consensus was that these questions could be considered along with Issue no. 3 -- place of resolution of the dispute. At least solving that problem might sometimes address this question. It might also be that extending the 100 mile limit could have the effect of reducing the frequency of resort to a distant court to enforce the subpoena. But it was cautioned that it is still important to decide whether this is really a problem at all.

(11) Whether hand delivery of the subpoena should be required. Comments received in the Committee's inbox had initially raised this issue. Although service of a summons and complaint may be made in any manner permitted by Rule 4, Rule 45 requires personal hand delivery to the person subpoenaed. Should the provisions for service be the same? The initial ranking of this matter was C.

A question was raised, however, about why service of a subpoena should be by hand delivery if service of a summons and complaint need not be. Why not make all service methods allowed under Rule 4 valid for subpoenas as well?

One reaction was "We always try to contact the nonparty before serving." But there is a problem with those nonparties who prove difficult to reach. "I remember having a process server waiting outside a hotel for a week to serve one witness. And the fear of a punch-out is real." A response was that this is not a problem. Process servers are in the business of serving process, and it is probably not particularly more or less difficult than it was in the past. Treating a nonparty who is subpoenaed differently from the way we treat a party makes sense. A nonparty has different incentives from a defendant. At least this assures notice to the nonparty, who might be held in contempt for failure to show up. Contempt is not available for failure to respond to a summons, although default is.

The resolution was that this issue should be brought forward for discussion by the full Committee.

(12) Expert subpoena problems. In 1991, Rule 45 was amended to provide protections for unaffiliated witnesses who were subpoenaed. Has this been effective? And do subpoenas sometimes cause problems with expert witnesses regarding discovery seemingly not allowed by ordinary party discovery

means? For example, in Plymovent Corp. v. Air Technology Solutions, Inc., 243 F.R.D. 139 (D.N.J. 2007), defendant served a subpoena on an expert consultant retained by plaintiff seeking results of testing done by the consultant. It contended that the protections of Rule 26(b)(4)(B) did not apply because those protections only restrict discovery by deposition or interrogatory and it was seeking production of documents. The court rejected this argument and held that the protections of Rule 26(b)(4)(B) applied.

The concern raised by the cited case seems unimportant. More generally, the risk that use of Rule 45 subpoenas on expert witnesses might disturb the proposed amendments that the Standing Committee approved seems small. The issue is to be taken off the table for current Subcommittee work.

(13) Effect of an order denying a motion to quash. There may be uncertainty about whether an order denying a motion to quash also commands compliance with a subpoena. It may be that parties serving subpoenas normally move to compel in response to a motion to quash, but if that is not done the rule could possibly address the consequences of denial of the motion to quash. The consensus was that this is not a problem warranting further work.

(14) Subpoenas in arbitration proceedings. The relation between Rule 45 and arbitration proceedings has produced some uncertainties, particularly when subpoenas are used for purposes of discovery as opposed to requiring testimony during the hearing. For example, Hay Group, Inc. v. E.B.S. Acquisition Corp., 360 F.3d 404 (3d Cir. 2004) (Alito, J.), addresses such issues. The consensus was that these issues do not warrant work on Rule 45.

(15) Whether there are adequate requirements that notice be given to the other parties of service of the subpoena before it is served. This has already been addressed above. Except for that discussion, no further work is needed.

No. 16 has been discussed above.

(17) Whether the protection Rule 45 provides against "significant expense" should be clarified regarding what costs it covers. For example, would it include the attorney time required to review materials before production? The initial ranking was B.

The discussion began with the observation that the question who pays the nonparty's lawyers is an important one. But is this unclear under the caselaw? It would be good to have that question cleared up.

A different question was how these issues relate to the sanctions provision of Rule 45(c)(1). What triggers sanctions there? Merely serving the subpoena? Insisting on unduly burdensome performance? A party initially serving a subpoena cannot know enough to tailor it to the information systems of the nonparty. Consider the emphasis in the E-Discovery amendments of 2006 on using the Rule 26(f) conference to enable the parties to gain an appreciation of how to seek electronically stored information from one another. There is no comparable method to use when a nonparty is to be subpoenaed. Also, a nonparty served with your subpoena may be inclined to make your life difficult if sympathetic to your opponent in the underlying litigation. If it can do that on your nickel, that bolsters its incentive to do so.

Another way of looking at the question was that this illustrates how variable the issue of cost allocation can be. The problem is likely to be highly fact-specific. It may not be possible to do more than the current rule already does.

A reaction was "Why not adopt a rule that in the ordinary case the cost of attorney time should be borne by the nonparty?" That at least provides a reasonable starting point. Otherwise there is no downside for the nonparty to insist initially that no response to the subpoena will be made unless payment for all attorney fees is guaranteed. This prompted the question again whether the caselaw supports this sort of argument. That may be a question prior to trying to determine what ideally should be the rule.

The consensus was that this issue should be brought forward for further consideration by the full Committee, and that additional information would be helpful to resolving it.

Prof. Marcus had added some other issues that were briefly discussed. They had already been covered in discussion of topics from the list of 17. First, the ABA Section of Litigation suggested that notice be required of the fact of production. That topic has been included with other issues about notice already discussed and carried forward.

Second, the question of cost and burden had just been discussed and would be carried forward for full Committee discussion.

Third, questions of location had been fully discussed already.

Finally, the various ideas of the Sedona Conference on meet-and-confer requirements, inclusion in Rule 26(f) conferences, and inclusion in the Rule 16(b) scheduling order had been addressed.

* * * * *

The next step is to determine where initial drafting to provide concrete illustrations of possible rule provisions should be directed, and to gather further information from practitioners about actual practice experience with various of the issues raised.

MEMORANDUM

DATE: September 15, 2009

TO: Advisory Committee on Civil Rules

FROM: **Steven M. Colloton**
Circuit Judge

RE: Joint Civil/Appellate Subcommittee

* * * * * * * * *

The joint subcommittee of the advisory committees on the civil rules and appellate rules met by teleconference on August 14, 2009. All six members of the subcommittee participated, along with reporters Edward Cooper and Catherine Struve, from the civil and appellate committees, respectively, and Judge Mark Kravitz, chair of the civil rules committee. The subcommittee considered two matters that arose from comments submitted to the appellate rules committee concerning pending amendments to Federal Rule of Appellate Procedure 4(a)(4)(B)(ii).

The first matter involves a lack of clarity in the current rules concerning the time for civil appeals. A commentator has noted that under Appellate Rule 4(a)(4)(B), the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, however, the amended judgment may not be entered until the time for appeal – as measured from the entry of the order on the tolling motion – has expired.

To resolve this problem, the Subcommittee recommends an amendment to Appellate Rule 4(a)(4) causing the time for appeal to run from the *latest* of entry of an order disposing of the last tolling motion *or* the entry of any altered or amended judgment. The Subcommittee also recommends a corresponding amendment to Civil Rule 58(a) to clarify the requirement that every altered or amended judgment be set out in a separate document. Although the problem seems likely to arise only infrequently in practice, and there are means under the current rules for a careful attorney to protect the rights of his or her client, the Subcommittee believes that the amendments would improve clarity and eliminate a potential timing trap for the unwary. Please refer to Part I of Professor Struve's memorandum of September 7, 2009, for a comprehensive discussion of the issue and the proposed amendments.

The second matter involves suggestions by commentators that Appellate Rule 4(a)(4) be amended so that the initial notice of appeal in a civil case encompasses appeals from any subsequent

order disposing of a postjudgment motion. The Subcommittee recommends no action on this matter. One member stated that the suggested amendment appeared to be a "solution in search of a problem," and that sentiment was shared widely within the Subcommittee. Please refer to Part II of Professor Struve's memorandum of September 7 for a discussion of this matter.

MEMORANDUM

DATE: September 7, 2009

TO: Judge Steven M. Colloton

FROM: Catherine T. Struve

RE: Possible amendments to Civil Rule 58 and Appellate Rule 4(a)(4)

This memo summarizes my understanding[1] of the considerations underlying the Civil / Appellate Subcommittee's discussions concerning the possibility of Rule amendments to alter the treatment of certain issues relating to motions that toll the time for taking a civil appeal. These items arise from comments[2] submitted on the pending amendment to Appellate Rule 4(a)(4)(B)(ii).[3]

Part I of this memo discusses the possibility of amending the Civil Rules and Appellate Rules to address a problem identified by Peder Batalden. Mr. Batalden points out that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended *judgment* runs from the entry of the *order* disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden suggests, the judgment might not be issued and entered until well after the entry of the order. As the Subcommittee discussed during the summer, revisions to Appellate Rules 4(a)(4)(A) and (B) could address this problem, and an accompanying amendment to Civil Rule 58(a) would also be desirable.

Part II of this memo discusses an additional suggestion. Public Citizen Litigation Group ("Public Citizen") and the Seventh Circuit Bar Association Rules and Practice Committee (the "Bar Association") have suggested that Appellate Rule 4(a) be amended so that the initial notice of appeal in a civil case encompasses appeals from any subsequent order disposing of a

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[1] Informed by your guidance and that of Professor Cooper.

[2] The full text of the comments is available at http://www.uscourts.gov/rules/2007_Appellate_Rules_Comments_Chart.html.

[3] That amendment has been approved by the Supreme Court and will take effect, absent contrary action by Congress, on December 1, 2009. Rule 4(a)(4)(B)(ii) would then read:

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a ~~judgment altered or amended~~ judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

postjudgment motion. The Subcommittee's discussions this summer, as you know, led to the conclusion that this suggestion should not be pursued.

The topic of manufactured finality – which I understand the Subcommittee may address in future deliberations – is not covered in this memo.

I. Proposed amendments to Appellate Rule 4(a)(4) and Civil Rule 58(a)

Mr. Batalden has identified a lack of clarity in the rules governing the time for civil appeals. Because any lack of clarity in the appeal-time framework is undesirable, a clarifying amendment to Rule 4(a)(4) is worthwhile. In addition, due to the importance of Civil Rule 58(a)'s separate document requirement, a clarifying amendment to Civil Rule 58(a) would also be useful.

Part I.A. below sets forth my understanding concerning the desirability of the proposed amendments. Part I.B. sets forth the amendments themselves.

A. The desirability of the proposed amendments

As Mr. Batalden pointed out, there may indeed be some instances when more than 30 days elapses between the entry of an order disposing of a postjudgment motion and the entry of any amended judgment pursuant to that order. One situation in which Mr. Batalden's concern may arise involves remittitur.[4] Suppose that the district court conditionally grants a new trial unless the plaintiff agrees to accept a reduced award within 40 days from the date of entry of the court's order. Suppose further that as of Day 30 the plaintiff has not decided whether to accept the reduced award. If the plaintiff decides not to accept the reduced award, the case is headed to a new trial; thus, until the plaintiff makes a decision on this issue (or the 40-day time period runs out) there would seem to be no final judgment. In this scenario, the defendant's options appear to be:

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[4] Another such situation might occur in a case involving a request for complex injunctive relief. Suppose that the district court enters a judgment that includes an injunction. Suppose further that, in response to a timely tolling motion, the district court enters an order which (1) grants the motion and (2) directs the parties to attempt to agree on a proposed amended judgment embodying a less extensive grant of injunctive relief. And further suppose that it takes the parties longer than 30 days after the entry of the order to agree on the wording of the proposed amended judgment.

(1) file the notice of appeal by Day 30 (and then withdraw the notice of appeal if the plaintiff rejects the reduced award);[5]

(2) point out the timing problem to the district court and seek an extension of time to file the notice of appeal under Rule 4(a)(5); or

(3) wait to file the notice of appeal until the judgment has become final by virtue of the plaintiff's acceptance of the reduced award.

The risks and benefits of Option 3 depend in part on whether a separate document is required for the order "disposing of" – in this instance, conditionally granting – the new trial motion. If a separate document is required and has not been provided, then the litigant can select Option (3) without concern, because the time to take an appeal from the order has not yet commenced to run. However, if a separate document is not required, Option (3) seems riskier. Granted, even if a separate document is not required a strong argument can be made that choosing Option (3) results in a timely notice: It would make little sense to penalize a litigant for waiting to appeal until there exists an appealable final judgment. But Rule 4(a)(4)(B)(ii) might be read to require a contrary result: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal– in compliance with Rule 3(c)– within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

To assess whether a separate document is required for the order "disposing of" the new trial motion we must examine Appellate Rule 4(a)(7) and and Civil Rule 58(a). Appellate Rule 4(a)(7) is designed to incorporate, for purposes of Rule 4(a), the separate-document rules found in Civil Rule 58(a).[6] Under Rule 4(a)(7)(A),

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[5] If the plaintiff accepts the reduced award and the judgment is amended to reflect the reduced award, it should not be necessary for the defendant to amend the notice of appeal unless the defendant intends to challenge something about the amendment of the judgment – such as the remittitur amount. Cautious practitioners, though, are likely to amend the notice of appeal in any event just to be on the safe side.

[6] There is currently a technical glitch in Appellate Rule 4(a)(7), because its application turns on whether "Federal Rule of Civil Procedure 58(a)(1)" does or does not require a separate document. The appropriate reference, after the restyling of the Civil Rules, is to Civil Rule 58(a), not Civil Rule 58(a)(1). A technical amendment designed to update these cross-references has been approved by the Appellate Rules Committee and the Standing Committee and will be submitted to the Judicial Conference for its approval this month. That technical amendment will, if approved, take effect December 1, 2010. For simplicity's sake, the discussion in the text proceeds as though Rule 4(a)(7) refers to Civil Rule 58(a).

> [a] judgment or order is entered for purposes of this Rule 4(a):
>
> (i) if [Civil Rule 58(a)] does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or
>
> (ii) if [Civil Rule 58(a)] requires a separate document, when the judgment or order is entered in the civil docket ... and when the earlier of these events occurs: • the judgment or order is set forth on a separate document, or • 150 days have run from entry of the judgment or order in the civil docket ...."

The key question, then, is whether Civil Rule 58(a) requires a separate document. Rule 58(a) (in what we may call "clause 1") provides that "Every judgment and amended judgment must be set out in a separate document," but it also provides (in what we may call "clause 2") that "a separate document is not required for an order disposing of" any of a list of motions; the list includes all the motions that have tolling effect under Appellate Rule 4(a)(4)(A).[7] On the one hand, it might be argued that a separate document is required in our hypothetical when the court conditionally grants the new trial motion, because if the plaintiff accepts the reduced award that will result in an amendment of the original judgment. But on the other hand, it might be argued that no separate document is required for the *order* (as opposed to the amended judgment), for two reasons:

First, the apparent meaning of Rule 58(a) is that no separate document is required for the order because it is "an order disposing of" a listed motion. But the Seventh Circuit has addressed this problem by reading Civil Rule 58(a)'s reference to orders "disposing of" tolling motions to mean orders *denying* postjudgment motions. *See Kunz v. DeFelice*, 538 F.3d 667, 673 (7th Cir. 2008). In the Seventh Circuit, and any circuit that might come to follow it, it would be clear that, in our hypothetical, clause 2 of Rule 58(a) does not apply because the order is not one that *denies* a postjudgment motion. However, it is not clear that other circuits will follow *Kunz*, and therefore some uncertainty on this issue is likely to remain.

Second, it might also be argued that (1) the order is not currently appealable and therefore (2) the order does not currently constitute a judgment within the terms of Civil Rule 54(a), which would mean that (3) Civil Rule 58(a)'s separate document requirement (which is cast in terms of "judgments") does not apply. The order would not be immediately appealable because the outcome depends on a contingency that has not yet occurred – namely, the plaintiff's decision whether to accept the reduced award. (An appealable judgment would result only when the plaintiff accepts the reduced award, or – if the plaintiff does not accept – after the new trial.) This, of course, illustrates the incongruous result that could be produced by a literal reading of

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[7] Civil Rule 58(a)'s list of motions is somewhat broader than Appellate Rule 4(a)(4)(A)'s list of tolling motions, but that discrepancy is not material to the issues discussed in this memo.

Appellate Rules 4(a)(7) and 4(a)(4)(B)(ii): the reason a separate document is not required, in this view, is that the order is not currently appealable – yet the fact that the order is not currently appealable also means that, under Rule 4(a)(7)(A)(i), the order is deemed entered when it is entered in the civil docket, and that, under Rule 4(a)(4)(B)(ii), the time to appeal from the order or from the resulting alteration or amendment of the judgment runs from that date of entry.

During the fall 2008 Appellate Rules Committee meeting, one attorney member noted that he had seen this general type of situation arise in his practice. And a judge member noted that even if problems in this area turn out to be rare overall, such problems are very serious when they do arise. However, it is questionable whether Mr. Batalden's proposed amendment would solve the problem. Under Mr. Batalden's proposal, Rule 4(a)(4)(B)(ii) would be amended to read: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A)~~, or a judgment altered or amended upon such a motion,~~ must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion." This change would remove the requirement that the notice of appeal challenging the judgment's alteration or amendment be filed within 30 days from entry of the order disposing of the motion. But in the scenario described above, this change would not remove the incongruity concerning the timing of a notice of appeal challenging the order itself; Rule 4(a)(4)(B)(ii) would still purport to direct that such a notice of appeal be filed within 30 days after entry of the order, even if there is not yet a final and appealable judgment on that 30th day. Moreover, the proposed change might be undesirable in that it would remove from the Rule text which currently serves to remind would-be appellants of the need to file a notice of appeal that encompasses the amendment or alteration of the judgment (if the appellant wishes to challenge that alteration or amendment).

Based on our discussions to date, if a rule change is warranted, it seems that the best way to address Mr. Batalden's concern would be through coordinated amendments to Civil Rule 58's separate document requirement and to Appellate Rule 4(a)(4). The Civil Rule 58 amendment would read something like this: "Every judgment and [altered or] amended judgment must be set out in a separate document, but a separate document is not required ~~for~~ when an order -- without [altering or] amending the judgment -- dispose~~ing~~s of a motion: * * *."[8]

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[8] Apart from the larger questions concerning the desirability of each of these possible changes, there is a more technical consideration that would affect the drafting of each of these amendments. That consideration concerns the terms "alteration" and "amendment." Civil Rule 59 and Appellate Rule 4 (or its predecessor, former Civil Rule 73) have used these terms in the disjunctive ever since the 1946 amendments to the Civil Rules took effect. The proposed draft language in this memo carries that practice forward. But, as Professor Cooper has pointed out, it is unclear "whether we have to say 'altered or' amended. Why not just amended? Tradition, and the need to change in too many places to be worth the fuss? Or some functional theory that a judgment can be altered without amending it?" If the Committees decide to proceed with either of the amendments discussed in this memo, it will be necessary to decide whether to continue using these terms in the disjunctive.

Amending Civil Rule 58(a) would take us partway to a solution to the problem, by clarifying the list of orders for which no separate document is required. That change would address the first of the arguments (set forth on page 4) for maintaining that no separate document is required: It could no longer be argued that no separate document is required in the wake of the order just because it is "an order disposing of" a listed motion.

But amending Civil Rule 58(a) alone would not address the second argument: It could still be argued that the order conditionally granting the new trial is not immediately appealable, that it therefore does not constitute a "judgment" as defined in Civil Rule 54(a), and that it therefore is not subject to Civil Rule 58(a)'s separate document requirement – leaving us with the same problem described on the preceding page: Because no separate document is required, under Rule 4(a)(7)(A)(i), the order is deemed entered when it is entered in the civil docket, and under Rule 4(a)(4)(B)(ii) the time to appeal from the order or from the resulting alteration or amendment of the judgment runs from that date of entry rather from a later date.

To put the point in more general terms, these difficulties arise from the fact that Appellate Rules 4(a)(4)(A), (B)(i) and (B)(ii) all peg timing questions to the entry of *the order disposing of* the last remaining tolling motion, and they do not take account of the possibility that time may elapse between that order and any ensuing amendment or alteration of the judgment. So the best way to address that problem (assuming that a rules amendment is warranted) is to amend those provisions to refer to that possibility. In short, these issues could be addressed by amending Rule 4(a)(4) as shown in Part I.B.

B. The proposed amendments

Here are the proposed amendments to Civil Rule 58(a) and Appellate Rule 4(a)(4):

Rule 58. Entering Judgment

1 **(a) Separate Document.** Every judgment and [<u>altered or</u>[9]]

2 amended judgment must be set out in a separate

3 document, but a separate document is not required ~~for~~

[9] "Alter or amend" appears in Civil Rule 59, and in Rule 58(a)(4)'s invocation of Rule 59. It appears throughout Rule 4(a)(4). It seems better to adopt the same phrase in every appearance in Rule 58(a) and Rule 4. But we may be able to discard "altered or." If a judgment is altered, it should be formally amended or vacated in honor of a new judgment. See supra note 8.

4 when an order — without [altering or] amending the

5 judgment — dispose~~sing~~s of a motion:[10]

6 (1) for judgment under Rule 50(b);

7 (2) to amend or make additional findings under Rule

8 52(b);

9 (3) for attorney's fees under Rule 54;

10 (4) for a new trial, or to alter or amend the judgment,

11 under Rule 59; or

12 (5) for relief under Rule 60.

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[10] Professor Cooper suggests that this wording – "when an order – without altering or amending the judgment – disposes ..." – is awkward. He queries whether it would work to reframe Rule 58(a) so as to avoid that awkward phrasing. The reframed Rule might read:

> (a)(1) Every judgment and amended judgment must be set out in a separate document.
>
> (2) A separate document is not required for an order that -- without amending the judgment -- disposes of a motion: * * * [present paragraphs (1) through (5) would become subparagraphs (A) through (E).]

As Professor Cooper puts the question:

> The potential downside is that this seems to take sides in what was, at least as of 2002, a debate among the circuits. The 2002 Committee Note observes that "[s]ome courts treat such orders as those that deny a motion for new trial as a 'judgment,' so that appeal time does not start to run until the order is entered on a separate document. Without attempting to address the question whether such orders are appealable, and thus judgments as defined by rule 54(a), the amendment provides that entry on a separate document "is not required * * *." It was this dilemma that led to the awkward recent drafting that substitutes "when an order -- without amending the judgment -- disposes of a motion * * *." "[F]or an order that – *** -- disposes of a motion" reads more naturally. If we separate (1) from (2), is it less risky?

Committee Note

Rule 58(a) is amended to conform to changes in Appellate Rule 4 that clarify the provisions for starting appeal time from the latest of entry of the order disposing of the last timely tolling motion or, if disposition of the motion results in [alteration or] amendment of the judgment, entry of any [altered or] amended judgment. The Rule 58 amendment makes clear the need to enter an [altered or] amended judgment in a separate document whenever disposition of the motion [alters or] amends the judgment.

It should be remembered that in some situations an order may dispose of one of the listed motions by granting the motion without [altering or] amending the judgment. An example would be an order amending or making additional findings of fact under Rule 52(b) without changing the judgment. [No separate document is required if the order does not [alter or] amend the judgment.]

Rule 4. Appeal as of Right– When Taken

1 **(a) Appeal in a Civil Case.**

2 * * * * *

3 (4) **Effect of a Motion on a Notice of Appeal.**

4 (A) If a party timely files in the district court any

5 of the following motions under the Federal

6 Rules of Civil Procedure, the time to file an

7 appeal runs for all parties from the <u>latest</u>

8 <u>of</u> entry of the order disposing of the last

9 such remaining motion <u>or, if a motion's</u>

10 <u>disposition results in alteration or amendment</u>

11 of the judgment, entry of any altered or
12 amended judgment:
13 (i) for judgment under Rule 50(b);
14 (ii) to amend or make additional factual
15 findings under Rule 52(b), whether or
16 not granting the motion would alter the
17 judgment;
18 (iii) for attorney's fees under Rule 54 if the
19 district court extends the time to appeal
20 under Rule 58;
21 (iv) to alter or amend the judgment under
22 Rule 59;
23 (v) for a new trial under Rule 59; or
24 (vi) for relief under Rule 60 if the motion is
25 filed no later than [10] ***[will be "28"]***[11]
26 days after the judgment is entered.
27 (B)(i) If a party files a notice of appeal after
28 the court announces or enters a
29 judgment– but before it disposes of any
30 motion listed in Rule 4(a)(4)(A)– the

[11] N.B.: Bolded, italicized notations in brackets indicate the effect of pending amendments to Rule 4(a)(4) that will take effect December 1, 2009, absent contrary action by Congress.

31 notice becomes effective to appeal a
32 judgment or order, in whole or in part,
33 ~~when~~ upon the latest of entry of the
34 order disposing of the last such
35 remaining motion ~~is entered~~ or, if a
36 motion's disposition results in alteration
37 or amendment of the judgment, entry of
38 any altered or amended judgment.
39 (ii) A party intending to challenge an order
40 disposing of any motion listed in Rule
41 4(a)(4)(A), or a [judgment altered or
42 amended] ***[will be "judgment's***
43 ***alteration or amendment"]*** upon such
44 a motion, must file a notice of appeal,
45 or an amended notice of appeal--in
46 compliance with Rule 3(c)– within the
47 time prescribed by this Rule measured
48 from the latest of entry of the order
49 disposing of the last such remaining
50 motion or, if a motion's disposition
51 results in alteration or amendment of

52 the judgment, entry of any altered or

53 amended judgment.

54 (iii) No additional fee is required to file an

55 amended notice.

56 * * * * *

Committee Note

Rule 4(a)(4)(A) currently provides that if a timely motion of certain listed types is filed, the time to appeal runs for all parties from the entry of the order disposing of the last such remaining motion. Subdivisions (a)(4)(B)(i) and (ii) also contain timing provisions that depend on the date of entry of the order disposing of the last such remaining motion. These three subdivisions are amended to make clear that if one of those tolling motions results in the alteration or amendment of the judgment, the relevant date is the latest of the entry of any altered or amended judgment or the entry of the order disposing of the last remaining tolling motion. To illustrate: Suppose that Defendant moves for judgment as a matter of law under Civil Rule 50(b) and wins an amended judgment. Plaintiff then moves for a new trial; the motion is denied. Denial of Plaintiff's motion is the "latest of" the described events. [As a second illustration: In a different case, two defendants each move for judgment under Civil Rule 50(b). The court grants Jones's motion and enters judgment for Jones, without directing entry of a final judgment pursuant to Civil Rule 54(b). Later, it grants Brown's motion, and enters judgment that plaintiff take nothing. This is the "latest of" the described events.]

II. The proposals by Public Citizen and the Bar Association

As noted above, Public Citizen and the Bar Association have suggested that Appellate Rule 4(a) be amended so that the initial notice of appeal in a civil case encompasses appeals from any subsequent order disposing of a postjudgment motion. This is a more sweeping proposal than Mr. Batalden's. In some instances it would streamline the process for the would-be appellant. But that benefit should be weighed against the possibility that the change would deprive potential appellees of notice they would receive under the current rule. In addition, it turns out to be challenging to draft an appropriately tailored amendment.

Part II.A. summarizes the proposals, and Parts II.B. through II.D sketch my understanding concerning the desirability of the proposed amendments.

A. The proposals

Public Citizen suggests deleting Rule 4(a)(4)(B)(ii) and substituting a provision stating that "the original notice of appeal serves as the appellant's appeal from any order disposing of any post-trial motion." Public Citizen argues that where the appellant has already filed a notice of appeal from the original judgment, it serves no useful purpose to require a new or amended notice of appeal when the appellant also wishes to challenge the disposition of a post-judgment motion. Public Citizen asserts that there are many instances when a notice of appeal does not itself provide clear notice of the precise nature of the issues to be raised on appeal – for example, when a notice of appeal from a final judgment brings up for review issues relating to prior orders that merged into that judgment. In many instances, Public Citizen argues, the appellee instead "is put on notice of the issues on appeal when, shortly after an appeal is filed, the appellant states the issues on a form or in some other filing required by the circuit clerk." Thus, deleting the requirement that appellants file a new or amended notice in order to challenge the disposition of a postjudgment motion "would prevent the inadvertent loss of issues on appeal, without harming appellees or the courts."

The Bar Association reports that participants in a discussion of the proposed Rules amendments in December 2007 doubted whether the proposed amendment to Rule 4(a)(4)(B)(ii) "would have any practical effect because, if there is any chance that the amended judgment could be argued as affecting the appeal, the appealing party always will file an amended notice of appeal." Participants suggested amending Rule 4(a) "to state that any post-appeal amendment to an underlying judgment is automatically incorporated into the scope of the originally filed notice of appeal."

B. An initial assessment of the proposals

In assessing these proposals it is worthwhile to note Rule 4(b)'s approach with respect to criminal appeals. Rule 4(b)(3)(C) provides, with respect to criminal appeals, that "[a] valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A)." The substance of this language came into the Rule in the 1993 amendments, which added, among other features, the following provision: "Notwithstanding the provisions of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions." Interestingly, the 1993 Committee Note to Rule 4(b) does not explain this addition. Instead, the Committee Note focuses its explanation on the addition of language designed to make clear that certain types of post-verdict motions in criminal cases did not nullify a previously-filed notice of appeal.

The 1993 amendments also added Rule 4(a)'s language specifying that one wishing to challenge the disposition of a postjudgment motion in a civil case must amend a previously-filed notice of appeal. (Prior to 1993, such an admonition would have been unnecessary as a technical matter, because from 1979 to 1993 Rule 4(a) provided that a tolling motion nullified any previously-filed notice of appeal.) As shown in the April 1991 Appellate Rules Committee Minutes, the substance of both these changes was adopted in the course of the same meeting. At that meeting, the Committee decided both (1) to adopt language in Rule 4(a) stating that a challenge to the disposition of a post-judgment motion in a civil case requires a new or amended notice of appeal[12] and (2) to adopt in Rule 4(b) language stating that a previously-filed notice of appeal encompasses the disposition of tolling motions.[13]

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[12] The minutes state in relevant part:

> Judge Keeton asked whether the intent of the motion was to eliminate the requirement of a new notice of appeal. Judge Williams stated that the rule should not add any more requirements as to notices of appeal than those already in Fed. R. App. P. 3. He suggested that the Committee Note make reference to Fed. R. App. P. 3(c) and state that in order to appeal from disposition of a post trial motion a party may need to file a new notice of appeal or amend the original notice.
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> Judge Keeton suggested a revision of the sentences in question to read as follows:
>
> > An appeal from an order disposing of any of the above motions requires an amendment of the party's previously filed notice of appeal in compliance with Rule 3(c). Any such amended notice of appeal shall be filed within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last of all such motions.

Minutes of the April 17, 1991, Meeting of the Advisory Committee on Federal Rules of Appellate Procedure ("April 1991 Minutes"), at 14-15.

[13] The minutes state in relevant part:

> Judge Logan suggested eliminating the language at lines 33 through 41 of the draft requiring a new notice or amended notice of appeal in order to bring an appeal from denial of a post trial motion. Judge Logan moved, and the motion was seconded by Judge Ripple, substitution of the following language for lines 33 through 41 of the draft:
>
> > Notwithstanding the provision of Rule 3(c), a valid notice of appeal is effective without amendment to appeal from an order disposing of any of the above motions.

April 1991 Minutes at 18.

The April 1991 Minutes do not explain why the Committee decided to take these differing approaches with respect to civil and criminal appeals. One reason might be that members were more concerned about criminal defendants' appeals due to the particularly serious nature of the stakes in criminal cases. Another reason might be that in most criminal cases the potential for confusion (as to what the defendant-appellant is likely to be appealing from) is relatively small; thus, providing that the initial notice of appeal encompasses challenges to subsequent dispositions of tolling motions probably does not make it difficult for the government to discern the nature of the orders being appealed. In complex civil cases, by contrast, there may be multiple postjudgment motions involving various parties, which might make it harder for the appellee to discern, in the first instance, which orders are being appealed if Rule 4(a) were to provide that an initial notice of appeal encompasses challenges to subsequent orders disposing of tolling motions.

Relevant questions, then, include whether current practice under Rule 4(a)(4)(B)(ii) poses undue difficulties for practitioners, and, if so, whether the benefits of a provision directing that an initial notice of appeal be read to encompass any challenges to subsequent dispositions of tolling motions would outweigh the possible downsides of such a provision. As Public Citizen's comments suggest, a key question might be whether, under such a regime, the notice of appeal would provide sufficient information to the appellee, and if not, whether other filings early in the course of the appeal would supply the missing specificity.

If the decision were taken to change Rule 4(a)'s approach so as to provide that an initial notice of appeal encompasses challenges to any subsequent dispositions of post-judgment motions, it would be necessary to consider how to implement that change. It seems unlikely that 28 U.S.C. § 2107(a)'s general requirement that the notice of appeal be filed "within thirty days after the entry of such judgment, order or decree" would pose a barrier to providing that a previously-filed notice of appeal could encompass a later-issued order disposing of a tolling motion; one could read the statutory language as setting an outer time limit, not as requiring that the notice of appeal be filed "after" the entry of the judgment, order or decree. That reading would be consistent with the treatment accorded notices of appeal filed after announcement but before entry of a judgment, see Appellate Rule 4(a)(2).

But as the next two subsections illustrate, the drafting would pose other challenges.

C. Possible language for an amendment to Rule 4(a)(4)

Here is a possible amendment to Rule 4(a)(4), designed to implement the suggestions discussed above.

Rule 4. Appeal as of Right– When Taken

1 **(a) Appeal in a Civil Case.**

2 * * * * *

3 (4) **Effect of a Motion on a Notice of Appeal.**

4 (A) If a party timely files in the district court any
5 of the following motions under the Federal
6 Rules of Civil Procedure, the time to file an
7 appeal runs for all parties from the entry of
8 the order disposing of the last such remaining
9 motion:

10 (i) for judgment under Rule 50(b);

11 (ii) to amend or make additional factual
12 findings under Rule 52(b), whether or
13 not granting the motion would alter the
14 judgment;

15 (iii) for attorney's fees under Rule 54 if the
16 district court extends the time to appeal
17 under Rule 58;

18 (iv) to alter or amend the judgment under
19 Rule 59;

20 (v) for a new trial under Rule 59; or

21 (vi) for relief under Rule 60 if the motion is
22 filed no later than [10] ***[will be "28"]***
23 days after the judgment is entered.

24 (B)(i) If a party files a notice of appeal after
25 the court announces or enters a
26 judgment--but before it disposes of any
27 motion listed in Rule 4(a)(4)(A)– the
28 notice becomes effective to appeal a
29 judgment or order, in whole or in part,
30 when the order disposing of the last
31 such remaining motion is entered.
32 (ii) A party ~~intending~~ who intends to
33 challenge an order disposing of any
34 motion listed in Rule 4(a)(4)(A), or a
35 [judgment altered or amended] ***[will be***
36 ***"judgment's alteration or***
37 ***amendment"]*** upon such a motion, and
38 who has not previously filed a valid
39 notice of appeal, must file a notice of
40 appeal ~~, or an amended notice of~~
41 ~~appeal~~--in compliance with Rule 3(c)–
42 within the time prescribed by this Rule
43 measured from the entry of the order
44 disposing of the last such remaining
45 motion.

46 (iii) No additional fee is required to file an

47 amended notice. A valid notice of

48 appeal is effective – without

49 amendment – to appeal from an order

50 disposing of any of the motions referred

51 to in Rule 4(a)(4)(A) [and from a

52 judgment's alteration or amendment

53 upon such a motion].[14]

54 * * * * *

D. Drafting difficulties

The potential complexity of tolling-motion practice in multi-party civil cases makes it hard to draft the Rule 4(a)(4) amendment.

In particular, the reference – in the possible amendment set out in Part II.C above – to "a valid notice of appeal" may be undesirably broad. In the civil-appeal context[15] there is a fair amount of caselaw stating that a notice of appeal that enumerates fewer than all the possible issues for appeal fails to encompass the other issues (applying the "expressio unius" canon).[16]

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[14] The bracketed language may be unnecessary: Appealing the order disposing of the motion logically embraces any change in the judgment directed by the order. But keeping subdivision (iii) parallel to subdivision (ii) might help to avoid confusion.

[15] My impression is that the "expressio unius" question concerning notices of appeal arises more rarely in the criminal-appeal context than in the civil context. This impression might, however, be mistaken. For examples of decisions addressing this question in the criminal context, *see United States v. Adrian*, 978 F.2d 486, 489 (9th Cir. 1992), *overruled on other grounds by United States v. W.R. Grace*, 526 F.3d 499 (9th Cir. 2008), and *United States v. Oberhauser*, 284 F.3d 827, 833 (8th Cir. 2002).

[16] *See, e.g.*, *Brooks v. AIG SunAmerica Life Assur. Co.*, 480 F.3d 579, 585 (1st Cir. 2007); *Navani v. Shahani*, 496 F.3d 1121 (10th Cir. 2007); *Constructora Andrade Gutierrez, S.A. v. American Intern. Ins. Co. of Puerto Rico*, 467 F.3d 38, 44 (1st Cir. 2006); *Parkhill v. Minnesota Mut. Life Ins. Co.*, 286 F.3d 1051, 1058 (8th Cir. 2002). Some cases take a more forgiving approach. *See, e.g.*, *Satterfield v. Johnson*, 434 F.3d 185, 190–91 (3d Cir. 2006);

Questions might arise whether such a narrowly-drafted notice of appeal should qualify for the new treatment, or whether the fact that it specified only particular orders would prevent it from encompassing the later disposition of the postjudgment motions. To illustrate the point, consider the following pair of hypotheticals.

Hypothetical One: Defendant Brown is dismissed January 3, 2008; no Rule 54(b) judgment. Jury verdict for Plaintiff against Defendant Jones; judgment is entered on the verdict on August 1, 2009. On August 2, 2009, Plaintiff files a notice of appeal designating "the final judgment entered August 1, 2009"; though this notice does not specify that Plaintiff is challenging the dismissal as against Brown, at that moment it is unlikely that Jones will think Plaintiff is appealing from the judgment for Plaintiff against Jones.[17] The clerk serves notice of the filing by mailing a copy to counsel of record for each party (Jones, Brown, and also Green, a defendant who was dismissed from the action in 2008). On August 8, 2009, Jones files a renewed rule 50(b) motion (thereby suspending the effect of Plaintiff's notice of appeal). The motion is granted; an amended judgment that Plaintiff take nothing against Jones is entered on September 28. Plaintiff's original notice springs into effect on September 28; see Rule 4(a)(4)(B)(i). Plaintiff does nothing to amend the August 2 notice of appeal.

In this hypothetical, should Plaintiff's notice of appeal be treated – under the proposed amendment to Rule 4(a)(4) – as encompassing a challenge to the grant of judgment as a matter of law to Jones? It is conceivable that Plaintiff may not want to appeal the judgment as a matter of law for Jones; for example, Plaintiff might conclude that such a challenge would be unlikely to succeed. However, a proponent of the proposed amendment might argue that Jones should simply assume that Plaintiff's generic notice of appeal "from the final judgment" encompasses any and all grievances that Plaintiff may have with the outcome of the case. That would certainly be true as to interlocutory orders entered prior to entry of the final judgment. For instance, defendant Green – who won summary judgment dismissing Plaintiff's claims against her in June 2008 – is considered to be on notice that the notice of appeal encompasses a challenge to that dismissal. Why should Jones be treated differently than Green?

Hypothetical Two: Same as above, except that Plaintiff's notice of appeal states that Plaintiff is appealing from "the order of January 3, 2008, dismissing Plaintiff's claims against defendant Brown." The specificity of this notice will likely lead to the conclusion that the notice of appeal does not encompass a challenge to the June 2008 dismissal of Plaintiff's claims against Green. That being so, why should the proposed Rule 4(a)(4) amendment permit that notice of

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Nieves-Marquez v. Puerto Rico, 353 F.3d 108, 122–23 (1st Cir. 2003).

[17] It is possible to think of variants on this hypothetical in which Jones would have reason to anticipate that the notice of appeal runs against Jones as well. For example, this would be true if one of Plaintiff's claims against Jones had been dismissed prior to trial in an order as to which no Civil Rule 54(b) judgment was entered.

appeal to encompass a challenge to the (post-judgment) dismissal of Plaintiff's claim against Jones?

If we conclude that the amendment should not, in fact, permit such a specific notice of appeal to encompass the challenge to the dismissal of the claim against Jones, the question is how to draft the rule so as to capture that insight. We have considered a few options, but we have not yet hit upon one that seems fully satisfactory.

We considered the possibility of using the phrase "a valid notice of appeal from the entire judgment" – to distinguish such a notice from notices that designate only a particular order. But Professor Cooper has aptly captured the difficulties with that language:

> We probably cannot say "original" judgment -- that would create real problems when a first entire judgment is set aside and a new judgment is later entered. But appeal can be taken from something that is not easily characterized as an "entire" judgment -- an easy example is judgment on liability, leaving attorney fees to be resolved. Although I hope it is unlikely, I suppose one of the time-suspending motions could be addressed to a Rule 54(b) judgment: is that an "entire" judgment? Suppose judgment is entered, a notice of appeal is filed on Day 2, a Rule 59 motion is timely filed, a responsive Rule 59 or other suspending motion is filed, an amended judgment is entered on one of the motions pending disposition of the other (whether or not that was a wise thing to do), the other motion leads to a further amendment of the judgment: was the original judgment an "entire" judgment? And so on.

We also considered the possibility of tackling this issue through a requirement that the notice of appeal have designated the relevant party as an appellee, thus: "A valid notice of appeal is effective <u>without amendment as an appeal by any party named as an appellant in the notice</u> to appeal from an order disposing of any of the motions referred to in Rule 4(a)(4)(A) <u>as to any party named as an appellee in the notice</u>." But an objection to that approach is that FRAP 3 currently includes no requirement that the notice of appeal name the appellee(s).[18] Admittedly, some courts have suggested that the better practice is to name the appellee(s) in the notice of appeal.[19] But the notion that this is better practice does not necessarily provide a reason to write it into FRAP 3 across the board; such a change could sometimes lead to forfeitures of all or part of an appeal. One possible resolution might be to take an intermediate approach which (1) for general purposes, continues *not* to require the notice of appeal to name appellees; but

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[18] *See, e.g.*, *Crawford v. Roane*, 53 F.3d 750, 752 (6th Cir. 1995) ("Federal Rule of Appellate Procedure 3(c), only requires that the notice of appeal 'specify the party or parties taking the appeal,' and does not require an appellant to name appellees.").

[19] *See, e.g.*, *House v. Belford*, 956 F.2d 711, 717 (7th Cir. 1992) ("Even though courts have declined to require the appellant to name each appellee in the notice of appeal, we do not think it is good legal practice to fail to do so.").

(2) provides that a notice of appeal encompasses a later disposition of a post-judgment motion only if the notice names as an appellee any party benefited by the disposition of the post-judgment motion. Such an approach might encourage litigants to name the appellees in the notice of appeal, but would pose a risk of forfeiture only if a litigant failed to name an appellee and then sought to argue that the notice of appeal encompassed the disposition of a postjudgment motion that benefited that appellee. A cost of this approach would be the additional intricacy it would introduce into practice under Rule 4.

In sum, the "expressio unius" problem illustrates the broader conceptual question presented by this item. As Professor Cooper puts it, that question is "whether we should, as Rule 4 now does, require an amended notice of appeal. If not, how should we attempt -- if at all -- to distinguish the cases in which Jones should fairly expect to become embroiled in the appeal from those in which Jones deserves notice that the Plaintiff will continue to pursue the dispute on appeal? The idea of writing the rule in terms of reasonable expectations seems a non-starter."

III. Conclusion

As discussed in Part I, amendments to address Mr. Batalden's concern seem relatively straightforward and useful. By contrast, as explained in Part II, amendments along the lines suggested by Public Citizen and the Bar Association pose significant drafting challenges and do not seem necessary.

RULE 26(c)

BACKGROUND

In 1992 proposed "sunshine in discovery" provisions in H.R. 2017 prompted the Advisory Committee to explore the advisability of amending the discovery protective-order provisions of Rule 26(c). The effort produced a published proposal; a recommendation for adoption of a somewhat revised proposal that was rejected by the Judicial Conference; publication for comment of the proposal that was submitted to the Judicial Conference; a decision to postpone further consideration pending broader consideration of the discovery rules; and finally, in 1998, a decision to suspend active consideration while maintaining watch on continuing practice. The work was aided by a Federal Judicial Center study.

Comments on the published proposals were divided. One side emphasized the view that discovery should be limited to what is needed to resolve a particular lawsuit. Discovery permits a party to force production of information that is private for all other purposes. That privacy should be protected against all other inroads. Facilitating protection by way of orders limiting the subjects or use of discovery information also facilitates production of the information in discovery without burdensome collateral litigation. The other side took a "public interest" view, emphasizing the belief that once government power has been exerted to dissipate privacy there should be broad access to the disclosed information.

The decision to defer action rested in large part on the conclusion that courts seemed to be striking proper balances between private and public interests. Years of study, prompted by concern that the proponents of successive bills in Congress might be pointing to serious problems, concluded there were no serious problems. Rather than risk disrupting satisfactory practice under Rule 26(c) as it has been, the Committee chose to defer.

CURRENT INTEREST

There still are no signs that federal judges or most practicing lawyers believe that Rule 26(c) needs to be revised. But Congress continues to study bills that would drastically change protective-order practice. H.R. 1508, the "Sunshine in Litigation Act of 2009," is a current model. Congressional concern continues to command respectful attention from the Rules Committees. It is time to consider whether to reopen the Rule 26(c) inquiry. If there are problems that deserve attention, it is important that the Rules Committees lead the way through the Enabling Act process to craft the best possible rule.

The materials that follow are rather long. Appendix A includes a draft Rule 26(c) taken for the most part from the final version before the Advisory Committee in 1996, here inserted in the Style version of Rule 26(c) as paragraph (c)(4). Paragraph (4) and the Committee Note give a good picture of the Committee's work. Footnotes in paragraph (2) suggest some other items the Committee might wish to consider if it seems desirable to go beyond adopting an explicit procedure for modifying or dissolving a protective order. The first footnote points to a provision that apparently caused rejection by the Judicial Conference in 1995 — an explicit recognition in rule text of 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.

APPENDIX A

1996 Proposal, Adapted to Style Rule 26(c), with Footnotes

1 **Rule 26. Duty to Disclose; General Provisions Governing**
2 **Disclosures**
3 * * * * *
4 **(c) Protective Orders.**
5 **(1)** ***Motion.*** A party or any person from whom
6 discovery is sought may move for a protective
7 order in the court where the action is pending — or
8 as an alternative on matters relating to a
9 deposition, in the court for the district where the
10 deposition will be taken. The motion must include
11 a certification that the movant has in good faith
12 conferred or attempted to confer with other
13 affected parties in an effort to resolve the dispute
14 without court action.
15 **(2)** ***Order.*** The court may, after considering the public
16 and private interests in allowing or restricting
17 access to information sought or obtained by
18 discovery, including any risks to the public health
19 or safety, and[1] for good cause or on stipulation,[2]
20 issue an order to protect a party or person from
21 annoyance, embarrassment, oppression, or undue

[1] This is new over the 1996 proposal. It illustrates one version of how Rule 26(c) might look if it were to absorb the core of the "sunshine" bills.

[2] Inclusion of this provision, framed as "stipulation of the parties," generated heated debate.

22 burden or expense,[3] including one or more of the
23 following:[4] [5]
24 **(A)** forbidding the ~~disclosure or~~[6] discovery;
25 **(B)** specifying terms, including time and place,
26 for the ~~disclosure or~~ discovery;
27 **(C)** prescribing a discovery method other than the
28 one selected by the party seeking discovery;
29 **(D)** forbidding inquiry into certain matters, or
30 limiting the scope of ~~disclosure or~~ discovery
31 to certain matters;

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[3] A Committee-based effort to revise Rule 26(c) should reconsider this sequence of oddly inappropriate words.

[4] 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, after considering the public and private interests in allowing or restricting access to information sought or obtained by discovery, including any risks to the public health or safety, and for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. The order may not prohibit disclosing information to a Federal or State agency with regulatory or enforcement authority related to the information. The order may~~;~~ includ~~ing~~ one or more of the following:

[5] The "including" list does not directly describe provisions that are likely to be common. It takes work to find simple nondisclosure; the e-discovery orders we worked for, and Evidence Rule 502; sharing with experts but not others — that can be read into (G) for commercial information, but (G) does not speak of personal information; and so on. Again, Committee-based consideration should address this list carefully.

[6] Present Rule 26(c) wobbles. (1) begins by addressing only "discovery." The idea may be that as diluted in 2000, disclosure carries few risks and initial disclosure is subject to the Rule 26(a)(1)(C) opportunity to seek protection at the outset. On the other hand, there may be good reasons to limit access to liability insurance disclosures or damages calculations. In some circumstances there may be good reasons to protect even the identity of witnesses or documents that may be used to support claims or defenses. Overlining is adopted only as the easier mode of illustration. One way or the other, the rule should be internally consistent.

32 **(E)** designating the persons who may be present
33 while the discovery is conducted;
34 **(F)** requiring that a deposition be sealed and
35 opened only on court order;
36 **(G)** requiring that a trade secret or other
37 confidential research, development, or
38 commercial information not be revealed or be
39 revealed only in a specified way; or
40 **(H)** requiring that the parties simultaneously file
41 specified documents or information in sealed
42 envelopes, to be opened as the court directs.
43 **(~~2~~3)** ***Ordering Discovery.*** If a motion for a protective
44 order is wholly or partly denied, the court may, on
45 just terms, order that any party or person provide
46 or permit discovery.
47 **(4)(A)** The court may modify or dissolve a
48 protective order on motion made by a party,
49 a person bound by the order, or a person who
50 has been [allowed to intervene]{granted
51 leave}[7] to seek modification or dissolution.
52 **(B)** In ruling on a motion to dissolve or modify a
53 protective order, the court must consider,
54 among other matters, the following:

[7] The most recent published proposal had this as "intervene," with a Committee Note statement that Rule 24 standards do not control. Rather than rely on a Note, it may be better to say something like "granted leave." And we need to consider whether to open it up far enough to allow anyone to make a motion without first obtaining leave.

55 (i) the extent of reliance on the order;

56 ~~(ii) the public and private interests affected~~

57 ~~by the order, including any risk to~~

58 ~~public health or safety;~~[8]

59 (ii) the movant's consent to submit to the

60 terms of the order;

61 (iii) the reasons for entering the order, and

62 any new information that bears on the

63 order; and

64 (iv) the burden that the order imposes on

65 persons seeking information relevant to

66 other litigation.

67 (~~3~~5) **Awarding Expenses.** Rule 37(a)(5) applies to the

68 award of expenses.

Committee Note

Subdivisions (1) and (2) are revised to conform to the style conventions adopted for simplifying the present rules. No change in meaning is intended by these style changes.

Subdivision (1)[2] also is amended to confirm the common practice of entering a protective order on stipulation of the parties. Stipulated orders can provide a valuable means of facilitating discovery without frequent requests for action by the court, particularly in actions that involve intensive discovery. If a stipulated protective order thwarts important interests, relief may be sought by a motion to modify or dissolve the order under subdivision (3)[4]. Subdivision (1), as all of Rule 26(c), deals only with discovery protective orders. It does not address any other form of order that limits access to court proceedings or materials submitted to a court.

Subdivision (3)[4] is added to the rule to dispel any doubt whether the power to enter a protective order includes power to

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[8] (iii) refers to the reasons for entering the order initially. If we add public health and welfare to the initial consideration of the order, we probably do not need to repeat it here.

modify or vacate the order. The power is made explicit, and includes orders entered by stipulation of the parties as well as orders entered after adversary contest. The power to modify or dissolve should be exercised after careful consideration of the conflicting policies that shape protective orders. Protective orders serve vitally important interests by ensuring that privacy is invaded by discovery only to the extent required by the needs of litigation. Protective orders entered by agreement of the parties also can serve the important need to facilitate discovery without requiring repeated court rulings. A blanket protective order may encourage the exchange of information that a court would not order produced, or would order produced only under a protective order. Parties who rely on protective orders in these circumstances should not risk automatic disclosure simply because the material was once produced in discovery and someone else might want it.

Modification of a protective order may be sought to increase the level of protection afforded as well as to reduce it. Among the grounds for increasing protection might be violation of the order, enhanced appreciation of the extent to which discovery threatens important interests in privacy, or the need of a nonparty to protect interests that the parties have not adequately protected.

Modification or dissolution of a protective order does not, without more, ensure access to the once-protected information. If discovery responses have been filed with the court, access follows from a change of the protective order that permits access. If discovery responses remain in the possession of the parties, however, the absence of a protective order does not without more require that any party share the information with others.

Despite the important interests served by protective orders, concern has been expressed that protective orders can thwart other interests that also are important. Two interests have drawn special attention. One is the interest in public access to information that involves matters of public concern. Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may continue to cause injury until the information is widely disseminated. The other interest involves the efficient conduct of related litigation, protecting adversaries of a common party from the need to engage in costly duplication of discovery efforts.

The first sentence of subparagraph (A) recognizes that a motion to modify or dissolve a protective order may be made by a party, a person bound by the order, or a person allowed to intervene for this purpose. A motion to intervene for this purpose need not meet the technical requirements of Rule 24. It is enough to show that the applicant has a sufficient interest to justify consideration of the motion. These provisions are supported by the practice that has developed through a long line of decisions.

Subparagraph (B) lists some of the matters that must be considered on a motion to dissolve or modify a protective order. The list is not all-inclusive; the factors that may enter the decision are too varied even to be foreseen.

The most important form of reliance on a protective order is the production of information that the court would not have ordered produced without the protective order. Often this reliance will take the form of producing information under a blanket protective order without raising the objection that the information is not subject to disclosure or discovery. The information may be protected by privilege or work-product doctrine, the outer limits of Rule 26(b)(1), or other rules. Reliance also may take other forms, including the court's own reliance on a protective order less sweeping than an order that flatly prohibits discovery. If the court would not have ordered discovery over proper objection, it should not later defeat protection of information that need not have been produced at all. Reliance also deserves consideration in other settings, but a finding that information is properly discoverable directs attention to the question of the terms — if any — on which protection should continue.

The public and private interests affected by a protective order include all of the myriad interests that weigh both for and against discovery. The question whether to modify or dissolve a protective order is, apart from the question of reliance, much the same as the initial determination whether there is good cause to enter the order. An almost infinite variety of interests must be weighed. The public and private interests in defeating protection may be great or small, as may be the interests in preserving protection. Special attention must be paid to a claim that protection creates a risk to public health or safety. If a protective order actually thwarts publication of information that might help protect against injury to person or property, only the most compelling reasons, if any, could justify protection. Claims of commercial disadvantage should be examined with particular care, and mere commercial embarrassment deserves little concern. On the other hand, it is proper to demand a realistic showing that there is a need for disclosure of protected information. Often there is full opportunity to publicize a risk without access to protected discovery information. Paradoxically, the cases that pose the most realistic public risk also may be the cases that involve the greatest interests in privacy, such as a yet-to-be-proved claim that a party is infected with a communicable disease.

Consent to submit to the terms of a protective order may provide strong reason to modify the order. Submission to the terms of the order should include submission to the jurisdiction of the court to enforce the order. This factor will often overlap the fifth enumerated factor that considers the interests of persons seeking information relevant to other litigation. Submission to the protective order, however, does not establish an automatic right to modification.

It may be better to leave to the court entertaining related litigation the question whether information is discoverable at all, the balance between the needs for discovery and for privacy, and the terms of protection that may reconcile these competing needs. These issues often are highly case-specific, and the court that entered the protective order may not be in a good position to address them.

Submission to the protective order and the court's enforcement jurisdiction also may justify disclosure to a state or federal agency. A public agency that has regulatory or enforcement jurisdiction often can compel production of the protected information by other means. The test of modification, however, does not turn on a determination whether the agency could compel production. Rather than provoke satellite litigation of this question, protection is provided by requiring the agency to submit to the protective order and the court's enforcement jurisdiction. If there is substantial doubt whether the agency's submission is binding, the court may deny disclosure. One obvious source of doubt would be a freedom of information act that does not clearly exempt information uncovered by this process.

The role of the court in considering the reasons for entering the protective order is affected by the distinction between contested and stipulated orders. If the order was entered on stipulation of the parties, the motion to modify or dissolve requires the court to consider the reasons for protection for the first time. All of the information that bears on the order is new to the court and must be considered. If the order was entered after argument, however, the court may justifiably focus attention on information that was not considered in entering the order initially.

A protective order does not of itself defeat discovery of the protected information by independent discovery demands made in independent litigation on the person who produced the information. The question of protection must be resolved independently in each action. At the same time, it may be more efficient to reap the fruits of discovery already under way or completed without undertaking duplicating discovery. The closer the factual relationships between separate actions or potential actions, the greater the reasons for modifying a protective order to allow disclosure by the most efficient means.

Assessment of the need for disclosure in support of related litigation may require joint action by two courts. The court that entered the protective order can determine most easily the circumstances that justified the order and the extent of justifiable reliance on the order. The court where related litigation is pending can determine most easily the importance of the information in that litigation, and often can determine most accurately the balance between the interest in disclosure and the interest in nondisclosure or further protection. The rule does not attempt to prescribe procedures for cooperative action.

Special questions arise from the prospect of multiple related actions brought at different times and in different courts. Great inefficiencies can be avoided by establishing means of sharing information. Informal means are frequently found by counsel, and occasional efforts are made at establishing more formal means even outside the framework of consolidated proceedings. There is not yet sufficient experience to support adoption of formal rules establishing — and regulating the terms of access to — litigation support libraries, document depositories, depositions taken once for many actions, or similar devices. To the extent that consolidation devices may not prove equal to the task, however, these questions will deserve attention in the future.

Rule 26(c)(3)[4] applies only to the dissolution or modification of protective orders entered by the court under subdivision (c)(1)[2]. It does not address private agreements entered into by litigants that are not submitted to the court for its approval. Nor does Rule 26(c)(3)[4] apply to motions seeking to vacate or modify final judgments that occasionally contain restrictions on the disclosure of specified information. Rules 59 and 60 govern such motions.

1994 SUMMARY OF COMMENTS

Rule 26(c) Comments

Many suggestions for change were made by the written comments on the version of Rule 26(c) published for comment on October 15, 1993. They can be roughly grouped in several categories.

Initial Sealing Standard

Rule 26(c)(1) should be amended to require consideration of the public interest as part of the initial determination whether to enter a protective order. (An alternative version would require that at least the parties stipulate that a protective order will not conceal information about a risk to public health or safety.)

It should be made clear that there is a presumption against secrecy.

Unfiled Discovery Materials

The Note should say that the Rule does not address access to unfiled discovery materials.

The Rule should explicitly recognize the post-judgment power to require that unfiled discovery materials be filed.

Standards for Modification or Dissolution

It is a mistake to attempt to list standards for modification or dissolution. No list can be complete; an incomplete list is misleading, even if it is written in nonexclusionary terms.

"Good cause" should be adopted as the sole standard for modification.

It should be made clear that the "public interest" that may justify modification does not include mere curiosity.

Reliance

The reference to reliance is wrong. The only question on motion for modification or dissolution is whether there is a continuing need for protection. The court should order access to any information that would not be protected on the basis of all information available at the time of the request for access, without regard to claims of "reliance."

Standing

It should be made clear that nonparties and the media have standing to seek modification or dissolution. Intervention should not be required.

The Note should say that the amendment does not address the question of standing.

Other Litigation

The draft reference to persons seeking information relevant to other litigation is undesirable because it implies undue restrictions on access. Access should be allowed simply on agreement to be bound by the protective order and, perhaps, agreement to submit to the jurisdiction of the court for purposes of enforcing the protective order.

Access for purposes of "other litigation" should be narrowed by requiring that the litigation be "similar," "related," or "collateral."

Litigated versus Stipulated Orders

A distinction should be made between protective orders entered after consideration by the court and those that result from agreement of the parties. The burden should be on anyone seeking to modify or undo an order that results from active consideration by the court. If the order results from agreement of the parties, however, the burden should be on anyone who seeks to maintain protection.

No reference should be made to blanket protective orders. They are not authorized under present practice.

Alternative Means of Access

A person who has access to information by subpoena or other means of public compulsion should be treated differently than those who have no alternative means; greater justification must be shown for overcoming protection.

Burdens at Time of Modification

One suggestion is that when modification or dissolution of a protective order is sought, the burden of justification should be placed on any party who seeks to preserve confidentiality.

Materials Used in Litigation

It should be made clear that different rules apply to materials used in support of motions or at trial.

Final Judgments

The amendment should be extended to reach secrecy provisions in final judgments.

It should be made clear that there is continuing jurisdiction to modify or dissolve after final judgment.

"Return or Destroy"

The Rule should provide that "return or destroy" provisions are available only if the party providing discovery responses retains both the request and the responding materials in readily accessible form for the benefit of future litigants.

MAXIMUM ACCESS RULE 26(C): 1994 DRAFT

(From October 20-21, 1994 Agenda Materials, Tab IV)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

1 * * * * *

2 (2) When the public or nonparties have an
3 interest in access to discovery
4 materials, the court must limit a
5 protective order to the least restrictive
6 terms necessary to protect more
7 important interests of the parties, the
8 person making the discovery response,
9 and any other person who might be
10 adversely affected by access to the
11 materials.

12 (~~2~~3) (present (2) on ordering discovery.

13 (~~3~~4) (Present (3) on awarding expenses.

14 (5) A protective order ceases to apply to
15 discovery materials used, on terms
16 that do not violate the protective
17 order, to support or oppose a motion
18 or as evidence at trial.

19 (6) The court may allow a nonparty
20 access to discovery materials
21 governed by a protective order if:

22 (A) the nonparty asserts a claim
23 factually related to the
24 protected materials; and
25 (B) the nonparty agrees to submit
26 to the terms of the protective
27 order and to the jurisdiction of
28 the court to enforce the
29 protective order.
30 (7) A party or nonparty may move at any
31 time before or after judgment to
32 dissolve or modify a protective
33 discovery order made under this rule
34 or a provision in a judgment limiting
35 access to discovery or trial materials.
36 If the order or provision was entered
37 on stipulation of the parties, the
38 burden of establishing the need for
39 continued protection is on the person
40 asserting the need. If the order or
41 provision was contested, the burden of
42 establishing the need for dissolution or
43 modification is on the person seeking
44 access to protected material. The
45 court may dissolve or modify the
46 order or provision to allow access to
47 protected material if:

48 **(A)** production of the material
49 would have been ordered over
50 objection by the person
51 producing it; and
52 **(B)** access would be allowed if
53 protection were first sought at
54 the time of the motion.

AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

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

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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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in Litigation 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 disclo-
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

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CHAIR

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RICHARD C. TALLMAN
CRIMINAL RULES

ROBERT L. HINKLE
EVIDENCE RULES

June 2, 2009

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

Dear Mr. Chairman:

I write to advise you that the Judicial Conference's Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules oppose the "Sunshine in Litigation Act of 2009" (H.R. 1508), which was introduced on March 12, 2009. The Rules Committees have carefully and thoroughly studied the bill's proposed requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure and for issuing orders approving settlements with confidentiality provisions. As a result of this work, the Rules Committees concluded that the legislation is not necessary to protect the public health and safety and that the discovery protective order provision would make it more difficult to protect important privacy interests and would make civil litigation more expensive, more burdensome, and less accessible. The Committees also oppose the legislation because it is inconsistent with the Rules Enabling Act, 28 U.S.C. §§ 2071-2077. For many of the same reasons, the American Bar Association voted to approve a resolution opposing H.R. 1508, which is enclosed.

Discovery Protective Orders

H.R. 1508 would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c) of the Federal Rules of Civil Procedure, to make findings of fact that the information obtained through discovery is not 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 the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 1508, have been introduced regularly since 1991. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to inform themselves about the problems identified by these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies. They found that the criteria courts rely on when entering an order sealing documents filed with the court are properly more demanding than the criteria relied on when issuing a discovery protective order, which typically govern documents not filed with the court. Because discovery material does not affect the judicial function in determining the parties' substantive rights, the level of scrutiny for granting a protective order is not the same as for an order that seals filings. The difference explains why courts routinely require a separate showing of good cause when a party requests that documents subject to a protective order be sealed.

Based on lengthy and thorough examination of the issues, the Rules Committees concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 1508, are not warranted and would adversely affect the administration of justice. They found that: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available.

The Empirical Data Shows No Need for the Legislation

In the early 1990s, the Rules Committees began studying pending bills requiring courts to make findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant issues about the potential for revealing confidential information that could endanger privacy interests and increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Committees concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committees asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep from the public information about public safety or health hazards. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders are requested in only about 6% of civil cases. Most of the requests are made by motion, which are briefed by both parties and courts carefully review and deny or modify a substantial proportion; about one-quarter of the requests are made by party stipulations that courts usually accept.

The empirical study showed that discovery protective orders entered in most cases do not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. A little more than 50% were civil rights and contract cases and about 9% were personal injury cases. About half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. This half had nothing to do with restricting access to discovery material. In the other half of the 398 cases, a protective order was entered restricting access to discovery materials. Most of these cases are not personal injury cases in which public health and safety issues are most likely to arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards.

Other Information Shows No Need for the Legislation

The Rules Committees also studied the examples commonly cited as illustrations of the need for legislation such as H.R. 1508. In these cases, information sufficient to protect public health or safety was publicly available from other sources. The Committees examined the case law to understand what courts are in fact doing when parties file motions for protective orders in discovery. The case law showed that the courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also shows that courts often reexamine protective orders if intervenors or third parties raise concerns about them.

The Rules Committees also considered specific proposals to amend Rule 26(c), intended to address the problems identified in H.R. 1508's predecessor bills. The Committees published proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and extensive public comment.

At the conclusion of this process, the Judicial Conference decided to return the proposals to the Committees for further study. That study included the work described above.

The Legislation Would Have Significant Negative Consequences

The Rules Committees also carefully considered the impact of requiring findings of fact before any discovery protective order could be issued. As noted, the empirical data showed that about 50% of the cases in which discovery protective orders of the type addressed in H.R. 1508 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery.

The risks to privacy are significantly greater today than when bills similar to H.R. 1508 were first introduced, because of the computer. The federal courts all have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. New rules implementing the E-Government Act do not reduce the need for protective orders to safeguard against dissemination of highly personal and sensitive information. If fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Although few cases involve discovery into information relevant to public health or safety hazards, H.R. 1508 would apply to all civil cases. In many cases, protective orders are essential to effective discovery management. That importance has increased with the explosive growth in electronically stored information. Even relatively small cases often involve massive amounts of information. Requiring courts to review information – which can often amount to thousands or even millions of pages – to make such determinations will burden judges and further delay pretrial discovery. The likely mechanics of a procedure implementing the bill underscore the significant delays it would add. As a

practical matter, a party requesting discovery would not receive discoverable material until the producing party completed its collection, processing, and review of discoverable material and transmitted it to the judge, which could take months. The case would then be put on hold until the judge reviewed the materials and made the necessary findings under the bill.

Parties often rely on the ability to obtain protective orders in voluntarily producing information without the need for extensive judicial supervision. If obtaining a protective order required item-by-item judicial consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The Legislation Would Primarily Affect Information that is Not Publicly Available Because it is Not Filed With the Court

Not only would the proposed legislation exact a heavy toll on litigants, lawyers, and judges, its potential benefit would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Conclusion

The Rules Committees oppose the proposed legislation on discovery protective orders on the ground that it is inconsistent with the Rules Enabling Act. The Committees' substantive concerns with the proposed legislation result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted and that the proposed legislation would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 1508 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information 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 the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted. In 2002, the Rules Committees asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committees asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 1508 contains a similar provision. In April 2004 the FJC completed its comprehensive study, surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%).

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings

were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Rules Committees were nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available information about potential hazards contained in other records that were not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. The product-liability suit complaints, for example, specifically identified the product at issue, described the accident or event, and described the harm or injury alleged to have resulted. In many cases, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings."

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 1508, prohibiting a

court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources – including the complaint – to inform the public of potential hazards in cases involving a sealed settlement agreement, the Rules Committees concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements.

Summary

For these reasons, the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules oppose the discovery protective order and settlement order provisions of H.R. 1508. I thank you for your consideration and look forward to continuing to work together to ensure that our civil justice system is just and fair.

Sincerely,

Lee H. Rosenthal
United States District Judge
Chair, Committee on Rules of Practice
and Procedure

Enclosure

cc: Members, House Committee on the Judiciary

Identical letter sent to: Honorable Lamar Smith

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
AND ITS
ADVISORY COMMITTEE ON CIVIL RULES
JUDICIAL CONFERENCE OF THE UNITED STATES

STATEMENT OF
THE HONORABLE MARK R. KRAVITZ

JUDGE, UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

FOR THE
SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON
THE "SUNSHINE IN LITIGATION ACT OF 2009," H.R. 1508

JUNE 4, 2009

Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544

STATEMENT OF JUDGE MARK R. KRAVITZ
ON BEHALF OF THE RULES COMMITTEES OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

Mr. Chairman and members of the subcommittee, I am Judge Mark R. Kravitz of the United States District Court for the District of Connecticut, and I chair the Judicial Conference's Advisory Committee on Civil Rules. I am submitting this statement on behalf of the Conference's Committee on Rules of Practice and Procedure and its Advisory Committee on Civil Rules.

The Rules Committees oppose the "Sunshine in Litigation Act of 2009" (H.R. 1508), which was introduced on March 12, 2009, on the ground that it effectively amends the Federal Rules of Civil Procedure outside the rulemaking process, contrary to the Rules Enabling Act (28 U.S.C. §§ 2071-2077). Under the Rules Enabling Act, proposed amendments to federal court rules are subjected to extensive scrutiny by the public, bar, and bench through the advisory committee process, carefully considered by the Judicial Conference, and then presented after approval by the Supreme Court to Congress. It is an exacting, transparent, and deliberative process designed to provide exhaustive scrutiny to every proposed amendment of the rules, by many knowledgeable individuals and entities, so that lurking ambiguities can be unearthed, inconsistencies removed, problems identified, and improvements made. It is also a process that relies heavily upon empirical research, rather than anecdotal information, to identify problems and to ensure that any solution is workable, effective, and does not create unintended consequences. Direct amendment of the federal rules through legislation, even when the rulemaking process has been completed, circumvents the careful safeguards that Congress itself established in the Rules Enabling Act.

After years of careful and thorough study through the Rules Enabling Act process, the Judicial Conference Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules did not recommend that the Judicial Conference approve a change to Rule 26(c) similar to that proposed in the Sunshine in Litigation Act and its predecessors. Because the Rules

Committees made no such recommendation, the Judicial Conference has not been asked nor has it taken a formal position on the specifics of the Act's provisions. The Rules Committees did not recommend such a change to Rule 26(c) for three principal reasons. First, the bill is unnecessary. Second, it would impose an intolerable burden on the federal courts. Third, it would have significant adverse consequences on civil litigation, including making litigation more expensive and making it more difficult to protect important privacy interests.

I am no stranger to these issues. In my former life as a private practitioner, I represented numerous media companies in their efforts to gain access to court proceedings and to information held by state and federal governments. As a judge, I have worked with litigants to craft responsible protective orders that safeguard the legitimate privacy interests of the parties while at the same time protecting the public's constitutionally grounded interest in open judicial proceedings.

Discovery Protective Orders

H.R. 1508 is intended to prevent parties from using the federal judicial process to conceal matters that harm the public health or safety by imposing requirements for issuing discovery protective orders under Rule 26(c) of the Federal Rules of Civil Procedure. The bill would require a judge presiding over a case, who is asked to enter a protective order governing discovery under Rule 26(c), to make findings of fact that the information obtained through discovery is not 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 the public interest in maintaining the confidentiality of the information and that the protective order requested is no broader than necessary to protect the privacy interest asserted.

Bills that would regulate the issuance of protective orders in discovery under Rule 26(c), similar to H.R. 1508, have been introduced regularly since 1991. Under the Rules Enabling Act, the Rules Committees studied Rule 26(c) to inform themselves about the problems identified by

these bills and to bring the strengths of the Rules Enabling Act process to bear on the problems that might be found. Under that process, the Rules Committees carefully examined and reexamined the issues, reviewed the pertinent case law and legal literature, held public hearings, and initiated and evaluated empirical research studies.

The Rules Committees also considered specific alternative proposals to amend Rule 26(c), intended to address the problems identified in H.R. 1508's predecessor bills, including an amendment to Rule 26(c) that expressly provided for modification or dissolution of a protective order on motion by a party or nonparty. The Rules Committees published the proposed amendments through the Rules Enabling Act process. Public comment led to significant revisions, republication, and further extensive public comment. At the conclusion of this process, the Judicial Conference decided to return the proposals to the Rules Committees for further study. That study included the work described above.

The Empirical Data Identify Scope of Protective Order Activity

In the early 1990's, the Rules Committees began studying pending bills, like H.R. 1508, requiring courts to make particularized findings of fact that a discovery protective order would not restrict the disclosure of information relevant to the protection of public health and safety. The study raised significant concerns about the potential for revealing, in the absence of a protective order, confidential information that could endanger privacy interests and generate increased litigation resulting from the parties' objections to, and refusal to voluntarily comply with, the broad discovery requests that are common in litigation. The Rules Committees concluded that the issues merited further consideration and that empirical information was necessary to understand whether there was a need to regulate the issuance of discovery protective orders by changing Rule 26(c).

In 1994, the Rules Committees asked the Federal Judicial Center (FJC) to do an empirical study on whether discovery protective orders were operating to keep information about public safety

or health hazards from the public. The FJC completed the study in April 1996. It examined 38,179 civil cases filed in the District of Columbia, Eastern District of Michigan, and Eastern District of Pennsylvania from 1990 to 1992. The FJC study showed that discovery protective orders were requested in only about 6% of the approximately 220,000 civil cases filed in federal courts in that time period. Most of the requests are made by motion. Courts carefully review these motions and deny or modify them in a substantial proportion. Less than one-quarter of the requests are made by party stipulations and the courts usually accept them.

In most civil cases in which discovery protective orders were entered, the empirical study showed that the orders did not impact public safety or health. In its study, the FJC randomly selected 398 cases that had protective order activity. A careful inspection of the data reveals that the protective orders targeted by H.R. 1508 represent only a small fraction of civil cases in federal courts. Only half of the 398 cases studied by the FJC involved a protective order restricting disclosure of discovery materials. The other half of the 398 cases involved a protective order governing the return or destruction of discovery materials or imposing a discovery stay pending some event or action. In addition, in those cases in which a protective order was entered, a little more than 50% were civil rights and contract cases and only about 9% were personal injury cases, in which public safety or heath issues might conceivably arise. The empirical data showed no evidence that protective orders create any significant problem of concealing information about public hazards. A copy of the study is attached to this statement.

Information Shows No Need for the Legislation

The Rules Committees studied the examples of cases in which information was hidden from the public commonly cited to justify legislation such as H.R. 1508. In these cases, the Rules Committees found that there was information available to the public sufficient to protect public health or safety. The pertinent information was found in court documents available to the public,

e.g., pleadings and motions, as well as in reported stories in the media. In particular, the complaints filed in these civil cases typically contained extensive information describing the alleged party's actions sufficient to inform the public of any health or safety issue. In product defect cases, for example, complaints typically, at a minimum, identify the allegedly defective product or alleged wrongdoer, identify the accident or event at issue, and describe the harm. Complaints are readily accessible to the public, the press and regulatory agencies. Indeed, remote access to court filings, now available in virtually all federal courts, makes it easier, more efficient, and inexpensive to find complaints with allegations that raise public health and safety issues.

The Rules Committees also examined the case law to determine whether the court rulings in cases in which parties file motions for protective orders in discovery justified legislation. The case law showed that federal courts review such motions carefully and often deny or modify them to grant only the protection needed, recognizing the importance of public access to court filings. The case law also showed that courts often reexamine protective orders if intervenors or third parties raise concerns. *See, e.g., In re Zyprexa Prods. Liab. Litig.*, 253 F.R.D. 69, 208-09 (E.D. N.Y. 2008). That conforms with my own personal experience as a lawyer in representing media companies. The FJC study corroborated the findings of the case law study and showed that judges denied or modified a substantial proportion of motions for protective orders.

The bill's limited practical effect further undermines its justification. The potential benefit of the proposed legislation would be minimized by the general rule that what is produced in discovery is not public information. The Supreme Court recognized this limit when it noted in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), that discovery materials, including "pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, ... and, in general, they are conducted in private as a matter of modern practice." Information produced in discovery is not publicly available unless it is filed

with the court. Information produced in discovery is not filed with the court unless it is part of or attached to a motion or other submission, such as a motion for summary judgment. Consequently, if discovery material is in the parties' possession but not filed, it is not publicly available. The absence of a protective order does not require that any party share the information with the public. The proposed legislation would have little effect on public access to discovery materials not filed with the court.

Even when a protective order is entered, it usually does not result in the sealing of all, or even many, documents or information submitted to the court. Case law shows that courts are rightly protective of the public's right to gain access to information and documents submitted to the courts. Thus, my court of appeals, the Second Circuit, has held that "[d]ocuments used by parties moving for, or opposing summary judgment should not remain under seal *absent the most compelling reasons*." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) (quoting *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982)); *see Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004) (stating that judicial records enjoy a "presumption of openness," a presumption that is rebuttable only "upon demonstration that suppression is essential to preserve higher values and is narrowly tailored to serve that interest" (internal quotations omitted)). The Court of Appeals has instructed District Courts that "a judge must carefully and skeptically review sealing requests to insure that there really is an extraordinary circumstance or compelling need." *Video Software Dealers Assoc. v. Orion Pictures, Corp. (In re Orion Pictures Corp.)*, 21 F.3d 24, 27 (2d Cir. 1994) (citation omitted).

The Legislation Would Impose Intolerable Burdens on the Federal Civil Justice System

The scope of discovery has dramatically changed since legislation like H.R. 1508 was first introduced in 1991. Most discoverable information is now stored in computers and the growth in electronically stored information has exploded. Relatively "small" cases often involve huge

volumes of information. The discovery requests in cases filed in federal court typically involve gigabytes of electronically stored information or about 50,000 pages per gigabyte. Cases requiring intensive discovery can involve many gigabytes, and some cases are now producing terabytes of discoverable information, or about 50 million pages.

Requiring courts to review discovery information to make public health and safety determinations in every request for a protective order, no matter how irrelevant to public health or safety, will burden judges, further delay pretrial discovery and inevitably increase the cost of civil litigation in federal courts. It is important to recognize that most protective orders are requested *before* any documents are exchanged among the parties or submitted to the court and that it would be difficult, if not impossible, for the court to make the review the legislation requires. Furthermore, as a practical matter, "smoking guns" will be difficult, if not impossible, for the judge to recognize in the mountain of documents that must be reviewed, all without the assistance of the requesting party's counsel or expert. Indeed, the requirement to review all this information would make it infeasible for most federal judges even to consider undertaking the review.

Under current law, by contrast, motions for protective orders typically do not require the judge, who at that point has little information about the case, to examine all documents and information that may be produced in discovery to try to determine in advance whether any of it is relevant to protecting public health or safety. Instead, the parties generally request protective orders that seek confidentiality for categories of documents or information. The lawyers for each side can present arguments and the judge can evaluate whether particular categories of documents should be covered by a protective order and what the terms should be. If entered by the judge, protective orders provide the parties and the court with a procedural framework that allows the parties to produce documents and information much more quickly than would be the case if item-by-item judicial examination was required.

Moreover, protective orders also usually provide that after documents are produced in discovery, the receiving party may challenge whether particular documents or information should be kept confidential. Such challenges are often made at a time when the judge knows more about the case, and they typically involve a much smaller subset of the documents produced in discovery. In considering such requests, the judge also has the benefit of input from the lawyers after they have received the documents and know what they contain. Current law also allows federal courts to tailor protective orders to be sure that they are no broader than necessary. Finally, when documents are filed in court, the common law or constitutional interest of the public in open proceedings will apply.

The Legislation Would Have Significant Adverse Consequences

Since bills like H.R. 1508 were first introduced in 1991, obtaining information contained in court documents has become much easier. Court records no longer enjoy the practical obscurity they once had when the information was available only on a visit to the courthouse. The federal courts now have electronic court filing systems, which permit public remote electronic access to court filings. Electronic filing is an inevitable development in this computer age and is providing beneficial increases in efficiency and in public access to court filings. But remote public access to court filings makes it more difficult to protect confidential information, such as competitors' trade secrets or individuals' sensitive private information. If particularized fact findings are required before a discovery protective order can issue, parties in these cases will face a heavier litigation burden, and some plaintiffs might abandon their claims rather than risk public disclosure of highly personal or confidential information.

Parties rely on the ability to obtain protective orders in voluntarily producing information to each other without the need for extensive judicial supervision. They do this for many valid reasons, including saving costs that would otherwise be incurred in carefully screening every document produced in discovery. If obtaining a protective order required item-by-item judicial

consideration to determine whether the information was relevant to the protection of public health or safety, as contemplated under the bill, parties would be less likely to seek or rely on such orders and less willing to produce information voluntarily, leading to discovery disputes. Requiring parties to litigate and courts to resolve such discovery disputes would impose significant costs and burdens on the discovery process and cause further delay. Such satellite disputes would increase the cost of litigation, lead to orders refusing to permit discovery into some information now disclosed under protective orders, add to the pressures that encourage litigants to pursue nonpublic means of dispute resolution, and force some parties to abandon the litigation.

The burdensome requirements of H.R 1508 are especially objectionable because they would be imposed in cases having nothing to do with public health or safety, in which a protective order may be most needed and justified. As noted, the empirical data showed that about one-half of the cases in which discovery protective orders of the type addressed in H.R. 1508 are sought involve contract claims and civil rights claims, including employment discrimination. Many of these cases involve either protected confidential information, such as trade secrets, or highly sensitive personal information. In particular, civil rights and employment discrimination cases often involve personal information not only about the plaintiff but also about other individuals who are not parties, such as fellow employees. As a result, the parties in these categories of cases frequently seek orders protecting confidential information and personal information exchanged in discovery. H.R 1508 would make it more difficult to protect confidential and personal information in court records to the detriment of parties filing civil rights and employment discrimination cases.

Conclusion

The Rules Committees consistently have concluded that provisions affecting Rule 26(c), similar to those sought in H.R. 1508, are not warranted and would adversely affect the administration of justice. The Committees' substantive concerns about the proposed legislation

result from the careful study conducted through the lengthy and transparent process of the Rules Enabling Act. That study, which spanned years and included research to gather and analyze empirical data, case law, academic studies, and practice, led to the conclusion that no change to the present protective-order practice is warranted because: (1) the empirical evidence showed that discovery protective orders did not create any significant problem of concealing information about safety or health hazards from the public; (2) protective orders are important to litigants' privacy and property interests; (3) discovery would become more burdensome and costly if parties cannot rely on protective orders; (4) administering a rule that added conditions before any discovery protective order could be entered would impose significant burdens on the court system and costs on litigants; and (5) such a rule would have limited impact because much information gathered in discovery is not filed with the court and is not publicly available in any event.

If the Committee is aware of empirical information that suggests that protective orders have become a problem of some kind, the Rules Committees would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response. To date, the Rules Committees have not been directed to any such empirical information. In the absence of demonstrated abuses, there seems no reason to burden litigants and courts with the requirements of H.R. 1508.

Confidentiality Provisions in Settlement Agreements

The Empirical Data Shows No Need for the Legislation

H.R. 1508 would also require a judge asked to issue an order approving a settlement agreement to make findings of fact that such an order would not restrict the disclosure of information 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 the public interest in maintaining the confidentiality of the information and that the protective order requested is no

broader than necessary to protect the privacy interest asserted. In 2002, the Rules Committees asked the Federal Judicial Center to collect and analyze data on the practice and frequency of "sealing orders" that limit disclosure of settlement agreements filed in the federal courts. The Committees asked for the study in response to proposed legislation that would regulate confidentiality provisions in settlement agreements. H.R. 1508 contains a similar provision. In April 2004, the FJC completed its comprehensive study surveying civil cases terminated in 52 district courts during the two-year period ending December 31, 2002. In those 52 districts, the FJC found a total of 1,270 cases out of 288,846 civil cases in which a sealed settlement agreement was filed, about one in 227 cases (0.44%). A copy of the study is attached to this statement.

The FJC study then analyzed the 1,270 sealed-settlement cases to determine how many involved public health or safety. The FJC coded the cases for the following characteristics, which might implicate public health or safety: (1) environmental; (2) product liability; (3) professional malpractice; (4) public-party defendant; (5) death or very serious injury; and (6) sexual abuse. A total of 503 cases (0.18% of all cases) had one or more of the public-interest characteristics. That number would be smaller still if the 177 cases that were part of two consolidated MDL (multidistrict litigation) proceedings were viewed as two cases because they were consolidated into two proceedings before two judges for centralized management.

After reviewing the information from the 52 districts, the FJC concluded that there were so few orders sealing settlement agreements because most settlement agreements are neither filed with the court nor require court approval. Instead, most settlement agreements are private contractual obligations.

The Rules Committees were nonetheless concerned that even though the number of cases in which courts sealed a settlement was small, those cases could involve significant public hazards. A follow-up study was conducted to determine whether in these cases, there was publicly available

information about potential hazards contained in other records that were not sealed. The follow-up study showed that in the few cases involving a potential public health or safety hazard and in which a settlement agreement was sealed, the complaint and other documents remained in the court's file, fully accessible to the public. In these cases, the complaints generally contained details about the basis for the suit, such as the defective nature of a harmful product, the dangerous characteristics of a person, or the lasting effects of a particular harmful event. Although the complaints varied in level of detail, all identified the three most critical pieces of information regarding possible public health or safety risks: (1) the risk itself; (2) the source of that risk; and (3) the harm that allegedly ensued. In many of the product-liability cases, for example, the complaints went further and identified a particular feature of the product that was defective, or described a particular way in which the product failed. In the cases alleging harm caused by a specific person, such as civil rights violations, sexual abuse, or negligence, the complaints consistently identified the alleged wrongdoer and described in detail the causes and extent of the alleged injury. These findings were consistent with the general conclusions of the FJC study that the complaints filed in lawsuits provided the public with "access to information about the alleged wrongdoers and wrongdoings." A copy of the follow-up study is attached to this statement.

The Legislation is Unlikely to be Effective

The FJC study shows that only a small fraction of the agreements that settle federal-court actions are filed in the court. Most settlement agreements remain private contracts between the parties. On the few occasions when parties do file a settlement agreement with the court, it is to make the settlement agreement part of the judgment to ensure continuing federal jurisdiction, not to secure court approval of the settlement. Such agreements would not be affected by prohibitions, like those in H.R. 1508, prohibiting a court from entering an order "approving a settlement agreement that would restrict disclosure" of its contents.

Conclusion

Based on the relatively small number of cases involving a sealed settlement agreement and the availability of other sources — including the complaint — to inform the public of potential hazards in cases involving a sealed settlement agreement, the Rules Committees concluded that it was not necessary to enact a rule or a statute restricting confidentiality provisions in settlement agreements. Once again, if the Committee is aware of empirical information that suggests that sealed settlements have become a larger problem, the Rules Committees would be pleased to take a look at the empirical information and consider whether any rules changes are needed in response.

I thank you for the opportunity to appear before you today.

Response of the Honorable Mark R. Kravitz
to
Questions for the Record
Subcommittee on Commercial and Administrative Law
Hearing on H.R. 1508, the "Sunshine in Litigation Act of 2009"

Questions from the Honorable Steve Cohen, Chairman

1. You note in your written statement (at 6) that H.R. 1508 would impose an "intolerable burden" on the federal judiciary. Please confirm that your contention is limited to H.R. 1508's regulation of protective orders and does not extend to its regulation of orders restricting public access to court records, approving settlement settlements, or enforcing settlement agreements.

1. The reference in my written statement to "intolerable burden" is a reference to H.R. 1508's requirement that a judge review all the information to be obtained through discovery before entering any protective order to determine whether any of that information is relevant to the protection of public health or safety. My reference to "burden" is not an objection to additional work for the judge. Instead, it is a concern that if a judge conducts this review, it will result in other deserving litigants and critical issues receiving less of the judge's time. Discovery intensive cases can contain thousands, and even millions of pages of documents, particularly if the cases involve electronically stored information, which is fast becoming routine. I frankly do not know how a judge could possibly do such a review effectively, much less how a judge could conduct such reviews in all cases in which protective orders are sought and attend to the other tasks judges must perform in those cases and in all the other cases on the docket.

   The "intolerable burden" reference was only directed to orders restricting information that is obtained in discovery but not filed with the court. The reference was not directed to orders restricting access to court-filed documents, approving settlements, or enforcing settlement agreements. The Federal Judicial Center conducted a comprehensive study of orders restricting disclosure of information in settlement agreements and found that the number of cases involving such orders was quite small. Based on the study's results, the duties imposed on a judge by the proposed legislation would have little impact on the federal judiciary's burden as a whole. But there is one point I would like to make on this part of the bill. As I mentioned in my oral testimony, the standard set forth in H.R. 1508 for restricting access to court-filed documents is far less demanding than the standard that

federal courts across the country now follow when sealing court documents. Therefore, as Ms. Bailey also points out in her written statement, H.R. 1508 will only confuse litigants as to the appropriate standard for sealing documents that are filed in court and appears to weaken the standard that exists under current law.

2. What amendments could be made to H.R. 1508's provision governing protective orders to render the burden on the judiciary "tolerable," while still ensuring that protective orders covering discovery materials "relevant to the protection of public health or safety" are not kept in place any longer than necessary to accommodate the needs of the discovery process, even if the parties to the case are unconcerned about the protection of public health or safety?

2. The Rules Committees believe that any provisions regarding protective orders should proceed through the Rules Enabling Act rulemaking process established by Congress, and should not be legislated directly by Congress. The Rules Committees would certainly be willing to consider a proposal to include specific provisions in Rule 26 on the standards for dissolving or modifying protective orders based on, among other factors, public health and safety. Under Rule 26 as it is currently worded, federal courts require good cause for protective orders and modify or dissolve protective orders at the request of parties and nonparties, including for reasons of public health and safety. In this regard, I would refer the Committee to my response to Question # 6 and the legal research I am providing the Committee in response to Question # 3.

3. Do existing legal doctrines governing protective orders require judges to consider whether, in the language of H.R. 1508, a requested protective order will cover information "relevant to the protection of public health or safety?"

3. There is an extensive body of case law on the good-cause standard in Rule 26 of the Federal Rules of Civil Procedure for issuing protective orders for materials to be produced in pretrial discovery. Attached is a detailed survey of governing law that the Rules Committees have compiled to demonstrate that existing law in the federal courts does not lead to protective orders preventing access to information relevant to the protection of public health or safety. In sum, under existing case law, federal courts frequently state in opinions and orders that the good cause for a protective order requires a clearly defined and serious need, which is not satisfied by generalized or conclusory allegations. The case law also shows that the public interest is considered under the standards used throughout the circuits for entering, modifying, or dissolving protective orders.

In evaluating whether good cause exists for a protective order, courts have considered many factors, including: the importance of a protective order to the fair and efficient conduct of discovery; the confidentiality interests of the parties or nonparties; whether the information is being sought for a legitimate or improper purpose; whether the information at issue is important to public health and safety; whether the party seeking confidentiality is a public entity or official; and whether the litigation involves issues important to the public. The case law stresses the importance of maintaining flexibility in evaluating requests for protective orders because each case involves different circumstances.

Unlike H.R. 1508, courts carefully distinguish between the standard for a protective order in the pretrial discovery stage for documents that are not filed with the court, and the more stringent standard applied to sealing documents filed with the court. Courts recognize that protective orders restricting dissemination of documents produced in discovery are often essential to the efficient and fair conduct of that discovery, and that the public usually does not have a right of access to such material. The extensive discovery that takes place in federal litigation frequently turns up huge amounts of material. Allowing public access to that discovery material may result in the dissemination of private, irrelevant, and even false information. As the Eleventh Circuit Court of Appeals noted: "The realities of today's world have shown that discovery and the exchange of information can become extremely difficult. . . . [An interim protective order] is designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure. . . . History has confirmed the tremendous saving of time effected by such an approach. The objective is to speed up discovery." *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356-357 (11th Cir. 1987). Electronic discovery has made these points even more important.

In contrast, courts require a much more exacting standard when parties seek to keep the public from obtaining documents filed with a court, emphasizing the presumption of public access to court records and requiring compelling reasons to seal such documents, even in cases that do not implicate public health and safety.

4. The Rules Committee's opposition to H.R. 1508 is based in large part on a 1996 empirical study conducted by the Federal Judicial Center. Is the Rules Committee's opposition to the bill grounded in any more recent empirical studies?

4. No. However, the Rules Committees are not aware of abuses in federal courts, and the Committees would become aware of such abuses since the Rules Committees regularly review case law regarding protective orders. Indeed, in connection with consideration of H.R. 1508, the Rules Committees conducted an exhaustive review of existing law, a copy of which I have attached to my answers, and that case law shows emphatically that there is no abuse occurring in the federal courts. The Rules Committees have a procedure for receiving requests, complaints, and statements of concern from lawyers, litigants, and judges. This "open line" is frequently used. But the Rules Committees have not received requests for an amendment to the rules regarding protective orders. The Rules Committees are also aware that bar organizations and legal policy research groups have studied protective orders in detail and found no evidence of abuses in the federal courts.

Furthermore, both last year and this year, I asked witnesses at the hearings to provide me with decisions by federal courts denying access to documents relevant to protecting public health and safety. Last year, no witness provided me with such a decision. On June 12 of this year, Mr. Kaster provided the Chairman and me with a decision from District Court Judge Daniel Jordan in *Bradley v. Cooper Tire & Rubber Co.* But that decision does not support Mr. Kaster's point. Judge Jordan reviewed orders entered by magistrate judges, including orders requiring the defendant to provide Mr. Kaster with certain documents containing trade secret information. Judge Jordan overruled an objection by Mr. Kaster to an order denying his request to unseal certain documents, noting that "by the time this objection was filed, the vast majority of the considerable number of motions in this case had already been filed, and the motion deadline has now passed." The Judge also noted that the objection was based primarily on Mr. Kaster's desire to use the documents in other cases he was handling against the same defendant. (Enclosure 2, Judge Jordan's Order, page 19). Judge Jordan's decision does not provide support for H.R. 1508.

On Monday, July 6, I received copies of additional protective orders and court records from Mr. Kaster offered to support the need for legislation. Of course, without more information about the cases, reliable conclusions are difficult. But a review of the materials submitted does not show that the courts are condoning abuses of protective orders or keeping information relevant to protecting public health and safety hidden. The materials provided by Mr. Kaster can be generally divided into two general groups. Neither group demonstrates any abuses or endangerment of public health and safety.

The first group includes sample protective orders. Such orders, as the case law makes clear, are important to allowing discovery to occur in cases involving proprietary or confidential business information, such as trade secrets, or involving sensitive personal information. All but one of the orders Mr. Kaster enclosed with his letter has a specific detailed provision for the party receiving the discovery to challenge the designation of

any document or information as confidential. (*See* Enclosure 3, Protective Order signed by Judge Whiteaker at ¶ 4; Enclosure 4 at ¶ 3; Enclosure 5, Stipulated Sharing Confidentiality Protective Order at ¶ 3; Enclosure 7, Protective Order dated February 23, 2005 at ¶ 5, Nonsharing Protective Order at ¶ 6; and Enclosure 8, at ¶ 6). Under well-established case law, a judge asked to decide a challenge to designating specific documents as confidential would consider public and private interests, including public health and safety. These protective orders provide counsel, such as Mr. Kaster, an efficient and effective way to have a judge conduct this review – after counsel has obtained the documents in discovery and can explain to the judge why specific documents should not be treated as confidential. These protective orders allow a much more efficient and effective way to have the type of judicial review that H.R. 1508 would require, without the grave difficulties for discovery that H.R. 1508 would create.

The second group of materials Mr. Kaster submitted are court orders and lawyers' briefs on motions to compel production of documents or motions relating to protective orders. This group includes some information about objections to protective orders. The main issue as to this group appears to be whether the protective order should permit sharing of confidential information with lawyers representing plaintiffs in other, similar cases, to achieve efficiency and economy, not for the purpose of protecting the public health or safety. It is clear from the materials that Mr. Kaster provided that the courts applied the law requiring good cause and balanced the need for keeping certain information produced in discovery confidential with the interest in broader disclosure.

Many of the orders Mr. Kaster cites have "sharing provisions" that expressly allow disclosure of information designated as confidential to lawyers representing plaintiffs in other, similar cases. Even in the absence of such a provision, under current law, as shown in the attached memorandum summarizing the case law around the country, courts often grant requests to allow information designated as confidential to be shared with counsel in other cases. Courts recognize that such sharing can make discovery more efficient and less expensive. In some cases, however, courts find that the efficiencies and economies such sharing can produce are outweighed by the need for a higher level of confidentiality for certain kinds of information, such as trade secrets.

The courts' rulings in each of the cases Mr. Kaster cites appear consistent with the case law that requires a court to weigh the parties' interests in protecting trade secrets or other confidential information exchanged in discovery with the interests supporting broader disclosure. There is no indication in the materials that the outcomes would have been different under H.R. 1508, except that the discovery process would have been much more difficult and time-consuming, and the court's rulings would have been based on much less information about what the documents contained and why they were important.

Let me make a few other specific points on the cases Mr. Kaster cites, in addition to the *Bradley v. Cooper Tire* case discussed above. Mr. Kaster cites *Kreiner v. Firestone*. The issue in that case did not appear to be whether specific information produced in discovery should be distributed because it was relevant to protecting public health or safety. So far

as we can tell from the excerpts provided, there was not an attempt to modify or dissolve the protective order on the basis of public health or safety.

Mr. Kaster cites *Browlee/Whitaker v. Cooper Tire.* But the material he enclosed shows that the federal court carefully considered the plaintiffs' and the defendant's arguments about whether to adopt the protective order that the parties had entered in the state court case before voluntarily dismissing that case and refiling in federal court. The court emphasized that the protective order "provides sufficient mechanism for plaintiffs to seek review of defendant's designations as they have not shown a reluctance to file discovery-related motions." The court also carefully considered a proposed sharing provision and concluded that given the nature of the documents and the disputes over what cases were "similar," such a provision would not adequately protect the need for confidentiality." (Enclosure 3, Order dated March 30, 2001, page 3). This case does not support the argument that the order was problematic or that H.R. 1508 would lead to a different result.

Mr. Kaster also cites *Bridgestone/Firestone, Inc.* and argues that the protective order in that case applied to "hundreds of documents" that would not have been protected under H.R. 1508. The protective order in that case does not support his argument. The protective order was consistent with the case law in stating: "Nothing in this Order is intended to prevent any party from raising with the Court any concern that the non-disclosure of certain Confidential Material may have a possible adverse effect upon the general public health or safety, or the administration or operation of government or public office." The order also allowed the use of information designated as confidential to be shared with "any attorney, expert, or consultant representing a party in other present or future cases" involving Bridgestone or Ford "arising out of the same or similar set of facts, transactions, or occurrences." (Enclosure 4, ¶ 7(f)).

Mr. Kaster cites *Tiller v. Ford Motor Company.* In that case, the court's order granted the plaintiffs' motion to compel production of information over the defendant's objection. The protective order at issue not only had a specific provision allowing the receiving party to challenge the confidentiality designation of any document, it also allowed the party to share the information designated as confidential with other attorneys involved in "active, ongoing litigation against Ford" involving "Ford Explorers and allegations of serious injury or death from roof crush, stability or handling issues, or from occupant restraint systems."). (Enclosure 5, Stipulated Sharing Confidentiality Protective Order, ¶ ¶ 3, 5(e)).

In *O'Hara v. General Motors*, Mr. Kaster cites a second, nonsharing protective order put into place after a protective order with a sharing provision had been entered. The first order specifically allowed the plaintiffs' counsel to share the documents with "other Plaintiffs' attorneys involved in the prosecution of product liability litigation against GM" involving similar claims. The other, "nonsharing" protective order was only entered after vigorous litigation over whether the limited group of documents at issue – trade secrets and other proprietary information about a specific type of laminated glass – were so confidential as to warrant the higher protection. The parties specifically briefed

the need for confidentiality and the interest in broader dissemination of the information. (Enclosure 7).

Mr. Kaster also cites a court order in *Ramirez v. Michelin*. In that order, the court granted the plaintiffs' motion to compel production of information the plaintiffs' lawyer had already obtained in previous litigation. The defendant objected on the ground that the documents were trade secrets. The court carefully considered the arguments and held that of the two categories of documents at issue, one was indeed a trade secret and one was not. The court ordered the defendant to produce both categories of documents. The court noted that the protective order was not limited to trade secrets. That is consistent with current law and with H.R. 1508, neither of which limits confidential information to trade secrets. The protective order entered in that case allowed the receiving party to challenge the propriety of a confidentiality designation at any time in the litigation. The protective order also followed current law by providing that the court could modify the order.

Finally, the Rules Committees would be willing to undertake another empirical study of the uses of protective orders and would be pleased to share the results of that study with Congress. You can be assured that the Rules Committees will be eager to consider remedies for any problems that might appear.

5. You note in your written statement (at page 4) that the 1996 study conducted by the Federal Judicial Center found that in "most civil cases" protective orders "did not impact public safety or health." Does that imply that there were some cases in which protective orders did impact public safety or health, and if so, why does the Rules Committee discount those cases?

5. The Rules Committees are not aware of federal court cases in which the public health and safety were adversely affected by protective orders, despite repeated requests for any such examples in federal courts. The point of the statement in my written testimony was not to discount any cases. Instead, the point was that using personal injury cases as a proxy for those that might conceivably affect public health and safety, the empirical data shows that those cases represent a very small percentage of the federal courts' docket. Furthermore, as to those cases, protective orders were entered in a relatively small percentage. When those orders were entered in a personal injury case, it was apparent from the judicial record precisely what the case was about; information about public health and safety was not kept secret from agencies or consumer groups that might have an interest.

As I stated last year and this year, if the Congress is aware of empirical information showing that protective orders in federal courts are having an adverse effect on public health and safety, the Rules Committees would be anxious to examine that data. To date, the Rules Committees have not been provided with data that shows that protective orders are adversely impacting public health or safety. There is, in our judgment, no need for the protective-order provisions in H.R. 1508, and those provisions would have serious negative effects on pretrial litigation, which is already struggling with the high costs, burdens, and delays of discovery.

6. Are you at all concerned that some judges (perhaps many judges) give insufficient scrutiny to requests for protective orders governing discovery materials—especially stipulated requests, which you note on page 4 of your prepared statement courts "usually accept"?

6. Courts may not accept stipulated requests simply because counsel have agreed to the terms of a protective order. Rule 26 still requires the Court to make a determination of "good cause," a determination that the Court can make from the information in the pleadings about the issues in the case and the parties' representations about the types of information that they seek to place under a protective order, e.g., trade secrets in a patent infringement case; confidential salary and performance information about the plaintiff and fellow employees in an employment discrimination case; or medical information in a personal injury case.

In cases involving massive amounts of discovery material with thousands and sometimes millions of pages of documents or electronic information at issue, both parties can reap enormous benefits from an appropriately worded stipulated protective order. Absent a protective order, discovery in these cases would essentially grind to a halt with needless disputes constantly rising over the production of individual documents. The great savings in time and expense that can be gained from an appropriate protective order benefits not only the parties in the litigation but the administration of justice as a whole. It is not surprising, therefore, that when all parties agree that a case warrants a protective order, judges usually grant those requests to hasten the production of needed documents in discovery.

The Rules Committee are not concerned that stipulated requests abuse the process, for a number of reasons. The Federal Judicial Center research showed that stipulated orders represented only a fraction of all protective orders entered by federal courts. Furthermore, most, if not all, protective orders that are entered in federal court give the party receiving the document the right to challenge before the judge the producing party's designation of a document as confidential or needing protection. This allows the requesting party to get the documents, to review them, and to make a specific challenge to any restrictions on disclosure, and allows the court to decide disputes on an informed, effective, and efficient basis, which cannot be done before when no discovery has taken place.

Finally, case law recognizes that a protective order governing discovery that is entered into at the outset of a case may need to be modified or even vacated. It is routine, therefore, to allow the parties, or even third parties, including the press or intervenors, to challenge the application of the protective order to particular documents or categories of documents or to move to modify the order. When a party or intervenor challenges the good-cause determination as to specific documents, courts review the issue with care and courts of appeals have made it clear that the consent of the parties is not sufficient, in and of itself, to constitute "good cause." As the attached summary of case law shows, cases

throughout the circuits have developed standards for evaluating requests to modify protective orders. Among the factors that courts have considered are: whether the protected information is important to public health and safety; whether there is a continuing need for protection; whether those who produced discovery pursuant to a protective order reasonably relied on the order; whether alternative means exist for obtaining the information; and the relevance of protected materials to related litigation. The case law shows that courts do give scrutiny to the use of protective orders, even when the parties initially agree to their entry.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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July 9, 2009

Honorable Steve Cohen
Chairman, Subcommittee on Commercial
and Administrative Law
Committee on the Judiciary
2138 Rayburn House Office Building
Washington, D.C. 20515-6216

Dear Chairman Cohen:

On behalf of the Judicial Conference's Committee on Rules of Practice and Procedure and the Civil Rules Advisory Committee, I want to thank you for giving me the opportunity to share with your Subcommittee the concerns that the Rules Committees have with H.R. 1508. In accordance with your request, I enclose a few transcript edits as well as answers to the Subcommittee's additional questions. As a supplement to my answers to the Subcommittee's additional questions, I attach a comprehensive compilation of federal court decisions regarding the standards for entry of a protective order, the standards for modifying or dissolving a protective order, and the standards for sealing documents or pleadings that are filed with the court. I also provide an Executive Summary of the case law compilation.

The Rules Committees stand willing to assist the Subcommittee in its deliberations regarding H.R. 1508 in any way that you believe would be useful. Once again, I want to thank you and the Subcommittee for the courtesies you have shown me and the Rules Committees.

Sincerely yours,

Mark R. Kravitz

Enclosures

JUDGE KRAVITZ'S EDITS TO TRANSCRIPT

ON

PAGES 21, 22, 23, 36, 37, 38, and 40

HEARING ON H.R. 1508 - SUNSHINE IN LITIGATION ACT OF 2009

SUBCOMMITTEE ON COMMERCIAL AND ADMINISTRATIVE LAW

JUNE 4, 2009

428 STATEMENT OF MARK KRAVITZ

429 Judge KRAVITZ. Thank you, Mr. Chairman. And I appear
430 today on behalf of both the Judicial Conferences committee on
431 Rules of Practice and Procedure and the Advisory committee on
432 Civil Rules, which I chair.
433 I should say at the outset, no one is opposed to the
434 concept that information that is injurious to the public
435 health and safety should get in the hands of people who can
436 fix that. That is not the issue here.
437 This bill, therefore, has a good goal but its means are
438 seriously flawed. And those means are likely to hurt rather
439 than help.
440 The Rules committees ~~has~~ have studied this for years and we
441 oppose it for really three different reasons. And I have to
442 ask this committee, and I would ask the witnesses themselves
443 to distinguish here between what we are talking about.
444 We have heard evidence of the Honda case. We have heard
445 evidence of Seattle Times and 400 cases. Those are state
446 court cases. What I want to hear is evidence of federal courts
447 abusing the process and not doing what the rule says it
448 should do, which is only grant protective orders for good
449 cause shown. And there is a huge body of case law.
450 We have not seen any empirical evidence of that and the
451 Rules committees rely ~~relies~~ on empirical evidence. But if this

452 committee has evidence of federal judges abusing the process
453 repeatedly, I want to know about that, and we will do
454 something about it.
455 Secondly, the burdens, again, I am not worried about me
456 being burdened. Frankly, I have lots of things to do. But
457 to the extent to which I spend my time looking document
458 through document of truckloads of documents or electronic
459 discovery, then other deserving litigants and critical issues
460 are not going to get my attention. And, frankly, Mr. Kaster,
461 whom I want to get those documents as quickly as possible is
462 not going to get them in any time soon.
463 So I would ask this committee also to distinguish
464 between two things. First, documents that come into evidence
465 at trial or are filed with the court. Frankly, the courts
466 have more severe rules than this legislation as Ms. Bailey
467 points out that require those documents not to be sealed
468 absent extraordinary circumstances.
469 So the law that exists there is actually more stringent
470 than this legislation and it covers all cases not just cases
471 dealing with public health and safety. So what we are
472 dealing with really is the exchange of information in
473 discovery.
474 And I want to get that information to Mr. Kaster and his
475 experts as quickly as possible so that they will tell me if
476 the public health and safety is implicated because I am not

477 going to be able to know that myself. The notion that there
478 are smoking guns out there in roomful of documents and me not
479 knowing anything about the case will stumble upon the smoking
480 gun, I think, is naive to say the least.
481 So courts have a well-developed body of case law that
482 allows parties to come in and get modifications to the
483 ~~document~~ protective order. I cited the Zyprexa case. That is the case where
484 Judge Jack Weinstein of the Eastern District of New York had
485 a protective order, allowed information to get to the
486 plaintiffs and their experts, under the protective order.
487 And then a couple of years later after he knew more
488 about the case and there had been motions, he then unsealed
489 all that material that he had previously sealed and got it to
490 the right people. And he did it under the existing law. And
491 it happens all the time.
492 So I think the burdens here--this is just going to slow
493 down Mr. Kaster getting any information. It is going to
494 increase the cost of litigation at a time when the lawyers
495 and the public are concerned about the cost of litigation.
496 And I don't think it is going to achieve the goal. And
497 the reason I don't think it is going to achieve the goal is
498 he is going to agree to a private agreement, not a protective
499 order but a private agreement, that will have the same terms
500 in it so he can get the information sooner.
501 And so the legislation at the end will not achieve what

502 it is designed to achieve, which is a laudatory goal that we
503 all support.
504 Thank you, Mr. Chairman.
505 [The statement of Judge Kravitz follows:]

506 ********** INSERT **********

683 my client. If I didn't have that, I would be caught in the
684 trap of not being able to push those documents to become
685 public because my client has what they need.
686 And if I were selfish and decided to go that route, then
687 Congress has to mandate to the courts, you have got to take
688 on that burden if a lawyer won't do it.
689 Mr. MAFFEI. Do you agree with Professor Cohn's comments
690 on the interest of various--
691 Mr. KASTER. We all agree that settlements should not
692 hide the truth. That is, I think everyone here agrees to
693 that. But that is not the problem. I have never had that as
694 a problem.
695 Mr. MAFFEI. Thank you Mr. Kaster.
696 Judge Kravitz, I assume you have a different take on how
697 a judge looks at a motion to open up these documents.
698 Judge KRAVITZ. Yes, I think this discussion has been
699 interesting for a couple of different levels. I mean, if in
700 fact Ms. Bailey and Mr. Kaster have all these decisions of
701 judges routinely rejecting their motions to open up
702 documents, then they have to exist. And, in fact, Mr. Kaster
703 said he is going to send me the Bradley decision, and I can
704 take a look at it.
705 But there are lots of decisions of judges opening up
706 cases. And the key point that I think Mr. Kaster made, what
707 you need to keep in mind is this, he got the document, and

708 then he came back to the federal court, and he could explain
709 to the judge as was true in the Zyprexa case.
710 But that is not what this legislation says. This
711 legislation says before he even gets those documents, I have
712 to do a document by document review without his assistance to
713 try to figure out whether those documents are "relevant to
714 public health and safety."
715 The truth is I am not going to be able to do that. I
716 think as Professor Cohn said, we need to get the documents to
717 Mr. Kaster, and then he needs to come back either under
718 existing law or some changes in the rules that we would
719 certainly be willing to entertain, to get the protective
720 order lifted with respect to that.
721 But it can't be at the front end. That is the problem.
722 Mr. MAFFEI. Thank you, Judge Kravitz.
723 I now recognize the Ranking Member of the Subcommittee,
724 Mr. Franks, for 5 minutes.
725 Mr. FRANKS. Well, thank you, Mr. Chairman. Mr.
726 Chairman, I am observing some unprecedented common sense and
727 dialogue between the witnesses here and it scares me to
728 death. But it makes me think that perhaps there might be
729 some middle ground here that perhaps, you know--
730 Mr. MAFFEI. Don't worry, that is the judicial branch.
731 We would never fall into any of that.
732 Mr. FRANKS. You know, confidence like that is something

733 one gets before they fully understand the situation, I
734 suppose. But is it possible that the Rules committee or the
735 entire Judicial Conference could craft a more narrow bill?
736 That is the one suggestion that I would put forward.
737 But let me ask you, Judge Kravitz, I kind of had a
738 little epiphany in your last comment. You are saying, just
739 for clarity here--
740 Judge KRAVITZ. Right.
741 Mr. FRANKS. --that in Mr. Kaster's case, even though
742 the judge ruled against making some of the documents public,
743 and you never know whether that was justified or not, that
744 indeed, he got the documents that he asked for--
745 Judge KRAVITZ. Absolutely.
746 Mr. FRANKS. --and that the difference that this bill
747 would make is that before he ever got the documents he would
748 have to go over them with a fine-toothed comb, as it were,
749 before he ever got them.
750 Judge KRAVITZ. By myself. Without his assistance.
751 Mr. FRANKS. See, I find that a stunning crux of the
752 discussion here. And again, maybe I am misunderstanding, but
753 it sounds like Mr. Kaster's comments here, I mean, he has
754 been very forthright, and you have said that yourself. And
755 maybe he has had some narrow-minded judges that he has dealt
756 with.
757 But isn't it true then, based on that, that if those

758 same judges were forced to go through all of that data before
759 Mr. Kaster had ever gotten it, that they would probably come
760 to the same conclusion that it was, you know, if they--in
761 other words, if I am a judge, and I am looking at this data,
762 and I am going to try to move through it as quickly as
763 possible.

764 I am going to be much more deferential to a lawyer that
765 comes in and says, "Judge, there is a problem here. This is
766 a safety issue for the public. Please look at this." I am
767 going to look at that much more carefully.

768 Judge KRAVITZ. Here is the thing, practically. In Mr.
769 Kaster's example, it is the defendants who have the document.
770 They are going to give them to me to look at presumably in
771 camera so I can figure out whether they impact public health
772 or safety.

773 Mr. Kaster doesn't even have the documents. His experts
774 don't have the documents. And I am going to make up my mind.
775 And who is the person who is going to be telling me whether
776 the documents ~~are~~ bear on public health and safety? It is
777 the defendant, in his example.

778 So what we need to do is get the documents in his hands
779 as rapidly as possible, get his expertise and then have him
780 come back to the judge, if that is what he wants. And that
781 is exactly what happened with Jack Weinstein in the Zyprexa
782 litigation.

783 And I really urge the committee to take a look at that
784 decision, because Judge Weinstein in that case, after having
785 ~~gotten~~--had a protective order and gotten the information out
786 says, public access is now advisable.
787 Now that he can figure out that--because the litigation
788 involves issues of great public interest, the health of
789 hundreds of thousands of people, fundamental questions about
790 our system or approval and monitoring of pharmaceutical
791 products and the funding of many health and insurance plans.
792 Public and private agencies have a right to be informed.
793 And that information got out there. And that is under
794 the existing rules. So I don't think we need necessarily any
795 new rules.
796 But let me just say to Professor Cohn's point. There
797 are things in this bill that are substantive, like the
798 provision that a court can't approve an agreement that
799 prevents people from going to a federal agency with documents
800 that bear on public health and safety.
801 But the provisions of this bill that deal with protective
802 orders and the time at which judges agree to protective
803 order, that is a procedural question and the factors that a
804 court is going to consider. And the Rules Enabling Act has
805 been in existence for 70 years and has worked extremely well
806 for 70 years. It is going to be 70 years about next month, I
807 think.

808 And as to procedure, the Congress has deferred to us,
809 and I would ask them to continue to do so. To the extent
810 there are substantive ~~things~~ matters that deal with social policy
811 like getting information to relevant agencies or even the
812 sealed settlements offers which I do not personally oppose at
813 all. There shouldn't be sealed settlements, frankly. Those
814 are appropriate for the Congress and appropriate to enact.
815 Mr. FRANKS. Well, thank you. Mr. Chairman, I am about
816 out of time here. In fact, I am out of time as it looks
817 like.
818 But let just suggest to the full chairman of the
819 committee--the chairman of the full committee, I should say.
820 There may be an opportunity for reason to get the best of us
821 all here.
822 Where Mr. Kaster's comments were he has never won a
823 situation like that may be where to focus our attention to
824 where there is some type of appeals process or something that
825 would overcome a recalcitrant or unreasonable judge that, you
826 know, is simply not looking at the facts.
827 If he has never won, one of two things. Either he is a
828 really rotten lawyer and that doesn't occur--
829 Chairman CONYERS. He is going to share with me those
830 decisions.
831 Mr. FRANKS. He is going to explain that, but I just
832 think that there may be an opportunity for some reasonable

833 compromise here that would solve the problems of everyone on
834 the--maybe I am wrong, again, I don't want to be too
835 optimistic in an environment like this.
836 But thank you, Mr. Chairman.
837 Mr. MAFFEI. Thank you, Mr. Franks. Since the
838 distinguished member of the full committee is here, am I
839 right in understanding that you are not interested in asking
840 questions, but you are here to observe and--you are
841 interested in healing us.
842 Chairman CONYERS. My lips are sealed.
843 [Laughter.]
844 Mr. MAFFEI. Well, thank you to the chairman. Then I
845 will recognize the distinguished gentleman from North
846 Carolina, Mr. Coble, for 5 minutes hoping that he doesn't
847 take the full 5 minutes, since we do have floor vote.
848 Mr. COBLE. Mr. Chairman, I will try to move it along.
849 Judge Kravitz, let me put a two-part question to you.
850 Judge KRAVITZ. Sure.
851 Mr. COBLE. If this bill were enacted, how would this
852 impact the workload of the Federal Judiciary, A, and B, how
853 would you determine what matters effect public health or
854 safety? Is there case law or judicial doctrine from which
855 judges might draw to determine that distinction?
856 Judge KRAVITZ. Okay. Two things. First, the average
857 case load of an active federal judge is about 550 cases.

858 That is the average.

859 There are judges in California who have 1,000 cases.
860 And the notion that they could then fish through document by
861 document and get ~~those~~ that information to Mr. Kaster in any time
862 horizon that is reasonable, I think, is illusory.

863 So I think, again, I am not worried about my burden of
864 doing this. I am worried about other litigants who deserve
865 our time and attention.

866 Secondly, as to whether there is any existing case law,
867 there is existing case law under the good ~~clause~~ cause standard of
868 Rule 26 that requires judges to consider the public interest
869 and, of course, public health and safety. But this statute
870 says anything that is relevant to public health and safety.

871 And I said the last time, I mean, if I have an
872 employment case and someone is accused of having child
873 pornography on their computer, is that relevant to public
874 health and safety? Maybe it is. I don't know.

875 Mr. COBLE. Thank you. I hate to cut you off but I am--

876 Judge KRAVITZ. No, that is fine. That is fine.

877 Mr. COBLE. One more question to Ms. Bailey. Ms.
878 Bailey, what issues or matters do not affect public health or
879 safety? Give me a couple of examples.

880 Ms. BAILEY. Well, I think that is a tough question.
881 And fortunately, at this point in my career, I am not a
882 judge. So I am not in a position to be put to that test.

908 Mr. KASTER. I only talked about federal judges today.

909 Mr. COHEN. All right. Ms. Bailey, do you have any?

910 Judge KRAVITZ. And he is going to send me that list.

911 Mr. COHEN. All right. If you would give that list to

912 Judge Kravitz and give it to us. And we need to go vote.

913 And I would like to thank all the witnesses for their

914 testimony. The members who attended, without objection,

915 members have 5 legislative days to submit any additional

916 written questions which, as part of the witnesses, ask you to

917 answer as promptly as possible to be made part of the record.

918 Without objection the record will remain open for 5

919 legislative days for submission of any additional material.

920 Thank you for your time and patience. The committee is

921 adjourned. Done.

922 [Whereupon, at 11:52 a.m., the subcommittee was

923 adjourned.]

ADOPTED

AMERICAN BAR ASSOCIATION

OHIO STATE BAR ASSOCIATION
SECTION OF LITIGATION

REPORT TO THE HOUSE OF DELEGATES

RECOMMENDATION

1 RESOLVED, That the American Bar Association reaffirms its support for the
2 Congressionally-enacted, judicial rulemaking process set forth in the Rules Enabling Act
3 and opposes those portions of the Sunshine in Litigation Act of 2007 of the 110th
4 Congress (S.2449) or other legislation that would circumvent that process.
5
6 FURTHER RESOLVED, That the American Bar Association opposes the Sunshine in
7 Litigation Act of 2007 of the 110th Congress (S.2449) or other legislation that would
8 impose similar requirements or burdens on the federal courts above and beyond the
9 current (2008) provisions of Fed. R. Civ. P. 26(c) for entering or modifying protective
10 orders or sealing settlements.

Defending Liberty
Pursuing Justice

Thomas M. Susman
Director
Governmental Affairs Office

AMERICAN BAR ASSOCIATION
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Washington, DC 20005-1022
(202) 662-1760
FAX: (202) 662-1762

April 13, 2009

The Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
433 Russell Senate Office Building
Washington, D.C. 20510

Dear Chairman Leahy:

I am writing on behalf of the American Bar Association to voice our strong opposition to S. 537, the "Sunshine in Litigation Act of 2009."

The Act would change Federal Rule of Civil Procedure 26(c) by limiting a court's ability to enter an order in a civil case (1) restricting disclosure of information obtained through discovery; (2) approving a settlement agreement restricting the disclosure of such information; or (3) restricting access to court records in civil cases – unless the court makes certain findings that the order would not restrict the disclosure of information relevant to the protection of public health or safety, or that the public interest in disclosure of such information is outweighed by a specific interest in maintaining the confidentiality of the information and that the protective order is no broader than necessary to protect the privacy interest asserted.

The ABA opposes S. 537 for two reasons. First, the bill would circumvent the Rules Enabling Act, the procedure established by Congress for revising rules in the federal courts. Second, the bill would impose additional, unnecessary requirements on, and restrict the discretion of, federal courts in ways that will only increase the burdens of litigation in both time and expense. The existing provisions of Rule 26 are currently operating to protect the public interest against unnecessary restrictions on information bearing on public health and safety, and protective orders are important to facilitate the prompt flow of discovery in litigation without imposing the additional burdens contemplated in the bill.

Rules Enabling Act Issues

S. 537 is an unwise retreat from the balanced and inclusive process established by Congress in the Rules Enabling Act. The Rules Enabling Act process is based on three fundamental concepts: (1) the essential, central role of the judiciary in initiating and formulating judicial rulemaking; (2) the use of procedures that permit full public participation, including participation by members

of the legal profession, in considering changes to the rules; and (3) congressional review before changes are adopted.

S. 537 would depart from this balanced and inclusive process. The failure to follow the processes in the Rules Enabling Act would frustrate the purpose of the Act and could do harm to the effective functioning of the judicial system.

Substantive Issues

The current version of Rule 26(c) and the case law applying it give judges appropriate authority to determine when to enter a protective order and what provisions should or should not be in it in light of the particular facts and circumstances of each case. There are three substantive flaws in the proposed legislation:

First, there is no demonstrable deficiency in the current version of Rule 26(c) that requires a change. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States (the "Rules Committee") reported to this Committee in 2008 that empirical studies since 1991 show "no evidence that protective orders create any significant problem of concealing information about public hazards." A copy of the Rules Committee's letter of March 4, 2008, is attached to this letter.

Second, requiring particularized findings of fact before any protective order could be issued in *any* case would impose an enormous burden on both the courts and litigants.

Only a small fraction of civil cases involve issues that implicate the public health and safety. Yet, the bill would impose a broad rule that would apply to every civil case. Even in cases that arguably may bear on public health and safety issues, requiring a court to make detailed findings at the beginning of a case, possibly on a document-by-document basis, will impose an impossible burden on the court and the litigants. Protective orders facilitate the timely production of documents and permit challenges to particular documents after the parties have had a chance to review them and the case has evolved to the point when the parties and the court can understand their significance and context.

The Rules Committee correctly noted in its letter to this Committee that the proposed legislation "would make discovery more expensive, more burdensome, and more time-consuming, and would threaten important privacy interests."

Third, the requirement that judges entering an order approving a sealed settlement agreement must make the same particularized findings of fact necessary for discovery protective orders is also unnecessary. Only a small number of cases involve a sealed settlement agreement and only a portion of those cases involve a potential public health or safety hazard. In those cases that do, the complaints and other documents that are a matter of public record typically contain sufficient details about the alleged hazard or harm to apprise the public of the risk, the source of the risk,

and the harm it allegedly causes. Sealing a settlement agreement in these cases would have no material impact on the public's ability to be informed of potential health or safety hazards.

The ABA has adopted policy regarding secrecy and coercive agreements on this very issue:

> Where information obtained under secrecy agreements (a) indicates risk of hazards to other persons, or (b) reveals evidence relevant to claims based on such hazards, courts should ordinarily permit disclosure of such information, after hearing, to other plaintiffs or to government agencies who agree to be bound by appropriate agreements or court orders to protect the confidentiality of trade secrets and sensitive proprietary information; . . . .

Following adoption of this ABA policy, the Rules Committee and the Advisory Committee on Civil Rules of the Judicial Conference explored at length the need for changes in Rule 26(c) similar to the proposed changes in legislation such as S. 537. Both committees concluded that these changes are not warranted. They are not warranted for one overriding reason: the federal courts are already addressing these concerns when they consider whether to enter a protective order.

Conclusion

The current version of Rule 26(c) is and has been an appropriate, effective mechanism to protect the rights of both litigants and the public, without overburdening the administration of justice in the federal courts. Any proposed amendment to its provisions should be addressed through the existing Rules Enabling Act procedure. S. 537 would not serve the public interest.

Sincerely,

Thomas M. Susman

cc: Members, Senate Committee on the Judiciary

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July 2, 2009

VIA ELECTRONIC MAIL
AND U.S. MAIL

Honorable John Conyers, Jr.
Committee on the Judiciary
United States House of Representatives
2426 Rayburn House Office Building
Washington, D.C. 20515
john.conyers@mail.house.gov

Re: H.R. 1508, Sunshine in Litigation Act of 2009

Dear Chairman Conyers:

I am the managing partner of Girard Gibbs LLP, a law firm that is devoted to representing plaintiffs in a wide range of litigation, with particular emphasis on securities and consumer class actions. We have recovered many millions for our clients, in cases before federal and state courts arising out of violations of state deceptive trade practice laws, federal and state securities laws, telecommunications laws, the Truth-in-Lending Act, and many other state and federal statutes.

I write to express my firm's respectful opposition to H.R. 1508, the Sunshine in Litigation Act of 2009, as it relates to discovery protective orders in civil actions before the federal courts. As plaintiffs' lawyers, we believe that the bill, as presently drafted, would be harmful to our clients, consumers and the general public.

The civil discovery process is absolutely essential to the work that we do. In a consumer class action, without access to a defendant's internal records and information, it is all but impossible to prove plaintiffs' claims, hold defendants accountable and obtain compensation for our clients. Defendants are well aware of this fact. All too often, the most hotly contested issues in a class action suit will relate not to the merits of the plaintiffs' claims, but the defendant's efforts to resist the plaintiffs' discovery requests.

As a practical matter, protective orders issued by courts can be very helpful to our ability to obtain discovery on behalf of our clients. We will often stipulate to the issuance of a protective order prohibiting the disclosure of the defendant's confidential information that we receive through discovery, typically using forms provided by district courts. We do this because it removes an entire category of potential objections that a defendant can raise in opposition to our clients' discovery requests. Where a protective order is in place, it is much more difficult for the defendant to argue that producing documents in discovery would reveal its trade secrets or other confidential information, which makes it more likely for us to be able to obtain the information that we need to prosecute our clients' cases. In other situations, we may agree to the issuance of a protective order in order to facilitate the settlement of a class action, allowing our clients and similarly situated consumers to receive compensation more quickly.

H.R. 1508 would harm our clients by making it all but infeasible for courts to issue protective orders in complex class action suits. The bill's provisions requiring specific findings of fact that a protective order "would not restrict the disclosure of information which is relevant to the protection of public health or safety" would require courts to review the entire content of a defendant's discovery production.

Not only would the required review be very difficult for even the most experienced jurist to undertake, given the technical accounting, financial, engineering and other subject matter of many consumer class action suits — the sheer amount of the information to be reviewed by the courts would be inordinately great. Because of the steady expansion of information and computer technology, the volume of documents produced in discovery, especially in electronic form, has expanded exponentially over the past decade. A typical consumer class action case today will involve hundreds of thousands or millions of pages of discovery. We fear that many courts simply would not be able to undertake a task of this scope and would be required to withhold protective orders on this basis.

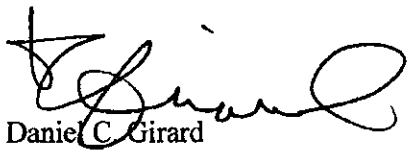
While the bill would prohibit defendants from conditioning the production of discovery on a plaintiff's stipulation to a protective order, it would have no effect on any of the confidentiality objections that defendants would almost certainly make in the absence of such orders. A defendant has every incentive to resist discovery most strongly as to precisely those documents that provide the most compelling evidence of the plaintiffs' claims against it. If the bill were to be enacted, plaintiffs would be required to litigate each of these objections separately and repeatedly before they would be able to obtain the documents they need to substantiate their claims.

All of this would mean greater expense, delay and uncertainty in plaintiffs' prosecution of class actions and may simply prevent plaintiffs from holding defendants to account, regardless of the harm suffered or the extent of the defendants' violations of law. While we are certain that the bill is intended to promote the laudable goal of greater openness and transparency in civil litigation, its actual effect would be to make it more difficult for plaintiffs to prove their claims, put an end unlawful business practices and obtain compensation for themselves and other injured consumers.

I thank you for considering these views and respectfully urge you not to support the passage of H.R. 1508.

Very truly yours,

GIRARD GIBBS LLP



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June 3, 2009

The Honorable Trent Franks
Member of Congress
2435 Rayburn Building
Washington DC 20515

Dear Congressman Franks:

Re: Statement for Hearing on H.R. 1508, the "Sunshine in Litigation Act of 2009"

This is in response to your request for my views regarding the subject of a subcommittee hearing on Thursday, June 4, 2009 on H.R.1508, the so-called "Sunshine in Litigation Act of 2009".

I regret that I will be unable to appear in person at the hearing due to a prior engagement, but I am pleased to submit this statement. As you noted, I have had a great deal of experience in analyzing and evaluating a variety of proposals in this area. In fact, I have observed and commented on the court confidentiality debate for many years, including authoring a comprehensive law review article[1] and many shorter written commentaries.[2] I have reviewed many state legislative proposals and court rule amendments, and have testified numerous times on this issue before the federal rulemakers as well as the United States Senate and House of Representatives. The first time I submitted a statement to the Senate on this subject was at a hearing of the Subcommittee on Courts of the Senate Judiciary Committee in May, 1990.[3]

My views on the subject are even stronger today, reinforced by dramatic changes in the litigation landscape: I believe that the current system under the Rules of Civil Procedure that empowers the federal courts with balanced discretion to protect litigants' privacy, property, and confidentiality in appropriate cases works well and does not need to be changed. And, the massive expansion of discovery

[1] Arthur R. Miller, Confidentiality, Protective Orders, and Public Access To The Courts, 105 HARV. L. REV. 427 (1991).

[2] See, e.g., Arthur R. Miller, Traveling Courthouse Circuses, A.B.A. J. 100 (Feb. 1999); Arthur R. Miller, Protective Order Practice: No Need To Amend F.R.C.P. 26(c), Prod. Safety & Liab. Rptr. 438 (BNA) (Apr. 21, 1995); Arthur R. Miller, Private Lives or Public Access? A.B.A. J. 65 (August 1991); Arthur R. Miller, Renewed Tension Between Right To Privacy, Boston Globe, March 10, 1991, § A, pg. 31, col. 1.

[3] See Statement of Professor Arthur R. Miller, Before Subcommittee on Courts of the Senate Judiciary Committee, Privacy, Secrecy, and the Public Interest, May 17, 1990.

in today's electronic world magnifies the need for broad judicial discretion to protect all litigants' privacy and property rights.

The extreme restrictions on protective and sealing orders and the ability of the parties to assure confidentiality in civil litigation proposed in all prior bills on this subject are, in my view, unnecessary and ill advised. Indeed, as time has passed judges have become more knowledgeable and sensitive to the balancing of interests that protects the rights of both sides in this debate and any legislation mandating more restrictive procedures has become even less advisable.

As I wrote in the Harvard Law Review article cited in footnote 1, such restrictive legislation is "ill advised" because:

> (1) such "restrictions run counter to important procedural trends designed to enhance judicial power to control discovery, improve efficiency, and promote settlement in the hope of reducing cost and delay"; (2) "proponents of the reforms have not demonstrated any clear need for constricting judicial discretion"; and (3) "constricting discretion would impair the fairness and efficiency of the existing system and would unduly impinge upon litigants' rights to maintain their privacy, to protect valuable property interests, and to resolve their legal disputes freely with minimal intrusion from outside forces." 105 Harv. L. Rev. at 432.

These are some of the reasons why over forty state legislatures and rulemaking bodies, the Congress, and the Judicial Conference of the United States have refused to enact such extreme restrictions on the discretion of judges to protect confidentiality in the courts.

Indeed, the more time that passes, the more secure I am in the knowledge that the use of protective and sealing orders and extra-judicial confidentiality agreements agreed to among the litigants is not prone to the serious abuses that the proponents of various forms of restrictive legislation suggest. At the same time, as a student of the courts and an active practitioner for over fifty years, I have no doubt that an assurance of confidentiality often is the essential ingredient that starts the information exchange flowing among the parties during discovery. That, in turn, facilitates the truth-seeking goals of the adversary process and the resolution of cases on their merits. Similarly, it ensures production of the materials that persuade parties to settle and comforts litigants that the price of peace was fair.

Confidentiality Is Necessary To the Efficient Functioning of the Civil Justice System.

Take away or restrict the ability to protect confidentiality and the civil justice system will suffer, particularly in this age of electronic discovery. If the parties are prevented from agreeing to confidentiality or a protective order among themselves the process is adversely impacted. Not only will proceedings be slower and more contentious, but in some instances proceedings will come to a complete halt while the court attempts to sort out what often are unreasonable and burdensome procedures contemplated.

Thus, the federal courts are likely to become mired in a morass of motions that siphon precious judicial resources away from higher level duties, such as presiding over trials or writing opinions and that force judges to devote time to tedious, low-level tasks, such as document review and motions directed to the legitimacy of claims of, for example, "concealment of a public hazard." This drain on the federal system's limited judicial resources is particularly wasteful when we remember that discovery was

designed to be self-executing. Thus, the parties generally are expected to be able to resolve discovery disputes themselves. Protective and sealing orders are devices that always have promoted that design.

Confidentiality serves several values in the civil justice system. A brief analysis of these demonstrates that they are fundamental and often of constitutional dimension, such as rights to privacy and property. The benefit of public access to certain litigation materials simply does not rise to, much less transcend, these essential rights. The Committee also must consider the effects that a decrease in the availability of confidentiality would have on the litigation process as a whole.

Confidentiality is of paramount importance during discovery because the willingness of the parties to produce information voluntarily often hinges on a guarantee that it will be preserved. Remove this guarantee and discovery will become more contentious, requiring frequent court intervention. Less information will be produced, making it more difficult to ascertain the facts underlying the dispute. Without all the facts, rendering a fair, just resolution of the dispute becomes less likely and reaching a truly informed settlement becomes more difficult. Consequently, any changes regarding confidentiality inevitably will produce a chain reaction affecting the litigation process.

It has long been my view that any public information purpose that public access serves is more appropriately accomplished by numerous other branches and agencies of government that are far better equipped to identify issues affecting public health or safety and to disseminate relevant information to the public. Superimposing a public information function on the courts decreases their efficiency, delays justice, and distorts the primary purpose for which courts exist. The current federal law and rules appear to me to strike a fair, workable balance between confidentiality and public access. No change has been shown to be needed and none is warranted.

Further Restricting Judicial Discretion to Protect Confidential Information Would Deprive The Public of Constitutionally Protected Privacy Rights.

Due to the invasive nature of the litigation process in this e-discovery age, parties often place substantive rights unrelated to the underlying legal issues at risk. One of the substantive rights that only confidentiality can protect is the right to privacy. The Supreme Court has indicated that litigants have privacy rights in the information produced during the discovery process, and that courts should protect those rights by ensuring confidentiality when good cause is shown. [4] Restricting the discretion of courts to keep sensitive information confidential would be a costly mistake for several substantive reasons.[5] There is a strong, symbiotic inter-relationship between rules of procedure and substantive rights. Procedure exists to give effect to substantive rights. For example, procedural rules governing service of process protect certain substantive rights under the Due Process clause.[6] By protecting confidential information to make certain that it is used solely to resolve disputes, courts also protect the substantive rights of the parties -- rights that may be placed in jeopardy quite unintentionally during the disclosure process by a desire to make the litigation process efficient and fair.[7]

Litigants do not give up their rights to privacy merely because they have walked, voluntarily or involuntarily, through the courthouse door.[8] The rulemakers who created the broad discovery regime of

[4] Seattle Times v. Rhinehart, 467 U.S. 20 (1984)

[5] Id. at 34-36 (discovery process is subject to substantial abuse that could damage the litigants' interests).

[6] Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[7] Seattle Times, 467 U.S. at 35.

[8] U.S. Dep't of Justice v. Reporters Committee for Freedom of the Press. 109 S. Ct. 1468 (1989).

modern civil procedure in order to promote the resolution of civil disputes on the merits, never intended that rights of privacy or confidentiality be destroyed in the process. They had no intention of using the compulsion of these procedures to undermine privacy in the name of public access or to warn the public of "public hazards."

Because of my belief in the importance of the right to privacy in our computerized world, about which I have written extensively,[9] I am strongly opposed to any proposal that would restrict or eliminate the discretion of the courts to protect the privacy rights of litigants.[10]

Two provisions have been added to H.R.1508 in an unsuccessful attempt to ameliorate the bills adverse impact on privacy rights and national security. Section 1660(d) creates "a rebuttable presumption that the interest in protecting personally identifiable information relating to financial, health, or other similar information of an individual outweighs the public interest in disclosure." And, Section 1660(e) provides that "Nothing in this section shall be construed to permit, require, or authorize the disclosure of classified information (as defined under section 1 of the Classified Information Procedures Act (18 U.S.C. App.))." Although of value, neither provision addresses the fundamental flaws of the bill that as a practical matter would prevent judges from protecting private, proprietary, and constitutionally protected information from disclosure. There is no sibstitute for the exercise of discretion by an informed and experienced federal judge in the context of a particular case.

Restrictive Legislation Would Put the Intellectual Property and Confidential Information of all Litigants at Risk

Another substantive right that litigants often are compelled to place at risk in order to resolve a dispute is the right to the exclusive use of private property. Information is often very valuable -- so valuable that it can be bought and sold for great sums of money. It is not surprising then, that our legal system considers information to be property.[11] To expedite resolution of a lawsuit, rules of procedure can compel all litigants to reveal information in which a property right exists, such as a trade secret, that is costly to develop and that has enormous value to competitors and others who may or may not be involved in the lawsuit.[12] Protective and sealing orders, limiting access to and use of proprietary information, are the most effective means of protecting the commercial value of this type of information while still making it available for use in the litigation at hand. The only alternative might be denying disclosure altogether.[13]

Numerous provisions of the federal and various state Constitutions are intended to protect personal property and the right to its exclusive use against government abuse or appropriation without compensation. Confidentiality is the sine qua non of preserving the modern property right in information

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[9] See, e.g., A. Miller, The Assault on Privacy: Computers, Data Banks, and Dossiers (1971); A. Miller, Press Versus Privacy,
16 Gonzaga L. Rev. 843 (1981).

[10] Cf. In re Halkin, 598 F.2d 176,195 (D.C. Cir. 1979) ("Only in the context of particular discovery material and a particular trial setting can a court determine whether the threat to substantial public interests is sufficiently direct and certain.").

[11] Carpenter v. United States, 108 S. Ct. 316, 320 (1987); Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000-01 (1984); see also 8 C. Wright, A. Miller, & R. Marcus, Federal Practice and Procedure: Civil 2d § 2043 (1994); Warren & Brandeis, The Right To Privacy, 4 Harv. L. Rev. 193, 193 (1890).

[12] Hoenig, Protective Confidentiality Orders, New York Law Journal, Mar. 5, 1990, at 6-7; "FBI Stings Parts Counterfeiters," "Holograms Battle Counterfeit GM Parts," Automotive News, Jan. 22, 1990, at 19 and 20.

[13] In re Halkin, 598 F.2d 176, 195 (D.C. Cir. 1979) (only alternative to use of protective order might be denial of discovery).

that has become the backbone of the American economy. This "property" is exceptionally fragile, for once its confidentiality is lost, the value that comes from confidentiality -- exclusive ownership and possession of the information -- is irretrievably lost and can never be restored. Although our Nation's founders never contemplated a world of semiconductors, television, the internet, and e-discovery they foresaw the need to protect property rights in industrial and artistic creativity and embedded it in the United States Constitution, Art. I, § 8, cl. 8. The states have embellished that basic theme and recognize that the courts have an obligation to protect litigants' property rights when compelled to produce informational property in discovery in civil litigation in order to promote the just resolution of civil disputes.

Protective orders, sealing orders, and confidentiality agreements are the primary means of protecting constitutionally recognized intellectual property rights in litigation. Many of the rejected "Sunshine in Litigation" bills I have reviewed, ask us to accept as gospel that a handful of documents possibly taken out of context in highly complex litigation are evidence of widespread wrong-doing, or that the allegations set forth in a complaint are invariably true. As a consequence of these assumptions, these legislative proposals could compel the litigants to reveal personal or corporate documents, regardless of how proprietary, how valuable, how irrelevant, how embarrassing, or how confidential they might be.

The report from the National Academy of Sciences[14] about the breast implant litigation has shown us that we cannot always place our faith solely in excerpts from a few documents, or the unproven allegations in a lawsuit, regardless of how well pled, how many other similar lawsuits have been filed, or how many other plaintiffs are lined up making the same claims. The breast implant litigation, we recall, was an early poster child for a previous wave of unsuccessful "Sunshine in Litigation" bills. Then, we had the Ford–Firestone litigation which proponents of earlier bills citeed, in highly inflammatory terms, as justification for such legislation. When we take complex, confidential, untested information out of context during the pretrial process as "evidence" or "proof" of wrong-doing, I fear it is an invitation to go down the same road that we went down with breast implants and a number of other false alarms. With respect to Ford – Firestone, I understand that: a) the National Highway Traffic Safety Administration was alerted to a potential problem by early claim data compiled and submitted by the manufacturers and insurers; b) the companies voluntarily produced millions of pages of documents in a document depository which some plaintiff lawyers refused to share with other claimants; and c) the few settlements that were confidential, were sealed at the claimants' request, not the manufacturers'. As I said in a 1999 article:

> My own research shows that information about dangers to the public is available even when confidentiality orders are in place. Most compelling are the findings of empirical research conducted by the Federal Judicial Center, the research arm of the federal courts, as well as extensive public comment submitted to the Judicial Conference's Committee on Rules of Practice and Procedure. Both failed to detect anything wrong with current protective order practice or the use of confidentiality agreements. * * * Ironically, the center's study found that protective orders most often were used to protect the privacy of

[14] See, e.g., Stuart Bondurant, Virginia Ernster & Roger Herdman, eds., INSTITUTE OF MEDICINE, NATIONAL ACADEMY OF SCIENCES, THE SAFETY OF SILICONE BREAST IMPLANTS (Nat'l Academy Press 1999) (finding no scientific cause and effect relationship between silicone gel implants and the serious injuries alleged in thousands of highly publicized lawsuits).

plaintiffs in civil rights litigation. In light of the evidence, the federal rule makers quite correctly decided to make no changes to current rules of procedure.[15]

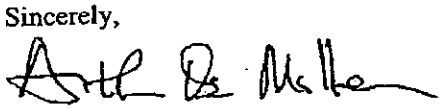
It is much more rational to allow the whole truth-finding process to run its course before we require judges to make judgments about whether or not particular bits of information produced to an adversary solely for purposes of litigation demonstrate the existence of a "public hazard" or other presumed effects on "public health and safety." It is the full adversarial process, with its rules of evidence and cross-examination procedures, that acts as the crucible from which the truth will emerge. And it is the informed and experienced judgment of Article III judges who are in the best position to make judgments of this character. If we by-pass that process and do not allow it to operate, or require the premature resolution of such difficult and important issues and the disclosure of untested information produced in the civil litigation discovery process, we will not be serving the truth.

In actuality, courts rarely use their authority to seal information, especially in today's transparency environment. When they do, there is compelling evidence that preserving confidentiality is of primary importance. Even if the courts had the resources to assume a public information function, they are not the appropriate institutions for doing so. Indeed, a multitude of executive, administrative, and law enforcement agencies exist for the purpose of protecting the public's health and safety. If efforts by these agencies are claimed to be inadequate, it does not follow that their responsibilities should be shifted to the courts.

The present practice should be retained -- relying on our courts to use their balanced discretion to issue confidentiality orders to protect the legitimate interests of the parties -- and allowing parties to retain their rights to negotiate confidentiality agreements voluntarily. Current rules of practice and procedure allow judges to consider and act in the public interest when circumstances so indicate. There is simply no reason to believe that existing court rules and practice create any risks to public health and safety. All indications are that the current system works quite well. The public, including the news media, already has plentiful access to the courts and court records; information affecting significant public interests is available to all. As I have said before: "The appropriate concern is not that there is too much 'secrecy.' Rather, it is that there is too little attention to privacy, to the loss of confidentiality and to interference with the proper functioning of the judicial process." A.B.A.J. at 100 (Feb. 1999). Consequently, I strongly recommend against enactment of constricting legislation in this area because of the many deleterious effects it is likely to have.

I hope you find these comments helpful. I am always available to be of service to the Committee.

Sincerely,



Arthur R. Miller
University Professor

[15] Arthur R. Miller, Traveling Courthouse Circuses, ABA Journal "Perspective" 100 (Feb. 1999).

Chris Kitchel
Chair, Federal Civil Rules Committee
Email ckitchel@stoel.com

June 3, 2009

Honorable Mark R. Kravitz
United Stated District Judge
Chair, Civil Rules Advisory Committee
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Proposed "Sunshine in Litigation" Legislation

Dear Judge Kravitz:

The American College of Trial Lawyers is dedicated to maintaining and improving the standards of trial practice, the administration of justice and the ethics of the legal profession. The Federal Civil Procedure Committee of the College is charged with monitoring the operation of the Federal Rules of Civil Procedure and, when requested, evaluating proposed changes.

At your request, the College's Federal Civil Procedure Committee, which I chair, has reviewed the proposed legislation, "Sunshine in Litigation Act," its legislative history, as well as earlier comments of our Committee submitted in 1988 regarding the Federal Rules Enabling Act. Our Committee members conclude the currently proposed "Sunshine in Litigation Act" is ill-conceived and unnecessary.

Our Committee agrees with the two principal grounds that the Judicial Conference previously expressed in opposing this new legislation:

1. The "Sunshine in Litigation Act" would establish an undesirable precedent of circumventing the process set out in the Rules Enabling Act, the procedure that Congress dictated for amending the Federal Rules of Civil Procedure. We remain concerned that ad hoc legislative initiatives that address a specific aspect of the Federal Rules is ill-advised, and that changes in the Rules should be enacted based on the procedure Congress endorsed in the Rules Enabling Act.

2. The Act as drafted would unduly restrict the discretion of trial judges and impose substantial new fact finding burdens on the courts, without a demonstrated need for those changes. The experience of most of our Committee members does not suggest that protective orders or settlement agreements are frequently abused, or that they serve to keep private information that is important to protecting public health and safety. Requiring federal trial judges to engage in the specific fact-finding set out in the Act would add an unnecessary procedural hurdle in what already is a complex, expensive and time-consuming process.

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Our Committee agrees with the positions of the Judicial Conference, and believes that they thoroughly address the reasons why the Act should be rejected as unnecessary and counter-productive.

We are authorized to relate these as the views of our Committee members who remain very appreciative of this opportunity to comment on the ongoing efforts of the Judicial Conference to improve the Federal Rules of Civil Procedure. Please let us know if we can be of any further service.

Very truly yours,

Chris Kitchel

Chris Kitchel
Chair, Federal Civil Rules Committee
American College of Trial Lawyers

CXK:kle

Executive Summary of the Case Law on Entering and Modifying Protective Orders in Discovery

There is an extensive body of case law on the good-cause standard in Rule 26 of the Federal Rules of Civil Procedure for issuing protective orders for materials to be produced in pretrial discovery. Federal courts have explained that showing good cause for entry of a protective order requires a clearly defined and serious need, not satisfied by generalized or conclusory allegations. The case law shows that the public interest is considered under the standards used throughout the circuits for entering and modifying protective orders.

In evaluating whether good cause exists for entering a protective order, courts have considered many factors, including: the importance of a protective order to the fair and efficient conduct of discovery; the confidentiality interests of the parties or nonparties; whether the information is being sought for a legitimate or improper purpose; whether the information at issue is important to public health and safety; whether the party seeking confidentiality is a public entity or official; and whether the litigation involves issues important to the public. The case law stresses the importance of maintaining flexibility in evaluating requests for protective orders because each case involves different circumstances.

Courts carefully distinguish between the standard for entering a protective order in the pretrial discovery stage for documents that are not filed with the court, and the standard applied to sealing documents filed with the court. They require a much more exacting standard when parties seek to keep the public from obtaining documents filed with a court, emphasizing the presumption of public access to court records and requiring compelling reasons to seal such documents. In contrast, the public usually does not have a right of access to discovery material, and the courts recognize that protective orders restricting dissemination of discovery documents are often essential to the efficient and fair conduct of that discovery. The extensive discovery that takes place in federal litigation can turn up huge amounts of material. Allowing a party to freely disseminate the discovery material may result in the spreading of private, irrelevant, and even false information.

The case law recognizes that a protective order governing discovery may need to be modified or even vacated. It is routine to allow parties, or third parties, including the press or other intervenors, to challenge the application of the protective order to particular documents or categories of documents or to move to modify the order. As with requests for entry of protective orders, cases throughout the circuits have developed standards for evaluating requests to modify protective orders. Among the factors that courts have considered are: whether the protected information is important to public health and safety; whether there is a continuing need for protection; whether those who produced discovery pursuant to a protective order reasonably relied on the order; whether alternative means exist for obtaining the information; and the relevance of protected materials to related litigation. Courts considering modification requests recognize the need for flexibility to consider appropriate factors that vary depending on the case.

CASE LAW ON ENTERING AND MODIFYING PROTECTIVE ORDERS IN DISCOVERY

Committee on Rules of Practice and Procedure
(Prepared by Andrea Kuperman)
July 2009

Federal courts have extensive experience in evaluating requests for protective orders. Through the development of the case law, federal courts have grappled with competing interests involved in determining whether a protective order is warranted in various circumstances, and if so, the proper limits of the order. In evaluating requests for protective orders governing discovery, courts have considered various factors, including, for example, the confidentiality interests at issue, the need to protect public health and safety interests, the fairness and efficiency of entering a protective order, and the importance of the litigation to the public. The cases do not set out exhaustive factors and often emphasize that courts must maintain flexibility in analyzing requests for protective orders, explaining that the proper factors to consider will vary depending on the circumstances of each individual case.

Courts differentiate the standard for sealing documents filed with the court, which usually is much more exacting than the showing required for entering a protective order limiting the dissemination of discovery materials. In analyzing requests to seal court documents, courts emphasize the presumption of public access to judicial records and often require compelling reasons in order to seal court documents.

The case law also emphasizes that courts maintain discretion to modify protective orders, which can often act as a mechanism for protecting the interests of the public, the press, and collateral litigants. As with requests to grant protective orders, courts have developed standards for analyzing requests to modify protective orders. Although the circuits take various approaches to dealing with requests for modification, they have developed factors and standards that take into consideration the competing interests involved. Courts examining requests to modify protective orders often balance a variety of factors, including, for example, the continuing need for protection, the reliance interests

of those who produced discovery pursuant to a protective order, efficiency and fairness concerns, and the needs of the public, collateral litigants, and news organizations for the protected information.

In sum, the case law has developed flexible standards that have worked well for years in balancing the competing public and private interests implicated at various stages of litigation. Courts within each of the circuits have described the standards for evaluating requests to grant protective orders, requests to seal court documents, and requests to modify protective orders, as follows:

FIRST CIRCUIT

Standard for Entering a Protective Order

- The First Circuit has explained that protective orders can be used to promote the public interest by facilitating discovery:

> Nor does public access to the discovery process play a significant role in the administration of justice. Indeed, if such access were to be mandated, the civil discovery process might actually be made more complicated and burdensome than it already is. In discovery, the parties are given broad range to explore "any matter, not privileged, which is relevant to the subject matter involved in the pending action" so that they may narrow and clarify the issues and obtain evidence or information leading to the discovery of evidence for future use in the trial. *See* FED. R. CIV. P. 26(b)(1); *Hickman v. Taylor*, 329 U.S. [495,] 501, 67 S. Ct. [385,] 388 [(1947)]. The public's interest is in seeing that the process works and the parties are able to explore the issues fully without excessive waste or delay. But rather than facilitate an efficient and complete exploration of the facts and issues, a public right of access would unduly complicate the process. It would require the court to make extensive evidentiary findings whenever a request for access was made, and this could in turn lead to lengthy and expensive interlocutory appeals, just as it did in this case. The Supreme Court declined to apply heightened first amendment scrutiny to requests for protective orders at least in part because of these concerns. *See Seattle Times Co.* [*v. Rhinehart*], 467 U.S. [20,] 36 n. 23, 104 S. Ct. [2199,] 2209 n. 23 [(1984)].

Anderson v. Cryovac, Inc., 805 F.2d 1, 12 (1st Cir. 1986).

- In another case, the First Circuit recognized that courts need discretion in order to

appropriately handle requests for protective orders in various contexts:

> District judges need wide latitude in designing protective orders, and the Federal Rules of Civil Procedure reflect that approach. Rule 26(c) generously permits "for good cause shown" the making of "any order which justice requires" to protect against annoyance, embarrassment or undue burden occasioned by discovery. The district court has "broad discretion" to decide "when a protective order is appropriate and what degree of protection is required," *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199, 2209, 81 L. Ed. 2d 17 (1984), and great deference is shown to the district judge in framing and administering such orders. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030, 109 S. Ct. 838, 102 L. Ed. 2d 970 (1989); 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2036 (1970).

Poliquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st Cir. 1993).

The court further recognized that while allowing the issuance of broad protective orders in discovery may have some costs, those costs are outweighed by the benefits of allowing litigation to proceed more efficiently:

> The argument [that disclosure of discovery is warranted to avoid wasteful duplication of discovery in other cases] has a surface appeal in a time of swollen litigation cost and crowded dockets, but it looks at only one element in the equation. Absent an immediate threat to public health or safety, the first concern of the court is with the resolution of the case at hand. Judges have found in many cases that effective discovery, with a minimum of disputes, is achieved by affording relatively generous protection to discovery material. Impairing this process has immediate costs, including the delay of discovery and the cost to the parties and the court of resolving objections that would not be made if a protective order were allowed.

Id. at 535. The First Circuit explained that public interests could still be protected, even with the issuance of broad protective orders:

> Nevertheless, a protective order, like any ongoing injunction, is always subject to the inherent power of the district court to relax or terminate the order, even after judgment.
>
> This retained power in the court to alter its own ongoing directives provides a safety valve for public interest concerns,

> changed circumstances or any other basis that may reasonably be offered for later adjustment.

Id. (internal citation omitted).

- In another case, the First Circuit recognized that although parties may usually disclose materials obtained in discovery in the absence of a protective order, the public ordinarily has no right to compel private litigants to disclose materials gained in discovery:

> Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants. [Local] Rule 16(g) does not in any way limit the use or dissemination of discovery materials by *parties*. Indeed, the Supreme Court has noted that parties have general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are entitled to disseminate the information as they see fit. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31–36, 104 S. Ct. 2199, 2206–09, 81 L. Ed. 2d 17 (1984); *see also Oklahoma Hospital Ass'n v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984), *cert. denied*, 473 U.S. 905, 105 S. Ct. 3528, 87 L. Ed. 2d 652 (1985).

Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 780 (1st Cir. 1988).

Standard for Entering a Sealing Order

- The *Poliquin* court emphasized that once discovery material becomes part of the trial record, it can no longer be kept private without the party seeking confidentiality making a very high showing:

> One generalization, however, is safe: the ordinary showing of good cause which is adequate to protect discovery material from disclosure cannot alone justify protecting such material after it has been introduced at trial. This dividing line may in some measure be an arbitrary one, but it accords with long-settled practice in this country separating the presumptively private phase of litigation from the presumptively public. *See Cowley v. Pulsifer*, 137 Mass. 392 (1884) (Holmes, J.). Open trials protect not only the rights of individuals, but also the confidence of the public that justice is being done by its courts in all matters, civil as well as criminal. *See Seattle Times Co.*, 467 U.S. at 33, 104 S. Ct. at 2207–08 (distinguishing discovery material, traditionally not available to the public, from trial evidence which normally is available).

> There is thus an abiding presumption of access to trial records and ample reason to "distinguish materials submitted into evidence from the raw fruits of discovery." *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678, 684 & n.28 (3d Cir. 1988). As we have said elsewhere, "'[o]nly the most compelling reasons can justify the non-disclosure of judicial records.'" *FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (quoting *In re Knoxville News-Sentinal Co.*, 723 F.2d 470, 476 (6th Cir. 1983)). *Accord, Joy v. North*, 692 F.2d 880, 893–94 (2d Cir. 1982).

Poliquin, 989 F.2d at 533.

- In another case, the First Circuit emphasized the presumption of public access to court documents. *See Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 9–10 (1st Cir. 1998) (noting that "[t]he common law presumes a right of public access to judicial records" and that "[t]he presumption extends to records of civil proceedings") (citations omitted). The court explained: "Though the public's right of access to such materials is vibrant, it is not unfettered. Important countervailing interests can, in given instances, overwhelm the usual presumption and defeat access. It follows that when a party requests a seal order, or, as in this case, objects to an unsealing order, a court must carefully balance the competing interests that are at stake in the particular case." *Id.* at 10 (internal citation omitted). The court explained that "[t]he mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access," *id.*, but concluded that the interest in preserving attorney-client privilege "is precisely the kind of countervailing concern that is capable of overriding the general preference for public access to judicial records," *id.* at 11 (citations omitted). The court cautioned that even though sealing was appropriate to maintain attorney-client privilege under the facts of the case, the materials did not necessarily need to remain permanently sealed, and the seal could be lifted at a later time, if it turned out that claims of privilege were unsupported or that an exception applied. *See id.* at 12.

Standard for Modifying a Protective Order

- The First Circuit has questioned whether "extraordinary circumstances" are necessary to modify a protective order, distinguishing a Second Circuit case that applied that standard. *See Public Citizen*, 858 F.2d at 791 (stating that it was "not convinced that the extraordinary circumstances standard" proffered by the appellants was applicable because the decision relied upon, *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979), had focused on "the fact that the party seeking access . . . was the federal government, which . . . had at its disposal investigatory powers not available to private litigants . . . .")

(internal quotation marks and citation omitted).[1] Instead, the court held that a more lenient standard for modification would apply:

> Outside the area of government intervention, courts have applied much more lenient standards for modification. *See e.g.*, *Wilk* [*v. Am. Med. Ass'n*], 635 F.2d [1295,] 1300 [(7th Cir. 1980)] (holding that the court's prior invocation of the extraordinary circumstances test "was an unfortunate choice of words"); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984) (suggesting that the good cause standard of Rule 26(c) governs modifications of protective orders). While we need not decide the matter definitively, we reject the "extraordinary circumstances" standard. In a case such as this, where the party seeking modification has pointed to some relevant change in the circumstances under which the protective order was entered, we think that a standard less restrictive than "extraordinary circumstances" is appropriate.

Id. at 791. The court concluded that it did not need to define the contours of the standard because the relevant facts of the case showed that the district court had power to modify its prior protective order. The court relied on the fact that the reasons underlying the initial order no longer existed and the fact that public interest considerations favored allowing counsel to make certain documents public. *Id.* at 791–92.

- A district court in the First Circuit recently explained that the exact standard for modifying a protective order is not clearly defined in the First Circuit: "While the First Circuit has not definitively resolved the matter of the standard applicable to modification of a protective order, it has expressed the view that 'a standard less restrictive than 'extraordinary circumstances' is appropriate[,]' noting that other courts have applied 'much more lenient standards for modification[,]' including the standard of 'good cause.'" *Fairchild Semiconductor Corp. v. Third Dimension Semiconductor, Inc.*, No. 08-158-P-H, 2009 WL 1210638, at *1 (D. Me. Apr. 30, 2009) (quoting *Public Citizen*, 858 F.2d at 791). The court held that the party seeking modification bears the burden of showing good cause for the modification. *Id.* The court also noted that "'[w]hen a party to a *stipulated* protective order seeks to modify that order, that party must demonstrate particular good cause to obtain relief.'" *Id.* at *1 n.5 (quoting *Guzhagin v. State Farm Mut. Auto Ins. Co.*, Civil No. 07-4650 (JRT/FLN), 2009 WL 294305, at *2 (D. Minn. Feb. 5, 2009) (citation and internal quotation marks omitted) (emphasis in original)).

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[1] The Second Circuit has more recently emphasized that its opinion in *Martindell* was not limited to requests by the government to modify a protective order. *See S.E.C. v. TheStreet.com*, 273 F.3d 222, 229 n.7 (2001) ("Some district courts in our Circuit have incorrectly concluded that the *Martindell* rule only applies when the Government seeks modification of a protective order. Though *Martindell* did involve a Government request to modify a protective order, its logic is not restricted to Government requests, nor did our opinion in *Martindell* suggest otherwise.") (internal citation omitted).

SECOND CIRCUIT

Standard for Entering a Protective Order

- In discussing public access to discovery documents, the Second Circuit has stated:

> [I]t must be recognized that an abundance of statements and documents generated in federal litigation actually have little or no bearing on the exercise of Article III judicial power. The relevance or reliability of a statement or document generally cannot be determined until heard or read by counsel, and, if necessary, by the court or other judicial officer. As a result, the temptation to leave no stone unturned in the search for evidence material to a judicial proceeding turns up a vast amount of not only irrelevant but also unreliable material.

  United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995). As a result of the fact that many documents unearthed in discovery are not relevant to judicial actions, the Second Circuit explained: "Unlimited access to every item turned up in the course of litigation would be unthinkable. Reputations would be impaired, personal relationships ruined, and businesses destroyed on the basis of misleading or downright false information." *Id.* at 1048–49. The *Amodeo* court set out the following standard: "We believe that the weight to be given the presumption of access must be governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *Id.* at 1049. The court recognized a presumption of public access to documents involved in litigation, but explained that "[d]ocuments that play no role in the performance of Article III functions, *such as those passed between the parties in discovery*, lie entirely beyond the presumption's reach, and 'stand[ ] on a different footing than . . . a motion filed by a party seeking action by the court,' or, indeed, than any other document which is presented to the court to invoke its powers or affect its decisions." *Id.* at 1050 (internal citations omitted) (emphasis added).

- In another case, the Second Circuit explained the standard for entering a protective order: "The district court has broad discretion to determine whether an order should be entered protecting a party from disclosure of information claimed to be privileged or confidential. *Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973). Where, as here, the documents are relevant, the burden is upon the party seeking non-disclosure or a protective order to show good cause." *Penthouse Int'l, Ltd. v. Playboy Enters., Inc.*, 663 F.2d 371, 391 (2d Cir. 1981) (citations omitted).

- A court within the Second Circuit has explained that public interest also must factor into the

determination of whether to grant a protective order:

> The test for entering a protective order under FED. R. CIV. P. 26(c) is "good cause." *See, e.g.*, *Dove v. Atlantic Capital Corp.*, 963 F.2d 15, 18–19 (2d Cir. 1992); *Bank of New York v. Meridien Biao Bank Tanzania*, 171 F.R.D. 135, 143 (S.D.N.Y. 1997). In assessing a party's application for such relief, the court must balance the demonstrated interest of the applicant in the secrecy of the information in question against not only the prejudice, if any, to the opposing party, but also the recognized federal common-law interest of the public in access to court proceedings. *See, e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–99 (1978); *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997), *cert. denied*, 522 U.S. 1049 (1998); *United States v. Amodeo*, 71 F.3d 1044, 1053 (2d Cir. 1995).

Byrnes v. Empire Blue Cross Blue Shield, No. 98 Civ. 8520 BSJ MHD, 2000 WL 60221, at *1 (S.D.N.Y. Jan. 25, 2000) (footnote omitted). The court recognized that the public's interest in litigation materials depends on the stage of the litigation:

> Since the articulated public interest is in court proceedings, the weight of the interest varies depending upon the role the information in question plays in the adjudicative process. At one end of the spectrum is information produced to a litigant in discovery. Most discovery, including document production, typically takes place privately. Moreover, given the liberal standards that govern discovery, it is often the case that much of the information actually turned over has little or no significance for the resolution of the claims and defenses or other issues presented to the court in the course of the litigation. For these reasons, the public interest in access to discovery materials is recognized as generally of a limited order, although most courts have held that the producing party still has the burden of demonstrating good cause for preventing public access to discovery materials. In contrast, the public interest in access to the proceedings of the court is a central and compelling policy consideration, and that policy dictates that the party seeking a protective order must satisfy a more demanding standard to justify sealing portions of trials, other court hearings or papers filed with the court, including motion papers.

Id. (internal citations omitted).

Standard for Entering a Sealing Order

- The Second Circuit has emphasized that sealing documents associated with dispositive motions requires making a very high showing. In *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 113 (2d Cir. 2006), the Second Circuit concluded that the district court had erred by holding in abeyance a motion by the press to intervene to access sealed documents filed in connection with a summary judgment motion because "the contested documents are judicial documents to which a presumption of immediate access applies under both the common law and the First Amendment." The court explained that "[t]he common law right of access to judicial documents is firmly rooted in our nation's history," and stated:

> The presumption of access is based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

Id. at 119 (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*")) (quotation marks omitted). The *Lugosch* court explained that "in order to be designated a judicial document, 'the item filed must be relevant to the performance of the judicial function and useful in the judicial process.'" *Id.* (quoting *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*")). The court noted that once a "court has determined that the documents are judicial documents and that therefore a common law presumption of access attaches, it must determine the weight of that presumption," which is "'governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts,'" *id.* (quoting *Amodeo II*, 71 F.3d at 1049). Then, "after determining the weight of the presumption of access, the court must 'balance competing considerations against it,'" which "include but are not limited to 'the danger of impairing law enforcement or judicial efficiency' and 'the privacy interests of those resisting disclosure.'" *Id.* at 120 (quoting *Amodeo II*, 71 F.3d at 1050).

The *Lugosch* court also explained that "[i]n addition to the common law right of access, it is well established that the public and the press have a 'qualified First Amendment right to

attend judicial proceedings and to access certain judicial documents.'" *Id.* (quoting *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 91 (2d Cir. 2004)). The court elaborated:

> We have articulated two different approaches for determining whether "the public and the press should receive First Amendment protection in their attempts to access certain judicial documents." [*Hartford Courant*, 435 F.3d] at 92. The so-called "experience and logic" approach requires the court to consider both whether the documents "have historically been open to the press and general public" and whether "public access plays a significant positive role in the functioning of the particular process in question." *Id.* (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986)). "The courts that have undertaken this type of inquiry have generally invoked the common law right of access to judicial documents in support of finding a history of openness." *Id.* The second approach considers the extent to which the judicial documents are "derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings." *Id.* at 93.

Lugosch, 435 F.3d at 120 (footnote omitted). However, even if a court determines that documents are entitled to a qualified First Amendment right of access, "'[d]ocuments may be sealed if specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Id.* (quoting *In re New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987) (internal quotation marks omitted)). "'Broad and general findings by the trial court, however, are not sufficient to justify closure.'" *Id.* (quoting *In re New York Times*, 828 F.2d at 116).

The court noted that Second Circuit "precedents indicate that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment." *Id.* at 121. As a result, the court concluded that "'documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.'" *Id.* (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). The court continued: "The justification offered in *Joy v. North* for this conclusion is that summary judgment is an adjudication, and '[a]n adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.'" *Id.* (quoting *Joy*, 692 F.2d at 893).

In addition, the *Lugosch* court emphasized that in evaluating whether court documents may be sealed from the press, the court should not consider the press's motive in seeking access:

> Although the presumption of access is based on the need for the public monitoring of federal courts, those who seek access to

> particular information may want it for entirely different reasons. However, we believe motive generally to be irrelevant to defining the weight accorded the presumption of access. It is true that journalists may seek access to judicial documents for reasons unrelated to the monitoring of Article III functions. Nevertheless, assessing the motives of journalists risks self-serving judicial decisions tipping in favor of secrecy. Where access is for the purpose of reporting news, moreover, those interested in monitoring the courts may well learn of, and use, the information whatever the motive of the reporting journalist.

435 F.3d at 123 (quoting *Amodeo II*, 71 F.3d at 1050) (quotation marks omitted).

The *Lugosch* court noted that even where both a common law and First Amendment right of access attaches, documents can be sealed in some circumstances:

> Notwithstanding the presumption of access under both the common law and the First Amendment, the documents may be kept under seal if "countervailing factors" in the common law framework or "higher values" in the First Amendment framework so demand. Since we have concluded that the more stringent First Amendment framework applies, continued sealing of the documents may be justified only with specific, on-the-record findings that sealing is necessary to preserve higher values and only if the sealing order is narrowly tailored to achieve that aim.

Id. at 124 (citing *In re New York Times*, 828 F.2d at 116).

Finally, the court emphasized that documents may not remain sealed simply because parties relied on a discovery protective order in producing documents:

> [T]he argument that the defendants' reliance on [the confidentiality order] during years of discovery shields them now from the burden of justifying protection of the documents ignores the fact that civil litigants have a legal obligation to produce all information "which is relevant to the subject matter involved in the pending action," FED. R. CIV. P. 26(b)(1), subject to exceptions not involved here. Thus, defendants cannot be heard to complain that their reliance on the protective order was the primary cause of their cooperation during years of discovery: even without [the confidentiality order], I would eventually have ordered that each discoverable item be turned over to the plaintiffs. Umbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella protection should not substantively expand the protection provided by Rule 26(c)(7) or

> countenanced by the common law of access. To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right.

Id. at 125–26 (quoting *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 43–44 (C.D. Cal. 1984)) (quotation marks omitted).

- The Second Circuit has also noted that "several 'competing interests [have been weighed] in a variety of contexts in determining whether to grant access to judicial documents . . . ." *S.E.C. v. TheStreet.com*, 273 F.3d 222, 231 n.10 (2d Cir. 2001) (quoting *Amodeo I*, 44 F.3d at 147 (citations omitted)). The court also noted:

> [T]he public has in the past been excluded, temporarily or permanently from . . . the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity.
>
> We have [elsewhere] recognized the law enforcement privilege as an interest worthy of protection.

Id. (quoting *Amodeo I*, 44 F.3d at 147 (citations omitted)) (quotation marks omitted). *TheStreet.com* court explained that in *Amodeo II*, the court had found that once the document at issue had been deemed a judicial document, the next step was to "determine the weight of the presumption of public access by evaluating 'the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts.'" *Id.* at 232 (quoting *Amodeo II*, 71 F. 3d at 1049). The court explained that once the weight of the presumption of public access is determined, a court should "'balance [the] competing considerations against [that presumption],'" *id.* (quoting *Amodeo II*, 71 F.3d at 1050), including at least two countervailing factors: "(1) the danger of impairing law enforcement or judicial efficiency; and (2) the privacy interests of those who resist disclosure," *id.* With respect to the latter countervailing factor, the court stated that "'the privacy interests of innocent third parties . . . should weigh heavily in a court's balancing equation,'" and that "the weight of the privacy interest should depend on 'the degree to which the subject matter is traditionally considered private rather than public.'" *Id.* (quoting *Amodeo II*, 71 F.3d at 1050, 1051). The court also stated that "a court should consider 'the nature and degree of injury' as well as whether 'there is a fair opportunity for the subject to respond to any accusations contained therein.'" *TheStreet.Com*, 273 F.3d at 232 (quoting *Amodeo II*, 71 F.3d at 1051).

Standard for Modifying a Protective Order

- The Second Circuit has set forth a restrictive standard for modifying a protective order:

"Where there has been reasonable reliance by a party or deponent, a District Court should not modify a protective order granted under Rule 26(c) 'absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.'" *TheStreet.com*, 273 F.3d at 229 (quoting *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979)). The Second Circuit emphasized the importance of parties being able to rely on protective orders:

> [P]rotective orders issued under Rule 26(c) serve "the vital function . . . of 'secur[ing] the just, speedy, and inexpensive determination' of civil disputes . . . by encouraging full disclosure of all evidence that might conceivably be relevant. This objective represents the cornerstone of our administration of civil justice." Without an ability to restrict public dissemination of certain discovery materials that are never introduced at trial, litigants would be subject to needless "annoyance, embarrassment, oppression, or undue burden or expense." Rule 26(c). And if previously-entered protective orders have no presumptive entitlement to remain in force, parties would resort less often to the judicial system for fear that such orders would be readily set aside in the future.

Id. at 229–30 (footnote and internal citation omitted). The Second Circuit warned against the effects of granting requests to modify protective orders without a compelling reason:

> If protective orders were easily modified, moreover, parties would be less forthcoming in giving testimony and less willing to settle their disputes: "Unless a valid Rule 26(c) protective order is to be fully and fairly enforceable, witnesses relying upon such orders will be inhibited from giving essential testimony in civil litigation . . . ." *Martindell*, 594 F.2d at 295. Indeed, we have observed that protective orders can provide a powerful incentive to deponents who would not otherwise testify. *Id.* at 296 (finding that "the deponents testified in reliance upon the Rule 26(c) protective order, absent which they may have refused to testify").

Id. at 230. The court concluded that "another compelling reason to discourage modification of protective orders in civil cases is to encourage testimony in pre-trial discovery proceedings and to promote the settlement of disputes." *Id.* In addition to focusing on the parties' reliance on protective orders, the Second Circuit noted the unfairness of modifying protective orders. *Id.* ("It is . . . presumptively unfair for courts to modify protective orders which assure confidentiality and upon which the parties have reasonably relied."). However, the Second Circuit emphasized that to avoid modification, the parties' reliance must be reasonable, explaining that "protective orders that are on their face temporary or limited may not justify reliance by the parties." *Id.* at 231.

- Another court in the Second Circuit recently discussed the standard for modifying a protective order: "In the Second Circuit, where there has been reasonable reliance by a party or deponent on the confidentiality order in giving testimony or producing materials, a district court should not modify an order granted under 26(c) ''absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need.'"" *In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 317 (D. Conn. 2009) (citing *TheStreet.com*, 273 F.3d at 229). The *EPDM* court recognized that the Second Circuit approach is stricter than other circuits:

> This presumption [in the Second Circuit] against modification differs from the standard in other circuits, which have a presumption in favor of access in cases where an intervening party involved in bona fide collateral litigation seeks access to protected discovery materials. *See, e.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990); *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980). *See also Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 789–90 (3rd Cir. 1994) (rejecting Second Circuit approach); *Beckman Industries, Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir. 1992) (same); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988) (same). In those circuits, modification is favored when it will "place private litigants in a position they would otherwise reach only after repetition of another's discovery." *Wilk*, 635 F.2d at 1299. A trial court should deny modification only where it would "tangibly prejudice substantial rights of the party opposing modification." *Id.* The desire to make litigation more burdensome to pursue in the collateral jurisdiction "is not legitimate prejudice." *United Nuclear Corp.*, 905 F.2d at 1428. Any legitimate interest the defendants have in keeping the materials filed under the protective order out of public hands can be accommodated by placing the intervening party under the same use and disclosure restrictions contained in the original order. *Id.* *See also Linerboard*, 333 F. Supp. 2d at 339–40 (allowing modification on the condition that the Canadian third-party intervenor be bound by the protective order's use and disclosure requirements and submit to the personal jurisdiction of the court for purposes of enforcing the agreement); *Neurontin*, MDL Docket No. 1629 (D. Mass. Oct. 13, 2006) (order granting motion to intervene) (same).

Id. at 317–18 (footnote omitted).

The court emphasized that the strict Second Circuit standard for modifying a protective order only applies where the parties *reasonably* relied on the order:

> [T]hough the *Martindell* standard is admittedly a stringent one, it

> does not apply uniformly to *all* protective orders. *Id.* Rather, the application of the strong presumption against modification is dependent upon a protective order's particular characteristics and whether it invites reasonable reliance on the permanence of the order. *Id.* "Even the Second Circuit recognizes that there must be a plausible showing of reliance on the order to narrow the grounds for modification." 8 WRIGHT & MILLER § 2044.1. For example, where the deponent or party could not have reasonably relied on the protective order to continue indefinitely, "a court may properly permit modification of the order." *TheStreet.com*, 273 F.3d at 231. In *TheStreet.com*, the Court concluded that the *Martindell* presumption against access did not apply to the protective order at issue because the deponents, unlike in *Martindell*, had not provided their depositions in reasonable reliance on the protective order. *Id.* at 233. Absent such reliance, the *Martindell* standard "never came into play," and therefore the lower court's decision to modify the order after balancing the parties' interests was within the scope of its discretion. *Id.* at 234.

Id. at 318. The *EPDM* court described the factors used to consider whether the parties have reasonably relied on a protective order:

> Application of the *Martindell* presumption against modification depends on the nature of the protective order and whether it invited reasonable reliance by a party or deponent. An examination of Second Circuit case law reveals the following factors are relevant when determining whether a party has reasonably relied on the protective order: (1) the scope of the protective order; (2) the language of the order itself; (3) the level of inquiry the court undertook before granting the order; and (4) the nature of reliance on the order. Additional considerations that may influence a court's decision to grant modification include: the type of discovery materials the collateral litigant seeks and the party's purpose in seeking a modification. Given the wide variety of protective orders in operation, the more flexible approach to modification emphasized by *TheStreet.com* is sensible.

Id. at 318–19.

Under Second Circuit law, the type of protective order under consideration affects the determination of whether the parties reasonably relied upon it:

> When considering a motion to modify, it is relevant whether the order is a blanket protective order, covering all documents and

> testimony produced in a lawsuit, or whether it is specifically focused on protecting certain documents or certain deponents for a particular reason. A blanket protective order is more likely to be subject to modification than a more specific, targeted order because it is more difficult to show a party reasonably relied on a blanket order in producing documents or submitting to a deposition. "Although such blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification." Stipulated blanket orders are even less resistant to a reasonable request for modification.

Id. at 319. (internal citations omitted).

Parties also may not reasonably rely on a protective order that expressly limits its applicability: "Where a protective order contains express language that limits the time period for enforcement, anticipates the potential for modification, or contains specific procedures for disclosing confidential materials to non-parties, it is not reasonable for a party to rely on an assumption that it will never be modified." *Id.* at 320 (citing *TheStreet.com*, 273 F.3d at 231). Further, "[e]xpress provisions of an order permitting non-parties to seek access to the protected materials will diminish the reasonableness of reliance a party claims to place on the order's permanent secrecy." *EPDM*, 255 F.R.D. at 320. "Courts evaluating the language of stipulated agreements between the parties must interpret the order 'as its plain language dictates.'" *Id.* (citation omitted).

In addition, the modification analysis in the Second Circuit considers the extent to which the district court examined the protective order initially:

> Whether a protective order is entitled to *Martindell's* strong presumption against modification is also dependent upon the circumstances surrounding its grant, i.e., how much consideration the court gave to the request for a protective order before granting it. A protective order granted on the basis of a stipulation by the parties carries less weight than a protective order granted after a hearing to show good cause.
>
> The heightened *Martindell* "extraordinary circumstances" standard applies where a court has already "considered each document in the first instance according to a 'good cause' standard" and is not appropriate in cases with stipulated protective orders that grant parties "open-ended and unilateral deference" to protect whichever discovery materials they choose.

Id. at 321 (internal citations omitted).

Further, the modification analysis considers the degree of reliance, such as whether a party produced documents it was not required to produce in reliance on the provisions of a protective order:

> Where a party or deponent, in reliance on the protective order, gives up its right to refuse to testify, or to produce documents it would not otherwise be compelled to produce, the heightened *Martindell* presumption against modification naturally applies. "The extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case."

Id. at 322 (citation omitted). The court further explained:

> Conversely, where the parties have not given up any rights and indeed would have been compelled to produce the discovery materials even in the absence of a protective order, the presumption against modification is not as strong. In such cases, the protective order has been granted to parties concerned about disclosing non-public information and as a convenience to avoid time-consuming discovery disputes and document-by-document good cause showings.

Id. at 323.

Finally, the *EPDM* court discussed several other factors relevant to the modification analysis:

> Although the type of materials sought by an intervenor does not affect the nature of reliance on the protective order by the existing parties, it is another important factor for a court to consider when deciding a motion to modify. Whether the collateral litigant could retrieve the same materials in question through its own discovery requests or whether it is attempting to subvert a limitation on discovery, such as the close of the factual record, should be taken into account. Certainly if the litigant could access the same materials and deposition testimony by conducting its own discovery, it is in the interest of judicial efficiency to avoid such duplicative discovery. *See* 8 WRIGHT & MILLER § 2044.1 (noting that modification in these situations prevents litigants from having to "reinvent the wheel"). However, if the intervenor is seeking to circumvent limitations on its ability to conduct discovery in its own case or to gain access to materials it would otherwise have no right to access, a court should refuse to modify the protective order.

Id. at 324 (citation omitted). The court also concluded that the purpose for which modification is sought is a factor to be considered:

> A litigant's *purpose* in seeking modification of an existing protective order is also relevant for determining whether to grant a modification. Requests to modify protective orders so that the public may access discovery materials is arguably subject to a more stringent presumption against modification because there is no public right of access to discovery materials. *TheStreet.com*, 273 F.3d at 233. In the absence of a compelling need for the public to access sealed documents, courts have generally been reluctant to disturb discovery protective orders for public dissemination.

EPDM, 255 F.R.D. at 324.

THIRD CIRCUIT

Standard for Entering a Protective Order

- The Third Circuit has stated:

> A party seeking a protective order over discovery materials must demonstrate that "good cause" exists for the protection of that material. FED. R. CIV. P. 26(c); *Pansy* [*v. Borough of Stroudsburg*,] 23 F.3d [772,] 786 [(3d Cir. 1994)]. "Good cause" is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. *Id.* Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice. *Id.*

Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995). The *Glenmede* court set forth factors that it described as "neither mandatory nor exhaustive," that could be considered in determining whether "good cause" exists for granting a protective order. *Id.* These factors include:

> 1) whether disclosure will violate any privacy interests;
>
> 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
>
> 3) whether disclosure of the information will cause a party embarrassment;
>
> 4) whether confidentiality is being sought over *information important to public health and safety*;

> 5) whether the sharing of information among litigants will promote fairness and efficiency;
>
> 6) whether a party benefitting from the order of confidentiality is a public entity or official; and
>
> 7) whether the case involves issues important to the public.

Id. (citing *Pansy*, 23 F.3d at 787–91) (internal quotation marks omitted) (emphasis added).

The *Glenmede* court "recognized that the district court is best suited to determine what factors are relevant to the dispute," but "cautioned that the analysis should always reflect a balancing of private versus public interests." *Id.*; *see also Shingara v. Skiles*, 420 F.3d 301, 308 (3d Cir. 2005) ("*Pansy* emphasized that a court always must consider the public interest when deciding whether to impose a protective order.") (citation omitted).

The *Glenmede* court also recognized the importance of open court proceedings, particularly to allow those who may have related claims to observe the proceedings, stating:

> Federal courts should not provide a shield to potential claims by entering broad protective orders that prevent public disclosure of relevant information. The sharing of information among current and potential litigants is furthered by open proceedings. . . . Absent a showing that a defined and serious injury will result from open proceedings, a protective order should not issue.

Glenmede, 56 F.3d at 485 (footnote omitted).

Glenmede emphasized the importance of judicial oversight to ensure that information that is appropriately in the public domain remains accessible, rejecting a rule that would require the issuance of protective orders to protect privileged materials sought in discovery until all avenues of appeal are exhausted because "[s]uch a rule would be tantamount to permitting the parties to control the use of protective orders." *Id.* (footnote omitted).

- Another Third Circuit case has explained:

> In the context of discovery, it is well-established that a party wishing to obtain an order of protection over discovery material must demonstrate that "good cause" exists for the order of protection. FED. R. CIV. P. 26(c); *Smith v. Bic Corp.*, 869 F.2d 194, 199 (3d Cir. 1989). . . . Protective orders over discovery materials and orders of confidentiality over matters relating to other stages of litigation have comparable features and raise similar public policy concerns. All such orders are intended to offer litigants a measure of privacy, while

> balancing against this privacy interest the public's right to obtain information concerning judicial proceedings. Also, protective orders over discovery and confidentiality orders over matters concerning other stages of litigation are often used by courts as a means to aid the progression of litigation and facilitate settlements. Protective orders and orders of confidentiality are functionally similar, and require similar balancing between public and private concerns. We therefore exercise our inherent supervisory power to conclude that whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order. *Cf. City of Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991) ("We do not . . . give parties *carte blanche* either to seal documents related to a settlement agreement or to withhold documents they deem so 'related.' Rather, the trial court—not the parties themselves—should scrutinize every such agreement involving the sealing of court papers and [determine] what, if any, of them are to be sealed, and it is only after very careful, particularized review by the court that a Confidentiality Order may be executed.").

Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994) (footnote omitted). The court continued:

> "Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not support a good cause showing. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976, 108 S. Ct. 487, 98 L. Ed. 2d 485 (1987). The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order. *Id.* at 1122.

Id. at 786–87. The court elaborated:

> In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 432–33 (1991). The balancing conducted in the discovery context should be applied by courts when considering whether to grant confidentiality orders at any stage of litigation, including settlement:

> [T]he court . . . must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.
>
> Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should "be disclosed only in a designated way," as authorized by the last clause of Rule 26(c)(7) . . . . Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.

Id. at 787 (quoting Miller, *supra*, 105 HARV. L. REV. at 433–35 (footnotes omitted)).

The court noted the need for flexibility in analyzing requests for protective orders:

> The factors discussed above are unavoidably vague and are of course not exhaustive. Although the balancing test discussed above may be criticized as being ambiguous and likely to lead to unpredictable results, we believe that such a balancing test is necessary to provide the district courts the flexibility needed to justly and properly consider the factors of each case.
>
> Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overly broad use of [confidentiality] orders and the unnecessary denial of confidentiality for information that deserves it . . . .

Id. at 789 (quoting Miller, *supra*, 105 HARV. L. REV. at 492).

Standard for Entering a Sealing Order

- The Third Circuit has recognized a right of public access to judicial proceedings, *see, e.g.*, *In re Cendant Corp. v. Forbes*, 260 F.3d 183, 192 (3d Cir. 2001), and has explained that "[t]he status of a document as a 'judicial record,' . . . depends on whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings," *id.* The *Cendant* court explained that sealing parts of the judicial record requires a particularized showing:

> In order to override the common law right of access, the party seeking the closure of a hearing or the sealing of part of the judicial record "bears the burden of showing that the material is the kind of information that courts will protect" and that "disclosure will work a clearly defined and serious injury to the party seeking closure." In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient. As is often the case when there are conflicting interests, a balancing process is contemplated. "[T]he strong common law presumption of access must be balanced against the factors militating against access. The burden is on the party who seeks to overcome the presumption of access to show that the interest in secrecy outweighs the presumption."

Id. at 194 (internal citations omitted). The *Cendant* court emphasized that in the limited circumstances in which sealing is warranted, the seal should be lifted as soon as practicable: "Even if a sealing order was proper at the time when it was initially imposed, the sealing order must be lifted at the earliest possible moment when the reasons for sealing no longer obtain." *Id.* at 196.

Standard for Modifying a Protective Order

- In *Pansy*, the Third Circuit explained that in considering whether to modify a protective order, the court must evaluate the degree of reliance by the parties on the order. *Pansy*, 23 F.3d at 789 ("In determining whether to *modify* an already-existing confidentiality order, the parties' reliance on the order is a relevant factor."). The court recognized that the various circuits accord different weight to the parties' reliance as a factor in determining whether modification of a protective order is appropriate. *See id.* The court noted that the Second Circuit had "announced a stringent standard for modification, holding that a confidentiality order can only be modified if an extraordinary circumstance or compelling need warrants the requested modification." *Id.* (citations omitted). The court also noted that "[o]ther courts of appeals have rejected this stringent standard, [and] have held that a more lenient test for modification applies, but have failed to articulate precisely what that standard is." *Id.* (citations omitted). The Third Circuit determined that a standard less stringent than the Second Circuit's approach was appropriate:

> We agree with these courts that the standard of the Court of Appeals for the Second Circuit for modification is too stringent. The appropriate approach in considering motions to modify confidentiality orders is to use the same balancing test that is used in determining whether to grant such orders in the first instance, with one difference: one of the factors the court should consider in determining whether to modify the order is the reliance by the original parties on the confidentiality order. The parties' reliance on an order, however, should not be outcome determinative, and should only be one factor that a court considers when determining whether to modify an order of confidentiality.

Id. at 790 (footnote omitted). The court continued:

> The extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case. For instance, reliance would be greater where a trade secret was involved, or where witnesses had testified pursuant to a protective order without invoking their Fifth Amendment privilege . . . .
>
> . . . Reliance will be less with a blanket order, because it is by nature overinclusive.

Id. at 790 (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475–76 (9th Cir. 1992)) (internal quotation marks omitted). The court also emphasized that parties could not rely on a protective order that was not properly granted in the first place:

> "[R]eliance on [confidentiality] orders [will] not insulate those orders from subsequent modification or vacating if the orders were improvidently granted *ab initio* . . . . [N]o amount of official encouragement and reliance thereon could substantiate an unquestioning adherence to an order improvidently granted." "Improvidence in the granting of a protective order is [a] justification for lifting or modifying the order." It would be improper and unfair to afford an order presumptive correctness if it is apparent that the court did not engage in the proper balancing to initially determine whether the order should have been granted.

Id. (internal citations omitted).

The court set out the following procedure for determining whether to modify a protective order:

> The party seeking to modify the order of confidentiality must come forward with a reason to modify the order. Once that is done, the court should then balance the interests, including the reliance by the original parties to the order, to determine whether good cause still exists for the order.
>
> If access to protected [material] can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted. Even then, however, the movant should not be saddled with a burden more onerous than explaining why his need for the materials outweighs existing privacy concerns.

Pansy, 23 F.3d at 790.

Finally, the *Pansy* court explained that an additional factor was relevant to the facts of that case:

> [W]here [a governmental entity] is a party to litigation, no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of [government] records to the public under [state and federal freedom of information laws]. An order binding [governmental entities] shall be narrowly drawn to avoid interference with the rights of the public to obtain disclosure of [government] records and shall provide an explanation of the extent to which the order is intended to alter those rights.

Id. at 791 (quoting Janice Toran, *Secrecy Orders and Government Litigants: "A Northwest Passage Around the Freedom of Information Act"?*, 27 GA. L. REV. 121, 182 (1992)) (quotation marks omitted). The court held that "where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality whose scope would prevent disclosure of that information pursuant to the relevant freedom of information law. In the good cause balancing test, this strong presumption tilts the scales heavily against entering or maintaining an order of confidentiality. To avoid complicated inquiries as to whether certain information would in fact be available under a freedom of information law, courts may choose to grant conditional orders." *Id.* The court explained that "[n]either the interests of parties in settling cases, nor the interests of the federal courts in cleaning their dockets, can be said to outweigh the important values manifested by freedom of information laws." *Id.* at 792.

- In *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005), the Third Circuit explained that after a court enters a protective order, "there must be good cause to maintain the order in the face of a motion to vacate it, particularly when, as here, the moving party did not have an opportunity to oppose the entry of the protective order in the first instance."

- One district court in the Third Circuit, in considering a request for modification of a protective order to provide more protection than originally granted, explained that the Third Circuit requires good cause to modify a protective order, rather than the more stringent "extraordinary circumstances" or "compelling need" required by the Second and Sixth Circuits. *See Green, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, L.L.C.*, No. Civ. A. 00-3058, 2002 WL 32349383, at *2 (E.D. Pa. Feb. 6, 2002). In addition to the factors considered for granting a protective order, the court considered "the interests of fairness and efficiency and the parties' reliance on the protective order." *See id.* at *4.

- Another district court discussed the various factors from *Pansy* in considering a request to modify a protective order. The court explained:

  > Two factors to consider are (i) whether the information sought is important to the public's health and safety, and (ii) whether it involves any legitimate public concern. If the parties or issues are of a public nature, and are matters of legitimate public concern, that should be a factor weighing in favor of disclosure. On the other hand, "[w]here the parties are private, the right to rely on confidentiality in their dealings is more compelling than where a government agency is involved[.]"

  Damiano v. Sony Music Entm't, Inc., 168 F.R.D. 485, 491 (D.N.J. 1996) (internal citations omitted). The court also considered whether the party benefitting from the confidentiality order was a public entity or official and whether sharing the information would promote fairness and efficiency among the litigants. *Id.* at 491–92. The court also considered the purpose for which confidentiality was sought, and concluded that seeking to use "raw discovery materials for financial profit is not what this court considers to be a legitimate purpose for disclosure." *Id.* at 492. Finally, the court considered whether the parties had reasonably relied upon the protective order. *Id.* at 492–93.

- Another court explained that the standard used by the Seventh Circuit in *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980), is the appropriate standard for evaluating a request to modify a protective order:

  > [W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the

> party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order. (citations omitted).

Koprowski v. Wistar Inst. of Anatomy and Biology, No. Civ. A. 92-CV-1182, 1993 WL 332061, at *2 (E.D. Pa. Aug. 19, 1993) (quoting *Jochims v. Isuzu Motors, Ltd.*, 148 F.R.D. 624, 630 (S.D. Iowa 1993) (quoting *Wilk*, 635 F.2d at 1299)) (quotation marks omitted). The court concluded:

> This standard is consistent with the purpose of the federal rules to "secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1. Courts have favored promotion of full disclosure through discovery to meet the needs of parties in pending litigation.
>
> Accordingly, in applying the *Wilk* standard, a court must weigh potential prejudice, if any, against the benefits of modification of the confidentiality agreement.

Id. (internal citations omitted). The court also pointed out that "[t]he extent to which a party can rely on a protective order or confidentiality agreement should depend on the extent to which the order induced the party to allow discovery or to settle the case." *Id.* The court found it relevant that the intervenors seeking modification had agreed to use the information in accordance with the protective order provisions, disposing of the threat of dissemination, and disposing of the argument that modification would undermine the plaintiffs' reliance. *Id.* The court found that modification was appropriate, concluding that "[t]he potential benefits to intervenors from modification of the confidentiality agreement—against which must be weighed plaintiff's potential prejudice—is the saving of time and expense which may be achieved by avoiding duplicative discovery." *Id.* at *3 (citations omitted).

FOURTH CIRCUIT

Standard for Entering a Protective Order

- A district court in the Fourth Circuit has explained:

> Under Rule 26(c) of the Federal Rules of Civil Procedure, a court may enter a protective order upon motion of a party or persons from whom discovery is sought. In order to obtain a protective order, the party requesting the protective order must show good cause. *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 412 (M.D.N.C. 1991). The request for a protective order must be based on a specific demonstration of facts rather than speculative statements about the

> need for a protective order and generalized claims of harm. *Gulf Oil v. Bernard*, 452 U.S. 89, 102 n.16 (1981). "This requirement furthers the goal that the court grant as narrow a protective order as is necessary under the facts." *Brittain*, 136 F.R.D. at 412.

Vallejo v. Alan Vester Auto Group, Inc., No. 5:07-CV-343-BO, 2008 WL 4610233, at *2 (E.D.N.C. Oct. 16, 2008).

Standard for Entering a Sealing Order

- In determining whether to seal court documents, the Fourth Circuit has differentiated between a common law presumption in favor of access, which "attaches to all 'judicial records and documents,'" and a First Amendment guarantee of access, which "has been extended only to particular judicial records and documents." *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988) (citations omitted). "The common law presumption of access may be overcome if competing interests outweigh the interest in access . . . ." *Id.* (citations omitted). "Where the First Amendment guarantees access, on the other hand, access may be denied only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest." *Id.* The court explained that the procedure for weighing competing interests in entering an order to seal judicial documents was set forth in *In re Knight Publishing Co.*, 743 F.2d 231 (4th Cir. 1984):

> Under *Knight*, a court must first give the public notice of a request to seal and a reasonable opportunity to challenge it. While individual notice is unwarranted, the court must notify persons present in the courtroom of the request, or docket it "reasonably in advance of deciding the issue." The court must consider less drastic alternatives to sealing and, if it decides to seal documents, must "state the reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing in order to provide an adequate record for review."

Stone, 855 F.2d at 181 (internal citations omitted).

Standard for Modifying a Protective Order

- A court within the Fourth Circuit has explained the factors to consider in evaluating a request for a protective order:

> A number of factors may be employed to help guide a court in exercising its discretion as to whether to modify a protective order. These factors include: the reason and purpose for a modification, whether a party has alternative means available to acquire the information, the type of protective order which is at issue, and the

type of materials or documents which are sought.

SmithKline Beecham Corp. v. Sunthon Pharms. Ltd., 210 F.R.D. 163, 166 (M.D.N.C. 2002). The court found that "[t]he party seeking to modify a protective order bears the burden of showing good cause for the modification."[2] *Id.* (citing *TheStreet.com*, 273 F.3d at 229); *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 342 (S.D. Iowa 1993)). The court also noted that some courts have applied a stringent standard to modification. *See id.* ("Some courts even require a showing of compelling need, improvidence in consenting to the order, or some extraordinary circumstance.") (citations omitted). The court added that many courts have found sufficient need for modification where modification would avoid duplicative discovery, focusing on "the considerable efficiency and savings of time and effort in avoiding duplicative discovery." *Id.* (citing *Beckman Indus.*, 966 F.2d 470; *United Nuclear*, 905 F.2d 1424; *Jochims*, 148 F.R.D. 624, *as modified*, 151 F.R.D. 338).

The court noted that even when a collateral litigant needs documents to avoid duplicative discovery, that litigant would need to show an inability to obtain the information by alternative means. *Id.* The court explained:

> A court should be hesitant to modify protective orders for matters unrelated to the litigation in front of it because otherwise, in the long run, parties may begin to distrust protective orders. Discovery, in turn, will become more complicated and expensive and settlements will be more difficult. *S.E.C.*, 273 F.3d at 230. A natural feeling of unfairness arises when the rules are modified during the middle of the game, especially without very good cause. *Id.* Second, modifying protective orders for other litigation involves re-litigation over issues that have nothing to do with the lawsuit in front of the court. *Jochims*, 151 F.R.D. at 343. This burdens both the court and the parties. *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 334 (M.D.N.C. 1999) (modification for ulterior purpose); *Jochims*, 151 F.R.D. at 343 (allowing modification but setting cut-off date for continued litigation). Such modifications involve the court in a controversy with which it is not familiar and over which it lacks control. *United Nuclear*, 905 F.2d at 1428 ("district court must refrain from issuing discovery orders applicable only to collateral litigation."). The court in which the matter is pending will be in a better position to make rulings and the third party will have greater control when it is directly involved in that controversy. For these reasons, alternative means of obtaining the information should be

[2] The court was considering a request by the plaintiffs to modify a stipulated, blanket protective order. It is unclear if the court would require the party seeking modification to show good cause for modification if modification of a stipulated order were requested by a party who had not agreed to a stipulated protective order.

> sought prior to attempting to modify a protective order entered in another case.

Id. at 166–67. The court described additional factors relevant to the analysis:

> In addition to the good cause and alternative means factors, the type of protective order sought to be modified has a direct bearing on the decision to modify. If the protective order has been entered upon an actual finding that the information falls within Rule 26(c) protection, great care should be exercised before modifying a protective order for use outside of the litigation and the court's control. A blanket protective order, on the other hand, often is nothing more than a FED. R. CIV. P. 29 stipulation between the parties to keep discovery confidential. A party's claimed reliance on such orders to protect confidentiality is, consequently, less than if the party had to make an actual or particular showing of confidentiality in order to obtain the protective order. Therefore, when the modification involves a blanket protective order, the nature of the document which is sought assumes even greater importance.
>
> The type of documents or information which will be revealed by the modification to the protective order directly bears on the decision to modify. To the extent that the documents are so-called "judicial documents," any presumption in favor of maintaining confidentiality must now contend with a presumption in favor of public access. While the parameters for defining a judicial document may not be entirely set, there appears to be agreement that it does not arise from the mere filing of papers or documents, but only those used, submitted and relied upon by the court in making its decision. And, even as to judicial documents, the court must balance the confidentiality concerns of law enforcement, the private interests of innocent third parties, and the parties themselves.

SmithKline Beecham, 210 F.R.D. at 167 (internal citations and footnote omitted). The court added: "When the document or information does not fall under the judicial document category, the court may look to the reasonableness of a party's reliance on maintaining confidentiality under a protective order." *Id.* The court noted that "nothing else appearing, a court may presume that any production of documents or information under a protective order has been in reasonable reliance on that order," but that "[f]acts, of course, may dispel this presumption." *Id.* The court further explained:

> For example, greater credence may be given to reliance on the confidentiality of settlement protective orders as opposed to more temporary pretrial ones. On the other hand, when the documents at

> issue do not likely involve highly confidential information, and/or the reason opposing disclosure is mainly the desire to make litigation more difficult, opposition to modification carries less weight. And, the wholesale release of documents creates problems when doing so impinges on a wide variety of confidentiality, from trade secrets to less confidential business information. The burden of reviewing such a wholesale request constitutes grounds for denying the same.

Id. at 167–68 (internal citations omitted). The court concluded by noting that while avoiding duplicative discovery can be a proper ground for modifying a protective order, it "should, in most cases, be the last resort of a party, not the first." *Id.* at 169.

- Another case noted that a court must be careful to protect the parties' reliance on a protective order, stating:

> [U]nless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding. The reality seems obvious: for protective orders to be effective, litigants must be able to rely on them.

State Auto Mutual Ins. Co. v. Davis, No. 2:06-cv-00630, 2007 WL 2670262, at *2 (S.D. W. Va. Sept. 7, 2007) (quoting *SRS Techs., Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 529 (N.D. Ala. 2003) (quoting Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 499–501 (1991))).

- In another case, the court assumed that only good cause was required to modify a protective order, and explained that whether the burden of showing good cause rested with the party seeking modification or with the party seeking confidentiality depends on the showing made when the order was entered. *See Factory Mut. Ins. Co. v. Insteel Indus., Inc.*, 212 F.R.D. 301, 303 (M.D.N.C. 2002) ("'The standard for modifying a protective order depends on whether the parties were required to demonstrate good cause for the issuance of the order, whether the parties relied on the order, and whether the parties stipulated to the terms of the order.'") (quoting *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 333 (M.D.N.C. 1999)). The court stated: "If good cause were not required to be shown when the order was initially entered, the party who later seeks to prevent disclosure of the information bears the burden of showing good cause. If good cause were shown initially, however, the party seeking to modify the order must show good cause." *Id.* (internal citation omitted). The *Factory Mutual Insurance* court found that because the parties and a nonparty had entered into a stipulated protective order, they had "'implicitly acknowledged' that there was good cause for protecting" the information at issue, and the court held that the party seeking to lift the

protective order therefore bore the burden of showing good cause to modify the order. *Id.* at 304. The court also noted that "when the party seeking modification stipulated to the terms of the order, courts have treated the issue of showing good cause differently." *Id.* at 304 n.2 (citations omitted); *see also Longman*, 186 F.R.D. at 334 ("It is not appropriate to allow a party to agree to a protective order, only to attempt to undo their agreement at the last possible moment."); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987) ("When, however, the proposed modification affects a protective order stipulated to by the parties, as opposed to one imposed by the court, it is clear that the shared and explicit assumption that discovery was for the purposes of one case alone goes a long way toward denying the movant's request without more."). The *Factory Mutual Insurance* court also noted that it was "even more apparent" that the party seeking modification was required to show good cause because "this issue is treated differently when modification is sought for purely investigative purposes in which no actual litigation is involved." 212 F.R.D. at 305. The court explained that "[i]n such a case, modification of the protective order is less likely to be granted, in part because the absence of any pending litigation diminishes the likelihood that costly and time-consuming discovery will be avoided." *Id.* (footnote and citation omitted). The court noted that the situation would be different if it were clear that modification of the protective order would avoid duplicative discovery in another case, relying on the standard set out by the Seventh Circuit. *See id.* at 305 n.4 ("Modification of protective orders may be appropriate if repetition of discovery could be avoided without tangibly prejudicing the substantial rights of another party.") (citing *Wilk*, 635 F.2d at 1299). The court found that good cause for modification was lacking and that "[r]epetition of discovery is simply unavoidable when a party . . . seeks to modify or to vacate a protective order solely to investigate possible collateral litigation." *Id.* at 306.

FIFTH CIRCUIT

Standard for Entering a Protective Order

- The Fifth Circuit has explained:

> Rule 26(c)'s requirement of a showing of good cause to support the issuance of a protective order indicates that "[t]he burden is upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements." *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); *see also* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER AND RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2035, at 483–86 (2d ed. 1994).

In re Terra Int'l Inc., 134 F.3d 302, 306 (5th Cir. 1998) (per curiam).

- A court within the Fifth Circuit has also stated:

> "Good cause" exists when disclosure will result in a clearly defined and serious injury to the party seeking the protective order. *Pansy*, 23 F.3d at 786. The litigant seeking a protective order must articulate the injury with specificity. "Broad allegations of harm, unsubstantiated by specific examples," do not support a showing of good cause. The burden of justifying a protective order remains on the litigant seeking the order. In determining good cause, the court must balance the risk of injury without the protective order and the requesting party's need for information. The court has wide discretion in determining the scope of a protective order.

Blanchard & Co., Inc. v. Barrick Gold Corp., No. 02-3721, 2004 WL 737485, at *5 (E.D. La. Apr. 5, 2004).

Standard for Entering a Sealing Order

- The Fifth Circuit has described the following standard for sealing court documents:

> Courts have recognized that the public has a common law right to inspect and copy judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978); *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423, 429 (5th Cir. 1981). However, the public's common law right is not absolute. *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312; *see Belo*, 654 F.2d at 430. "Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Nixon*, 435 U.S. at 598, 98 S. Ct. at 1312. Thus, the common law merely establishes a presumption of public access to judicial records. *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988). Although the common law right of access to judicial records is not absolute, "the district court's discretion to seal the record of judicial proceedings is to be exercised charily." *Federal Savings & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987).
>
> In exercising its discretion to seal judicial records, the court must balance the public's common law right of access against the interests favoring nondisclosure. *See Nixon*, 435 U.S. at 599, 602, 98 S. Ct. at 1312, 1314 (court must consider "relevant facts and circumstances of the particular case"); *Belo*, 654 F.2d at 434; *see also Bank of America Nat'l Trust v. Hotel Rittenhouse*, 800 F.2d 339, 344 (3d Cir. 1986) (court had duty to "balance the factors favoring secrecy against the common law presumption of access"); *Newman v. Graddick*, 696 F.2d 796, 803 (11th Cir. 1983) ("The historic

> presumption of access to judicial records must be considered in the balance of competing interests." (citing *Belo*)).

S.E.C. v. Van Waeyenberghe, 990 F.2d 845, 848 (5th Cir. 1993) (footnote omitted). The *Van Waeyenberghe* court found that the district court had abused its discretion in sealing court documents because there was no evidence that the district court balanced the competing interests prior to entering the sealing order, noting that the district court had not mentioned the presumption in favor of public access to judicial records and had not articulated any reasons that would support sealing the document at issue. *See id.* at 848–49.

The *Van Waeyenberghe* court also found a distinction between the public's right to information and the public's right to access judicial records:

> Although the public may have a right to the *information* that Schwartz was enjoined, that right cannot be equated with the public's right of access to *judicial records*. The public's right to information does not protect the same interests that the right of access is designed to protect. "Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness."

Id. at 849 (citations omitted).

- The Fifth Circuit has also explained that the right of public access to judicial records applies even in cases where the information may not be of particular interest to the public. In *Macias v. Aaron Rents, Inc.*, 288 F. App'x 913, 915 (5th Cir. 2008) (unpublished), the Fifth Circuit found that the district court had not abused its discretion by refusing to seal court documents because the concerns the party requesting sealing raised—"the lack of importance to the public and the potential for employer retaliation against litigious employees—could apply to nearly all cases filed in the federal courts, especially those involving title VII." The court continued: "If we were to decide that the court's determination here was an abuse of discretion, then the same argument could successfully be made by countless plaintiffs. Such a result, however, would be contrary to our statement that 'the district court's discretion to seal the record of judicial proceedings is to be exercised *charily*.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 848 (internal citations and quotations omitted)) (emphasis added by *Macias* court).

- A district court within the Fifth Circuit has explained the standard for sealing as follows:

> To determine whether to disclose or seal a judicial record, the Court must balance the public's common law right of access against interests favoring non-disclosure. *See S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993). "Courts have recognized that the

> public has a common law right to access judicial records and proceedings, although the right is not absolute." *Bahwell v. Stanley-Bostitch, Inc.*, No. Civ.A. 00-0541, 2002 WL 1298777, at *1 (E.D. La. June 10, 2002). "Public access serves important interests, such as 'to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of fairness.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 849). "Accordingly, 'the district court's discretion to seal the record of judicial proceedings is to be exercised charily.'" *Id.* (quoting *Van Waeyenberghe*, 990 F.2d at 848). Although countervailing interests may outweigh the right of public access, the party seeking to overcome the presumption of access bears the burden of showing that the interest in secrecy outweighs the presumption. *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir. 1993). The decision as to access is left to the discretion of the trial court, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978), but any doubt must be construed in favor of disclosure. *Marcus v. St. Tammany Parish Sch. Bd.*, No. Civ.A. 95-3140, 1997 WL 313418, at *5 (E.D. La. June 9, 1997) (citing *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994)). Finally, that no third party objects to the sealing of the records here is "inconsequential," because the presumption of openness does not depend on such an objection. *Stalnaker v. Novar Corp.*, 293 F. Supp. 2d 1260, 1263 (M.D. Ala. 2003); *see also Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it) . . .[.] [She] may not rubber stamp a stipulation to seal the record.") (internal citations omitted).

Jaufre ex rel. Jaufre v. Taylor, 351 F. Supp. 2d 514, 516 (E.D. La. 2005). In discussing possible interests that might outweigh the right to public access, the court stated that "[c]ourts have recognized that the privacy of children may constitute a compelling interest that outweighs the presumption in favor of public access." *Id.* (citations omitted). The court also noted that "[c]ourts have also recognized, however, that the public's interest in access to court records 'is particularly legitimate and important where, as in this case, at least one of the parties to the action is a public entity or official.'" *Id.* at 517 (citations omitted). The court emphasized that "[w]hen courts find that a privacy interest justifies restricting the public's access, they restrict access in a way that will minimize the burden on the public's right, such as by sealing or redacting only those records that contain sensitive information," *id.* at 517–18 (citations omitted), and that "'[a] blanket sealing order . . . would rarely, if ever, be appropriate,'" *id.* at 518 (quoting *T.K. and R.K. v. Waterbury Bd. of Ed.*, No. Civ.

303CV1747, 2003 WL 2290433, at *1 (D. Conn. Oct. 19, 2003)) (additional citation omitted). The court also recognized that where the public has already had access to documents, that is a factor weighing "in favor of continued public access." *Id.* (citation omitted); *see also Weiss v. Allstate Ins. Co.*, No. 06-3774, 2007 WL 2377119, at *5 (E.D. La. Aug. 16, 2007) ("[T]his Court has consistently refused to seal judicial records to which the public has already had access.") (citations omitted).

Standard for Modifying a Protective Order

- The Fifth Circuit has recognized that modification of a protective order to avoid duplicative discovery in collateral litigation should generally be permitted, but has emphasized that requests for modification should not be used simply to obtain documents that were not produced in discovery in another case because the more efficient course would be to obtain the discovery in the collateral case. *See Stack v. Gamill*, 796 F.2d 65, 68 (5th Cir. 1986) ("Discovery has already taken place in [the collateral litigation] and the [collateral] plaintiffs seek only to obtain documents which Tenneco allegedly failed to produce in that case. As the district court noted, requiring the [collateral] plaintiffs to move to compel discovery in their own case would not cause undue wastefulness; indeed, such a motion would be the most efficient way to obtain the desired discovery.").

- In a recent district court case, the court considered a party's request to modify a stipulated protective order to allow discovery for collateral litigation, and recognized several factors a court should consider in deciding whether to grant a request for modification:

> Parties may seek modification of a protective order to gain access to previously deemed confidential materials. The Fifth Circuit has "recognize[d] that protective order[s] should generally be modified to allow discovery in other actions . . . ." *Stack v. Gamill*, 796 F.2d 65, 68 (5th Cir. 1986). . . . .
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> . . . .
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> . . . The following factors should be considered in deciding whether to modify a protective order: "(1) the nature of the protective order, (2) the foreseeability, at the time of issuance of the order, of the modification requested, (3) the parties' reliance on the order[,] and most significantly[,] (4) whether good cause exists for the modification."

Schafer v. State Farm & Fire Cas. Co., No. 06-8262, 2009 WL 650263, at *2 (E.D. La. Mar. 11, 2009) (citations omitted); *accord Raytheon Co. v. Indigo Sys. Corp.*, No. 4:07-cv-109, 2008 WL 4371679, at *2 (E.D. Tex. Sept. 18, 2008) (listing same four factors for consideration in deciding whether to modify a protective order at the request of a party who originally agreed to the order); *Peoples v. Aldine Indep. Sch. Dist.*, No. 06-2818, 2008 WL

2571900, at *2 (S.D. Tex. June 19, 2008) (same); *Holland v. Summit Tech., Inc.*, No. Civ. A. 00-2313, 2001 WL 1132030, at *2 (E.D. La. Sept. 21, 2001) (same).

- In considering the same four factors listed in *Schafer*, another court elaborated:

> First, the court considers the nature of the protective order. Protective orders generally may be ascribed one of three labels. Specific protective orders are the narrowest type and cover specifically identified information. Umbrella protective orders are at the other end of the spectrum and provide for the designation of all discovery as protected without any screening by either the parties or the court. Blanket protective orders, which require the parties to designate as protected that information that each side reasonably believes to be particularly sensitive are common in litigation between direct competitors. Specific protective orders are the least susceptible to modification, umbrella protective orders are the most susceptible to modification, and blanket protective orders fall somewhere in between.

Raytheon, 2008 WL 4371679, at *2 (internal citations omitted). The court noted that although "blanket orders are moderately susceptible to modification," the fact that the parties had stipulated to the protective order weighed against modification. *Id.* The court continued:

> Foreseeability in this context consists of inquiry into "whether the need for modification was foreseeable at the time the parties negotiated the original stipulated protective order." . . . .
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> . . . .
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> The reliance factor focuses on the extent to which the party opposing the modification relied on the protective order in deciding the manner in which documents would be produced in discovery. It is important that litigants can place their confidence in the integrity of protective orders so that sufficient information passes between the parties "to secure the just, speedy, and inexpensive determination," FED. R. CIV. P. 1, of lawsuits while protecting from excess dissemination that which rightly should be.

Id. at *2–3 (internal citations omitted). The court explained that if the protective order is initially entered on a showing of good cause, the party seeking modification has the burden to establish good cause for modification. *See id.* at *3. The good cause inquiry involves balancing the need of the party requesting modification with the opposing party's need for protection, and requires taking into account available alternatives to modification. *Id.* Another court explained that "'[g]ood cause' in this context requires 'changed circumstances

or new situations' warranting modification of a protective order," and that "[g]ood cause includes the need to make information available for use in subsequent proceedings." *Peoples*, 2008 WL 2571900, at *3.

- In the context of a nonparty seeking to obtain documents subject to a protective order, another district court has explained that the Fifth Circuit has rejected the strict standard applied in the Second Circuit for modifying protective orders to provide access to discovery for collateral litigation. *See In re United States' Motion to Modify Sealing Orders*, No. 5:03-MC-2, 2004 WL 5584146, at *3 (E.D. Tex. June 8, 2004) (explaining that the "extraordinary circumstances" test for modification used by the Second Circuit in *Martindell* "has not prevailed in the arena of ideas," and stating that "'[w]hatever the status of the Second Circuit view, the prevailing approach is more flexible, calling for a balancing test that accords substantial importance to avoiding repetitive discovery.'") (quoting 8 CHARLES A. WRIGHT, ARTHUR R. MILLER, & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2044.1 (2d ed. 1994)). The court found that determining which party or nonparty bears the burden of showing good cause depends on the public interest in the case: "The criterion for modification of a protective order by a nonparty seeking to obtain access to information of public interest is a 'good cause' standard. When the case is of great interest to the public and media, the courts refuse to shift the burden to the party seeking to modify the protective order. Instead, the party seeking to maintain confidentiality must show good cause for continued protection." *Id.* at *2.

The court explained the more flexible approach adopted by the Fifth Circuit, *see id.* at *3 ("[T]he Fifth Circuit embraces a flexible approach towards the modification of protective orders."), and noted that the Fifth Circuit has relied on the approach stated in *Wilk v. American Medical Association*, 635 F.2d 1295 (7th Cir. 1980). The court stated:

> [W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.

Motion to Modify Sealing Orders, 2004 WL 5584146, at *4 (quoting *Wilk*, 635 F.2d at 1299 (certain citations omitted)) (quotation marks omitted); *accord Bell v. Chrysler Corp.*, No. 3:99-CV-0139-M, 2002 WL 172643, at *2 (N.D. Tex. Feb. 1, 2002). Another court elaborated that "[t]he clear majority of courts utilizing the test for modification of protective orders set out in *Wilk* have allowed liberal modification. However, in most instances where modification is allowed there has been no discovery in the collateral action and the court is thus reluctant to require wasteful and needlessly repetitive discovery." *Forest Oil Corp v. Tenneco*, 109 F.R.D. 321, 322 n.2 (S.D. Miss. 1985) (citing *Phillips Petroleum Co. v.*

Pickens, 105 F.R.D. 545, 551 (N.D. Tex. 1985)), *appeal dismissed for lack of jurisdiction*, *Stack v. Gamill*, 796 F.2d 65 (5th Cir. 1986).

- Another court has explained that in cases involving a large amount of discovery, courts can enter umbrella protective orders and delay findings of good cause as to particular documents until confidentiality designations are challenged: "'[B]ecause of the benefits of umbrella protective orders in cases involving large-scale discovery, the court may construct a broad umbrella protective order upon a threshold showing by the movant of good cause. After delivery of the documents, the opposing party would have the opportunity to indicate precisely which documents it believed not to be confidential, and the party seeking to maintain the seal would have the burden of proof with respect to those documents.'" *Holland v. Summit Tech., Inc.*, No. Civ. A. 00-2313, 2001 WL 1132030, at *2 (E.D. La. Sept. 21, 2001) (quoting *Pansy*, 23 F.3d at 787 n.17).

SIXTH CIRCUIT

Standard for Entering a Protective Order

- The Sixth Circuit has emphasized that public access to pretrial discovery documents is limited:

> The Supreme Court has directly addressed the constitutionality of orders limiting access to the fruits of discovery in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). . . . The Supreme Court observed that "an order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny," 467 U.S. at 33, 104 S. Ct. at 2208, because "such a protective order prevents a party from disseminating only that information obtained through use of the discovery process." *Id.* at 34, 104 S. Ct. [at] 2208. Pretrial discovery, the Court stated, is traditionally subject to the control and discretion of the trial judge, and ordinarily proceeds as a private interchange between the parties, the fruits of which are not presumptively public. Accordingly, any judicial review of protective orders entered in the discovery context must take into account "the unique position that such orders occupy in relation to the First Amendment." *Id.* Concluding that "[t]he unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders," *id.* at 36, 104 S. Ct. at 2209, the *Seattle Times* Court held:
>
> > [W]here, as in this case, a protective order is entered on a showing of good cause, . . . is limited to the context of pretrial civil discovery, and does not

> restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

In re Courier-Journal v. Marshall, 828 F.2d 361, 364 (6th Cir. 1987) (quoting *Seattle Times*, 467 U.S. at 37).

The *Courier-Journal* court rejected a news organization's "claim of a first amendment right of access to the fruits of discovery" as "unavailing." *Id.* at 366. The court approved of the protective orders at issue because they were "'limited to the context of pretrial civil discovery,' and they did not 'restrict the dissemination of the information if gained from other sources,'" *id.* at 367 (quoting *Seattle Times*, 467 U.S. at 37), and because the orders were entered on a showing of "good cause," "after fairly balancing the very limited right of access the press has to the presumptively nonpublic fruits of civil discovery against the right of civil rights plaintiffs to obtain discovery . . . over a claimed privilege based on first amendment associational rights." *Id.*

- The Sixth Circuit has also stated the standard as follows:

> Rule 26 of the Federal Rules of Civil Procedure permits courts to issue a protective order, if justice requires and to protect individuals from "annoyance, embarrassment, oppression, or undue burden or expense" (FED. R. CIV. P. 26(c)). The burden of establishing good cause for a protective order rests with the movant. *See General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). "To show good cause, a movant for a protective order must articulate specific facts showing 'clearly defined and serious injury' resulting from the discovery sought and cannot rely on mere conclusory statements." *Avirgan v. Hull*, 118 F.R.D. 252, 254 (D.D.C. 1987) (citations omitted).

Nix v. Sword, 11 F. App'x 498, 500 (6th Cir. 2001) (unpublished) (per curiam).

<u>Standard for Entering a Sealing Order</u>

- The Sixth Circuit has explained that while a court may have some discretion to seal court documents, that discretion is limited by "long-established legal tradition." *Brown & Williamson Tobacco Corp. v. Fed. Trade Comm'n*, 710 F.2d 1165, 1177 (6th Cir. 1983). The court explained that "[t]he English common law, the American constitutional system, and the concept of the 'consent of the governed' stress the 'public' nature of legal principles and decisions." *Id.* (footnote omitted). The court analyzed the Supreme Court's decision in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which discussed the history behind the right of access to legal proceedings. *See Brown & Williamson*, 710 F.2d at 1178. The *Brown & Williamson* court described the policies emphasized by the Supreme Court in

Richmond Newspapers:

> The Supreme Court's historical argument is based on policy considerations developed in the past that remain valid today. First, public trials play an important role as outlets for "community concern, hostility, and emotions." *Richmond Newspapers*, *supra*, 448 U.S. at 571, 100 S. Ct. at 2824. When judicial decisions are known to be just and when the legal system is moving to vindicate societal wrongs, members of the community are less likely to act as self-appointed law enforcers or vigilantes. "The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is 'done in a corner [or] in any covert manner.'" *Id.* at 571, 100 S. Ct. at 2824.
>
> Second, public access provides a check on courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court. The remedies or penalties imposed by the court will be more readily accepted, or corrected if erroneous, if the public has an opportunity to review the facts presented to the court. In his concurrence, Justice Brennan emphasized this link between access to the courtroom and the popular control necessary in our representative form of government. *Id.* at 592, 100 S. Ct. at 2835. Although the federal judiciary is not a majoritarian institution, public access provides an element of accountability. One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion.
>
> Finally, Justice Brennan points out that open trials promote "true and accurate fact finding." *Id.* at 596, 100 S. Ct. at 2838. When information is disseminated to the public through the media, previously unidentified witnesses may come forward with evidence. Witnesses in an open trial may be less inclined to perjure themselves. Public access creates a critical audience and hence encourages truthful exposition of facts, an essential function of a trial.

Id. (some internal citations omitted). *Brown & Williamson* concluded that "[t]he Supreme Court's analysis of the justifications for access to the criminal courtroom apply as well to the civil trial." *Id.*

However, the court noted that "[t]he right of access is not absolute . . . , despite these justifications for the open courtroom." *Id.* at 1179. The court explained courts have made several exceptions to the strong presumption of access, which it stated fall into the categories of "those based on the need to keep order and dignity in the courtroom and those which

center on the content of the information to be disclosed to the public." *Id.* With respect to the first category, the court stated that regulations on access "must pass the following three-part test: that the regulation serve an important governmental interest; that this interest be unrelated to the content of the information to be disclosed in the proceeding; and that there be no less restrictive way to meet that goal." *Brown & Williamson*, 710 F.2d at 1179 (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)). With respect to the second category, the court found that "content-based exceptions to the right of access have been developed to protect competing interests," and that "[i]n addition to the defendant's right to a fair trial, these interests include certain privacy rights of participants or third parties, trade secrets and national security." *Id.* (citations omitted). The court concluded that harm to a company's reputation is not sufficient to warrant sealing. *Id.*

The court held that sealing was not appropriate and focused on the fact that the subject of the litigation—the accuracy of testing the "tar" and nicotine content of cigarettes—was one in which the public had a strong interest and that potentially involved the public's health. *See id.* at 1180–81.

- In another case, the Sixth Circuit noted the long history of the presumption of public access to the courts, but explained that there are several "important exceptions which limit the public's right of access to judicial records." *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 474 (6th Cir. 1983). The court explained:

> [T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.

Id. (quoting *Nixon v. Warner Commc'ns*, 435 U.S. 589, 598 (1978) (citations omitted)) (quotation marks omitted). The court stated that "trial courts have always been afforded the power to seal their records when interests of privacy outweigh the public's right to know," and that "the decision as to when judicial records should be sealed is left to the sound discretion of the district court, subject to appellate review for abuse." *Id.* (citations omitted). The Sixth Circuit emphasized that the district court should have afforded the press a reasonable opportunity to object to the protective order sealing the court record, *id.* at 474–75, and explained that "the district court had an obligation to consider the rights of the public and the press," *id.* at 475. The court formulated a procedure for ensuring the press and the public's right to object to sealing:

> In order to protect this right to be heard, the most reasonable approach would be to require that motions to seal be docketed with the clerk of the district court. The records maintained by the clerk are public records. If a party moves to seal a document, or the entire court record, such a motion should be made "sufficiently in advance of any hearing on or disposition of the [motion to seal] to afford interested members of the public an opportunity to intervene and present their views to the court." The district court should then allow interested members of the public a reasonable opportunity to present their claims, without causing unnecessary or material delay in the underlying proceeding.

Id. at 475–76 (internal citations omitted). The court explained that "[o]nly the most compelling reasons can justify non-disclosure of judicial records." *Knoxville News*, 723 F.2d at 476 (citing *Brown & Williamson*, 710 F.2d at 1179–80; *United States v. Myers* (*In re Nat'l Broadcasting Co.*), 635 F.2d 945, 952 (2d Cir. 1980)).

- A district court in the Sixth Circuit recently emphasized that compelling reasons are necessary to seal court documents. *See Pucci v. 19th Dist. Court*, No. 07-10631, 2009 WL 596196, at *9 (E.D. Mich. Mar. 6, 2009). The court recognized the long history of the presumption of public access to judicial records, and stated that "[i]n exercising its discretion to seal judicial records, the Court must balance the public's common law right of access against the interests favoring nondisclosure." *Id.* at *8 (citations omitted). The court explained that "'[o]nly the most compelling reasons can justify non-disclosure of judicial records,'" *id.* at *9 (quoting *Knoxville News*, 723 F.2d at 476), and that "'[t]he mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records,'" *id.* (quoting *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)).

- In the context of considering a request to seal a doctor's report evaluating the competency of a habeas petitioner, another case discussed the competing interests weighed in connection with a request to seal judicial documents. The court explained:

> Historically, there has been a presumption of openness and public access to judicial proceedings and documents. *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise II)*, 478 U.S. 1, 10, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986); *Press-Enterprise Co. v. Superior Court of Cal. (Press-Enterprise I)*, 464 U.S. 501, 507, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 100 S. Ct. 2814, 65 L. Ed. 2d 973 (1980). Addressing the presumption of access to judicial proceedings, in *Press-Enterprise II*, the Supreme Court held that there is a qualified right of public access to judicial proceedings, rooted in the First Amendment, if there is "a tradition of

accessibility" to the nature of the proceedings involved and if public access "plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8–9, 106 S. Ct. 2735.

Beyond the First Amendment analysis, there exists a common law right of access to judicial proceedings and documents that does not rise to a constitutional dimension and is left to the sound discretion of the trial court. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597–99, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978). Distinguishing between access to judicial proceedings and access to judicial documents, the Sixth Circuit has addressed whether there is a First Amendment right to inspect and copy judicial documents, or only a common law right of access. *Compare United States v. Beckham*, 789 F.2d 401, 406–409, 412–15 (6th Cir. 1986) (holding that media members had no constitutional right of access to tapes), *with Application of National Broadcasting Company, Inc.*, 828 F.2d 340, 345 (6th Cir. 1987) (holding that there is a qualified First Amendment right of access to proceedings and documents relating to disqualification of a judge in a criminal case and to conflicts of interest between attorneys in a criminal case).

With respect to the common law right of access, a trial court's discretion is not unfettered and typically involves a fact-intensive and context-specific balancing of the competing interests of those who seek access and those who seek to deny it. The interests to be weighed include (1) the Court's supervisory powers over its own documents; (2) the benefit to the public from the incremental gain in knowledge that would result from access to the materials in question; (3) the degree of danger to the petitioner or other persons mentioned in the materials; (4) the possibility of improper motives on the part of the media; and (5) any special circumstances in the case. That said, there is a strong presumption in favor of access, and any balancing of interests begins with that presumption in favor of access. In light of the presumption in favor of access, merely articulating rational justifications for denying access will not suffice; rather, a district court must set forth "substantial reasons" for denying access.

Ashworth v. Bagley, 351 F. Supp. 2d 786, 788–89 (S.D. Ohio 2005) (some internal citations

omitted).[3]

- Another district court case emphasized the difference in proof between a discovery protective order and an order to seal documents. *See White v. GC Servs. Ltd. P'ship*, No. 08-11532, 2009 WL 174503, at *1 (E.D. Mich. Jan. 23, 2009) (recognizing "the differing standards of proof that apply to Rule 26(c) discovery-phase orders vis-a-vis orders to seal documents that are submitted to the court for filing"). The court explained that a party must show "good cause" to obtain a protective order governing discovery material, but that "[o]nce documents are filed with the court, there is a strong presumption, grounded in both the First Amendment and the common law, that they should be open to the public." *Id.* (citations omitted). The court stated that "[w]hile protective orders and sealing orders for court documents are permissible under the First Amendment, the 'good cause' standard of Rule 26(c) does not suffice. Rather, the party seeking to seal documents must show 'compelling reasons.'" *Id.* (internal citation omitted).

Standard for Modifying a Protective Order

- The Sixth Circuit appears to leave the determination of whether to modify a protective order to the discretion of the district court, rather than mandate a particular standard to be used in every case. *See United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (noting that when a collateral litigant requests modification of a protective order to access protected discovery, the circuits have adopted various approaches to balancing the interests at stake, and that some, including the Sixth Circuit, "have simply left the balancing to the discretion of the trial court") (citing *Stavro v. Upjohn Co.* (*In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*), 664 F.2d 114, 120 (6th Cir. 1981)).

- In one case, the Sixth Circuit has favorably cited the relatively less stringent standard used in *Wilk*:

> We therefore agree with the results reached by every other appellate court which has considered the issue, and hold that where an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.

Upjohn, 664 F.2d at 118 (quoting *Wilk*, 635 F.2d at 1299) (quotation marks omitted).

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[3] The court noted that "[b]ecause the Court is persuaded that a common law right of access exists with respect to the competency evaluation reports that have and will be submitted in this case, the Court need not reach the question of whether, or to what extent, there also exists a First Amendment right of access." *Ashworth*, 351 F. Supp. 2d at 789.

- Another Sixth Circuit case also recognized discretion to modify protective orders, but focused on the parties' reliance on a protective order and discussed the need for the party requesting continued sealing of documents subject to a protective order to show compelling reasons. *See Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 161, 164 (6th Cir. 1987). The court described the applicable standard for considering a request for modification of a protective order:

> Given that proceedings should normally take place in public, imposing a good cause requirement on the party seeking modification of a protective order is unwarranted. If access to protected fruits can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted. Even then, however, the movant should not be saddled with a burden more onerous than explaining why his need for the materials outweighs existing privacy concerns.
>
> *Nonparty Access to Discovery Materials in Federal Courts*, 94 HARV. L. REV. 1085, 1092 (1981) (footnotes omitted).

Id. at 163 (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 570 (E.D.N.Y. 1985))[4] (quotation marks omitted); *accord Haworth, Inc. v. Steelcase, Inc.*, No. 4:85:CV:526, 1993 WL 195116, at *1 (W.D. Mich. 1993), *aff'd*, 12 F.3d 1090 (Fed. Cir. 1993); *Kerasotes Mich. Theatres, Inc. v. Nat'l Amusements, Inc.*, 139 F.R.D 102, 104 (E.D. Mich. 1991). The *Meyer Goldberg* court found that "[p]rotective orders may be subject to modification 'to meet the reasonable requirements of parties in other litigation,'" 823 F.2d at 164 (quoting *United States v. GAF Corp.*, 596 F.2d 10, 16 (2d Cir. 1979); citing *Wilk*, 635 F.2d at 1299), but remanded and implied that "compelling reasons" had to be present to allow denial of access to discovery material filed with the court. *See id.* ("We direct a remand, because the record does not reflect the district court's consideration of the strong underlying tradition of open records, and that only compelling reasons justify denial or continued denial of access to records of the type sought . . . .").

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[4] The district court's decision in *Agent Orange* was affirmed by the Second Circuit, *see In re "Agent Orange" Product Liability Litigation*, 821 F.2d 139 (2d Cir. 1987), but portions of the Second Circuit's *Agent Orange* opinion discussing a presumption of public access to discovery materials have subsequently been questioned in light of an amendment to Federal Rule of Civil Procedure 5 that instructed parties not to file discovery materials with the court in most instances. *See, e.g.*, *TheStreet.com*, 273 F.3d at 233 n.11 ("[T]o the extent that *Agent Orange* relied upon Federal Rule of Civil Procedure 5(d) to find a statutory right of access to discovery materials, we observe that the recent amendment to this rule provides no presumption of filing all discovery materials, let alone public access to them. Indeed, the rule now *prohibits* the filing of certain discovery materials unless they are used in the proceeding or the court orders filing.") (citing FED. R. CIV. P. 5(d)).

- One district court found *Stavro v. Upjohn Co.* (*In re Upjohn Co. Antibiotic Cleocin Products Liability Litigation*), 664 F.2d 114 (6th Cir. 1981), to be distinguishable, and applied the more stringent standard from *Meyer Goldberg*. *See In re Air Crash Disaster at Detroit Metro. Airport on Aug. 16, 1987*, 130 F.R.D. 634, 640 (E.D. Mich. 1989). The court explained that "'[i]n considering motions to modify protective orders, courts are split as to whether the burden of showing good cause for continued protection lies with the protected party or with the party seeking modification.'" *Id.* at 638 (citation omitted). But the court cited the language in *Meyer Goldberg* regarding the standard in the Sixth Circuit. *Id.* The court recognized that *Upjohn* puts less of a burden on the party requesting modification of a protective order, but found the *Upjohn* analysis inapplicable, stating:

> The *Upjohn* Court instructs that the party, who opposes a modification of a protective order, must assume the burden of proof when a party in a pending case seeks to use discovery information that had been obtained pursuant to a protective order in a parallel case. In contrast, the Sixth Circuit Court of Appeals stated in a case, which was factually distinct from *Upjohn*, that when "legitimate secrecy interests" are involved, the party requesting a modification . . . must "show why [its] needs for the materials outweighs existing privacy concerns." *Fisher Foods*, 823 F.2d at 163. Therefore, this Court concludes that neither the reasoning, the holding, nor the requisite burden of proof in *Upjohn* supports [the] instant request [for modification].

Id. at 640.[5]

- In another case, the court relied on the standard discussed in *Meyer Goldberg*, and found that a sealed transcript should remain sealed in the face of a request to modify a protective order because there was no pending related litigation and the deponent objected to releasing the seal. *See In re Bell & Beckwith*, 198 B.R. 265, 269 (Bankr. N.D. Ohio 1996). The court quoted the Second Circuit opinion in *Martindell*, which emphasized the importance of the parties' reliance on protective orders and which stated that "absent a showing of improvidence in the grant of a Rule 26(c) protective order or some other extraordinary circumstance or compelling need, . . . a witness should be entitled to rely upon the enforceability of a protective order against third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's

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[5] The court explained that the *Upjohn* court had focused on the following issues in deciding to lift the protective order: "(1) whether diversity of citizenship should serve as the basis for determining which plaintiffs may share in discovery material, (2) the 'similar interests and motives' of the entities requesting to share the information, and (3) a desire to allow the plaintiffs to develop their cases more fully." *In re Air Crash Disaster*, 130 F.R.D. at 639–40. The court found that those considerations were not applicable to the request to modify in its own case because in its own case, a party sought modification to allow it to provide discovery to the National Transportation Safety Board, which was not a party to a pending lawsuit. *Id.* at 640.

desire to inspect protected testimony for possible use in a criminal investigation . . . ." *Id.* at 167–68. The *Bell & Beckwith* court noted that in *Meyer Goldberg*, the Sixth Circuit had cited *Martindell* as well as the standard in *Agent Orange*. *Id.* at 168. The court held that unsealing was not warranted because "there is no related litigation or even anyone who specifically requests these documents for particular purposes,"[6] and because the deponent had relied on the protective order and opposed unsealing. *Id.* at 269.

- A district court in the Sixth Circuit has explained that in determining where to place the burden of showing good cause upon a request for modification of a protective order, it is relevant whether good cause was shown when the order was entered: "If a protective order was initially issued based upon good cause shown, the party seeking to modify the order has the burden of proof. However, if good cause was not shown when the protective order was issued, the party seeking to maintain the order has the burden of proof." *Playa Marel, P.M., S.A. v. LKS Acquisitions, Inc.*, No. C-3-06-366, 2007 WL 756697, at *3 (S.D. Ohio Mar. 8, 2007) (internal citation omitted). The court recognized four factors to be considered in determining whether a protective order should be modified:

> Several factors may be used to assist a court in exercising its discretion as to whether to modify a protective order. They include (1) whether good cause exists for the modification, (2) the nature of the protective order, (3) the foreseeability of the modification requested at the time of issuance of the order, and (4) the parties' reliance on the order.

Id. at *4 (citations omitted).

SEVENTH CIRCUIT

Standard for Entering a Protective Order

- The Seventh Circuit has emphasized the court's duty to examine proposed protective orders to prevent the parties from having complete control over the degree of public access. *See Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999). In *Citizens First National Bank*, the Seventh Circuit noted that the judge is required to make a determination of good cause to seal any part of the record of a case,[7] and explained

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[6] The bankruptcy trustee had requested that all documents be released from seal "to further the bankruptcy policy of open disclosure . . . ." *Bell & Beckwith*, 198 B.R. at 266.

[7] The protective order at issue in *Citizens First National Bank* had been issued by the district judge in accordance with a stipulation by the parties, and "authoriz[ed] either party to designate as confidential, and thus keep out of the public record of the litigation, any document 'believed to contain trade secrets or other confidential or governmental information, including information held in a fiduciary capacity.'" 178 F.3d at 944. On appeal, one of the parties sought permission to file an appendix under seal, based on the district court's protective order. *See id.* The

that "[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding." *Id.* The court recognized that "pretrial discovery, unlike the trial itself, is usually conducted in private," but noted that "the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding." *Id.* at 944–45. The court explained that the public's interest "does not always trump the property and privacy interests of the litigants, but it can be overridden only if the latter interests predominate in the particular case, that is, only if there is good cause for sealing a part or the whole of the record in that case." *Id.* at 945 (citations omitted). The court emphasized:

> The determination of good cause cannot be elided by allowing the parties to seal whatever they want, for then the interest in publicity will go unprotected unless the media are interested in the case and move to unseal. The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record.

Id. (internal citation omitted).

The *Citizens First National Bank* court recognized that some courts may find that blanket protective orders entered by stipulation, without judicial review, that allow litigants to seal all documents produced in discovery, are useful aids to expediting the discovery process and not problematic because there is no tradition of public access to discovery materials, but pointed out that the weight of authority is to the contrary. *Id.* at 945–46. The court stated that "[m]ost cases endorse a presumption of public access to discovery materials, and therefore require the district court to make a determination of good cause before he may enter the order."[8] *Id.* at 946 (internal citations omitted).

Seventh Circuit expressed concern because the protective order was not limited to the pretrial stage and because the public has an interest in what occurs at all stages of a judicial proceeding. *Id.* at 945.

[8] The *Citizens First National Bank* decision was issued before the 2000 amendment to Federal Rule of Civil Procedure 5, which removed the requirement of filing discovery materials with the court. To the extent the court's decision was based on Rule 5's previous requirement of filing discovery materials, its discussion of public access to discovery materials may have less relevance to current protective order standards. *Cf. In re Thow*, 392 B.R. 860, 868 (Bankr. W.D. Wash. 2007) (questioning the "continued viability" of a statement in a Ninth Circuit case that "the fruits of pretrial discovery are 'presumptively public,'" and noting that "when *Agent Orange* and *Public Citizen* were decided, FRCP 5(d) required the filing of discovery materials with the court (subject to local rule or court order to the contrary)"). Another court explained that while "in *Citizens First National Bank*, 178 F.3d at 946, the Seventh Circuit summarized that '[m]ost cases endorse a presumption of access to discovery materials,' . . . it does not follow . . . that courts can therefore order parties to make available all discovery items exchanged amongst themselves." *In re Bridgestone/Firestone, Inc.*, 198 F.R.D. 654, 657 (S.D. Ind. 2001). The court continued: "In . . . *Citizens First National Bank* . . . , the court[] discussed access to discovery materials in the context of items that *had been filed with the court*. Access to discovery materials when those materials have been presented to the court is one issue and quite another issue [is presented] when the parties are exchanging the materials amongst themselves." *Id.* The court explained that "[a]bsent

The court emphasized that good cause must be found, but need not be determined for each individual document, stating:

> We do not suggest that all determinations of good cause must be made on a document-by-document basis. In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge. There is no objection to an order that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record, provided the judge (1) satisfies himself that the parties know what a trade secret is and are acting in good faith in deciding which parts of the record are trade secrets and (2) makes explicit that either party and any interested member of the public can challenge the secreting of particular documents.

Id.

- Another case also emphasized that courts have an independent duty to find good cause before entering a protective order, even if the parties stipulate to the terms. The court stated:

> Stipulated protective orders place the district court in an unusual position. Normally, the court is quick to ratify (and rightly so) any areas of agreement between opposing parties. However, under Fed. R. Civ. Pro. 26(c), the district court has the power to issue a protective order only upon a showing of "good cause." Even if the parties agree that a protective order should be entered, they still have "the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse is also true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection . . . ."

Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994) (quoting *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988)).

Standard for Entering a Sealing Order

- Another Seventh Circuit court has explained:

> Secrecy is fine at the discovery stage, before the material enters the

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a protective order, parties to a law suit may disseminate materials obtained during discovery as they see fit," and that "if they do not see fit to disseminate discovery information, the parties need not do so." *Id.* (quotation marks and citations omitted).

> judicial record. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S. Ct. 2199, 81 L. Ed. 2d 17 (1984). But those documents, usually a small subset of all discovery, that influence or underpin the judicial decision are open to public inspection unless they meet the definition of trade secrets or other categories of bona fide long-term confidentiality. *See, e.g.*, *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984). Information transmitted to the court of appeals is presumptively public because the appellate record normally is vital to the case's outcome. Agreements that were appropriate at the discovery stage are no longer appropriate for the few documents that determine the resolution of an appeal, so any claim of secrecy must be reviewed independently in [the appellate] court.

Baxter Int'l Inc. v. Abbott Labs., 297 F.3d 544, 545–46 (7th Cir. 2002); *see also Containment Techs. Group, Inc. v. Am. Society of Health Sys. Pharmacists*, No. 1:07-cv-997-DFH-TAB, 2008 WL 4545310, at *4 (S.D. Ind. Oct. 10, 2008) ("[M]ost documents designated as confidential will never be filed with the Court or used in any Court proceeding. As a result, heightened attention to confidentiality designations is more appropriate at the time the document is filed with the Court or used in a Court proceeding (if ever), as opposed to the time such a document is produced as part of what may often be a massive discovery response.").

The *Baxter* court recognized that while confidentiality may be appropriate in early stages in the litigation, it is rarely appropriate when the materials relate to judicial decision making, stating:

> Yet the sort of agreement that governs discovery (or arbitration) is even weaker as a reason for appellate secrecy than is a contemporaneous agreement limited to the record on appeal. Allowing such an agreement to hold sway would be like saying that any document deemed provisionally confidential to simplify discovery is confidential forever. That would contradict *Grove Fresh* and its predecessors, which hold that the dispositive documents in any litigation enter the public record notwithstanding any earlier agreement. How else are observers to know what the suit is about or assess the judges' disposition of it? Not only the legislature but also students of the judicial system are entitled to know what the heavy financial subsidy of litigation is producing. These are among the reasons why very few categories of documents are kept confidential once their bearing on the merits of a suit has been revealed. In civil litigation only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information

> required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault), is entitled to be kept secret on appeal. . . . [M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed.

Baxter, 297 F.3d at 546–47 (internal citations omitted).

- The Seventh Circuit has also used a balancing approach to determine whether sealing court documents is warranted, recognizing the presumption that the public has a right of access to documents relied on in making dispositive decisions. *See Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 898 (7th Cir. 1994). The court stated:

> [T]he right of the press to obtain timely access to judicial decisions and the documents which comprise the bases of those decisions is essential. We conclude, therefore, that once the press has adequately demonstrated that its access has been unjustifiably limited, but where there are legitimate concerns of confidentiality, the burden should shift to the litigants to itemize for the court's approval which documents have been introduced into the public domain. We believe that such an approach provides a legitimate means of reconciling the press's rights with the time constraints facing the trial courts.

Id.

The *Grove Fresh* court also recognized that although "the media's right of access does not extend to information gathered through discovery that is not part of the public record, the press does have standing to challenge a protective order for abuse or impropriety." *Id.* (citations omitted). The court concluded that "where the rights of the litigants come into conflict with the rights of the media and public at large, the trial judge's responsibilities are heightened. In such instances, the litigants' purported interest in confidentiality must be scrutinized heavily." *Id.* at 899.

Standard for Modifying a Protective Order

- The Seventh Circuit has used the following standard for considering requests for modification to allow for use of protected documents in collateral litigation:

> [W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated,

> however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order.

Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980) (internal citation omitted); *accord Griffith v. Univ. Hosp., L.L.C.*, 249 F.3d 658, 661 (7th Cir. 2001) (quoting *Wilk*, 635 F.2d at 1299); *Jepson*, 30 F.3d at 861 ("*Wilk* has been followed by this and other circuits.") (citations omitted). *Wilk* distinguished *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), and *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1976), which applied a more stringent standard to requests for modification:

> These cases are distinguishable in that the party seeking access in them was the federal government, which in each case had at its disposal special investigatory powers not available to private litigants. Thus, the government could have employed a grand jury in aid of its perjury investigation in *Martindell*, and since the antitrust investigation it conducted in *Eastman Kodak* could have led to criminal or civil proceedings, it might have used either a grand jury or the special "civil investigative demand" created by 15 U.S.C. [§] 1312. As the opinions in both cases suggest, the explicit grant of such extensive investigatory powers should be construed to preclude the implication of supplemental powers, absent unusual circumstances. When the investigator is the government, there is also a unique danger of oppression. This case involves neither circumstance.

Wilk, 635 F.2d at 1300 (footnotes omitted). The court described the Seventh Circuit's reference to "exceptional considerations" in *American Telephone and Telegraph Co. v. Grady*, 594 F.2d 594 (7th Cir. 1979), as "an unfortunate choice of words." *Wilk*, 635 F.2d at 1300. The court recognized that "[a] collateral litigant should not be permitted to exploit another's discovery in the sense of instituting the collateral litigation simply as a device to obtain access to the sealed information," that "federal discovery may not be used merely to subvert limitations on discovery in another proceeding," and that "a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation." *Id.* (citations omitted).

EIGHTH CIRCUIT

Standard for Entering a Protective Order

- A court in the Eighth Circuit has explained: "Under Rule 26(c), a court may grant a protective order only upon a showing of good cause by the moving party. The movant must articulate 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Pochat v. State Farm Mutual Auto. Ins. Co.*, No. 08-5015-

KES, 2008 WL 5192427, at *3 (D.S.D. Dec. 11, 2008) (internal citation omitted) (quoting *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973)). "Such determination must also include a consideration of the relative hardship to the non-moving party should the protective order be granted." *Gen. Dynamics Corp.*, 481 F.2d at 1212 (citation omitted). The *Pochat* court noted that protective orders over discovery require "'balancing between public and private concerns.'" *Pochat*, 2008 WL 5192427, at *3 (quoting *Pansy*, 23 F.3d at 786). The court explained:

> In considering whether good cause exists for a protective order, the federal courts have generally adopted a balancing process . . . . [T]he court . . . must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled. When the risk of harm to the owner of [a] trade secret or confidential information outweighs the need for discovery, disclosure [through discovery] cannot be compelled, but this is an infrequent result.
>
> Once the court determines that the discovery policies require that the materials be disclosed, the issue becomes whether they should "be disclosed only in a designated way," as authorized by the last clause of Rule 26(c)(7) . . . . Whether this disclosure will be limited depends on a judicial balancing of the harm to the party seeking protection (or third persons) and the importance of disclosure to the public. Courts also have a great deal of flexibility in crafting the contents of protective orders to minimize the negative consequences of disclosure and serve the public interest simultaneously.

Id. at *4 (quoting *Pansy*, 23 F.3d at 787) (internal quotation marks omitted). The court described various factors listed in *Pansy* that might be considered in determining whether to enter a protective order. *See id.* The court emphasized that "[t]hese factors . . . 'are unavoidably vague and are of course not exhaustive' so as to provide courts with 'the flexibility needed to justly and properly' resolve discovery disputes." *Id.* (citing *Pansy*, 23 F.3d at 787). The court rejected a proposed protective order that would allow the parties to designate material they believed contained trade secrets or other confidential material because the court was "concerned that this broad language will serve to give each party 'carte blanche to decide what portions of the record shall be kept secret.'" *Id.* at *10 (quoting *Citizens First Nat'l Bank*, 178 F.3d at 945).

Standard for Entering a Sealing Order

- In the context of reviewing a sealing order made by a bankruptcy judge, the Eighth Circuit has recognized the public's right to inspect judicial records and stated that compelling reasons are necessary to infringe on that right. *See In re Neal*, 461 F.3d 1048, 1053 (8th Cir.

2006) (noting that courts recognize a general right to inspect judicial records, that courts have supervisory power over their records and may deny access where the records may be used for improper purposes, but that while "the court is given this supervisory power [to deny access], 'only the most compelling reasons can justify non-disclosure of judicial records'") (quoting *In re Gitto Global Corp.*, 422 F.3d 1, 6 (1st Cir. 2005) (internal brackets and quotations omitted)).

- In another case, the Eighth Circuit explained that whether to seal a court record is a decision within the district court's discretion. *See Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 340 (S.D. Iowa 1993) ("[T]he decision of whether court records should be sealed is one committed to the sound discretion of the trial court.") (citing *Webster Groves Sch. Dist. v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1374 (8th Cir. 1990)). The court explained that "[w]hile recognizing a common law right of access to court records, the Eighth Circuit has expressly declined to adopt a 'strong presumption' of common law access." *Id.* The court noted that there is a "need to balance the competing interests involved, and to make this determination in light of the facts and circumstances of this particular case." *Id.* at 341 (citations omitted). The court concluded that "the public good would be substantially disserved if the introduction of a document in a civil trial deprived it of its otherwise confidential status." *Id.* at 342. The court continued: "Discovery, often a contentious and difficult process in complex cases, would become even more contentious and expensive, if there was no assurance of continued protection for confidential business information." *Id.* (citing *Seattle Times*, 467 U.S. at 34); *State ex rel. Butterworth v. Jones Chems., Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993)). The court explained that "[c]oncern with the 'efficient administration of justice' is also a valid interest to be considered in making this determination [of whether to grant access]." *Id.* (citation omitted). The court noted that "[n]either the Supreme Court nor the Eighth Circuit has recognized a constitutional right of access in a civil case," but concluded that even if a constitutional right exists, the order at issue only sealed a small number of exhibits in comparison to the number entered at trial and did so to protect a legitimate interest in confidentiality. *See Jochims*, 151 F.R.D. at 342 n.8.

- In a district court case, the court noted that the Eighth Circuit had recognized a general right to inspect judicial records, and that "[a] party seeking closure or sealing of court documents must show that a restriction of the right of public access is necessitated by a compelling government interest." *S.E.C. v. Shanahan*, No. 4:06-MC-546 CAS, 2006 WL 3330972, at *3 (E.D. Mo. Nov. 15, 2006) (citing *Goff v. Graves*, 362 F.3d 543, 550 (8th Cir. 2004)). The court emphasized that "[i]f a district court decides to close a proceeding or seal certain documents, it must explain why closure or sealing was necessary and why less restrictive alternatives were not appropriate." *Id.* at *4 (citing *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F. 2d 569, 574 (8th Cir. 1988) (citation omitted)). The court noted that "Eighth Circuit precedent indicates that in order to seal records or documents, there must be a compelling *governmental* interest." *Id.* (citation omitted). The court distinguished private interests, which it deemed insufficient to warrant sealing:

> In the absence of evidence that court files might be used for improper

> purposes such as to "gratify private spite" or "promote public scandal," the respondents' interest in keeping their names out of the public record is not a governmental interest at all, but rather a private interest. "The mere fact that the production of records may lead to a litigant's embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records."

Id. (internal citation omitted).

- Another district court described the following standard for sealing court documents:

> There is a common-law right of access to judicial records. *See Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990). The Eighth Circuit has held that this right of access "is not absolute, but requires a weighing of competing interests." *Id.* A court has supervisory power over its own records, and the decision to seal a file is within the court's discretion. *Id.* The Court finds that Guidant and Duron have a heightened burden to overcome the presumptive right of the public to access of the briefs and supporting documents at issue because they were filed in support of and in opposition to motions for summary judgment. *See Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("[D]ocuments used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.").

Duron v. Guidant Corp. (*In re Guidant Corp. Implantable Defibrilators Prods. Liab. Litig.*), 245 F.R.D. 632, 636 (D. Minn. 2007). After the parties objected to unsealing certain documents, the court reviewed the documents *in camera* "for good cause under FED. R. CIV. P. 26[,] and weighed the competing interests regarding the common-law right of access to judicial records." *Id.* (footnote omitted).

- Another court concluded that "there is no established right of public access to prejudgment records in civil cases." *Simon v. G.D. Searle & Co.*, 119 F.R.D. 683, 684 (D. Minn. 1987) (citation omitted). The court concluded that it had "discretion to deny access to documents filed, but not admitted into evidence or relied upon by the Court." *Id.* (citing *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653 (D.D.C. 1986)). The court also found that "[a]t best, the presumption of public access to judicial records has force only when the Court relies on particular documents to determine the litigants' substantive rights," *id.* (citing *Anderson*, 805 F.2d at 13), and explained that "even in cases which do not involve confidential documents, this Court, as a matter of course, has never sanctioned wholesale filing of discovery materials, depositions or exhibits until it is clear said materials will be relied on and considered by the Court," *id.*

Standard for Modifying a Protective Order

- The Eighth Circuit has at least implied that a party requesting modification of a protective order must show intervening circumstances warranting modification. In *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 952 (8th Cir. 1979), a defendant requested that the court dissolve a protective order to allow him to comply with subpoenas issued by a congressional subcommittee investigating pricing practices in the meat industry. The district court partially lifted the protective order to allow the defendant to respond to the subpoena. *Id.* The Eighth Circuit vacated the order modifying the protective order, noting that the district court had made the modification "without any showing that *intervening circumstances* had in any way obviated the potential prejudice to [the protected party] . . . ."[9] *Id.* at 954 (emphasis added).

- A district court has explained that "'[t]he party seeking to modify the protective order bears the burden of showing good cause for the modification,'" *Guzhagin v. State Farm Mut. Auto. Ins. Co.*, No. 07-4650 (JRT/FLN), 2009 WL 294305, at *2 (D. Minn. Feb. 5, 2009) (quoting *Medtronic, Inc. v. Boston Sci. Corp.*, No. Civ. 99-1035, 2003 WL 352467, at *1 (D. Minn. Feb. 14, 2003)), and that "[w]hen a party to a stipulated protective order seeks to modify that order, 'that party must demonstrate particular good cause to obtain relief,'" *id.* (quoting *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 501 (S.D. Iowa 1992)). The court recognized that "[c]ourts outside [the Eighth] Circuit have noted a 'sufficient need for modification . . . to avoid duplicative discovery when parties in other litigation seek to obtain discovery in concluded litigation,'" *id.* (quoting *SmithKline Beecham Corp. v. Synthon Pharms., Ltd.*, 210 F.R.D. 163, 166 (M.D.N.C. 2002)), but that "*SmithKline* cautions . . . against modifying protective orders 'in a controversy with which [the Court] is not familiar and over which it lacks control,'" *id.* (quoting *SmithKline*, 210 F.R.D. at 166). The court implied that "compelling need" was required in order for modification of a protective order to be warranted. *See id.* ("State Farm has therefore satisfied its burden by demonstrating *compelling need* for modification.") (emphasis added).

- Another district court explained the standard as follows:

> "When a party seeks modification of a confidentiality order, they must 'come forward with a reason to modify the order.'" *Arnold v. Pennsylvania, Dep't of Transp.*, 477 F.3d 105, 108 (3d Cir. 2007) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994)). Specifically, "[t]he party seeking the modification must explain why its need for the materials outweighs existing privacy

[9] On reconsideration, the Eighth Circuit "adhere[d] in general to the views expressed" in its original opinion, but found that formal issuance of mandamus had been improvident because compelling reinstatement of the protective order would not alter the status quo, as there was no basis for requiring the Subcommittee to return the documents it obtained and the order lifting the protective order had only pertained to the documents provided in response to the subpoena, meaning that any further disclosures would violate even the modified protective order. 601 F.2d at 956.

> concerns." *MSC.Software Corp. v. Altair Eng'[]g, Inc.*, No. 07-CV-12807, 2008 WL 2478313, at *1 (E.D. Mich. June 17, 2008) (Slip Copy). Some courts hold the burden is not easily met as there is a "stringent standard for modification," . . . "a confidentiality order can only be modified if an extraordinary circumstance or compelling need warrants the requested modification." *Pansy*, 23 F.3d at 789 (citing cases). In contrast, other courts hold the movant to a more lenient standard by incorporating a balancing test. *Id.* at 789–90 (citing cases). The *Pansy* court identified a number of factors for the good cause balancing test used to issue or modify a protective order including: (1) the interest in privacy of the party seeking protection; (2) whether the information is being sought for a legitimate purpose or an improper purpose; and (3) the parties' reliance on the protective order. *Id.* at 787–89.

Streck, Inc. v. Research & Diagnostic Sys., Inc., No. 8:06CV458, 2008 WL 2813081, at *3 (D. Neb. July 18, 2008). The court indicated that compelling need and extraordinary circumstances were sufficient (and perhaps necessary) for modification. *See id.* at *4 ("The plaintiff has presented a legitimate and not improper purpose for use of the documents outside this litigation. The plaintiff's need is *compelling* and presents an *extraordinary circumstance*.") (emphasis added).

- Another case found that the magistrate judge had erred by relying on the standard for modification set out in *Wilk* when the "controlling standard is found in *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert denied*, 441 U.S. 907, 99 S. Ct. 1997, 60 L. Ed. 2d 376 (1979)." *Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 342 (S.D. Iowa 1993). The court explained that *Iowa Beef Processors* set out the following standard:

> [T]he Eighth Circuit recognized that the initial showing of good cause for entry of a protective order under FED. R. CIV. P. 26(c) is on the party seeking protection. However, when an attempt is made to amend or lift that protection, there must be a showing that intervening circumstances have obviated or eliminated any potential prejudice to the protected party. I believe that *Bagley*'s requirement of a showing of intervening circumstances implicitly places the burden of making the showing on the party seeking to amend or lift the protective order. This standard is fully applicable to a petition by plaintiffs in other litigation, such as intervenors.

Id. (internal citations omitted).

NINTH CIRCUIT

Standard for Entering a Protective Order

- In *Pintos v. Pacific Creditors Association*, Nos. 04-17485, 04-17558, 2009 WL 1151800, at *5–6 (9th Cir. Apr. 30, 2009), the Ninth Circuit recently explained the differences between the standard for entering a protective order and the standard for entering a sealing order:

> Two standards generally govern motions to seal documents like the one at issue here. First, a "compelling reasons" standard applies to most judicial records. *See Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (holding that "[a] party seeking to seal a judicial record . . . bears the burden of . . . meeting the 'compelling reasons' standard"); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36 (9th Cir. 2003). This standard derives from the common law right "to inspect and copy public records and documents, including judicial records and documents." *Kamakana*, 447 F.3d at 1178 (citation and internal quotation marks omitted). To limit this common law right of access, a party seeking to seal judicial records must show that "compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." *Id.* at 1178–79 (internal quotation marks and citations omitted).
>
> Second, a different standard applies to "private materials unearthed during discovery," as such documents are not part of the judicial record. *Id.* at 1180. Rule 26(c) of the Federal Rules of Civil Procedure governs here, providing that a trial court may grant a protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."
>
> The relevant standard for purposes of Rule 26(c) is whether "'good cause' exists to protect th[e] information from being disclosed to the public by balancing the needs for discovery against the need for confidentiality." *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). This "good cause" standard presents a lower burden for the party wishing to seal documents than the "compelling reasons" standard. The cognizable public interest in judicial records that underlies the "compelling reasons" standard does not exist for documents produced between private litigants. *See Kamakana*, 447 F.3d at 1180 (holding that "[d]ifferent interests are at stake with the right of access than with Rule 26(c)"); *Foltz*, 331 F.3d at 1134 ("When discovery material is filed with the court . . . its status changes.").

> The "good cause" standard is not limited to discovery. In *Phillips*, we held that "good cause" is also the proper standard when a party seeks access to previously sealed discovery attached to a nondispositive motion. 307 F.3d at 1213 ("when a party attaches a sealed discovery document to a nondispositive motion, the usual presumption of the public's right of access is rebutted"). Nondispositive motions "are often 'unrelated', or only tangentially related, to the underlying cause of action," and, as a result, the public's interest in accessing dispositive materials does "not apply with equal force" to nondispositive materials. *Kamakana*, 447 F.3d at 1179. In light of the weaker public interest in nondispositive materials, we apply the "good cause" standard when parties wish to keep them under seal. Applying the "compelling interest" standard under these circumstances would needlessly "undermine a district court's power to fashion effective protective orders." *Foltz*, 331 F.3d at 1135.

Id. at *5–6 (footnote omitted).

- Another court has explained: "'It is well-established that the fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public. Rule 26(c) authorizes a district court to override this presumption where 'good cause' is shown.'" *AGA Shareholders, LLC v. CSK Auto, Inc.*, No. CV-07-62-PHX-DGC, 2007 WL 4225450, at *1 (D. Ariz. Nov. 28, 2007) (quoting *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1103 (9th Cir. 1999)). The court stated:

> For good cause to exist under Rule 26(c), "the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." *Phillips v. G.M. Corp.*, 307 F.3d 1206, 1210–11 (9th Cir. 2002). "'Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.'" *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (citation omitted). Rather, the party seeking protection must make a "particularized showing of good cause with respect to [each] individual document." *San Jose Mercury News*, 187 F.3d at 1102.

Id.

<u>Standard for Entering a Sealing Order</u>

- The Ninth Circuit has also explained that with respect to court documents, the showing that must be made to seal the documents depends on whether the documents are associated with a dispositive motion. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135–36

(9th Cir. 2003). The court explained that the Ninth Circuit has "a strong presumption in favor of access to court records," but that "[t]he common law right of access . . . is not absolute and can be overridden given sufficiently compelling reasons for doing so." *Id.* at 1135 (citing *San Jose Mercury News, Inc. v. U.S. Dist. Court—Northern District (San Jose)*, 187 F.3d 1096, 1102 (9th Cir. 1999)). The court explained that in determining whether the common law right of access can be overridden, a court should consider all relevant factors, including:

> the public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets . . . . After taking all relevant factors into consideration, the district court must base its decision on a compelling reason and articulate the factual basis for its ruling, without relying on hypothesis or conjecture.

Id. (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)). The court explained that with respect to sealed discovery attached to nondispositive motions, "'the usual presumption of the public's right of access is rebutted,'" and "'good cause' suffices to warrant preserving the secrecy of sealed discovery material attached to nondispositive motions." *Id.* (quoting *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002)). The court held that "the presumption of access is not rebutted where . . . documents subject to a protective order are filed under seal as attachments to a dispositive motion," and that in that scenario, "[t]he *Hagestad* 'compelling reasons' standard continues to apply." *Id.* at 1136. The court explained that "[t]here are good reasons to distinguish between dispositive and nondispositive motions" because "[i]n *Seattle Times*, the Supreme Court noted that '[m]uch of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action,'" but "[t]he same cannot be said for materials attached to a summary judgment motion because 'summary judgment adjudicates substantive rights and serves as a substitute for trial.'" *Id.* (citations omitted).

Standard for Modifying a Protective Order

- The Ninth Circuit has explained that where the court enters a blanket protective order without requiring the party seeking confidentiality to show good cause for specific documents, upon a challenge by intervenors to the asserted confidentiality, the district court should require a showing of good cause for continued protection of the documents under Rule 26(c). *See Foltz*, 331 F.3d at 1131. The court explained that it "strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation" because "[a]llowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery." *Id.* (citations omitted). The court quoted the Seventh Circuit standard described in *Wilk*, and stated: "Where reasonable restrictions on collateral disclosure will continue to protect an

affected party's legitimate interests in privacy, a collateral litigant's request to the issuing court to modify an otherwise proper protective order so that collateral litigants are not precluded from obtaining relevant material should generally be granted." *Id.* at 1132 (citing *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265–66 (9th Cir. 1964)). But the court cautioned:

> [A] court should not grant a collateral litigant's request for such modification automatically. As an initial matter, the collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein. Requiring a showing of relevance prevents collateral litigants from gaining access to discovery materials merely to subvert limitations on discovery in another proceeding. *See Wilk*, 635 F.2d at 1300. Such relevance hinges "on the degree of overlap in facts, parties, and issues between the suit covered by the protective order and the collateral proceedings." Laurie Kratky Dore, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 366–67 (1999).

Id.

The court elaborated on the standard for considering the relevance of the documents sought to the collateral litigation:

> The case law suggests that the court that entered the protective order should satisfy itself that the protected discovery is sufficiently relevant to the collateral litigation that a substantial amount of duplicative discovery will be avoided by modifying the protective order. *See Wilk*, 635 F.2d at 1300 (comparing complaints to conclude that "much, if not most," of the protected discovery would be eventually discoverable in the collateral suit); *United Nuclear*, 905 F.2d at 1428 (upholding the modification of a protective order but admonishing the district court to leave the specific "[q]uestions of the discoverability in the [collateral] litigation of the materials discovered in [this] litigation" to the collateral courts (quoting *Superior Oil Co. v. Am. Petrofina Co.*, 785 F.2d 130, 130 (5th Cir. 1986) (internal quotation marks omitted))). No circuits require the collateral litigant to obtain a relevance determination from the court overseeing the collateral litigation prior to requesting the modification of a protective order from the court that issued the order. The court that issued the order is in the best position to make the relevance assessment for it presumably is the only court familiar with the contents of the protected discovery.

Id. (footnote omitted). But the court explained that the court's relevance inquiry is limited to whether a modification of the protective order is appropriate, and does not extend into determining whether the collateral litigant will actually obtain the documents:

> Because the district court that issued the order makes only a rough estimate of relevance, however, the only issue it determines is whether the protective order will bar the collateral litigants from gaining access to the discovery already conducted. Even if the issuing court modifies the protective order, it does not decide whether the collateral litigants will ultimately obtain the discovery materials. As the Fifth and Tenth Circuits have noted, once the district court has modified its protective order, it must refrain from embroiling itself in the specific discovery disputes applicable only to the collateral suits.

Id. at 1132–33 (citation omitted).

The court also explained that in addition to considering the relevance of the materials sought through modification of the protective order, the court should consider other factors:

> Of course, before deciding to modify the protective order, the court that issued it must consider other factors in addition to the relevance of the protected discovery to the collateral litigation. In particular, it must weigh the countervailing reliance interest of the party opposing modification against the policy of avoiding duplicative discovery. *See Beckman*, 966 F.2d at 475. However, we have observed that "[r]eliance will be less with a blanket [protective] order, because it is by nature overinclusive." *Id.* at 476. As noted above, a party seeking the protection of the court via a blanket protective order typically does not make the "good cause" showing required by Rule 26(c) with respect to any particular document. Thus, reliance on a blanket protective order in granting discovery and settling a case, without more, will not justify a refusal to modify. "[A]ny legitimate interest . . . in continued secrecy as against the public at large can be accommodated by placing [the collateral litigants] under the same restrictions on use and disclosure contained in the original protective order." *United Nuclear*, 905 F.2d at 1428; *see also Beckman*, 966 F.2d at 476.

Id. at 1133. The court stated that "the extent to which a party can rely on a protective order depends on the extent to which the order did reasonably induce the party to allow discovery as opposed to settling the case." *Id.* at 1137–38 (citations omitted).

- The Ninth Circuit has rejected application of the Second Circuit's "extraordinary circumstances" test for modification. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d

470, 475 (9th Cir. 1992) ("The 'extraordinary circumstances' test is incompatible with our circuit's law. Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation."). The *Beckman* court recognized the countervailing concern that modification would result in slowing down discovery in the initial litigation, but found that "legitimate interests in privacy can be protected by putting the intervenors under the same restrictions as those contained in the original protective order." *Id.* (citing *United Nuclear*, 905 F.2d at 1428). The court also recognized the importance of protecting the parties' reliance interests, but explained that "[t]he extent to which a party can rely on a protective order should depend on the extent to which the order induced the party to allow discovery or to settle the case." *Id.* The court noted that "reliance would be greater where a trade secret was involved, or where witnesses had testified pursuant to a protective order without invoking their Fifth Amendment privilege," *id.* (citing *Public Citizen*, 858 F.2d at 791), and that "[r]eliance will be less with a blanket order, because it is by nature overinclusive," *id.* at 476 (citing *Public Citizen*, 858 F.2d at 790).

- In the context of a party seeking modification of a stipulated protective order, one court explained that "district courts have inherent authority to grant a motion to modify a protective order where 'good cause' is shown." *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 201 (N.D. Cal. 2009) (citation omitted). "A party asserting good cause bears the burden to show that specific prejudice or harm will result if the motion is not granted." *Id.* (citation omitted). The court explained that "[i]n the Ninth Circuit, issues concerning the scope of protective orders for confidential information entail[] a balancing test of the conflicting interests between the protection of Rule 26(c) and the broad mandate of the admissibility of information in discovery conferred by Rule 26(b)(1) of the Federal Rules of Civil Procedure." *Id.* at 204–05 (citing *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992), *cert. denied*, 506 U.S. 869 (1992)). The court found that the party seeking modification, who had agreed to a stipulated protective order, bore the burden of showing good cause for modification to use documents in potential collateral litigation alleging misappropriation of trade secrets. *See id.* at 205. The court concluded that because there was questionable use of proprietary information, good cause was shown for modification to allow the plaintiff to protect itself by using documents for separate trade secret litigation. *See id.* The court stated: "A good cause analysis under Federal Rule of Civil Procedure 26(c) entails a balancing of the needs for discovery against the need for confidentiality. The typical analysis considers whether sufficient cause exists to protect such information from being disclosed to the public." *Id.* The court noted that "[i]n the Ninth Circuit, there is a strong policy 'favor[ing] access to discovery materials to meet the needs of parties engaged in collateral litigation,'" and that "Ninth Circuit precedent also looks to the needs of parties engaged in pending litigation and, in particular, the reliance interests on the protective order of the party opposing its modification." *CBS Interactive*, 257 F.R.D. at 206 (citations omitted). The court concluded that "[m]ere reliance on a blanket protective order does not justify a refusal to modify it when a reasonable request for disclosure has been made." *Id.* (citation omitted). The court explained that "[n]ormally, the court must also weigh the countervailing reliance interest of the party opposing modification against the likelihood that the collateral action is sufficiently related to the instant action, such that a

significant amount of duplicative discovery may be avoided by granting the modification request." *Id.* (citing *Foltz*, 331 F.3d at 1133).

- Another court explained that while the Ninth Circuit favors providing access to documents for collateral litigation, "adoption of such a policy in no way gives those seeking intervention carte blanche to obtain all discovery produced as part of an underlying action, as a matter of course." *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2008 WL 4191780, at *1 (N.D. Cal. Sept. 10, 2008). The court discussed the considerations used by the court in *Foltz*, but also considered the additional factor of whether the underlying litigation in which the protective order was entered is still pending. *See id.* at *2. The court explained that where the underlying action is still pending, "the court must pay careful consideration . . . before granting movants' request [to intervene to modify the protective order], so as not to prejudice any of the existing parties or ongoing litigation in the case." *Id.* In addition, the court explained that it is important to consider whether collateral litigants are seeking modification "merely to subvert limitations on discovery in collateral litigation." *Id.*

TENTH CIRCUIT

Standard for Entering a Protective Order

- The Tenth Circuit has stated:

> Under Federal Rule of Civil Procedure 26(c), for "good cause" a court may issue a protective order regarding discovery "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Such an order may forbid the disclosure of discovery, *see* FED. R. CIV. P. 26(c)(1)(A), and require that depositions be sealed and opened only upon court order, *see id.* Rule 26(c)(1)(F). The "good cause" standard of Rule 26(c) is "highly flexible, having been designed to accommodate all relevant interests as they arise." *United States v. Microsoft Corp.*, 165 F.3d 952, 959 (D.C. Cir. 1999).

Rohrbough v. Harris, 549 F.3d 1313, 1321 (10th Cir. 2008).

- The Tenth Circuit has recognized that blanket protective orders may be necessary in complex cases to allow discovery to proceed:

> These stipulated "blanket" protective orders are becoming standard practice in complex cases. *See* MANUAL FOR COMPLEX LITIGATION, SECOND, § 21.431 (1985). They allow the parties to make full disclosure in discovery without fear of public access to sensitive information and without the expense and delay of protracted disputes

> over every item of sensitive information, thereby promoting the overriding goal of the Federal Rules of Civil Procedure, "to secure the just, speedy, and inexpensive determination of every action." FED. R. CIV. P. 1; *see generally In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356–57 (11th Cir. 1987); Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 9–11 (1983).

United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427 (10th Cir. 1990).

- A court in the Tenth Circuit has stated: "The party seeking a protective order has the burden to show good cause for it. To establish good cause, that party must submit 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Wilson v. Olathe Bank*, 184 F.R.D. 395, 397 (D. Kan. 1999) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981)) (internal citation omitted).

- In another case, the court elaborated:

> The decision to enter a protective order lies within the sound discretion of the court. Despite this broad discretion, the court may only issue a protective order if the moving "party demonstrates that the basis for the protective order falls within one of the categories enumerated in FED. R. CIV. P. 26(c)[,]" *i.e.*, that the requested order is necessary to protect the party "from annoyance, embarrassment, oppression, or undue burden or expense." "Rule 26(c) does not provide for any type of order to protect a party from having to provide discovery on topics merely because those topics are overly broad or irrelevant, or because the requested discovery is not reasonably calculated to lead to the discovery of admissible evidence." "Although a party may object to providing discovery on the basis that the request is overly broad, irrelevant or not calculated to lead to the discovery of admissible evidence, the court may only rule on the validity of such an objection in the context of a motion to compel." "Such an objection is not a basis upon which the court may enter a Rule 26(c) protective order."

P.S. v. Farm, Inc., No. 07-CV-2210-JWL, 2009 WL 483236, at *3 (D. Kan. Feb. 24, 2009) (footnotes omitted).

<u>Standard for Entering a Sealing Order</u>

- The Tenth Circuit has discussed the following standard for sealing court documents:

> Courts have long recognized a common-law right of access to judicial records. This right, however, is not absolute. The

> "presumption of access . . . can be rebutted if countervailing interests heavily outweigh the public interests in access." *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). "The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption." *Id.*

Mann v. Boatright, 477 F.3d 1140, 1149 (10th Cir. 2007) (some internal citations omitted). In *Mann*, the Tenth Circuit also found it important that much of the information contained in the complaint sought to be sealed had been previously disclosed in other public court proceedings, undermining the asserted privacy concerns. *See id.*

- In a district court case, the court explained that it had previously discussed the standard for sealing the record of a case in a non-discovery context:

> Federal courts recognize a common-law right of access to judicial records, although that right is not absolute. Whether to allow access at the district court level is left to the discretion of the district court, which has supervisory control over its own records and files. In exercising that discretion, the district court must consider the relevant facts and circumstances of the case and balance the public's right of access, which is presumed paramount, with the parties' interests in sealing the record. The public has an interest "in understanding disputes that are presented to a public forum for resolution" and "in assuring that the courts are fairly run and judges are honest." Courts have denied access in cases in which the court files have been sought for improper purposes such as promoting public scandal or harming a business litigant's competitive standing.

Bryan v. Eichenwald, 191 F.R.D. 650, 652 (D. Kan. 2000) (quoting *Ramirez v. Bravo's Holding Co.*, No. Civ. A. 94-2396-GTV, 1996 WL 507238, at *1 (D. Kan. Aug. 22, 1996)) (quotation marks omitted). The court explained that "[u]nless a party establishes a 'public or private harm sufficient to overcome the public's right of access to judicial records,' the court declines to seal any part of the record in the case." *Id.* (quoting *Ramirez*, 1996 WL 507238, at *1). The court emphasized that even if the parties agree to sealing, the court must independently determine whether sealing is appropriate. *See id.* ("'The fact that all litigants favor sealing the record is of interest, but not determinative.'") (quoting *Ramirez*, 1996 WL 507238, at *1).

The *Bryan* court explained that balancing public and private interests is necessary regardless of the stage of the litigation:

> Although cognizant of the inapplicability of FED. R. CIV. P. 26(c) in non-discovery contexts . . . , the court, nevertheless, views the standards for permitting documents to be filed under seal to be the

> same regardless of the stage of litigation [in which] the issue arises. At the discovery stage, the court may speak in terms of "good cause." At other stages, the court may simply refer to its discretion to supervise its own records and files. At whatever stage of the litigation, however, the movant must demonstrate a public or private harm sufficient to overcome the public's right of access to judicial records.

Id. at 652–53; *see also Allen v. Kline*, No. 07-2037-KHV, 2007 WL 3396470, at *2 (D. Kan. Nov. 13, 2007) (noting the same standard and explaining that "political consequences do not amount to a public harm that would be suffered if the underlying motion were filed on an unsealed basis").

- Another court stated the standard as follows:

> It is well settled that federal courts recognize a common-law right of access to judicial records.[] This right derives from the public's interest "in understanding disputes that are presented to a public forum for resolution" and is intended to "assure that the courts are fairly run and judges are honest." This public right of access, however, is not absolute. As federal district courts have supervisory control over their own records and files, the decision whether to allow access to those records is left to the court's sound discretion. In exercising that discretion, the court must consider the relevant facts and circumstances of the case and balance the public's right of access, which is presumed paramount, with the parties' interests in sealing the record or a portion thereof. Documents should be sealed "only on the basis of articulable facts known to the court, not on the basis of unsupported hypothesis or conjecture."

Hatfield v. Price Mgmt. Co., No. 04-2563-JWL-DJW, 2005 WL 375665, at *1 (D. Kan. Feb. 16, 2005) (footnotes omitted).

- In another case, the court recognized that a party seeking sealing must demonstrate a public or private harm that overcomes the public's right of access, regardless of the stage of the litigation, but noted that "[o]ther courts in [its] district have distinguished somewhat between the broad latitude the court has to accord confidentiality to the parties' discovery and other preliminary proceedings, and the narrower discretion the court has in issuing orders resolving litigation." *Snyder-Gibson v. Cessna Aircraft Co.*, No. 06-1177-JTM, 2007 WL 527835, at *5 & n.6 (D. Kan. Feb. 14, 2007) (citing *Vulcan Materials Co. v. Atofina Chems. Inc.*, 355 F. Supp. 2d 1214, 1216–18 (D. Kan. 2005)).

Standard for Modifying a Protective Order

- The Tenth Circuit has explained that a district court has discretion to modify a protective order and discussed the competing interests to be considered in deciding whether modification is appropriate:

> Allowing modification of protective orders for the benefit of collateral litigants tends to undermine the order's potential for more efficient discovery. But when a collateral litigant seeks access to discovery produced under a protective order, there is a counterv[a]iling efficiency consideration—saving time and effort in the collateral case by avoiding duplicative discovery. In striking this balance, some circuits have adopted a presumption in favor of the continued integrity of the protective order, *see, e.g.*, *Agent Orange*, 821 F.2d at 147–48 (protective orders modifiable only under extraordinary circumstances), others have tipped the balance in favor of avoiding duplicative discovery, *see, e.g.*, *Wilk*, 635 F.2d at 1299; *Olympic Refining Co. v. Carter*, 332 F.2d 260, 264–66 (9th Cir.), *cert. denied*, 379 U.S. 900, 85 S. Ct. 186, 13 L. Ed. 2d 175 (1964), and still others have simply left the balancing to the discretion of the trial court, *see, e.g.*, *Stavro v. Upjohn Co.* (*In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*), 664 F.2d 114, 120 (6th Cir. 1981).

United Nuclear, 905 F.2d at 1427–28 (footnote omitted). The Tenth Circuit concluded that the Seventh Circuit's approach in *Wilk* was the most appropriate:

> "[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification. Once such prejudice is demonstrated, however, the district court has broad discretion in judging whether that injury outweighs the benefits of any possible modification of the protective order."

Id. at 1428 (quoting *Wilk*, 635 F.2d at 1299); *see also Grundberg v. Upjohn Co.*, 140 F.R.D. 459, 464 (D. Utah 1991) (noting that "[w]here . . . the case involves materials and information which are restricted from public access, such as materials produced under a protective order and lodged with the court under seal, it is necessary to weigh the rights of the private party litigants who produced such materials and the reasons and policies for such restrictions against the interests of collateral and other litigants in disclosure of such materials," and stating that the Tenth Circuit has adopted the standard for modification set out in *Wilk*). The *United Nuclear* court explained that allowing collateral litigants to have access to protected discovery often is not problematic because "any legitimate interest the defendants have in continued secrecy as against the public at large can be accommodated by

placing [i]ntervenors under the restrictions on use and disclosure contained in the original protective order." 905 F.2d at 1428 (citations omitted). The court noted that "the district court must refrain from issuing discovery orders applicable only to collateral litigation," that "'[f]ederal civil discovery may not be used merely to subvert limitations on discovery in another proceeding . . . ,'" and that "'a collateral litigant has no right to obtain discovery materials that are privileged or otherwise immune from eventual involuntary discovery in the collateral litigation.'" *Id.* (quoting *Wilk*, 635 F.2d at 1300). But the court cautioned that "'[q]uestions of the discoverability in the [collateral] litigation of the materials discovered in [this] litigation are, of course, for the [collateral] courts.'" *Id.* (quoting *Superior Oil Co. v. Am. Petrofina Co.*, 785 F.2d 130, 130 (5th Cir. 1986)).

- In a district court case, the court entered a stipulated, blanket protective order "upon a threshold showing of good cause under FED. R. CIV. P. 26(c) that the discovery [would] involve confidential, proprietary, or trade secret information . . . ," and explained that the order's terms were consistent with cases in its district that "place the burden of proving confidentiality on the party asserting the claim of confidentiality." *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, No. 05-md-1721-KHV, 2009 WL 951532, at *2, *3 (D. Kan. Apr. 7, 2009). The court explained that "the burden of proving confidentiality under a blanket protective confidentiality order 'never shifts from the party asserting that claim [of confidentiality], only the burden of raising that issue.'" *Id.* at *3 (footnote omitted). The court noted that the retained power to modify protective orders acts as a "safety valve" and "assumes particular importance in the context of blanket protective orders, which are generally entered without extensive, if any, balancing of affected interests." *Id.* (footnote omitted). The court continued: "The uncontested nature of blanket protective orders and the absence of any judicial determination of good cause with respect to specific documents arguably make such confidentiality orders particularly vulnerable to subsequent modification." *Id.* (footnote omitted). The court noted that "[a] protective order is always subject to modification or termination for good cause." *Id.* at *4 (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004)). The court relied on another case for the proposition that "the 'party seeking dissolution [of a longstanding protective order] bears the burden of showing that intervening circumstances have removed potential prejudice from disclosure that the protective order was initially intended to protect.'" *Id.* (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 894 (E.D. Penn. 1981)). The court held that when a party to an agreed protective order seeks to modify the order, the moving party "should have the burden of persuasion" because the party "agreed to the protective order . . . and the Court [initially] found sufficient good cause to enter the parties' joint protective order." *In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 2009 WL 951532, at *4. The court described the following standard:

> In assessing requests to modify, courts balance the potential harm to the party seeking protection against the requesting party's need for the information and the public interest served by its release. If good cause for the protective order existed when entered, only a change in circumstances by which the good cause is either removed

> or outweighed by other interests would justify modification. . . . .
>
> Good cause requires balancing the harm to the party seeking the protective order and the importance of disclosure to the public. Some factors the court may consider in making this determination, include "privacy interests, whether the information is important to public health and safety and whether the party benefitting from the confidentiality of the protective order is a public official."

Id. at *5 (footnotes omitted).

- In the context of a defendant's request to modify a protective order to allow the defendant's experts to publish their findings, one court concluded that the lenient standard in *United Nuclear* and *Wilk* did not apply. *See Taylor v. Solvay Pharms., Inc.*, 223 F.R.D. 544, 548–49 (D. Colo. 2004). The protective orders at issue were entered upon a finding of good cause, based on concern for the privacy and safety of the families of the victims and perpetrators of a school shooting, as well as the safety of the general public. *Id.* at 547. The court found that "[t]he standard to be used in deciding whether to modify the [protective orders] is not obvious." *Id.* at 548. The court distinguished *United Nuclear* because the movant "had not suggested that the materials at issue . . . would assist it in another lawsuit or that continued protection of the materials would force it to engage in repetitive discovery in any other case." *Id.* at 548–49. The court also found that *United Nuclear*, and its requirement that parties opposing modification of a protective order demonstrate prejudice to avoid modification, was inapplicable because "[m]any of the families interested in the materials [were] not parties to [the] case and no one appears to advocate on their behalf or on behalf of the public at-large." *Id.* at 549. The court also examined the more stringent Second Circuit standard described in *TheStreet.com*, and concluded that "[t]hough that standard might have application here, where the non-party families relied upon the protective order by producing material and testifying in depositions, this case does not require such a sweeping rule." *Id.* The court settled on the following standard: "Because good cause for the [protective orders] existed when the Magistrate Judge issued them, only a change in circumstances by which the good cause is either removed or outweighed by other interests would justify modification." *Id.* The court determined that the First Circuit's decision in *Public Citizen* set out an appropriate standard under the facts, where the court upheld modification because "the party seeking modification had met its burden of showing that 'the reasons underlying the initial promulgation of the order in respect to the particular document sought no longer exist[ed]; and the district court made a reasoned determination that public interest considerations favored allowing counsel to make those particular documents public.'" *Id.* (quoting *Public Citizen*, 858 F.2d at 791–92).

ELEVENTH CIRCUIT

Standard for Entering a Protective Order

- The Eleventh Circuit has recognized that there is no common-law right of access to discovery materials not filed with the court, *see In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (per curiam) (holding that the news organizations' "common-law right of access does not extend to information collected through discovery which is not a matter of public record"), and that news organizations "possess no First Amendment rights to the protected [discovery] information which override the provisions of FED. R. CIV. P. 26(c)," *id.* The court explained that a protective order could be issued under Rule 26(c) upon a showing of good cause, and elaborated:

> "Good cause" is a well established legal phrase. Although difficult to define in absolute terms, it generally signifies a sound basis or legitimate need to take judicial action. In a different context, this court has identified four factors for ascertaining the existence of good cause which include: "[1] the severity and the likelihood of the perceived harm; [2] the precision with which the order is drawn; [3] the availability of a less onerous alternative; and [4] the duration of the order." *Kleiner v. First National Bank of Atlanta*, 751 F.2d 1193, 1205 (11th Cir. 1985). In addition, this circuit has superimposed a "balancing of interests" approach to Rule 26(c). *See Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985).

Id. at 356.

The court explained that agreed protective orders can be necessary to facilitate discovery, but that even when such orders are entered, the burden remains on the party seeking confidentiality to show good cause for protecting individual documents upon a later challenge:

> Because parties often resist the exchange of confidential information, "parties regularly agree, and courts often order, that discovery information will remain private." The *Manual for Complex Litigation, Second*, prepared by the Federal Judicial Center, suggests that in complicated cases where document-by-document review of discovery materials would be unfeasible, an "umbrella" protective order, similar to the one issued in this case, should be used to protect documents designated in good faith by the producing party as confidential. Under the provisions of umbrella orders, the burden of proof justifying the need for the protective order remains on the movant; only the burden of raising the issue of confidentiality with respect to individual documents shifts to the other party. Protective

> measures requested by the parties incorporating umbrella orders have been approved by other courts pursuant to Rule 26(c).

Id. (internal citations omitted); *see also Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1362 (N.D. Ga. 2002) ("[C]alling a document confidential does not make it so in the eyes of the court; these consensual protective orders merely delay the inevitable moment when the court will be called upon to determine whether Rule 26(c) protection is deserved, a decision ultimately rooted in whether the proponent demonstrates 'good cause.'") (citation omitted). The *Alexander Grant* court also articulated the reasons that umbrella protective orders may be necessary:

> The realities of today's world have shown that discovery and the exchange of information can become extremely difficult. Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document. The order issued in this case, as in others, is designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure. After this sifting, material can be "filed" for whatever purpose consistent with the issues being litigated whether by pretrial hearing or an actual trial. Judicial review will then be limited to those materials relevant to the legal issues raised. History has confirmed the tremendous saving of time effected by such an approach. The objective is to speed up discovery. Efficiency should never be allowed to deny public access to court files or material of record unless there has been an appropriate predicate established. The procedures utilized here allow the litigation to proceed expeditiously without compromising the rights of anyone. . . . We conclude that in complex litigation where document-by-document review of discovery materials would be unpracticable, and when the parties consent to an umbrella order restricting access to sensitive information in order to encourage maximum participation in the discovery process, conserve judicial resources and prevent the abuses of annoyance, oppression and embarrassment, a district court may find good cause and issue a protective order pursuant to Rule 26(c).

820 F.2d at 356–57.

- The Eleventh Circuit has also set out the following standard:

> Public disclosure of discovery material is subject to the discretion of the trial court and the federal rules that circumscribe that discretion. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33, 104 S. Ct. 2199, 2208, 81 L. Ed. 2d 17[] (1984). Where discovery

> materials are concerned, the constitutional right of access standard is identical to that of Rule 26(c) of the Federal Rules of Civil Procedure. *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989) (citations omitted). Accordingly, where a third party seeks access to material disclosed during discovery and covered by a protective order, the constitutional right of access, like Rule 26, requires a showing of good cause by the party seeking protection. *Id.*

Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310 (11th Cir. 2001) (per curiam).

With respect to the common-law right of access to judicial documents, the court explained that "[n]ot unlike the Rule 26 standard, the common-law right of access requires a balancing of competing interests." *Id.* at 1311 (citation omitted). But the court cautioned that there is no common-law right of access to discovery materials:

> Although there is some disagreement about where precisely the line should be drawn, when applying the common-law right of access federal courts traditionally distinguish between those items which may properly be considered public or judicial records and those that may not; the media and public presumptively have access to the former, but not to the latter. An illustrative example is the treatment of discovery material, for which there is no common-law right of access, as these materials are neither public documents nor judicial records.

Id. (footnote and citation omitted).

With respect to the balancing required under Rule 26(c), the court stated:

> Rule 26(c) permits a court upon motion of a party to make a protective order requiring "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." FED. R. CIV. P. 26(c)(7). The prerequisite is a showing of "good cause" made by the party seeking protection. *See id.* Federal courts have superimposed a balancing of interests approach for Rule 26's good cause requirement. *Farnsworth v. Procter & Gamble, Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) (citations omitted). This standard requires the district court to balance the party's interest in obtaining access against the other party's interest in keeping the information confidential. *Id.*

Id. at 1313.

In her concurring opinion, Judge Black pointed out that discovery is necessarily a presumptively private endeavor:

> If it were otherwise and discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe. Not only would voluntary discovery be chilled, but whatever discovery and court encouragement that would take place would be oral, which is undesirable to the extent that it creates misunderstanding and surprise for the litigants and the trial judge.

Id. at 1316 (Black, J., concurring) (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986)) (quotation marks omitted). Judge Black explained that "the purpose of discovery is to resolve legal disputes between parties, not to provide newsworthy material." *Id.* (Black, J., concurring). Judge Black further explained that the press could intervene to challenge a protective order as overly broad, but that the courts do not have the resources to deal with document-by-document challenges:

> To facilitate prompt discovery and the timely resolution of disputes, this Court has upheld the use of umbrella protective orders similar to the one used in this case. *See, e.g.*, *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89, 91 (11th Cir. 1989); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987). In these cases, we did not permit the media to challenge each and every document protected by the umbrella order. *See McCarthy*, 876 F.2d at 92; *Alexander Grant*, 820 F.2d at 356. Instead, the media was permitted only to challenge the umbrella order as being too broad, based on a variety of factors. *See id.* (listing four factors). We have restricted the scope of the media's challenge because a document-by-document approach would not only burden the trial court, but, more importantly, it would interfere with the free flow of information during discovery. *See id.* at 355–56. Such interference by parties who have no interest in the underlying litigation could seriously impair an Article III court from carrying out its core function—resolving cases and controversies. *See Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1017 (11th Cir. 1992) (Edmondson, J., dissenting).

Id. at 1316–17 (Black, J., concurring) (footnotes omitted).

- A court in the Eleventh Circuit has stated:

> Rule 26(c) authorizes the Court "for good cause shown" to protect parties from "undue burden or expense" in discovery by

> ordering "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way . . . ." FED. R. CIV. P. 26(c)(7). The party moving for a protective order has the burden of demonstrating "good cause." *Williams v. Taser Int'l, Inc.*, No. 1:06-CV-0051, 2006 WL 1835437, at *1 (N.D. Ga. June 30, 2006) (Story, J.). In demonstrating good cause, the movant must "make a 'particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements' supporting the need for a protective order." *Id.* (citations omitted); *see also United States v. Dentsply Int'l, Inc.*, 187 F.R.D. 152, 158 (D. Del. 1999) ("'Broad allegations of harm, unsubstantiated by specific examples,' do not support a showing for good cause.") (quoting *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986)).

Estate of Manship v. United States, 240 F.R.D. 700, 702 (N.D. Ga. 2006).

Standard for Entering a Sealing Order

- The *Chicago Tribune* court recognized a heightened standard under the common-law right of access analysis where a court seals an entire case:

> In certain narrow circumstances, the common-law right of access demands heightened scrutiny of a court's decision to conceal records from the public and the media. Where the trial court conceals the record of an entire case, making no distinction between those documents that are sensitive or privileged and those that are not, it must be shown that "the denial [of access] is necessitated by a compelling governmental interest, and is narrowly tailored to that interest." This heightened scrutiny is necessitated by the fact that entire civil cases otherwise open to the public are erased as if they never occurred.

263 F.3d at 1311 (internal citations omitted). In contrast, the court stated that "[t]he common law right of access standard as it applies to particular documents requires the court to balance the competing interests of the parties." *Id.* at 1312. The court concluded that the degree of public access to court documents depends on the documents' involvement in judicial decisionmaking on the merits of a case: "The better rule is that material filed with discovery motions is not subject to the common-law right of access, whereas discovery material filed in connection with pretrial motions that require judicial resolution of the merits is subject to the common-law right, and we so hold." *Id.* (footnote omitted).

- In connection with sealing documents filed with the court, the Eleventh Circuit has also recognized that the court has an independent duty to scrutinize requests for sealing:

> [E]ven where no third party challenges a protective order, "[t]he judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it). He may not rubber stamp a stipulation to seal the record." *Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) (citations omitted). Otherwise, "the interest in publicity will go unprotected unless the media are interested in the case and move to unseal." *Id.*

Estate of Martin Luther King, Jr., Inc. v. CBS, Inc., 184 F. Supp. 2d 1353, 1363 (N.D. Ga. 2002).

The *Martin Luther King* court discussed the common-law right of access to judicial records:

> Because the "operations of the courts and the judicial conduct of judges are matters of the utmost public concern," courts have long recognized the public's right to inspect and copy judicial records. Nevertheless, this common-law right of access to the courts is not absolute. For example, the public has no common-law right of access to discovery materials, exchanged during a process that is typically conducted in private with minimal judicial supervision. Further, even where litigants file discovery materials with a court in connection with pretrial discovery motions, such as motions to compel, the supporting discovery documents are not subject to the common-law right of access. However, discovery materials filed with the court "in conjunction with pretrial motions that require judicial resolution of the merits [are] subject to the common-law right . . . ." This is because, unlike privately exchanged discovery materials, "documents filed as part of a dispositive motion, such as a summary judgment motion," assist the court in determining the parties' substantive rights, serve as a substitute for trial, and render those discovery documents "judicial."
>
> Nevertheless, even where the common-law right of access attaches, only in extraordinary circumstances need the denial of such access be justified by a compelling interest. Instead, the common-law right of access merely necessitates a "good cause" analysis under Rule 26(c). This analysis requires the court to (1) determine whether valid grounds for the issuance of a protective order have been presented; and (2) balance the public's interest in access against the litigant's interest in confidentiality. Where the proponent of the protective order contends that the materials at issue contain trade secrets, for example, the court must first determine whether such

> assertion is true. To present a *prima facie* case for trade secret protection, the proponent of the protective order must prove that it consistently treated the information as a secret and took steps to guard it, the information is of substantial value to the proponent, the information would be valuable to the proponent's competitors, and the information "derives its value by virtue of the effort of its creation and lack of dissemination." If the proponent fails to satisfy this first inquiry, then no "good cause" exists for the protective order. If satisfied, however, the court must then weigh the proponent's interest in confidentiality against the public's interest in access before ultimately deciding whether to issue the order.

Id. at 1365–66 (internal citations omitted).

With respect to the First Amendment right of access, the court stated that "'[m]aterials merely gathered as a result of the civil discovery process . . . do not fall within the scope of the constitutional right of access's compelling interest standard,'" and that "for purposes of determining whether to unseal such discovery materials, the First Amendment right of access standard is 'identical to the Rule 26 good cause standard.'" *Id.* at 1366 (citations omitted). The court also explained that "[w]ith respect to discovery documents submitted to a court in connection with a dispositive motion, rather than '[m]aterials merely gathered as a result of the civil discovery process,' the Eleventh Circuit has presented a somewhat muddled First Amendment analysis," and stated that "[e]ven though documents filed in support of dispositive motions are used to facilitate a resolution of the action on the merits, and are likely considered by courts in lieu of a trial to adjudicate the parties' substantive rights, the Eleventh Circuit has declared that the good cause standard, rather than the compelling interest test, satisfies any First Amendment concerns." *Id.* (citing *Chicago Tribune*, 263 F.3d at 1316; *Citizens First Nat'l Bank*, 178 F.3d at 946).

Standard for Modifying a Protective Order

- The Eleventh Circuit has not firmly set out a specific standard for modifying a protective order. *See SRS Techs., Inc. v. Physitron, Inc.*, 216 F.R.D. 525, 526 (N.D. Ala. 2003). The *SRS Technologies* court noted that there is "no consensus among the circuits as to the proper standard to apply" to modification. *Id.* at 527. The court distinguished the First Circuit's *Public Citizen* case, explaining that in the case at bar, the parties mutually agreed to the terms of the protective order and the plaintiff was not a public citizen group seeking to obtain documents for public benefit, but a party seeking to use confidential documents in lawsuits against third parties. *Id.* After surveying the approaches in different circuits, the *SRS Technologies* court settled on the following approach:

> While this review of authority reveals no majority rule or consensus among the circuits, and no dispositive case in the Eleventh Circuit, one undisputed point does emerge: the trial court retains the

> power and the discretion to modify a prior protective order. *See, e.g.*, *Public Citizen*, 858 F.2d at 782; *United Nuclear*, 905 F.2d at 1427. Exactly what standard should guide a trial court in deciding whether to modify a protective order is less clear. The Second Circuit test, urged by defendants, applies a stringent standard that requires the moving party to show extraordinary circumstance or a compelling need to modify a protective order. *In re Agent Orange*, 821 F.2d at 147. As noted, the Eleventh Circuit rejected this strict standard in favor of grand jury access to material produced in civil litigation and covered by a protective order. *In re Grand Jury Proceedings*, 995 F.2d [1013,] 1020 [(11th Cir. 1993)]. The court assumes that the Eleventh Circuit would not follow that rejected standard in a case involving access to protected material for use in a future civil case, even though the circumstances of these two cases vary widely. The court concludes, however, that the Eleventh Circuit would not adopt the per se rule of disclosure employed in *In re Grand Jury Proceedings*, 995 F.2d at 1015, in situations like this case that do not involve the special concerns of a grand jury subpoena.
>
> This court finds that the better-reasoned standard applies a balancing test to determine whether any justification exists for lifting or modifying the protective order, similar to that employed by the Third Circuit. *See Pansy*, 23 F.3d at 790. As the Third Circuit noted, one factor the court should consider is the reliance placed by the parties on the protective order. *Id.* Another important factor should be the integrity of court orders and the purpose of confidentiality orders in streamlining the discovery process. *See* Miller, *supra*, 105 HARV. L. REV. at 499–501.

Id. at 529–30. In considering modification, the court found it important that one of the parties sought to undo the protective order after the parties had agreed to it, that the defendant had relied on the protective order, that it was important to promote reliance interests for future cases, that the plaintiff had waited until after the lawsuit settled to seek changes, and that the parties had settled the lawsuit without either party admitting liability. *See id.* at 530.

- In the context of a nonparty seeking modification of a stipulated protective order, a court in the Eleventh Circuit has explained that the party seeking confidentiality bears the burden of showing good cause for protection. *See McCarty v. Bankers Ins. Co.*, 195 F.R.D. 39, 42 (N.D. Fla. 1998) ("[W]here good cause was not shown for the initial issuance of the protective order, parties seeking to maintain the protective order must establish the need for continued protection (i.e. good cause).") (citation omitted). The court stated that although "some jurisdictions have held that general concerns of case management and efficiency have been held not to establish the requisite good-cause required for the initial issuance of a

protective order," *id.* (footnote omitted), where there has been reliance on the protective order, "the good-cause analysis for maintaining the protective order differs from the good-cause analysis which would normally accompany an initial request for a protective order," *id.* The court held that "additional factors such as reliance on the protective order, the status and needs of the person or entity seeking modification, and the pendency of other litigation brought by the person or entity seeking modification, will factor into the court's determination of the propriety of maintaining the protective order." *Id.*

The court found reliance to be an important factor in considering modification, noting that "'[f]ailure to protect Defendants' reliance on the Protective Order would not only prejudice the confidentiality interests of Defendants, it would undermine the effectiveness of protective orders in facilitating discovery.'" *Id.* at 43 (quoting *State of Florida v. Jones Chems., Inc.*, 148 F.R.D. 282, 288 (M.D. Fla. 1993) (internal citations omitted)) (footnote omitted). The court also focused on whether other litigation is pending against the party opposing modification, noting that "[c]ourts have reasoned that the absence of any pending litigation makes it less likely that modification will avoid repetitious or duplicative discovery, and that allowing modification may result in harassment." *Id.* (citation omitted). The court pointed out that another court had focused on the status of the nonparty as an investigator, rather than a litigant, and found that this fact required the party seeking modification to demonstrate adequate grounds for granting the request. *Id.* (citing *H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc.*, 106 F.R.D. 551 (S.D.N.Y. 1985)).

D.C. CIRCUIT

Standard for Entering a Protective Order

- The D.C. Circuit has recognized the need for flexibility in considering protective orders:

> Rule 26(c) is highly flexible, having been designed to accommodate all relevant interests as they arise. *See, e.g.*, Adv. Comm. Note, 28 U.S.C. App., p. 715 ("The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure"); *Burka v. HHS*, 87 F.3d 508, 517 (D.C. Cir. 1996) (factors considered include "the requester's need for the information from this particular source, its relevance to the litigation at hand, the burden of producing the sought-after material, and the harm which disclosure would cause to the party seeking to protect the information"); *Hines v. Wilkinson*, 163 F.R.D. 262, 266 (S.D. Ohio 1995) ("the Rule's incorporation of the concept of 'good cause' implies that a flexible approach to protective orders may be taken, depending upon the nature of the interests sought to be protected and the interests that a protective order would infringe"); *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 106 F.R.D. 551, 556

> (S.D.N.Y. 1985) (assessing interests of third party state governments that had subpoenaed from plaintiff documents plaintiff had obtained from defendant in discovery subject to protective order); WRIGHT, 8 FEDERAL PRACTICE AND PROCEDURE 2D § 2036, at 484–86 ("the existence of good cause for a protective order is a factual matter to be determined from the nature and character of the information sought . . . weighed in the balance of the factual issues involved in each action").

United States v. Microsoft Corp., 165 F.3d 952, 959 (D.C. Cir. 1999). The court noted that Rule 26 incorporates the flexibility necessary to accommodate the interests at issue in different cases: "[A]lthough 'the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.'" *Id.* (quoting *Seattle Times*, 467 U.S. at 35 n.21). The court explained: "[T]he good cause standard of Rule 26(c) comports with the first amendment not fortuitously but precisely because it takes into account all relevant interests, including those protected by the first amendment." *Id.* at 959–60. The court concluded that "the 'good cause' standard in the Rule is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case." *Id.* at 960.

- A court in the D.C. Circuit has explained that the party seeking the protective order "must make a specific demonstration of facts to support her request for the protective order quashing the deposition." *Alexander v. Fed. Bureau of Investigation*, 186 F.R.D. 71, 75 (D.D.C. 1998). The court stated:

> Specifically, good cause exists under Rule 26(c) when justice requires the protection of a party or a person from any annoyance, embarrassment, oppression, or undue burden or expense. The party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one. Indeed, "[t]he moving party has a heavy burden of showing 'extraordinary circumstances' based on 'specific facts' that would justify such an order." *Prozina Shipping Co., Ltd. v. Thirty-Four Automobiles*, 179 F.R.D. 41, [48] (D. Mass. 1988). *See also Bucher v. Richardson Hospital Auth.*, 160 F.R.D. 88, 92 (N.D. Tex. 1994) (stating that protective orders prohibiting depositions are 'rarely granted' and then only if the movant shows a "particular and compelling need" for such an order). Moreover, the showing required under Rule 26(c) must be sufficient to overcome plaintiffs' legitimate and important interests in trial preparation. *See Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985) ("[T]rial preparation and defense . . . are important interests, and great care must be taken to avoid their unnecessary

infringement.").

Id.

- Another court has stated:

> Note that plaintiff argues that there is a presumption under Rule 26(c) that "discovery should be open." I see no basis for such a presumption in that Rule. *See* Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) That the Federal Rules Do Not Declare That Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV[.] 331 (2006). To the contrary, in my view, determining whether there should be public access to materials disclosed in discovery requires a nuanced balancing of various factors, including "(1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced."

Huthnance v. Dist. of Columbia, 255 F.R.D. 285, 288 n.3 (D.D.C. 2008) (quoting *Anderson v. Ramsey*, No. 04-CV-56, 2005 WL 475141, at *2 (D.D.C. Mar. 1, 2005) (citing *United States v. Hubbard*, 650 F.2d 293, 324–25 (D.C. Cir. 1980))) (internal record citation omitted). The court also explained:

> "[G]ood cause exists under Rule 26(c) when justice requires the protection of a party or a person from any annoyance, embarrassment, oppression, or undue burden or expense." *Fonville v. District of Columbia*, 230 F.R.D. 38, 40 (D.D.C. 2005), but "[t]he party requesting a protective order must make a specific demonstration of facts in support of the request as opposed to conclusory or speculative statements about the need for a protective order and the harm which will be suffered without one." *Id.* "Accordingly, courts apply a balancing test, weighing the movant's proffer of harm against the adversary's 'significant interest' in preparing for trial." *Doe* [*v. Dist. of Columbia*], 230 F.R.D. [47,] 50 [(D.D.C. 2005)].

Id. at 296.

<u>Standard for Entering a Sealing Order</u>

- In *United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980), the D.C. Circuit discussed

factors to be considered in sealing court documents in the context of a criminal suppression hearing. The court recognized the "important presumption in favor of public access to all facets of criminal court proceedings." *Id.* at 317. The court recognized the following factors in considering whether the sealing of the documents at issue was appropriate: (1) the need for public access to the documents at issue; (2) previous public use of the documents; (3) whether objections to unsealing are raised and the identity of those objecting; (4) the strength of the generalized property and privacy interests asserted; (5) the possibility of prejudice by disclosure; and (6) the purposes for which the documents were introduced to the court. *See id.* at 317–22.

With respect to the first factor, the court considered the fact that the public had access to the courtroom proceedings on the relevant motion, the memoranda filed by the parties, the trial judge's decisions on the motion, the stipulated record, and the trial of the criminal charges. *Id.* at 317–18. The court also considered the fact that none of the documents at issue were used in the examination of witnesses, referred to in the judge's decision, or included as part of the stipulated public record. *Id.* at 318.

With respect to the second factor, the court explained:

> Previous access is a factor which may weigh in favor of subsequent access. Determining whether, when and under what conditions the public has already had access to court records in a given case cannot of course guide decision concerning whether, when and under what conditions the public should have access as an original matter. However, previous access has been considered relevant to a determination whether more liberal access should be granted to materials formerly properly accessible on a limited basis through legitimate public channels and to a determination whether further dissemination of already accessible materials can be restrained.

Id. (footnotes omitted).

With respect to the third factor, the court noted: "The kinds of property and privacy interests asserted by [a nonparty] to require retention of the documents under seal can be waived by failure to assert them in timely fashion, and the strength with which a party asserts its interests is a significant indication of the importance of those rights to that party." *Hubbard*, 650 F.2d at 319 (footnote omitted). The court elaborated that "where a third party's property and privacy rights are at issue[,] the need for minimizing intrusion is especially great and the public interest in access to materials which have never been judicially determined to be relevant to the crimes charged is especially small." *Id.* (footnote omitted).

With respect to the fourth factor, the court considered it important that the nonparty's property and privacy interests would be infringed by making the documents public. *See id.* at 320.

With respect to the fifth factor, the court stated: "[T]he possibility of prejudice to the defendants by sensational disclosure is a factor which may weigh in favor of denying immediate public access. The likelihood of prejudice will in turn depend on a number of factors, including, most importantly, the nature of the materials disclosed. Until such an examination is undertaken, the weight of this factor cannot be determined." *Id.* at 320–21 (footnote omitted).

With respect to the sixth factor, the court considered it important that the documents at issue were not relevant to the crimes charged, were not used in the trial, and were not relied upon by the judge in issuing a decision on the motion to suppress. *Id.* at 321. The fact that the connection to the proceedings was minimal weighed against public access. *See id.*

- Another case examined the propriety of granting public access to tapes used in a criminal trial, and discussed the public's general right of access to judicial documents, but also recognized that exceptions to public access exist:

> [T]he tradition of access is not without its time-honored exceptions:
>
> > Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes. For example, the common-law right of inspection has bowed before the power of a court to insure that its records are not "used to gratify private spite or promote public scandal" through the publication of "the painful and sometimes disgusting details of a divorce case." Similarly, courts have refused to permit their files to serve as reservoirs of libelous statements for press consumption, or as sources of business information that might harm a litigant's competitive standing.
>
> [*Nixon v. Warner Communications*, 435 U.S. 589, 598, 98 S. Ct. 1306, 1312, 55 L. Ed. 2d 570 (1978)] (citations omitted). The public has in the past been excluded, temporarily or permanently, from court proceedings or the records of court proceedings to protect private as well as public interests: to protect trade secrets, or the privacy and reputation of victims of crimes, as well as to guard against risks to national security interests, and to minimize the danger of an unfair trial by adverse publicity.

In re Nat'l Broadcasting Co., 653 F.2d 609, 613 (D.C. Cir. 1981) (quoting *Hubbard*, 650 F.2d at 315–16 (footnotes omitted)) (quotation marks omitted). The court explained that "[b]ecause of the difficulties inherent in formulating a broad yet clear rule to govern the

variety of situations in which the right of access must be reconciled with legitimate countervailing public or private interests, the decision as to access is one which rests in the sound discretion of the trial court." *Id.* (footnote and citations omitted). The court continued:

> This discretion, however, is not open-ended. Rather, access may be denied only if the district court, after considering "the relevant facts and circumstances of the particular case", and after "weighing the interests advanced by the parties in light of the public interest and the duty of the courts", concludes that "justice so requires". The court's discretion must "clearly be informed by this country's strong tradition of access to judicial proceedings". In balancing the competing interests, the court must also give appropriate weight and consideration to the "presumption—however gauged—in favor of public access to judicial records." Any denial or infringement of this "precious" and "fundamental" common law right remains subject to appellate review for abuse.

Id. (footnotes and citations omitted).

- In *DBI Architects, P.C. v. American Express Travel Related Services Co.*, 462 F. Supp. 2d 1 (D.D.C. 2006), the court applied the six factors from *Hubbard* in the context of determining whether to seal a settlement agreement in a civil case. The court stated:

> The following six factors are to be considered when determining "whether and to what extent a party's interest in privacy or confidentiality of its processes outweighs this strong presumption in favor of public access to judicial proceedings"[:]
>
> > [ ](1) the need for public access to the documents at issue; (2) the extent to which the public had access to the documents prior to the sealing order; (3) the fact that a party has objected to disclosure and the identity of that party; (4) the strength of the property and privacy interests involved; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced.

Id. at 7–8 (quoting *Johnson v. Greater Southeast Cmty. Hosp. Corp.*, 951 F. 2d 1268, 1277, 1277 n.14 (D.C. Cir. 1991)). The court noted that "[w]hile the sealing of court records barring public access may be justified when a litigant's privacy interest outweighs the public's right to know, the balancing of these important interests is a matter committed to

the trial court's sound discretion."[10] *Id.* at 8 (citing *Johnson*, 951 F.2d at 1277).

Standard for Modifying a Protective Order

- The D.C. Circuit has explained that "[g]enerally, '[t]he decision to lift or modify a protective order is proper where changed circumstances eliminate 'a continued need for protection.'" *In re Vitamins Antitrust Litig.*, No. Misc. 99-197(TFH), MDL 1285, 2001 WL 34088808, at *6 (D.D.C. Mar. 19, 2001) (citation omitted). The court also noted that "[p]rotective orders may also be modified to meet the need[s] of parties in other litigation." *Id.* (citation omitted). The court stated:

> Courts have used various formulae in determining whether to modify a protective order. In balancing competing interests, courts have weighed, *inter alia*, efficiency concerns, reliance interests upon the continued integrity of the protective order, and the public interest in open access to records and documents. A significant factor for many courts is whether the discovery sought will obviate the need for that party to engage in duplicative discovery. Implicit in this consideration is a determination of the discoverability of the materials sought.

Id. (internal citations and footnotes omitted). The court also stated that "[c]ourts have considered factors such as: whether the movant is a party to the original litigation or non-party intervenor, whether the protective order was agreed upon by the parties, whether the party seeking intervention is the government or a private party, and whether modification is sought for purely private reasons or for public reasons." *Id.* at *6 n.16.

The court noted that courts have taken various approaches to modification of a protective order:

> One line of authorities . . . place[s] the burden on the intervening party moving for modification. The rationale for this line of cases is that a party to a protective order is entitled to rely upon it. A second line of cases, however, hold[s] that the party seeking to continue a protective order bears the burden of demonstrating good cause. The rationale underscoring this line of cases is that to place the burden on the party seeking discovery of documents covered by a protective order would place an undue burden on the public's right of access and generally ignores the fact that civil litigants have an obligation to produce all relevant information.

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[10] The court denied the motion to seal, noting that the settlement agreement had not been filed with the court and there was no need for its terms to be entered in the record of the case. *See DBI Architects*, 462 F. Supp. 2d at 8.

Id. at *6 n.18 (quoting *Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 502 n.7 (S.D. Iowa 1992)) (quotation marks omitted).

- A court in the D.C. Circuit has explained that protective orders "may be modified to serve important efficiency or fairness goals in the court's discretion." *Infineon Techs. AG v. Green Power Techs. Ltd.*, 247 F.R.D. 1, 2 (D.D.C. 2005) (citing *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046 (D.C. Cir. 1998); *Alexander*, 186 F.R.D. at 100). The court noted that "[m]odification of a protective order requires a showing of good cause," that "'[g]ood cause' implies changed circumstances or new situations," that "a continuing objection to the terms of an order does not constitute good cause to modify or withdraw a protective order," and that "[t]he party seeking modification of a protective order bears the burden of showing that good cause exists." *Id.* (citations omitted); *accord United States v. Diabetes Treatment Ctrs. of Am.*, No. Civ. 99-3298, 01-MS-50 (MDL)(RCL), 2004 WL 2009414, at *2 (D.D.C. May 17, 2004).

  The *Infineon* court listed relevant factors, including: "(1) the nature of the protective order; (2) the foreseeability of the modification; (3) the parties' reliance on the protective order; and (4) the presence of good cause for modification." 247 F.R.D. at 2 (citations omitted). In addition to considering these factors, the court also considered important the fact that the party seeking confidentiality had not shown how it would be prejudiced by modification, and noted that "confidentiality concerns can be allayed by the limited modification, and by putting . . . counsel [in the related proceeding] under the terms of the Protective Order." *Id.* (citing *In re Jenoptik AG*, 109 F.3d 721, 723 (Fed. Cir. 1997)).[11]

[11] The court also considered the factors identified in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 124 S. Ct. 2466 (2004), to be used in assessing a discovery request under 28 U.S.C. § 1782(a), which governs proceedings in a foreign tribunal. *See Infineon*, 247 F.R.D. at 4–5. The court recognized that the statute did not control the outcome in its case, but found that the factors were helpful in assessing the motion for modification of a protective order, which was made by a party for the purpose of providing documents to its counsel in Germany for use in proceedings there. The *Intel* factors include: "(a) whether the person from whom discovery is sought is a participant in the foreign proceeding; (b) the nature of the foreign tribunal, the character of the proceedings underway, and the receptivity of the tribunal to U.S. federal judicial assistance; (c) whether the request is an attempt to circumvent foreign proof gather restrictions; and (d) the intrusiveness or burden imposed by the discovery." *Id.* at 4 (quoting *Intel*, 124 S. Ct. at 1483). These factors would not seem relevant in most motions for modification of a protective order.

FEDERAL CIRCUIT[12]

Standard for Entering a Protective Order

- In analyzing Court of Federal Claims Rule 26(c), the counterpart to Federal Rule of Civil Procedure 26(c), the Federal Circuit explained that "[a] movant for a protective order . . . must show 'good cause' why a protective order should issue. Good cause requires a showing that the discovery request is considered likely to oppress an adversary or might otherwise impose an undue burden." *Forest Prods. Northwest, Inc. v. United States*, 453 F.3d 1355, 1361 (Fed. Cir. 2006) (citing *Capital Props., Inc. v. United States*, 49 Fed. Cl. 607, 611 (2001)).

Standard for Modifying a Protective Order

- In one case, applying First Circuit law, the Federal Circuit noted that "in determining whether a protective order should be modified, the court must balance the privacy interests of the parties against the public interest in access to the discovery information." *Baystate Techs., Inc. v. Bowers*, 283 F. App'x 808, 810 (Fed. Cir. 2008) (unpublished) (per curiam).

- In another case, applying Ninth Circuit law, the Federal Circuit stated:

> In *Beckman Industries, Inc. v. International Insurance Co.*, 966 F.2d 470, 475 (9th Cir. 1992), the court stated that "Ninth Circuit precedent strongly favors disclosure to meet the needs of parties in pending litigation." The court stated that "legitimate interests in privacy can be protected by putting the intervenors [the parties requesting modification of the protective order] under the same restrictions as those contained in the original protective order" and

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[12] The Federal Circuit applies the law of the regional circuit when considering procedural issues not unique to patent law. *See In re Advanced Micro Devices, Inc.*, 230 F. App'x 971, 972 (Fed. Cir. 2007) (unpublished) ("Because this case involves a procedural issue not unique to patent law, we apply the law of the regional circuit . . . .") (citing *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 n.2 (Fed. Cir. 1996)); *see also Baden Sports, Inc. v. Molten USA, Inc.*, 556 F.3d 1300, 1304 (Fed. Cir. 2009) ("We apply our own law with respect to issues of substantive patent law and also with respect to certain procedural issues pertaining to patent law. We apply the law of the regional circuit on non-patent issues.") (internal citation omitted); *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1373 (Fed. Cir. 2008) ("This court applies the law of the regional circuit to discovery issues.") (citation omitted). Because whether to grant or modify a protective order is a procedural issue not unique to patent law, the law of the regional circuit, rather than the law of the Federal Circuit, would apply when the Federal Circuit considers requests to grant or modify a protective order. *See Advanced Micro Devices*, 230 F. App'x at 972–73 (applying Ninth Circuit law to the decision of whether to grant a motion for protective order); *Schlafly v. Caro-Kann Corp.*, No. 98-1005, 1998 WL 205766, at *3 (Fed. Cir. Apr. 28, 1998) (unpublished table decision) (considering a request to review a protective order under Ninth Circuit law because the Federal Circuit "review[s] matters not within [its] exclusive jurisdiction, such as matters relating to discovery, under the applicable law of the regional circuit in which the district court sits . . . ") (citation omitted). As a result, there is not a unique set of decisions in the Federal Circuit regarding the standard for granting or modifying protective orders. The cases discussed from the Federal Circuit are examples of the application of the law of other circuits.

> noted that the parties in the case had agreed to use the information only in accordance with the protective orders. *Id.*

In re Jenoptik, AG, 109 F.3d 721, 723 (Fed. Cir. 1997).[13]

[13] The dissent argued that the court also should have considered issues of comity, and argued that "[i]t is improper use of United States discovery procedures, by a party to a German action, to place in evidence, in Germany, trade secret information that is not discoverable under German law." *In re Jenoptik*, 109 F.3d at 725 (Newman, J., dissenting).

PLEADING ADVENTURES CONTINUE: IQBAL

Introduction

Almost exactly two years — and two S.Ct. volumes — after Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S.Ct. 1955, (2007), the Court decided Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). Senator Specter has managed to beat the law reviews into print, introducing S. 1504 to restore pleading practice as established by the half-century of precedent that evolved under Conley v. Gibson, 355 U.S. 41 (1957). These notes briefly describe the Iqbal opinion, identifying the phrases and statements that seem most likely to become the catch words for the next round of adventures in pleading practice. It is too early to hazard any guesses about the ways in which litigants and courts will respond in the short and intermediate run. But it is not too early to begin to sketch some of the possible modes of rulemaking response. Three modes are noted here: general pleading revision through Rule 8(a)(2), pre-pleading "protocols," and pleading forms.

The appendices include the Iqbal opinions; S. 1504 and a memorandum prepared by Professor Marcus to highlight the risks of attempting to overrule the Twombly and Iqbal decisions by this means; earlier agenda materials reflecting stages in Committee discussions of leading, including a memorandum describing the Twombly decision and possible reactions to it; and an article on Twombly by Professor Bone.

Putting Iqbal on the agenda recognizes the importance of paying close attention to continuing developments. It does not imply any suggestion that bad things will follow. To the contrary, it is possible — and to be hoped — that lower courts, inspired or prodded by the Iqbal opinion, will develop pleading practice under an unrevised Rule 8(a)(2) in ways just as effective as might occur under revised rule language. There may be some value in reflecting on experience with adjusting to an advisory Sentencing Guidelines regime after the *Booker* decision. Lower courts, with occasional review of particular issues by the Supreme Court, seem to be working out a process that has held back any burning desire for legislative revision. So it may be with Iqbal. The Administrative Office is launching a docket study that will provide a comparison of dispositions over a period beginning two years before the Twombly decision and running, initially, through the first months after the Iqbal decision. Meanwhile, the mood can be not alarm but anticipation.

Ashcroft v. Iqbal: The Opinion

(1) Broad principles

"Two working principles" are announced in the Iqbal decision. 129 S.Ct. at 1949-1950:

> First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.
>
> Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. * * * Determining whether a complaint states a plausible claim for relief will * * * be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. * * * But where the well-pleaded facts do not permit the court to infer more than a mere possibility of misconduct, the complaint has alleged — but it has not "show[n]" — "that the pleader is entitled to relief." Fed.Rule Civ.Proc. 8(a)(2).

Some difficulty may lie in drawing the line between "legal conclusions," that need not be accepted, and "well-pleaded facts." In discussing collateral-order appeal jurisdiction, the Court observed: "Though determining whether there is a genuine issue of material fact at summary judgment is a question of law, it is a legal question that sits near the law-fact divide. Or as we said

* * * it is a 'fact-related' legal inquiry." 129 S.Ct. at 1947. Later on the same page, the Court stated that "[e]valuating the sufficiency of a complaint is not a 'fact-based' question of law * * *."

More obvious room for creative interpretation lies in determining what is "plausible" in any specific context, as determined by "judicial experience and common sense." These words have already provoked anguished predictions that courts have been set free to measure complaints, and dismiss actions, based on the sympathies and distastes of individual judges and panels.

(2) Finer-grained phrases

At the beginning of the pleading discussion, Part IV A, the Court invoked Twombly for the proposition that Rule 8(a)(2) "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Standing alone, this observation easily fits with the actual run of pre-Twombly notice pleading; the "no set of facts" hyperbole was not used to allow "you hurt me" pleading.

The Court also spurned "'a formulaic recitation of the elements of a cause of action,'" and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." Although the Court began by "taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination," the opinion does not seem to look toward a rule that a complaint need only plead the elements of the claim.

The level of fact detail and the cogency of the inferences required to get beyond the threadbare and conclusional, to move from the possible to the plausible, is described in various ways. At first, 129 S.Ct. 1949, the Court invoked Twombly for this: "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." That seems to suggest that a possibility less than a probability suffices — something less than 50% likely. But in describing the actual decision in Twombly, the Court explained that it had "concluded that [parallel conduct] did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." 129 S.Ct. 1950. "[M]ore likely explained," without more, seems to look for at least equipoise; a 49% prospect is a possibility, not yet a probability. But the continuing emphasis on "plausibility" surely does not seem to imply anything as high as 49% probability.

(3) Application

Any attempt to assess the general statements must be informed by the application. And the application turns on what the Court was looking for — what must be shown to hold the defendants liable as a foundation for determining what must be pleaded.

The claim was taken to be that Attorney General Ashcroft and FBI Director Mueller violated the plaintiff's constitutional right to be protected against discrimination because of race, religion, or national origin. The violation occurred by the policy designating Arab Muslim men as persons of "high interest" in investigating the terrorist acts of September 11, 2001. Attorney General Ashcroft was said to be the principal architect of the policies, and Director Mueller was said to have been instrumental in adopting, promulgating, and implementing the challenged policies and practices. In addition, the complaint alleged that these defendants knew of, condoned, and willfully and maliciously agreed to subject the plaintiff to harsh conditions of confinement on account of his religion, race, and national origin, and for no legitimate penological interest.

In approaching these allegations, Part III of the opinion, 129 S.Ct. 1947-1949, rejects "respondeat superior" liability for government officials. "[E]ach Government official, his or her title

notwithstanding, is only liable for his or her own misconduct." An official charged with unlawful discrimination arising from superintendent responsibilities is liable only for "purposeful discrimination," which requires "undertaking a course of action '"because of," not merely "in spite of," [the action's] adverse effects upon an identifiable group.'" This was immediately tied to pleading:

> It follows that, to state a claim based on a violation of a clearly established right, [the plaintiff] must plead sufficient factual matter to show that [defendants] adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

The complaint, then, must contain well-pleaded facts, not legal conclusions, making an inference of purpose plausible. The Court found the "bare assertions" of agreement, acting as architect or as instrumental in adopting the policies, were no more than a formulaic recitation of the elements of the claim. "[T]he allegations are conclusory and not entitled to be assumed true." They were rejected not "on the ground that they are unrealistic or nonsensical," nor because of "their extravagantly fanciful nature." "It is the conclusory nature of [the] allegations * * * that disentitles them to the presumption of truth."

Turning to the factual allegations, taken as true, they were "consistent with [defendants'] purposefully designating detainees 'of high interest' because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose." The more likely explanation was found in the circumstances of the Al Quaeda organization. The allegations plainly suggest that top law enforcement officers sought to keep suspected terrorists in the most secure conditions available until cleared of terrorist activity. The allegations of wrongdoing by lower officials, "if true, and if condoned by [defendants], could be the basis for some inference of wrongful intent on [defendants'] part." But no factual allegation was sufficient "to plausibly suggest [defendants'] discriminatory state of mind" — that the defendants "themselves acted on account of a constitutionally protected characteristic."

(4) Other Matters

The Court disposed of three additional arguments. First, it ruled that Twombly was not merely an antitrust pleading decision; it expounded, as it must, a pleading standard for all civil actions covered by Rule 8. Third, it recognized that Rule 9(b) allows a general allegation of intent, "[b]ut 'generally'is a relative term. * * * It does not give * * * license to evade the less rigid — though still operative — strictures of Rule 8."

Second, and more significantly, the Court rejected "the careful-case-management approach" to discovery as a justification for allowing limited discovery to support more detailed fact pleading. Twombly "held * * * 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." This approach is particularly important in cases that involve government officials as defendants entitled to assert a qualified-immunity defense. The purpose of official immunity is to free officials from the concerns of litigation, including the burdens of discovery.

Ashcroft v. Iqbal: What To Make of It?

The message of the Iqbal opinion, although indeterminate, is less diffuse than the multi-faceted Twombly opinion that engendered a variety of responses in the lower courts. It is no longer possible to argue that the decisions are "antitrust-only" or "official-immunity only." The insistence that Iqbal's allegations did not include sufficient fact detail is plainly influenced by concern not only for the values of official immunity, but by special concern for tracing from the acts of government

officials at the lowest levels of responsibility back to the Cabinet level. But the opinion plainly requires context-specific fact detail to satisfy the still-vague plausibility requirement. And it plainly invites the exercise of "judicial experience and common sense" in flexible, perhaps creative ways. Pleading barriers have been raised, at least for some types of claims.

The ambiguities of the Twombly opinion, and the uncertainty it engendered in the lower courts, may have prompted the Court to return to the pleading fray a bare two years later. The Court may well allow a greater period for lower-court developments before its next entry. The two opinions together suggest one thing clearly. The Court is concerned that relaxed notice pleading has lowered too far the barriers that should protect against discovery practices that seem to be ever expanding, ever more expensive, and ever more resistant to efforts to assert control through case management and periodic amendments of Rules 26 through 37 and 45. It likely will take several years of experience to determine whether, pushed in new pleading directions, courts will achieve a better balance of pleading and discovery.

That is not to suggest that even several years of experience will yield lessons capable of rigorous empirical demonstration. The concerns that led to relaxed pleading standards are that valid claims will be lost because they cannot be pleaded without access to fact information available to others, mostly defendants. It would be difficult to determine how many potential actions were not brought in the height of notice pleading because they could not be pleaded, and it will be equally difficult to determine how many will not be brought because of heightened pleading standards. Simply measuring the frequency of pleadings dismissals in the actions that are brought will be little more illuminating — we cannot measure how many of those actions presented claims that were valid, if only the facts could be known. Some help might be found in comparative summary-judgment outcomes: if summary judgments become less frequent, it might be that pleading practice has separated out more of the actions doomed to fail. But even then it may be difficult to control for competing explanations.

The importance of approaching these questions with some deliberation can be illustrated by one observation. Any attempt to rush toward revised pleading rules in the aftermath of the Twombly decision would have been caught up short by the Iqbal decision, unless by chance the effort had fully anticipated the decision.

A more important reason for proceeding deliberately is the 2010 Conference. The Conference will provide a great deal of useful information about discovery, including several empirical studies now under way. It also will provide information about pleading practice, with nearly a year's worth of experience after the Iqbal decision. It will still be early in the developing practice, but it will be well focused and much better informed than more speculative attempts to react immediately.

Despite these reasons for caution, it may be helpful to consider a few of the approaches that might be taken when the pleading question comes into better focus. The most obvious is to address Rule 8(a)(2) itself. Alternative possibilities include development of some sort of pre-litigation protocols of the sort recently introduced in English practice, or development of subject-specific form pleadings quite different from the Forms now appended to the Civil Rules. Each approach is briefly addressed below.

Rule 8(a)(2)

From the time of the first explicit "no heightened pleading" pronouncement in the Leatherman case up to the time of Twombly, continuing consideration of Rule 8(a)(2) focused on the possibility of establishing some form of heightened pleading. Apart from revising Rule 8(a)(2) itself, thought was given to expanding the Rule 9(b) categories requiring pleading with particularity.

The most recent effort shifted the focus to Rule 12(e), pointing toward use of the motion for a more definite statement to facilitate not merely a responsive pleading but pretrial management of discovery and other pretrial devices. Given Twombly and Iqbal, the need to encourage heightened pleading may subside, at least for a while. Different questions now seem more pressing.

Prompt action may be important if it seems, as S 1504 suggests, that the Iqbal decision retreats too far from desirable notice pleading. That concern may be questioned on several grounds. Most obviously, it will take years of lower-court development to generate any real sense of what pleading practices may emerge. The desire for more effective pre-discovery screening has persisted, and perhaps grown, for many years; the Court's slightly detached view from above the fray may be an important signal that the need is greater than appears to those immediately engaged in the fray. It may prove possible to plead sufficient facts to survive motions to dismiss in a very high proportion of the cases that deserve to survive into discovery. And it may prove that the cases that do not survive mostly deserved an early death. Prompt action seems desirable only if it is actually possible to restore notice pleading as it was in early 2007, or to devise an improved version. Restoration intact is likely to be difficult — simply retracting all of the things said in the Twombly and Iqbal opinions would likely have some effect, however unintended. Devising an improved version of notice pleading has not seemed easy in the past, and does not seem obviously easy now.

Prompt action also might be important if Iqbal is accepted as fully right and there is a fear that lower courts will not develop its meaning as quickly or fully as should be. That fear seems premature, just as the fear that Iqbal got it wrong and will lead to wrong results.

If something were to be done now, an obvious starting point is Rule 8(a)(2). The possibilities are endless. Three suffice to illustrate the point:

"a short and plain statement <u>of facts constituting a claim</u>." This is notice pleading. Compare the Court's statement in Iqbal, 129 S.Ct. at 1950: "Rule 8 marks a notable and generous departure from the hyper-technical, code-leading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions." The Court is not ready to restore Code pleading, at least not by decision, and this possibility has found few proponents in the past.

"a short and plain statement <u>of facts making a plausible</u> showing that the pleader is entitled to relief." This is one way to pick up on the simplest thread of the Iqbal opinion. Many variations are possible: "a plausible statement [of facts] showing that the pleader is entitled to relief"; "a plausible statement of non-conclusional facts"; "facts that, in context, suffice to show"; and so on. "Judicial experience and common sense" do not seem well adapted to formal rule text, but are obvious material for a Committee Note.

"a short and plain statement <u>of facts</u> showing that the pleader is entitled to relief." This is a modest addition, but it is difficult to guess just what responses it might elicit in practice.

Whatever might be done to Rule 8(a)(2), related pleading rules also should be considered. Rule 15 focuses attention on the purpose of raising the pleading bar. Should amendments become even more freely available than now, to protect against the risk that a valid claim can be lost by inept selection of known facts? Or should amendments be discouraged in an effort to force more diligent prefiling investigation (Rule 11 on steroids), and to diminish the risks that pleading motions will proliferate and too many ill-founded cases will slip through the screen and into discovery?

Rule 12(e) also might come back for consideration. The focus would shift somewhat from the most recent effort. Rather than develop a party-initiated device for enhanced pretrial management, the motion would become a device for requesting greater detail even when a complaint

meets whatever enhanced pleading standards are developed. Having a case-specific and explicit means for exercising judicial experience and common sense might make it possible to adopt lower pleading standards as an initial matter.

Rule 16 also might be further developed, perhaps in conjunction with the discovery and disclosure rules, to restore faith in the possibility of controlled discovery in aid of framing a sufficient complaint. This path might even lead to reconsideration of Rule 27 by providing an opportunity for tightly controlled discovery to aid in framing a sufficient complaint.

Pre-filing Protocols

England is now assessing experience with recent reforms that create strong incentives to engage in pre-filing exchanges through protocols developed for the most commonly encountered categories of litigation. In very general terms, this approach might be conceived of as moving initial disclosure and the Rule 26(f) conference up before filing, engaging the parties in pre-judicial scheduling practice, and providing subject-specific frameworks for guidance. Even Rule 68 offer-of-judgment provisions may provide a further analogy.

A great deal of work will be required to flesh out this approach. The more the number of protocols expands to include a variety of subject matters, the greater the work. As with developing subject-specific pleading rules, there is room for some care in staying within the line that divides substance from procedure. But a determined effort to collect scheduling orders now in use might provide a strong start. And the British experience may provide real help, perhaps going down to a stage one step up from the finest details.

Forms

A separate agenda item raises the question whether the Rule 84 Forms now part of the Rules have outlived any likely usefulness. This paragraph raises a responding question: should an attempt be made in the Enabling Act process to develop more detailed pleading forms for many, or even most, of the kinds of claims that federal courts most frequently encounter? The challenge of illustrating fact pleading seems apparent. Can a negligence form, for example, do more than leave blanks: "the defendant was negligent by: * * *"? If the form includes a dozen alternatives: "was negligent by driving too fast, driving over the posted speed limit, driving in a car known to have faulty brakes," and so on, will the many and necessary omissions cause confusion and worse? What value would there be in a form complaint including sufficient non-conclusional facts to persuade the Twombly court that a contract, combination, or conspiracy had been adequately pleaded for that specific offense?

End Note

The Iqbal decision opens up fascinating prospects for the conjoint evolution of pleading and discovery. It is good to begin thinking about them in preparing for the 2010 Conference. There are strong reasons to defer any more concrete projects for amending the rules as promptly as the Enabling Act allows.

H

Supreme Court of the United States
John D. ASHCROFT, Former Attorney General, et al., Petitioners,
v.
Javaid **IQBAL** et al.
No. 07-1015.

Argued Dec. 10, 2008.
Decided May 18, 2009.

Background: Muslim Pakistani pretrial detainee brought action against current and former government officials, alleging that they took series of unconstitutional actions against him in connection with his confinement under harsh conditions after separation from the general prison population. The United States District Court for the Eastern District of New York, John Gleeson, J., 2005 WL 2375202, denied in part defendants' motions to dismiss on ground of qualified immunity. Defendants appealed. The United States Court of Appeals for the Second Circuit, Jon O. Newman, Circuit Judge, 490 F.3d 143, affirmed in part, reversed in part, and remanded. Certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:
(1) Second Circuit had subject matter jurisdiction to affirm district court's order denying officials' motion to dismiss on grounds of qualified immunity, and
(2) detainee's complaint failed to plead sufficient facts to state claim for purposeful and unlawful discrimination.

Reversed and remanded.

Justice Souter filed dissenting opinion in which Justices Stevens, Ginsburg, and Breyer joined.

Justice Breyer filed dissenting opinion.

West Headnotes

[1] Federal Courts 170B ⚷30

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction, Determination and Waiver
170Bk30 k. Power and Duty of Court. Most Cited Cases

Federal Courts 170B ⚷31

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk29 Objections to Jurisdiction, Determination and Waiver
170Bk31 k. Waiver or Consent. Most Cited Cases
Subject matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt.

[2] Federal Courts 170B ⚷572.1

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk572.1 k. In General. Most Cited Cases
Under "collateral-order doctrine," limited set of district court orders are reviewable though short of final judgment; orders within this narrow category are immediately appealable because they finally determine claims of right separable from, and collateral to, rights asserted in action, too important to be denied review and too independent of cause itself to require that appellate consideration be deferred until whole case is adjudicated. 28 U.S.C.A. § 1291.

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[3] Federal Courts 170B ⚷574

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk574 k. Other Particular Orders. Most Cited Cases
District court decision denying Government officer's claim of qualified immunity can fall within narrow class of appealable orders despite the absence of a final judgment. 28 U.S.C.A. § 1291.

[4] Civil Rights 78 ⚷1376(1)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(1) k. In General. Most Cited Cases

Civil Rights 78 ⚷1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases
"Qualified immunity," which shields Government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights, is both a defense to liability and limited entitlement not to stand trial or face the other burdens of litigation.

[5] Federal Courts 170B ⚷574

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk572 Interlocutory Orders Appealable
170Bk574 k. Other Particular Orders. Most Cited Cases
Provided it turns on issue of law, district court order denying qualified immunity can fall within narrow class of prejudgment orders reviewable under collateral order doctrine; such an order conclusively determines that defendant must bear burdens of discovery, conceptually distinct from merits of plaintiff's claim, and would prove effectively unreviewable on appeal from final judgment. 28 U.S.C.A. § 1291.

[6] Federal Courts 170B ⚷589

170B Federal Courts
170BVIII Courts of Appeals
170BVIII(C) Decisions Reviewable
170BVIII(C)2 Finality of Determination
170Bk585 Particular Judgments, Decrees or Orders, Finality
170Bk589 k. Dismissal and Nonsuit in General. Most Cited Cases
Second Circuit had subject matter jurisdiction to affirm district court's order denying government officials' motion to dismiss Muslim Pakistani pretrial detainee's *Bivens* action on grounds of qualified immunity; because the order turned on issue of law and rejected qualified immunity defense, it was a "final decision" subject to immediate appeal. 28 U.S.C.A. § 1291.

[7] United States 393 ⚷50.1

393 United States
393I Government in General
393k50 Liabilities of Officers or Agents for Negligence or Misconduct
393k50.1 k. In General. Most Cited Cases
Bivens recognizes implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights.

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[8] Civil Rights 78 ⚷1355

78 Civil Rights
78III Federal Remedies in General
78k1353 Liability of Public Officials
78k1355 k. Vicarious Liability and Respondeat Superior in General; Supervisory Liability in General. Most Cited Cases

Civil Rights 78 ⚷1398

78 Civil Rights
78III Federal Remedies in General
78k1392 Pleading
78k1398 k. Defenses; Immunity and Good Faith. Most Cited Cases

United States 393 ⚷50.2

393 United States
393I Government in General
393k50 Liabilities of Officers or Agents for Negligence or Misconduct
393k50.2 k. Vicarious Liability; Respondeat Superior. Most Cited Cases
Government officials may not be held liable, under *Bivens* or § 1983, for unconstitutional conduct of their subordinates under theory of respondeat superior; because vicarious liability is inapplicable, plaintiff must plead that each government official-defendant, through his or her own actions, has violated Constitution. 42 U.S.C.A. § 1983.

[9] Constitutional Law 92 ⚷1150

92 Constitutional Law
92X First Amendment in General
92X(A) In General
92k1150 k. In General. Most Cited Cases

Constitutional Law 92 ⚷3040

92 Constitutional Law
92XXVI Equal Protection
92XXVI(A) In General
92XXVI(A)5 Scope of Doctrine in General
92k3038 Discrimination and Classification
92k3040 k. Intentional or Purposeful Action Requirement. Most Cited Cases

United States 393 ⚷50.20

393 United States
393I Government in General
393k50 Liabilities of Officers or Agents for Negligence or Misconduct
393k50.20 k. Actions. Most Cited Cases
Factors necessary to establish *Bivens* violation will vary with constitutional provision at issue, and where claim is invidious discrimination in contravention of First and Fifth Amendments, plaintiff must plead and prove that defendant acted with discriminatory purpose; under extant precedent, "purposeful discrimination" requires more than intent as volition or intent as awareness of consequences and instead involves decisionmaker's undertaking course of action because of, not merely in spite of, action's adverse effects upon identifiable group. U.S.C.A. Const.Amends. 1, 5.

[10] 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
Requirement that pleading contain a short and plain statement of claim showing that pleader is entitled to relief does not require detailed factual allegations, but demands more than unadorned "the defendant unlawfully harmed me" accusation. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[11] Federal Civil Procedure 170A ⚷673

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(B) Complaint
170AVII(B)1 In General

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170Ak673 k. Claim for Relief in General. Most Cited Cases
Pleading that offers labels and conclusions or formulaic recitation of elements of cause of action will not do, nor does complaint suffice if it tenders naked assertions devoid of further factual enhancement. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[12] Federal Civil Procedure 170A ⚷1772

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
To survive motion to dismiss, complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face; claim has "facial plausibility" when plaintiff pleads factual content that allows court to draw reasonable inference that defendant is liable for misconduct alleged. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[13] Federal Civil Procedure 170A ⚷1772

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
"Plausibility" standard, for complaint to survive motion to dismiss for failure to satisfy short and plain statement requirement, is not akin to probability requirement, but asks for more than sheer possibility that defendant has acted unlawfully. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[14] United States 393 ⚷50.20

393 United States
393I Government in General
393k50 Liabilities of Officers or Agents for Negligence or Misconduct
393k50.20 k. Actions. Most Cited Cases
Muslim Pakistani pretrial detainee's *Bivens* complaint against government officials failed to plead sufficient facts to state claim for purposeful and unlawful discrimination; complaint challenged neither constitutionality of detainee's arrest nor his initial detention but rather policy of holding post-September 11th detainees once they were categorized as of "high interest," and complaint thus had to contain facts plausibly showing that officials purposefully adopted policy of so classifying detainees because of their race, religion, or national origin. Fed.Rules Civ.Proc.Rule 8(a)(2), 28 U.S.C.A.

[15] Officers and Public Employees 283 ⚷119

283 Officers and Public Employees
283III Rights, Powers, Duties, and Liabilities
283k119 k. Actions by or Against Officers and Employees. Most Cited Cases
Basic thrust of qualified immunity doctrine is to free officials from concerns of litigation, including avoidance of disruptive discovery.

[16] Federal Civil Procedure 170A ⚷630

170A Federal Civil Procedure
170AVII Pleadings and Motions
170AVII(A) Pleadings in General
170Ak630 k. Sufficiency in General. Most Cited Cases

Federal Civil Procedure 170A ⚷636

170A Federal Civil Procedure

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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
Requirement that fraud be pled with particularity does not give party license to evade the less rigid, though still operative, strictures of plain and short statement requirement. Fed.Rules Civ.Proc.Rules 8, 9(b), 28 U.S.C.A.

**1939 Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Following the September 11, 2001, terrorist attacks, respondent **Iqbal**, a Pakistani Muslim, was arrested on criminal charges and detained by federal officials under restrictive conditions. **Iqbal** filed a *Bivens* action against numerous federal officials, including petitioner Ashcroft, the former Attorney General, and petitioner Mueller, the Director of the Federal Bureau of Investigation (FBI). See *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619. The complaint alleged, *inter alia,* that petitioners designated **Iqbal** a person "of high interest" on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments; that the FBI, under Mueller's direction, arrested and detained thousands of Arab Muslim men as part of its September-11th investigation; that petitioners knew of, condoned, and willfully and maliciously agreed to subject **Iqbal** to harsh conditions of confinement as a matter of policy, solely on account of the prohibited factors and for no legitimate penological interest; and that Ashcroft was the policy's "principal architect" and Mueller was "instrumental" in its adoption and execution. After the District Court denied petitioners' motion to dismiss on qualified-immunity grounds, they invoked the collateral order doctrine to file an interlocutory appeal in the Second Circuit. Affirming, that court assumed without discussion that it had jurisdiction and focused on the standard set forth in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, for evaluating whether a complaint is sufficient to survive a motion to dismiss. Concluding that *Twombly* 's "flexible plausibility standard" obliging a pleader to amplify a claim with factual allegations where necessary to render it plausible was inapplicable in the context of petitioners' appeal, the court held that **Iqbal's** complaint was adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law.

Held:

1. The Second Circuit had subject-matter jurisdiction to affirm the District ***1940** Court's order denying petitioners' motion to dismiss. Pp. 1944 - 1947.

(a) Denial of a qualified-immunity claim can fall within the narrow class of prejudgment orders reviewable under the collateral-order doctrine so long as the order "turns on an issue of law." *Mitchell v. Forsyth,* 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411. The doctrine's applicability in this context is well established; an order rejecting qualified immunity at the motion-to-dismiss stage is a "final decision" under 28 U.S.C. § 1291, which vests courts of appeals with "jurisdiction of appeals from all final decisions of the district courts." *Behrens v. Pelletier,* 516 U.S. 299, 307, 116 S.Ct. 834, 133 L.Ed.2d 773. Pp. 1945 - 1946.

(b) Under these principles, the Court of Appeals had, and this Court has, jurisdiction over the District Court's order. Because the order turned on an issue of law and rejected the qualified-immunity defense, it was a final decision "subject to immediate appeal." *Behrens, supra,* at 307, 116 S.Ct. 834. Pp. 1946 - 1947.

2. **Iqbal's** complaint fails to plead sufficient facts to

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state a claim for purposeful and unlawful discrimination. Pp. 1947 - 1954.

(a) This Court assumes, without deciding, that **Iqbal's** First Amendment claim is actionable in a *Bivens* action, see *Hartman v. Moore,* 547 U.S. 250, 254, n. 2, 126 S.Ct. 1695, 164 L.Ed.2d 441.Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, see, *e.g., Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611, the plaintiff in a suit such as the present one must plead that each Government-official defendant, through his own individual actions, has violated the Constitution. Purposeful discrimination requires more than "intent as volition or intent as awareness of consequences"; it involves a decisionmaker's undertaking a course of action " 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870. **Iqbal** must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason, but for the purpose of discriminating on account of race, religion, or national origin. Pp. 1947 - 1949.

(b) Under Federal Rule of Civil Procedure 8(a)(2), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." "[D]etailed factual allegations" are not required, *Twombly,* 550 U.S., at 555, 127 S.Ct. 1955, but the Rule does call for sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face," *id.,* at 570, 127 S.Ct. 1955. A claim has facial plausibility when the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.,* at 556, 127 S.Ct. 1955. Two working principles underlie *Twombly.* First, the tenet that a court must accept a complaint's allegations as true is inapplicable to threadbare recitals of a cause of action's elements, supported by mere conclusory statements. *Id.,* at 555, 127 S.Ct. 1955. Second, determining whether a complaint states a plausible claim is context-specific, requiring the reviewing court to draw on its experience and common sense. *Id.,* at 556, 127 S.Ct. 1955. A court considering a motion to dismiss may begin by identifying allegations that, because they are mere conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the complaint's framework, they must be supported by factual allegations. When there are well-***1941** pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Pp. 1948 - 1951.

(c) **Iqbal's** pleadings do not comply with Rule 8 under *Twombly.* Several of his allegations-that petitioners agreed to subject him to harsh conditions as a matter of policy, solely on account of discriminatory factors and for no legitimate penological interest; that Ashcroft was that policy's "principal architect"; and that Mueller was "instrumental" in its adoption and execution-are conclusory and not entitled to be assumed true. Moreover, the factual allegations that the FBI, under Mueller, arrested and detained thousands of Arab Muslim men, and that he and Ashcroft approved the detention policy, do not plausibly suggest that petitioners purposefully discriminated on prohibited grounds. Given that the September 11 attacks were perpetrated by Arab Muslims, it is not surprising that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the policy's purpose was to target neither Arabs nor Muslims. Even if the complaint's well-pleaded facts gave rise to a plausible inference that **Iqbal's** arrest was the result of unconstitutional discrimination, that inference alone would not entitle him to relief: His claims against petitioners rest solely on their ostensible policy of holding detainees categorized as "of high interest," but the complaint does not contain facts plausibly showing that their policy was based on discriminatory factors. Pp. 1950 - 1953.

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(d) Three of **Iqbal's** arguments are rejected. Pp. 1952 - 1954.

(i) His claim that *Twombly* should be limited to its antitrust context is not supported by that case or the Federal Rules. Because *Twombly* interpreted and applied Rule 8, which in turn governs the pleading standard "in all civil actions," Rule 1, the case applies to antitrust and discrimination suits alike, see 550 U.S., at 555-556, and n. 14, 127 S.Ct. 1955. Pp. 1952 - 1953.

(ii) Rule 8's pleading requirements need not be relaxed based on the Second Circuit's instruction that the District Court cabin discovery to preserve petitioners' qualified-immunity defense in anticipation of a summary judgment motion. The question presented by a motion to dismiss for insufficient pleadings does not turn on the controls placed on the discovery process. *Twombly, supra,* at 559, 127 S.Ct. 1955. And because **Iqbal's** complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise. Pp. 1952 - 1954.

(iii) Rule 9(b)-which requires particularity when pleading "fraud or mistake" but allows "other conditions of a person's mind [to] be alleged generally"-does not require courts to credit a complaint's conclusory statements without reference to its factual context. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade Rule 8's less rigid, though still operative, strictures. Pp. 1953 - 1954.

(e) The Second Circuit should decide in the first instance whether to remand to the District Court to allow **Iqbal** to seek leave to amend his deficient complaint. P. 1954.

490 F.3d 143, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, and ALITO, JJ., joined. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined. BREYER, J., filed a dissenting opinion.

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For U.S. Supreme Court briefs, see:2008 WL 4063957 (Pet.Brief)2008 WL 4734962 (Resp.Brief)2008 WL 4063958 (Resp.Brief)2008 WL 4063959 (Resp.Brief)2008 WL 5009266 (Reply.Brief)2008 WL 5027911 (Reply.Brief)2008 WL 5027912 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

Respondent Javaid **Iqbal** is a citizen of Pakistan

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and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, ***1943** plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks 1, 11-12 (Apr.2003) (hereinafter OIG Report), http:// www. usdoj. gov/ oig/ special/ 0306/full.pdf?bcsi_scan_61073EC0F74759AD=0 & bcsi_scan_filename=full.pdf (as visited May 14, 2009, and available in Clerk of Court's case file).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.*, at 1. Of those individuals, some 762 were held on immigration charges; and a 184-member subset of that group was deemed to be "of 'high interest' " to the investigation. *Id.*, at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.*, at 112-113.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. ***Iqbal** v. Hasty,* 490 F.3d 143, 147-148 (C.A.2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person "of high interest" to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.*, at 148. As the facility's name indicates, the ADMAX SHU incorporates the maximum security conditions allowable

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under Federal Bureau of Prison regulations. *Ibid.* ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.,* at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 "John Doe" federal corrections officers. See *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners-officials who were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04-CV-1809 (JG)(JA), ¶¶ 10-11, App. to Pet. for Cert. 157a (hereinafter Complaint).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his ***1944** treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, *id.,* ¶ 113, App. to Pet. for Cert. 176a; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, *id.,*¶¶ 143-145, App. to Pet. for Cert. 182a; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists," *id.,* ¶ 154, App. to Pet. for Cert. 184a.

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11." *Id.,* ¶ 47, at 164a. It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.,* ¶ 69, at 168a. Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." *Id.,* ¶ 96, at 172a-173a. The pleading names Ashcroft as the "principal architect" of the policy, *id.,* ¶ 10, at 157a, and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation." *Id.,* ¶ 11, at 157a.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.,* at 136a-137a (relying on *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly'* s applicability to this case. Acknowledging that

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Twombly retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 490 F.3d, at 155. It concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*." *Id.*, at 157-158. The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law. *Id.*, at 174.

***1945** Judge Cabranes concurred. He agreed that the majority's "discussion of the relevant pleading standards reflect[ed] the uneasy compromise ... between a qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure." *Id.*, at 178 (internal quotation marks and citations omitted). Judge Cabranes nonetheless expressed concern at the prospect of subjecting high-ranking Government officials-entitled to assert the defense of qualified immunity and charged with responding to "a national and international security emergency unprecedented in the history of the American Republic"-to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. *Id.*, at 179. Reluctant to vindicate that concern as a member of the Court of Appeals, *ibid.*, Judge Cabranes urged this Court to address the appropriate pleading standard "at the earliest opportunity." *Id.*, at 178. We granted certiorari, 554 U.S. ----, 128 S.Ct. 2931, 171 L.Ed.2d 863 (2008), and now reverse.

II

[1] We first address whether the Court of Appeals had subject-matter jurisdiction to affirm the District Court's order denying petitioners' motion to dismiss. Respondent disputed subject-matter jurisdiction in the Court of Appeals, but the court hardly discussed the issue. We are not free to pretermit the question. Subject-matter jurisdiction cannot be forfeited or waived and should be considered when fairly in doubt. *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (citing *United States v. Cotton*, 535 U.S. 625, 630, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002)). According to respondent, the District Court's order denying petitioners' motion to dismiss is not appealable under the collateral-order doctrine. We disagree.

A

[2] With exceptions inapplicable here, Congress has vested the courts of appeals with "jurisdiction of appeals from all final decisions of the district courts of the United States." 28 U.S.C. § 1291. Though the statute's finality requirement ensures that "interlocutory appeals-appeals before the end of district court proceedings-are the exception, not the rule," *Johnson v. Jones*, 515 U.S. 304, 309, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995), it does not prevent "review of all prejudgment orders." *Behrens v. Pelletier*, 516 U.S. 299, 305, 116 S.Ct. 834, 133 L.Ed.2d 773 (1996). Under the collateral-order doctrine a limited set of district-court orders are reviewable "though short of final judgment." *Ibid.* The orders within this narrow category "are immediately appealable because they 'finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' " *Ibid.* (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949)).

[3][4][5] A district-court decision denying a Government officer's claim of qualified immunity can fall within the narrow class of appealable orders despite "the absence of a final judgment." *Mitchell*

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v. Forsyth, 472 U.S. 511, 530, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). This is so because qualified immunity-which shields Government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights," ***1946***Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)-is both a defense to liability and a limited "entitlement not to stand trial or face the other burdens of litigation." *Mitchell,supra,* 472 U.S., at 526, 105 S.Ct. 2806. Provided it "turns on an issue of law," *id.,* at 530, 105 S.Ct. 2806, a district-court order denying qualified immunity " 'conclusively determine[s]' " that the defendant must bear the burdens of discovery; is "conceptually distinct from the merits of the plaintiff's claim"; and would prove "effectively unreviewable on appeal from a final judgment." *Id.,* at 527 - 528 (citing *Cohen, supra,* at 546, 69 S.Ct. 1221). As a general matter, the collateral-order doctrine may have expanded beyond the limits dictated by its internal logic and the strict application of the criteria set out in *Cohen.* But the applicability of the doctrine in the context of qualified-immunity claims is well established; and this Court has been careful to say that a district court's order rejecting qualified immunity at the motion-to-dismiss stage of a proceeding is a "final decision" within the meaning of § 1291. *Behrens,* 516 U.S., at 307, 116 S.Ct. 834.

B

[6] Applying these principles, we conclude that the Court of Appeals had jurisdiction to hear petitioners' appeal. The District Court's order denying petitioners' motion to dismiss turned on an issue of law and rejected the defense of qualified immunity. It was therefore a final decision "subject to immediate appeal." *Ibid.* Respondent says that "a qualified immunity appeal based solely on the complaint's failure to state a claim, and not on the ultimate issues relevant to the qualified immunity defense itself, is not a proper subject of interlocutory jurisdiction." Brief for Respondent **Iqbal** 15 (hereinafter **Iqbal** Brief). In other words, respondent contends the Court of Appeals had jurisdiction to determine whether his complaint avers a clearly established constitutional violation but that it lacked jurisdiction to pass on the sufficiency of his pleadings. Our opinions, however, make clear that appellate jurisdiction is not so strictly confined.

In *Hartman v. Moore,* 547 U.S. 250, 126 S.Ct. 1695, 164 L.Ed.2d 441 (2006), the Court reviewed an interlocutory decision denying qualified immunity. The legal issue decided in *Hartman* concerned the elements a plaintiff "must plead and prove in order to win" a First Amendment retaliation claim. *Id.,* at 257, n. 5, 126 S.Ct. 1695.Similarly, two Terms ago in *Wilkie v. Robbins,* 551 U.S. 537, 127 S.Ct. 2588, 168 L.Ed.2d 389 (2007), the Court considered another interlocutory order denying qualified immunity. The legal issue there was whether a *Bivens* action can be employed to challenge interference with property rights. 551 U.S., at 549, n. 4, 127 S.Ct. 2588.These cases cannot be squared with respondent's argument that the collateral-order doctrine restricts appellate jurisdiction to the "ultimate issu[e]" whether the legal wrong asserted was a violation of clearly established law while excluding the question whether the facts pleaded establish such a violation. **Iqbal** Brief 15. Indeed, the latter question is even more clearly within the category of appealable decisions than the questions presented in *Hartman* and *Wilkie,* since whether a particular complaint sufficiently alleges a clearly established violation of law cannot be decided in isolation from the facts pleaded. In that sense the sufficiency of respondent's pleadings is both "inextricably intertwined with," *Swint v. Chambers County Comm'n,* 514 U.S. 35, 51, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995), and "directly implicated by," ***1947***Hartman, supra,* at 257, n. 5, 126 S.Ct. 1695, the qualified immunity defense.

Respondent counters that our holding in *Johnson,* 515 U.S. 304, 115 S.Ct. 2151, 132 L.Ed.2d 238, confirms the want of subject-matter jurisdiction here. That is incorrect. The allegation in *Johnson*

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was that five defendants, all of them police officers, unlawfully beat the plaintiff. *Johnson* considered "the appealability of a portion of" the District Court's summary judgment order that, "though entered in a 'qualified immunity' case, determine[d] only" that there was a genuine issue of material fact that three of the defendants participated in the beating. *Id.*, at 313, 115 S.Ct. 2151.

In finding that order not a "final decision" for purposes of § 1291, the *Johnson* Court cited *Mitchell* for the proposition that only decisions turning " '*on an issue of law* ' " are subject to immediate appeal. 515 U.S., at 313, 115 S.Ct. 2151. Though determining whether there is a genuine issue of material fact at summary judgment is a question of law, it is a legal question that sits near the law-fact divide. Or as we said in *Johnson*, it is a "fact-related" legal inquiry. *Id.*, at 314, 115 S.Ct. 2151. To conduct it, a court of appeals may be required to consult a "vast pretrial record, with numerous conflicting affidavits, depositions, and other discovery materials." *Id.*, at 316, 115 S.Ct. 2151. That process generally involves matters more within a district court's ken and may replicate inefficiently questions that will arise on appeal following final judgment. *Ibid.* Finding those concerns predominant, *Johnson* held that the collateral orders that are "final" under *Mitchell* turn on "abstract," rather than "fact-based," issues of law. 515 U.S., at 317, 115 S.Ct. 2151.

The concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings. True, the categories of "fact-based" and "abstract" legal questions used to guide the Court's decision in *Johnson* are not well defined. Here, however, the order denying petitioners' motion to dismiss falls well within the latter class. Reviewing that order, the Court of Appeals considered only the allegations contained within the four corners of respondent's complaint; resort to a "vast pretrial record" on petitioners' motion to dismiss was unnecessary. *Id.*, at 316, 115 S.Ct. 2151. And determining whether respondent's complaint has the "heft" to state a claim is a task well within an appellate court's core competency. *Twombly*, 550 U.S., at 557, 127 S.Ct. 1955. Evaluating the sufficiency of a complaint is not a "fact-based" question of law, so the problem the Court sought to avoid in *Johnson* is not implicated here. The District Court's order denying petitioners' motion to dismiss is a final decision under the collateral-order doctrine over which the Court of Appeals had, and this Court has, jurisdiction. We proceed to consider the merits of petitioners' appeal.

III

In *Twombly, supra*, at 553-554, 127 S.Ct. 1955, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

[7] In *Bivens*-proceeding on the theory that a right suggests a remedy-this Court "recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen's constitutional rights." ***1948***Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66, 122 S.Ct. 515, 151 L.Ed.2d 456 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability "to any new context or new category of defendants." 534 U.S., at 68, 122 S.Ct. 515. See also *Wilkie*, 551 U.S., at 549-550, 127 S.Ct. 2588. That reluctance might well have disposed of respondent's First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, see *Davis v. Passman*, 442 U.S. 228, 99 S.Ct. 2264, 60 L.Ed.2d 846 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush v.*

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Lucas, 462 U.S. 367, 103 S.Ct. 2404, 76 L.Ed.2d 648 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent's First Amendment claim is actionable under *Bivens.*

[8] In the limited settings where *Bivens* does apply, the implied cause of action is the "federal analog to suits brought against state officials under Rev. Stat. § 1979, 42 U.S.C. § 1983." *Hartman,* 547 U.S., at 254, n. 2, 126 S.Ct. 1695.Cf. *Wilson v. Layne,* 526 U.S. 603, 609, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior.* **Iqbal** Brief 46 ("[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior* "). See *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (finding no vicarious liability for a municipal "person" under 42 U.S.C. § 1983); see also *Dunlop v. Munroe,* 7 Cranch 242, 269, 3 L.Ed. 329 (1812) (a federal official's liability "will only result from his own neglect in not properly superintending the discharge" of his subordinates' duties); *Robertson v. Sichel,* 127 U.S. 507, 515-516, 8 S.Ct. 1286, 3 L.Ed. 203 (1888) ("A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties"). Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution.

[9] The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 540-541, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (First Amendment); *Washington v. Davis,* 426 U.S. 229, 240, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than "intent as volition or intent as awareness of consequences." *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256, 279, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). It instead involves a decisionmaker's undertaking a course of action " 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Ibid.* It follows that, to state a claim based on a violation of a clearly established right, respondent must plead sufficient factual matter to show that ***1949** petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." **Iqbal** Brief 45-46. That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a § 1983 suit or a *Bivens* action-where masters do not answer for the torts of their servants-the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate

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for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

IV

A

[10][11] We turn to respondent's complaint. Under 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." As the Court held in *Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555, 127 S.Ct. 1955 (citing *Papasan v. Allain,* 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555, 127 S.Ct. 1955. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.,* at 557, 127 S.Ct. 1955.

[12][13] To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Id.,* at 570, 127 S.Ct. 1955. 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. *Id.,* at 556, 127 S.Ct. 1955. 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. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.,* at 557, 127 S.Ct. 1955 (brackets omitted).

Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.,* at 555, 127 S.Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we ***1950** "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.,* at 556, 127 S.Ct. 1955. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157-158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not "show[n]"-"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive

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entry, in violation of the Sherman Act, 15 U.S.C. § 1. Recognizing that § 1 enjoins only anticompetitive conduct "effected by a contract, combination, or conspiracy," *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 775, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984), the plaintiffs in *Twombly* flatly pleaded that the defendants "ha[d] entered into a contract, combination or conspiracy to prevent competitive entry ... and ha[d] agreed not to compete with one another." 550 U.S., at 551, 127 S.Ct. 1955 (internal quotation marks omitted). The complaint also alleged that the defendants' "parallel course of conduct ... to prevent competition" and inflate prices was indicative of the unlawful agreement alleged. *Ibid.* (internal quotation marks omitted).

The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a " 'legal conclusion' " and, as such, was not entitled to the assumption of truth. *Id.,* at 555, 127 S.Ct. 1955. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed perforce. The Court next addressed the "nub" of the plaintiffs' complaint-the well-pleaded, nonconclusory factual allegation of parallel behavior-to determine whether it gave rise to a "plausible suggestion of conspiracy." *Id.,* at 565-566, 127 S.Ct. 1955. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. *Id.,* at 567, 127 S.Ct. 1955. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed. *Id.,* at 570, 127 S.Ct. 1955.

B

[14] Under *Twombly* 's construction of Rule 8, we conclude that respondent's complaint***1951** has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible." *Ibid.*

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96, App. to Pet. for Cert. 173a-174a. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, *id.,* ¶ 10, at 157a, and that Mueller was "instrumental" in adopting and executing it, *id.,* ¶ 11, at 157a. These bare assertions, much like the pleading of conspiracy in *Twombly,* amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, 550 U.S., at 555, 127 S.Ct. 1955, namely, that petitioners adopted a policy " 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Feeney,* 442 U.S., at 279, 99 S.Ct. 2282. As such, the allegations are conclusory and not entitled to be assumed true. *Twombly, supra,* 550 U.S., at 554-555, 127 S.Ct. 1955. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a " 'contract, combination or conspiracy to prevent competitive entry,' " *id.,* at 551, 127 S.Ct. 1955, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Ar-

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ab Muslim men ... as part of its investigation of the events of September 11." Complaint ¶ 47, App. to Pet. for Cert. 164a. It further claims that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.,* ¶ 69, at 168a. Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim-Osama bin Laden-and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that "obvious alternative explanation" for the arrests, *Twombly, supra,* at 567, 127 S.Ct. 1955, and the purposeful, invidious discrimination respondent***1952** asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint's well-pleaded facts give rise to a plausible inference that respondent's arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent's complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent's constitutional claims against petitioners rest solely on their ostensible "policy of holding post-September-11th detainees" in the ADMAX SHU once they were categorized as "of high interest." Complaint ¶ 69, App. to Pet. for Cert. 168a. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as "of high interest" because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before us, may have labeled him a person of "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were " 'cleared' by the FBI." *Ibid.* Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly,* 550 U.S., at 570, 127 S.Ct. 1955.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly,* the complaint alleged general wrongdoing that extended over a period of years, *id.,* at 551, 127 S.Ct. 1955, whereas here the complaint alleges discrete wrongs-for instance, beatings-by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could

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be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly,* where the doctrine of *respondeat superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

C

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

***1953** 1

Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. **Iqbal** Brief 37-38. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U.S., at 554, 127 S.Ct. 1955. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike. See 550 U.S., at 555-556, and n. 3, 127 S.Ct. 1955.

2

Respondent next implies that our construction of Rule 8 should be tempered 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)).

[15] Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. 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). There are serious and legitimate reasons for this. If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when

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Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic." 490 F.3d, at 179.

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 ***1954** ground that the Court of Appeals promises petitioners minimally intrusive discovery. 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. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3

Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. **Iqbal** Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶ 96, App. to Pet. for Cert. 172a-173a. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

[16] It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid-though still operative-strictures of Rule 8. See 5A C. Wright & A. Miller, Federal Practice and Procedure § 1301, p. 291 (3d ed. 2004) ("[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a)... should control the second sentence of Rule 9(b)"). And 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.

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SOUTER, with whom Justice STEVENS, Justice GINSBURG, and Justice BREYER join, dissenting.

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This case is here on the uncontested assumption that *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), allows personal liability based on a federal officer's violation of an individual's rights under the First and Fifth Amendments, and it comes to us with the explicit concession of petitioners Ashcroft and Mueller that an officer may be subject to *Bivens* liability as a supervisor on grounds other than *respondeat*1955 superior.* The Court apparently rejects this concession and, although it has no bearing on the majority's resolution of this case, does away with supervisory liability under *Bivens.* The majority then misapplies the pleading standard under *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), to conclude that the complaint fails to state a claim. I respectfully dissent from both the rejection of supervisory liability as a cognizable claim in the face of petitioners' concession, and from the holding that the complaint fails to satisfy Rule 8(a)(2) of the Federal Rules of Civil Procedure.

I

A

Respondent **Iqbal** was arrested in November 2001 on charges of conspiracy to defraud the United States and fraud in relation to identification documents, and was placed in pretrial detention at the Metropolitan Detention Center in Brooklyn, New York. ***Iqbal** v. Hasty,* 490 F.3d 143, 147-148 (C.A.2 2007). He alleges that FBI officials carried out a discriminatory policy by designating him as a person " 'of high interest' " in the investigation of the September 11 attacks solely because of his race, religion, or national origin. Owing to this designation he was placed in the detention center's Administrative Maximum Special Housing Unit for over six months while awaiting the fraud trial. *Id.,* at 148. As I will mention more fully below, **Iqbal** contends that Ashcroft and Mueller were at the very least aware of the discriminatory detention policy and condoned it (and perhaps even took part in devising it), thereby violating his First and Fifth Amendment rights.[FN1]

FN1. **Iqbal** makes no claim against Ashcroft and Mueller based simply on his right, as a pretrial detainee, to be free from punishment prior to an adjudication of guilt on the fraud charges. See *Bell v. Wolfish,* 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979).

Iqbal claims that on the day he was transferred to the special unit, prison guards, without provocation, "picked him up and threw him against the wall, kicked him in the stomach, punched him in the face, and dragged him across the room." First Amended Complaint in No. 04-CV-1809 (JG)(JA), ¶ 113, App. to Pet. for Cert. 176a (hereinafter Complaint). He says that after being attacked a second time he sought medical attention but was denied care for two weeks. *Id.,*¶¶ 187-188, at 189a. According to **Iqbal's** complaint, prison staff in the special unit subjected him to unjustified strip and body cavity searches, *id.,*¶¶ 136-140, at 181a, verbally berated him as a " 'terrorist' " and " 'Muslim killer,' " *id.,* ¶ 87, at 170a-171a, refused to give him adequate food, *id.,* ¶ 91, at 171a-172a, and intentionally turned on air conditioning during the winter and heating during the summer, *id.,* ¶ 84, at 170a. He claims that prison staff interfered with his attempts to pray and engage in religious study, *id.,*¶¶ 153-154, at 183a-184a, and with his access to counsel, *id.,*¶¶ 168, 171, at 186a-187a.

The District Court denied Ashcroft and Mueller's motion to dismiss **Iqbal's** discrimination claim, and the Court of Appeals affirmed. Ashcroft and Mueller then asked this Court to grant certiorari on two questions:

"1. Whether a conclusory allegation that a cabinet-level officer or other high-ranking official knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts purportedly com-

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mitted by subordinate officials is sufficient to state individual-capacity claims against those officials under *Bivens*.

***1956** "2. Whether a cabinet-level officer or other high-ranking official may be held personally liable for the allegedly unconstitutional acts of subordinate officials on the ground that, as high-level supervisors, they had constructive notice of the discrimination allegedly carried out by such subordinate officials." Pet. for Cert. I.

The Court granted certiorari on both questions. The first is about pleading; the second goes to the liability standard.

In the first question, Ashcroft and Mueller did not ask whether "a cabinet-level officer or other high-ranking official" who "knew of, condoned, or agreed to subject a plaintiff to allegedly unconstitutional acts committed by subordinate officials" was subject to liability under *Bivens*. In fact, they conceded in their petition for certiorari that they would be liable if they had "actual knowledge" of discrimination by their subordinates and exhibited " 'deliberate indifference' " to that discrimination. Pet. for Cert. 29 (quoting *Farmer v. Brennan,* 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). Instead, they asked the Court to address whether **Iqbal's** allegations against them (which they call conclusory) were sufficient to satisfy Rule 8(a)(2), and in particular whether the Court of Appeals misapplied our decision in *Twombly* construing that rule. Pet. for Cert. 11-24.

In the second question, Ashcroft and Mueller asked this Court to say whether they could be held personally liable for the actions of their subordinates based on the theory that they had constructive notice of their subordinates' unconstitutional conduct. *Id.,* at 25-33. This was an odd question to pose, since **Iqbal** has never claimed that Ashcroft and Mueller are liable on a constructive notice theory. Be that as it may, the second question challenged only one possible ground for imposing supervisory liability under *Bivens*. In sum, both questions assumed that a defendant could raise a *Bivens* claim on theories of supervisory liability other than constructive notice, and neither question asked the parties or the Court to address the elements of such liability.

The briefing at the merits stage was no different. Ashcroft and Mueller argued that the factual allegations in **Iqbal's** complaint were insufficient to overcome their claim of qualified immunity; they also contended that they could not be held liable on a theory of constructive notice. Again they conceded, however, that they would be subject to supervisory liability if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination." Brief for Petitioners 50; see also Reply Brief for Petitioners 21-22. **Iqbal** argued that the allegations in his complaint were sufficient under Rule 8(a)(2) and *Twombly,* and conceded that as a matter of law he could not recover under a theory of *respondeat superior*. See Brief for Respondent **Iqbal** 46. Thus, the parties agreed as to a proper standard of supervisory liability, and the disputed question was whether **Iqbal's** complaint satisfied Rule 8(a)(2).

Without acknowledging the parties' agreement as to the standard of supervisory liability, the Court asserts that it must *sua sponte* decide the scope of supervisory liability here. *Ante,* at 1947 - 1949. I agree that, absent Ashcroft and Mueller's concession, that determination would have to be made; without knowing the elements of a supervisory liability claim, there would be no way to determine whether a plaintiff had made factual allegations amounting to grounds for relief on that claim. See *Twombly,* 550 U.S., at 557-558, 127 S.Ct. 1955. But deciding the scope of supervisory***1957** *Bivens* liability in this case is uncalled for. There are several reasons, starting with the position Ashcroft and Mueller have taken and following from it.

First, Ashcroft and Mueller have, as noted, made the critical concession that a supervisor's knowledge of a subordinate's unconstitutional conduct

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and deliberate indifference to that conduct are grounds for *Bivens* liability. **Iqbal** seeks to recover on a theory that Ashcroft and Mueller at least knowingly acquiesced (and maybe more than acquiesced) in the discriminatory acts of their subordinates; if he can show this, he will satisfy Ashcroft and Mueller's own test for supervisory liability. See *Farmer, supra,* at 842, 114 S.Ct. 1970 (explaining that a prison official acts with "deliberate indifference" if "the official acted or failed to act despite his knowledge of a substantial risk of serious harm"). We do not normally override a party's concession, see, *e.g., United States v. International Business Machines Corp.,* 517 U.S. 843, 855, 116 S.Ct. 1793, 135 L.Ed.2d 124 (1996) (holding that "[i]t would be inappropriate for us to [e]xamine in this case, without the benefit of the parties' briefing," an issue the Government had conceded), and doing so is especially inappropriate when, as here, the issue is unnecessary to decide the case, see *infra,* at 1958 - 1959.I would therefore accept Ashcroft and Mueller's concession for purposes of this case and proceed to consider whether the complaint alleges at least knowledge and deliberate indifference.

Second, because of the concession, we have received no briefing or argument on the proper scope of supervisory liability, much less the full-dress argument we normally require. *Mapp v. Ohio,* 367 U.S. 643, 676-677, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961) (Harlan, J., dissenting). We consequently are in no position to decide the precise contours of supervisory liability here, this issue being a complicated one that has divided the Courts of Appeals. See *infra,* at 1957 - 1959. This Court recently remarked on the danger of "bad decisionmaking" when the briefing on a question is "woefully inadequate," *Pearson v. Callahan,* 555 U.S. ----, ----, 129 S.Ct. 808, 819, 172 L.Ed.2d 565 (2009), yet today the majority answers a question with no briefing at all. The attendant risk of error is palpable.

Finally, the Court's approach is most unfair to **Iqbal**. He was entitled to rely on Ashcroft and Mueller's concession, both in their petition for certiorari and in their merits briefs, that they could be held liable on a theory of knowledge and deliberate indifference. By overriding that concession, the Court denies **Iqbal** a fair chance to be heard on the question.

B

The majority, however, does ignore the concession. According to the majority, because **Iqbal** concededly cannot recover on a theory of *respondeat superior,* it follows that he cannot recover under any theory of supervisory liability. *Ante,* at 1948 - 1949. The majority says that in a *Bivens* action, "where masters do not answer for the torts of their servants,""the term 'supervisory liability' is a misnomer," and that "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Ibid.* Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; it is eliminating *Bivens* supervisory liability entirely. The nature of a supervisory liability theory is that the supervisor may be liable, under certain conditions, for the wrongdoing of his subordinates, and it is this very principle that the majority rejects. *Ante,* at 1952 ("[P]etitioners cannot be held liable unless they themselves ***1958** acted on account of a constitutionally protected characteristic").

The dangers of the majority's readiness to proceed without briefing and argument are apparent in its cursory analysis, which rests on the assumption that only two outcomes are possible here: *respondeat superior* liability, in which "an employer is subject to liability for torts committed by employees while acting within the scope of their employment,"Restatement (Third) of Agency § 2.04 (2005), or no supervisory liability at all. The dichotomy is false. Even if an employer is not liable for the actions of his employee solely because the employee was acting within the scope of employment, there still

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might be conditions to render a supervisor liable for the conduct of his subordinate. See, *e.g., Whitfield v. Melendez-Rivera,* 431 F.3d 1, 14 (C.A.1 2005) (distinguishing between *respondeat superior* liability and supervisory liability); *Bennett v. Eastpointe,* 410 F.3d 810, 818 (C.A.6 2005) (same); *Richardson v. Goord,* 347 F.3d 431, 435 (C.A.2 2003) (same); *Hall v. Lombardi,* 996 F.2d 954, 961 (C.A.8 1993) (same).

In fact, there is quite a spectrum of possible tests for supervisory liability: it could be imposed where a supervisor has actual knowledge of a subordinate's constitutional violation and acquiesces, see, *e.g., Baker v. Monroe Twp.,* 50 F.3d 1186, 1194 (C.A.3 1995); *Woodward v. Worland,* 977 F.2d 1392, 1400 (C.A.10 1992); or where supervisors " 'know about the conduct and facilitate it, approve it, condone it, or turn a blind eye for fear of what they might see,' " *International Action Center v. United States,* 365 F.3d 20, 28 (C.A.D.C.2004) (Roberts, J.) (quoting *Jones v. Chicago,* 856 F.2d 985, 992 (C.A.7 1988) (Posner, J.)); or where the supervisor has no actual knowledge of the violation but was reckless in his supervision of the subordinate, see, *e.g., Hall,supra,* at 961; or where the supervisor was grossly negligent, see, *e.g., Lipsett v. University of Puerto Rico,* 864 F.2d 881, 902 (C.A.1 1988). I am unsure what the general test for supervisory liability should be, and in the absence of briefing and argument I am in no position to choose or devise one.

Neither is the majority, but what is most remarkable about its foray into supervisory liability is that its conclusion has no bearing on its resolution of the case. The majority says that all of the allegations in the complaint that Ashcroft and Mueller authorized, condoned, or even were aware of their subordinates' discriminatory conduct are "conclusory" and therefore are "not entitled to be assumed true." *Ante,* at 1951. As I explain below, this conclusion is unsound, but on the majority's understanding of Rule 8(a)(2) pleading standards, even if the majority accepted Ashcroft and Mueller's concession and asked whether the complaint sufficiently alleges knowledge and deliberate indifference, it presumably would still conclude that the complaint fails to plead sufficient facts and must be dismissed.[FN2]

FN2. If I am mistaken, and the majority's rejection of the concession is somehow outcome determinative, then its approach is even more unfair to **Iqbal** than previously explained, see *supra,* at 1957, for **Iqbal** had no reason to argue the (apparently dispositive) supervisory liability standard in light of the concession.

II

Given petitioners' concession, the complaint satisfies Rule 8(a)(2). Ashcroft and Mueller admit they are liable for their subordinates' conduct if they "had actual knowledge of the assertedly discriminatory nature of the classification of suspects as being 'of high interest' and they were deliberately indifferent to that discrimination." Brief for Petitioners 50. **Iqbal** alleges***1959** that after the September 11 attacks the Federal Bureau of Investigation (FBI) "arrested and detained thousands of Arab Muslim men," Complaint ¶ 47, App. to Pet. for Cert. 164a, that many of these men were designated by high-ranking FBI officials as being " 'of high interest,' " *id.,*¶¶ 48, 50, at 164a, and that in many cases, including **Iqbal's**, this designation was made "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detainees' involvement in supporting terrorist activity,"*id.,* ¶ 49. The complaint further alleges that Ashcroft was the "principal architect of the policies and practices challenged,"*id.,* ¶ 10, at 157a, and that Mueller "was instrumental in the adoption, promulgation, and implementation of the policies and practices challenged,"*id.,* ¶ 11. According to the complaint, Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject [**Iqbal**] to these conditions of confinement as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate

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penological interest." *Id.,* ¶ 96, at 172a-173a. The complaint thus alleges, at a bare minimum, that Ashcroft and Mueller knew of and condoned the discriminatory policy their subordinates carried out. Actually, the complaint goes further in alleging that Ashcroft and Muller affirmatively acted to create the discriminatory detention policy. If these factual allegations are true, Ashcroft and Mueller were, at the very least, aware of the discriminatory policy being implemented and deliberately indifferent to it.

Ashcroft and Mueller argue that these allegations fail to satisfy the "plausibility standard" of *Twombly*. They contend that **Iqbal's** claims are implausible because such high-ranking officials "tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command." Brief for Petitioners 28. But this response bespeaks a fundamental misunderstanding of the enquiry that *Twombly* demands. *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. See *Twombly,* 550 U.S., at 555, 127 S.Ct. 1955 (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"); *id.*, at 556, 127 S.Ct. 1955 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable"); see also *Neitzke v. Williams,* 490 U.S. 319, 327, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989) ("Rule 12(b)(6) does not countenance ... dismissals based on a judge's disbelief of a complaint's factual allegations"). The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.

Under *Twombly,* the relevant question is whether, assuming the factual allegations are true, the plaintiff has stated a ground for relief that is plausible. That is, in *Twombly* 's words, a plaintiff must "allege facts" that, taken as true, are "suggestive of illegal conduct." 550 U.S., at 564, n. 8, 127 S.Ct. 1955.In *Twombly,* we were faced with allegations of a conspiracy to violate § 1 of the Sherman Act through parallel conduct. The difficulty was that the conduct alleged was "consistent with conspiracy, but just as much in line with a wide swath of rational and competitive business strategy unilaterally prompted by common perceptions of the market." *Id.,* at 554, 127 S.Ct. 1955. We held that in ***1960** that sort of circumstance, "[a]n allegation of parallel conduct is ... much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitlement to relief.' " *Id.,* at 557, 127 S.Ct. 1955 (brackets omitted). Here, by contrast, the allegations in the complaint are neither confined to naked legal conclusions nor consistent with legal conduct. The complaint alleges that FBI officials discriminated against **Iqbal** solely on account of his race, religion, and national origin, and it alleges the knowledge and deliberate indifference that, by Ashcroft and Mueller's own admission, are sufficient to make them liable for the illegal action. **Iqbal's** complaint therefore contains "enough facts to state a claim to relief that is plausible on its face." *Id.,* at 570, 127 S.Ct. 1955.

I do not understand the majority to disagree with this understanding of "plausibility" under *Twombly*. Rather, the majority discards the allegations discussed above with regard to Ashcroft and Mueller as conclusory, and is left considering only two statements in the complaint: that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11," Complaint ¶ 47, App. to Pet. for Cert. 164a, and that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and

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MUELLER in discussions in the weeks after September 11, 2001,"*id.*, ¶ 69, at 168a. See *ante,* at 1951. I think the majority is right in saying that these allegations suggest only that Ashcroft and Mueller "sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity,"*ante,* at 1952, and that this produced "a disparate, incidental impact on Arab Muslims,"*ante,* at 1951 - 1952. And I agree that the two allegations selected by the majority, standing alone, do not state a plausible entitlement to relief for unconstitutional discrimination.

But these allegations do not stand alone as the only significant, nonconclusory statements in the complaint, for the complaint contains many allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates. See Complaint ¶ 10, App. to Pet. for Cert. 157a (Ashcroft was the "principal architect" of the discriminatory policy); *id.*, ¶ 11 (Mueller was "instrumental" in adopting and executing the discriminatory policy); *id.*, ¶ 96, at 172a-173a (Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" **Iqbal** to harsh conditions "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest").

The majority says that these are "bare assertions" that, "much like the pleading of conspiracy in *Twombly,* amount to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim" and therefore are "not entitled to be assumed true." *Ante,* at 1951 (quoting *Twombly,supra,* at 555, 127 S.Ct. 1955). The fallacy of the majority's position, however, lies in looking at the relevant assertions in isolation. The complaint contains specific allegations that, in the aftermath of the September 11 attacks, the Chief of the FBI's International Terrorism Operations Section and the Assistant Special Agent in Charge for the FBI's New York Field Office implemented a policy that discriminated against Arab Muslim men, including **Iqbal**, solely on account of their race, religion, or national origin. See ***1961** Complaint ¶¶ 47-53, App. to Pet. for Cert. 164a-165a. Viewed in light of these subsidiary allegations, the allegations singled out by the majority as "conclusory" are no such thing. **Iqbal's** claim is not that Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed to subject" him to a discriminatory practice that is left undefined; his allegation is that "they knew of, condoned, and willfully and maliciously agreed to subject" him to a particular, discrete, discriminatory policy detailed in the complaint. **Iqbal** does not say merely that Ashcroft was the architect of some amorphous discrimination, or that Mueller was instrumental in an ill-defined constitutional violation; he alleges that they helped to create the discriminatory policy he has described. Taking the complaint as a whole, it gives Ashcroft and Mueller " 'fair notice of what the ... claim is and the grounds upon which it rests.' " *Twombly,* 550 U.S., at 555, 127 S.Ct. 1955 (quoting *Conley v. Gibson,* 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957) (omission in original)).

That aside, the majority's holding that the statements it selects are conclusory cannot be squared with its treatment of certain other allegations in the complaint as nonconclusory. For example, the majority takes as true the statement that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." Complaint ¶ 69, App. to Pet. for Cert. 168a; see *ante,* at 1951. This statement makes two points: (1) after September 11, the FBI held certain detainees in highly restrictive conditions, and (2) Ashcroft and Mueller discussed and approved these conditions. If, as the majority says, these allegations are not conclusory, then I cannot see why the majority deems it merely conclusory when **Iqbal** alleges that (1) after September 11, the FBI designated Arab Muslim detainees as being of " 'high interest' " "because of the race, religion, and national origin of the detainees, and not because of any evidence of the detain-

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ees' involvement in supporting terrorist activity," Complaint ¶¶ 48-50, App. to Pet. for Cert. 164a, and (2) Ashcroft and Mueller "knew of, condoned, and willfully and maliciously agreed" to that discrimination, *id.,* ¶ 96, at 172a. By my lights, there is no principled basis for the majority's disregard of the allegations linking Ashcroft and Mueller to their subordinates' discrimination.

I respectfully dissent.

Justice BREYER, dissenting.
I agree with Justice SOUTER and join his dissent. I write separately to point out that, like the Court, I believe it important to prevent unwarranted litigation from interfering with "the proper execution of the work of the Government." *Ante,* at 1953. But I cannot find in that need adequate justification for the Court's interpretation of *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007), and Federal Rule of Civil Procedure 8. The law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference. As the Second Circuit explained, where a Government defendant asserts a qualified immunity defense, a trial court, responsible for managing a case and "mindful of the need to vindicate the purpose of the qualified immunity defense," can structure discovery in ways that diminish the risk of imposing unwarranted burdens upon public officials. See ***Iqbal** v. Hasty,* 490 F.3d 143, 158 (2007). A district court, for example, can begin discovery with lower level government defendants before determining whether a case can be made to allow ***1962** discovery related to higher level government officials. See *ibid.* Neither the briefs nor the Court's opinion provides convincing grounds for finding these alternative case-management tools inadequate, either in general or in the case before us. For this reason, as well as for the independently sufficient reasons set forth in Justice SOUTER's opinion, I would affirm the Second Circuit.

U.S.,2009.
Ashcroft v. Iqbal

129 S.Ct. 1937, 77 USLW 4387, 09 Cal. Daily Op. Serv. 5961, 21 Fla. L. Weekly Fed. S 853

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NOTICE PLEADING: THE AGENDA AFTER *TWOMBLY*

Introduction

On May 21, 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 550 U.S. ___. At the time a jaded academic might have viewed the opinion as simply one more entry in the variegated catalogue of decisions that in alternative sequence deny "heightened pleading" standards outside explicit rule or statute and then seem, surreptitiously, to impose heightened pleading standards. The *Twombly* opinion, indeed, seems to combine both elements. Any temptation to take this view is confounded by the outpouring of lower-court decisions following in *Twombly's* wake. A few months of concentrated attention do not suffice to establish the decision's long-term impact. It would be premature to launch Rule 8 amendments, either for fear that the pleading bar has been raised too high or to secure the bar and perhaps raise it higher still. Barring truly drastic changes, time will be required both to determine what changes have emerged in pleading standards and to evaluate them. As so often, developed practice will provide the surest guide to the need for Rules amendments and, if a need emerges, to the shape of effective amendments. Much of the burden of developing the new practices — if indeed new practices emerge — will fall on the practicing bar. But the pace of the rulemaking process ensures that this burden must be born at least for several years. Delay is not indifference.

If it be accepted that it would not be wise to attempt immediate Rule 8 revision, there are powerful reasons to advance Rule 8 back to a more active place on the Advisory Committee's agenda. If discovery has been on the agenda almost constantly for the last 40 years, notice pleading has been on the agenda for at least 20 years — longer if Rule 11 is included. Concerns about the role of discovery have led repeatedly to thoughts that perhaps the failure to establish a fully satisfactory discovery practice justifies reconsideration of the basic notice pleading part of the package. The Court's invitation to reinterpret present Rule 8 explicitly reflects similar concerns about the role of pleading as a protection against overblown discovery. The immediate response in the lower courts provides assurance that a variety of approaches will be taken, not only in pleading standards as such but also in more assertive efforts to manage the early stages of discovery to facilitate more detailed pleading or summary judgment. If substantial uniformity emerges, there may be no occasion to revise Rule 8 or any other rule. But amendments must at least be considered if disuniformity persists after the initial period of adjustment. Active attention has become important. And it may soon enough be possible to call on the Federal Judicial Center for help in devising empirical studies to help sort through developing practice and its consequences.

Recent Committee History

Pleading practices have been on the agenda for many years. In 1988 the Advisory Committee considered a proposal to abrogate the Rule 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted. The defendant would be required to answer on the merits, and then seek dismissal either by a Rule 12(c) motion for judgment on the pleadings or by a Rule 56 motion for summary judgment. An opportunity for "any necessary discovery" would be required before ruling even on a Rule 12(c) motion. The Committee sought research help from the Federal Judicial Center. The result was Willging, "Use of Rule 12(b)(6) in Two Federal District Courts" (Federal Judicial Center 1989). The study found that Rule 12(b)(6) motions were filed in 13% of the cases in the sample. The motions were granted in 6% of the cases; in 5% of the cases the result was dismissal either of the entire action or dismissal as to one or more defendants. In 3% of the cases the result was dismissal of the entire action. The proposal to abrogate Rule 12(b)(6) was later withdrawn.

Pleading standards were again brought to the agenda by discussion at the May 1993 Advisory Committee meeting, and were the subject of occasional discussion over the following years. Rule 15 amendment practice was studied in depth, leading to recently published amendment proposals. Discussion of notice pleading as such in part responded to Supreme Court decisions. More recently pleading has been considered along with discovery and summary judgment. The inquiry was bold enough to extend to the fundamental "package" that sought to subordinate pleading to discovery as a means of developing and exchanging fact information, relying on summary judgment for protection against positions of claim or defense that do not merit trial. The bold inquiry did not lead to bold action. Fundamental reconsideration of notice pleading has been deferred in the hope that less drastic approaches will meet whatever problems may persist. The alternative of developing particular pleading requirements for specific substantive areas also was deferred, despite the implicit invitations in Supreme Court observations that any departures from the notice pleading standard must be provided by statute or court rule. Substance-specific standards will be difficult to develop without a keen appreciation of actual practice needs in any field that might be taken on. There also is a risk that substance-specific standards might encroach on the premise that Enabling Act rules must not abridge, enlarge, or modify any substantive right. Finally, attention turned to proposals to expand the Rule 12(e) motion for a more definite statement. A number of alternative drafts were considered at the September 2006 Committee meeting, focusing on more definite statements that would pave the way for disposition under Rule 12(b), (c), or (f), or that would support pretrial management in more general terms. The discussion reflected a balance between enthusiasm for some means to go beyond the generality of the pleadings and reluctance to add a new opportunity for "roadblock" motions. The conclusion was that these proposals might be further considered by the Rule 56 Subcommittee in conjunction with revision of Rule 56. Immediate Subcommittee action does not seem likely.

Twombly

The Twombly opinion is open to many interpretations. There was no room to doubt what the two Sherman Act conspiracy claims were. Nor was there any room to doubt the sufficiency of the legal theory — an explicit agreement among potential horizontal competitors to refrain from market-extension activities is per se invalid. The plaintiffs, consumers of telephone services, alleged that the four incumbent local exchange carriers had conspired to do two things. One was to adopt terms for dealing with competitive local exchange carriers that effectively defeated the purposes of the 1996 Telecommunications Act by thwarting the entry of new local-exchange competition. The second was to refrain from entering each others' territories by themselves becoming competitive local exchange carriers. The "nature" of the claims, 127 S.Ct. at 1965 n. 3, was clear. The question was instead whether the complaint provided sufficient "grounds" for the claims by pleading "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal conspiracy," 127 S.Ct. at 1965. The link between pleading and discovery was thus forged early in the opinion. The link was further shaped as the opinion progressed. Emphasizing the burdens of discovery in complex antitrust litigation and the difficulties of judicial management, the single most frequently used label — perhaps to become a "test" — looks for "plausibility." An early statement looks for "factual enhancement" that crosses "the line between possibility and plausibility of 'entitlement to relief.'" 127 S.Ct. at 1966.

It is tempting to predict that eventually the Twombly opinion will come to stand for a context-specific test that looks for sufficiently detailed fact allegations to make it plausible to move beyond the bare pleadings into the potentially expensive discovery stage. The effect of context could be measured by a variety of factors that shape expectations of discovery burdens. Lower demonstrations of plausibility might suffice when discovery does not threaten to consume vast resources, while greater detail would be required when discovery seems likely to prove costly. Context also might be shaped, although perhaps not explicitly, by the nature of the substantive claim.

The element of agreement required to establish an antitrust "conspiracy" is confused in theory and may be exquisitely difficult to establish in practice. The structure of many markets enables parallel conduct that might reflect conduct that can be characterized as "agreement," but also might reflect successful independent oligopoly rationalization. An allegation that is easy to allege but costly to discover and difficult to prove may encounter higher plausibility barriers. Simple familiarity with the law and frequent experience with litigation under it also may count — the bare allegation of "negligence" in Form 9 (to become Form 11) suffices because court and counsel know full well how to manage a negligence action. There is strong reason to believe that courts now measure the sufficiency of pleadings by responding to all of these influences, and that adoption of a "plausibility" test will make the process somewhat more open and may encourage more deliberate pursuit of the process.

It is almost as tempting to make a different prediction. The Twombly opinion may come to be seen as specific — specific not to antitrust pleading in general, but specific to the particular problems presented by claims that rest on the agreement component of a § 1 "contract, combination in the form of trust or otherwise, or conspiracy."

Either of these predictions seems reasonable. The complex Twombly opinion, however, invites speculation at least as much as prediction. The catalogue of phrases that can be built out of the opinion is intriguing. One phrase or another can be made to point in almost any direction. A partial catalogue illustrates the possibilities:

> "a conclusory allegation of agreement at some unspecified point does not supply facts adequate to show illegality. Hence, when allegations of parallel conduct are set out in order to make a § 1 claim, they must be placed in a context that raises a suggestion of a preceding agreement."
>
> "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'"
>
> "The border in [a court of appeals case] was the line between the conclusory and the factual. Here it lies between the factually neutral and the factually suggestive. Each must be crossed to enter the realm of plausible liability."
>
> A case should be disposed of at the point of minimum expenditure by parties and court "when the allegations in the complaint, however true, could not raise a claim of entitlement to relief."
>
> Quoting a court of appeals, the costs of federal antitrust litigation "'counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim.'"
>
> "Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no '"reasonably founded hope that the [discovery] process will reveal relevant evidence."'"
>
> In Conley v. Gibson, the Court said that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." "This 'no set of facts' language can be read

in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings; and the Court of Appeals appears to have read Conley in some such way when formulating its understanding of the proper pleading standard. * * * On such a focused and literal reading * * *, a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery." The complaint in this case "does not set forth a single fact in a context that suggests an agreement. * * * It seems fair to say that this approach to pleading would dispense with any showing of "'a reasonably founded hope'" that a plaintiff would be able to make a case." The "no set of facts" language has confused and divided courts and commentators. The Conley complaint in fact amply stated a claim for relief. "[T]his familiar observation has earned its retirement. The phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint. * * * Conley * * * described the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival."[1]

"[B]efore proceeding to discovery, a complaint must allege facts suggestive of illegal conduct."

The complaint in Twombly describes parallel conduct and asserts agreement, but the "few stray references" to agreement "are merely legal conclusions resting on the prior allegations." "The pleadings mentioned no specific time, place, or person involved in the alleged conspiracies." Form 9, in alleging negligence, also alleges a specific time and place. The Twombly complaint "furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place." Nothing in the complaint "invests either the action or inaction alleged with a plausible suggestion of conspiracy." [It is natural for each of the defendants, acting independently, to resist competition from new local carriers; "there is no reason to infer that the companies had agreed among themselves to do what was only natural anyway * * *."]

"[W]e do not apply any 'heightened' pleading standard, nor do we seek to broaden the scope of * * * Rule * * * 9. * * * On certain subjects understood to raise a high risk of abusive litigation, a plaintiff must state factual allegations with greater particularity than Rule 8 requires. [Rule] 9(b)-(c). Here, our concern is not that the allegations in the complaint were insufficiently 'particular[ized], * * *; rather, the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible."

---

[1] It may be noted that the Conley opinion did not make up the "no set of facts" test out of whole cloth. The opinion cites earlier appeal decisions. The earliest is Leimer v. State Mut. Life Assur. Co., 8th Cir.1940, 108 F.3d 302. At p. 306, after citing several pre-Civil Rules decisions, describing Rule 8(a)(2) and the Forms, and noting the possibility of testing a complaint by a bill of particulars under the pre-1948 version of Rule 12(e) or by summary judgment, the court said: "[T]here is no justification for dismissing a complaint for insufficiency of statement, except where it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of the claim."

> "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."

Phrases will be picked out from this array and from other parts of the opinion. It is clear that the "no set of facts" hyperbole of the Conley opinion has been abolished. Many statements suggest a requirement that facts be pleaded — if not the "fact pleading" of the Codes, still something more than mere "conclusions." Apparent approval of the barebones allegation of "negligence" indicates that the line between "fact" and "[legal] conclusion" will depend on the context. So the opinion variously refers to "enough fact to raise a reasonable expectation that discovery will reveal evidence"; "factual enhancement" to cross "the line between possibility and plausibility of entitlement to relief"; "facts adequate to show illegality"; the lines between "the conclusory and the factual," and "between the factually neutral and the factually suggestive"; "fact in a context that suggests agreement"; "facts suggestive of illegal conduct"; "merely legal conclusions"; and "not * * * heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."

Beyond the search for some fact component, the opinion distinguishes between the "nature" of the claim and the "grounds." (Remember that Rule 8(a)(1) requires a short and plain statement of the "grounds" for jurisdiction, while (2) does not refer to "grounds" in stating the claim.) The complaint must show that the pleader is entitled to relief — in itself an observation that is easily anchored in 8(a)(2)'s "a short and plain statement of the claim showing that the pleader is entitled to relief." Something must show "an entitlement to relief," also an observation clearly anchored in the rule text. There must be a "reasonable likelihood that the plaintiffs can construct a claim" — an observation that seems to mean that a plaintiff must state a claim and also show a chance of "constructing it." There must be a reasonably founded hope that discovery will reveal "relevant" evidence — this does not seem to look for a prospect that discovery will reveal sufficient evidence, but only relevant evidence. So too of a reasonably founded hope the plaintiff will be able to make a case.

All of this could be reduced to a simple proposition, similar to one of the suggestions made early in the Committee's renewed consideration of notice pleading. Rule 8(a)(2) has it right. It requires not merely a short and plain statement, but a statement "showing that the pleader is entitled to relief." The suggestion was that some innocuous word might be added as a justification for publishing an amended rule with a Committee Note saying "and we really mean it. There must be some showing sufficient to justify moving beyond the pleadings to the next stage. The showing may be adjusted to the apparent costs of proceeding to discovery and other pretrial work, and may be integrated with focused and limited resort to discovery and other pretrial work in a process that requires some initial success in discovery to justify better focused pleading and further discovery." The antitrust context of the Twombly decision is fully consistent with this view.

Erickson (and Tellabs)

The Twombly decision was not the last word on pleading in the October 2006 Term. Two subsequent decisions fill out the picture.

Erickson v. Pardus, 2007, 127 S.Ct. 2197, is more general. The Court granted review and vacated on the certiorari papers. The plaintiff prisoner, proceeding pro se, alleged that he had been improperly withdrawn from treatment for hepatitis C, and alleged that nontreatment caused continued damage to his liver and was endangering his life. The court of appeals affirmed dismissal, finding no more than "conclusory allegations" that suspension of treatment caused harm independent

of the harm that would result from hepatitis C itself. The Supreme Court ruled that the allegations were not "too conclusory" for pleading purposes. The allegation that removal from treatment endangered the plaintiff's life "alone was enough to satisfy Rule 8(a)(2)." Quoting Twombly quoting Conley, the Court said:

> Specific facts are not necessary; the statement need only "'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'"

The Court went on to note that the claim was "bolstered" by more specific allegations in attachments to the complaint and in later filings. It also noted that a pro se complaint is held to less stringent standards than a formal pleading drafted by a lawyer. In the final paragraph, on the other hand, it observed that the complaint still might be dismissed — that "the proper application of the controlling legal principles to the facts is yet to be determined."

It is often difficult to know just what to make of a summary disposition on the certiorari papers. The potential effect of the Erickson decision could easily be limited by the indulgence extended to pro se pleadings. It also could be limited by the manifest cogency of a claim that suspension of hepatitis C treatment for a minimum period of 18 months may lead to further liver damage and perhaps worse. At the same time, this selective quotation from the Twombly opinion could imply that the Twombly decision is, after all, specific to antitrust cases and perhaps is more specific still, looking only to conspiracy claims founded on parallel behavior. The steadfast denial of "heightened pleading" in the Twombly opinion could provide further support for this interpretation.

Tellabs, Inc. v. Makor Issues & Rights, Ltd., 2007, 127 S.Ct. 2499, is more limited. The Private Securities Litigation Reform Act of 1995 requires that a complaint "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." "The inquiry is inherently comparative." It is not enough that a reasonable inference of "scienter" can be drawn. The pleaded facts satisfy the test "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." This part of the opinion does not speak to pleadings governed by general notice-pleading standards. But another part may be more relevant. The Court ruled that this reading of the statute "does not impinge upon the Seventh Amendment right to jury trial." Here the opinion could be read to say only that when Congress creates a statutory claim — as in the securities laws — Congress "has power to prescribe what must be pleaded to state the claim." For that matter, the Leatherman decision recognized that heightened pleading requirements can be created by court rule, such as Civil Rule 9(b). The statute does not require the plaintiff to plead more than she would be required to prove at trial. (This part of the opinion seems to go further: the plaintiff need only plead facts making the inference of scienter at least as likely as any plausible opposing inference; at trial, the plaintiff must demonstrate that scienter is more likely than not. The pleading test thus falls somewhat short of the directed verdict standard.)

The Courts of Appeals Confront Twombly

Reaction to the Twombly decision has been immediate and universal. Electronic research accounts counted the first thousand cases citing Twombly by early September. No doubt the count will climb past two thousand by the time of the November meeting. The appellate opinions alone counted up rapidly, although perforce in appeals from decisions rendered before Twombly was decided. This pervasive fascination may reflect an eagerness for guidance in notice pleading stemming from long-continued uncertainty as well as the centrality of the Supreme Court and the complexity of the opinion. If a brief period suffices to show the importance of the decision and the range of possibilities it opens up, however, more time will be needed to reach any settled account

of actual consequences. The time has not yet come for an exhaustive accounting of even the appellate decisions. But it is helpful to consider a small set of illustrations drawn from different circuits. The illustrations show that thoughtful proceduralists find that Twombly opens many possible approaches.

The Second Circuit: Iqbal

Pride of place in the early returns belongs to *Iqbal v. Hasty*, 2d Cir.2007, 490 F.3d 143. The appeal was argued in October 2006. The decision was entered on June 14, 2007, barely more than three weeks after the Twombly decision. The court managed, in this brief period, to provide not only a thorough review of the perplexities it found in the Twombly opinion but also a careful application of the standard it found there — a "plausibility" test of pleading.

A brief summary is even more inadequate with respect to the Iqbal decision than with respect to the Twombly case. It is easy to frame the Twombly pleading problem in abstract terms. Not so for Iqbal. "Iqbal is a Muslim Pakistani currently residing in Pakistan." His complaint alleged that two months after he was arrested and placed in the general prison population he was moved to a newly created "Administrative Maximum Housing Unit" for no reason other than designation by the FBI as a person "of high interest" in "investigation into the events of 9/11." In addition to the onerous general terms of confinement, the complaint alleged many acts of individual injury, including beatings, repeated strip and body-cavity searches, inadequate food, interference with prayer, delay in delivering legal mail, and the like. In addition to a wide array of constitutional and statutory claims the complaint presented particularly thorny problems with respect to official immunity and the responsibility of such high officials as the Attorney General and the Director of the FBI for acts playing out in the remote reaches of the Bureau of Prisons hierarchy. In the end, most of the allegations were found sufficient to withstand a motion to dismiss.

The discussion of "pleading requirements" in Iqbal begins with a review of the familiar cases, including those that reject "heightened pleading" requirements. 490 F.3d at 153-155. Then attention turns to Twombly, 490 F.3d at 155-159. The court recognized that a "narrow view" could be taken, limiting the Twombly decision to the specific context of an antitrust conspiracy claim based on nothing more than allegations of parallel conduct in a market structured to facilitate parallelism without agreement. The opinion, however, through "several, not entirely consistent, signals," indicates an intent "to make some alteration in the regime of pure notice pleading that had prevailed in the federal courts ever since Conley v. Gibson."

Judge Newman then quoted many of the phrases in the Twombly opinion that "point toward a new and heightened pleading standard." Disavowal of the "no set of facts" language in Conley v. Gibson was the beginning. (Later, 490 F.3d at 157 n. 7, the opinion notes that this language "has been cited by federal courts at least 10,000 times in a wide variety of contexts.") The Supreme Court discounted the ability of careful case management to weed out failing cases early in the discovery process. The opinion seems to adopt a "plausibility" standard.

On the other hand, there are grounds for limiting the possible reach of the Twombly opinion. The Court explicitly disclaimed "heightened pleading." The Erickson decision is in this same vein. Form 9 (Style Form 11) was noted approvingly, although the Court "took no notice of the total lack of an allegation of the respects in which the defendant is alleged to have been negligent." The emphasis on the burdens of antitrust discovery might imply that special pleading tests apply in antitrust actions. And the Erickson opinion says that a pleading need not include specific facts to satisfy Rule 8(a)(2).

"These conflicting signals create some uncertainty as to the intended scope of the Court's decision." But at least some of the language discussing Rule 8 in general terms "seems to be so integral to the rationale of the Court's parallel conduct holding as to constitute a necessary part of that holding." The conclusion, then, is that

> [T]he Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible "plausibility" standard, which obliges a pleader to amplify a claim with some allegations in those contexts where such amplification is needed to render the claim plausible.

Finally, the court expressed some lingering regret that heightened pleading could not be required in cases posing issues of the sort presented to it involving official immunity and "supervisory involvement." It suggested that Civil Rule 12(e) more definite statements might be required; that when a complaint passes the plausibility threshold "some limited and tightly controlled reciprocal discovery" might be used — focusing on interrogatories and requests to admit before depositions — to maintain control; and that summary judgment after carefully targeted discovery may provide important additional protection.

Judge Cabranes concurred, fully joining the opinion but also suggesting that it might be better to develop a pleading system that gives better effect to the purposes of official immunity. 490 F.3d at 178-179.

In some ways the most important lesson of the Iqbal opinion goes beyond the immensely valuable recognition and resolution of the complex details of the Twombly opinion. Application of the plausibility test ascribed to Twombly led the court through many pages of closely reasoned analysis. The task set by this upward adjustment in notice pleading standards will often be onerous. The work may be repaid, both for court and the parties, by reductions in the other work required to dispose of ill-founded claims or defenses without trial. But it will be hard work.

Other Circuit Examples

Seventh Circuit

Soon after the Twombly decision the Seventh Circuit affirmed denial of a motion to dismiss after accepting jurisdiction under § 1292(b). Judge Posner begins the opinion with a description that might seem to foretell reversal: "The complaint is a hideous sprawling mess * * *. We have found it difficult and in many instances impossible to ascertain the nature of the charges. * * * [T]he defendants can hardly be blamed for wanting to strangle the monster in its crib." Many pages are then devoted to the conclusion that the judge should have required greater specification of the acts claimed to violate state law in order to apply the proper standards of federal preemption. At the close, it is suggested that the district court might also want to consider whether any portions of the complaint should be dismissed for failure "to comply with the recent pleading standard announced by the Supreme Court" in Twombly. After noting that the Court had "rejected the hitherto canonical formula of Conley v. Gibson," the opinion concludes on this note: "The present case is not an antitrust case, but the district court will want to determine whether the complaint contains 'enough factual matter (taken as true)' to provide the minimum notice of the plaintiffs' claim that the Court believes a defendant entitled to." In re Ocwen Loan Servicing, LLC Mortgage Servicing Litigation, 7th Cir.2007, 491 F.3d 638, 641, 648-649. This passage implies that the pleading standard has somehow been changed, now requiring "enough factual matter" to give "minimum notice" of the claim.

Two months later Judge Wood wrote an opinion in a case that did not challenge the ruling that the third amended complaint failed to state a claim. The only issue was whether it was an abuse of discretion — it was not — to deny leave to file a fourth amended complaint after more than four years of pleading practice. At the close of the opinion, however, the court quotes Twombly and then describes Erickson as a decision "clarif[ying] that Twombly did not signal a switch to fact-pleading in the federal courts." Erickson teaches that specific facts are not necessary; all that is required is fair notice of what the claim is and the grounds on which it rests. "Taking Erickson and Twombly together, we understand the Court to be saying only that at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." Airborne Beepers & Video, Inc. v. AT & T Mobility LLC, 7th.Cir.2007, 499 F.3d 663.

Local 15, International Bhd. of Electrical Workers v. Exelon Corp., 7th Cir.2007, 495 F.3d 779, affirmed dismissal of an action challenging a labor arbitrator's award. Given the tests for reviewing arbitral awards, the result is not surprising. The opinion begins by quoting a 2004 Seventh Circuit opinion quoting the "no set of facts" test, and then adds "But see * * * Twombly"'s statement that this test "is best forgotten." Noting "the liberal notice pleading standard," the opinion leaves matters at that.

EEOC v. Concentra Health Services, Inc., 7th Cir. 2007, 496 F.3d 773, provides many passages praising simplified notice pleading, but affirms dismissal in circumstances calculated to test judicial patience. The first EEOC complaint asserted that the defendant terminated an employee for complaining to top management that the employee's supervisor was giving preferential treatment to another employee who was having an affair with the supervisor. This complaint was dismissed without prejudice because the terminated employee could not reasonably have believed that Title VII is violated simply by giving preferential treatment to an employee because of an affair. The EEOC then filed an amended complaint that deleted the description of the employee's complaint, "undoubtedly * * * to avoid pleading itself out of court." Amendment to delete a self-defeating allegation is permitted. But, as the opinion later makes clear, not favored. As to notice pleading, the court observes that in 2006 it had stated that a complaint can be dismissed only if it would be necessary to contradict the complaint to prevail on the merits. That test is no longer valid in light of Twombly's rejection of the "no set of facts" test that generated these decisions. Under Twombly, "it is not enough for a complaint to avoid foreclosing possible bases for relief; it must actually suggest that the plaintiff has a right to relief" by allegations that rise above the speculative level. Rule 8(a)(2) requires "a minimal level of factual detail, although that level is indeed very minimal." So Twombly quotes Conley v. Gibson for the requirement that the complaint give fair notice of what the claim is and the grounds upon which it rests. This statement captures the mood of notice pleading, but is not a precise test. Requiring detailed facts interferes with the purpose to ensure that claims are decided on the merits in multiple ways. "Most details are more efficiently learned through the flexible discovery process. Swierkiewicz * * *." The court should keep the case moving, not lavish attention on the complaint. "[A] plaintiff might sometimes have a right to relief without knowing every factual detail supporting its right; requiring the plaintiff to plead those unknown details before discovery would improperly deny the plaintiff the opportunity to prove its claim." On the other hand, liberal notice pleading "is less convincingly invoked by a government agency seeking to simply step around a more informative complaint that has been dismissed for failure to state a claim." "Encouraging a plaintiff to plead what few facts can be easily provided and will clearly be helpful serves to expedite resolution by quickly alerting the defendant to basic, critical factual allegations (that is, by providing 'fair notice' of the plaintiff's claim) and, if appropriate, permitting a quick test of the legal sufficiency of those allegations." "A complaint should contain information that one can provide and that is clearly important; the EEOC has removed information that it did provide and that showed that its prior allegations did not state a claim." An allegation that the defendant fired the plaintiff because of race suffices to give notice. But a retaliation complaint

must specify the act that led to the retaliation. This "is only to insist upon easily provided, clearly important facts." And, more generally: "It is rarely proper to draw analogies between complaints alleging different sorts of claims; the type of facts that must be alleged depend [sic] upon the legal contours of the claim." Judge Flaum concurred, arguing — contrary to the majority — that the complaint was sufficient under pre-Twombly Seventh Circuit decisions. "I am unable to share the majority's view that Bell Atlantic left our notice pleading jurisprudence intact." It requires a plaintiff to "plead enough facts to demonstrate a plausible claim."

Eighth Circuit

Gregory v. Dillard's, 8th Cir.2007, 494 F.3d 694, 709-710, is an example of the many cases where Twombly does not seem to have made a difference. The court reverses dismissal of a complaint alleging violation of 42 U.S.C. § 1981 by harassing African-American shoppers in ways that intentionally interfered with their plans to make purchase contracts at a department store and that intentionally denied them the same services as were extended to other purchasers. The central themes are taken from 1995 and 2003 Eighth Circuit decisions: "Particularly in civil rights actions the complaint should be liberally construed." "Great precision is not required of the pleadings." As in Swierkiewicz, the complaint "need not track the precise wording of a § 1981 prima facie case because there is not 'a rigid pleading requirement for discrimination cases.'" As Swierkiewicz quotes Conley, the simplified notice pleading standard requires only fair notice of what the plaintiff's claim is and the grounds upon which it rests. The fact allegations in this case satisfy Twombly because they are more than mere labels and conclusions, more than a formulaic recitation of the elements of a cause of action. "[T]he pleadings, while not particularly detailed, were nevertheless sufficient * * *."

Tenth Circuit

The multiple references to plausibility in the Twombly opinion seem to encourage reliance on "plausibility" as the new definition of notice pleading. A clear illustration is provided in an opinion by Judge Paul Kelly, Jr., Ridge at Red Hawk, L.L.C. v. Schneider, 10th Cir.2007, 493 F.3d 1174. Noting that Twombly has retired Conley's "no set of facts" test that had guided Tenth Circuit decisions, the court quotes two of the Twombly references to plausibility and concludes:

> [T]he mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.

The questions raised in the Ridge at Red Hawk case did not provide an occasion for illumination of the test that looks for "a reasonable likelihood of mustering factual support" for a claim. Four days later a different panel, of which Judge Kelly was a member, affirmed another dismissal for failure to state a claim. This time, after announcing a search for "'plausibility in th[e] complaint,'" the court suggested that while "the Supreme Court was not clear on the articulation of the proper standard for a Rule 12(b)(6) dismissal," the Twombly and Erickson decisions together "suggest that courts should look to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief." The court went on to say that it would have affirmed under its earlier approach as well as under the new approach. Alvarado v. KOB-TV, L.L.C., C.A.10th, 2007, 493 F.3d 1210, 1215 n. 2. (The pleadings included comprehensive fact allegations, perhaps making it easier to conclude that there was little room to imagine further facts that might constitute a claim.) Combining these approaches, the proposed test may be that some level of specific allegations is needed to establish a reasonable likelihood of mustering factual support. Ten days after that, however, the "plausibility" test was again quoted in text, with a footnote observation that the

Erickson decision shows that specific facts are not needed, but only fair notice of what the claim is and the grounds upon which it rests. TON Services, Inc. v. Qwest Corp., C.A.10th, 2007, 493 F.3d 1225, 1236.

Eleventh Circuit

Judge Carnes wrote the opinion in Watts v. Florida International University, 2007, 495 F.3d 1289; Judge Hills "concur[s] in the opinion" because "the complaint does not affirmatively show that the appellant may not have a case." The opinion is too rich for full description. The plaintiff was dismissed from a practicum for graduate social-work students because he advised a student who had identified herself as Catholic that among the options available for bereavement counseling would be a "church" program. The majority concludes that the complaint stated "a valid First Amendment free exercise of religion claim." To state the claim, the plaintiff must plead both a "religious" belief and that the belief is "sincerely held." Addressing the "sincerity" element first, the court noted that the belief need not be "central" to the religion — courts should not undertake to determine centrality. "With what specificity must sincerity be pleaded?" "How do you plead sincerity of belief? One way is to state that the belief is, in fact, your religious belief." The complaint alleged that the plaintiff "is a Christian. He is not Catholic. [His] religious beliefs include the belief that a patient who professes a religion is entitled to be informed if the counselor is aware of a religious avenue within the patient's religion that will meet the appropriate therapy protocol for the patient. * * * [Terminating the plaintiff] evidences Defendants' intent to compel [the plaintiff] to act contrary to his religious beliefs and constitutes a substantial burden on the exercise of his religious beliefs." This suffices to plead sincerity because termination would not impose a substantial burden if the belief were not sincere. "In Twombly terms, Watts has certainly alleged 'enough factual matter (taken as true) to suggest' that his religious belief was sincerely held, * * * putting forward plausible grounds to infer' that it was sincerely held, * * * and 'identifying facts that are suggesting enough to render [the sincerity of his belief] plausible,' * * *." As to the religious character of the belief, courts must not attempt to determine whether a belief is objectively reasonable. There is no need to plead facts to establish that "belief is of the type that a judge would generally consider to be religious in nature. Watts is not on the hook for our inability to understand his religious system." The question is whether the belief is religious in the plaintiff's own scheme of things. But even if the religious character of a belief must be objectively reasonable, a single statement that a belief is religious is sufficient pleading. "How else does one plead a religious basis or motivation for a belief except by asserting it in a statement in a complaint?" A single statement is enough. The representation that a belief is religious "is all that is necessary to raise the possibility that his belief is a religious one 'above the speculative level.' Twombly * * * We are at a loss to understand how much more he could say in his complaint and still adhere to the Rule 8 model of 'a short and plain statement of the claim.'" There is more — including quotations from Kierkegaard and Samuel Taylor Coleridge. But the point is clear: some things can be pleaded only by conclusory labels. Twombly does not raise a fact pleading requirement for them.

Federal Circuit

The Federal Circuit decision in McZeal v. Sprint Nextel Corp., Fed.Cir., 2007 WL 2683705, applies the "lesser standard" suitable for a pro se plaintiff. Dismissal for failure to state a claim was reversed both as to a patent infringement claim and a trademark infringement claim. Relying on Form 16, the court concluded "that a patentee need only plead facts sufficient to place the alleged infringer on notice as to what he must defend," and "is not required to specifically include each element of the claims of the asserted patent." As to Twombly, the Court's direction to forget the "no set of facts" language in Conley v. Gibson is offset by the Court's favorable quotation of other parts of the Conley opinion. "This does not suggest that Bell Atlantic changed the pleading requirement of * * * Rule * * * 8 as articulated in Conley." n. 4. "By ruling in McZeal's favor, we do not

condone his method of pleading. * * * [W]here pleadings are sufficient, yet it appears almost a certainty to the court that the facts alleged cannot be proved to support a legal claim, a motion to dismiss for failure to state a claim must nevertheless be overruled." Summary judgment is the proper procedure. (Judge Dyk dissented as to the patent infringement claim, reading the complaint to rely on the doctrine of equivalents and urging that Twombly "makes clear that * * * conclusory allegations of infringement under the doctrine of equivalents are insufficient." As to Form 16, "[o]ne can only hope that the rulemaking process will eventually result in eliminating the form, or at least revising it to require allegations specifying which claims are infringed, and the features of the accused device that correspond to the claim limitations.")

Self-Defeating Specificity

Whether for good or bad, encouraging greater fact specificity may lead to complaints that plead the plaintiff out of court. An illustration is provided by the en banc decision in NicSand v. 3M Co., 6th Cir., 2007 WL 3010426. The opinion is written as one affirming dismissal for want of antitrust standing resulting from failure to plead antitrust injury. The failure to plead antitrust injury, however, rested on examining all of the acts claimed to establish an antitrust violation and concluding that they reflected legitimate competitive conduct, not anticompetitive conduct. This sentence appears in the court's reply to the dissent: "The key failing in NicSand's complaint is not that it has too few details but that it has too many." 2007 WL @ * 11.

Details that plead the plaintiff out of court seem a good thing when the plaintiff begins the action knowing all of the facts that may be available to support the claim. An incomplete set of details, however, may present troubling questions. The plaintiff in the NicSand case, for example, seemed to say that multi-year exclusive dealing contracts were insisted upon by the customers contested for between the plaintiff and the defendant. The circumstances, however, suggested that the customers "insisted" upon binding themselves to long commitments because they could win more favorable terms from their only two potential suppliers by giving the commitments in exchange. It is not entirely comforting to dismiss a plaintiff who feels compelled to plead what prove to be self-defeating fact details when there may be other facts that would be self-curing.

Impact on The Scope of Discovery

Rule 26(b)(1) defines the presumptive scope of discovery as "any nonprivileged matter that is relevant to any party's claim or defense." Beyond that point, the court may for good cause order discovery of any matter relevant to the subject matter involved in the action. The 2000 Committee Note explaining adoption of the distinction between "claim or defense" and "subject matter" says there is "no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." Various observers predicted various reactions to the change. Some hoped that it would encourage more detailed pleading in order to ensure a broad scope for "lawyer-managed" discovery. Some expected that any tendency to specific pleading would be matched by the addition of broad general claims designed for the same purpose. Whatever the effects may have been, it will be important to remember the links between pleading and the scope of discovery in watching the effects of the Twombly decision on pleading practice. Enhanced pleading may have desirable consequences on discovery management by the parties, their lawyers, and the court. To the extent that this happens, continuing concerns about the scope of discovery may be mollified.

APPENDIX

The attached materials sketch the outlines of Advisory Committee consideration of notice pleading from 1993 on. They do not represent any anticipation of the Twombly decision, much less an attempt to draft rules that either codify or modify it. They do sketch the seeming variability of "notice" pleading standards even before Twombly. Some decisions seemed to demand greater fact detail than others, to the extent that it is possible to imagine degrees of fact specificity as between different types of claims. More importantly, they illustrate the difficulty of drafting a flexible approach that calls for more fact pleading in some circumstances than in others. Even after Twombly, it remains difficult to define or even suggest the circumstances that distinguish between cases properly pleaded to give mere notice of the events in suit and those that must be pleaded by providing facts that make the claimed right "plausible."

Particularized Pleading

The pleading questions raised by Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 1993, 113 S.Ct. 1160, were discussed at the May meeting and put on the agenda for the October meeting. The portion of the May meeting minutes relating to these questions is attached.

The Leatherman decision involved two actions asserting that a municipal employer was liable because its law enforcement officers had violated the Fourth Amendment rights of the plaintiff and it had failed to train them to avoid Fourth Amendment violations. The district court dismissed, invoking the "heightened pleading standard" required by the Fifth Circuit in § 1983 actions. The heightened pleading requirement began with decisions requiring pleading "with factual detail and particularity" in actions against officers who likely would plead official immunity, so that the complaint would show arguments defeating immunity. It was later extended to actions asserting municipal liability. The Court of Appeals for the Fifth Circuit affirmed the dismissal. The Supreme Court reversed.

The core of Chief Justice Rehnquist's opinion for a unanimous Court is "that it is impossible to square the 'heightened pleading standard' applied by the Fifth Circuit in this case with the liberal system of 'notice pleading' set up by the Federal Rules." A plaintiff is not required to set out in detail the facts underlying the claim. Rule 9(b), which requires particularity in pleading fraud or mistake, does not include "any reference to complaints alleging municipal liability under § 1983. Expressio unius est exclusio alterius."

The rationale of the opinion may be slightly clouded by a reservation expressed at the outset. The Court noted that municipalities do not enjoy immunity from suit; the limits on municipal liability are more direct. "We thus have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." On the face of things, this reservation is puzzling. The "expressio unius" theory seems to apply to individual official immunity in the same way that it applies to municipal liability. The answer may be that "expressio unius" interpretation carries only so far; it can be overcome by pressing interests. Municipal corporation defendants do not have pressing interests that justify overriding ordinary pleading doctrine. Individual official defendants may have pressing interests that deserve to be protected by strict pleading requirements that were not contemplated when the Federal Rules were written. Protecting the immunity interests of individual defendants has generated a complicated body of doctrine that justifies appeal before final judgment, see 15A Federal Practice & Procedure: Jurisdiction 2d, § 3914.10. Similar impulses may still justify special pleading doctrine after the Leatherman decision.

At the close of the opinion, the Court observed that Rules 8 and 9 were written before it had recognized grounds for holding municipal corporations liable because of constitutional wrongs by their employees.

> "Perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the addedd specificity requirement of Rule 9(b).. But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation."

This passage may be a veiled invitation to consider amending the pleading rules. An explicit suggestion for amendment has been made by Chief Judge Harry Lee Hudspeth of the Western District of Texas, who wrote to the Committee that an order for a more definite statement has been a valuable tool in determining whether pro se complaints are supported by any ground for litigation.

Beyond the setting of the Leatherman case, it seems clear that the required level of pleading specificity varies widely among different types of litigation. An exhaustive demonstration of this proposition was provided by Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 1986, 86 Colum. L. Rev. 433. A survey of more recent decisions by Judge Keeton led to the same conclusion: "[S]pecificity requirements are not limited to cases decided under Rule 9(b) or under Admiralty Rules C(2) and E(2)(a). Rather, the 'degree of specificity with which the operative facts must be stated in the pleadings varies depending on the case's context.'" Boston & Maine Corp. v. Town of Hampton, 1st Cir., 1993, 987 F.2d 855, 866.

There is room to debate the desirability of this contextual specificity phenomenon. It may seem a wilful defiance of notice pleading philosophy. It also may seem a desirable reinstatement of the easily ignored requirement of Rule 8(a)(2) that the short and plain statement of the claim "show[] that the pleader is entitled to relief." A requirement that a complaint do more than identify the transaction that gives rise to litigation could support early disposition of actions that proceed on inadequate legal theories or without hope of establishing indispensable facts.

These general questions invite consideration of a range of responses. One response is to do nothing. Doing nothing could be appropriate on either of two opposed points of view, or on a more relaxed conclusion that it is too early to do anything.

One set of arguments for doing nothing would begin with the premise that all heightened pleading requirements are wrong. Pleading should do no more than identify the transaction underlying suit, paving the way for discovery and formal pretrial procedures that establish more reliable means for disposition without trial. There is no need for amendment on this view if the Leatherman decision will, in relatively short order, cause most courts to abandon all explicit and implicit heightened pleading requirements.

The opposing point of view would be that heightened pleading requirements are a good thing, and that courts will continue to impose them without any particular deference to the apparent force of the Leatherman decision. This point of view would be bolstered by the argument that it would be virtually impossible for the rulemaking process to regularize the process by which heightened pleading requirements are enforced. The rulemaking process cannot keep abreast of the intricacies of desirable pleading practice for the ever-changing array of claims that can be brought to federal courts. Detailed rules for specific categories of cases must always be incomplete and must lag far behind the lessons of emerging experience. It is better to rely on the present requirement that a complaint show that the pleader is entitled to relief, allowing courts to tailor this requirement to the circumstances that may make early disposition more appropriate. Some categories of cases, for example, may frequently involve ill-founded claims; such tendencies may vary between different parts of the country, and over time. Discretion to insist on more particular pleading, allowing opportunity to amend to meet perceived deficiencies, may work far better than detailed rulemaking. Many categories of cases, as another example, may threaten to impose exhausting pretrial burdens before it is possible to consider disposition apart from the pleadings. Courts should be empowered to protect themselves and the adversaries by requiring a preliminary assurance that the burdens are justifiable. Yet other categories of cases may involve areas in which special desires to protect against the burdens of litigation contend with the need to enforce rights — the official immunity question put aside in the Leatherman opinion is a good illustration.

If the detailed rule approach is rejected, an alternative approach would be to regularize the process for demanding more helpful pleading. In one form or another, the rules could adopt a modernized form of the antique motion for a bill of particulars. The most obvious means of

following this approach would be amendment of the procedure for demanding a more definite statement. This approach seems the most promising if any rules amendment is to be attempted. The rule could be framed directly in terms of the need to facilitate disposition by pretrial motions. It would not have the appearance of singling out particular categories of apparently disfavored claims for hostile treatment.

Expansion of the more definite statement procedure would provide a clear focus for arguments about the need to expand the role of pleading motions. One range of arguments surely will be that a seemingly neutral procedure will in fact be used to dispose of disfavored claims by artificially elevated pleading requirements. Another will be that augmented pleading demands are inherently undesirable. Rule 12(e) originally provided for bills of particulars. It was amended in 1948 to provide only for a more definite statement, and to limit the occasion for more definite statement to situations in which a responsive pleading is required and cannot reasonably be framed. The purpose of the amendment was to reinforce the basic structure of the rules: the exchange of fact information and identification of the issues should be accomplished through discovery and pretrial conference. Apparent failure to state a claim should be raised by motion under Rule 12(b)(6); if the pleading as framed is sufficient, Rule 12(e) should not be used to require more detailed statements that may make it insufficient. Pretrial disposition should be by summary judgment after opportunity to explore the facts, not on the pleadings. Pleading should not be used to force allegations that can be made only after discovery. More particular statements are seldom appropriate even if a pleading suggests that a particular defense may be available — the absence of allegations of time or writing may suggest a limitations of statute of frauds defense, but that does not of itself make more a more definite statement appropriate. All of these matters, and more, are explored in 5A Federal Practice & Procedure: Civil 2d, §§ 1374-1379.

The wide variety of heightened pleading requirements that have emerged in practice provides the foundation for a response to this history. It may show that the collective wisdom of many judges, growing over time, is better than the abstract passion for minimized pleading. Whatever may have been desirable in 1938 or 1948 is no longer desirable. The burdens imposed by going to pretrial stages beyond pleading continue to grow. As the law keeps growing to regulate more and more human activities in increasingly complex ways, so grows the opportunity to bring lawsuits founded on theories that cannot withstand the light of full statement. Pleading must be restored as a protection against the procedures that help to prepare for trial or summary dispostion.

Some support for these arguments may be found in recent experiences of the Committee. A few years ago it was proposed that the Rule 12(b)(6) motion to dismiss for failure to state a claim be abolished; the Committee did not accept the proposal. More recently, the amendments now pending in Congress encourage more particular pleading in at least two ways. Rule 11 would allow for specific identification of factual allegations as "likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." Rule 26(a)(1)(A) and (B) provide for disclosure of information "relevant to disputed facts alleged with particularity in the pleadings." The Rule 26 provisions were informed by extensive testimony at the hearings on disclosure, especially from product liability defense attorneys, asserting that notice pleading often provides little guidance for an adversary attempting to understand the purpose and character of an action.

A final approach might be to amend Rule 8(a)(2) to emphasize the perhaps overlooked requirement that a pleading show that the pleader is entitled to relief. This approach might work best if the purpose of the amendment were left to statement in a Note suggesting that the Leatherman decision may cause some courts to forswear desirable opportunities to dispose of actions on the pleadings.

The Rule 8, 9, and 12 approaches can be illustrated by the following rough drafts.

Rule 8(a)(2)

A pleading * * * shall contain * * * (2) a short and plain statement of the claim in sufficient detail to showing that the pleader is entitled to relief * * *.

NOTE

Rule 8(a)(2) is amended to reinvigorate the requirement that the pleading show that the pleader is entitled to relief. The amount of detail sufficient to show a right to relief will depend on the nature of the action. Heightened pleading requirements often have been exacted in a wide variety of actions, particularly those that promise to involve protracted and expensive pretrial and trial proceedings. Illustrative opinions are gathered in Boston & Maine Corp. v. Town of Hampton, 1st Cir., 1993, 987 F.2d 855. The wisdom of this practice has been proved by its gradual evolution. The lack of clear support for the practice in the text of the rules led to the ruling that heightened pleading requirements could not be required in actions asserting municipal liability under 42 U.S.C. § 1983, see Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160. The Court observed in the Leatherman decision that if heightened pleading requirements are desirable, "that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." It is not feasible or desirable to draft specific pleading requirements for all of the different actions that may come before a federal court. This amendment restores the gradual process of judicial evolution that developed up to the time of the Leatherman decision.

Rule 8(e)(1)

Each averment of a pleading ~~shall~~ must be simple, concise, and direct. No technical forms of pleading or motions are required. The pleading as a whole must be sufficient to support informed decision of a motion under Rule 12(b), (c), (d), or (f).

Note

(The Note would draw from the Note set out for Rule 12(e) below.)

Rule 9

Rule 9(b): "In all averments of fraud, ~~or~~ mistake, or civil rights violation by a public official or public entity, the circumstances constituting fraud, ~~or~~ mistake, or civil rights violation by a public official or public entity ~~shall~~ must be stated with particularity." -or-

[*A pleading of fraud, mistake, or civil rights violation by a public official or entity must be stated with particularity.*] -or-

Rule 9(x, renumbering later subdivisions): An averment of a civil rights violation by a public official must be stated with particularity.

NOTE

Many courts have found it useful to require specific statement of civil rights claims against public officials or against public bodies responsible for official wrongs. In Leatherman v. Tarrant

Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160, the Court held that the relationship between Rules 8 and 9 shows that particular statement can be required only by specific rule provision. This amendment restores the heightened pleading requirements that had evolved in many courts before the Leatherman decision. It does not attempt to define the nature of a claim that may properly be classified as a "civil rights violation by a public official." The classification should be made according to the needs that have informed the evolving practice up to the time of the Leatherman decision.

Rule 12(e)

(e) Motion for More Definite Statement. ~~If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within 10 days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.~~

(1) On motion or on its own, the court may order a more definite statement of a pleading:
  (A) If the pleading is one that requires a responsive pleading and is so vague or ambiguous that a responsive pleading cannot reasonably be required; or
  (B) If a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f).

(2) A motion for a more definite statement must point out the deficiencies in the pleading and the details desired.

(3) A more definite statement must be made within the time fixed by the order or, if no time is fixed, within 10 days after notice of the order. If a more definite statement is not made the court may strike the pleading or impose other sanctions.

NOTE

Rule 12(e) is amended to reinvigorate the function of pleading as a method of disposing of actions — or portions of actions — that rest on inadequate legal premises. The structure of these rules places primary reliance on discovery, pretrial conferences, and summary judgment not only to shape a case for trial but also to winnow out matters that ought not go to trial. Pleading is intended primarily to establish the framework for these later proceedings. It is important that cases not be decided on the pleadings before all parties are afforded adequate opportunity to discover the fact information that may be needed to support a clear statement of legal theory. Post-pleading procedures, however, have come to pose increasingly heavy burdens on litigants and courts in more and more cases. Recognizing the nature of these burdens, a host of decisions have developed increasingly detailed pleading requirements for a wide variety of cases. The framework of the present rules requires that such requirements be imposed by a process of moving to challenge the pleading, consideration of often limited allegations, and — if the pleading is inadequate — working through the process of amendment. A more direct procedure is provided by a motion for more definite statement.

The need to expand the role of the motion for more definite statement arises in part from the decision in Leatherman v. Tarrant Cty. Narcotics Intelligence & Coord. Unit, 1993, 113 S.Ct. 1160. The Court ruled that heightened pleading requirements cannot be imposed outside the categories

specifically enumerated in Rule 9. At the same time, it suggested that the appropriate means of establishing such requirements is "by the process of amending the Federal Rules." It is not feasible to establish detailed catalogues of pleading requirements for every legal category that may warrant such requirements, nor to express adequately the nuanced shades of specificity that may be appropriate for different categories. The more definite statement procedure can be used to restore the process of gradual judicial development that, up to the time of the Leatherman decision, was responsible for establishing pleading requirements adapted to the needs of different actions.

Notice Pleading Reconsidered

Pleading and discovery are inseparably joined in the Civil Rules system of "notice pleading." The complaint and answer are designed primarily to set the framework for pretrial litigation, relying on disclosure, discovery, and increasingly on "managerial judging" to inform the parties as to fact, contention, and legal theory. The discovery part of this package, recently joined by disclosure, has provoked such continuing anguish that it has been the subject of constant Advisory Committee study for the last 40 years. At least some segments of the bar continue to be dissatisfied with the disruptions and costs imposed by discovery. Although discovery issues will remain on the agenda, it may be appropriate to explore once again the question whether the notice pleading part of the package should be revised.

The most likely goal of revising the pleading rules would be to strengthen the use of pleadings to dismiss at the outset actions by plaintiffs who cannot even identify in a complaint facts that, if proved, would establish a claim for relief. The argument would be that Rule 11 does not provide adequate protection against actions brought without a solid foundation in both fact and law, in the hope that discovery either will show that there actually is a sustainable claim or, less attractively, in the hope that the prospect of discovery will elicit a settlement offer.

Whether there is any force to the arguments that pleading rules need strengthening depends on experience, not theory. Experience, not theory, also will shape the revisions that might be considered. There may be no general problems, or no sufficient number of problems to believe that any "solution" is possible. Or there may be discrete problems that are better addressed by focused rules than by a general revision of notice pleading. Or there may be some number of significant problems, but no way to improve on wise administration of the current pleading rules, perhaps assisted by occasionally turning a blind eye to some of the more open-ended opinions that seem to deny any role for variable application of particular pleading requirements according to the nature of the litigation.

The immediate question is whether it would be desirable to undertake further study of notice pleading. As with recent discovery and class-action projects, organized bar groups are a likely source of help. Any useful appraisal of current pleading practice will require information drawn from many substantive areas and from courts in all parts of the country. Comparisons to state-court pleading practices also will be helpful. In addition to the familiar national groups that have helped with other projects, it may be particularly useful to seek out state bar groups in states that have distinctive pleading practices. It also may prove possible to enlist the Federal Judicial Center, either for an ambitious study or for something simpler akin to the recent survey of federal judges on Rule 11.

One testing hypothesis can be simply stated, with only brief elaboration. It begins with the belief that pleadings appropriately play different roles in different types of litigation. Form 9 is famous, and for good reason. The simplest pleading suffices for an automobile collision case based on negligence. There is likely to have been a collision, and with that reasonable ground for bringing suit. The law is familiar, the means of investigation and discovery ready to hand, and the need to test the sufficiency of the legal theory almost nonexistent. Many courts, on the other hand, might be less comfortable with a similarly brief allegation that from July 1, 2001 continuing to the present the defendant has contracted, combined, or conspired with others unknown to fix the price of widgets purchased by the plaintiff in violation of § 1 of the Sherman Act. The conclusion of this hypothesis is that courts in fact act on these distinctions, insisting on greater pleading detail in cases that seem to call for it. If the automobile collision occurred in a no-fault state, allegations will be required to bring the suit into the tort system. Different levels of detail will be required in alleging title depending on whether the action is one to compel specific performance with an allegation of marketable title, one to quiet title, one to remove a cloud from title, or one to eject a trespasser. More generally, courts will consider experience with frequent misuse of specific types of claims,

projected complexity in discovery and trial, and — more controversially — whether a particular type of claim should be favored. The burden is on would-be reformers to show that courts could do a better job if given more explicit authority to impose higher pleading standards.

Two Supreme Court decisions provide the texts that cast doubt on the proposition that lower courts can tailor the specificity required by notice pleading to the perceived needs of different types of litigation. The lead decision is Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 1993, 507 U.S. 163, 113 S.Ct. 1160. A 1993 memorandum on the Leatherman decision is attached. The lesson that pleading with particularity can be required only when directed by a specific Civil Rule provision was repeated in Swierkiewicz v. Sorema N.A., 2002, 534 U.S. 506, 122 S.Ct. 992. The Swierkiewicz decision ruled that a complaint claiming employment discrimination need not "plead facts establishing a prima facie case" within the familiar burden-shifting framework. The decision relied in part on the observation that a plaintiff who has direct evidence of discrimination may prevail without proving all the elements of a "prima facie case." Beyond that, the court observed:

> imposing the * * * heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2) * * *. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See * * * Leatherman * * *.
>
> Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example * * *. This Court * * * has declined to extend such exceptions to other contexts. * * * Just as Rule 9(b) makes no mention of municipal liability * * *, 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).[1]
>
> Other provisions of the Federal Rules * * * are inextricably linked to Rule 8(a)'s simplified notice pleading standard. * * * Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 72, 104 S.C.t 2229 * * * (1984). * * * the liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim.

Alongside these decisions lie other Supreme Court decisions that seem to look in a different direction. The first is Crawford-El v. Britton, 1998, 523 U.S. 574, 597-598, 118 S.Ct. 1584, 1596-1597. The claim was that the defendant prison official had punished the plaintiff prisoner for exercising his First Amendment rights by arranging for transfer of the plaintiff's legal materials to the plaintiff's new prison by inappropriately slow means. The claim required showing improper motive. The Court quoted an earlier observation that

> "firm application of the Federal Rules of Civil Procedure is fully warranted" and may lead to the prompt disposition of insubstantial claims. * * * Though we have rejected the Court of Appeals' solution, we are aware of the potential problem that troubled the court. It is therefore appropriate to add a few words on some of the existing procedures available to federal trial judges in handling claims that involve examination of an official's state of mind.

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[1] These requirements are exemplified by the * * * Forms * * *. For example, Form 9 sets forth a complaint for negligence * * *.

> When a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the trial court must exercise its discretion in a way that protects the substance of the qualified immunity defense. It must exercise is discretion so that officials are not subjected to unnecessary and burdensome discovery or trial proceedings. The district judge has two primary options prior to permitting any discovery at all. First, the court may order a reply to the defendant's or a third party's answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff "put forward specific, nonconclusory factual allegations" that establish improper motive causing cognizable injury in order to survive a prediscovery motion for dismissal or summary judgment. * * * This option exists even if the official chooses not to plead the affirmative defense of qualified immunity."

Christopher v. Harbury, 2002, 536 U.S. 403, 416-418, 122 S.Ct. 2179, 2187-2188, is more difficult to describe. The Court recognized the legal theory underlying a claim that the plaintiff's access to court had been denied by State Department refusal to provide access to information that would have enabled the plaintiff to maintain an action arising from the killing of her husband by Guatemala officials who were trained, paid, and used as informants by the CIA. In order to make out the present claim, the plaintiff must show that if she had been given access to the information she could have successfully maintained an action for relief that cannot any longer be sought:

> Like any other element of an access claim, the underlying cause of action and its lost remedy must be addressed by allegations in the complaint sufficient to give fair notice to a defendant. See generally Swierkiewicz * * *. Although we have no reason here to try to describe pleading standards for the entire spectrum of access claims, this is the place to address a particular risk inherent in backward-looking claims. Characteristically, the action underlying this sort of access claim will not be tried independently, a fact that enhances the natural temptation on the part of plaintiffs to claim too much, by alleging more than might be shown in a full trial focused solely on the details of the predicate action.
>
> Hence the need for care in requiring that the predicate claim be described well enough to apply the "nonfrivolous" test and to show that the "arguable" nature of the underlying claim is more than hope. * * *
>
> The particular facts of this case underscore the need for care on the part of the plaintiff in identifying, and by the court in determining, the claim for relief underlying the access-to-courts plea. The action alleged on the part of all the Government defendants * * * was apparently taken in the conduct of foreign relations by the National Government. Thus, if there is to be judicial enquiry, it will raise concerns for the separation of powers in trenching on matters committed to the other branches. * * * Since the need to resolve such constitutional issues ought to be avoided where possible, * * * the trial court should be in a position as soon as possible in the litigation to know whether a potential constitutional ruling may be obviated because the allegations of denied access fail to state a claim on which relief could be granted.
>
> * * * [T]he complaint should state the underlying claim in accordance with * * * Rule * * * 8(a), just as if it were being independently pursued, and a like plain statement should describe any remedy available under the access claim and presently unique to it.

If it were not for the citation of the Swierkiewicz decision, even a careful reader might be pardoned for thinking these words recognize the role of heightened pleading.

The most recent of the Supreme Court decisions is Dura Pharmaceuticals, Inc. v. Broudo, 2005, 125 S.Ct. 1627, 1634. The ruling on the securities law question was that a fraud plaintiff cannot recover simply by showing that the price on the day of purchase was higher than it would have been but for the fraud; the purchaser must prove "economic loss." The Court concluded that the complaint "failed adequately to allege" proximate cause and economic loss:

> [W]e assume, at least for argument's sake, that neither the [Civil] Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss. But, even so, the "short and plain statement" must provide the defendant with "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 * * * (1957). * * *
>
> [The complaint alleged only that the plaintiffs paid artificially inflated prices, and suffered damages. It did not claim that the share price fell significantly after the truth was known. But an artificially inflated purchase price] is not itself a relevant economic loss. And the complaint nowhere else provides the defendants with notice of what the relevant economic loss might be or of what the causal connection might be between that loss and the misrepresentations * * *.
>
> We concede that ordinary pleading rules are not meant to impose a great burden upon a plaintiff. Swierkiewicz * * *. But it should not prove burdensome for a plaintiff who has suffered an economic loss to provide a defendant with some indication of the loss and the causal connection that the plaintiff has in mind. At the same time, allowing a plaintiff to forgo any indication of the economic loss and proximate cause that the plaintiff has in mind would bring about harm of the very sort the statutes seek to avoid. * * * Such a rule would tend to transform a private securities action into a partial downside insurance policy.

The Court quoted and cited to the legislative history of the Private Securities Litigation Reform Act. Again, the concept of "notice" seems to have taken on an increased level of detail in response to the perceived needs of a particular class of litigation.

Given the directness of the Leatherman and Swierkiewicz pronouncements and the indirectness of the Court's potentially opinions, it should not be surprising that the courts of appeals have generally abandoned the once-familiar theory that heightened pleading could be required in civil rights actions against government officials who are likely to plead official immunity. Judge Posner provided a succinct statement in Thomson v. Washington, 7th Cir.2004, 362 F.3d 969, 970-971:

> [T]he judge wanted the plaintiff to plead enough facts to show that it would be worthwhile to put the defendants to the bother of answering the complaint. That is an understandable approach in light of the burden that prisoners' civil rights litigation places on the district courts, the frivolousness of most of that litigation, and the endeavor of Congress in the Prison Litigation Reform Act to curb the abuse of legal process by prisoners with time on their hands. But it is an approach that the Federal Rules of Civil Procedure and the decisions of the Supreme court and the federal courts of appeals forbid. The federal rules replaced fact pleading with notice pleading. All that the rules require, with a few exceptions inapplicable to this case, such as pleading fraud, * * * is that a complaint state the plaintiff's legal claim, such as, in this case, denial of access to the courts in violation of the due process clause, infliction of cruel and unusual punishment by denying essential medical treatment (Eighth Amendment), and retaliation for seeking to use the legal process to petition for redress of grievances (First Amendment), together with some indication (here

amply supplied) of time and place. * * * Federal judges are forbidden to supplement the federal rules by requiring "heightened" pleading of claims not listed in Rule 9.

Apart from this specific area, it is difficult without intensive and probably impressionistic study to guess at the ways in which notice pleading may, in practice, entail requirements that vary with the specific subject of action. The greater the variability, the less pressing the case will be for undertaking a lengthy study of possible reforms.

A few general observations remain possible. One is that careful lawyers commonly plead far more than needed to withstand a motion to dismiss. One reason is that the pleadings are the first part of the case to come to the judge's attention — it is important to tell a compelling story, or least a persuasive story. Another may be to frame the issues — a detailed complaint may elicit an answer that advances the litigation. Yet another reason may arise from the 2000 amendment that ties the scope of party-controlled discovery to the claims and defenses stated in the pleadings. A plaintiff who wants to ensure broad discovery without venturing into "subject matter" territory may simultaneously plead some claims in broad general terms and other claims in careful detail.

Apart from direct pleading requirements, courts may seek detailed statement by other means. Reconciling these means with general notice pleading practice may prove difficult. Some courts, for example, have adopted standing orders that require a "case statement" in actions under the Racketeer Influenced and Corrupt Organizations Act. These orders stand on shaky ground to the extent that they go beyond the requirements of Rule 9(b); see Wagh v. Metris Direct, Inc., 9th cir.2003, 363 F.3d 821. Even case-specific directions may prove vulnerable. In Wynder v. McMahon, 2d Cir.2004, 360 F.3d 73, 77-79, the court reversed dismissal of the action based on failure to comply with an order that the plaintiff articulate in a logical way his theory of the case and his employment discrimination claim. "Rule 8 would become a dead letter if district courts were permitted to supplement the Rule's requirements through court orders demanding greater specificity or elaboration of legal theories, and then to dismiss the complaint for failure to comply with those orders." If this were allowed, "district courts could impose disparate levels of pleading requirements on different sorts of plaintiffs."

More extreme situations, however, may provoke different responses. Acuna v. Brown & Root Inc., 5th Cir.2000, 200 F.3d 335, affirmed dismissal for failure to comply with a scheduling order that required statement of the individual claims of some 1,600 plaintiffs — a so-called "Lone Pine" order. The injuries "occurr[ed] over a span of up to forty years. Neither the defendants nor the court was on notice from plaintiffs' pleadings as to how many instances of which diseases were being claimed as injuries or which [uranium] facilities were alleged to have caused those injuries. It was within the court's discretion to take steps to manage the complex and potentially very troublesome discovery that the cases would require." Before filing, "[e]ach plaintiff should have had at least some information regarding the nature of his injuries, the circumstances under which he could have been exposed to harmful substances, and the basis for believing that the named defendants were responsible for his injuries."

This preliminary sketch is nothing more than a bloodless introduction to a topic that stirs deep passions. The combination of notice pleading and searching discovery created in 1938 by the Civil Rules has transformed the meaning of the law in many areas. It is not only that real value has been given to substantive principles that would have been more difficult to enforce under earlier procedure. It also is that the substantive law itself has developed in response to the information unearthed by discovery launched from notice-pleaded claims. It will be essential to determine whether the problem of notice pleading is that it is inadequate procedure, not that it has become an essential part of the law-enforcing and lawmaking role of the courts. If courts are managing to muddle along reasonably well, it may be better to defer this project to a day of greater need.

Sketches of Possible Rules Approaches

Several approaches might be taken to depart from the relaxed "notice" pleading now in place. They cannot be ranked in clear order from least to greatest departure. Among the possibilities are these:

(1) Add a verification requirement. This approach would entail substantial revision of Rule 11, particularly the provision in Rule 11(b)(3), added in 1993, that permits allegations "if specifically so identified," that "are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery * * *."

(2) Republish present Rule 8(a)(2), with a Committee Note stating that it is time to give meaning to the dead-letter requirement that the short and plain statement show that the pleader is entitled to relief.

(3) Revise Rule 8(a)(2). Three obvious variations would be:

[a] A pleading * * * must contain * * * (2) a short and plain statement of the claim <u>in sufficient detail to</u> show~~ing~~ that the pleader is entitled to relief * * *; or

[b] A pleading * * * must contain * * * (2) a short and plain statement of the <u>facts constituting a</u> claim * * *; or

[c] A pleading * * * must contain * * * (2) a short and plain statement of the claim<u>, stating with particularity facts</u> showing that the pleader is entitled to relief * * *.

(4) Revise [Style] Rule 8(d)(1) by adding a new sentence at the end:

Each allegation must be simple, concise, and direct. No technical form is required. <u>The pleading as a whole must be sufficient to support informed decision of a motion under Rule 12(b), (c), (d), or (f).</u>

(5) Revise Rule 9 by adding a catalogue of claims that must be pleaded with particularity. Many entries in the catalogue could be found by regularizing the tendency of many courts to require heightened pleading of many claims now.

(6) Revive the motion for a bill of particulars by scrapping Style Rule 12(e) and substituting the following:

(1) On motion or on its own, the court may order a more definite statement of a pleading:

(A) If the pleading is one that requires a responsive pleading and is so vague or ambiguous that a party cannot reasonably prepare a response; or

(B) If a more particular pleading will support informed decision of a motion under subdivisions (b), (c), (d), or (f).

(2) A motion for a more definite statement must be made before filing a responsive pleading and must point out the deficiencies in the pleading and the details desired.

(3) If the court orders a more definite statement and the order is not obeyed within 10 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other order that it considers appropriate.

(7) Revise Rule 7 to encourage use of a reply. The most extensive requirement, short of requiring a reply to all new matter in the answer, would be to allow a defendant to impose a reply obligation simply by including in the answer a request for a reply. Short of that, Rule 7 might identify specific circumstances calling for a reply. The narrowest version would focus on specific types of litigation; cases in which the defendant pleads some form of official immunity are a familiar example.

AUTHENTICATED
U.S. GOVERNMENT
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111TH CONGRESS
1ST SESSION

S. 1504

To provide that Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).

IN THE SENATE OF THE UNITED STATES

JULY 22, 2009

Mr. SPECTER introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To provide that Federal courts shall not dismiss complaints under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Notice Pleading Restoration Act of 2009".

1 **SEC. 2. DISMISSAL OF COMPLAINTS IN FEDERAL COURTS.**

2 Except as otherwise expressly provided by an Act of
3 Congress or by an amendment to the Federal Rules of
4 Civil Procedure which takes effect after the date of enact-
5 ment of this Act, a Federal court shall not dismiss a com-
6 plaint under rule 12(b)(6) or (e) of the Federal Rules of
7 Civil Procedure, except under the standards set forth by
8 the Supreme Court of the United States in Conley v. Gib-
9 son, 355 U.S. 41 (1957).

○

Preliminary Review of the Notice
Pleading Restoration Act of 2009 (S. 1504)

I. Background of Current Issues

Since 1938, Rule 8 of the Federal Rules of Civil Procedure has required that a complaint contain a "short and plain statement of the claim showing that the pleader is entitled to relief." This standard was preceded by 19th century common law pleading, which proved arcane and prevented decisions on the merits, and by "fact pleading" under the Field Code, first adopted in New York in 1848, which generated uncertainty over what should be regarded as a "fact."

After 1938, litigation in the lower courts focused on the factual detail required under Rule 8. In 1957, the Supreme Court addressed this issue in *Conley v. Gibson.*

Conley was mainly focused on labor law issues; the pleading issues were not even briefed. In the short discussion of pleading sufficiency, *Conley* emphasized that under Rule 8, a complaint must give fair notice to the defendant of the claims and the grounds on which they are based. *Conley* rejected the approach of some lower courts requiring detailed factual pleading. In what one scholar has called "precedent by accident," *Conley* borrowed a phrase from a treatise and said that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The "no set of facts" language in *Conley* could never have been, and was not, applied literally. To do so would mean that a completely uninformative complaint could not be dismissed. After 1957, the Supreme Court repeatedly directed lower courts to use pleading motions to screen out unjustified claims, either by dismissing under Rule 12(b)(6) or using Rule 12(e) to require a more definite statement. The Supreme Court also held in 1993 and 2002 that some lower courts' application of specific or "heightened" pleading in certain kinds of cases was not authorized because those cases were not included in Rule 9 of the Federal Rules of Civil Procedure, which lists matters requiring "particularized" pleading.

Bell Atlantic v. Twombly, a 2007 decision authored by Justice Souter and joined by six other members of the Court, described *Conley v. Gibson* as "an early statement of ours construing Rule 8." The Court noted that under Rule 8, a complaint must set out allegations that give the defendant notice of the claims and of the grounds for relief and that "show" entitlement to relief. The Court emphasized that it was not disturbing the *Conley* holding that a complaint must give fair notice of the claims and their grounds. Two weeks later, the Court reversed a pleadings dismissal and cited *Bell Atlantic* as incorporating *Conley v. Gibson*'s directive that the complaint need only "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests."

In determining whether the antitrust complaint before it in *Bell Atlantic* "showed" entitlement to relief, the Supreme Court surveyed the years of case law and concluded that "*Conley*'s 'no set of facts' language has been questioned, criticized, and explained away long enough . . . . After puzzling the profession for 50 years, this famous observation has earned its retirement." The Court held that a complaint is sufficient under Rule 8 if it sets out allegations that make the claims "plausible." The complaint at issue failed the test because it did not include allegations that, taken as true, would suggest that an agreement violating the antitrust laws had been made. The Court noted that its 2002 decision

rejecting heightened pleading specificity was consistent, adding that "we do not require heightened fact pleading of specifics." The Court stated that if the complaint's allegations, "however true, could not raise a claim of entitlement to relief," that deficiency should be exposed early, before expensive and protracted discovery begins. The Court emphasized the extraordinarily difficult problems posed by the costs and burdens of discovery and the consequent pressure to settle even unjustified cases.

Ashcroft v. Iqbal, decided May 18, 2009, held that a Pakistani Muslim detained after Sept. 11, 2001, did not make a plausible claim that Attorney General Ashcroft or FBI Director Mueller personally initiated a program for the purpose of discriminating against him on grounds of race or national origin. The Supreme Court did not disturb the plaintiff's claims against others accused of mistreating him.

II. Absence of Justification for Legislation

- The courts are working diligently to fairly and carefully apply the 2007 and 2009 decisions to the myriad of specific cases that are filed. Although *Bell Atlantic* has provoked numerous academic critiques, no empirical study has shown that it has led to inappropriate decisions to dismiss. *Ashcroft v. Iqbal* was decided barely two months ago, and while it is not possible fully to determine its impact, it appears that the courts are applying it with care.

- It is far too early to know whether there is any real change in pleading standards, much less dramatic change. The Supreme Court opinions are all based in the unchanged text of Rule 8(a)(2). *Bell Atlantic* invoked *Conley v. Gibson* while "retiring" only the "no set of facts" language. Together with the other pleading decisions by the Supreme Court since 1957, the 2007 and 2009 decisions may lead to more scrutiny of complaints but do not radically change pleadings standards.

III. Preliminary Concerns about S. 1504

- Confusion for Rule 12(b)(6) decisions – As sketched above, the Supreme Court and the lower courts have decided many pleading cases since 1957. Legislation directing that Rule 12(b)(6) dismissals may only be granted "under the standards set forth . . . in *Conley v. Gibson*" rolls back the clock to that "early statement . . . construing Rule 8." The effect on 50 years of important Supreme Court and lower court precedent is ambiguous.

- Confusion for Rule 12(e) decisions – S. 1504 also says that district courts may dismiss in response to Rule 12(e) motions for a more definite statement only under the standards of *Conley v. Gibson*. But *Conley* itself identified Rule 12(e) motions as among the "pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense," and the Supreme Court has since 1957 cited motions for more definite statements as appropriate methods for screening claims. Referring to the use of Rule 12(e) to dismiss a complaint confuses the rules and the standards for applying them, pointing to the complexity of the interrelationship among the pleading rules.

- Confusion for Rule 12(c) decisions – Rule 12(c) authorizes a motion for judgment on the pleadings. When made by a defendant, it raises essentially the same issues as a Rule 12(b)(6) motion. S. 1504 leaves the law applicable to Rule 12(c) motions ambiguous and confusing.

- Confusion for Rule 9(b) – This rule applies to claims for fraud or mistake, and requires that the plaintiff "state with particularity the circumstances constituting fraud or mistake." It has been used repeatedly in fraud cases, and was a partial model for the Private Securities Litigation Reform Act of 1995. The absence of a similar rule for other types of claims was crucial to the Supreme Court's 1993 and 2002 decisions rejecting "heightened pleading requirements." Yet S. 1504 says that a complaint may only be dismissed under the standards of *Conley*, which are considerably less demanding than Rule 9(b).

IV. S. 1504 Circumvents the Ongoing Rules Enabling Act Rulemaking Process

- The Judicial Conference Standing Committee on the Rules of Practice and Procedure and the Advisory Committee on Civil Rules have regularly monitored pleading practice for over 15 years. When the Supreme Court overturned lower courts' "heightened" pleading requirements in 1993, the Committee carefully studied whether additional provisions like Rule 9(b) should be added, but concluded that the overall pleading practice did not call for such action. Since the *Bell Atlantic* decision, the Standing Committee and the Advisory Committee have held presentations on the impact of the case. The Advisory Committee has already placed the pleading rules on the agenda for the Fall 2009 meeting. The Advisory Committee is also holding a major conference in May 2010 on civil litigation in the federal courts. The conference will focus on pleading standards and rules and on the costs and burdens of discovery, which have continued to escalate with electronically stored information. The Committee will study empirical information and has commissioned papers on these issues.

- The Rules Enabling Act process has worked well for over 75 years and is well designed to identify and avoid the sorts of confusion sketched above. It has been addressing the proper role of pleading decisions and will continue to address those issues. Any rule changes will emerge from an open, transparent, and exacting process involving the bench, bar, and public, with ultimate submission to Congress under the terms of the Act.

Twombly, Pleading Rules, and the Regulation of Court Access

Robert G. Bone[*]

ABSTRACT: In Bell Atlantic Corp. v. Twombly, *the Supreme Court reconsidered* Conley v. Gibson*'s very liberal notice pleading standard and held that the plaintiff must allege enough to support a plausibility of wrongdoing. This Article considers the* Twombly *decision within the broader framework of court access regulation and sketches a normative roadmap for designing optimal pleading and merits-based case-screening rules. The Article begins with an analysis of* Twombly *itself. It argues, contrary to much criticism of the decision, that the Court's plausibility standard represents only a modest departure from traditional notice pleading and that its interpretation of Rule 8(a)(2) is consistent with the text and history of the Rule and in line with the pragmatic vision of the original Federal Rule drafters. The Article then addresses the broader normative issues involved in regulating court access through stricter pleading and other case-screening devices. It argues that a pleading requirement along the lines of* Twombly*'s thin plausibility standard might be justified by a process-based theory of fairness as reason-giving, but that anything stronger must be evaluated on outcome-based grounds. Applying utilitarian and rights-based metrics of outcome quality, the Article then explores various methods of screening meritless suits. It highlights several issues that are often ignored or misunderstood, including the importance of carefully defining the undesirable lawsuits to be screened, correctly identifying the causes of the problem, and proceeding cautiously in the absence of empirical information by designing regulatory responses to fit the most probable causes. It argues that information asymmetry is likely to be a more important cause of meritless litigation than the commonly assumed cost asymmetry, and it outlines a hybrid approach to handle the information-*

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asymmetry cases. The Article concludes by emphasizing the importance of using formal rulemaking or the legislative process to design case-screening rules and making those rules substance-specific rather than trans-substantive.

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I. INTRODUCTION

Pleading rules are once again a hot topic in civil procedure circles. At the end of its 2007 Term, the Supreme Court decided three pleading cases,[1] and in June 2008, the Court granted certiorari in another case that raises pleading issues.[2] In what is surely the most controversial of these decisions, *Bell Atlantic Corp. v. Twombly*, the Court held that to survive a motion to dismiss, antitrust class action plaintiffs must state facts in their complaint sufficient to support a "plausible" inference of conspiracy.[3] Many judges and academic commentators read the decision as overturning fifty years of generous notice pleading practice, and critics attack it as a sharp departure from the "liberal ethos" of the Federal Rules, favoring decisions "on the merits, by jury trial, after full disclosure through discovery."[4]

This reaction is not surprising. In a society that relies heavily on the courts for rights vindication and social reform, the distribution of litigating power is vital to the distribution of social and political power.[5] As a result, rules that regulate court access often trigger intense controversy, especially

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1. Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499 (2007) (interpreting the pleading standard for securities fraud claims in the Private Securities Litigation Reform Act ("PSLRA")); Erickson v. Pardus, 127 S. Ct. 2197 (2007) (per curiam) (interpreting the pleading standard in FED. R. CIV. P. 8(a)(2)); Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007) (same).

2. Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *cert. granted sub nom.* Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008). The Court heard oral argument in the *Iqbal* case on December 10, 2008.

3. *Twombly*, 127 S. Ct. at 1964–65.

4. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986) (coining the term "liberal ethos"). For examples of jurists reading *Twombly* as a watershed opinion effecting a major change in pleading practice, see *Twombly*, 127 S. Ct. at 1979, 1983 (Stevens, J., dissenting) (referring to the majority's decision as "rewrit[ing] the Nation's civil procedure textbooks"); Kendall v. Visa U.S.A., Inc., 518 F.3d 1042, 1047 n.5 (9th Cir. 2008); *Iqbal*, 490 F.3d at 155; A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 433, 446–47 (2008); Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 137–41 (2007), http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf; Michael C. Dorf, *The Supreme Court Wreaks Havoc in the Lower Federal Courts—Again*, FINDLAW'S WRIT, Aug. 13, 2007, http://writ.news.findlaw.com/dorf/20070813.html. *See generally* Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1235 (2008) (noting that "a majority of scholars" view *Twombly* as a "sea of change in the traditional pleading standard the Court has followed since *Conley*"). For a contrary view, see generally Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604 (2008) (concluding that *Twombly* was correctly decided); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147862 (arguing that *Twombly*'s plausibility standard is consistent with notice pleading).

5. In his sharp *Twombly* dissent, Justice Stevens hints at the impact he believes the decision will have on the distribution of power. *Twombly*, 127 S. Ct. at 1989 (Stevens, J., dissenting) ("The transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery.").

when they make it more difficult for plaintiffs to sue.[6] In civil procedure, for example, debates in the nineteenth century focused on the technical obstacles created by common law pleading, and in the early twentieth century on similar problems with code pleading.[7] More recently, Rule 11 penalties and heightened pleading requirements have been the major targets of concern.[8]

This Article situates the Supreme Court's *Twombly* decision in this broader framework. It views *Twombly* not so much as a pleading decision but rather as a court access decision, one that addresses a general problem of institutional design: how best to prevent undesirable lawsuits from entering the court system. From this broader perspective, screening more aggressively at the front door by demanding more from the complaint is just one approach, with its own costs and benefits, and should be evaluated relative to other alternatives. It makes no sense, for example, to strengthen pleading requirements if the same result can be achieved much better by bolstering Rule 11 sanctions, placing stricter limits on discovery in complex cases, shifting fees, or allowing truncated summary judgment determinations based on targeted and phased discovery.

The Supreme Court is in a poor position to make these choices in individual cases. Even conceding broad latitude for interpretation, the

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6. *See, e.g.*, Phillips v. County of Allegheny, 515 F.3d 224, 230 (3d Cir. 2008) ("Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts."). Of course, concerns about court access extend well beyond the civil procedure examples mentioned in the text. In the 1970s, for example, a debate raged over the constitutionality of filing fees for certain types of cases. *See, e.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1008–10 (1978); Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 1), 1973 DUKE L.J. 1153, 1165. Also, the Supreme Court's standing cases have evoked heated controversy for decades, with the critics complaining that restrictive standing doctrines impede socially desirable forms of public law litigation. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 60–66 (3d ed. 2006) (discussing standing doctrine).

7. *See* N.Y. STATE COMM'RS ON PRACTICE & PLEADINGS, FIRST REPORT TO THE NEW YORK LEGISLATURE 75–76 (Albany 1848) (criticizing common law pleading); CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 150–79 (1928) [hereinafter CODE PLEADING] (describing and criticizing code pleading rules). *See generally* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 19–22, 101 n.345 (1989) (describing the history and development of pleading rules).

8. Rule 11 of the Federal Rules of Civil Procedure imposes penalties on parties and their lawyers who file meritless suits either intentionally or without doing a reasonable pre-filing investigation. *See* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1331, at 470–74, § 1332, at 480–95 (3d ed. 2004) (discussing the 1983 amendments to Rule 11 and the accompanying controversy). Heightened or strict pleading requirements force plaintiffs (or defendants in an answer) to allege more factual detail in support of the elements which they must plead. *See* 15 U.S.C. § 78u-4(b) (2000) (codifying the Private Securities Litigation Reform Act's strict pleading requirement); Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 994–97 (2003) (describing the development of judicially created strict pleading standards).

Justices cannot, for example, put teeth into Rule 11 at odds with its clear language or substantially alter the discovery rules. If these options are desirable, they must be implemented through the established process for making and amending the Federal Rules of Civil Procedure.[9] Moreover, some alternatives, such as fee-shifting, might require congressional action because of the Rules Enabling Act's prohibition on Federal Rules that "abridge, enlarge or modify any substantive right."[10]

Given these limitations, the Court would be well advised to exercise restraint in adapting existing Federal Rules to screen cases more aggressively. And that is just what it has done. In fact, as I argue below, the Supreme Court's decision in *Twombly* does not alter pleading rules in as drastic a way as many of its critics, and even some of its few defenders, suppose.

This is a critical time to examine these issues. *Twombly* has already had a major impact. The case was cited a startling 4000 times during the first nine months after it was decided,[11] and the Supreme Court's grant of certiorari in *Ashcroft v. Iqbal* sets the stage for a possible clarification of the plausibility standard.[12] The Committee on Rules of Practice and Procedure discussed *Twombly*'s impact at its January 2008 meeting,[13] and scholarly commentary promises to continue for some time to come.[14]

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9. The Rules Enabling Act vests the authority to make procedural rules for the federal courts in the U.S. Supreme Court and creates a multi-stage rulemaking process with opportunities for public input. 28 U.S.C. §§ 2072–2073 (2000). A proposed amendment to an existing Federal Rule of Civil Procedure or a new Rule is first considered by the Advisory Committee on Civil Rules. If the proposal meets with the Advisory Committee's approval, it is forwarded to the Standing Committee and then to the Judicial Conference, and eventually to the U.S. Supreme Court. If the Supreme Court approves the proposal, it is forwarded to Congress, which has the opportunity to veto it. If Congress does not exercise its veto within the prescribed period, the proposal goes into effect. *See* Robert G. Bone, *The Process of Making Process: Court Rulemaking, Democratic Legitimacy, and Procedural Efficacy*, 87 GEO. L.J. 887, 892 (1999) (describing the amendment process).

10. 28 U.S.C. § 2072(b). All types of fee-shifting involve one party paying all or a portion of the opposing party's attorney fees. The obligation to pay fees can be triggered by different conditions, such as a trial loss, failure to improve on a settlement offer at trial, or filing a meritless suit.

11. Hoffman, *supra* note 4, at 1222; *see also* Ettie Ward, *The After-Shocks of* Twombly*: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 893 (2008) (counting more than 9400 citations of *Twombly* as of March 15, 2008).

12. Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007), *cert. granted sub nom.* Ashcroft v. Iqbal, 128 S. Ct. 2931 (2008). The certified questions also raise substantive issues relating to the scope of a *Bivens* action against federal officials, so it is not certain that the Court will address the pleading issue.

13. *See* COMM. ON RULES OF PRACTICE & PROCEDURE, MEETING OF JANUARY 14–15, 2008, at 37–44 (2008), *available at* http://www.uscourts.gov/rules/Minutes/ST01-2008-min.pdf.

14. The AALS Civil Procedure Section chose a topic for its January 2009 annual section meeting, "The Changing Shape of Federal Pretrial Practice," which was inspired in part by the *Twombly* decision. ASS'N OF AM. LAW SCH., 2009 ANNUAL MEETING PROGRAM 72 (2009), *available at* http://www.aals.org/documents/2009am/program.pdf (noting the impact of *Twombly*).

The remainder of this Article is divided into four Parts. Part II examines the *Twombly* decision with care. It argues that, contrary to much criticism of the case, the Court's plausibility standard marks only a modest departure from notice pleading. Properly interpreted, it requires no more than that the allegations describe a state of affairs that differs significantly from a baseline of normality and supports a probability of wrongdoing greater than the background probability for situations of the same general type.

Part III places *Twombly* in historical perspective. It describes the genesis of Rule 8(a), the federal pleading rule, and argues that *Twombly*'s pleading standard neither signals a return to code fact pleading nor represents a sharp break from the vision of the 1938 Federal Rule drafters, as some critics have argued.[15] The drafters were pragmatists, who assumed that procedural rules would be "continually changed and improved" as litigation conditions changed.[16] *Twombly* reflects a similar pragmatism.

Part IV addresses the normative issues involved in designing optimal pleading and case-screening rules. In what is perhaps the most important part of the *Twombly* opinion, the Court concedes, in the clearest possible way, that trial judges are likely to have difficulty managing complex litigation on a case-specific basis given informational and strategic constraints. Part IV argues that the *Twombly* Court is correct to question the efficacy of case-specific discretion and that this calls for consideration of more rule-based approaches, such as strict pleading. Moreover, the shift from discretion to rule forces explicit attention to the normative issues involved in constructing an optimal system.

In analyzing these normative issues, Part IV begins, in Section A, by considering whether a thin version of *Twombly*'s plausibility standard is required by a process-based principle of fairness as reason-giving. Section B then considers pleading rules that require more factual detail than thin plausibility, including the heightened level of specificity that critics of *Twombly* fear lower courts might require. These stricter rules must be justified, if at all, on outcome-based grounds as tools to screen undesirable lawsuits.

Section B also highlights four central points, often overlooked, that are crucial to an outcome-based analysis. First, any such analysis must choose between utilitarian and rights-based metrics for evaluating outcome quality. These two metrics weigh costs and benefits differently and have different implications for regulatory choices. Second, it is also important to define the case-screening goal clearly. In particular, there is a crucial difference between screening meritless suits and screening weak suits that nonetheless have merit. Third, it is important to identify the cause of undesirable filings

15. *See, e.g.*, Spencer, *supra* note 4, at 431–33, 445–46 (arguing that *Twombly* breaks from the intent of the Rule 8 drafters).

16. Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 304 (1938).

as precisely as possible. The *Twombly* Court and many commentators assume cost asymmetry is the principal cause, but informational asymmetry is likely to have a much stronger effect, and informational asymmetry requires a different response. Finally, it is important to consider all regulatory options, not just strict pleading, to compare the costs and benefits of each, and to choose the combination that best addresses the problem given its most likely cause.

Part V concludes by drawing the different strands together and highlighting two important general lessons. First, adjustments to pleading burdens require a global and systemic analysis that is possible only through the formal committee-based rulemaking process or through Congress, and not by common law adjudication or creative interpretation of the Federal Rules. Second, any approach to regulation of court access should be substance-specific so that it can take account of the different cost-benefit tradeoffs for different types of cases.

II. *TWOMBLY* AND NOTICE PLEADING

A. *THE* TWOMBLY *DECISION*

Bell Atlantic Corp. v. Twombly was a consumer antitrust class action brought against local telephone and telecommunications carriers, alleging a conspiracy in violation of section 1 of the Sherman Act.[17] To understand the allegations, one must know something about the history of the telephone industry.[18] In 1984, the American Telephone & Telegraph Company ("AT&T") was ordered to divest its local telephone business.[19] The local business was taken over by regional monopolies, known as incumbent local exchange carriers ("ILECs").[20] In 1996, Congress forced the ILECs to share their networks with competing companies seeking entry into the local markets. These competing companies are known as competitive local exchange carriers ("CLECs").[21]

The antitrust claim in *Twombly* was brought on behalf of a class consisting of "at least 90 percent of all subscribers to local telephone or high-speed Internet service in the continental United States" against "America's largest telecommunications firms" operating as ILECs.[22] The plaintiffs sought treble damages as well as declaratory and injunctive relief.[23] The complaint alleged that the ILEC defendants restrained trade by adopting common measures to "inhibit the growth of upstart CLECs" and by

17. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1962 (2007).
18. This history is taken from the summary in the *Twombly* opinion. *Id.* at 1961–62.
19. *Id.* at 1961.
20. *Id.*
21. *Id.*
22. *Twombly*, 127 S. Ct. at 1967.
23. *Id.* at 1962.

agreeing not to compete in one another's markets.[24] As for the critical element of conspiracy, the complaint stated that the defendants "entered into a contract, combination or conspiracy to prevent competitive entry . . . and have agreed not to compete with one another and otherwise allocated customers and markets to one another."[25]

The defendant ILECs filed a motion to dismiss for failure to state a claim, arguing that the complaint did not allege facts sufficient to infer the express or tacit agreement required for a violation.[26] The district judge granted the motion and dismissed the complaint.[27] The Second Circuit Court of Appeals reversed, holding that the complaint need only allege facts sufficient to put the defendant on notice of the general nature of the dispute.[28] The Supreme Court granted certiorari and reversed the Court of Appeals over the vigorous dissent of Justices Stevens and Ginsburg.[29] The seven-Justice majority held that the complaint failed to allege enough to support a "plausible" inference of agreement.[30]

Twombly triggered a sharp response from the academic community almost immediately, most of it criticizing the Court for tightening up on pleading requirements.[31] The main reason for the furor has to do with the Court's discussion of the old civil procedure chestnut *Conley v. Gibson*.[32] *Conley*, decided in 1957, is the hallmark case that single-handedly established Rule 8(a)(2) as a notice pleading rule.[33] Notice pleading requires only a general description of the events sufficient to give fair notice to the defendant (and the court) of what the dispute generally is about so the defendant can file an answer or otherwise respond.[34] It assigns the fact-gathering process to the discovery rather than the pleading stage, and most important, it rejects case screening as a pleading function.

Notice pleading proponents focus their concern on *Twombly*'s treatment of language in *Conley* quoted for fifty years as the key statement of the notice pleading standard: "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[35] The

24. *Id.*

25. *Id.* at 1962–63 (quoting from the complaint).

26. *See id.* at 1964 (noting that section 1 requires more than parallel conduct).

27. Twombly v. Bell Atl. Corp., 313 F. Supp. 2d 174, 174 (S.D.N.Y. 2003).

28. Twombly v. Bell Atl. Corp., 425 F.3d 99, 118–19 (2d Cir. 2005).

29. *Twombly*, 127 S. Ct. at 1955, 1963, 1974.

30. *Id.* at 1970–74.

31. *See* Hoffman, *supra* note 4, at 1225 ("The majority view among academics has been that robust efforts to regulate at the pleading stage are wrongheaded and inconsistent with the traditional pleading standard the Court has followed since *Conley*.").

32. Conley v. Gibson, 355 U.S. 41 (1957).

33. *Id.* at 47.

34. *Id.*

35. *Id.* at 45–46.

Twombly majority rejected a literal interpretation of this passage[36] and held that a complaint's allegations must support a "plausible" not merely a "possible" inference, one that rises above a "speculative level."[37] It defended the plausibility standard not only as good policy, but also as a proper interpretation of Rule 8(a)(2).[38]

The Court's criticism of *Conley* has caused a great deal of confusion. Lower court judges and commentators at first questioned whether *Twombly*'s holding might be confined to antitrust cases like *Twombly* itself,[39] but the lower courts appear to have answered this question in favor of a more general application.[40] A much more difficult issue involves determining exactly how the plausibility standard changes previous Rule 8(a)(2) pleading law.[41] The term "plausible" obviously refers to the strength of the inference from allegation to necessary factual conclusion. It is useful to think about an inference as a conditional probability: in this case, the probability that the defendants entered into an agreement conditional on the allegations in the complaint being true. "Plausible" corresponds to a probability greater than "possible." Exactly how much greater is uncertain.[42]

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36. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1968 (2007) ("This 'no set of facts' language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings." (quoting *Conley*, 355 U.S. at 45–46)).

37. *Id.* at 1964–65.

38. Specifically, the Court reasoned that *Conley*'s broad formulation was inconsistent with Rule 8(a)(2)'s requirement that the plaintiff provide not only a "short and plain statement of the claim" but also a statement "showing that the pleader is entitled to relief." *Id.* at 1964, 1965 & n.3.

39. *See, e.g.*, Lewis v. Marriott Int'l, Inc., 527 F. Supp. 2d 422, 424 n.1 (E.D. Pa. 2007) ("[T]he applicability of *Twombly* to non-Sherman Act claims is unknown."); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 305, 310 n.51 (2007) ("[S]ome scholars view *Twombly* as primarily an antitrust case.").

40. *See, e.g.*, Williams v. Gerber Prods. Co., 523 F.3d 934, 939–40 (9th Cir. 2008) (applying the plausibility standard to tort and breach-of-warranty claims); Perez-Acevedo v. Rivero-Cubano, 520 F.3d 26, 29 (1st Cir. 2008) (stating that a § 1983 claim must "raise right to relief above a speculative level"); Davis v. Coca-Cola Bottling Co. Consol., 516 F.3d 955, 974 n.43 (11th Cir. 2008) ("We understand *Twombly* as a further articulation of the standard by which to evaluate the sufficiency of all claims brought pursuant to Rule 8(a)."); Phillips v. County of Allegheny, 515 F.3d 224, 234 (3d Cir. 2008) ("[W]e decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context."); Sonnier v. State Farm Mut. Auto. Ins. Co., 509 F.3d 673, 675–76 (5th Cir. 2007) (extending the plausibility standard to civil contract disputes); *see also* Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on the Impact of* Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814–15, 1834–38 (2008) (finding that reported cases apply *Twombly* to a wide range of different types of claims).

41. *See, e.g.*, Robbins v. Oklahoma, 519 F.3d 1242, 1247 (10th Cir. 2008) (calling the new formulation "less than pellucid"); *Phillips*, 515 F.3d at 230 (describing *Twombly*'s impact as "confusing"); Iqbal v. Hasty, 490 F.3d 143, 155, 157 (2d Cir. 2007) (noting the Supreme Court's "conflicting signals" and the "considerable uncertainty" created by *Twombly*).

42. The Court does make clear that it is not imposing a "probability" standard, perhaps suggesting that plausible lies somewhere between possible and probable. *See Twombly*, 127 S. Ct.

B. TWOMBLY'S *IMPACT*

In evaluating *Twombly*'s impact, one must first recognize that there are two distinct issues any system of pleading has to resolve: first, it has to identify which elements of a dispute the plaintiff must allege, and second, it has to determine how much the plaintiff must allege about each such element. Even in a very liberal notice pleading system, the complaint must do more than tell an interesting story. While it need not state each element explicitly, it must offer some reason to believe that the story it tells is linked to the elements of a legal claim.[43] This means that a judge evaluating whether a given complaint meets the relevant pleading requirement must have a standard that specifies the elements that should appear in a complaint and a criterion for evaluating whether the complaint adequately reveals those elements. *Twombly* deals with the second part—how strict the criterion of adequacy should be.

What *Twombly* actually says about this issue is difficult to determine because the Court sends seemingly inconsistent messages on the subject.[44] On the one hand, it condemns *Conley*'s "no set of facts" language.[45] On the other, it emphasizes that its plausibility standard is not a form of "heightened pleading."[46] Moreover, it endorses the skeletal complaint in Form 9 (now Form 11) appended to the Federal Rules of Civil Procedure as

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at 1965 ("Asking for plausible grounds to infer an agreement does not impose a probability requirement."). It is also clear that the Court does not mean to impose a standard as strict as the "strong inference" that the Private Securities Litigation Reform Act requires for scienter allegations in a securities fraud claim. 15 U.S.C. § 74u-4(b)(2) (2000); *see* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2510 (2007) (holding that the PSLRA requires the plaintiff to allege sufficient facts so that "a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged").

43. *See* Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that Rule 8(a) requires that the complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests"); 5A WRIGHT & MILLER, *supra* note 8, § 1215 (stating that Rule 8(a)(2) "calls for simple, concise, and direct averments, authorizes alternative and hypothetical pleading, and eliminates any requirement of consistency of statement"); *id.* § 1216 ("[T]he pleading must contain something more by way of a claim for relief than a bare averment that the pleader wants compensation and is entitled to it."). As Justice Stevens in his sharp *Twombly* dissent recognized:

> [H]ad the amended complaint in this case alleged *only* parallel conduct, it would not have made the required "showing." Similarly, had the pleadings contained *only* an allegation of agreement, without specifying the nature or object of that agreement, they would have been susceptible to the charge that they did not provide sufficient notice.

Twombly, 127 S. Ct. at 1979 n.6 (Stevens, J., dissenting) (internal citation omitted).

44. *See Iqbal*, 490 F.3d at 157 (noting the "conflicting signals").

45. *Conley*, 355 U.S. at 45–46.

46. *Twombly*, 127 S. Ct. at 1973 n.14 (noting that the creation of heightened pleading standards is for the formal rulemaking process or for Congress).

an example of acceptable pleading, and cites with approval several previous decisions that seem to apply extremely liberal pleading standards.[47]

To confuse matters even further, just three weeks after the Court decided *Twombly*, it upheld the sufficiency of a complaint in *Erickson v. Pardus* without even mentioning the plausibility standard.[48] The Court went out of its way to chastise the lower courts for a "stark" departure from what it later in the opinion called "the liberal pleading standards" of Rule 8(a)(2).[49] Moreover, the Court characterized the Rule 8(a)(2) standard in language reminiscent of traditional notice pleading.[50]

Despite these seemingly contradictory signals, evaluating *Twombly*'s impact on notice pleading is not as difficult as some critics believe. The Court's signals appear conflicting only if one assumes that *Twombly* substantially tightens pleading requirements. But this assumption is incorrect. To be sure, *Twombly* departs from notice pleading on a policy level. It elevates case screening to an important pleading function in sharp contrast to notice pleading's exclusive focus on giving notice.[51] This is a significant change, but equally significant is the modest nature of the Court's move in this direction. The Court's approval of liberal pleading does not contradict its holding; it qualifies and explains that holding by

47. After the recent style amendments, Form 9—a model complaint for automobile negligence—appears as Form 11 and the specific date and location references in the original have been replaced with placeholders. FED. R. CIV. P. Form 11.

48. Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007) (per curiam). The lower courts held that Erickson had not adequately pleaded his Eighth Amendment claim, but the Supreme Court reversed. *Id.* at 2199–200. For more on this case, see *infra* note 68.

49. *Pardus*, 127 S. Ct. at 2198, 2200.

50. *Id.* at 2200 (emphasizing that "specific facts are not necessary").

51. *Twombly*, 127 S. Ct. at 1966–67 (arguing that the plausibility requirement is needed to avoid high discovery costs and to weed out meritless suits before the threat of these high costs pressures defendants to settle). It is easy to miss this important distinction if one focuses only on doctrine and the linguistic shift to "plausibility." Indeed, some courts and commentators have tried to subsume the "plausibility" standard under notice pleading by arguing that the Court merely specified what was required to give the defendant fair notice. *See, e.g.*, Phillips v. County of Allegheny, 515 F.3d 224, 233–34 (3d Cir. 2008) (linking together "plausibility," a Rule 8 "showing," and notice); Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667 (7th Cir. 2007) ("[A]t some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8."); Smith, *supra* note 4, at 24 (arguing that *Twombly* simply sets out the requirements for adequate notice: "It is only where the complaint states a logically coherent theory of liability that a defendant is truly 'on notice' of the claim against it."). This effort might reflect an implicit realization that pleading standards are about fairness to defendants, not just system efficacy, fairness to plaintiffs, or efficiency. *Infra* notes 137–66 and accompanying text. Whether or not *Twombly*'s plausibility standard can be justified in fairness terms, however, the Court's opinion clearly mentions case screening as an appropriate pleading function. *See generally* Marcus, *supra* note 4, at 452 (observing that the traditional notice-giving function requires very little by way of allegations when the defendant has access to broad discovery).

indicating that "plausibility" should not be interpreted as a demanding standard.[52]

Indeed, *Twombly* itself was a particularly suitable candidate for a pleading-stage dismissal because of two factors. First, the suit has many of the features usually associated with a significant risk of nonmeritorious filings and huge potential discovery costs. Second, the allegations of the complaint do not provide a strong enough signal that the case is in fact meritorious.

As to the first factor, *Twombly* involves an antitrust conspiracy claim with the possibility of treble-damage recovery. It is brought as a nationwide class action with millions of class members.[53] It targets events that occurred over a seven-year period and are likely to generate massive amounts of discoverable information, including e-mail and electronic records.[54] And it names as defendants some of the largest companies in the telecommunications industry.[55]

These elements together create a situation where defendants might settle even suits they know lack merit in order to avoid crippling discovery costs and a nontrivial risk of an erroneous trial verdict.[56] The *Twombly* Court recognizes this problem and rejects the conventional case-management solution.[57] The majority argues that judges operate under severe informational constraints impeding effective discovery management and cannot use summary judgment to weed out nonmeritorious cases when discovery costs pressure settlements before summary judgment.[58] In the Court's opinion, these problems elevate the importance of case screening at the pleading stage.

To be sure, enhancing the pleading burden risks screening meritorious suits, but this is where the second factor—the nature of the *Twombly* allegations—comes into play. Based on those allegations alone, it is relatively unlikely, or at least highly uncertain, that the *Twombly* suit is in fact meritorious. Those allegations describe a state of affairs that is not merely consistent with lawful competition, but fits neatly within the normal baseline

52. *Twombly*, 127 S. Ct at 1974.

53. *Id.* at 1967 (noting that the class consists of at least 90% of all subscribers in the continental United States).

54. *Id.*

55. *Id.* The named defendants were Verizon Communications Inc., AT&T Inc., Qwest Communications International, Inc., and Bellsouth Corp.

56. *Infra* notes 196–207 and accompanying text. The fact that defendants have a great deal of discoverable information and plaintiffs have very little gives plaintiffs settlement leverage, especially when information about the merits is asymmetrically distributed. In addition, the class action aspect coupled with treble damages creates a potential award sizable enough to support a credible trial threat even for a meritless suit, assuming a large enough error risk at trial.

57. *Twombly*, 127 S. Ct. at 1966–67.

58. *Id.*

of conduct expected from a vigorously competitive telecommunications market.[59] It is true that this conduct could also be the product of illegal agreement, but the complaint gives no reason to believe that this is so, other than the plaintiffs' conclusory statement to that effect.[60] Thus, the complaint fails to support a probability of wrongdoing any greater than what exists under normal conditions in the market, and this background probability is not enough to support a lawsuit. If it were, anyone could file a suit about virtually anything merely by alleging perfectly ordinary conduct and arguing a possibility of wrongdoing.[61]

It is tempting to conclude that there must be something amiss when competing firms stay out of one another's markets and use common techniques to deter entry into their own. But this is an example of a baseline problem. Parallel conduct of this sort might seem odd when compared to the baseline of competitive behavior in general.[62] But this is the wrong baseline for the *Twombly* case. The correct baseline is competitive behavior under the particular conditions of the telecommunications market. And compared to that baseline, there is nothing necessarily odd about what the defendants are doing.[63]

By a "baseline," I mean the normal state of affairs for situations of the same general type as those described in the complaint. The probability of wrongdoing for baseline conduct is not necessarily zero, but it should be very small, for otherwise the conduct in question would not be part of a socially acceptable baseline. Understood in these terms, what the *Twombly* Court requires are allegations that differ in some significant way from what usually occurs in the baseline and differ in a way that supports a higher probability of wrongdoing than is ordinarily associated with baseline

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59. Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 81–92 (2007).

60. *Twombly*, 127 S. Ct. at 1970. Some readers might object to my calling this allegation "conclusory." In deciding a Rule 12(b)(6) motion to dismiss, the rule is that the judge must assume that all plaintiff's allegations are true except those that are conclusory. The question therefore is why the *Twombly* plaintiffs' allegations of agreement are conclusory. The Court's answer is that a "fair reading" of the complaint shows that the plaintiffs themselves intended the allegations to be conclusions based on other allegations in their complaint. *See id.* ("Although in form a few stray statements speak directly of agreement, on fair reading these are merely legal conclusions resting on the prior allegations."). Had the plaintiffs good reasons to suspect a conspiracy apart from the existence of parallel conduct, their allegations of agreement might have sufficed, although the plaintiffs might also have had to plead those additional reasons.

61. *See id.* at 1969 (remarking that "Mr. Micawber's optimism would be enough" to bring suit).

62. The *Twombly* Court makes a point of noting that the allegations might be enough to support agreement in a different market setting. *Id.* at 1972 ("In a traditionally unregulated industry with low barriers to entry, sparse competition among large firms dominating separate geographical segments of the market could very well signify illegal agreement . . . ."). This different setting would be associated with a different baseline.

63. *Id.* (concluding that there is a "natural explanation" for the parallel conduct alleged, given the distinctive history of the telecommunications market).

conduct. For example, a negligence complaint might describe erratic behavior that deviates from what would normally happen under similar circumstances. A breach-of-contract claim might allege acts and events that ordinarily do not occur without a contractual agreement, and then allege a failure to do something that would normally be done if there were an agreement.

This baseline explanation for *Twombly*'s holding helps to explain the more confusing aspects of the opinion. For example, some courts and commentators claim to be confused by the Court's apparent approval of the very skeletal Form 9 complaint appended to the Federal Rules of Civil Procedure.[64] The original Federal Rule drafters included a set of forms to illustrate the types of pleadings and motions that satisfy the requirements of the Rules. Form 9 (now renumbered as Form 11)[65] is a complaint for negligence arising from an automobile accident. The relevant allegations state: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."[66] These allegations, while thin, are enough to support the existence of a duty of reasonable care (automobile drivers owe such a duty to pedestrians) and a substantial probability that the defendant breached that duty.[67] After all, drivers do not usually strike pedestrians when driving with reasonable care, so the probability of negligence conditional on a pedestrian being struck should be quite high.

The baseline in the Form 9 case is the behavior of automobile drivers in general, which supports the inference of a breach of duty from a pedestrian being struck. This is the appropriate baseline because Form 9 does not suggest any other and there is no reason to think that driving on Boylston Street in Boston is materially different from driving on any other street.[68]

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64. *See, e.g.*, Iqbal v. Hasty, 490 F.3d 143, 156 (2d Cir. 2007) (citing *Twombly*'s approval of Form 9 as a conflicting signal); Dodson, *supra* note 4, at 141–42 (noting tension between plausibility pleading and Form 9).

65. *Supra* note 47.

66. FED. R. CIV. P. Form 9, para. 2. The complaint also alleges that the plaintiff suffered a broken leg and other losses as a result. The restyled Form 11 omits the particular date and place references. *Supra* note 47.

67. To be sure, the plaintiff might have been negligent himself, but contributory negligence is for the defendant to allege.

68. The Court's subsequent holding in *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), easily fits this framework. In *Erickson*, a pro se plaintiff alleged that prison officials wrongfully withheld his hepatitis C treatment and that he would suffer irreparable and life-threatening damage to his liver as a result, in violation of the Eighth Amendment's prohibition on cruel and unusual punishment. *Id.* at 2198–99. The defendants argued that the complaint failed to allege that the plaintiff would suffer "substantial harm" distinct from whatever harm he would have suffered anyway as a result of his condition. *Id.* at 2199. The sensible baseline, given the prison regulations entitling inmates to treatment, is that the plaintiff would receive treatment for his serious illness. Withholding treatment deviates significantly from this baseline and in a way that correlates with substantial harm. After all, people suffering from serious illnesses usually get

There is another aspect that distinguishes *Twombly*. Not only is the likelihood of a meritorious suit much lower in *Twombly* than in the Form 9 negligence case, but the social cost of the litigation if suit turns out to be meritless is much higher. If meritless plaintiffs in a large treble-damages class action are able to get past the pleading stage and use the threat of discovery to leverage a large settlement, the result might disrupt competition in the telecommunications market, which would be directly contrary to antitrust goals.[69] By contrast, the impact of an unjustified settlement or trial verdict in a Form 9 automobile negligence case is likely to be much less serious.[70]

Defining the appropriate baseline will not always be easy, and in any event it involves a normative judgment. But it should be clear in many cases. For example, the baseline in *Twombly* follows from an application of economic theory to the particular conditions of the telecommunications industry as alleged in the complaint and revealed through publicly available

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much worse when they do not receive medical treatment. Therefore, it is certainly plausible based on these allegations that the defendants' decision to withhold treatment would cause substantial harm to the plaintiff.

The *Twombly* Court also approved its previous decision in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). The plaintiff in *Swierkiewicz* alleged that the defendants discriminated against him on the basis of national origin and age. *Id.* at 509. The Supreme Court held that the plaintiff could allege intentional discrimination in any way he saw fit and did not have to plead the four elements of a trial prima facie case outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Swierkiewicz*, 534 U.S. at 510–11. Even though the *Twombly* Court's basis for distinguishing *Swierkiewicz* is problematic, *see* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1973–74 (2007), the result is clearly consistent with my baseline interpretation of plausibility. The plaintiff in *Swierkiewicz* "detailed the events leading up to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." *Swierkiewicz*, 534 U.S. at 514. He also alleged that he was more qualified than the younger person of French origin who replaced him. *Id.* at 508. The baseline for this type of case is a qualified employee continuing to be employed unless the position is closed or upgraded to a level beyond the employee's qualifications. Thus, a termination under the circumstances alleged deviates from the baseline and does so in a way that suggests a discriminatory motive.

69. As Part IV.B explains, it is important to consider not only the likelihood that a suit is meritless as opposed to meritorious, but also the cost of allowing a meritless suit to proceed compared to the cost of screening a meritorious suit. In *Twombly*, the costs are substantial on both sides. If the allegation of agreement is, in fact, correct, the dismissal would frustrate efforts to restore competition in a major market (although there are other options, such as action by the Federal Trade Commission). By the same token, if the allegation of agreement is incorrect, allowing the suit to proceed forward and secure an unjustified settlement might also disrupt competition in the telecommunications market.

70. I am not suggesting that the Court meant its plausibility standard to apply only to complex cases with a high risk of costly meritless suits. Some have suggested as much, but such an interpretation fits the language of *Twombly* rather poorly. *See, e.g.*, Smith, *supra* note 4, at 18–20 (collecting sources suggesting a limitation to complex cases and criticizing this approach as a poor reading of *Twombly*). The Court condemns *Conley*'s "no set of facts" formulation for all lawsuits, not just for complex suits.

sources. And the baseline in the Form 9 example follows from ordinary experience with automobiles.[71]

My interpretation of *Twombly*'s plausibility standard differs from interpretations others have given. Some scholars, for example, read the Court to require factual allegations supporting each element of the legal claim.[72] The problem with this formulation is that the *Twombly* plaintiffs did allege the element of agreement. Of course, the allegation was conclusory, but so is the allegation of negligence in the Form 9 complaint. What is different about the two situations is the relationship between the allegations and the ordinary baseline appropriate for the case.

Professor A. Benjamin Spencer interprets *Twombly*'s standard to require allegations of "objective facts" that raise "a presumption of impropriety."[73] He argues that factual allegations create such a presumption when they "present a scenario that, if true, suggests wrongdoing," and he contrasts plausible allegations with those for which lawful and unlawful explanations are "equally possible."[74] Professor Spencer is correct to associate plausibility with allegations that differ from an ordinary state of affairs, but his formulation of the requirement in terms of a "presumption of impropriety" is confusing. For example, he does not explain clearly how to tell whether a set of allegations "suggests wrongdoing" strongly enough to meet the standard.[75] My baseline idea clarifies the matter. What *Twombly* requires is a set of allegations describing a state of affairs that differs from a baseline of

71. The plaintiff's description must not only differ from the baseline but also correlate with illegal conduct in more than a trivial way. Moreover, it is possible that the requisite degree of correlation might vary to a limited extent with the risks and costs of meritless litigation and the effectiveness of judicial case management for the particular type of suit.

72. *See* Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 23 (2008) (suggesting that the appropriate pleading standard under Rule 8(a)(2) requires factual allegations reaching all material elements necessary to recover under substantive law); Smith, *supra* note 4, at 23 (arguing that the "central theme of the plausibility standard is logical coherence," which means that the complaint cannot have "logical holes" or omit "essential elements"; liability must be "a necessary consequence" of the allegations).

73. A. Benjamin Spencer, *Deconstructing Pleading Doctrine* 15–16 (Wash. & Lee Pub. Legal Studies Research Series, Paper No. 2008-41, 2008), *available at* http://ssrn.com/abstract=1272074.

74. *See id.* ("[T]he facts presented [in *Twombly*] were equivocal and thus the presumption of propriety was not overcome.").

75. Spencer suggests that dismissal is appropriate when lawful and unlawful explanations are "equally possible," which might mean that one should compare the relative strength of different inferences that the allegations support. However, he cannot mean that an inference of illegality must be more likely than an inference of legality. That standard is even stronger than the very strict pleading requirement of the Private Securities Litigation Reform Act. *See* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 127 S. Ct. 2499, 2510 (2007) (holding that the inference of scienter must be "cogent" and "at least as compelling as any opposing inference").

normality, and in a way that supports a stronger correlation to wrongdoing than for baseline conduct.[76]

Understood relative to a baseline, *Twombly*'s plausibility standard should have only a minor impact on notice pleading as a practical matter.[77] Most complaints that pass muster under notice pleading should also pass muster under plausibility pleading. They describe situations that are unusual relative to the most sensible baseline of normality and correlate significantly with unlawful conduct.[78]

The major impact of *Twombly*—and I believe the reason critics are so concerned—is not so much what it says about the pleading standard, but rather what it says about discovery costs and settlement leverage as well as the ineffectiveness of case management more generally. This portion of the opinion, coupled with the Court's explicit endorsement of case screening as an appropriate pleading function, might be interpreted by overburdened district judges as an invitation to use the vague "plausibility" standard aggressively, notwithstanding language in *Twombly*[79] and later in *Erickson*[80] to the contrary. In other words, critics fear that *Twombly* gives too much latitude to district judges, who are eager to screen cases and likely to read the opinion as granting permission to do so.[81]

This fear is not unfounded given the judicial track record with strict pleading over the past twenty years. In the 1980s, federal judges tightened

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76. Professor Richard Epstein offers an interpretation of *Twombly* that, while useful in some respects, also misses the mark. He argues that the result makes sense given the fact that the plaintiffs relied on "public information, easily assembled and widely available, that can be effectively rebutted by other public evidence." Epstein, *supra* note 59, at 67. I agree with Professor Epstein that the defendants' conduct appears perfectly competitive when all the public information about the telecommunications market is considered, but I disagree that this turns the motion to dismiss into a "mini-summary judgment." *Id.* at 81. My baseline interpretation of *Twombly* has the advantage of explaining how the Court's holding extends beyond antitrust cases and cases involving public agency records or other publicly available information. I do agree with Professor Epstein, however, that pleading standards should balance error costs, a point I explore in more detail *infra* Part IV.

77. Hannon, *supra* note 40, at 1815 (finding no statistically significant effect on dismissal rates after *Twombly* except in civil rights suits).

78. The Court distinguishes between "factually neutral" and "factually suggestive" allegations, a distinction that fits the idea of a legal baseline relative to which allegations could be neutral or suggestive. *Twombly*, 127 S. Ct. at 1966 n.5. Thanks especially to Alexi Lahav for helpful comments on my baseline idea.

79. *Id.* at 1974.

80. Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007).

81. *See, e.g.*, Hoffman, *supra* note 4, at 1258–59 (expressing concern about what lower courts might do with *Twombly*). Another possible concern, which is relevant mostly for antitrust cases, is that judges untutored in economic theory will misapply economics at the pleading stage. This is certainly a risk, but it is also a risk at summary judgment and other stages of the litigation where the judge has power to influence the outcome. And it is arguably an even more serious problem when the jury deliberates. If we tolerate this risk at later stages, it is not clear why we should not tolerate it at the pleading stage as well.

pleading requirements in antitrust, securities fraud, civil rights, and other cases that they believed had serious frivolous suit problems.[82] The Supreme Court tried to stop this practice with its *Leatherman* decision in 1993[83] and again with its *Swierkiewicz* decision in 2002.[84] The Court held in both cases that any departure from liberal notice pleading had to be accomplished through the formal rulemaking process or through legislation—and not by judge-made common law rules.[85] However, lower court enthusiasm for heightened pleading persisted despite these holdings.[86] Concerns about case backlog, high costs, and litigation delay were simply too strong for district judges to give up on screening at the pleading stage, and as a result, many found ways to get around *Leatherman* and *Swierkiewicz*.[87] Given this track record, it is not unreasonable to think that lower courts might push *Twombly*'s vague plausibility standard as far as possible in the direction of more demanding pleading requirements. But aggressive screening through stiff pleading is not what the Supreme Court intended.

III. *TWOMBLY* IN HISTORICAL CONTEXT

It is important to correct two exaggerated historical claims made by some of *Twombly*'s critics.[88] First, it is wrong to condemn *Twombly*'s plausibility standard for being inconsistent with the language of Rule 8(a)(2) or the intent of the 1938 Advisory Committee. Second, one should be careful about any claim that *Twombly* departs from the procedural vision of the Federal Rule drafters. At the core of that vision was a pragmatic

82. *See, e.g.*, Cash Energy, Inc. v. Weiner, 768 F. Supp. 892, 897–900 (1991) (explaining the trend toward higher standards of particularity); Marcus, *supra* note 4, at 444–51 (discussing the revival of fact pleading).

83. Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993).

84. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002).

85. Both *Leatherman* and *Swierkiewicz* affirm *Conley v. Gibson*'s liberal notice pleading standard and hold that the lower courts have no power to create heightened pleading rules on their own. *Swierkiewicz*, 534 U.S. at 512–14; *Leatherman*, 507 U.S. at 168–69.

86. *See, e.g.*, Fairman, *supra* note 8, at 1011–59 (discussing pleading requirements in a variety of different substantive areas).

87. *Id.* at 1062–64. In fact, the Supreme Court itself sent mixed signals in its 1998 *Crawford-El* opinion and its 2005 *Dura Pharmaceuticals* opinion. Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005) (holding that Rule 8(a) requires securities fraud class action plaintiffs to allege loss causation with greater particularity); Crawford-El v. Britton, 523 U.S. 574, 598 (1998) (rejecting strict pleading for a § 1983 complaint, but suggesting that courts might use the motion for a more definite statement or a Rule 7(a) reply to require more factual detail).

88. *See, e.g.*, Spencer, *supra* note 4, at 434–36, 461, 479–80 (making these criticisms); *The Supreme Court, 2006 Term—Leading Cases*, *supra* note 39, at 311–12 (criticizing *Twombly* for inconsistency with the original drafters' intent). *But see* Campbell, *supra* note 72, at 27–32 (arguing that a proper understanding of Rule 8(a) and 1938 Advisory Committee intent is consistent with *Twombly*). Also, it is common for critics to describe *Twombly*'s plausibility standard as a throwback to "fact pleading" under the codes, which is tantamount to criticizing it for inconsistency with the 1938 drafters' intent.

commitment to making procedure an efficient means to enforce the substantive law accurately, and *Twombly* shares that pragmatism.

A. *RULE 8(a)(2), CODE PLEADING, AND 1938 ADVISORY COMMITTEE INTENT*

Charles Clark, reporter for the original Advisory Committee and chief architect of the 1938 Federal Rules, was an authority on pleading, having published numerous articles and one of the most important books on the subject.[89] Pleading reform was one of his key innovations for the new Federal Rules.[90]

Clark's views on pleading and those of his contemporaries were developed in response to perceived deficiencies in common law and code pleading.[91] These deficiencies had to do mainly with an insistence on technicality unrelated to any sensible pleading function.[92] Although the code system improved on the common law,[93] nineteenth-century judges applied the code rules in a hyper-technical fashion, insisting on "strict and logical accuracy" and drawing hopeless distinctions among allegations of ultimate fact, legal conclusions, and evidentiary facts.[94]

In Clark's view, a complaint, while it should include some facts beyond a mere conclusion of liability,[95] need only state enough so as to:

> isolate [the case] from all others, so that the parties and the court will know what is the matter in dispute, the case can be routed through the court processes to the proper method of trial and disposition and the judgment will be *res adjudicata*, so that the same matter cannot again be litigated.[96]

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89. CODE PLEADING, *supra* note 7.

90. Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917–18 (1976).

91. *See* 5A WRIGHT & MILLER, *supra* note 8, § 1202 ("[The system of common law pleading was] excruciatingly slow, expensive, and unworkable. The system was better calculated to vindicate highly technical rules of pleading than it was to dispense justice.").

92. *See* CODE PLEADING, *supra* note 7, at 12–15, 21–23 (critiquing the technicalities of common law pleading).

93. Most code pleading provisions were similar to the New York Field Code section, which required that the complaint contain "a plain and concise statement of the facts constituting each cause of action without unnecessary repetition." *Id.* at 138.

94. *Id.* at 159. Clark gave an example of a bicyclist who was injured when she struck a hole in a negligently maintained street. The bicyclist's suit was dismissed because, while she alleged the hole and the failure to maintain the street, she stated only that her bicycle "struck said defective, unsafe, and out of repair street," not that it struck the hole in the street. *Id.* at 158.

95. Charles E. Clark, *The Complaint in Code Pleading*, 35 YALE L.J. 259, 285 (1926) (noting that a complaint should be structured around a legal theory, for otherwise it would "be a meaningless jumble"); Smith, *supra* note 90 (noting that Clark demanded more than a conclusory allegation of negligence).

96. Clark, *supra* note 16, at 316; *accord* Charles E. Clark, *Simplified Pleading*, 2 F.R.D. 456, 460–61 (1942) (stating that the pleadings need only give notice "of the general nature of the case and the circumstances or events upon which it is based").

Clark believed that merits screening should take place after discovery, at summary judgment in some cases and at trial in most.[97]

There is no question that the *Twombly* complaint met Clark's notice pleading standard.[98] Still, one must be careful about accusing the Court of deviating radically from Rule 8(a)(2). The Rule refers to "a short and plain statement of the claim showing that the pleader is entitled to relief" only in order to avoid the code's "facts constituting a cause of action" formulation.[99] It does not refer to notice pleading explicitly. The term "notice pleading" was in common use at the time to refer to the most liberal pleading standard, so if notice pleading were intended, one might have expected the text of the Rule or the Committee Note to say so.[100]

Moreover, not everyone agreed that the federal standard should be very liberal notice pleading. During the years leading up to adoption of the Federal Rules, and continuing for almost twenty years afterward, jurists and politicians sharply divided on the pleading issue, some insisting that specific pleading was essential to properly framing the lawsuit and rendering it manageable.[101] It should be no surprise then that when Charles Clark explained the new pleading rule to an American Bar Association conference held in Cleveland, Ohio, he made a point of mentioning that different judges might vary to some extent in the detail they required,[102] and that his

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97. *See* Marcus, *supra* note 4, at 439–40.

98. As for the existence of an agreement, the defendants had the information to know whether that allegation was true and could easily deny it.

99. 5A WRIGHT & MILLER, *supra* note 8, § 1202, at 87.

100. *See* CODE PLEADING, *supra* note 7, at 29–30 (distinguishing "issue pleading" at common law, "fact pleading" under the codes, and a new approach, "notice pleading," that "is now urged for general adoption"); *id.* at 163 (observing that "notice pleading" requires only "a very general reference to the happening out of which the case arose").

101. *See* Marcus, *supra* note 4, at 445 (describing judges engaged in "something bordering a revolt" over the existing rule); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 976–77, 983–84 (1987) (describing disagreement over liberal pleading among Advisory Committee members and resistance to it after 1938).

102. *See* AM. BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES, CLEVELAND, OHIO, JULY 21, 22, 23, 1938, at 220 (1938). Clark stated:

> I think there is no question that the rules are based on the theory of a rather general form of pleading. Whether they go as far as I believe they do, you may, of course, question. I want to point out that in this field there is a considerable room for variations between courts. After all, we made a generalized statement in the rules, a short and simple statement along the lines in which we believed, and to one judge that may require much more than it does to others.

Id. Clark also explained that a judge who believed more factual detail was desirable could grant a motion for a more definite statement under Rule 12(e), although he counseled against excessive use of this device. *Id.* at 223.

very liberal views might not be shared by all Advisory Committee members.[103]

What is clear is that the Committee intended to reject the code version of fact pleading and *Twombly*'s pleading standard is a far cry from that. The *Twombly* Court does not insist that every fact essential to liability be alleged clearly and precisely, nor does it insist that the complaint contain only allegations of ultimate fact rather than legal conclusions or evidence.[104] The plaintiffs' lawyer is free to use whatever method works to explain why the existence of an agreement is plausible.

Rule 8(a) came to stand clearly for notice pleading mainly through judicial interpretations of the Rule. After Charles Clark was appointed to the Second Circuit Court of Appeals in 1939, he worked hard to establish Rule 8(a)(2) as a notice pleading rule and resisted efforts to construe it more strictly.[105] But it was the Supreme Court's 1957 opinion in *Conley v. Gibson*[106] and its famous "no set of facts" language that firmly established notice pleading as the Rule 8(a) standard.[107] With this opinion, the Court put to rest, at least for a time, the two-decade controversy over the proper pleading standard.[108]

If notice pleading is best understood as a judicial interpretation of Rule 8(a)(2), then it is hardly illegitimate for the Court to revisit this earlier interpretation and qualify or revise it.[109] The Court must have a good reason

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103. *Id.* at 220; *see also* Smith, *supra* note 90, at 917.

104. At one point, however, the Court does suggest distinctions between "the conclusory and the factual" and between "the factually neutral and the factually suggestive," but these distinctions are very different from the code classifications. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966 n.5 (2007).

105. *See, e.g.*, Dioguardi v. Durning, 139 F.2d 774, 775 (2d Cir. 1944) (interpreting Rule 8(a)(2) very liberally); Marcus, *supra* note 4, at 445 (noting that Clark rejected moving toward more specific pleadings).

106. Conley v. Gibson, 355 U.S. 41 (1957). The complaint in *Conley* stated lots of facts and would have satisfied any pleading standard. Justice Black wrote the opinion for the Court. As a former trial lawyer, he was a strong proponent of jury trials and disliked procedural niceties. It is very likely that his strong language endorsing notice pleading was meant to ensure that as many cases as possible made it to the jury. *See* Emily Sherwin, *The Story of* Conley*: Precedent by Accident*, *in* CIVIL PROCEDURE STORIES 295, 308 (Kevin M. Clermont ed., 2d ed. 2008).

107. As the Court also stated:

> [T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.

Conley, 355 U.S. at 47 (quoting FED. R. CIV. P. 8(a)(2)).

108. Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749, 1750 (1998). That debate was to heat up again in the 1980s, when concerns about a litigation crisis in the federal courts grew more intense. *See supra* notes 82–87 and accompanying text.

109. Some might argue that events in 1955 indicate the Committee's intent to adopt the most liberal version of notice pleading for Rule 8(a)(2), but that would be a mistake. In 1955, the Advisory Committee, with Charles Clark still acting as Reporter, rejected an effort,

to do so, of course, and that reason must fit the idea that the Court is applying a Federal Rule, even if somewhat loosely, rather than simply making common law. As I explain in the following Section, the reason to revisit the interpretive question in *Twombly* has to do with responding to new litigation conditions, a reason that fits the principle of dynamic flexibility underlying the original Rules.

The doctrine of stare decisis is also relevant, especially in view of *Conley*'s fifty years of dominance. However, the values of predictability, reliance, equality, and stability that underlie stare decisis are not strongly implicated by pleading rules.[110] It might not be wise policy for judges to require stricter pleading outside of the formal rulemaking process, a point I discuss later, but that is a very different objection than one charging a violation of stare decisis.

B. *THE VISION OF THE FEDERAL RULE DRAFTERS*

Some critics of *Twombly* argue that the shift from notice to case screening marks a sharp break from the vision of the original Federal Rule

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spearheaded by the Ninth Circuit Judicial Conference, to amend Rule 8(a)(2) by adding the phrase "facts constituting a cause of action," so that the amended Rule would read: "(2) a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action." *Claim or Cause of Action: A Discussion on the Need for Amendment of Rule 8(a)(2) of the Federal Rules of Civil Procedure*, 13 F.R.D. 253, 253 (1952); *see* ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, REPORT OF PROPOSED AMENDMENTS TO THE RULES OF CIVIL PROCEDURE FOR THE UNITED STATES DISTRICT COURTS 18–19 (1955), *available at* http://www.uscourts.gov/rules/Reports/CV10-1955.pdf. The proposal was triggered by growing concern about the high costs of complex antitrust litigation in the 1950s. The problem with using this decision to infer committee endorsement of notice pleading is that the Committee's two-page explanation does not support the conclusion. Nowhere does it expressly refer to "notice pleading" by name. Rather, it defends Rule 8(a)(2) on the ground that it eliminates the technical skirmishing of code pleading by allowing only a general statement, yet still requires "the pleader to disclose adequate information as the basis for his claim for relief as distinguished from a bare averment that he wants relief and is entitled to it." ADVISORY COMM., *supra*, at 19. Responding to criticisms of *Dioguardi*, 139 F.2d at 774, the Committee stressed that the *Dioguardi* decision "was not based on any holding that a pleader is not required to supply information disclosing a ground for relief." ADVISORY COMM., *supra*, at 19.

110. This is especially true considering that plaintiffs are routinely given a chance to amend their complaints to meet the applicable pleading requirement. Professor Spencer makes much of the stare decisis constraint, likening interpretation of the Federal Rules to interpretation of a statute. *See* Spencer, *supra* note 4, at 461–63. However, the Federal Rules are not statutes and are generally interpreted more generously, even though the precise scope of interpretive flexibility is a matter of some dispute. *See* 4 WRIGHT & MILLER, *supra* note 8, § 1029, at 154 (stating that the Federal Rules of Civil Procedure are to be construed generously "to further the cause of justice" and noting that this liberal interpretive principle is endorsed explicitly by Rule 1). *Compare* Joseph P. Bauer, Schiavone*: An Un*-Fortune*-ate Illustration of the Supreme Court's Role as Interpreter of the Federal Rules of Civil Procedure*, 63 NOTRE DAME L. REV. 720, 720 (1988) (arguing that the Court's role is more expansive when interpreting a Federal Rule than when interpreting a statute), *with* Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. PA. L. REV. 1099, 1119 (2002) (criticizing judges and commentators who support a more generous approach to Federal Rule interpretation).

drafters. That vision, they argue, is inconsistent with case screening at the pleading stage, since it favors decisions on a complete factual record developed through discovery and usually tested at trial.[111] The problem with this argument is that it describes the drafters' vision at the wrong level of generality.

It is true that Charles Clark eschewed case screening at the pleading stage and that the drafters contemplated decisions on the basis of evidence rather than allegations. However, the 1938 drafters were pragmatists first and foremost and their work was influenced by the legal realism of the period.[112] They supported liberal pleading and evidence-based merits decisions as a pragmatic, not a natural law, ideal. They thought a procedural system with these elements would work much better than the common law and code systems they inherited.[113] "Work much better" meant that the procedural system would enforce the substantive law more effectively and "without undue waste or friction or consumption of fuel."[114]

This pragmatic vision—that procedural rules should be designed instrumentally to enforce the substantive law fairly and efficiently given the way those rules actually work in practice—operates at a deeper level than preferences for discovery and trial. The latter preferences just reflect structural choices. The drafters' pragmatic vision supplies the underlying normative support.

The 1938 drafters' choice of pleading rules closely fits their pragmatic vision.[115] Simplified pleading accomplished the notice-giving function at minimum cost and allowed cases to proceed through discovery and on to trial where they could be decided based on what actually happened rather than on legal technicalities.[116] The 1938 drafters' choices also made

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111. This vision is sometimes referred to as the "liberal ethos." Marcus, *supra* note 4, at 439.

112. For a detailed account of the 1938 drafters' pragmatism and the influence of legal realism, see Bone, *supra* note 7, at 78–98.

113. *Id.*

114. Roscoe Pound, *Some Principles of Procedural Reform*, 4 ILL. L. REV. 388, 394 (1909).

115. *See, e.g.*, Bone, *supra* note 7, at 101 n.345 (discussing Pound's and Clark's pragmatic views on pleading).

116. The importance of deciding cases on the facts and evidence is also closely related to the legal realist beliefs of Charles Clark and others on the Advisory Committee. *See* Bone, *supra* note 7, at 80–89 (describing Clark's realist views); *see also* Emily Sherwin, *The Jurisprudence of Pleading: Rights, Rules, and* Conley v. Gibson, 52 HOW. L.J. 73, 78–86 (2008) (discussing the effect of legal realism on the early twentieth-century pleading debate). Legal realism was a reaction to the formalism of the late nineteenth century, and moderate realists like Clark were very influential during the 1930s and 1940s. Bone, *supra* note 7, at 85. They stressed the importance of fitting law to social practice rather than deducing law from abstract concepts and principles. *Id.* Over the late nineteenth century, the idea of a "cause of action" became bound up with formalistic distinctions among primary rights, primary duties, and remedies—abstractions that the realists rejected as meaningless. *Id.* They redefined the cause of action in terms of operative facts rather than abstract rights. *Id.*

pragmatic sense in light of the way litigation actually worked in the early twentieth century.[117] Many cases were rather small affairs; the huge, complex case of today was relatively unknown.[118] Many lawyers were local practitioners who dealt with one another and with local judges repeatedly and had incentives to maintain a reputation for reasonableness.[119] The era of huge law firms with national practices and much weaker connections to local communities had not yet arrived. To be sure, the decades of the 1920s and 1930s had their own litigation crisis. But that crisis involved an explosion of litigation produced by the increased use of automobiles, and automobile accident cases are rather simple affairs, usually involving only a few parties and fairly straightforward factual and legal issues.[120]

It would have made sense in this earlier world to assume relatively manageable discovery and trial costs for most cases. Today's world of litigation is very different. There are many more large and complex lawsuits with high stakes, more large law firms and lawyers practicing nationwide who

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In addition, the early twentieth century was a period of dynamic legal change, as the rise of sociological jurisprudence, and then legal realism, produced a more functional, policy-oriented approach to common law rules and principles, and as the New Deal generated novel statutory claims. *See* Bone, *supra* note 7, at 78–98 (discussing the effect of legal realism and pragmatism on the early twentieth-century procedural reform movement); Sherwin, *supra* (describing the debate between legal realists and legal formalists in the early twentieth century and its impact on the choice of federal pleading rules). Forcing a plaintiff to identify a cause of action and plead it precisely once and for all might have impeded the dynamic growth of the law. In any event, it must have made little sense to lock a plaintiff into a cause of action when discovery might reveal facts supporting something quite different. *See* Bone, *supra* note 7, at 101 n.345; Sherwin, *supra*, at 83.

117. Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 508 (1986).

118. *See id.* at 508, 520; *see also* Daniel J. Meador, *A Perspective on Change in the Litigation System*, 49 ALA. L. REV. 7, 8–9 (1997). I do not mean to suggest, of course, that there were no complicated cases during the 1930s. Indeed, by the 1950s, judges in the Ninth Circuit were concerned enough about large antitrust suits to propose an amendment to the federal pleading rule. *See supra* note 109. There is no question, however, that today the large, complex suit is much more common, more complicated procedurally, and more salient as a focus of concern. Thanks to David Marcus for his suggestions on this topic.

119. *See* Meador, *supra* note 118, at 13–14 (noting the rise in recent decades of "mega-firms, national and international in scope," and the increase in "incentives to litigate and aggressiveness in litigating"). When discussing the merits of a uniform code of pleading at the 1913 American Bar Association meeting, J. Hansell Merrill noted that few lawyers practiced interstate compared to the "much larger number whose practice is confined to a single state." AM. BAR ASS'N, REPORT OF THE THIRTY-SIXTH ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION, 38 A.B.A. REP. 44 (1913).

120. The automobile litigation crisis was felt in many different states and even prompted proposals to create administrative solutions modeled on the then-recently-enacted workmen's compensation statutes. *See generally* Robert G. Bone, *Procedural Reform in a Local Context: The Massachusetts Supreme Judicial Court and the Federal Rule Model*, *in* THE HISTORY OF THE LAW IN MASSACHUSETTS: THE SUPREME JUDICIAL COURT 1692–1992, at 403–04 (Russell K. Osgood ed., 1992) (describing the automobile-litigation crisis in Massachusetts); Noel T. Dowling, *Compensation for Automobile Accidents: A Symposium*, 32 COLUM. L. REV. 785 (1932).

have much weaker incentives to build local reputations, and a much wider range of materials that can be targeted in discovery, including potentially massive electronic records.[121] These changes have fueled a powerful perception of serious litigation cost and frivolous suit problems.

Long before the *Twombly* decision, lower federal courts in the 1980s responded to this sense of crisis by tightening up on pleading requirements.[122] And they continued in this vein despite Supreme Court decisions to the contrary in *Leatherman* and *Swierkiewicz*.[123] This history is important because it shows just how strong the pressure is to rely on pleading specificity to address litigation problems. I am confident that the Federal Rule drafters, as procedural pragmatists, would also entertain the possibility of stricter pleading as a solution if they shared the same perceptions. Indeed, Charles Clark emphasized the evolving nature of the Federal Rules and the importance of revising those Rules to keep pace with changing litigation conditions.[124] Clark and his colleagues ultimately might reject strict pleading on pragmatic grounds, but they would not rule it out categorically any more than lawyers and judges do today.[125]

In fact, the original rule drafters adopted stricter pleading for fraud in Rule 9(b), and they did so in part because of the harm to defendant's reputation and the cost to settled transactions that ungrounded fraud allegations could create.[126] It is true that these stricter pleading rules were well established at common law and in equity, but the drafters did not have to incorporate them if they believed that the traditional rules were as misguided as the code's fact pleading approach. That they thought it worthwhile to include Rule 9(b) as an exception to Rule 8(a) is a sign that

121. *See* Meador, *supra* note 118, at 7–8, 12–14.

122. *See supra* notes 82–87 and accompanying text.

123. *See supra* notes 82–87 and accompanying text.

124. Clark, *supra* note 16, at 304.

125. In fact, Charles Clark seems to have tempered his more extreme notice pleading views in the late 1950s. *See* Marcus, *supra* note 4, at 451 & n.113 (noting that Clark later described notice pleading as "helpful . . . but . . . [not] anything that we can use with any precision"). It is worth mentioning that Clark, who was a strong proponent of the court rulemaking process, might have objected to a stricter pleading rule being implemented by courts rather than through formal rulemaking. However, I believe there is a strong possibility that even Charles Clark, if he were living today, would approve the thin plausibility standard as a reasonable interpretation of Rule 8(a)(2) in light of current litigation conditions.

126. Policy justifications for Rule 9(b)'s heightened pleading standard include preventing unnecessary harm to the defendant's reputation, screening frivolous suits, protecting settled transactions, and preventing "fishing expeditions." *See* 5A WRIGHT & MILLER, *supra* note 8, § 1296, at 31–47. Sometimes the rationale is expressed in terms of providing "fair notice" to defendants, *see id.* at 39–45, but Rule 9(b) is not required for this purpose since Rule 8(a) is supposed to do the notice-giving work. Furthermore, any adverse effect from a fraud allegation is a problem only if the allegation turns out to be wrong and the suit meritless. If the defendant is actually guilty of fraud, the reputation effect is deserved and any transaction based on the fraudulent representation *should* be rescinded. Thus, the stricter pleading standard for fraud must have to do with preventing unfounded allegations.

they accepted as a pleading objective the screening of cases when the frivolous suit risk was serious and harmful enough.[127]

I am not suggesting that procedural problems should be analyzed today using the same pragmatic approach that the original drafters employed. As Part IV demonstrates, I favor a more systematic and rigorous analysis that is attentive to the differences among normative theories and the availability of statistically reliable empirical support. Simply put, my point is that the *Twombly* decision could have been endorsed by an early-twentieth-century pragmatist living today and concerned about the litigation problems of the twenty-first century.

IV. OPTIMAL PLEADING AND CASE-SCREENING RULES: A NORMATIVE ANALYSIS

The previous discussion showed that *Twombly*'s plausibility standard, properly understood, marks only a small departure from existing pleading standards and one that is consistent with Rule 8(a)(2) and the pragmatic vision of the original Federal Rule drafters. Still, the question remains whether plausibility is justified on normative grounds, and more generally, whether stricter pleading is an optimal way to screen undesirable lawsuits. This Part discusses those issues.

These are particularly important issues to address today, especially given what the *Twombly* Court says about the efficacy of case-specific discretion. In what may be the most important part of the *Twombly* opinion—perhaps even more important than the discussion of *Conley*—the Court expresses serious doubts about how well trial judges can handle discovery problems and meritless suits using discretionary case-management tools. The Court first notes that "discovery expense will push cost-conscious defendants to settle even anemic cases"[128] and then points out that trial judges lack the information necessary to manage the problem effectively in complex antitrust cases,[129] especially as weak and frivolous suits are likely to settle before the summary judgment stage.[130]

This marks a significant change of course.[131] Until *Twombly*, the Supreme Court had never openly and directly questioned the effectiveness

127. To be sure, the drafters, concerned about information access, included an exception in Rule 9(b) for allegations of "[m]alice, intent, knowledge, and other conditions of a person's mind." FED. R. CIV. P. 9(b). This exception indicates that the drafters, if they lived today, would take account of information access, as they should, when designing case-screening rules. How they would handle this factor depends on the pragmatic balance in light of the perceived severity of the frivolous suit problem. My point is simply that the drafters were alert to these problems and willing to use strict pleading to address them.

128. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007).

129. *Id.* at 1967 & n.6.

130. *Id.*

131. Justice Stevens's dissenting opinion is a good example of the attitude that prevailed before *Twombly*:

of judicial discretion in managing litigation problems during the pre-trial phase.[132] The Court in the past either approved trial judge discretion or deferred to it without evaluative comment.[133] The same is true for the federal courts of appeal.[134] And the Advisory Committee on Civil Rules has operated for decades under the assumption that discretionary case management is an effective tool for dealing with litigation abuse.[135]

The *Twombly* Court's skepticism is in fact well justified. Serious litigation problems should not be left to trial judge discretion as much as they are today. Judges face information and other constraints that impair their ability to manage optimally, especially in the highly strategic environment of

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> The Court vastly underestimates a district court's case-management arsenal. . . . In short, the Federal Rules contemplate that pretrial matters will be settled through a flexible process of give and take, of proffers, stipulations, and stonewalls, not by having trial judges screen allegations for their plausibility *vel non* without requiring an answer from the defendant.

Id. at 1987 n.13 (Stevens, J., dissenting).

132. The Court has restricted trial judge discretion in some special areas unrelated to pleading and case management out of fear that judges might use their discretion to make decisions that expedite resolution but adversely affect the public interest. For example, in order to avoid arresting the development of constitutional law, the Court until recently required district judges in § 1983 cases to decide the issue of constitutional violation before qualified immunity, even when a straightforward qualified immunity determination would easily dispose of the case. *See* Saucier v. Katz, 533 U.S. 194, 201, 210 (2001). *Contra* Pearson v. Callahan, 129 S. Ct. 808, 818 (2009) (abandoning *Saucier*'s strict rule and holding that district judges have some discretion in this regard).

133. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 600 (1998) (noting that trial judge discretion can manage discovery and frivolous litigation effectively in § 1983 cases involving qualified immunity); Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168–69 (1993) ("[F]ederal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later."); Pavelic & LeFlore v. Marvel Entm't Group, 493 U.S. 120, 127 (1989) (Marshall, J., dissenting) (stressing the trial judge's "primary responsibility for managing the cases before him" and the discretion Rule 11 gives to set an appropriate penalty).

134. *See, e.g.*, Mass. Inst. of Tech. v. Abacus Software, 462 F.3d 1344, 1367 (Fed. Cir. 2006) (deferring to the district judge's case-management decisions because "a judge's discretion is at its broadest on matters of trial management"); Sims v. ANR Freight Sys., Inc., 77 F.3d 846, 848 (5th Cir. 1996) (lauding the district judge's "hard work and effective case management" skills even though his decision in the instant case caused a structural error); Jaquette v. Black Hawk County, 710 F.2d 455, 463 (8th Cir. 1983) ("In almost all cases the key to avoiding excessive costs and delay is early and stringent judicial management of the case."). A caveat is in order: my claim that neither the Supreme Court nor the courts of appeals ever directly questioned the efficacy of trial judge discretion in managing cases before *Twombly* is based on extensive searches in the LEXIS and Westlaw databases.

135. *See* Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1967–70, 1974–75 (2007) (reviewing Federal Rules that feature discretion and explaining why it is so prevalent in the Federal Rules today); Edward H. Cooper, *Simplified Rules of Federal Procedure?*, 100 MICH. L. REV. 1794, 1795 (2002) (emphasizing the prevalence of case-specific discretion in the Federal Rules); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L.J. 27, 37–46 (2003) (noting and criticizing the trend toward placing more case-management discretion in the hands of trial judges).

litigation.[136] But if deferring to case-specific discretion is not the solution, then the policy and regulatory issues must be confronted directly at the rulemaking stage.

The following discussion addresses these issues for pleading and case screening. Section A first considers whether the *Twombly* Court's thin plausibility standard can be justified by a process-based theory of fairness as reason-giving. Section B then analyzes pleading standards stricter than thin plausibility, designed to screen undesirable suits. Section B evaluates these stricter standards from an outcome-based perspective and compares them to other screening tools. Finally, Section C sketches the outlines of an optimal case-screening approach.

A. TWOMBLY*'S PLAUSIBILITY STANDARD FROM A PROCESS-BASED PERSPECTIVE*

Broadly speaking, there are two different normative approaches to analyzing procedural issues: process-based and outcome-based. A process-based approach evaluates a procedural rule by how it treats litigants independent of its consequences for outcome quality, while an outcome-based approach evaluates a rule by its effect on the quality of litigation outcomes.[137]

The following discussion outlines a process-based justification for *Twombly*'s plausibility standard in terms of a balance between fairness to defendants and fairness to plaintiffs. When proceduralists discuss pleading standards, they tend to assume that fairness applies just to plaintiffs and that any pleading standard stricter than liberal notice pleading can be justified only on efficiency grounds.[138] This is a mistake. Fairness applies to both parties. As the following discussion demonstrates, fairness in the pleading

136. For a thorough analysis of these and other constraints, see Bone, *supra* note 135.

137. For more on the distinction between process-based and outcome-based theories, see Robert G. Bone, *Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness*, 83 B.U. L. REV. 485, 508–16 (2003). A process-based approach is nonconsequentialist insofar as it evaluates procedure without regard to its consequences, whereas an outcome-based approach is consequentialist. However, an outcome-based approach can be tied to a nonconsequentialist metric for evaluating outcomes, as is the case for an outcome-based approach that relies on a rights-based theory of the substantive law. *See infra* notes 175–84 and accompanying text. For the distinction between consequentialist and nonconsequentialist theories in general, see Samuel Scheffler, *Introduction* to CONSEQUENTIALISM AND ITS CRITICS 1, 1–13 (Samuel Scheffler ed., 1988). Another point is worth mentioning. The analysis in this Section proceeds by deriving pleading and case-screening rules from broad normative theories of procedure. It is possible, however, to combine this analysis with a constructivist approach that develops procedural principles from an attractive normative account of settled practice. For an example of a constructivist approach, see Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181 (2004); *see also* Bone, *supra* note 9, at 943–47 (arguing that the Advisory Committee should use a constructivist approach and illustrating it with the example of the small-claim class action).

138. *See infra* note 168 (describing and critiquing this tendency).

context has something to say not only about a plaintiff's ability to sue, but also about when the defendant must respond to the plaintiff's demands.

1. Fairness to Defendants

We begin by asking whether fairness to the defendant requires some degree of pleading specificity. To get at this question, imagine a procedural system that has no pleadings at all. In this system, the plaintiff merely informs the defendant that he is being sued, perhaps by serving a summons, and then waits for the defendant to use discovery to find out why the suit has been brought. If the defendant does not respond within a specified period of time, he suffers a default judgment.

One might object to such a system as inefficient because it invites too many weak and frivolous suits and increases the social costs of litigation. I discuss this outcome-based objection in Section B below.[139] It is not clear, however, that the prospect of bad outcomes exhausts all possible grounds for objection. At least at first glance, there seems to be something unfair about a plaintiff forcing a defendant to shoulder the burden of litigation without giving the defendant any reason why he should do so. Explaining this intuition, however, is no easy matter.

It is possible that the intuition is prompted by a concern about how easy it is for a plaintiff in a system without pleadings to file a frivolous suit simply to spite the defendant or pressure an unjustified settlement. If this is the crux of the problem, then the source of unfairness resides in the moral culpability of intentionally filing a meritless suit. An intentional meritless filing is similar to an intentional tort and morally blameworthy for many of the same reasons.

Yet it is not clear that this explanation captures the root of the problem. The problem is not so much that a lawsuit might be frivolous, but rather that the defendant must bear the burden of response without being given any reason why.[140] Still, the question remains: What makes this unfair when the defendant can uncover the reason for himself by conducting discovery?

The standard process-based theory of participation rights is not terribly helpful in this regard.[141] According to this theory, respect for the dignity

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139. *See infra* Part IV.B.

140. Unless, of course, there are extrinsic circumstances that shed light on the probable reason for suit.

141. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 158–253 (1985). Another version of the process-based approach anchors the participation right in legitimacy rather than dignity. *See* Solum, *supra* note 137. It is worth noting that much of the discussion of intrinsic process value in civil procedure draws on the "procedural justice" literature. This literature demonstrates through psychological experiments that people are more likely to feel they have been treated fairly by the process and the outcome, even an adverse outcome, when they are given an opportunity to participate. *See, e.g.*, E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 26–40, 61–83, 93–127 (1988) (discussing these empirical studies); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants'*

and autonomy of persons significantly affected by litigation requires that the state give each litigant a chance to tell her story, and perhaps also a chance to control the major incidents of litigation, regardless of the effect on outcome quality.[142] Applying this theory to pleading, one might argue that a system without pleading does not give the defendant an adequate opportunity to participate.[143] The problem with this argument, however, is that the defendant *does* have an opportunity to participate. While the plaintiff need not give reasons, she must notify the defendant that he is being sued, and once notified the defendant can take the plaintiff's deposition, serve interrogatories, or use other discovery devices to ascertain why the suit has been brought.

Perhaps the need to use discovery burdens the defendant's right to participate in a morally impermissible way. But that hardly seems sensible. To be sure, effective participation requires that the defendant incur litigation costs to find out why he is being sued, but the necessity of incurring litigation costs is not in itself enough to render procedures morally objectionable. Moral concerns can arise when litigants lack the wealth necessary to finance litigation, but the sense of unfairness we are exploring is not confined to parties who have little wealth.

We come closer to the heart of the matter when we focus on the unchecked power a system without pleadings gives plaintiffs. This suggests that the objection might have to do with the unfairness of arbitrary state action in general. Many scholars of procedure and administrative law argue that respect for persons demands that the state act rationally and non-arbitrarily when adjudicating the entitlements or obligations of

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Evaluations of Their Experiences in the Civil Justice System, 24 LAW & SOC'Y REV. 953, 967–87 (1990) (analyzing the relationship between tort litigants' fairness judgments and various objective and subjective factors). However, these psychological responses have no normative significance on their own. They might be relevant for a moral conventionalist if they counted as evidence of generally shared moral beliefs. However, psychological responses like these must be subjected to critical reflection before they can count as well-considered beliefs. In general, those who rely on procedural justice studies to support conclusions about fairness tend to assume that procedures are fair precisely because of the positive psychological reactions they elicit. But this is mistaken. If positive feelings are what count, then all positive feelings should be counted equally (even positive feelings about ice cream), but this quickly ends up sliding into some form of aggregate utilitarianism. *See* Bone, *supra* note 137, at 505–07.

142. I have argued elsewhere that the dignitary value underlies the strong right to a personal "day in court" that figures prominently in American civil procedure. Robert G. Bone, *Rethinking the "Day in Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 230 (1992). I have also raised questions about the coherence of this theory. *Id.* at 279–85.

143. In constitutional due process terms, we might say that the notice is not "reasonable" or the participation not "meaningful." *See* Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (due process requires a hearing "at a meaningful time and in a meaningful manner"); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (due process requires notice "reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

individuals.[144] This means that the state must have good reasons for its actions.[145] It is true that in our hypothetical system, the plaintiff rather than a state agent imposes the burden. But the state empowers the plaintiff, and state judges coerce the defendant with the threat of default.

Still, it is one thing for the plaintiff to have a good reason, but quite a different thing for the plaintiff to inform the defendant of that reason. If fairness to the defendant has anything to say about pleading standards, it must be because there is a moral obligation not only to *have* reasons, but also to *provide* those reasons to the person affected. If such an obligation exists, it would follow that a procedural system should require some kind of initiating document, such as a complaint, that gives the defendant good reasons for bearing the burden of response. Moreover, the allegations of the complaint would have to do more than simply tell a story; they would have to tell a story that suggests in some way a legitimate ground for forcing the defendant into court. This means that the allegations should describe a state of affairs that differs from the ordinary baseline of acceptable conduct.[146] Otherwise, plaintiffs could force defendants into court for engaging in activities that are well within the scope of perfectly appropriate conduct.

The question, however, is whether the state has a moral obligation to give reasons when it imposes substantial burdens on individuals. The answer to this question is somewhat complicated. Many commentators argue that a general obligation exists, and they justify it in two different ways: either as a primary moral obligation rooted in the principle of respect for persons,[147]

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144. *See* MASHAW, *supra* note 141, at 189, 198–99, 201–04 (deriving a requirement of comprehensibility or "thin rationality" from respect for dignity); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 663–64, 666 (2d ed. 1988) (arguing that due process provides an "institutional check on arbitrary government action" and identifying an intrinsic dignitary value to a hearing "as an expression of the rule of law, regarded here as the antithesis of power wielded without accountability to those on whom it focuses"); Richard B. Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 120–24, 144–47 (1978) (arguing for "inherent dignity" as a foundation for due process and recognizing "the individual's right to be free from arbitrary governmental actions that threaten inherent dignitary values"); *see also* Robert S. Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 26–27 (1974) (arguing for "procedural rationality" as a "process value").

145. This is not the place to explore with care what constitutes a "non-arbitrary" decision. I employ the term in a loose way to refer to decisions that are backed by good reasons. For example, decision by random lottery is non-arbitrary by my definition as long as the decisionmaker has a good reason to use a lottery.

146. *See supra* notes 59–71 and accompanying text (describing the baseline idea).

147. *See* TRIBE, *supra* note 144, at 666, 743–44 (noting that "the right to be heard from, and the right to be told why, . . . express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one" and arguing that a due process obligation to provide an explanation can be based on a dignitary value); Frank I. Michelman, *Formal and Associational Aims in Procedural Due Process*, *in* DUE PROCESS: NOMOS XVIII, at 126, 126–27 (J. Roland Pennock & John W. Chapman eds., 1977) (arguing that "explanatory procedures," including the giving of reasons for a decision, are "responsive to demands for *revelation* and

or as a prudential obligation justified instrumentally for its value in helping to ensure that the state acts non-arbitrarily.[148] The problem is that there are many situations in which the state does not have to give reasons. For example, juries render verdicts without giving reasons; judges rule on admissibility of evidence without giving reasons, and judges sometimes sentence criminal defendants without publicly justifying the sentences they choose.[149]

But filing a lawsuit is different. The admissibility and sentencing examples involve decisions by an official (the judge) whose authority arguably derives from her official role rather than from the reason she gives, and who is more likely than a private party to be motivated by a concern for the public interest.[150] Moreover, when the judge makes a decision without giving a reason, she often does so against the background of arguments pro and con, or under conditions where a plausible reason or reasons can be inferred. And when the decision is completely crazy (say, sentencing a petty thief to death), it is usually subject to review and reversal.

None of these fairness-promoting features is present when a plaintiff files a lawsuit. For one thing, the filing decision is delegated to a private party, who does not act in an official role and whose motivations are personal. Without a complaint requirement, there is absolutely nothing to signal the defendant what the reason for suit might be or anything to check an impermissible filing.[151] To be sure, jurors render verdicts without giving reasons, but jurors do so as agents of the court.[152] Moreover, the evidentiary submissions and arguments preceding a jury verdict make it possible to infer

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participation" and can have value even when there is no opportunity to challenge the decision); Edmund Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, *in* DUE PROCESS, *supra*, at 172, 175–79 (deriving a moral right to reasons from the Kantian categorical imperative not to treat a person as a mere means to an end); Saphire, *supra* note 144, at 162–66 (arguing that due process protects inherent dignitary values of "revelation, explanation, and participation"); Summers, *supra* note 144, at 26–27 (arguing that the process value of procedural rationality includes giving reasons, an obligation that respects persons as rational beings).

148. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (holding that procedural due process requires a hearing before the termination of a welfare recipient's benefits). This is, of course, based on the assumption that it is more difficult for an actor to act arbitrarily when she must justify her actions publicly. It is also worth mentioning that non-arbitrariness and reason-giving can be justified on outcome-based grounds, for example, as instrumental to the accurate enforcement of rights.

149. *See* Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 634, 637 (1995) (analyzing reason-giving and reason-avoidance in law).

150. *See id.* at 658 ("When the source of a decision rather than the reason behind it compels obedience, there is less warrant for explaining the basis for the decision to those who are subject to it.").

151. This last point, the existence of checks on impermissible decisionmaking, opens up the possibility that the fairness of a procedural system that allows filings without reasons might depend on how effectively the system screens impermissible filings in other ways.

152. *See, e.g.*, Barzelis v. Kulikowski, 418 F.2d 869, 870 (9th Cir. 1969) ("A jury, however, does not have to give reasons for what it does.").

plausible reasons, and when there is no plausible reason, the verdict can be overturned through a motion for a judgment notwithstanding the verdict or a new trial, or by appeal.[153] In short, a procedural system without pleadings is tantamount to a naked delegation of state power to private individuals.[154]

A fairness rationale based on an obligation to give reasons is different from the usual justification for notice pleading. The usual justification evaluates the sufficiency of notice in terms of what is needed to make other elements of the system work effectively. For example, notice is deemed adequate if it gives the defendant enough information to prepare an answer or otherwise respond.[155] By contrast, the fairness argument treats notice as a matter of political morality not contingent on other elements of the system. It is required either as a primary moral obligation or as a prophylactic measure to ensure non-arbitrary decisionmaking.

The idea of fairness as reason-giving has important implications for *Twombly*. If the argument is persuasive, it means that the Court's rejection of *Conley*'s possibility standard is supported by a principle of fairness, not just a policy of case screening.[156] Of course, our litigation system does have a

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153. Another difference is that in the examples of no reason-giving, there are sound institutional grounds for acting without reasons. One can argue, for example, that the practice of jury verdicts, evidentiary rulings, or criminal sentencing works much better on balance without an obligation to give reasons. Therefore, even if there is a fairness value at stake in the abstract, it should not count because giving reasons is inconsistent with the effective functioning of the practice in question or it is outweighed by the benefits of decisionmaking without an obligation to state reasons publicly. By contrast, it is not clear why the practice of filing lawsuits would work better in general without an obligation to give good reasons for forcing the defendant to respond. *Cf.* Schauer, *supra* note 149, at 657–58 (arguing that reason-giving as an element of institutional design should be seen as contingent rather than necessary).

154. It is worth mentioning, however, that the U.S. Supreme Court has held that the Fourteenth Amendment's Due Process Clause does not prohibit a state from commencing a criminal prosecution without probable cause. Albright v. Oliver, 510 U.S. 266, 266 (1994). At first glance, this decision might suggest a negative answer to our question about a duty to act on and furnish good reasons. If the state can act without providing a good reason in the form of probable cause when initiating a criminal prosecution, perhaps the state can act without a good reason when initiating a civil suit as well. The *Albright* Court, however, did not hold that the state can initiate a prosecution without probable cause. It held only that any challenge to a state's decision to prosecute on the ground of probable cause had to be brought under the Fourth Amendment's seizure provisions rather than the Fourteenth Amendment's substantive due process provisions. And the Justices based their conclusions mainly on a theory of constitutional interpretation. I am grateful to my colleague David Rossman for bringing the *Albright* case to my attention.

155. *See* 5A WRIGHT & MILLER, *supra* note 8, § 1215, at 190–93.

156. The *Twombly* Court itself is not absolutely clear about the basis for its plausibility standard. On the one hand, the Court discusses the need for case screening at the pleading stage, suggesting that it might have in mind a case-screening rather than a fairness justification. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966–67 (2007). On the other hand, the Court introduces plausibility not in the course of discussing case screening, but rather in the course of dismissing the "possibility" standard as an improper interpretation of *Conley* and wrongheaded. *Id.* at 1968–69. Notably, the Court does not argue that the possibility standard is undesirable

complaint requirement, in contrast to the hypothetical system without pleadings that we have been discussing. Moreover, *Conley*'s possibility standard at least gives the defendant notice of what the dispute generally concerns. The problem, however, is that a possibility standard tolerates complaints that do no more than describe conduct within the ordinary baseline of acceptable behavior. A complaint of this sort gives the defendant no better reason to defend than no complaint at all. In other words, if possibility pleading is sufficient, a defendant acting perfectly appropriately could be forced to bear the burden of a defense without the plaintiff offering a good reason why he should do so.

Although no court has gone as far as to construe *Twombly* in precisely these fairness terms, at least one court has equated the plausibility standard explicitly with fairness, observing that "Rule 8 is born out of a need to ensure fundamental fairness for defendants."[157] Moreover, there are other courts that assume plausibility is included in what it means to give "*fair* notice."[158]

One additional point deserves special mention. The argument in this Section relies on a process-based theory of procedural fairness, but as I have explained elsewhere, there are reasons to doubt whether process-based theories make sense in civil procedure.[159] However, these doubts are less

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because of a high risk of meritless suits or high discovery costs. Instead, it argues that possibility simply is not a sensible standard in general because it tolerates "a wholly conclusory statement of claim" and allegations that do not even support "a 'reasonably founded hope' that a plaintiff would be able to make a case." *Id.* at 1969. While the Court does not refer here to fairness, a concern about fairness to defendants certainly could explain the force and generality of its criticism.

157. United States *ex rel.* Snapp, Inc. v. Ford Motor Co., 532 F.3d 496, 503 (6th Cir. 2008) ("[A] complaint need not provide an exhaustive roadmap of a plaintiff's claims, but it must be sufficient to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" (quoting Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007))). It is important to note, however, that the court does not explain what it means by "fundamental fairness."

158. *See, e.g.*, Phillips v. County of Allegheny, 515 F.3d 224, 232 (3d Cir. 2008) ("[W]e understand the Court to instruct that a situation may arise where, at some point, the factual detail in a complaint is so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by Rule 8."); Airborne Beepers & Video, Inc. v. AT&T Mobility LLC, 499 F.3d 663, 667 (7th Cir. 2007) ("[A]t some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8."); *cf.* Robbins v. Oklahoma, 519 F.3d 1242, 1248 (10th Cir. 2008) ("This requirement of plausibility serves not only to weed out claims that do not (in the absence of additional allegations) have a reasonable prospect of success, but also to inform the defendants of the actual grounds of the claim against them.").

159. *See, e.g.*, Bone, *supra* note 137, at 509–10 (critiquing process-based theories of procedure). Other scholars have expressed similar doubts, although on different grounds. *See* RONALD A. DWORKIN, A MATTER OF PRINCIPLE 101–03 (1985) (questioning whether there can be any moral harm from denying participation apart from the moral harm of an erroneous outcome); Larry Alexander, *Are Procedural Rights Derivative Substantive Rights?*, 17 LAW & PHIL. 19, 31–36 (1998) (questioning the existence of substance-independent procedural values); Larry Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 325–26, 341–43 (1987) ("[B]ecause the procedure for applying a

relevant at the pleading stage, because they rest on the assumption that all parties are legitimately before the court and thus fairly subject to the rules that make courts work most effectively.[160] For defendants who are not properly brought into court, being required to defend a lawsuit is similar to being harmed in other ways. Insofar as the state's harming a person without a good reason fails to accord that person the respect to which he is entitled outside litigation, forcing a person to defend without a good reason might do the same within litigation.

In sum, the fairness argument based on reason-giving has force in the pleading context. It needs a more rigorous development than I have space to give it here.[161] But the analysis in this Section is sufficient to show that the argument must be taken seriously. In particular, if fairness demands plausibility, not just possibility, *Twombly*'s critics have a much more challenging task than they realize. They must be able to point to an

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rule can always be viewed as part of the substance of the rule itself, a concern for procedure apart from substance verges on incoherence.").

160. To elaborate a bit, the question that a process-based proponent must answer is why respect for persons is not fully satisfied by an outcome for each individual litigant that is the best it can be given institutional constraints and the equal rights of other litigants. *See* Bone, *supra* note 137, at 509–10. In other words, since adjudication is primarily about producing good outcomes, why are parties entitled to anything more than those procedures that are justified on outcome-based grounds? Of course, there are background rights that all institutions must respect, such as the right against torture, but the case for process-based procedural rights extends further to encompass institution-specific rights, such as the right to control one's own lawsuit.

161. A skeptical reader might wonder whether the burden of discovery is substantial enough to trigger a moral obligation to give reasons. I believe the answer is yes, at least in some cases. Discovery can be very costly, especially when the plaintiff acts strategically to resist disclosure. Moreover, filing can also impose serious reputational and psychological harms. Another issue has to do with whether respect for persons extends to artificial persons like corporations. While I cannot explore this issue here, it is worth mentioning that the principle against the arbitrary exercise of state power extends generally, suggesting that its support is general too. I am indebted to Ian Farrell for alerting me to this point. Finally, one might object that the fairness argument fails to take account of important social interests. Suppose, for example, that plaintiffs suspect the defendant is using an unsafe method to transport nuclear waste, but the suspicions are not based on any concrete facts or evidence. Also, suppose that an accident could expose millions of people to serious levels of radioactivity. The possibility standard would permit this lawsuit, but the plausibility standard would bar it. One might argue that the powerful social interests at stake should allow plaintiffs at least to take some depositions. However, it is not at all clear that this is the right thing to do. Litigation is not the only institution for handling problems of this sort. Nuclear waste disposal, for example, is heavily regulated and there are public agencies capable of taking action. More generally, the hypothetical raises the complicated question of the proper use of adjudication as an investigative tool. Adjudication is most centrally about determining legal rights. It also has investigative value, of course, but this value alone is not enough to justify suit without some colorable legal claim. Furthermore, if the need for depositions is compelling enough on particular facts, it might be possible to make an exception. The fairness argument supports only a prima facie right to reasons. If litigation is somehow the only viable option to handle a serious social problem, the social interests at stake might outweigh the prima facie right. I am grateful to Patrick Woolley for prompting me to think about this issue.

opposing principle with moral weight that supports a more relaxed standard than plausibility. As the following Section shows, this is no easy matter.

2. Fairness to Plaintiffs

Sometimes the information needed to make allegations is in the possession of the defendant and inaccessible to the plaintiff even with a reasonable investigation. Critics of *Twombly*, and more generally of pleading rules stricter than liberal notice pleading, argue (or assume) that dismissal of a lawsuit is unfair when the plaintiff cannot obtain the information necessary to meet the applicable pleading standard.[162] The question, however, is why. More precisely, why is it *unfair* to impose pleading requirements that apply to all plaintiffs and are justified in general terms simply because those requirements happen to make it difficult for some plaintiffs to sue?

One might argue that a strict pleading requirement is unfair because it deprives meritorious plaintiffs of a *right*—the right of access to court.[163] This argument, however, begs a difficult question: Is there a *moral* right to access for individuals with meritorious civil claims? The right must be moral because a purely legal right provides no ground for objecting to conditions that the law imposes on the right.

One might try to anchor this right in respect for individual dignity by invoking the dignitary theory of process value.[164] But obviously any right supported in this way must make room for reasonable procedural limitations; otherwise, no procedural system could operate at all effectively. Therefore, it is not enough to criticize stricter pleading simply on the ground that it denies access. The critic must be prepared to explain why the standard is not a reasonable limitation on the right of access if it makes the procedural system work more effectively overall by screening meritless suits.

In addition, respect for individual dignity applies equally to defendants and plaintiffs. This insight has several important implications. For one, if respect for the defendant's dignity requires a plaintiff to give legitimate reasons, as the previous Section argued, then plaintiff's right to access must be balanced against defendant's right to reasons, and it is possible that *Twombly*'s plausibility standard strikes the morally appropriate balance.

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162. *See, e.g.*, Hoffman, *supra* note 4, at 1261–64; Spencer, *supra* note 4, at 433.

163. The Supreme Court has recognized a "fundamental constitutional right of access to the courts." Bounds v. Smith, 430 U.S. 817, 828 (1976). However, this constitutional right is limited and usually requires that the lawsuit involve a "fundamental interest." *See* TRIBE, *supra* note 6, at 1008; Michelman, *supra* note 6, at 1169.

164. *See supra* notes 141–43 and accompanying text. Or one might try to anchor it in the conditions for political legitimacy. But legitimacy in turn can be grounded in respect for persons. *See, e.g.*, Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 2), 1974 DUKE L.J. 527, 539, 552–53, 556–57 (arguing that "all citizens by virtue of their citizenship have a 'fundamental interest' in access" to courts no matter what substantive right they allege and regardless of whether extrajudicial remedies exist).

Moreover, even pleading requirements stricter than plausibility might be justified on balancing grounds, but with a somewhat different moral balance. Intentionally filing a meritless suit out of spite or to force an unjustified settlement offends a defendant's dignity in much the same way an intentional tort does: the plaintiff intentionally harms the defendant. This means that a procedural system must balance two moral rights: the defendant's right to be free from intentionally filed meritless suits and the plaintiff's right of access to file a meritorious suit. A strict pleading rule designed to screen meritless suits might be a morally acceptable way to strike this balance.

To be sure, stricter pleading treats plaintiffs who do not have access to information less favorably than plaintiffs who do have access. However, the disadvantaged plaintiffs are not targeted for special treatment. The burden results from the general application of a rule that is itself justified on procedural grounds. Many procedural rules share this feature. When limits on discovery create errors, for example, it is because the plaintiff who is denied additional discovery is unable to obtain information in the possession of the defendant, and when summary judgment terminates a lawsuit that should go to trial, it is often because the plaintiff lacks evidence in the possession of the defendant that is needed to fill a gap in the prima facie case.[165]

In sum, two major points emerge from this process-based fairness analysis. First, there is a serious argument that *Twombly*'s plausibility standard can be justified by fairness as reason-giving consistent with a proper balance of fairness principles. It is important to see, however, that this process-based fairness argument supports only a thin plausibility standard along the lines that I argue the *Twombly* Court intended.[166] All the defendant is entitled to receive is some reason why his situation is special enough to require a defense. This is satisfied by allegations of conduct outside the normal baseline and supporting a higher-than-background probability of wrongdoing.

Second, it follows that fairness does not have strong or obvious implications for pleading standards that require more factual detail than thin plausibility. These stricter pleading standards aim to screen undesirable lawsuits in order to prevent unjustified settlements and reduce litigation costs. As such they must be evaluated on outcome-based grounds.

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165. One might argue that strict pleading is different from these examples because it denies access altogether and thus deprives a meritorious plaintiff of any opportunity to obtain relief. But this is incorrect. As I explain later, many plaintiffs who cannot sue because of strict pleading can still use the threat of filing as leverage for a pre-filing settlement. *See infra* notes 223–26 and accompanying text. To be sure, the pre-filing settlement is likely to fall short of full compensation, but that is true for post-filing settlements as well.

166. *See supra* Part II.B.

B. Stricter Pleading and Case Screening from an Outcome-Based Perspective

This Section analyzes the use of pleading standards to screen undesirable lawsuits. These standards include those that demand greater factual specificity than thin plausibility, and they also include plausibility itself, insofar as plausibility cannot be defended on process-based fairness grounds and therefore must be justified by its efficacy in achieving outcome-based case-screening goals.

The following discussion develops an outcome-based analysis. It first focuses on the choice of a suitable metric for evaluating outcome quality, and distinguishes between utilitarian and rights-based approaches. It then addresses the difficult, but fundamental, question of which lawsuits to screen; in other words, the problem of defining the "undesirable" suit. With this background in place, the discussion turns to an analysis of the costs and benefits of different case-screening approaches, comparing strict pleading with other options.

1. Choosing an Outcome-Based Metric

Outcome-based theories evaluate procedural rules according to the quality of the outcomes they make possible. Strict pleading furthers outcome quality by screening undesirable lawsuits. (In this Section, I refer to suits that should be screened as "undesirable lawsuits" to pitch the discussion at an appropriate level of generality, and I address the definition of "undesirable" in Section B.2 below.[167]) Strict pleading, however, is not the only screening method; there are others, such as penalties, fee-shifting, summary judgment, and pre-filing merits screening. All these methods must be evaluated and compared under an outcome-based approach, and the metric for evaluation depends on whether the outcome-based theory is utilitarian or rights-based.

a. Utilitarian

The utilitarian theory—or more precisely the law-and-economics version of utilitarianism—evaluates procedural rules by how well they balance social benefits and costs in the aggregate. The optimal rule from among a set of feasible alternatives is the rule that maximizes expected social benefit net of costs, or what is equivalent, minimizes the total of expected social costs.[168] The social costs that matter for a procedural rule are the costs

167. *See infra* notes 185–94 and accompanying text.

168. This is an application of the Kaldor–Hicks efficiency criterion. *See generally* Allan M. Feldman, *Kaldor-Hicks Compensation*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 417 (Peter Newman ed., 1998) (describing Kaldor–Hicks efficiency analysis). It is quite common in the procedure literature to associate "efficiency" with reducing litigation costs and deterring frivolous suits, and "fairness" and "justice" with facilitating court access and expanding litigation opportunities for meritorious plaintiffs. *See, e.g.*, Spencer, *supra* note 73, at 22 (discussing efficiency and entitlement to relief); *cf.* Hoffman, *supra* note 4, at 1218–19

of error operating with the rule (expected error costs) and the costs of administering the rule (expected process costs).[169]

As for error, any case-screening device is inevitably imperfect; it lets some undesirable lawsuits pass through and screens some desirable lawsuits. Thus, any analysis of error costs for a case-screening device must consider two different types of error: failing to screen undesirable suits (a false positive), and screening desirable suits (a false negative). Moreover, what matters is the *expected cost* of error, which is the cost of an error[170] discounted by the probability it will occur.[171] To complicate matters a bit further, the cost of one type of error need not be the same as the cost of the other. A well-known example is from criminal law, where the cost of convicting the innocent (a false positive) is considered much more serious than the cost of acquitting the guilty (a false negative).[172]

Thus, the overall objective of a utilitarian approach is to select the case-screening rule or combination of rules that minimizes the total sum of expected social costs, including false-positive error costs, false-negative error costs, and process costs. Each component of the sum is an *expected* cost, meaning that it is the cost of the particular thing if it happens (i.e., a false-negative error, a false-positive error, or a motion and hearing applying the rule) discounted by the probability it will happen.[173]

(juxtaposing efficiency and access to court). This formulation of the policy tradeoff can be misleading if it is not handled carefully. An efficiency metric is as concerned for plaintiffs as it is for defendants. It aims, after all, to achieve a socially optimal balance among all the competing objectives. In particular, efficiency, like fairness, is inconsistent with a single-minded commitment to reducing litigation costs and frivolous suits. Such a commitment gives insufficient weight to the error costs of screening meritorious suits. Efficiency and fairness–justice support different metrics, of course, but the difference does not have to do with running roughshod over plaintiffs.

169. For a more detailed account of expected error and process costs and how to combine them to evaluate pleading rules, see ROBERT G. BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 125–49 (2003).

170. For example, both false-positive and false-negative errors dilute the deterrent effect of the substantive law, which increases social costs. Moreover, a very defective screening mechanism that allows lots of meritless suits in and keeps lots of meritorious suits out might lead to a loss of confidence in the court system, which could produce serious long-term costs if people resort to less peaceful means to settle disputes.

171. This is just an application of the general idea of expected utility or expected value. Formally, let r be the probability of an error and let c be the cost of the error. The expected error cost is $r \times c$. For a more extensive explanation of expected value, see BONE, *supra* note 169, at 20–36.

172. *See* Alexander Volokh, *N Guilty Men*, 146 U. PA. L. REV. 173, 174–77 (1997). Another example involves environmental risk, where the cost of characterizing a toxic chemical as harmless (false negative) is significantly greater than the cost of characterizing a harmless chemical as toxic (false positive). *See* Talbot Page, *A Generic View of Toxic Chemicals and Similar Risks*, 7 ECOLOGY L.Q. 207, 219–20 (1978) (discussing false positives and false negatives in the context of environmental risk).

173. The objective function to be minimized can be expressed mathematically as follows. Let r_{FN} be the probability of a false-negative error (screening of a desirable suit) and let c_{FN} be

Obviously it makes no sense on this view to object to a strict pleading or other screening rule on the sole ground that it screens desirable lawsuits, including suits in which the defendant actually violated the law and the plaintiff could prove it with access to discovery. It depends on how many desirable and undesirable lawsuits the rule screens, the relative costs of the two types of error, and the expected process costs of administering the rule. At least in theory, a strict pleading rule might be optimal even if it screened a large number of desirable suits.[174]

b. Rights-Based

Those commentators who reject the law-and-economics approach rely, if only implicitly, on a rights-based theory to condemn strict pleading.[175] A rights-based theory focuses on protecting individual rights rather than minimizing social costs in the aggregate.[176] The rights-based objection to

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the cost of a false-negative error. Let r_{FP} be the probability of a false-positive error (filing and litigation of an undesirable suit) and let c_{FP} be the cost of a false-positive error. Let s be the probability that whatever rule is in place will be invoked, thereby necessitating a motion, hearing, and the rest, and let c_{PC} be the process cost expended to apply the rule when the rule is invoked. The goal of an economic analysis is to choose the rule or approach that minimizes the following expression: $r_{FN} \times c_{FN} + r_{FP} \times c_{FP} + s \times c_{PC}$.

174. For a numerical example, suppose 30% of all potential lawsuits are undesirable (e.g., meritless) and 70% are desirable (e.g., meritorious). Suppose that a strict pleading rule screens 60% of the undesirable suits and 20% of the desirable suits, and assume the cost of allowing an undesirable suit (false positive) is 20 and the cost of screening a desirable suit (false negative) is 10. Finally, suppose defendants file motions to dismiss in 30% of the cases and that it costs 5 to deal with a motion when one is filed. With these assumptions, one calculates the expected cost of the strict pleading rule as follows. The probability of a false-negative error is 20% (the fraction of desirable suits that are screened) × 70% (the fraction of potential suits that are desirable) = 0.14. Similarly, the probability of a false-positive error is 40% (the fraction of undesirable suits that are not screened) × 30% (the fraction of potential suits that are undesirable) = 0.12. Therefore, $r_{FN} = 0.14$, $c_{FN} = 10$, $r_{FP} = 0.12$, $c_{FP} = 20$, $s = 0.3$, and $c_{PC} = 5$. The expected cost of the strict pleading rule is: $0.14 \times 10 + 0.12 \times 20 + 0.3 \times 5 = \underline{5.3}$. Compare this to the expected cost without strict pleading. Assuming no desirable suits are screened with very liberal pleading, the expected false-negative error costs are zero, and assuming all undesirable suits are filed and get past the pleading stage, the expected false-positive error costs are $0.3 \times 20 = \underline{6.0}$. Therefore, if the only choice is between a strict pleading rule and no strict pleading rule, the strict pleading rule wins, even though it screens 20% of desirable suits.

175. Unfortunately, proceduralists rarely explain their normative premises carefully, and this is true for those who criticize *Twombly* and strict pleading. Some *Twombly* critics frame the problem as a tension between achieving efficiency and guaranteeing access for meritorious plaintiffs to vindicate substantive rights. *See, e.g.*, Hoffman, *supra* note 4, at 1218–19, 1224–25 (discussing the balance between access and efficiency); Spencer, *supra* note 4, at 433, 479–83 (arguing that *Twombly* threatens open access values to achieve efficiency). Others simply note the risk of screening meritorious suits, apparently assuming that this alone is a sufficient ground for objection. *See, e.g.*, Ward, *supra* note 11, at 911 ("Using motions to dismiss as a mechanism to control litigation costs . . . may . . . bar[] legitimate meritorious claims."). To make sense of these arguments, it is best to interpret them as invoking a right on the plaintiff's side capable of pushing against economic efficiency and supporting a priority concern for plaintiffs.

176. For a developed argument defending a rights-based theory of procedure, see generally DWORKIN, *supra* note 159.

strict pleading is that it prevents meritorious plaintiffs from vindicating their substantive legal rights. Notice that this objection differs from its process-based counterpart by locating the violated right in the substantive law rather than a general right of access to court and by defining the violation in terms of the outcome rather than the way the process itself treats litigants.

The fact that plaintiffs have trouble vindicating their substantive rights, however, is not by itself enough to condemn strict pleading or any other case-screening device on rights-based grounds. For one thing, the plaintiff is not the only party with a legal right. The defendant also has a right to be free from liability when the substantive law so provides. It follows, therefore, that if a moral wrong occurs when a meritorious plaintiff's legal right is not vindicated, a moral wrong must also occur when a defendant is forced into court by a meritless plaintiff and held liable or pressured to settle unfairly.[177] If these two wrongs have the same moral weight, it is not appropriate to protect the plaintiff's right exclusively at the expense of tolerating meritless suits that infringe the defendant's right.[178]

Furthermore, the argument proves too much. If a moral wrong occurs whenever a substantive right is not vindicated, all procedural systems would be morally defective because all systems are prone to at least some error.[179] And society would be morally committed to preventing all errors no matter how high the cost—an obviously absurd result.

Therefore, both types of error—screening desirable suits and inviting undesirable suits—matter to a rights-based approach, just as they matter to a utilitarian approach. However, the two types of error need not be balanced in the same way. The key is to probe behind the substantive right to its underlying justification. If a substantive legal right aims to protect interests that are valued in moral terms, the failure to vindicate the particular right is a cost that must be measured in moral terms as well.

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177. A settlement can be unfair or unjust to a defendant even though the defendant gave his consent. Consent cannot validate a settlement when the background conditions that produce the consent are themselves normatively flawed. For more on this point, see Bone, *supra* note 135, at 1981–85.

178. There is a difference, however, between how a false negative and a false positive work in this argument, which might complicate the point a bit. A false negative denies access to an entitled plaintiff and thus absolutely prevents her from vindicating her substantive right through adjudication. A false positive, on the other hand, simply imposes a risk of unjustified liability; the defendant can still win in the end. To be sure, the innocent defendant is forced to defend a lawsuit, but it is not clear that this is a moral wrong if his legal entitlement is a right to be free from liability as opposed to a right to be free from suit. *Cf.* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (distinguishing an immunity from a substantive defense, noting that "[qualified immunity] is an *immunity from suit* rather than a mere defense to liability"). Nevertheless, the defendant is also pressured to settle, and if the pressure is intense enough, it is not clear why paying the unjustified settlement is morally different from failing to gain access on plaintiff's side.

179. *See generally* DWORKIN, *supra* note 159 (making this point about procedural rights).

Suppose, for example, that a plaintiff files a § 1983 claim against state officials for violation of her First Amendment right to freedom of speech.[180] Many people assign substantial moral weight to constitutionally protected interests, including, and perhaps especially, the interests protected by the First Amendment. Moral interests have the property that they are not easily outweighed by ordinary costs lacking moral weight. The First Amendment right, for example, is generally understood to prevent a state legislature from banning speech even if the ban would make so many people better off that aggregate welfare would increase substantially as a result.[181]

It follows that a false negative—the erroneous screening of a plaintiff's meritorious First Amendment-based claim—creates a cost measured in moral terms, and this cost cannot be easily outweighed, in the usual utilitarian sense, by ordinary false-positive and process costs even if the latter are substantial. Unless a false positive implicates substantive interests on the defendant's side with comparable moral weight, the error–risk balance should favor the plaintiff.

Rights-based balancing might generate the same result as utilitarian balancing, but it also might not. For example, many courts and commentators believe that meritless § 1983 suits chill aggressive, yet lawful, action by state officials and discourage talented individuals from seeking government positions.[182] If these costs are substantial enough and the risk of meritless filings large enough, utilitarian balancing could support a strict pleading rule for constitutional claims.

The matter looks quite different, however, from a rights-based perspective. The moral weight behind the plaintiff's constitutionally protected interest creates a prima facie right to litigate a meritorious § 1983 claim. To be sure, this prima facie right can be rebutted. But a rights-based analysis, unlike its utilitarian counterpart, requires more than a modest improvement in aggregate welfare to do so.[183]

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180. Section 1983 here refers, of course, to 42 U.S.C. § 1983, which provides the remedial vehicle for individuals to sue state officials who violate their constitutional rights. 42 U.S.C. § 1983 (2000).

181. This is captured doctrinally by the strict scrutiny test that requires a compelling state interest. *See* CHEMERINSKY, *supra* note 6, at 541–42.

182. *See* Anderson v. Creighton, 483 U.S. 635, 638 (1987) ("Permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties."); Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 SUP. CT. REV. 281, 305–15 (describing various ways that the risk of personal liability can chill government officials from acting in the public interest). *But see* Jack M. Beermann, *A Critical Approach to Section 1983 with Special Attention to Sources of Law*, 42 STAN. L. REV. 51, 95 (1989) (noting the absence of reliable empirical evidence to support concerns about chilling government officials).

183. This is one way to understand the Court's reasoning in *Goldberg*. Goldberg v. Kelly, 397 U.S. 254 (1970) (a procedural due process, not First Amendment, case); *see also* Fuentes v. Shevin, 407 U.S. 67, 90 n.22 (1972) (noting in a procedural due process case that "ordinary

This brief account leaves many philosophical questions unanswered, and this Article is not the place to explore them with care. The discussion in this Section is sufficient to highlight four points needed for the analysis of regulatory options in Parts IV.B and IV.C below. First, even a rights-based approach must consider both types of error. Second, rights-based balancing is likely to support a weaker screen that tolerates more undesirable suits than utilitarian balancing, at least when moral interests are at stake on the plaintiff's side. Third, rights-based balancing is not necessarily appropriate for all lawsuits; it depends on whether there is a substantive interest at stake that has moral weight.

Fourth, rights-based balancing has implications for an equality constraint. Just as one should compare moral stakes on both sides of the party line, one should also compare moral stakes across different lawsuits. This means that scarce process resources should be allocated to produce an error-risk distribution that is roughly proportional to the importance of the different moral interests at stake.[184] If the moral importance of freedom of speech, for example, greatly exceeds the moral importance of being free from property damage, procedures should be designed to produce a substantially lower risk of false-negative error in free speech cases than in property damage cases. Thus, the optimal mix of cases entering the litigation system is the mix that results from giving proper weight to each of the moral interests at stake.

2. Defining the "Undesirable" Suit

To recap the argument so far, I began by showing that a thin plausibility standard of the sort the *Twombly* Court endorses might be justified on

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costs cannot outweigh [a] constitutional right" to a hearing and that "procedural due process is not intended to promote efficiency or accommodate all possible interests: it is intended to protect the particular interests of the person whose possessions are about to be taken").

184. *See* DWORKIN, *supra* note 159. This equality constraint needs more careful elaboration, but the simple formulation in the text is sufficient for our purposes. The general idea is that a procedural system should care more about outcome errors when the moral harm from those errors is more serious, and therefore invest more in preventing errors associated with more serious moral harms. However, it would be absurd if the equality constraint demanded that scarce process resources be funneled exclusively to those lawsuits that have moral stakes and away from those that do not. Professor Dworkin's theory, which derives ultimately from a background right to treatment as an equal, *id.* at 84–85, avoids this problem by assuming that all outcome errors produce moral harm no matter what substantive law is involved. The moral harm inheres in the denial of a substantive legal right itself (plaintiffs and defendants have mirror-image rights in Dworkin's theory). *Id.* at 80–81. The seriousness of this moral harm, however, depends on how the legal system as a whole values the type of substantive interest at stake, which in turn depends on how much the legal system is willing to invest to protect that interest. *Id.* at 93–98. The result is a requirement similar to the one I describe in the text: every procedural system must distribute the risk of error consistent with the best theory of moral harm embedded in the legal system as a whole. This means that the error-risk distribution must respect the relative weight of moral harm as between litigants in the same lawsuit and among litigants in different types of suits.

process-based fairness grounds, but that any rule requiring more factual detail must be justified, if at all, on outcome-based grounds, as a device to screen undesirable suits. From an outcome-based perspective, however, there is no reason to focus exclusively on strict pleading. In particular, a utilitarian should choose whatever regulatory approach achieves the minimum of expected error costs plus expected process costs. And a rights-based proponent should choose whatever regulatory approach achieves the best distribution of error risk in light of the moral nature of the substantive interests at stake.

The remainder of this Article applies these two metrics to chart a roadmap for designing optimal case-screening rules, and along the way identifies the most salient factors to consider.[185] This analysis has a lesson for district judges who are tempted to interpret *Twombly*'s plausibility standard strictly. Whether strict pleading should be used as a screening tool involves complex normative, empirical, and analytical issues. For this reason, there is a danger that district judges who use strict pleading to handle case backlog and frivolous suits will only make matters worse. It is much better to leave the policy analysis to the Advisory Committee and the formal rulemaking process than to try to fashion rules on a case-by-case basis.

Before delving into the analysis in depth, it is essential first to define as precisely as possible what constitutes an "undesirable lawsuit" that should be screened.[186] The following addresses this threshold question.

Virtually everyone can agree that truly meritless suits are undesirable, but what constitutes a truly meritless suit is far from obvious. The clearest example is a case in which the true state of affairs plainly shows that the defendant is not legally responsible. In these cases, the liability gap is created by a missing fact, the existence of which is decidable on purely descriptive grounds. For example, suppose the plaintiff claims she slipped on a puddle of water that the defendant carelessly failed to remove, when in fact there was no puddle of water and she tripped on her shoelaces instead. The true state of affairs in this example is missing a fact necessary to liability. For another example, suppose the plaintiff alleges that the defendant failed

185. The discussion in Parts IV.B.3 and IV.C builds on my previous work in this area. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 529–37 (1997).

186. Unfortunately, this definitional question is all too often ignored in discussions of case screening, despite its pivotal importance. *See* Warren F. Schwartz & C. Frederick Beckner III, *Toward a Theory of the "Meritorious" Case: Legal Uncertainty as a Social Choice Problem*, 6 GEO. MASON L. REV. 801, 801 (1998) (noting the lack of careful attention to the question). Moreover, those commentators who do attend seriously to the issue vary in how they define the set of lawsuits that should not be brought, with some adopting definitions that include suits with substantial merit. *See, e.g.*, David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 INT'L REV. L. & ECON. 3, 3 (1985) (including in the category of nuisance suits some that have merit but that the plaintiff would not take to trial because the litigation costs exceed the expected recovery); Schwartz & Beckner III, *supra*, at 816–19 (arguing on the basis of social choice theory for a 50% probability of success as the proper merits threshold).

to perform an express agreement when in fact the defendant had absolutely no dealings with the plaintiff that could possibly create an agreement. Again, the defendant's innocence turns on a fact that, in theory at least, can be verified objectively with sufficient information.

Cases turning on the application of standards such as reasonable care are not as easy to classify. For example, suppose the plaintiff claims that the defendant failed to notice an icy patch while driving. Whether the defendant exercised reasonable care cannot be determined categorically in the same way that factual matters can. The decision requires judgment even when all relevant information is available to the decisionmaker. It is still possible, however, to define a meritless suit in this situation. A suit is meritless if it is clear that no reasonable (or perhaps rational) decisionmaker considering all available information could possibly find that the defendant failed to meet the standard.[187] In the icy roadway hypothetical, for example, the evidence might clearly show that the defendant driver was attentive and the icy patch hidden completely from view.

This leaves cases in which the evidence is not as clear, so the determination of liability involves a range of reasonable judgment. None of these cases should be classified as meritless. Yet some of them will present a stronger case for violating the applicable negligence standard than others when all of the existing information is considered. In the icy roadway example, the case for a violation would be very strong if the evidence showed that the icy patch was plainly visible and the driver failed to notice it because he was adjusting the car radio. The case would be much weaker (but not meritless) if the evidence showed that the icy patch was somewhat obscured from view but still visible with sufficient effort.

If one adopts a utilitarian perspective, it is possible to justify treating some of these cases as undesirable even though they are not meritless. An undesirable lawsuit, according to this view, is a lawsuit where the probability that a fully informed decisionmaker would find a violation of the standard falls below some threshold level. A utilitarian can support a threshold significantly above zero because of the high costs of the litigation system.[188] A rights-based proponent, however, should have considerable difficulty defending a threshold above zero when the meritorious plaintiff's substantive right implicates weighty moral interests that are not matched on

187. This is, of course, the test for summary judgment, but assessed objectively on the assumption that all the information is available to the decisionmaker, not just whatever information the parties have been able to obtain.

188. As the threshold is set higher, the cases that enter the system have a greater chance of liability and thus a stronger claim on scarce private and public litigation resources. *See, e.g.*, Keith N. Hylton, *When Should a Case Be Dismissed? The Economics of Pleading and Summary Judgment Standards*, 16 SUP. CT. ECON. REV. 39, 41 (2008) ("[E]arly dismissals, by eliminating low-merit claims before they become costly, offer benefits to society in comparison to late dismissals."); *see also* Schwartz & Beckner III, *supra* note 186, at 816–19 (using social choice theory to justify setting the threshold at 50%).

the defendant's side.[189] Moreover, any system of adjudication like ours that relies on judges to develop new substantive law must be careful about screening meritorious suits. A case might appear weak at first but end up producing a novel legal precedent.[190]

The *Twombly* opinion illustrates the importance of defining undesirable lawsuits clearly. The Court refers to a "'largely groundless claim,'" "anemic cases," and cases "with no 'reasonably founded hope that the [discovery] process will reveal relevant evidence.'"[191] These references can be construed as encompassing not only meritless suits but also meritorious suits where the merits are "anemic" and the claim "*largely* groundless."[192] If this is the correct interpretation, the plausibility standard should be construed as a merits threshold; in other words, the complaint would have to show a plausible chance of success at trial.

If this is what the Court has in mind, it has entered treacherous territory. The normative stakes involved in screening meritorious suits are complex and highly contested. This favors a decisionmaking process that is more open to broad-based public input and more conducive to debate than case-by-case adjudication. In addition, the Court is not well suited to set an optimal merits threshold. The task requires global information on social costs and benefits, statistical and economic expertise, and a systemic approach not available through individual case adjudication. As a result, any effort to screen meritorious cases is better left to formal rulemaking or to the legislative process.

One can, however, interpret *Twombly*'s plausibility standard as focusing exclusively on meritless suits. Understood in this way, the standard is not a merits threshold, but rather an epistemological threshold. Plausibility is the Court's way of expressing the level of confidence that a judge must have in deciding that a suit is meritless. This interpretation better fits the Court's opinion. Recall that the Court meant its plausibility standard to be quite generous and made a point of stating that heightened pleading was for the

189. I do not mean to suggest that a rights-based proponent would never set a threshold above zero. Process costs and false-positive error costs matter in a rights-based theory, and if these costs are sufficiently serious, a rights-based proponent can support a strictly positive screening threshold too. Before doing so, however, she would demand a high risk of very serious costs and reliable information confirming that risk.

190. One might cite *Brown v. Board of Education*, 347 U.S. 483 (1954), as an example. Of course, the judge has a chance to develop new law at the motion to dismiss stage when she evaluates the strength of the case in light of the legal standards. However, she would not have this chance if a screening device prevents filing, and even if she does, her decision might benefit from exposure to more information than is available at the pleading stage.

191. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1966–67 (2007) (quoting Dura Pharms., Inc. v. Broudo, 544 U.S. 336, 347 (2005)).

192. *Id.* (emphasis added).

formal rulemaking process or for Congress.[193] Moreover, screening meritorious suits on the ground of high litigation costs is hard to square with the Court's rights-based views in other areas.

In keeping with the previous discussion, I shall define an "undesirable suit" as a meritless suit and define a meritless suit as one in which the defendant is clearly not liable as an objective matter.[194] This definition should be relatively uncontroversial and it is consistent with what I believe is the best interpretation of *Twombly*. It is worth bearing in mind, however, that much of the following analysis can be applied equally well to undesirable lawsuits defined to include meritorious suits that fall below a merits threshold.

A caveat is in order before proceeding further. We actually know very little about meritless litigation. There is an intense and widespread perception among judges, lawyers, and scholars that it is a serious problem, but reliable empirical studies are hard to come by.[195] The following discussion assumes that a problem exists and examines the regulatory alternatives for dealing with it. But if there is not a serious problem, obviously there is no reason to adopt costly regulations to fix it. Also, the paucity of empirical evidence affects the following discussion in another way. It means that the analysis must rely heavily on theory, especially game-theoretic tools, to predict causes and effects.

3. Analyzing the Regulatory Options

There are two general approaches to dealing with the problem of meritless filings. One approach targets the causes of the problem, while the other targets the symptoms. The following discussion first explains why targeting causes is likely to be unsuccessful and then examines approaches like strict pleading that target symptoms by screening meritless suits.

a. Targeting Causes

The *Twombly* Court assumes that the cause of meritless filings is asymmetry of discovery costs and the settlement leverage it confers.[196] When the defendant has a great deal of information relevant to liability and the

193. *Id.* at 1973 n.14. It also fits what the Court says about the importance of judges not making predictions of likely trial success at the pleading stage. *Id.* at 1965 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" (citation omitted)).

194. *See* Bone, *supra* note 185, at 533 (providing a more in-depth discussion of how to define frivolous suits).

195. *See* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1851 n.3 (2004) (citing empirical studies and noting a "general consensus that a problem exists" but also emphasizing the "paucity of empirical research substantiating its extent").

196. *Twombly*, 127 S. Ct. at 1967.

plaintiff has very little—as was true in the *Twombly* case and is true for many of the cases that prompt meritless suit concerns—the plaintiff can threaten to impose high discovery costs without having to worry that the defendant will reciprocate. Faced with a credible threat of incurring substantial discovery costs, the defendant will choose to settle rather than bear the expense.[197]

One or another version of this explanation is widely shared, and it has a superficial plausibility. If it were true, one obvious way to treat the problem would be to reduce discovery cost asymmetry by limiting discovery—although this is difficult to do effectively as the *Twombly* Court itself recognized.[198] The fact is, however, that this account explains only part of the meritless suit problem, and probably not a very substantial part at that. There is strong reason to believe that informational asymmetry is a much more important cause.

To understand why, let us consider a case with symmetric information and see if it is possible to explain meritless filings on the basis of asymmetric costs. Symmetric information means that both the plaintiff and the defendant know the suit is meritless. Because the suit is meritless, it can succeed at trial only if the factfinder makes a mistake. Assuming the chance of a mistake is small, the likelihood of recovery should be too small in most cases for a rational plaintiff to be willing to incur the cost of litigating through trial.[199] Thus, if the defendant can make a credible threat to try the case, he should simply refuse to settle, confident that the plaintiff will drop the suit. Anticipating this response from the defendant, the plaintiff will not file in the first place. The fact that discovery costs are substantial and asymmetrically distributed makes no difference because a rational plaintiff will never go through the discovery stage.[200]

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197. *See generally* Chris Guthrie, *Framing Frivolous Litigation: A Psychological Approach*, 67 U. CHI. L. REV. 163, 165 (2000); Rosenberg & Shavell, *supra* note 186.

198. *Twombly*, 127 S. Ct. at 1967. The limits might be imposed by general rule, but that approach has problems as well. *See* Bone, *supra* note 135, at 2006–11.

199. Throughout the rest of the analysis, I use the standard economic model of litigation. *See, e.g.*, BONE, *supra* note 169, at 30 (noting that the standard economic model is sometimes referred to as the Landes–Posner–Gould model); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 481 (1988). That model assumes that the parties are rational and make decisions by considering their expected benefits and costs. An expected benefit or expected cost is just the benefit or cost discounted by the probability it will materialize. *See supra* note 171 (explaining expected value). For example, the plaintiff's expected benefit from filing suit is the likely trial award discounted by the probability of success at trial, and her expected cost is the cost of litigating. A plaintiff will file suit if the expected benefit exceeds the expected cost. This can be expressed mathematically as follows. Let p be the plaintiff's probability of trial success, w be the likely trial award if the plaintiff is successful, and c be the plaintiff's anticipated cost of litigating through trial. The plaintiff will file suit if $p \times w > c$. When this condition holds, the lawsuit has positive expected value and is known as a PEV suit. When the inequality is reversed, the lawsuit has negative expected value and is known as a NEV suit.

200. *See* BONE, *supra* note 169, at 19–20.

This line of reasoning assumes, however, that the defendant can make a credible threat to take the case to trial. Defenders of the cost-asymmetry explanation challenge this assumption. They argue that a defendant cannot make a credible threat because he is better off paying a nuisance settlement after the complaint is filed as long as the settlement amount does not exceed the cost of responding to the complaint. In equilibrium, therefore, plaintiffs with meritless suits will file as long as what they expect in settlement exceeds their cost of filing, and when they do file, they will receive a nuisance settlement up to the amount of defendant's response costs.[201] There is a serious problem with this argument, however. As I have explained elsewhere, because a defendant can force a meritless plaintiff to invest more in the litigation simply by filing an answer, it is not clear how this argument predicts anything more serious than small nuisance settlements capped at defendant's cost of answering, settlements that might even be too small to justify the expense of regulatory intervention.[202]

The result is different when the plaintiff can make a credible threat to take the case through discovery and trial because of a very large risk of error or extremely high stakes. To illustrate, consider a large class action, like the *Twombly* case, and assume that it is meritless. Also assume that the total expected classwide recovery if the defendants are held liable is $50 million and that it would cost $2 million to litigate the case through trial. If the class attorney makes litigation decisions in the best interests of the class as a

201. *See, e.g.*, Rosenberg & Shavell, *supra* note 186 (constructing a formal model that incorporates this strategic interaction).

202. *See* Bone, *supra* note 185, at 537–41 (discussing several limitations of the argument). Indeed, there is no apparent reason to believe that the cost of filing an answer will exceed the cost of filing a complaint, which is a necessary condition in this model for a meritless filing to be profitable in the first place. Also, in cases where both sides know a suit is meritless, repeat-play defendants can benefit from building a reputation for fighting meritless suits, which deters future meritless filings. One might wonder why the defendant's response costs do not include more than the cost of an answer. The reason is that filing an answer forces the plaintiff to invest more in the lawsuit and a meritless plaintiff will not invest more unless she expects a large enough settlement to cover all her costs at a later stage of the litigation. Professor Lucian Bebchuk has modeled this dynamic. *See generally* Lucian Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEGAL STUD. 1 (1996). He shows that if there are enough separate stages of a lawsuit and total litigation costs are divided among the different stages in the right way, it is possible for the plaintiff in an NEV suit to make a credible threat to take the case all the way through trial. *Id.* The analysis relies on backward induction and is somewhat complicated. *Id.* There is no need to explore it, however, because it is very unlikely to apply to a truly meritless suit or to produce substantial settlements even when it does. *See* Bone, *supra* note 185, at 539 n.73 (arguing that a frivolous plaintiff will have a hard time presenting a credible threat at every stage of litigation). *See generally* Joseph A. Grundfest & Peter H. Huang, *The Unexpected Value of Litigation: A Real Options Perspective*, 58 STAN. L. REV. 1267, 1299–1305 (2006) (describing an option model of litigation that can explain negative-expected-value suits but does not clearly explain truly meritless suits that have tiny variance and that both parties know have no trial value).

whole, the attorney should be willing to take the case to trial whenever the risk of error at both summary judgment and trial exceeds 4%.[203]

In this example, the filing incentive does not depend on asymmetric costs; it depends on unusually high error or large stakes.[204] No doubt some meritless filings can be explained in this way. Still, the conditions that make this explanation viable are not easy to satisfy for a truly meritless suit, especially when judges are strict about insisting that the plaintiff submit admissible evidence to get past the summary judgment stage. Given the definition of a meritless suit, it is hard to imagine how a plaintiff could find enough evidence to support a prima facie case.[205]

More generally, it is difficult to construct a convincing account of filing and litigation incentives that points to asymmetric discovery costs as the cause of most meritless filings. Targeting asymmetric costs, therefore, is not likely to be all that productive.

The key to explaining much of meritless litigation is to introduce asymmetric information about the merits at the pleading stage. The analysis so far assumed that plaintiffs and defendants both know the suit is meritless,

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203. The numbers work out as follows. With an error rate of 4%, the expected classwide recovery is 0.04 × $50 million, or $2 million, exactly equal to the expected litigation costs. Thus, anything in excess of 4% yields a positive expected value from taking the case to summary judgment and then on to trial. The result changes if the class attorney makes the decisions in her self-interest, because the attorney expects only a fraction of the total recovery. The typical class attorney fee is 25% of class recovery. *See* Theodore Eisenberg & Geoffrey Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 57–65 (2004). When the attorney expects 25% of the recovery and litigation costs are $2 million, litigation is cost-justified for any error rate in excess of 4% only if the expected recovery exceeds $200 million (0.04 × 0.25 × $200 million = $2 million). Alternatively, litigation is cost-justified when expected recovery is $50 million and litigation costs are $2 million only if the error rate exceeds 16% (0.16 × 0.25 × $50 million = $2 million).

204. Filing might also occur when the plaintiff is motivated by revenge or her attorney is overly optimistic about her ability to trick a jury. But it is difficult to imagine a level of optimism sufficiently high or a desire for revenge sufficiently strong to make it worthwhile to try a case that the attorney knows is meritless. Another way in which trial can become a credible threat for a meritless suit is if the plaintiff's attorney develops a reputation for taking meritless suits to trial. *See* Amy Farmer & Paul Pecorino, *A Reputation for Being a Nuisance: Frivolous Lawsuits and Fee Shifting in a Repeated Play Game*, 18 INT'L REV. L. & ECON. 147 (1998). But the conditions that make reputation work in this way can be difficult to sustain in practice.

205. In general, for a suit to be meritless, the plaintiff must have no admissible evidence of an essential element of her prima facie case, or the defendant must have a clearly decisive affirmative defense. In the former situation, it is difficult to see how the plaintiff could get past summary judgment without admissible evidence. In the latter situation, the defendant should be able to prevail on summary judgment if his evidence supports only one reasonable conclusion. In an antitrust conspiracy case like *Twombly*, for example, the plaintiff must offer evidence of conspiracy above and beyond parallel conduct in order to avoid summary judgment, and it is not clear what evidence a meritless plaintiff could provide. The plaintiff might have a better chance if the judge were less strict about admissible evidence and willing to exercise her discretion to deny summary judgment even when all the requirements are satisfied. *See generally* Jack H. Friedenthal & Joshua E. Gardner, *Judicial Discretion to Deny Summary Judgment in the Era of Managerial Judging*, 31 HOFSTRA L. REV. 91, 104–05 (2002).

and this assumption is critical to the results. Since the plaintiff knows, she is not willing to go to trial (unless the case is one with unusually high error or stakes), and since the defendant knows, he can call the plaintiff's bluff.[206] By contrast, when at least one party does not know the suit is meritless, filing becomes much more attractive because then meritless suits sometimes obtain substantial settlements.[207]

It is extremely difficult, however, to cure informational asymmetries. The obvious method is to use discovery, but the problem, as the *Twombly* Court recognized, is that defendants are likely to settle before much discovery takes place.[208] And the more discovery one allows, the higher the costs and the greater the pressure to settle. Thus, targeting causes is not likely to be a very successful strategy.

b. Targeting Symptoms

Targeting symptoms means screening meritless suits, and there are two general ways to do this. One is to employ a gatekeeping rule, like strict pleading, which conditions access to court directly.[209] The other is to employ an incentive-shaping rule, like Rule 11 penalties or fee-shifting, which applies later in the litigation and works by reducing the expected payoff from a meritless suit.[210]

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206. Professor Paul Stancil has developed a model that he claims shows how discovery cost asymmetries can produce meritless filings even when both parties know that the suit is meritless. Paul J. Stancil, *Balancing the Pleading Equation* 30–52 (Univ. of Ill. Coll. of Law, Law & Econ. Research Paper Series, Research Paper No. LE08-018, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1266323. Professor Stancil sharpens our understanding of the problem by clearly separating informational asymmetries from cost asymmetries and by proposing a bifurcated approach to pleading standards. His model, however, seems to assume that a meritless plaintiff can make a credible threat to litigate to summary judgment simply because the defendant cannot exit the lawsuit until the summary judgment stage. But this assumption ignores how the strategic imposition of costs bilaterally and sequentially can undermine the credibility of a meritless plaintiff's threats. *See supra* note 202. It is possible that the model assumes a cost-free stage for the plaintiff, but cost-free stage models have difficulty explaining the filing of truly meritless suits because there is not likely to be a cost-free stage sufficiently late in the litigation to support a substantial settlement. *See* Bone, *supra* note 185, at 539 n.73.

207. *See infra* note 212–13 and accompanying text.

208. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1967 (2007).

209. For a classic analysis of gatekeeping, although not in the context of litigation, see Reinier Kraakman, *Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy*, 2 J.L. ECON. & ORG. 53, 53 (1986) (discussing "gatekeeper liability" as a regulatory device). In our situation, the gatekeeper is the judge, who prevents a meritless filing by checking for it at the pleading stage, and gatekeeping rules assist the judge in this task. *See id.* at 54 (defining a gatekeeper).

210. In a sense, all screening rules shape incentives. The difference is that a gatekeeping rule screens cases directly at the pleading stage while an incentive-shaping rule works indirectly by affecting the payoff.

1. Gatekeeping Rules

Information about the merits can be asymmetrically distributed in two different ways. The plaintiff might know the suit lacks merit while the defendant does not, or the defendant might know while the plaintiff does not.[211] The strategic dynamics are different between the two, but the reason meritless plaintiffs sue is the same. They believe that there is a significant chance they will receive the same settlement meritorious plaintiffs receive. The reason is simple. When the defendant decides to settle but does not know who is meritorious and who is meritless, he cannot adjust his offer to the type of suit, so he makes the same offer to meritless and meritorious plaintiffs alike.[212] When the information asymmetry is reversed and the meritless plaintiff does not know that her suit is meritless, she believes that her suit could be meritorious and as a result expects the settlement due a meritorious plaintiff with some probability.[213]

The first type of informational asymmetry—informed plaintiffs and uninformed defendants—can be difficult to handle with gatekeeping rules. For example, any device that relies on input from the defendant, such as a merits review at the filing stage, is not likely to work well because the defendant lacks the information necessary to mount a successful challenge.[214] Devices that depend on increasing the cost of filing, such as

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211. Of course, a plaintiff who knows the suit is meritorious might try to persuade the uninformed defendant of that fact, and an informed defendant who knows the suit is meritless might do the same for the uninformed plaintiff. However, these efforts face serious obstacles because the other type—i.e., informed plaintiffs in meritless suits and informed defendants in meritorious suits—will mimic in an effort to trick the uninformed party into believing that they are the same and should receive a large settlement as well. Anticipating this, the uninformed party will discount the truth of any statements or representations made by the opposing side. *See, e.g.*, Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437, 442 n.8 (1988) (noting that parties cannot eliminate information asymmetry without incurring prohibitive costs); Steven Shavell, *Sharing of Information Prior to Settlement or Litigation*, 20 RAND J. ECON. 183, 183–84 (1989) (analyzing voluntary information sharing where plaintiffs possess information unknown to the defendant).

212. Developing a fighting strategy by refusing to settle does not work as well when information is asymmetrically distributed. *Cf. supra* note 202 (mentioning the possibility of a fighting strategy for symmetric-information cases). If the defendant does not know whether suit is meritless, he cannot confine his fighting strategy to meritless suits, so he will sometimes end up fighting a meritorious suit by mistake and pay litigation costs as a result. If the plaintiff does not know whether her suit is meritless, the defendant has to worry that fighting might backfire if the meritless plaintiff is sufficiently confident that her suit is meritorious. Defendants sometimes fight in these situations—but not always—and fighting generates additional litigation costs.

213. In fact, a defendant who wants to settle meritorious claims has no incentive to offer anything less than a meritorious plaintiff would accept because he knows that only meritless plaintiffs would accept the lower amount. *See* Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 INT'L REV. L. & ECON. 3, 9 (1990).

214. For example, some states have created medical malpractice panels to screen medical malpractice suits immediately upon filing. *See* Jean A. Macchiaroli, *Medical Malpractice Screening Panels: Proposed Model Legislation to Cure Judicial Ills*, 58 GEO. WASH. L. REV. 181, 188–97, 239–51

increased filing fees, will not discourage meritless suits as long as meritless plaintiffs expect settlements greater than the filing cost.[215] Moreover, substantial filing costs can create undesirable distributional effects if they disproportionately affect meritorious plaintiffs with little wealth, a result that is particularly troubling from a rights-based perspective committed to distributing error risk proportional to relative moral harm.[216]

Strict pleading is also a poor option. If the meritless plaintiff and her attorney are willing to file a suit they know lacks merit, they are probably unethical enough to concoct allegations to get past the pleading stage. Since the defendant is unaware the suit lacks merit, he will have trouble verifying the truth of these allegations and arguing convincingly at a dismissal hearing.

The second type of informational asymmetry—informed defendants and uninformed plaintiffs—is more suitable for gatekeeping rules. *Twombly* is an example of this type of case, since the defendants are likely to have private information bearing on the existence of a conspiracy. So too are other cases that prompt some of the most serious concerns about frivolous suits, including securities fraud, medical malpractice, and some civil rights litigation.[217]

A plaintiff might be uninformed in these cases because the cost of investigating before filing is too high. Even if the cost is reasonable, the plaintiff's attorney might file without investigating in the hope of settling before the discovery stage or learning about the merits more cheaply from the informed defendant's response. Of course, the defendant has an incentive not to reveal useful information when the suit is meritorious in the hope that the ignorant plaintiff will conclude (incorrectly) that her suit is

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(1990). It is significant, however, that medical malpractice suits usually involve informed defendants and uninformed plaintiffs.

215. The analysis is more complicated. One must compare the filing cost with the *expected* gain from a meritless filing, which is the amount of the settlement discounted by the probability an offer is made. *See* Katz, *supra* note 213, at 13–15.

216. *See supra* note 184 and accompanying text (discussing the distributional implications of a rights-based approach).

217. In fact, most of the empirical studies indicating a possible problem focus on substantive fields where the defendants are likely to be the informed parties. *See, e.g.*, Kozel & Rosenberg, *supra* note 195, at 1851 n.3 (collecting studies, including ones done for securities fraud and medical malpractice cases). For example, securities fraud plaintiffs are likely to have difficulty obtaining the information necessary to allege scienter. Antitrust plaintiffs suffer from similar problems, as *Twombly* itself illustrates. Also, in medical malpractice cases, the doctor is the one with knowledge about what he did or did not do. And those civil rights suits involving constitutional rights that feature defendant's intent as an element also fit this profile. *See, e.g.*, Crawford-El v. Britton, 93 F.3d 813, 817–18 (D.C. Cir. 1996) (involving a constitutional claim that turned on defendant's intent).

meritless, but there is a limit to this strategy's effectiveness when the plaintiff anticipates it in advance.[218]

Not all gatekeeping approaches are viable for this category,[219] but strict pleading is more promising in these cases than it is in the informed-plaintiff cases, even though it also has problems. Strict pleading screens meritless suits not just by giving the judge more detailed allegations to assess the merits, but also, and more importantly, by encouraging attorneys to investigate before filing. When the plaintiff's attorney investigates and discovers that the suit lacks merit (and knows that the defendant also knows), the informational asymmetry is removed, and along with it, the information-based incentive to file a meritless suit.[220] It is possible that the attorney will simply fabricate the allegations, but in these cases, unlike those with informed plaintiffs and uninformed defendants, the defendant knows the truth and can make it difficult for the plaintiff to trick the judge. Also, an attorney who fails to investigate when she should is not necessarily a liar and should be more reluctant to make up allegations.

Any benefit from strict pleading in screening meritless suits must be balanced against the cost of screening meritorious suits. The result of this balance depends on whether a utilitarian or rights-based metric is employed. But for both metrics, two factors are likely to reduce the weight on the false-negative side of the balance.

First, in many cases where the defendant has private information, the plaintiff can still obtain clues from reasonably accessible sources to support an inference of wrongdoing.[221] Provided the focus of the strict pleading rule is limited to determining whether the suit is truly meritless, and provided the requisite strength of the inference is not set too high, at least some meritorious plaintiffs should be able to gather enough clues to make satisfactory allegations. Admittedly, the expense of investigating increases the cost of filing and this, like filing fees, can have undesirable distributional

218. I have analyzed these incentives in some detail elsewhere. *See* Bone, *supra* note 185, at 550–63. The strategic dynamics are complex but the intuition is as described in this paragraph.

219. A merits review at the filing stage benefits from the fact that the defendant is informed and can provide input, but the fact that the plaintiff is uninformed makes it more difficult to test the defendant's assertions. Many medical malpractice suits, for example, involve an informed doctor and an uninformed patient, and the informed doctor can provide information to a medical malpractice screening panel. *See supra* note 214 (discussing screening panels). A professional panel has the expertise and incentive to challenge the doctor's arguments as long as the panel is neutral (which is at least a questionable assumption), and this might offset to some extent the plaintiff's informational disadvantage.

220. Or if she does file, she is likely to obtain only a small nuisance settlement. *See supra* note 202 and accompanying text.

221. *See, e.g.*, Epstein, *supra* note 59 (discussing publicly available information to support an inference of conspiracy in antitrust cases); Geoffrey P. Miller, *Pleading After* Tellabs 11–19 (N.Y. Univ. Sch. of Law, Law & Econ. Research Paper Series, Working Paper No. 08-16, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1121396 (discussing the types of information that can support an inference of scienter in a securities fraud suit).

effects.[222] However, unlike filing fees, the investment in a pre-filing investigation can pay dividends later in the litigation if the results help guide a more efficient discovery process.

Second, a meritorious plaintiff who cannot file suit because she cannot obtain enough information before filing still might be able to obtain a pre-filing settlement. To be sure, a rational defendant would not settle if he were certain the meritorious plaintiff could not file. But certainty is elusive. A large corporate defendant cannot keep track of all the different ways that clues to its wrongdoing might be disclosed. Corporate employees might leak information, for example, or a creditor or other third party might behave in ways that signal something is amiss. Furthermore, if the plaintiff's attorney hires a private investigator, as is common in securities fraud suits after the Private Securities Litigation Reform Act imposed strict pleading,[223] the defendant will not necessarily know which investigator the plaintiff hired and how skillful the investigator is.

When both the plaintiff and the defendant are uncertain whether a reasonable investigation would reveal enough to enable suit, they each have an incentive to settle before any investigation is performed.[224] By settling, the defendant saves the cost of litigation in the event the plaintiff's investigation reveals enough information to plead successfully, and the plaintiff saves the cost of investigating as well as the cost of litigating to a post-filing settlement in the event an investigation proves fruitful.[225]

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222. *See supra* note 216 and accompanying text.

223. *See* Miller, *supra* note 221, at 17.

224. There is precedent for a practice of extra-adjudicative settlement emerging in an environment of long delays and high litigation costs. In the late nineteenth and early twentieth century, repeat-play employers cooperated with brokers for injured employees to create a private scheme of aggregative settlement for workplace injuries. *See* Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1584–96 (2004). Also, in the first half of the twentieth century, liability insurers developed a private scheme of scheduled settlement for automobile accident claims. *Id.* at 1603–10. At least some of these settlements appear to have been negotiated without the filing of a lawsuit. *See id.* at 1582–83. These developments are associated with special factors, such as correlated conduct and reputation markets, which might not exist in all cases. They are relevant nevertheless because they arose during periods of intense case congestion (a sharp spike in tort litigation in the late 1800s and a huge influx of automobile cases in the early 1900s) that should have greatly weakened any credible threat by plaintiffs to litigate their claims.

225. Consider the following simple and somewhat more formal analysis. Let R be the expected recovery by settlement or trial judgment if a meritorious plaintiff files suit and gets past the pleading stage. Let c be the plaintiff's cost of litigating to the point of recovery and let d be the defendant's cost. Assume that there are two types of cases. In type 1, all the information about wrongdoing remains hidden. In type 2, enough information is available from reasonably accessible sources to allow an investigating plaintiff to meet the pleading burden. Neither party knows for sure what type of case he has, but both estimate a probability, α, that the case is type 2. Finally, let b be the cost of a pre-filing investigation in a type 2 case. If $b < \alpha\ (R - c)$, the plaintiff would investigate if there were no pre-filing settlement and sue with probability α (assuming $R - c > 0$). Knowing that the plaintiff will investigate and sue with probability α, the

These settlements will not be as large as a meritorious plaintiff would receive if she did not have to worry about meeting a strict pleading burden, since they reflect a discount for the probability the investigation proves fruitless.[226] Still, from a utilitarian perspective, paying something in settlement adds to deterrence and reduces the cost of false negatives, making strict pleading more attractive on balance. From a rights-based perspective, the significance of the compensation shortfall depends on the moral theory underlying the substantive law, but at least the defendant is held accountable to some extent—a morally more acceptable result than letting the defendant off completely.

Nevertheless, a strict pleading approach has another flaw. Its beneficial effects follow only if the pleading standard is not set too high. If the standard is too onerous, few, if any, meritorious plaintiffs would be able to satisfy it even with a reasonable investigation. In that case, the defendant would offer nothing or only a small settlement, confident that there can be very few suits. In addition, given the difficulty of distinguishing among different pleading standards linguistically, any strict pleading rule must rely heavily on trial judge discretion. But discretionary judgments are likely to vary, making it difficult for lawyers to predict the outcome in advance and thus weakening the rule's beneficial effect in discouraging meritless filings. Moreover, discretionary judgments increase process costs by inviting more motions to dismiss, more hotly contested dismissal hearings, and more extensive deliberation on the part of the judge.

Still, one should not exaggerate these problems. Discretionary judgments should be more reliable and exclude fewer meritorious suits if they focus on the narrow question of whether the suit is or is not truly meritless.[227] Moreover, this determination can be improved if it is informed by more knowledge about the case, and Section C below outlines an approach along those lines.

2. Incentive-Shaping Rules

The other way to screen meritless suits is to use incentive-shaping rules. The rules I have in mind operate after the pleading stage and work indirectly by affecting incentives to file and litigate meritless suits. The two chief examples are penalties for meritless filings and fee-shifting.[228] As we

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defendant's loss without settlement is $\alpha\ (R + d)$. Thus, both parties are better off settling for some amount between $\alpha\ (R - c) - b$ and $\alpha\ (R + d)$. This much makes the point, but it is also worth mentioning that a more thorough analysis would take account of signaling and other strategic effects.

226. *See supra* note 225.

227. This is as compared with an inquiry that ranges more widely to engage the broad question of whether the suit meets some threshold level of merit.

228. Other creative approaches have been proposed, such as making summary judgment mandatory as a condition for a judicially enforceable settlement agreement and giving the

saw in the previous Section, gatekeeping rules, and especially strict pleading, are likely to work better when the informational asymmetry favors the defendant than when it favors the plaintiff. The result is less clear for incentive-shaping rules.[229]

To illustrate, consider a perfectly accurate penalty system that targets only meritless suits. The informed plaintiff knows she would be penalized were the defendant to seek penalties, and this discourages meritless filings.[230] Moreover, with perfect accuracy, the penalty threat has no effect on meritorious suits. By contrast, when the plaintiff is uninformed, as she is in the informed-defendant cases, she must worry about paying the penalty in the event her suit turns out to be meritless, so even a perfectly accurate penalty deters some meritorious suits.

One can handle the over-deterrence problem for the informed-defendant cases to some extent by imposing the penalty only if the plaintiff does not do a reasonable pre-filing investigation.[231] But this modification introduces new problems. The legal definition of what constitutes a reasonable pre-filing investigation is necessarily imprecise, so even meritorious plaintiffs must worry about whether their investigation will qualify, and this new source of uncertainty deters meritorious suits.[232]

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defendant an option to bar settlement. *See* Kozel & Rosenberg, *supra* note 195, at 1860–79 (proposing mandatory summary judgment); David Rosenberg & Steven Shavell, *A Solution to the Problem of Nuisance Suits: The Option to Have the Court Bar Settlement*, 26 INT'L REV. L. & ECON. 42, 49–50 (2006) (proposing an option to bar settlement). In addition, purely substantive reforms, such as caps on pain and suffering and elimination of punitive damages, have been proposed to reduce filing incentives for frivolous suits, but I do not address these alternatives here.

229. Fee-shifting conditional on a trial loss is not a good choice to deter meritless filings. It does generate deterrence benefits for some cases. *See* Farmer & Pecorino, *supra* note 204, at 149 (arguing that fee-shifting can reduce meritless filings when attorney reputation is a driving force behind nuisance suits); Katz, *supra* note 213, at 17–19 (showing that the effect of adopting the English rule depends on whether it increases expected recovery for meritorious plaintiffs). But it is likely to deter a large number of weak but meritorious suits as well. *See* Steven Shavell, *Suit, Settlement and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs*, 11 J. LEGAL STUD. 55, 59–60 (1982).

230. The defendant does not know at the outset, but presumably would find out and seek penalties if the case goes through discovery. Therefore, the plaintiff must factor the penalty risk into her settlement calculations. *See* Katz, *supra* note 213, at 19–20 (discussing the implications of his informed-plaintiff model for refundable deposits or penalties).

231. Rule 11 currently uses this approach. *See* FED. R. CIV. P. 11(b). I have argued elsewhere that a penalty equal to the cost of discovery might encourage all plaintiffs to conduct reasonable pre-filing investigations, but this assumes courts can define reasonableness clearly enough to minimize errors and uncertainty at the enforcement stage. Bone, *supra* note 185, at 592.

232. There is another reason why a penalty system that targets only meritless suits might work better in cases where the plaintiff is the informed party. As a practical matter, trial judges are much more willing to impose penalties when the plaintiff and her attorney file knowing that the suit is meritless (or with reckless disregard for the obvious possibility). Penalties smack of punishment for a moral wrong, and knowingly filing is much more culpable than a negligent failure to conduct a reasonable pre-filing investigation.

Of course, no penalty system is perfectly accurate and errors at the penalty stage are likely to deter even some informed plaintiffs from filing meritorious suits, especially if they are risk-averse.[233] Moreover, if the issues at the penalty stage are hotly contested, as one might expect when the plaintiff's attorney is targeted and her reputation is at stake, the process costs of litigating a penalty could be substantial.[234] These high process costs, combined with uncertain success, can also discourage defendants from seeking penalties.[235] This disincentive can be offset by increasing the penalty amount, but given the inevitability of error at the penalty stage, a larger penalty is likely to deter more plaintiffs with meritorious suits.[236]

These costs might be substantial enough to rule out penalties. However, a system of penalties limited to extreme cases of intentional meritless filings might work if the risk of erroneously penalizing a meritorious suit can be limited. This option is discussed in the following Section.

C. *TOWARD AN OPTIMAL APPROACH*

The previous analysis, though brief, points to the desirability of a hybrid approach, one sensitive to the different reasons for meritless filings. Moreover, since we know very little about the extent of the meritless suit problem, it is wise to proceed cautiously, especially when measures aimed at deterring meritless suits can have serious adverse effects on meritorious suits and add substantially to process costs.[237] One additional point is worth emphasizing. The analysis here is exclusively outcome-based. If process-based fairness principles require a thin plausibility standard, then that

233. To be sure, meritorious plaintiffs know they are likely to settle and not actually face a penalty proceeding, but the penalty risk reduces the settlement amount and thereby deters meritorious filings at the margin. *See* Katz, *supra* note 213, at 19.

234. This does not necessarily imply that the expected process costs of a penalty system would be high as well. While the cost of any particular penalty proceeding is likely to be large, the number of proceedings should be small if penalties are working properly. In that case, the defendant should expect few frivolous suits and therefore a low likelihood of success, which should produce few penalty motions and thus few proceedings. Still, expected process costs might be lower with strict pleading, because pleading-based dismissals do not implicate the attorney's reputation as directly and conspicuously and therefore are not likely to trigger the same degree of contentiousness.

235. *See* A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397, 404–06 (1993) (modeling the effects of a system of sanctions, including the effects of costly sanction proceedings).

236. This is another reason why a penalty approach is better suited to informed-plaintiff than informed-defendant cases. The risk of chilling meritorious suits might be even greater when the plaintiff is uninformed and penalized for failing to conduct a reasonable pre-filing investigation if the vagueness of the reasonableness standard creates a large enough error risk.

237. *See* 5A WRIGHT & MILLER, *supra* note 8, § 1332 (discussing criticism of the 1983 amendments to Rule 11, citing the increase in satellite litigation adding substantial process costs as well as excessive screening of meritless suits).

standard must be applied regardless of whether any of the following measures are also implemented.

It is possible that the only serious meritless suit problem involves large and complex class actions, especially those in which the expected recovery and error risk support a credible threat by the class attorney to go to trial.[238] The extent of meritless class action litigation is a matter of some dispute,[239] but assuming it is large enough to warrant regulatory attention, the appropriate response is to focus exclusively on the class action and target the solution to the particular features of that problem. Various approaches have been suggested, including merits review at the certification stage[240] and mandatory summary judgment.[241] This is not the place to analyze these different options. My point is simply that if the problem is with the class action, the solution should be confined to the class action.

If the meritless suit problem extends beyond the class action, as the popular view holds and the strategic analysis of the previous Sections suggests, then the regulatory solution should be tailored to the nature of the broader problem. In particular, since information asymmetry is likely to be a major cause, regulation should be tailored to the information structure of the typical lawsuit.[242]

For example, a penalty system might be appropriate for intentional meritless filings.[243] The defendant should be required to prove that the suit is meritless and the plaintiff knew it. To maximize deterrence, sanctions should be mandatory rather than discretionary, as they are in current Federal Rule 11.[244] The size of the penalty should also be set in advance

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238. *See supra* notes 203–04 and accompanying text.

239. For a skeptical view, see Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357 (2003) (analyzing and criticizing the argument that class action suits effectively blackmail defendants through settlement pressure).

240. *See* Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1257 (2002).

241. *See* Kozel & Rosenberg, *supra* note 195, at 1853.

242. For a critique of one proposal citing, among other things, problems created by informational asymmetry, see Ted M. Sichelman, *Why Barring Settlement Bars Legitimate Suits: A Reply to Rosenberg and Shavell*, 18 CORNELL J.L. & PUB. POL'Y (forthcoming 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=986234 (criticizing Rosenberg's and Shavell's proposal to give defendants an option to bar settlements).

243. It might also be appropriate to impose penalties on a plaintiff or her attorney who does *absolutely no* pre-filing investigation without good reason. This conduct fails to show respect for the defendant and the court, and implicates moral culpability. *See, e.g.*, Johnson v. A.W. Chesterton Co., 18 F.3d 1362, 1366 (7th Cir. 1994) (imposing sanctions for "reckless willingness to impose the burden of unwarranted litigation upon others"). However, extending penalties beyond this extreme case to an attorney who does some but not a reasonable investigation is more problematic, given the vagueness of the reasonableness standard. For this reason, I favor narrowing the current scope of subdivisions (b)(2) and (b)(3) of Rule 11.

244. *See* FED. R. CIV. P. 11(c)(1). Also, Rule 11's safe harbor provision should be eliminated. *See* FED. R. CIV. P. 11(c)(2). And, of course, the penalties should be limited to the category of suits covered by current Rule 11(b)(1).

rather than left to trial judge discretion, as it is under Rule 11.[245] One possibility is to set the penalty equal to the defendant's reasonable costs of responding to the complaint, including attorney's fees.[246] Given that deterrence is the goal, certainty and predictability are particularly important. Moreover, case-specific discretion is a poor method for selecting an optimal penalty because trial judges lack the global information necessary to figure out what general deterrence requires in particular cases.[247]

A penalty rule structured in this way should limit the risk of penalizing meritorious suits. With the burden on the defendant and meritlessness limited to extreme cases, the chance of penalizing a meritorious plaintiff is reduced. Proving lack of merit and plaintiff's knowledge is bound to be costly, but defendant's costs can be reimbursed as part of the penalty, thereby reducing the disincentive to seek penalties. As for expected process costs in general, if the penalty works effectively, there should be few penalty proceedings.

Special provision should be made for cases, such as civil rights suits, where a deserving plaintiff's substantive interest is valued in moral terms and a rights-based balance is appropriate. In these cases, the cost of screening meritorious suits has moral weight. At the same time, there is a moral harm to defendants when a plaintiff knowingly files a meritless suit to harass or force an unjustified settlement. With moral harms on both sides of the balance, some screening of meritorious suits should be permissible. Thus, a penalty approach could fit this situation too, but the penalty might be set at a lower amount.

A penalty system narrowly structured in this way might not deter enough meritless plaintiffs from filing, especially as the plaintiff can gamble on the defendant not knowing the suit is meritless. However, it is not clear how concerned one should be about these cases since it is questionable how much of the frivolous suit problem is due to filings by informed plaintiffs. As noted previously, the cases triggering the strongest complaints, like antitrust and securities fraud suits, normally involve the reverse situation; they are informed-defendant cases where the plaintiffs are the ones who are uninformed.[248]

As for these informed-defendant cases, the previous analysis suggests that strict pleading might work but that it also has serious shortcomings. There is precedent, however, for a more promising approach based on

245. *See* FED. R. CIV. P. 11(c)(4) (requiring that a sanction under Rule 11 "be limited to what suffices to deter repetition of the conduct by others similarly situated").

246. A fee-shifting penalty forces the plaintiff to internalize the private costs of filing and litigating.

247. The current Rule 11 instructs the judge to choose the penalty that achieves general deterrence, but it is difficult to see how trial judges can do that effectively on a case-by-case basis.

248. *See supra* note 217 and accompanying text.

supplementing strict pleading with limited pre-dismissal discovery,[249] and recently at least one trial judge has indicated a willingness to use this approach to address the information-access problems raised by *Twombly*'s plausibility standard.[250] The idea is simple: give the plaintiff a chance to conduct limited discovery before deciding a motion to dismiss for failure to state a claim or a motion for a more definite statement.[251]

An approach allowing limited discovery must be designed carefully to limit error and process costs. As a threshold matter, the plaintiff should be required to file an affidavit with her complaint describing in detail all the steps she took to investigate the merits before filing and stating what she learned. This requirement would help assure that the plaintiff does not

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249. Judges routinely allow targeted discovery before deciding a motion to dismiss for lack of subject matter or personal jurisdiction, but rarely before deciding a Rule 12(b)(6) motion. Nevertheless, a few courts before *Twombly* permitted discovery in cases subject to heightened pleading standards and with information in the exclusive control of the defendant, usually after finding the original complaint deficient and before the plaintiff filed an amended complaint. *See, e.g.*, Cordero-Hernandez v. Hernandez-Ballesteros, 449 F.3d 240, 244 (1st Cir. 2006) (limiting discovery to those cases where the allegations make it likely that wrongdoing occurred and the information needed to plead with particularity is in the exclusive control of the defendant); New England Data Servs., Inc. v. Becher, 829 F.2d 286, 290 (1st Cir. 1987) (holding that discovery may be warranted in certain fraud cases); Parish v. Beneficial Ill., Inc., No. 94 C 4156, 1996 U.S. Dist. LEXIS 4453, at *15–16 (N.D. Ill. Apr. 10, 1996) (permitting a plaintiff to conduct some discovery before re-filing an insufficiently pled RICO claim); *see also* Reints v. Sheppard, 90 F.R.D. 346, 347 (M.D. Pa. 1981) (agreeing with the policy that dismissal before discovery may be inappropriate for cases of heightened pleading specificity if the information is held exclusively by the defendant). It is worth mentioning that Federal Rule 27 allows a prospective party to take depositions before a lawsuit is filed. However, the prevailing view is that the right is limited to perpetuating testimony that might be lost before trial (such as a dying witness), although there are a few decisions to the contrary. *See In re* Bay City Middlegrounds Landfill Site, 171 F.3d 1044, 1047 (6th Cir. 1999) (allowing the deposition of a witness who was not dying). *But see Reints*, 90 F.R.D. at 347–48 (rejecting plaintiff's deposition requests); Bowles v. Pure Oil Co., 5 F.R.D. 300, 302–03, 303 n.2 (E.D. Pa. 1946) (rejecting plaintiff's deposition requests). Also, some states have special rules allowing pre-filing discovery, but these rules apply only in state court and are available only under limited conditions. *See generally* Lonny Sheinkopf Hoffman, *Access to Information, Access to Justice: The Role of Presuit Investigatory Discovery*, 40 U. MICH. J.L. REFORM 217 (2007) (discussing the range of pre-suit discovery tools).

250. *See, e.g.*, *In re* Graphics Processing Units Antitrust Litig., 527 F. Supp. 2d 1011, 1032–33 (N.D. Cal. 2007) (indicating that narrowly tailored discovery might be allowed before the plaintiff filed an amended complaint provided the need for it is well established). *But see In re* Flash Memory Antitrust Litig., No. C 07-0086 SBA, 2007 U.S. Dist. LEXIS 95869, at *29 (N.D. Cal. Dec. 24, 2007) (finding no authorization in the Federal Rules for pre-dismissal discovery in the circumstances of the case).

251. Another possibility is to give discretion to the trial judge to stage discovery in increments, evaluating the strength of the case after each stage. To proceed to the next stage, the plaintiff would have to convince the judge that the case is strong enough to warrant further discovery given what has already been obtained. I am skeptical, however, that trial judges can make good decisions about discovery's benefits to be able to implement a staged approach like this effectively in a complex case. Moreover, additional discovery increases costs and enhances the plaintiff's settlement leverage.

substitute discovery for a pre-filing investigation and impose costs on the defendant without good reason.

In addition, it is important that the discovery be limited in a clear way. One could leave the question of how much discovery to allow to the trial judge's discretion, but the trial judge is likely to have trouble determining the optimal amount in a complex case because of information and strategic constraints.[252] Therefore, the amount of discovery should be defined by general rule. One possibility is to give the plaintiff the option to take one deposition of each defendant and perhaps serve a narrowly tailored request for documents.[253] The objective is to ensure that discovery is not so costly that it pressures the defendant to settle before it even takes place.[254]

After the discovery is complete, the rule might require the plaintiff to file an amended complaint satisfying a strict pleading standard. Alternatively, it might bypass the amendment stage altogether and let the judge determine directly whether the suit is meritless by evaluating whatever information the plaintiff provides (perhaps supplemented by information from the defendant).[255] This approach adds process costs, but the additional costs are limited by the narrow scope of the inquiry, which should be confined to whether the suit is truly meritless.

If the judge determines based on the available information that the suit is probably meritless, the rule might mandate dismissal. Alternatively, the plaintiff might be allowed to proceed on the condition that she pay all the defendant's costs, including reasonable fees, up to summary judgment if the case is dismissed at that stage. This alternative reduces the risk of false negatives by allowing a plaintiff who has trouble verifying the merits to continue litigating if she is sufficiently convinced to assume the risk of paying the defendant's fees. Moreover, its cost-shifting condition relieves the defendant from pressure to settle.

This proposal needs more careful analysis than I can give it here.[256] One thing is clear, however. If pleading-stage discovery is a good way to deal

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252. *See supra* notes 128–36 and accompanying text.

253. Justice Stevens proposed something similar to this in his *Twombly* dissent. *See* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1986–87 (2007) (Stevens, J., dissenting) (suggesting plaintiff should have been able to depose at least one representative of each defendant).

254. The rule also could require that the discovery be confined to those elements that the plaintiff has trouble alleging because of the informational asymmetry. To facilitate this, the plaintiff might be required to explain why she cannot make the necessary allegations without the information she seeks. *See In re Graphics Processing*, 527 F. Supp. 2d at 1032–33 (requiring a similar explanation).

255. The judge would be required to meet whatever level of confidence the strict pleading rule requires.

256. For one thing, defendants have incentives to conceal information or delay its disclosure when they know that the discovery tools available to plaintiffs are extremely limited and the time period for using them is short. The plaintiff's lawyer can anticipate these incentives and will try to counter them by strategically deploying the limited discovery available

with the uninformed plaintiff, the Federal Rules should be revised to authorize it explicitly. Allowing pleading-stage discovery fits the current Rules awkwardly at best.[257] Moreover, with a new rule, the procedure can be designed optimally and the provisions applied uniformly to all district courts.

V. CONCLUSION

This Article set out to analyze *Twombly* in the broader context of court access regulation and to chart a roadmap for designing optimal case-screening rules. It began with a critical examination of *Twombly* itself. That analysis concluded that the Court's plausibility standard marks only a modest departure from traditional notice pleading. Moreover, *Twombly*'s interpretation of Rule 8(a)(2) is consistent with the text and history of the Rule, compatible with principles of stare decisis, and in line with the pragmatic vision of the original Federal Rule drafters.

The Article then turned in Part IV to the broader normative issues implicated in regulating court access through strict pleading. It argued that a pleading standard along the lines of *Twombly*'s thin plausibility requirement might be justified by a process-based principle of fairness as reason-giving, but that anything stronger had to be evaluated on outcome-based grounds. The analysis explored the implications of utilitarian and rights-based theories for various screening methods, along the way highlighting the crucial threshold task of defining an undesirable lawsuit, the necessity of correctly identifying the cause of the problem, and the importance of proceeding cautiously in the absence of empirical information and tailoring solutions to probable causes. It concluded by outlining a promising hybrid approach targeting informational asymmetry, one that addresses the informed-plaintiff cases with a system of penalties and the informed-defendant cases with a system of limited discovery prior to a merits review.

Whatever screening approach is adopted, however, two general points should guide its design. First, the project should be handled by formal rulemaking or the legislative process, not by the common law method or

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to her. Given this strategic interaction, it is difficult to predict exactly how effective pleading-stage discovery will be. However, it is promising enough to give it a try and see how it works.

257. For example, formal discovery is not supposed to begin until after the parties meet and confer pursuant to Rule 26(f). FED. R. CIV. P. 26(d)(1). The trial judge can grant an exception, but judges might be reluctant to do so without express authorization if they view routine exceptions as inconsistent with the purposes of the Federal Rules' elaborate discovery scheme. *See, e.g.*, *In re* Flash Memory Antitrust Litig., No. C 07-0086 SBA, 2007 U.S. Dist. LEXIS 95869, at *29 (N.D. Cal. 2007) (reviewing all the possible bases for pleading-stage discovery and concluding that allowing discovery "before an operative complaint is filed" is inconsistent with the timing and protective measures that constitute the Federal Rules' discovery scheme). Rule 27 allows pre-filing depositions but only to perpetuate testimony that might be lost before trial. FED. R. CIV. P. 27; *see also supra* note 249.

case-by-case interpretation of the Federal Rules. Because it requires a controversial choice of normative metric and a coordinated analysis of different rule options, this project is most suitable for a process open to public input, able to generate and properly consider relevant empirical information, and capable of addressing the issues from a global and systemic perspective. Second, because the screening approach should be tailored to the types of cases that involve meritless filings most seriously, any set of rules should be substance-specific. General trans-substantive rules cannot properly take account of the different cost–benefit tradeoffs for different types of cases or the different implications of utilitarian versus rights-based metrics.

Our institution of civil adjudication reflects and protects society's most basic values, and it is essential that access be regulated in a careful and deliberate way. The hope of this Article is that the framework outlined here will guide a careful analysis and assure a more just and efficient set of pleading and merits-based screening rules.

MEMORANDUM

DATE: October 2, 2009

TO: Professor Edward Cooper
Judge Mark Kravitz
Professor Richard Marcus
Judge Lee H. Rosenthal

FROM: Andrea Kuperman

SUBJECT: Application of pleading standards post-*Ashcroft v. Iqbal*

This memorandum addresses application of pleading standards after the Supreme Court recently clarified those standards in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937 (2009). The Civil Rules Advisory Committee is examining the effect of these decisions on the way in which courts consider motions to dismiss, and analyzing whether courts are interpreting these recent pronouncements by the Supreme Court as a significant change in the pleading requirements. Congress has expressed interest in this issue as well, and the Senate has introduced S. 1504, The Notice Pleading Restoration Act of 2009, which provides that a federal court cannot dismiss a complaint under Federal Rule of Civil Procedure 12(b)(6) or (e), except under the standards previously set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). In connection with the Civil Rules Committee's examination of pleading standards, I have been asked to review cases that have interpreted pleading standards post-*Iqbal*. While more time may be needed to allow the lower courts to fully flesh out the results of *Twombly* and *Iqbal*, most of the case law to date does not indicate a drastic change in pleading standards. Below is a short summary of the case law, followed by descriptions of cases discussing *Iqbal*'s effect on pleading, separated by circuit.[1]

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[1] A search in Westlaw reveals that, as of October 1, 2009, *Iqbal* had been cited over 2,100 times, in case law alone. Westlaw's KeyCite function, in addition to showing any negative citing references for the case, indicates how extensively positive citing references examine the case. The depth-of-treatment categories include "examining,"

SUMMARY OF THE CASE LAW

At this early stage in the development of the case law discussing and applying the *Iqbal* pleading standards, it is difficult to draw many generalized conclusions as to how the courts are interpreting and applying that decision. Overall, the case law does not appear to indicate a major change in the standards used to evaluate the sufficiency of complaints. Many courts have emphasized that notice pleading remains intact and continue to rely on pre-*Twombly* case law to support some of the propositions at the heart of *Twombly* and *Iqbal*—that legal conclusions need not be accepted as true and that at least some factual averments are necessary to survive the pleadings stage. This may suggest that *Twombly* and *Iqbal* provide only a new framework in which to analyze these familiar principles, rather than an entirely new pleading standard. Some of the post-*Iqbal* cases dismissing complaints note that the minimal pleadings would not have survived before *Twombly* and *Iqbal*, providing support for the proposition that even before *Twombly* and *Iqbal*, allegations providing notice of both the legal claims asserted and the factual background giving rise to those claims were required. And even when post-*Iqbal* cases dismissing complaints fail to expressly state that the allegations would not have survived before *Twombly* and *Iqbal*, the reason may often be that courts can easily rely on the more recent clarification of the pleading standards in *Twombly* and *Iqbal* instead

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"discussing," "citing," and "mentioning." This memo includes appellate cases that are labeled in Westlaw as either "examining" or "discussing" *Iqbal*. With respect to district court cases, as of October 1, 2009, there were over 800 cases listed on Westlaw as either "examining" or "discussing" *Iqbal*. Because of the large number of citations, this memo includes a sample of the district court cases, focusing largely on those that examine *Iqbal* in more detail.

I have also done searches for cases involving employment discrimination claims, cases addressing the adequacy of allegations of mental state, cases addressing pleading where information is in the opposing party's possession, and cases addressing whether pleading "on information and belief" is sufficient. While these searches were limited to cases addressing *Iqbal*, with these more pointed inquiries I did not limit the searches solely to those cases listed as "examining" or "discussing" *Iqbal*. Because these searches turned up many cases, particularly in the category of employment discrimination, this memo addresses examples drawn from those results.

of pointing to earlier case law describing similar pleading concepts.

While there are many cases supporting the proposition that pleading standards have not changed significantly, some courts have at least questioned whether there has been a change in the level of detail required to provide adequate notice. And a few others have indicated that the claims at issue might have survived before *Twombly* and *Iqbal*, but do not survive under current pleading standards. At least one court has gone so far as to intimate that *Iqbal* will cause certain plaintiffs to avoid federal court when possible. While it seems likely that *Twombly* and *Iqbal* have resulted in screening out some claims that might have survived before those cases, it is much more difficult to determine whether meritorious claims are being screened under the *Iqbal* framework or whether the new framework is effectively working to sift out only those cases that have no plausible basis for proceeding.

The fact that the *Iqbal* analysis is context-specific (as emphasized by many of the cases) may provide courts with the flexibility needed to apply the framework more leniently in cases where pleading with more detail may be difficult, such as where information is solely in the defendant's possession or the plaintiff is proceeding *pro se*. For example, courts have continued to emphasize that *pro se* pleadings are evaluated more leniently than others, and pleading on "information and belief" has been deemed appropriate in at least some situations. In addition, post-*Iqbal*, the lower courts largely appear to be carefully applying the two-step process outlined in *Iqbal* to determine whether pleadings are sufficient. Courts also continue to generously grant leave to amend if the allegations are initially deemed insufficient. The fact that courts are applying the structured approach set out in *Iqbal* based on the context of particular cases may help to keep *Iqbal* from being characterized as a sweeping change in pleading standards that can be broadly used to screen out weak

cases.

THE *TWOMBLY* AND *IQBAL* DECISIONS

The *Twombly* Decision

On May 21, 2007, the Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). In *Twombly*, the Court addressed the question of "whether a § 1 [of the Sherman Act] complaint can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to competition, absent some factual context suggesting agreement, as distinct from identical, independent action." *Id.* at 548. The complaint alleged that the "Incumbent Local Exchange Carriers" or "ILECs" had conspired to restrain trade by "'engag[ing] in parallel conduct' in their respective service areas to inhibit the growth of upstart CLECs [competitive local exchange carriers]," and by "allegedly . . . making unfair agreements with the CLECs for access to ILEC networks, providing inferior connections to the networks, overcharging, and billing in ways designed to sabotage the CLECs' relations with their own customers." *Id.* at 550. The complaint also alleged "agreements by the ILECs to refrain from competing against one another," which could be "inferred from the ILECs' common failure 'meaningfully [to] pursu[e]' 'attractive business opportunit[ies]' in contiguous markets where they possessed 'substantial competitive advantages,' and from a statement of Richard Notebaert, chief executive officer (CEO) of the ILEC Qwest, that competing in the territory of another ILEC ''might be a good way to turn a quick dollar but that doesn't make it right.'" *Id.* at 551 (internal record citations omitted).

The *Twombly* Court first discussed the requirements for pleading under Rule 8, noting that Rule 8(a)(2) "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.'" *See id.* at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). The court explained that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citations, footnote, and emphasis omitted). The Court emphasized that "[w]hile, for most types of cases, the Federal Rules eliminated the cumbersome requirement that a claimant 'set out *in detail* the facts upon which he bases his claim,' *Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957) (emphasis added), Rule 8(a)(2) still requires a 'showing,' rather than a blanket assertion , of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id.* at 555 n.3 (citation omitted). The Court held that stating a § 1 claim "requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made." *Id.* at 556. But the Court emphasized 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 illegal agreement." *Id.* (footnote omitted).

The Court cautioned that "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that recovery is very remote and unlikely.'"

Id. (citation omitted). Because lawful parallel conduct is not enough to show an unlawful agreement, the Court concluded that an allegation of parallel conduct and an assertion of conspiracy were not sufficient, explaining that "[w]ithout more[,] parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." *Id.* at 556–57. The Court stated that its conclusion was consistent with Rule 89: "The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Twombly*, 550 U.S. at 557. The Court held that '[a]n allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint close to stating a claim, but without some further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.'" *Id.* (citation omitted).

The Court expressed concern with the expense of discovery on a baseless claim, stating that "when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ''this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.'"" *Id.* at 558 (citations omitted). The Court seemed especially concerned with those costs in the context of antitrust litigation: "[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." *Id.* (internal citation omitted). The Court also expressed doubts about discovery management being effective in preventing unmeritorious claims from requiring expensive discovery, stating that "[i]t 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 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." *Id.* at 559 (citation omitted). The Court continued:

> And it is self-evident that the problem of discovery abuse cannot be solved by "careful scrutiny of the evidence at the summary judgment stage," much less "lucid instructions to juries"; the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings. Probably, then, it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no "'reasonably founded hope that the [discovery] process will reveal relevant evidence'" to support a § 1 claim.

Id. (internal citation omitted).

The *Twombly* Court also evaluated the language in *Conley v. Gibson* that "'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Twombly*, 550 U.S. at 561 (quoting *Conley*, 355 U.S. at 45–46). The Court explained that this statement in *Conley* could not be read literally: "On such a focused and literal reading of *Conley's* 'no set of facts,' a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some 'set of [undisclosed] facts' to support recovery. . . . It seems fair to say that this approach to pleading would dispense with any showing of a ''reasonably founded hope'' that a plaintiff would be able to make a case." *Id.* at 561–62 (citation omitted). The Court held that the "no set of facts" language from *Conley* should be retired and was "best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Id.* at 563 (citations omitted).

Using the foregoing principles, the Court concluded that the plaintiff's complaint was insufficient. The Court contrasted the conclusory allegations in the complaint with the notice given

by a complaint following Form 9:

> Apart from identifying a seven-year span in which the § 1 violations were supposed to have occurred . . . , the pleadings mentioned no specific time, place, or person involved in the alleged conspiracies. This lack of notice contrasts sharply with the model form for pleading negligence, Form 9, which the dissent says exemplifies the kind of "bare allegation" that survives a motion to dismiss. Whereas the model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.

Id. at 565 n.10. The Court was careful to emphasize that it was not applying a heightened or particularized pleading standard, which is only required for those categories of claims falling under Rule 9, and explained its "concern is not that the allegations in the complaint were insufficiently 'particular[ized]'; rather, the complaint warranted dismissal because it failed in toto to render plaintiffs' entitlement to relief plausible." *Id.* at 569 n.14 (internal citation omitted). The Court concluded: "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* at 570.

The *Iqbal* Decision

Two years after *Twombly*, the Supreme Court elaborated on the pleading standards discussed in *Twombly* in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). In *Iqbal*, the plaintiff, a citizen of Pakistan and a Muslim, was arrested on criminal charges and detained by federal officials. *Id.* at 1942. The plaintiff alleged that he was deprived of constitutional rights, and sued numerous federal officials,

including former Attorney General John Ashcroft and FBI Director Robert Mueller. *Id.* Ashcroft and Mueller were the only appellants. *Id.* The complaint alleged that "they adopted an unconstitutional policy that subjected the plaintiff to harsh conditions of confinement on account of his race, religion, or national origin." *Id.*

The *Iqbal* Court explained that "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* at 1949 (citing *Twombly*, 550 U.S. at 555). With respect to the "plausibility" standard described in *Twombly*, *Iqbal* explained that "[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." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556). The *Iqbal* Court noted that "[t]he plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* (citing *Twombly*, 550 U.S. at 556). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'"" *Id.* (quoting *Twombly*, 550 U.S. at 557). The Court explained:

> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. [*Twombly*, 550 U.S.] at 555, 127 S. Ct. 1955 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556, 127 S. Ct. 1955.

> Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief." FED. RULE CIV. PROC. 8(a)(2).

Id. at 1949–50.

The *Iqbal* Court set out a two-step procedure for evaluating whether a complaint should be dismissed:

> [A] court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Id. at 1950.

In analyzing the complaint in *Iqbal*, the Court noted that it alleged that Ashcroft and Mueller "'knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest'"; that Ashcroft "was the 'principal architect' of this invidious policy"; and that Mueller "was 'instrumental' in adopting and executing it." *Id.* at 1951 (citations omitted). The Court found these allegations to be conclusory, that they "amount[ed] to nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim," and that they were not entitled to a presumption of veracity. *Id.* (citations omitted).

Turning to the factual allegations in the complaint, the *Iqbal* Court noted that the complaint alleged that the FBI, under Mueller's direction, arrested and detained thousands of Arab Muslim men

as part of its investigation of the September 11 attacks, and that the policy of holding detainees in highly restrictive conditions until cleared by the FBI was approved by Ashcroft and Mueller. *Id.* The Court concluded that while these allegations were consistent with Ashcroft and Mueller designating detainees of "high interest" because of their race, religion, or national original, there were more likely explanations that prevented the allegations from plausibly establishing a claim. *See id.* Because the September 11 attacks were perpetrated by Arab Muslim hijackers claiming to be members of Al Qaeda, an Islamic fundamentalist group, the Court found that "[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims." *Id.* The Court also noted that while there were additional allegations against other defendants, the only factual allegation against the appellants was that they "adopt[ed] a policy approving 'restrictive conditions of confinement' for post-September-11 detainees until they were ''cleared' by the FBI.'" *Iqbal*, 129 S. Ct. at 1952. The Court said this was not enough:

> Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudg[e]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*, 550 U.S., at 570, 127 S. Ct. 1955.

Id.

The *Iqbal* Court also rejected the plaintiff's argument that because the Federal Rules allowed

pleading discriminatory intent "generally," his complaint was sufficient. *Id.* at 1954. The Court explained:

> It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[m]alice, intent, knowledge, and other conditions of a person's mind [to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. And 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. (internal citation omitted).

Finally, the *Iqbal* Court also confirmed that the pleading requirements described in *Twombly* are not limited to the antitrust context present in that case. *See id.* at 1953 (holding that the argument that "*Twombly* should be limited to pleadings made in the context of an antitrust dispute . . . is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure"). The Court explained that "[t]hough *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8," which "in turn governs the pleading standard 'in all civil actions and proceedings in the United States district courts.'" *Id.* (citations omitted). The *Iqbal* Court also confirmed *Twombly*'s rejection of case-management as an appropriate alternative to disposing of implausible claims, particularly in the context of qualified immunity:

> Our rejection of the careful-case-management approach is especially important in suits where Government-official defendants are entitled to assert the defense of qualified immunity. The basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery." There are serious and legitimate reasons for this. If a Government official is to

> devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government. The costs of diversion are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, "a national and international security emergency unprecedented in the history of the American Republic." 490 F.3d[] at 179.

Iqbal, 129 S. Ct. at 1953 (internal citations omitted).[2]

CASE LAW INTERPRETING *IQBAL*

First Circuit

- ***Maldonado v. Fontanes***, 568 F.3d 263 (1st Cir. 2009). Residents of public housing complexes brought a civil rights suit under § 1983 against the mayor of Barceloneta, Puerto Rico, alleging that their rights had been violated by the seizures and cruel killings of their pet cats and dogs. *Id.* at 266. The pets were taken in two separate raids after the Municipality of Barceloneta assumed control of the public housing complexes. *Id.* Prior to that transfer, the plaintiffs had been allowed to keep pets in the housing complexes. *Id.* A few days before the raids, the residents were told to surrender their pets or face eviction. *Id.* The plaintiffs alleged that after their pets were seized, the pets were violently killed. *Id.* The mayor, in his personal capacity, moved to dismiss all damages claims against him on the ground of qualified immunity. *Maldonado*, 468 F.3d at 266. The district court denied the motion to dismiss, and the mayor took an interlocutory appeal. *Id.* The First Circuit affirmed the denial of the motion for qualified immunity on the Fourth Amendment and Fourteenth Amendment procedural due process claims, but applied *Iqbal* to reverse the denial of qualified immunity to the mayor as to the Fourteenth Amendment substantive due process claims. *Id.* The mayor also moved to dismiss for failure to state a claim, which the district court granted as to some claims, and denied as to the Fourth and Fourteenth Amendment claims and pendent state law claims, but that order was not appealable. *Id.* at 267 n.1.

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[2] The Supreme Court found that Iqbal's complaint "fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners," and remanded to allow the "Court of Appeals [to] decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint." *Iqbal*, 129 S. Ct. at 1954. On remand, the Second Circuit noted that it was "accustomed to reviewing a district court's decision whether to grant or deny leave to amend, rather than making that decision for ourselves in the first instance," and found "no need to depart from the ordinary course . . . ." *Iqbal v. Ashcroft*, 574 F.3d 820, 822 (2d Cir. 2009). The Second Circuit remanded to the district court "for further proceedings in light of the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937." *Id.*

With respect to the substantive due process claim, the First Circuit stated: "[A]nalyzing the pleadings under *Iqbal*, we hold that the allegations of the complaint do not allege a sufficient connection between the Mayor and the alleged conscience-shocking behavior—the killing of the seized pets—to state the elements of a substantive due process violation." *Id.* at 273. Specifically, the court noted that the mayor's alleged liability did not involve a policy of the municipality and was not based on the mayor's personal conduct, but instead was based on the allegation that the mayor promulgated a pet policy for the public housing complexes and was present at and participated in one of the raids. *Id.* The court concluded that this was insufficient to find the mayor liable because there was nothing conscience-shocking about the pet policy itself, which did not address how prohibited pets were to be removed, and because the complaint alleged no policy authorizing the killing of the pets and no such policy authorized by the mayor. *Id.* The court noted that the complaint alleged an informal policy from the repeating of the raids, but held that a single repetition was not sufficient to show the mayor's endorsement of an informal policy, stating that it would "reject such ''naked assertion[s]' devoid of 'further factual enhancement.'"" *Maldonado*, 568 F.3d at 273 n.6 (quoting *Iqbal*, 129 S. Ct. at 1950 (quoting *Twombly*, 550 U.S. at 557)).

The court also concluded that there was no allegation that the mayor was personally involved in any of the conscience-shocking behavior. *Id.* at 274. The court noted that while the complaint alleged that the mayor was present at the first raid and observed it, he was "not named as the individual who directly planned, supervised, and executed the raids," and there was no allegation that he participating in the killings or directed the private contractor who captured the pets. *Id.* Instead, the complaint only alleged that "he supervised, directly or indirectly, the agencies involved." *Id.* The court noted the "generalized" allegation that the mayor "planned, personally participated in, and executed the raids in concert with others," but stated that "the others are named as the persons with specific administrative responsibilities as to the public housing complexes." *Id.* The court concluded that "'[t]hese bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a 'formulaic recitation of the elements' of a constitutional [tort],' *Iqbal*, at 1951 (quoting *Twombly*, 550 U.S. at 55, 127 S. Ct. 1955), and are insufficient to push the plaintiffs' claim beyond the pleadings stage." *Id.* The court continued: "[T]he complaint alleges, without any more details, that the Mayor was among all the other public and private employees 'snatching pets from owners.' Although these bare allegations may be 'consistent with' a finding of liability against the Mayor for seizure of the same pets, such allegations 'stop[ ] short of the line between possibility and plausibility of 'entitlement to relief' on the larger substantive due process claim." *Maldonado*, 568 F.3d at 274 (quoting *Iqbal*, 129 S. Ct. at 1960 (quoting *Twombly*, 550 U.S. at 557) (internal quotation marks omitted)). The court held that the allegations against the mayor did not show "that his involvement was sufficiently direct to hold him liable for violations of the plaintiffs' substantive due process rights." *Id.*

Finally, the court concluded that the allegations did not support a theory of supervisory liability because "supervisory liability lies only where an ''affirmative link' between the behavior of a subordinate and the action or inaction of his supervisor' exists such that ''the

supervisor's conduct led inexorably to the constitutional violation,'"' and the allegations did not support finding such a link. *See id.* at 274–75 (citations omitted).

The court also concluded that there was no liability under a theory of deliberate indifference because such liability "'will be found only if it would be manifest to any reasonable official that his conduct was very likely to violate an individual's constitutional rights,'" but "the Mayor's promulgation of a pet policy that was silent as to the manner in which the pets were to be collected and disposed of, coupled with his mere presence at one of the raids, is insufficient to create the affirmative link necessary for a finding of supervisory liability, even under a theory of deliberate indifference." *Id.* at 275 (citation omitted). The court concluded that qualified immunity on the Fourteenth Amendment substantive due process claim was warranted. *Id.*

- ***Soto-Martinez v. Colegio San Jose, Inc.***, No. 08-2374 (JAG), 2009 WL 2957801 (D.P.R. Sept. 9, 2009). The plaintiff alleged that he was subject to a hostile work environment, retaliation, and termination as a result of his gender. *Id.* at *1. The court found that the hostile work environment claim failed because the conclusory assertion that the plaintiff was discriminated against because of his gender was not entitled to a presumption of truth, and "[t]he only factual allegations proffered by Plaintiffs are that Soto-Martinez suffered from verbal harassment that insinuated that he was a homosexual." *Id.* at *3. The court relied on pre-*Twombly* cases to concluded that "[t]hese allegations are certainly not enough to sustain a Title VII hostile work environment claim." *Id.* (citing *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 258 (1st Cir. 1999)). The allegation that one of the defendants corrected the plaintiff's work in front of others was not sufficient to sustain a Title VII claim because the complaint did not allege that this act occurred because the plaintiff was a man. *Id.* at *4.

  In evaluating the claim that the plaintiff was terminated because of his gender, the court noted that "although heightened fact pleading of specifics is not required to properly allege a *prima facie* case of discrimination, there must be enough facts to state a claim to relief that is plausible on its face." *Id.* (citing *Twombly*, 550 U.S. at 569–70). The court dismissed this claim because in addition to failing to allege one of the elements of a *prima facie* case, the complaint failed to allege any facts to support the conclusion that the plaintiff was terminated based on his gender. *Soto-Martinez*, 2009 WL 2957801, at *5.

  The court also dismissed the retaliation claim because the allegations that the plaintiff engaged in protected conduct under Title VII were not sufficient. *Id.* at *6. The court explained that "Title VII does not protect against verbal harassment from fellow employees that insinuate that the person is a homosexual" and that "Title VII does not proscribe harassment simply because of sexual orientation." *Id.* The court concluded that the "complaint was not directed at an unlawful practice as it did not point out 'discrimination against particular individuals nor discriminatory practices by Defendants.'" *Id.* (citing *Higgins*, 194 F.3d at 259).

- ***Soukup v. Garvin***, No. 09-cv-146-JL, 2009 WL 2461687 (D.N.H. Aug. 11, 2009) (unpublished). The plaintiff sued an arresting officer and the officer's employer under § 1983, alleging violations of his civil rights under the Fourth and Fourteenth Amendments. *Id.* at *1. The plaintiff also asserted a common law claim for false imprisonment. *Id.* In considering a motion for judgment on the pleadings, the court concluded that allegations that the town's police department "'developed and maintained policies or customs exhibiting deliberate indifference to the constitutional rights of persons in the Town of Lisbon' and that it was the department's 'policy and/or custom . . . to fail to exercise reasonable care in supervising and training its police officers'" did not adequately plead the claim against the town because there were no supporting factual allegations. *Id.* at *2. The court concluded that the allegations would be insufficient both before and after *Twombly*/*Iqbal*:

> The debate over the extent to which *Twombly* and *Iqbal* have heightened the pleading standard under Rule 8 continues, and will undoubtedly fill law review articles, but is ultimately irrelevant to the disposition of this motion. Soukup cites *Conley's* maxim that a complaint requires notice only of "what the plaintiff's claim is and the grounds upon which it rests," 355 U.S. at 47, but elides the second requirement, arguing that "pleadings are intended to give notice to the defendant of the claims—not of the facts supporting them."
>
> This is incorrect. In fact, *even before* Twombly *and* Iqbal*, the court of appeals had repeatedly held that a complaint needs more than "bald assertions . . . [or] unsubstantiated conclusions*," *Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 52 (1st Cir. 1990), *overruled on other grounds by Educadores Puertorriguenos en Accion v. Hernandez*, 367 F.3d 61 (1st Cir. 2004); *nor may a plaintiff "rest on subjective characterizations or conclusory descriptions of a general scenario*." *Murphy v. United States*, 45 F.3d 520, 522 (1st Cir. 1995); *see also Redondo-Borges v. U.S. Dept. of Hous. and Urban Dev.*, 421 F.3d 1, 9 (1st Cir. 2005) ("The fact that notice pleading governs . . . does not save the plaintiffs' conclusory allegation."); *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir. 2005) (requiring pleadings to "set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain recovery under some actionable legal theory") (emphasis added) (internal quotation marks omitted). Soukup's complaint offers nothing more than these.
>
> While Soukup attempts to argue otherwise, he is belled by his complaint which, as to the constitutional claims against the Town of Lisbon, *contains not a single assertion of fact*. Rather, Soukup's accusations are couched completely as legal conclusions, with the defendant's name merely plugged into the elements of a municipal

> liability claim. *Even if* Twombly *or* Iqbal *had never been decided, Soukup's complaint would fall short of the pleading requirements under prior First Circuit authority*; as it is, it certainly fails to avoid *Twombly's* warning that "formulaic recitation of a cause of action's elements will not do." 550 U.S. at 555. His complaint therefore fails to state a claim that the Town of Lisbon violated his federal constitutional rights.

Id. at *3 (emphasis added).

- ***Ocasio-Hernandez v. Fortuno-Burset***, --- F. Supp. 2d ----, No. 09-1299 (GAG/JA), 2009 WL 2393457 (D.P.R. Aug. 4, 2009). Former employees of the governor's mansion sued the governor, his wife, and other staff members under § 1983, alleging their employment was terminated based on their political views. The claims against several of the defendants failed because there were no factual allegations tying the defendants to the deprivation of the plaintiffs' constitutional rights. *Id.* at *2. The court concluded that "[t]he allegation that all of the defendants asked all of the plaintiffs about how and when they began working at [the governor's mansion] is a generic allegation, made without reference to specific facts that might make it 'plausible on its face.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949). The claims against the governor's wife were supported only by citation to a law and an organization chart that gave her the power to oversee maintenance work at the mansion, and the court concluded that there were no facts alleged to suggest she participated in the decision to terminate the plaintiffs. *Id.* The political discrimination claim was dismissed because the "plaintiffs . . . failed to make a fact-specific showing that a causal connection exists between their termination from employment and their political affiliation . . . ." *Id.* at *4. The due process claim was dismissed because the plaintiffs had no right to continued employment." *Id.* at *4–5. The equal protection claim was dismissed because there was no distinct basis for it beyond the allegations under the First Amendment claim; because the plaintiffs failed to "allege a minimally sufficient claim in even conclusory terms, let alone support the claim with facts raising a plausible claim to relief"; and because the plaintiffs failed to explain why the "class-of-one" equal protection doctrine should be applied to a claim for employment discrimination. *Ocasio-Hernandez*, 2009 WL 2393457, at *5. The state law claims were dismissed because the alleged facts were insufficient to plead discriminatory animus and there was no other factual basis to find a violation of state law. *Id.* at *6. In dismissing the complaint, the court explained:

> The court notes that its present ruling, although draconianly harsh to say the least, is mandated by the recent *Iqbal* decision construing Rules 8(a)(2) and 12(b)(6). The original complaint, filed before *Iqbal* was decided by the Supreme Court, as well as the Amended Complaint, *clearly met the pre*-Iqbal *pleading standard under Rule 8*. As a matter of fact, counsel for defendants, experienced beyond cavil in political discrimination litigation, did not file a 12(b)(6) motion to dismiss the original complaint because the

> same was properly pleaded under the then existing, pre-*Iqbal* standard. . . .
>
> As evidenced by this opinion, even highly experienced counsel will henceforth find it extremely difficult, if not impossible, to plead a section 1983 political discrimination suit without "smoking gun" evidence. In the past, a plaintiff could file a complaint such as that in this case, and through discovery obtain the direct and/or circumstan[t]ial evidence needed to sustain the First Amendment allegations. If the evidence was lacking, a case would then be summarily disposed of. This no longer being the case, *counsel in political discrimination cases will now be forced to file suit in Commonwealth court*, where *Iqbal* does not apply and post-complaint discovery is, thus, available. *Counsel will also likely only raise local law claims to avoid removal to federal court where* Iqbal *will sound the death knell*. Certainly, such a chilling effect was not intended by Congress when it enacted Section 1983.

Id. at *6 n.4 (internal record citations omitted) (emphasis added).

- ***Chao v. Ballista***, 630 F. Supp. 2d 170 (D. Mass. 2009). The plaintiff alleged that prison officials failed to protect her from sexual abuse, and sought to recover under § 1983 for the officials' failure to investigate and prevent the abuse. *Id.* at 173. The court rejected that defendants' argument that the plaintiff alleged only conclusory allegations regarding the alleged failure to train, supervise, and investigate. *Id.* at 177. The court explained:

> *Notice pleading, however, remains the rule in federal courts*, requiring only "a short and plain statement of the claim." *See* FED. R. CIV. P. 8(a). While a plaintiff's claim to relief must be supported by sufficient factual allegations to be "plausible" under *Twombly*, *nothing requires a plaintiff to prove her case in the pleadings*. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). Plausibility, as the Supreme Court's recent elaboration in *Ashcroft v. Iqbal* makes clear, is a highly contextual enterprise—dependent on the particular claims asserted, their elements, and the overall factual picture alleged in the complaint. --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009); *Maldonado v. Fontanes*, 568 F.3d 263, 268 (1st Cir. 2009) ("[T]he court's assessment of the pleadings is context-specific, requiring the reviewing court to draw on its judicial experience and common sense.") (internal quotation marks omitted).

Id. (emphasis added). The court elaborated:

> Plausibility, in this view, is a relative measure. Allegations become "conclusory" where they recite only the elements of the claim and, at the same time, the court's commonsense credits a far more likely inference from the available facts. This analysis depends on the full factual picture, the particular cause of action, and the available alternative explanations. *Yet in keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible*. *See Thomas v. Rhode Island*, 542 F. 3d 944, 948 (1st Cir. 2008) (juxtaposing Rule 8(a)'s fair notice and plausibility requirements, as interpreted in *Twombly*).

Id. (additional internal citations omitted) (emphasis added). The court concluded that the factual allegations were more than sufficient to state a plausible claim to relief. *Id.* at 177–79. The court stated: "To be sure, discovery may ultimately reveal an alternative picture, showing that the Defendants made every reasonable effort to prevent the alleged abuse. But Chao has presented sufficient facts, at a stage where her factual allegations must be taken as true, to overcome that alternative for the time being." *Chao*, 630 F. Supp. 2d at 178.

Second Circuit

- ***Panther Partners Inc. v. Ikanos Commc'ns, Inc.***, No. 08-3398, 2009 WL 2959883 (2d Cir. Sept. 17, 2009) (unpublished summary order). The plaintiff alleged that defendant Ikanos, and various directors and underwriters, negligently made false statements in connection with the company's initial public offering and its secondary offering, in violation of the Securities and Exchange Act of 1933. *Id.* at *1. The district court dismissed the complaint under Rule 12(b)(6), denied leave to amend, and denied a request to reconsider. *Id.*

  The Second Circuit concluded that the standard applied by the district court was too strict, but nonetheless concluded that the complaint was not sufficient under the more lenient standard described in *Twombly*. *See id.* at *2. The complaint alleged that "'[b]y January 2006, Ikanos learned that the VDSL Version Four chips were failing,'" and that "'Ikanos determined that the VDSL Version Four chips had a failure rate of 25 % [to] 30%, which was extremely high.'" *Id.* The Second Circuit found that the district court had improperly required the plaintiff to allege when Ikanos knew the failure rate was specifically 25 to 30%, and explained that the plaintiff only needed to allege that Ikanos knew of abnormally high failure rates before the company published the registration statement accompanying its secondary offering. *Id.* The court explained: "The plausibility standard would not require that plaintiff assert, for example, exactly when the company knew the difference in defect rates between the VDSL chips and other chips was statistically significant. The plausibility standard, however, does require a statement alleging that they knew of the above-average defect rate before publishing the registration statement." *Id.* The court concluded that "the amended complaint failed to meet the plausibility requirements of *Twombly* because it did not allege facts sufficient to complete the chain of causation needed to prove that defendants

negligently made false statements." *Panther Partners*, 2009 WL 2959883, at *2.

In reviewing the district court's denial of reconsideration, the Second Circuit noted that the proposed second amended complaint alleged additional facts, but none of those facts resolved the critical issue of when the company knew that the defect rates were unusually high. *Id.* at *3. However, the court found that amendment might cure the defect, stating: "[C]ourts may consider all possible amendments when determining futility. Because it seems to us possible that plaintiff could allege additional facts that Ikanos knew the defect rate was above average before filing the registration statement, and that this allegation, if made, would be sufficient to meet *the high standards* that *Iqbal* and *Twombly* require for pleadings, further amendment may not be futile." *Id.* at *4 (emphasis added). The court concluded: "[W]e recognize that *Iqbal* and *Twombly raised the pleading requirements substantially* while this case was pending," and vacated the district court's denial of the motion to reconsider its decision to deny leave to amend. *Id.* (emphasis added).

- ***W. Va. Inv. Mgmt. Bd. v. Doral Fin. Corp.***, No. 08-3867-cv, 2009 WL 2779119 (2d Cir. Sept. 3, 2009) (unpublished summary order). The plaintiffs alleged that defendant PricewaterhouseCoopers LLP ("PWC") and others violated Section 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 by issuing four audits and one report for Doral Financial Corporation that were materially false. *Id.* at *1. The plaintiffs further alleged that these audits and reports allowed Doral to conceal frauds, including overstating pre-tax income and understating debt. *Id.* PWC moved to dismiss for failure to state a claim, asserting that the complaint failed to allege facts giving rise to a strong inference of scienter, as required by the Private Securities Litigation Reform Act of 1995 (PSLRA). *Id.* The district court dismissed the complaint, and the Second Circuit affirmed.

  The Second Circuit noted that a plaintiff can meet the required showing of a strong inference of scienter "by alleging facts '(1) showing that the defendants had both motive and opportunity to commit the fraud or (2) constituting strong circumstantial evidence of conscious misbehavior or *recklessness*.'" *Id.* (quoting *ASTI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 99 (2d Cir. 2007) (emphasis added by *Doral* court)). The Second Circuit explained that the allegations of PWC's carelessness did not create a strong inference of scienter because the inference of scienter is required to be "at least as compelling as an opposing inference, though it need not be more probable than not," and "[i]n this case, the opposing inference—that Doral concealed its fraud from [PWC], just as it concealed its fraud from investors—is objectively more compelling than plaintiffs' allegations of recklessness." *Id.* at *2. The court differentiated the plausibility standard required for general pleading from the more stringent standard under the PSLRA:

  > Although plaintiffs' allegations that Pricewaterhouse was reckless are arguably "plausible" under the general pleading standards established by the Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the PSLRA requires in this litigation context more than mere plausibility. Instead,

> the allegations must create an inference "at least as compelling as any opposing inference one could draw from the facts alleged." *Tellabs, Inc.*[*v. Makor Issues & Rights, Ltd.*], 551 U.S. [308,] 324[(2007)]. Because the competing inference that [PWC] was deceived is stronger than the inference that they were reckless, we conclude that plaintiffs' complaint does not meet the pleading requirements of the PSLRA, and therefore that it was proper for the District Court to dismiss it.

Doral Financial, 2009 WL 2779119, at *3.

- ***Bruno v. Metro. Transp. Auth.***, No. 08-1993-cv, 2009 WL 2524009 (2d Cir. Aug. 19, 2009) (unpublished summary order). The plaintiff sued his employer under the Federal Employers' Liability Act, which provides that a railroad engaged in interstate commerce will be liable "'to any person suffering injury while he is employed by such carrier in such commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier," *id.* at *1 (quoting 45 U.S.C. § 51), and which requires "'the plaintiff [to] prove the traditional common law elements of negligence: duty, breach, foreseeability, and causation,'" *id.* (quoting *Tufariello v. Long Island R.R.*, 458 F.3d 80, 87 (2d Cir. 2006)).

  The Second Circuit concluded that the plaintiff's claim that "he suffered 'severe and disabling injuries' as a result of the [defendant's] policy that requires its employees who are not on active work status to remain at home during working hours, unless they receive a 'no work' status" was "implausible on its face." *Id.* The court justified dismissal by noting that the complaint did not allege that the defendant had any duty to grant the "no work" status or that there was a causal link between the policy and the plaintiff's injuries, and that the plaintiff alleged "no facts apart from conclusory assertions as to how the MTA's denial of his no work status caused unspecified 'severe and disabling injuries.'" *Id.* The court concluded that the claim was frivolous. *Id.*

  The Second Circuit concluded that the plaintiff's second claim, "that on or prior to September 13, 2001, the [defendant] assigned [the plaintiff] to work at or near the World Trade Center, and that he sustained 'severe and disabling injuries' by reason of the [defendant's] negligence," should also be dismissed. *Bruno*, 2009 WL 2524009, at *1. The court explained that the plaintiff had conceded that he was precluded from bringing this claim in the absence of fraud because of a release he signed, and that he had not pleaded fraud. *Id.*

- ***South Cherry Street, LLC v. Hennessee Group LLC***, 573 F.3d 98 (2d Cir. 2009). The plaintiff alleged breach of contract and violation of § 10(b) of the Securities and Exchange Act of 1934 and Rule 10b-5 promulgated by the SEC, in connection with the defendant's alleged failure to learn and disclose that a hedge fund in which the plaintiff invested on the defendant's recommendation was part of a Ponzi scheme. *Id.* at 99–100. The district court dismissed the contract claim as barred by the Statute of Frauds, and dismissed the securities fraud claim on the ground that the complaint failed to plead scienter as required by the

PSLRA. *Id.* at 100. The Second Circuit affirmed.

The PSLRA requires that "'[i]n any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, *the complaint shall*, with respect to each act or omission alleged to violate this chapter, *state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind*.'" *Id.* at 110 (quoting 15 U.S.C. § 78u-4(b)(2)) (emphasis added by *South Cherry Street* court). The court explained that "'[a] plaintiff alleging fraud in a § 10(b) action . . . must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference.'" *Id.* at 111 (quoting *Tellabs*, 551 U.S. at 328) (emphasis added by *South Cherry Street* court). "And in determining whether this standard has been met, the court must consider whether '*all* of the facts alleged, taken collectively, give rise to a strong inference of scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.'" *Id.* (quoting *Tellabs*, 551 U.S. at 323). The court concluded that the complaint "lack[ed] sufficient factual allegations to give rise to a strong inference of either fraudulent intent or conscious recklessness." *South Cherry Street*, 573 F.3d at 112. The court found that the complaint failed to allege intentional misrepresentation because it alleged only that the defendant would have learned about the problems with the recommended funds if it had performed the due diligence it promised, and did not allege that the defendant had any knowledge that its representations about the funds were untrue. *See id.* The court also found that the complaint failed to allege recklessness because the complaint alleged only that the defendant breached its contractual obligation by failing to take obvious investigative steps and ignoring clear red flags, but did not allege that the defendant did not believe the funds' representations were accurate or any facts that the defendant knew that either made the falsity of the funds' representations obvious or that should have alerted the defendant that the representations were questionable. *Id.* The court concluded that while it might be plausible to infer that the defendant had acted negligently, it was "far less plausible to infer that an industry leader that prides itself on having expertise that is called on by Congress, that emphasizes its thorough due diligence process, that values and advertises its credibility in the industry—and that evaluates 550 funds—would deliberately jeopardize its standing and reliability, and the viability of its business, by recommending to a large segment of its clientele a fund as to which it had made, according to South Cherry, little or no inquiry at all." *Id.* at 113.

Although the court was examining the heightened pleading requirements under the PSLRA, it focused on the plausibility standard and discussed the need to plead more than speculation in order to meet the requirements of Rule 8. The Second Circuit noted that the plaintiff's assertion on appeal that it would be appropriate to draw the inference that the defendant acted illegally appeared nowhere in the complaint and the plaintiff had conceded that the inference was speculative. *Id.* The court continued:

> [The plaintiff] argues that because such facts would be *peculiarly within the knowledge of the defendants*, it had no obligation to include such an allegation in the Complaint, intimating that it might hope to

> develop some such evidence in discovery. To be sure, South Cherry should not include such an allegation in its pleading without having a "factual basis or justification," FED. R. CIV. P. 11 Advisory Committee Note (1993). But "before proceeding to discovery, a complaint must allege facts suggestive of illegal conduct," *Twombly*, 550 U.S. at 564 n.8, 127 S. Ct. 1955; and a plaintiff whose "complaint is deficient under Rule 8 . . . is not entitled to discovery," *Iqbal*, 129 S. Ct. at 1954. South Cherry's confessed inability to offer more than speculation that there may have been such unlawful conduct underscores, rather than cures, the deficiency in the Complaint.

Id. at 113–14 (emphasis added).

- ***Harris v. Mills***, 572 F.3d 66 (2d Cir. 2009). The plaintiff, formerly licensed by the state of New York as a doctor of osteopathic medicine, had his medical license revoked because he committed fraud and engaged in improper medical practices. The New York State Education Department denied the plaintiff's petition to reinstate his license, and the plaintiff brought a *pro se* action under the Americans with Disabilities Act (ADA), the Rehabilitation Act, and 42 U.S.C. § 1983, claiming that he was illegally denied a reasonable accommodation for his cognitive disabilities and unconstitutionally deprived of due process. *Id.* at 68. The district court dismissed the accommodation claims under the ADA and the Rehabilitation Act against the individual defendants because the statutes did not provide for individual liability, and dismissed the Rehabilitation Act claim and the remaining claims for failure to state a claim. The Second Circuit affirmed the finding that the claims were legally insufficient, "even when read with the lenity that must attend the review of *pro se* pleadings." *Id.*

  The plaintiff's first accommodation claim alleged that "the Education Department wrongly denied him an 'understanding of the impact of [his] disabilities,'" which deprived him of a fair reinstatement hearing, and prevented the Department from properly assessing his "'rehabilitation.'" *Id.* at 74 (citation omitted). The Second Circuit noted that the complaint did not identify how the plaintiff's disabilities affected the behavior that caused the revocation of his license or how those disabilities could be accommodated to reform that behavior. *Id.* The court explained that "[g]enerally construed, this allegation amounts only to the contention that Harris's medical licensing qualifications should be relaxed in light of his disability," but "[t]his is not a reasonable accommodation claim." *Id.*

  The plaintiff's second accommodation claim—based on denial of the opportunity "to read to the Committee on Professions a written explanation so his case 'would be more organized and clearly presented'"—failed because, even liberally construed, there was no allegation that the plaintiff was denied the opportunity to read his statement "'by reason' of his disability, let alone 'solely by reason' of his disability, as the Rehabilitation Act requires." *Harris*, 572 F.3d at 74–75. It was also unclear how the requested accommodation would have helped, since the plaintiff alleged "'difficulty with comprehending the written word' and 'a related problem with written expression.'" *Id.* at 75 (citations omitted).

The plaintiff's due process claim was dismissed because the plaintiff "was given notice and an opportunity to be heard before his petition for reinstatement was denied," and state law provided an adequate post-deprivation hearing for the denial of his petition to reinstate his license. *Id.* at 76.

Finally, the court found dismissal appropriate for the "cause of action that the defendants' decisions were '[a]rbitrary and capricious' inasmuch as the defendants failed to follow their own procedural rules." *Id.* (citation omitted). The court found that "[i]nsofar as this is intended to be a stand-alone legal claim based solely on violations of state regulations, it is not actionable in federal court," and "therefore states no claim upon which relief can be granted." *Id.*

- ***Gillman v. Inner City Broadcasting Corp.***, No. 08 Civ. 8909(LAP), 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009). The plaintiff asserted age discrimination and retaliation claims, alleging that he was fired as a result of his age and in retaliation for his reporting sexual harassment, and also asserted a claim for sexual harassment. The court confirmed that the *Iqbal* standard applies in employment discrimination cases:

> The *Iqbal* plausibility standard applies in conjunction with employment discrimination pleading standards. According to *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002), *employment discrimination claims need not contain specific facts establishing a* prima facie *case of discrimination*. Rather, "a complaint must include . . . a plain statement of the claim . . . [that] give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 512 (internal quotation marks and citations omitted); *see also Patane v. Clark*, 508 F.3d 106, 113 (2d Cir. 2007). Iqbal *was not meant to displace* Swierkiewicz*'s teachings about pleading standards for employment discrimination claims because in* Twombly*, which heavily informed* Iqbal*, the Supreme Court explicitly affirmed the vitality of* Swierkiewicz. *See Twombly*, 550 U.S. at 547 ("This analysis does not run counter to *Swierkiewicz* . . . . Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); *see also Iqbal*, --- U.S. ----, 129 S. Ct. at 1953 ("Our decision in *Twombly* expounded the pleading standard for all civil actions, and it applies to antitrust and discrimination suits alike." (internal quotation marks and citations omitted)). Accordingly, while a complaint need not contain specific facts establishing a *prima facie* case of employment discrimination to overcome a Rule 12(b)(6) motion to dismiss, it must nevertheless give fair notice of the basis of Plaintiff's claims, and the claims must be facially plausible.

Id. at *3 (footnote omitted) (emphasis added). The court also noted:

> [A]lthough decided before the Supreme Court's *Iqbal* decision, *Boykin v. KeyCorp*, 521 F.3d 202 (2d Cir. 2008), describes the interrelation of *Swierkiewicz* and *Twombly* and concludes that "the Supreme Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible."

Id. at *3 n.9 (quoting *Boykin*, 521 F.3d at 213 (internal quotation marks omitted)).[3]

The court concluded that the plaintiff had adequately pleaded a claim for hostile work environment:

> The facts alleged in the Complaint Letter are sufficient to make out a plausible claim that Plaintiff was forced to work in an environment where he felt sexually threatened. Plaintiff alleges that at least since 1993, Cheryl Sutton, a member of the Defendant's Board of Directors and sister of the Chairman, made unwanted advances toward Plaintiff in the form of invitations to travel with her, requests to work late when no employees would be in the workplace, and unsolicited gifts. *Whether or not those acts actually qualify as discriminatory conduct severe or pervasive enough to create an objectively hostile or abusive work environment is a question to be determined at a later stage of this action*. The record reflects that they were sufficiently troubling to Plaintiff to warrant a complaint to the Chairman of the Company in 1993 and in late 2007. And the fact

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[3] *See also Peterec-Tolino v. Commercial Elec. Contractors, Inc.*, No. 08 Civ. 0891(RMB)(KNF), 2009 WL 2591527, at *2 (S.D.N.Y. Aug. 19, 2009) (noting in the "legal standard" portion of the opinion that "'[a]n employment discrimination plaintiff . . . must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests,'" and that "'[t]he pleading requirements in discrimination cases are very lenient, even *de minimis*") (quoting *Kassner v. 2d Ave. Delicatessen Inc.*, 496 F.3d 229, 237 (2d Cir. 2007); *Deravin v. Kerik*, 335 F.3d 195, 200 (2d Cir. 2003); and citing *Boykin*, 521 F.3d at 212–16). The *Peterec-Tolino* court concluded that the plaintiff had adequately stated a claim of disability discrimination under the ADA by alleging that the defendant was his employer; that the plaintiff had physical impairments, including scoliosis and asthma, that substantially limited one or more major life activities; that the plaintiff had notified his employer of his medical conditions and requested a reasonable accommodation; that he was able to do his job and his performance had always been excellent; that the defendants failed to accommodate his disability; and that he was harassed, threatened, and terminated. *Id.* at *5. The court also concluded that the plaintiff had adequately alleged a claim of age discrimination under the Age Discrimination in Employment Act by alleging that he was 46 years old; that he was able to do his job; that the plaintiffs harassed, threatened, and terminated him; and that another employee warned the plaintiff that "he should 'not . . . be in this industry.'" *Id.* at *6. The court concluded that "'[s]uch allegations by a pro se plaintiff are sufficient to withstand a motion to dismiss.'" *Id.* (quoting *Legeno v. Corcoran Group*, 308 F. App'x 495, 497 (2d Cir. 2009)).

> that Plaintiff was terminated relatively soon after complaining to the offending Board Member seems not to be in dispute. Taking Plaintiff's factual allegations as true, Plaintiff suffered an alteration to the conditions of his work environment. Accordingly, Plaintiff's allegations present at least a minimally plausible and articulate discrimination claim.

Id. at *4 (footnote omitted) (emphasis added).

But the court concluded that the allegations regarding the age discrimination claim were insufficient, noting that most of the facts alleged were irrelevant to whether the plaintiff was fired based on his age. *Id.* at *5. The one allegation that might support the age discrimination claim—that 13 other individuals were fired after reaching age 40—was not sufficient "without more information about the reasons for their termination or specific employment practices by the Defendant . . . " because "merely alleging that a disparate impact occurred or pointing to a *generalized* discriminatory policy is insufficient to make out a plausible age discrimination claim." *Id.* at *6.

With respect to the retaliation claim, the court concluded that it was sufficiently pleaded because the plaintiff alleged that he complained about unwanted advances in late 2007 and was terminated in February 2008. *Gillman*, 2009 WL 3003244, at *6. The court held that "[c]onsidering that Plaintiff has made out a plausible hostile work environment claim, . . . these additional factual allegations, minimal as they might be, are sufficient to show (1) Plaintiff's opposition to the allegedly discriminatory treatment, (2) that Defendant was aware of Plaintiff's opposition—assuming Cheryl Sutton's knowledge may be imputed to the Company, (3) that Defendant took adverse action against Plaintiff by terminating him, and (4) that a retaliatory motive allegedly played a part in the adverse employment action." *Id.*

- ***Kregler v. City of N.Y.***, --- F. Supp. 2d ----, 2009 WL 2524628 (S.D.N.Y. Aug. 17, 2009). The plaintiff brought suit under § 1983, alleging that the defendants violated his rights under the First and Fourteenth Amendments when he allegedly was not hired for a job in retaliation for his public endorsement of a candidate for district attorney. *Id.* at *1. After working as Fire Marshal for the fire department for 20 years, the plaintiff retired and submitted an application to be a City Marshal. *Id.* In his lawsuit, the plaintiff alleged that the Chief Fire Marshal (Garcia) and the Department of Investigation Commissioner (Hearn) agreed to cause the plaintiff's application for City Marshal to be rejected because of the plaintiff's support of a candidate for district attorney; that Garcia, the Supervising Fire Marshal (Grogan), and other fire department employees requested that Department of Investigation employees misuse their authority to cause the plaintiff's application to be rejected; and that the stated reason for the rejection of plaintiff's application—that the plaintiff failed to disclose details of discipline he received at the fire department—was merely a pretext for the retaliation. *Id.* at *2. The court found the conclusory pleadings insufficient, noting that "[a]bsent sufficient factual allegations that Gill Hearn, who is the only decision-maker named in the Amended Complaint, had knowledge of Kregler's support of Morgenthau and agreed to cause his

application to be denied for that reason, Kregler has not pled facts 'enough to raise the right to relief above the speculative level.'" *Id.* at *5 (quoting *Twombly*, 550 U.S. at 555). The court concluded that even if it credited some of the conclusory allegations in the complaint, the allegations were merely consistent with unlawful behavior, not plausible. *Id.* The facts alleged were more consistent with lawful conduct because even though the plaintiff had already endorsed the candidate, his application for City Marshal went through significant administrative steps, and the court concluded that "[i]t would not comport with experience and common sense for Defendants to expend so much public time, energy and resources fully processing the papers of an applicant whose appointment they allegedly had already agreed to reject for unlawful reasons." *Id.*

The court employed a Rule 12(i) hearing[4] as a means of evaluating whether dismissal was appropriate, and in discussing the use of that mechanism, opined on the competing values at stake in evaluating complaints:

> Fundamentally, the "plausibility" standard that the Supreme

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[4] Rule 12(i)—formerly Rule 12(d) before the 2007 restyling—provides: "If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial." FED. R. CIV. P. 12(i). According to one treatise, "Rule 12(i) allows a party to assert Rule 12(b) defenses and a Rule 12(c) motion for judgment on the pleadings before trial on the merits, contemplating the possible hearing and determination of jurisdictional or other issues in advance of trial. The district court is free to decide the best way to deal with the question, because neither the federal rules nor the statutes provide a prescribed course. The court's decision whether to hold a preliminary hearing or to defer the matter to trial on the merits may be set aside on appeal only for abuse of discretion." 2 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 12.50 at 12-142 (3d ed. 2009) (footnotes omitted). The treatise explains: "Because most of the defenses in Rule 12(b) that can be addressed by a preliminary hearing affect the court's jurisdiction, it is advisable to dispose of them before trial if at all possible, regardless of the court's power to defer them On the other hand, if ruling on the defense entails substantial consideration of the merits, as is often the case, the question can most effectively be addressed during trial. Deferring matters until trial also allows a court to give consideration to matters with such grave consequences as motions for dismissal under Rule 12(b)(1)–(7) or a judgment on the pleadings under Rule 12(c)." *Id.* at 12-143. The treatise also notes that "[b]oth Rule 12's preliminary hearing and its discretionary deferral to trial are valuable but often overlooked tools in the court's arsenal." *Id.* at 12-143–44.

Another treatise has explained that in determining whether to exercise discretion to grant a preliminary hearing, as opposed to deferring the issues to trial, "the district court must balance the need to test the sufficiency of the defense or objection and the right of a party to have his defense or objection decided promptly and thereby possibly avoid costly and protracted litigation against such factors as the expense and delay the hearing may cause, the difficulty or likelihood of arriving at a meaningful result of the question presented by the motion at the hearing, and the possibility that the issue to be decided on the hearing is so interwoven with the merits of the case, which . . . can occur in various contexts, that a postponement until trial is desirable." 5C CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1373 (3d ed. 2004) (footnotes omitted). This treatise also notes: "A district court cannot dismiss a complaint on the basis of a Rule 12(b) defense or objections without giving the plaintiff an opportunity to be heard; a dismissal without that opportunity has been properly characterized as a denial of due process. At a preliminary hearing, the court may consider affidavits and other documentary matter and if the decision turns on issues of credibility or disputed questions of fact, the district judge may hear oral testimony." *Id.* (footnotes omitted). The treatise further notes that "[i]f the issue is of so complex or uncertain a nature that witnesses are necessary, it would be wise for the court to defer the determination of the matter until trial." *Id.* (footnote omitted).

> Court articulated in *Twombly* and *Iqbal* reflect[s] one judicial means to part the wheat from the chaff in assessing the sufficiency of pleadings. Yet, as the case at hand illustrates and the law reports amply record, the problem persists, a sign of an intrinsic tension built into the federal rules. Whether in their factual allegations as originally crafted, or upon being granted leave to replead deficient claims, seasoned plaintiffs' counsel know to charge the pleadings with enough adjectives that reverberate of extreme malice, improper motives, and bad faith to raise factual issues sufficient to survive a dispositive motion, thus securing a hold on the defendant strong enough for the duration, however long and costly the ultimate resolution of the claim may be.
>
> In practical terms, the philosophy of pleading that these rules embody, a one-rule-fits-all principle, defines the scope of the problem engendered by its unintended outcomes. For instance, in theory the same generalized minimal Rule 8(a) standards that govern the plaintiff's drafting, as well as the court's review, of a complaint alleging common law negligence stemming from a slip and fall, or a breach of a simple contract for failure to pay a debt, apply to writing and evaluating a complaint charging civil violations of intricate federal antitrust, intellectual property, or racketeering statutes. Similarly, the bare bones essence of a claim that is necessary to survive a motion to dismiss is the same whether the complaint is authored by John Dioguardi or by Wall Street lawyers. *See Dioguardi v. Durning*, 139 F.2d 774 (2d Cir.1944).
>
> In consequence, the Court's Rule 12(i) hearing represented an effort to employ an infrequently used procedure to bring about speedier and better-informed resolution of a motion to dismiss involving serious accusations of violations of constitutional rights leveled against high-ranking government officials.

Id. at *7.

- ***Air Atlanta Aero Eng'g Ltd. v. SP Aircraft Owner I, LLC***, --- F. Supp. 2d ----, 2009 WL 2191318 (S.D.N.Y. Jul. 23, 2009). The plaintiff brought suit alleging breach of contract, account stated, unjust enrichment, quantum meruit, and promissory estoppel in connection with services that the plaintiff provided to a non-party. The plaintiff alleged that it was a third-party beneficiary of the contracts at issue. The court granted the defendants' motion to dismiss all of the claims, but also granted leave to file an amended complaint. The court found that the breach of contract claim failed because the plaintiff was not a third party beneficiary, and the unjust enrichment, quantum meruit, and promissory estoppel claims failed because there were express contracts preventing quasi-contractual remedies. *Id.* at *8–9.

With respect to the account stated claim, the court concluded that the plaintiff had not alleged enough facts to state a plausible claim under *Iqbal*, particularly with respect to alleging the required state of mind. *See id.* at *11. Regarding the first element of the account stated claim—that an account was presented—the court noted that the complaint alleged an agency theory but the plaintiff "did not direct the Court to any language in the Leases granting . . . representatives with the authority to accept and review statements or otherwise supervise billing and payments." *Id.* at *12. The court found that "the Complaint d[id] not sufficiently allege facts supporting the legal conclusion that ACG functioned as Ambac's approved agent for the purpose of receiving presented statements such that presentation of a statement to ACG was the equivalent of its presentation to Ambac." *Id.* With respect to the second element of the account stated claim—that the account was accepted as correct—the court found that this element was sufficiently pleaded because the plaintiff alleged that the debtor never objected to the account stated, which could amount to an implied acceptance. *See id.* at *12–13. But the third element of the account stated claim—that the debtor promised to pay the amount stated—was deemed insufficient. *Air Atlanta*, 2009 WL 2191318, at *13. The court found that even if there was indebtedness, the plaintiff's "cryptic statement that 'Ambac confirmed its intention to pay AAAE' is not a sufficient pleading under *Iqbal*." *Id.* The court explained: "AAAE essentially makes a conclusory allegation as to Ambac's state of mind and its intentions. However, AAAE fails to specify the form of the alleged confirmation; who made the confirmation; how, where, or when the confirmation took place; or any other details about this confirmation." *Id.* (citing *Iqbal*, 129 S. Ct. at 1952). The court continued: "[I]n the context of this case, a blanket statement that a defendant 'confirmed an intention to pay' without any factual details supporting that allegation does not state a plausible claim for relief. While *such allegations may have provided sufficient notice pleading in the past*, *Twombly* and *Iqbal* provide clear instructions that conclusory statements about a party's alleged intentions should be accompanied with supporting factual allegations where circumstances so demand." *Id.* (emphasis added).[5]

- ***Argeropoulos v. Exide Techs.***, No. 08-CV-3760 (JS), 2009 WL 2132443 (E.D.N.Y. Jul. 8, 2009). The plaintiff sued his employer and another employee, alleging discrimination under Title VII and state law claims for violations of the New York Human Rights Law. *Id.* at *1. The plaintiff alleged that he was subject to discrimination and harassment because of his

[5] Another case in the Second Circuit analyzing pleading the defendant's state of mind is *Talley v. Brentwood Union Free School District*, No. 08-790, 2009 WL 1797627 (E.D.N.Y. Jun. 24, 2009). In *Talley*, in analyzing whether the plaintiff had adequately alleged equal protection violations based on termination of her probationary teaching contract, the court noted that the facts alleged to support the claim were that "(1) plaintiff is white whereas [defendant school board member] Del Rio is Hispanic and [defendant school board member] Kirkham is white; and (2) at the October 20, 2007 meeting 'Kirkham stated on the record that there should be more 'minority teachers' teaching in [the District] as it is a minority district' and is 'widely known in the district as advocating for more minority teachers to fill positions within the [District].'" *Id.* at *7. The court concluded that "[a]lthough not overwhelmed with this factual support, the Court finds it sufficient to state a race based Equal Protection claim as against Kirkham only." *Id.* The court explained that "[a]s to Del Rio and [defendant board member] Fritz, the amended complaint simply 'does not contain any factual allegations sufficient to plausibly suggest [their] discriminatory state of mind.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1952).

national origin and perceived sexual orientation. *Id.* The Title VII claims against the employee were dismissed as frivolous because individuals are not subject to liability under Title VII. *Id.* at *3. With respect to the plaintiff's discrimination claims based on perceived sexual orientation and sexual harassment, those claims were dismissed because Title VII does not prohibit harassment or discrimination based on sexual orientation. *Id.* Although Title VII protects against sexual harassment, the plaintiff failed to adequately plead facts supporting a claim for same-sex harassment. *Id.* at *4. The court emphasized that "[b]ecause he is at the motion to dismiss stage, Plaintiff obviously has no evidentiary burden to establish any of those methods [of showing sexual harassment]," but concluded that "Plaintiff pleads no facts (or, for that matter, even conclusory allegations) to suggest" same-sex harassment. *Argeropoulos*, 2009 WL 2132443, at *4. The court concluded that the only possible inference from the pleaded facts was that the plaintiff was harassed because of his sexual orientation, but that Title VII provides no remedy for such harassment. *Id.*

With respect to the plaintiff's claims based on national origin discrimination, the court noted that "[u]nlike with respect to sexual harassment, Plaintiff does at least plead *some* facts to suggest that he experienced hostility because of his Greek national origin," but that the two incidents discussed in the complaint did not establish discrimination under either a disparate treatment or hostile work environment theory. *Id.* With respect to disparate treatment, the claim failed "because Plaintiff does not plead that he suffered any adverse employment action, much less an adverse employment action that occurred due to Defendants' anti-Greek animus." *Id.* The allegations of constructive discharge failed because the plaintiff was still an employee of the employer defendant, even if he alleged that he had no plans to return to active work after his disability leave. *Id.* The hostile work environment claim failed because although the plaintiff pleaded "two incidents that could arguably be considered national origin harassment . . . a few 'isolated incidents,' especially when only verbal and not physical, do not suffice to plead a hostile work environment claim." *Id.* at *5 (citations omitted). The court said it was insufficient that the complaint alleged that the two incidents were only examples of daily discrimination, noting that "*this kind of non-specific allegation might have enabled Plaintiff's hostile work environment claim to survive under the old 'no set of facts' standard* for assessing motions to dismiss, . . . [b]ut *it does not survive the Supreme Court's* '*plausibility standard*,' as most recently clarified in *Iqbal*." *Argeropoulos*, 2009 WL 2132443, at *6 (internal citation omitted) (emphasis added). The court explained that "[a]t most, Plaintiff's national origin hostile work environment claim is 'conceivable,' . . . [b]ut without more information concerning the kinds of anti-Greek animus directed against Plaintiff, and the frequency thereof, the Court cannot conclude that Plaintiff's claim is 'plausible.'" *Id.* (citing *Iqbal*, 129 S. Ct. at 1951). The court granted leave to amend this claim "in a manner consistent with *Iqbal*'s requirements . . . ." *Id.*

With respect to the plaintiff's retaliation claim, the court noted that the plaintiff "fails to plead any facts documenting this alleged retaliation," and that "[a]t most, Plaintiff claims that, after he complained about the alleged harassment he suffered, 'the harassment got worse' and Plaintiff 'became the subject of discriminatory retaliation.'" *Id.* But the court noted that the plaintiff "pleads *nothing* to document *how* the harassment 'got worse' or how Plaintiff

suffered 'discriminatory retaliation.'" *Id.* The court explained that "[*e*]*ven before* Iqbal*, the federal rules required a plaintiff to do more than just plead 'labels and conclusions, and a formulaic recitation of the elements of a cause of action*.'" *Id.* (quoting *Twombly*, 550 U.S. at 555) (emphasis added).

Third Circuit

- ***Cann v. Hayman***, No. 08-3032, 2009 WL 3115752 (3d Cir. Sept. 30, 2009) (unpublished) (per curiam). A state prison inmate filed a *pro se* lawsuit against several prison officials under § 1983, alleging violations of his civil rights, including First Amendment retaliation, Fourth Amendment unreasonable search, Eighth Amendment cruel and unusual punishment, and Fourteenth Amendment due process/equal protection claims. *Id.* at *2. The district court dismissed the complaint for failure to state a claim; the Third Circuit affirmed and found that granting leave to amend would be futile. The plaintiff alleged that he had filed a grievance in which he accused prison officials of tampering with his inmate account. *Id.* at *1. The plaintiff further alleged that nearly two months after the grievance was filed, he set off a metal detector three times and then refused to comply with an officer's order regarding another search method. *Id.* Based on this refusal, the plaintiff was placed in a special cell and subjected to additional searches, but none of these measures resulted in finding contraband. *Id.* The plaintiff was charged with disciplinary infractions for failure to comply with the officer's order. In reviewing the complaint, the Third Circuit noted that *pro se* pleadings are liberally construed. *Id.* at *2 (citing *Erickson v. Pardus*, 551 U.S. 89 (2007)). The court found that the complaint "lack[ed] facial plausibility because the complained-of actions by the prison officials were not improper, let alone unconstitutional, given Cann's 'triple-triggering' of the metal detector in the yard and his subsequent refusal to comply with Martain's order . . . ." *Cann*, 2009 WL 3115752, at *2 (internal citation to *Iqbal*, 129 S. Ct. at 1949, omitted). The court held that "[t]he responsive actions take[n] by prison officials were rationally related to legitimate penological interests and goals," and concluded that the district court had appropriately dismissed the complaint. *Id.*

- ***Miles v. Twp. of Barnegat***, No. 08-1387, 2009 WL 2840733 (3d Cir. Sept. 4, 2009) (unpublished) (per curiam). The plaintiffs, siblings who inherited six contiguous properties in the Township of Barnegat, alleged that the Township created public rights of way on their property, approved plans for water drainage from adjacent properties, and granted easements to private development corporations for water drainage on their property. *Id.* at *1. The overflow from detention basins allegedly flooded the plaintiffs' property, creating a wetland, and the county's underground storm tunnels allegedly contributed to the flooding. *Id.* The plaintiffs also alleged that neighboring landowners improperly encroached on their property and granted easements to the property; that cable and electric companies placed utility lines, cables, and telephone wires on their property without consent; that the surveyor defendants omitted or misstated information to diminish the plaintiffs' property value; and that the engineering defendants encroached on their property by placing detention basins too close to the boundary, causing water runoff to flood their land. *Id.* The plaintiffs filed suit under § 1983, alleging violations of their Fifth Amendment rights under the Takings Clause, violations

of procedural due process, and a § 1983 conspiracy to encroach on and diminish the property. *Id.* The plaintiffs also alleged the Township fraudulently changed the boundaries of their property on Township maps. *Id.* The district court dismissed the takings claims for lack of jurisdiction because they were unripe; dismissed the procedural due process claims because New Jersey provided a judicial mechanism for challenging the Township's decision to build a road on their property; and dismissed the remainder of the § 1983 claims for failure to state a plausible claim of state action by private party defendants. The district court declined to exercise jurisdiction over the pendant state law claims. *Miles*, 2009 WL 2840733, at *2. The Third Circuit affirmed.

After describing the pleading standards in *Twombly* and *Iqbal*, the Third Circuit concluded that the district court had properly dismissed the procedural due process claims because "[v]iewing the allegations as true, the factual matter falls far short of permitting us to infer a plausible connection among the private party defendants and a governmental agency or official such that their private actions would constitute 'state action.'" *Id.* at *3 (citations omitted). "[T]he single-sentence conclusory allegations of a conspiracy contained in the Amended Complaint are insufficient to allege a plausible conspiracy among the defendants to deprive the Plaintiffs of their constitutional rights under § 1983." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949; *Kost v. Kozakiewicz*, 1 F.3d 176, 185 (3d Cir. 1993)).

- ***McTernan v. City of York***, 577 F.3d 521 (3d Cir. 2009). The complaint alleged that the plaintiffs have devout religious beliefs, including a belief that their religion requires them to share their beliefs with others, and that based on these beliefs, they protested against abortions outside a Planned Parenthood facility (the "Facility"). *Id.* at 524. The Facility was next to a public sidewalk and had a ramp leading to its front entrance that ran parallel to the sidewalk. *Id.* The plaintiffs alleged that a survey they conducted showed that 2.9 feet of this ramp were constructed on the public right of way. *Id.* The plaintiffs also alleged that they contacted the Commissioner of the city police department requesting that the encroaching portion of the ramp be removed. *Id.* Because the ramp and a banner allegedly encroached on the public right of way, the plaintiffs asked a city policy officer if they could go on the ramp to communicate with clients entering the Facility. *Id.* The officer refused and stated that he would arrest the plaintiffs if they entered the ramp. *McTernan*, 577 F.3d at 524. The plaintiffs sued the officer, the commissioner of the police department, and the city, claiming violations of their rights to free exercise of religion, peaceful assembly, and freedom of speech. *Id.* The defendants moved to dismiss, relying on regulations under the ADA that placed certain restrictions on the ramp at issue. *Id.* at 524–25. The district court denied the plaintiffs' request for a preliminary injunction, and dismissed the complaint based on finding that the ramp was a nonpublic forum and that plaintiffs had not suffered any constitutional injury. *Id.* at 525–26. The Third Circuit affirmed.

  The Third Circuit rejected the plaintiffs' argument that the district court was required to accept as true the statement in the complaint that the ramp was a public forum. *Id.* at 531. Relying on *Iqbal*, the court found that this statement was a legal conclusion that did not need to be accepted as true. *Id.* The finding that the ramp was nonpublic was supported by

attachments to the complaint that depicted the ramp and its overlap with the public sidewalk. *McTernan*, 577 F.3d at 531. The court concluded that "[i]f Plaintiffs were not excluded from a public forum, they have failed ''to state a [First Amendment] claim to relief that is plausible on its face.''" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949).

The Third Circuit also concluded that the claim of a violation of the plaintiffs' right to free exercise of religion failed because:

> In the complaint, Plaintiffs do not allege that they are treated differently than others, and instead claim only that "Defendants' actions target and are intended to chill, restrict, and inhibit Plaintiffs from exercising their religion in this way" and that "Defendants' actions constituted a substantial burden on Plaintiffs['] religious exercise, and Defendants lacked a compelling justification." App. at 48. Once again, these are merely conclusory allegations, and, as the Court stated in *Iqbal*, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 555, 127 S.Ct. 1955).
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> *Id.* at 532 (footnote omitted).

- ***Fowler v. UPMC Shadyside***, 578 F.3d 203 (3d Cir. 2009). The plaintiff was employed by UPMC as a janitor at the Shadyside Hospital. She was injured and placed on Family/Medical Leave and short-term disability, and eventually given a clerical position. *Id.* at 206. UPMC eliminated the plaintiff's clerical position, and the plaintiff alleged that before her position was eliminated, she applied for a similar job but was never contacted about that position. *Id.* The district court dismissed the complaint because the Rehabilitation Act's two-year statute of limitations had run, the restriction to sedentary work did not constitute a disability under the Rehabilitation Act, and the class action allegations were not appropriate claims under the Rehabilitation Act. *Id.* The Third Circuit vacated the dismissal on statute-of-limitations grounds and remanded.

The Third Circuit noted that it was "obligated to discuss recent changes in pleading standards." *Id.* at 209. The court stated:

> Standards of pleading have been in the forefront of jurisprudence in recent years. Beginning with the Supreme Court's opinion in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), continuing with our opinion in *Phillips* [*v. County of Allegheny*, 515 F.3d 224 (3d Cir. 2008)], and culminating recently with the Supreme Court's decision in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 1955, 173 L. Ed. 2d 868 (2009), pleading standards have *seemingly shifted from simple notice*

> *pleading to a more heightened form of pleading*, requiring a plaintiff to plead more than the possibility of relief to survive a motion to dismiss.

Id. at 209–10 (emphasis added). The court described *Iqbal*'s holding:

> The Supreme Court's opinion [in *Iqbal*] makes clear that the *Twombly* "facial plausibility" pleading requirement applies to all civil suits in the federal courts. After *Iqbal*, it is clear that conclusory or "bare-bones" allegations will no longer survive a motion to dismiss: "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 129 S. Ct. at 1949. To prevent dismissal, all civil complaints must now set out "sufficient factual matter" to show that the claim is facially plausible. This then "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 1948. The Supreme Court's ruling in *Iqbal* emphasizes that a plaintiff must show that the allegations of his or her complaints are plausible. *See* [*i*]*d.* at 1949–50; *see also Twombly*, 550 U.S. at 555, & n.3, 127 S. Ct. 1955.

Fowler, 578 F.3d at 210. The court continued:

> *Iqbal* additionally provides the final nail-in-the-coffin for the "no set of facts" standard that applied to federal complaints before *Twombly*. *See also Phillips*, 515 F.3d at 232–33. Before the Supreme Court's decision in *Twombly*, and our own in *Phillips*, the test as set out in *Conley v. Gibson*, 355 U.S. 41, 45–46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957), permitted district courts to dismiss a complaint for failure to state a claim only if "it appear[ed] beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* Under this "no set of facts" standard, a complaint effectively could survive a motion to dismiss so long as it contained a bare recitation of the claim's legal elements.
>
> The Supreme Court began its rejection of that test in *Twombly*, holding that a pleading offering only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955; *Phillips*, 515 F.3d at 232. In *Phillips*, we discussed the appropriate standard for evaluating Rule 12(b)(6) or 12(b)(1) motions in light of the anti-trust context presented in *Twombly*, holding that the acceptable statement of the standard remains: "courts accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the

> plaintiff may be entitled to relief." *Phillips*, 515 F.3d at 233 (internal quotations and citation omitted). The Supreme Court's opinion in *Iqbal* extends the reach of *Twombly*, instructing that all civil complaints must contain "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 129 S.Ct. at 1949.
>
> Therefore, after *Iqbal*, when presented with a motion to dismiss for failure to state a claim, *district courts should conduct a two-part analysis*. First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. *Id.* Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a "plausible claim for relief." *Id.* at 1950. In other words, a complaint must do more than allege the plaintiff's entitlement to relief. A complaint has to "show" such an entitlement with its facts. *See Phillips*, 515 F.3d at 234–35. As the Supreme Court instructed in *Iqbal*, "[w]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 129 S. Ct. at 1949. This "plausibility" determination will be "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

Id. at 210–11 (emphasis added).

The *Fowler* court then examined the effect of *Twombly* and *Iqbal* on the holding in *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002), in which the Supreme Court held that "a complaint alleging unlawful employment discrimination did not have to satisfy a heightened pleading requirement." *Fowler*, 578 F.3d at 211. The court explained that the continuing vitality of some of the holdings in *Swierkiewicz* might be questionable:

> The Supreme Court in *Swierkiewicz* expressly adhered to *Conley*'s then-prevailing "no set of facts" standard and held that the complaint did not have to satisfy a heightened standard of pleading. *Id.* *Swierkiewicz* and *Iqbal* both dealt with the question of what sort of factual allegations of discrimination suffice for a civil lawsuit to survive a motion to dismiss, but *Swierkiewicz* is based, in part, on *Conley*, which the Supreme Court cited for the proposition that Rule 8 "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." 534 U.S. at 512, 122 S. Ct. 992. We have to conclude, therefore, that because *Conley* has been specifically repudiated by

> both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.

Id.

In evaluating the complaint in *Fowler*, the Third Circuit found that it had "alleged sufficient facts to state a plausible failure-to-transfer claim," noting that "[a]lthough Fowler's complaint is not as rich with detail as some might prefer, it need only set forth sufficient facts to support plausible claims." *Id.* at 211–12 (footnote omitted). The court explained:

> Taking her allegations as true, we find (1) that she was injured at work and that, because of this injury, her employer regarded her as disabled within the meaning of the Rehabilitation Act; (2) that there was an opening for a telephone operator at UPMC, which was available prior to the elimination of her position and for which she applied; (3) that she was not transferred to that position; (4) that UPMC never contacted her about the telephone operator position or any other open positions; and (5) that Fowler believed UPMC's actions were based on her disability. Under the "plausibility paradigm" . . . , these averments are sufficient to give UPMC notice of the basis for Fowler's claim. The complaint pleads how, when, and where UPMC allegedly discriminated against Fowler. She avers that she was injured on the job and that her doctor eventually released her to perform "sedentary work." She pleads that UPMC gave her a light-duty clerical position. She also avers that before the elimination of her light duty clerical position, she applied for a telephone operator position, but "was never contacted by UPMC regarding that position." Fowler further alleges that she contacted "Susan Gaber, a Senior Human Resources Consultant with the Defendant, UPMC Shadyside, regarding [a] number of vacant sedentary jobs," but that she was "never contacted by UPMC regarding any open positions." Fowler's complaint alleges that UPMC "failed to transfer" her to another position in September of 2003. Fowler further pleaded that she was "terminated because she was disabled" and that UPMC discriminated against her by failing to "transfer or otherwise obtain vacant and funded job positions" for her. The complaint repeatedly references the Rehabilitation Act and specifically claims she was terminated because of her disability. Therefore, she has nudged her claims against UPMC "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. The factual allegations in Fowler's complaint are "more than labels and conclusions" or "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 564, 127 S. Ct. 1955. We have no trouble finding that Fowler has adequately pleaded a claim for relief under the standards announced in *Twombly* and *Iqbal*, *supra*.

Id. at 212 (internal citation omitted).

The Third Circuit concluded that the district court had erred by relying on *Conley* in finding that the plaintiff had insufficiently pleaded that she was disabled, and by relying on a case (and the cases cited therein) that had disposed of claims either at the summary judgment stage or at the judgment as a matter of law stage. *Id.* at 212–13. The court explained that the standard at these later stages is much more rigid, while "'[a] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable and that a recovery is very remote and unlikely.'" *Id.* at 213 (quoting *Twombly*, 550 U.S. at 556 (internal quotations omitted)). The court discussed the focus at the pleadings stage:

> At this stage of the litigation, the District Court should have focused on the appropriate threshold question—namely whether Fowler pleaded she is an individual with a disability. The District Court and UPMC instead focused on what Fowler can "prove," apparently maintaining that since she cannot prove she is disabled she cannot sustain a *prima facie* failure-to-transfer claim. A determination whether a *prima facie* case has been made, however, is an evidentiary inquiry—it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination. *See Powell v. Ridge*, 189 F.3d 387, 394 (3d Cir. 1999) (overruled on other grounds). Even post-*Twombly*, it has been noted that a plaintiff is not required to establish the elements of a *prima facie* case but instead, need only put forth allegations that "raise a reasonable expectation that discovery will reveal evidence of the necessary element." *See Graff v. Subbiah Cardiology Associates, Ltd.*[,] No. 08-207, 2008 WL 2312671 (W.D. Pa. June 4, 2008) [(]citing *Phillips*, 515 F.3d at 234[)]. Under the Federal Rules of Civil Procedure, *an evidentiary standard is not a proper measure of whether a complaint fails to state a claim*. *Powell*, 189 [F.3d] at 394.

Fowler, 578 F.3d at 213 (emphasis added). The Third Circuit emphasized that the plaintiff was not required "at this early pleading stage, to go into particulars about the life activity affected by her alleged disability or detail the nature of her substantial limitations." *Id.* Instead, the complaint was sufficient because it "identifie[d] an impairment, of which UPMC allegedly was aware and allege[d] that such impairment constitute[d] a disability under the Rehabilitation Act." *Id.* The court found that the plaintiff's "alleged limitation to sedentary work plausibly suggests that she might be substantially limited in the major life activity of working." *Id.* (citations omitted). The court explained that the plaintiff would of course ultimately have to prove that she was substantially limited in a major life activity, but that at the pleadings stage, the allegation regarding disability was sufficient. *Id.* at 214 (citation

omitted). The court emphasized that "[t]his so even after *Twombly* and *Iqbal*." *Id.*[6]

- ***Marangos v. Swett***, No. 08-4146, 2009 WL 1803264 (3d Cir. Jun. 25, 2009) (unpublished) (per curiam). The plaintiff sued his ex-wife, the state judge presiding over his divorce, and a variety of financial institutions that participated in refinancing the plaintiff's home mortgage. *Id.* at *1. The plaintiff alleged that his ex-wife conspired with the state judge to obtain favorable rulings in the divorce proceeding, and that she conspired with the refinancing defendants to obtain the proceeds from the refinanced home. *Id.* The plaintiff further alleged that "the refinancing defendants failed to inform him of a lis pendens [the plaintiff's ex-wife] had placed on the marital home before he signed a loan agreement for refinancing, held the refinancing proceeds in escrow instead of giving the money to him, and ultimately paid out the majority of the proceeds to [the ex-wife] and to the Child Support Agency with no notice to him." *Id.* The plaintiff alleged violations of § 1983, the Federal Truth in Lending Act (TILA), and civil RICO. *Id.* The plaintiff also brought state law claims against all defendants, alleging violations of New Jersey's Unfair and Deceptive Acts and Practices Act, intentional and/or negligent infliction of emotional distress, fraud, deception, and violation of privacy laws, as well as "'malicious abuse, misuse, and use of process'" by his ex-wife and the judge. *Id.* Finally, the plaintiff alleged "'Public Employee Wrongfully Enforcing the Law'" and "'Continuous Tort'" claims. *Id.* The district court dismissed the claims against the judge as barred by absolute immunity, and dismissed the remaining claims for failure to state a claim. The Third Circuit affirmed.

  The Third Circuit found that the plaintiff failed to state a claim under § 1983 as to the title company, the mortgagor, the loan servicer, and the ex-wife. *Marangos*, 2009 WL 1803264, at *2. The court noted that there was no factual content in the complaint showing that the loan servicer or the mortgager were involved in the divorce proceedings. *Id.* The only relevant allegation was that the state judge made two phone calls in chambers during family

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[6] In a more recent case, the Third Circuit confirmed that the holdings of *Twombly* and *Iqbal* apply to employment discrimination complaints. *See Guirguis v. Movers Specialty Servs., Inc.*, No. 09-1104, 2009 WL 3041992, at *1 n.6 (3d Cir. Sept. 24, 2009) (unpublished) ("We have applied *Twombly* and *Iqbal's* pleading requirements to employment discrimination claims, but the quantum of facts that a discrimination complaint should contain must bear further development.") (internal citations omitted). The court did not resolve the facts needed for a discrimination complaint because "[t]h[e] case . . . provide[d] a poor vehicle for that task because Guirguis relies in large measure upon bare legal conclusions that would likely have been insufficient even under the pre-*Twombly* pleading standard." *Id.* (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("holding, prior to *Twombly*, that courts were not required to accept the truth of legal conclusions contained in a plaintiff's complaint")). The court concluded that the allegations "that Guirguis is an Egyptian native of Arab descent, that [the defendant] discharged him, and that his termination occurred in violation of his civil rights," were "certainly deficient in the post-*Twombly* era," and that the last allegation was "precisely the type of factually unsupported legal conclusion that is inadequate to surmount a Rule 12(b)(6) challenge." *Id.* at *1 n.6, *2. The court noted that "the complaint never intimates in any way why Guirguis believes that national origin motivated [the termination]." *Id.* at *2. The court recognized that it had previously reassessed *Swierkiewicz* in *Fowler*, but noted that "*Swierkiewicz* remains instructive because Guirguis's complaint contains significantly less factual content than the pleading at issue in that case . . . , bolstering our conclusion that his claims would not have survived under the pre-*Twombly* pleading regime." *Id.* at *2 n.7.

court hearings to the title company to confirm the amount held in escrow. *Id.* The court concluded that "[v]iewing these allegations as true, the factual matter falls far short of permitting us to infer a plausible connection among [the title company, the mortgagor,] and/or [the loan servicer], all private corporations, and a governmental agency or official such that their private actions would constitute 'state action.'" *Id.* (footnote omitted).

The Third Circuit also concluded that the facts in the complaint were not sufficient to allege a plausible connection or conspiracy among the defendants to deprive him of his constitutional rights under § 1983. *Id.* at *3 (citing *Twombly*, 550 U.S. at 556–57; *Kost v. Kozakiewicz*, 1 F.3d 176, 185 (3d Cir. 1993)). The court also held that the claims that the plaintiff's ex-wife used the court system to ruin the plaintiff and that the state judge unlawfully issued decisions in favor of the plaintiff's ex-wife failed to state a claim. *Id.* (citing *Dennis v. Sparks*, 449 U.S. 24, 28 (1980) ("noting that 'merely resorting to the courts and being on the winning side of a lawsuit does not make a party a co-conspirator or a joint actor with the judge'")).

To the extent that the plaintiff sought relief against the title company, the mortgagor, or the loan servicer under TILA, the court concluded that "Marangos failed to state a claim for relief that is plausible on its face" (even assuming the claims were not time-barred) because TILA requires creditors to meaningfully disclose all credit terms to consumers in order to avoid the uninformed use of credit, but Marangos did not allege that these defendants failed to comply with the statute's disclosure requirements. *Marangos*, 2009 WL 1803264, at *3.

The Third Circuit also found dismissal of the civil RICO claims appropriate because such claims require "'a pattern of racketeering activity that include[s] at least two racketeering acts,'" and Marangos alleged theft and wire and mail fraud as predicate acts, but the theft allegations did not constitute predicate acts under RICO, and the mail and wire fraud allegations required pleading with particularity under Rule 9(b). *See id.* The court emphasized that it did not need to accept legal conclusions couched as factual allegations as true, giving this example from the complaint: "'Defendants Swett, Land Options, and Judge Guadagno, are involved in a cover-up and criminal and civil conspiracy to violate Plaintiff's Due Process and Equal Protection Rights, along with violating his fundamentally secured Property Rights.'" *Id.* at *4. The court explained that this statement was "merely a recitation of legal terms that enjoys no assumption of veracity." *Id.* The court noted that the complaint contained no facts to allow the court to reasonably infer, under Rule 9(b), that the title company, the mortgagor, and the loan servicer engaged in wire or mail fraud. *Id.* The court also noted that the complaint alleged that the judge spoke on the phone with the title company and had *ex parte* communications with the ex-wife, but found that "[a]ssuming, *arguendo*, that these allegations meet the standard of particularity required by Rule 9(b), and assuming their veracity, we agree with the District Court that they are insufficient under the less rigid pleading standard set forth in Rule 8(a)(2) to permit a plausible inference of a scheme or an intent to defraud . . . ." *Id.*

- ***Lopez v. Beard***, No. 08-3699, 2009 WL 1705674 (3d Cir. Jun. 18, 2009) (unpublished) (per curiam). The *pro se* plaintiff alleged that various officers in the Pennsylvania Department of

Corrections violated his rights under the ADA and the Eighth and Fourteenth Amendments. *Id.* at *1. Specifically, the plaintiff alleged that he had HIV/AIDS, that the prison officials and inmates knew this, that on one occasion his family was denied a contact visit with him, that on another occasion his family was erroneously told that they were not on the visitors list, and that individuals not named as defendants made disparaging statements about the plaintiff's medical condition. *Id.* The magistrate judge recommended that the claims against four of the defendants be dismissed for failure to allege any personal involvement; that the claims against the remaining defendants be dismissed because denial of visitation did not rise to the level of a constitutional violation and the plaintiff had failed to allege physical injury in connection with his emotional distress; and that the ADA claims be dismissed for failure to allege any nexus between the denials of visitation and his disability. *Id.* The district court allowed the plaintiff to file an amended complaint, in which he alleged that he was deliberately denied contact with family members "'in retaliation and discrimination of plaintiff being HIV-AIDS positive and having a history of problems with staff, including the filing of numerous complaints against staff.'" *Id.* at *2. "The only specific claim [the plaintiff] made with respect to any individually named defendant was that Correctional Officer Alvarez made 'belittling and discriminating remarks and gestures about plaintiff to his then-girlfriend' and altered his approved visitors list, thus preventing his sister and brother-in-law from visiting him." *Id.* The amended complaint also alleged that the prison officials falsified their grievance response "to cover up their bad acts." *Id.* The district court dismissed the complaint, and the Third Circuit affirmed. The Third Circuit explained:

> What Lopez has alleged in his complaint and amended complaints are theories and conclusions, not facts. While Lopez claims that he has been subject to "prejudice, discrimination and retaliation" at the hands of certain defendants, and that Officer Alvarez made "belittling and discriminating remarks and gestures about plaintiff to his then-girlfriend," he does not offer any specifics about these alleged incidents which would permit a court to reach the conclusion that they were discriminatory. *See Iqbal*, 129 S. Ct. at 1952 ("He would need to allege more by way of factual content to 'nudg[e]' his claim of purposeful discrimination 'across the line from conceivable to plausible.'"). Accordingly, we agree that the District Court properly dismissed his claims of violations of his rights under the First, Eighth and Fourteenth Amendments of the U.S. Constitution and Title II of the ADA for failure to state a claim.

Lopez, 2009 WL 1705674, at *3 (footnote omitted).

- ***Taylor v. Pittsburgh Mercy Health Sys., Inc.***, No. 09-377, 2009 WL 2992606 (W.D. Pa. Sept. 17, 2009). The court denied a motion for more definite statement, noting that "*Twombly* and *Iqbal* notwithstanding, the notice pleading standard still applies in federal court." *Id.* at *2. The court noted that "[a]lthough Defendants assert that the details regarding Plaintiffs' alleged pre- and postliminary work and/or training may excuse FLSA

liability, these arguments are better suited for resolution at a later stage in the proceedings." *Id.* at *2 n.1 (internal record citation omitted).

- ***Vorassi v. US Steel***, No. 09cv0769, 2009 WL 2870635 (W.D. Pa. Sept. 3, 2009). The court dismissed employment discrimination claims as time-barred. *Id.* at *1. The court cited pre-*Twombly* case law for the proposition that "a court will not accept bald assertions, unwarranted inferences, or sweeping legal conclusions cast in the form of factual allegations." *Id.* (citing *In re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 215 (3d Cir. 2002); *Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 n.8 (3d Cir. 1997)). The court noted that "a plaintiff must put forth sufficient facts that, when taken as true, suggest the required elements of a particular legal theory," *id.* at *2 (citation omitted), but explained that "*this standard does not impose a heightened burden on the claimant above that already required by Rule 8*, but instead calls for fair notice of the factual basis of a claim while 'rais[ing] a reasonable expectation that discovery will reveal evidence of the necessary element.'" *Id.* (citation omitted) (emphasis added); *see also Koynok v. Lloyd*, No. 06cv1200, 2009 WL 2981953, at *3 (W.D. Pa. Sept. 11, 2009) (same).

- ***Adams v. Lafayette College***, No. 09-3008, 2009 WL 2777312 (E.D. Pa. Aug. 31, 2009). In an employment discrimination case based on alleged age discrimination, the court concluded that the plaintiff's pleading was insufficient because it was conclusory and devoid of factual details, and better explained by lawful conduct. *Id.* at *3–4. The court rejected the plaintiff's argument, based on "the liberal pleading discussion in *Swierkiewicz*," that requiring more detailed pleading "would improperly limit a plaintiff's ability to raise a discrimination claim by requiring the plaintiff to muster the crucial evidence, which is most often in the defendants' hands, *before* discovery." *Id.* at *4 (citations omitted). The court explained that "[c]ontrary to plaintiff's position, the *Fowler* decision specifically noted the Supreme Court's indirect repudiation of the *Swierkiewicz* ruling to the extent it relies on *Conley* and its 'no set of facts' requirements." *Id.* (citation omitted). But the court explained that the complaint was deficient even under *Swierkiewicz*:

> More importantly, Adams overlooks the key factual distinctions between his case and *Swierkiewicz*. In that case, the Court specifically noted the complaint easily satisfied the requirements of Rule 8(a) because it "detailed the events leading to termination, provided relevant dates, and included the ages . . . of at least some of the relevant persons involved with his [adverse employment action]." *Swierkiewicz*, 534 U.S. at 514. On the other hand, Adams's complaint['s] factual allegations are scant and rely primarily on his own averments that he has been treated differently because of his age. Though Adams has sufficiently plead[ed] he was suspended for one day for turning his back to his supervisor, he has failed to allege sufficient facts to nudge his claim from conceivable to plausible.

Id. (footnote omitted). The court emphasized that the facts necessary to survive the pleadings

stage are minimal:

> My ruling should not be construed as requiring potential plaintiffs to muster all facts necessary for their claim before the complaint is filed. As discussed earlier, *the Federal Rules of Civil Procedure have consistently been interpreted as providing a liberal pleading standard*. To be sure, the *Twombly* and *Iqbal* decisions have *clarified* the minimal pleading standards by rejecting formulaic recitations of the elements of a cause of action as well as allegations consisting only of labels or conclusions. Additionally, the complaint must . . . recite facts sufficient to show a plausible claim of relief.
>
> Here, the complaint is dismissed because it fails to clear minimal procedural hurdles. Careful analysis of the allegations reveal they are only conclusory restatements of the elements of an employment discrimination claim. Adams has certainly stated facts for a conceivable claim but falls short of demonstrating a plausible claim of relief.

Id. at *4 n.2 (emphasis added).

- ***Garczynski v. Countrywide Home Loans, Inc.***, --- F. Supp. 2d ----, No. 08-5128, 2009 WL 2476622 (E.D. Pa. Aug. 12, 2009). The court concluded that the factual allegations were insufficient to allege that the defendant violated the state unfair trade practices and consumer protection law, finding that they were "essentially no more than a restatement of the elements of the statute." *Id.* at *6. The court stated: "Plaintiffs cannot adequately plead that Countrywide violated the UTPCPL simply by pasting the language of the statute into their Amended Complaint." *Id.* The court commented:

> Although *Twombly* and *Iqbal* have been criticized as both ignoring the liberal concept of notice pleading and representing an unwarranted change in Supreme Court jurisprudence on the adequacy of pleadings, *the Complaint in the present case is a good example of why allowing a case to proceed simply on its allegations of statutory elements, which some might equate with notice pleading, can be unfair in some cases*. The relationship between the parties in this case is based on contract. If Plaintiffs had grounds to believe that Defendants had violated the contract, a claim for breach of contract would surely be proper. However, Plaintiffs' claims are based solely on alleged oral representations, which Plaintiffs claim induced them to enter into the mortgage agreement. If, as Plaintiffs allege, they did not understand the mortgage agreement, they should not have signed it or sought services of a lawyer or written clarification from Countrywide. *Allowing a claim of this nature to proceed when the terms of the*

> *written documents are clearly contrary to the Plaintiffs' allegations would not only violate* Iqbal *and* Twombly*, but other long-standing principles of federal jurisprudence*.

Id. at *6 n.6 (citation omitted) (emphasis added).

- ***Carpenters Health & Welfare Fund of Philadelphia v. Kia Enters. Inc.***, No. 09-116, 2009 WL 2152276 (E.D. Pa. Jul. 15, 2009). The plaintiffs sued to collect money allegedly owed under a collective bargaining agreement and related trust agreements, and the defendant filed a counterclaim, alleging that in seeking to collect the payments, the plaintiffs had violated the Civil Rights Act of 1866. *Id.* at *1. The court concluded that the counterclaim was insufficient under *Iqbal*:

> The Supreme Court's clarification of federal pleading standards in *Twombly* and *Iqbal* has *raised the bar for claims to survive a motion to dismiss* by emphasizing that a plaintiff cannot rely on legal conclusions or implausible inferences from factual allegations to state a claim. Measured against this clarified standard, Kia's amended counterclaim fails.
>
> The amended counterclaim's allegations that the Carpenter's Union has a "longstanding pattern and practice" of discriminating against minorities and minority-owned businesses and the allegations that the plaintiffs' actions were intentional and motivated by racial animus and a desire to exclude minorities and minority-owned businesses from the construction industry are all legal conclusions that under *Iqbal* and *Twombly* are not entitled to be assumed to be true.
>
> The factual allegations in the amended counterclaim concern actions by the plaintiffs to collect the payments they claim Kia owes them. The amended counterclaim alleges that the plaintiffs took steps to make a claim against Kia's performance bond, sought to persuade a city agency to withhold payments to Kia, and demanded to audit Kia's books and records. These actions are entirely consistent with a lawful attempt by the plaintiffs to collect unpaid CBA obligations that they are owed. By themselves, these allegations are "not only compatible with, but more likely explained by," lawful behavior and therefore cannot "plausibly suggest" actionable wrongdoing. *Iqbal*, 129 S. Ct. at 1950. Kia's allegations that the plaintiffs took similar steps against another minority-owned business . . . are also entirely consistent with lawful actions by the plaintiffs to collect unpaid CBA payments.
>
> Kia has attempted to plead sufficient additional facts to

> "nudge" its allegations of discrimination across the "line from conceivable to plausible" by alleging, *on information and belief*, that the plaintiffs do not make similar efforts to collect unpaid CBA obligations from non-minority-owed businesses. Kia, however, *offers no specific facts in support of the plaintiffs' alleged disparate treatment of minority and non-minority businesses*. In the absence of any more specific allegations identifying particular instances of disparate treatment, these allegations are merely "legal conclusions couched as factual allegations," which under *Twombly* and *Iqbal* cannot be taken as true.
>
> Kia's allegations that the Carpenter's Union refused to cooperate with the Mayor's Advisory Commission and has a "historical and present day antipathy" to racial minorities are also not enough to make Kia's discrimination claims plausible. Even if taken as true, these allegations are not probative to the question of whether the specific actions taken by the plaintiffs against Kia can be plausibly alleged to have been motivated by discrimination.

Id. at *3 (emphasis added).

Fourth Circuit

- ***Monroe v. City of Charlottesville***, --- F.3d ----, No. 08-1334, 2009 WL 2749993 (4th Cir. Aug. 31, 2009). The plaintiff sued the city and individual police officers under § 1983, alleging violations of the Fourth and Fourteenth Amendments, because he was approached at his home by a police officer and asked to give a DNA sample because he matched the description of a serial rapist given by victims who described their assailant as "a youthful-looking black male." *Id.* at *1. The plaintiff alleged that his equal protection rights were violated because he was stopped based on his race, and because officers did not perform similar stops when victims describe an assailant as white. *Id.* The plaintiff also alleged that he was subject to an unreasonable seizure when the officer came to his home and when the plaintiff gave a sample for DNA analysis. *Id.* The district court concluded that the plaintiff could not proceed on his equal protection claim based on being stopped on account of his race because the Equal Protection Clause is not violated when the police limit their investigation to those matching a victim's description, but found that the plaintiff could proceed on the claim that the City did not investigate crimes in the same way when the assailant is described as white. *Id.* The district court dismissed the seizure claim based on the officer coming to the plaintiff's home because "Monroe failed to state facts sufficient to show the consensual encounter escalated to a seizure," but his claim that his bodily fluids were unreasonably seized was allowed to proceed. *Id.* The plaintiff amended his complaint, and the defendant again moved to dismiss. The district court again dismissed the portion of the equal protection claim asserting that the officers only approached him based on his race, but allowed the rest of the equal protection claim to proceed; dismissed the claim that the

plaintiff was unreasonably seized because "the newly alleged facts did not cure the original deficiencies"; and allowed the seizure claim based on the officer's taking bodily fluids to proceed. *Monroe*, 2009 WL 2749993, at *2. The plaintiff appealed the dismissal of his Fourth Amendment claim and the dismissal of his equal protection claim; the Fourth Circuit affirmed.

On appeal, the plaintiff asserted that the district court improperly "required him to plead facts sufficient to prove his claim, instead of merely requiring 'enough facts from which the trial court could infer a basis for [Monroe's] claim' when viewed in conjunction with the potentially discoverable facts." *Id.* at *4. Citing a pre-*Twombly* case, the Fourth Circuit noted that "the court 'need not accept legal conclusions drawn from the facts, and [ ] need not accept as true unwarranted inferences, unreasonable conclusions, or arguments.'" *Id.* (quoting *Jordan v. Alternative Res. Corp.*, 458 F.3d 332, 338 (4th Cir. 2006)).

With respect to the seizure claim, the court noted that the plaintiff had alleged that "he 'was visited in his home and coerced into giving a DNA sample'"; "[t]he encounter was not consensual because 'Monroe had both an objectively and subjectively reasonable belief that he was not free to decline the officer's request or otherwise terminate the encounter"; "[t]he encounter was at Monroe's home and he was concerned neighbors would view him 'as a snitch'"; "Monroe, based on his and others' interactions with police, believed he had to comply with the officers, and the fact that he was approached at his home meant he 'was not free to terminate the interaction'"; and "Monroe's belief that he could not terminate the encounter was objectively reasonable based on '[t]he state of relations between law enforcement and members of the minority communities.'" *Id.* at *5. The Fourth Circuit noted that "[t]o elevate . . . an encounter to a seizure, a reasonable person must feel he is not free to disregard the officer and terminate the encounter," and that because the inquiry is an objective one, the plaintiff's subjective beliefs were irrelevant. *Id.* The court rejected the plaintiff's theory that it was sufficient to plead that a sufficient proportion of the population shared his beliefs, stating that "[t]o agree that Monroe's subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor would result in a rule that all encounters between police and minorities are seizures." *Id.* The court concluded that "while Monroe's subjective beliefs may be facts, they are irrelevant facts that neither plausibly give rise to a right to relief nor suggest there are discoverable facts that may plausibly give rise to a right to relief." *Monroe*, 2009 WL 2749993, at *5. The court found that the remaining allegations in the complaint did not meet the *Twombly* standard:

> The remaining facts in the complaint regarding the alleged seizure do not satisfy the *Twombly* test either. First, Officer Mooney's failure to tell Monroe that he could terminate the encounter has been rejected as a means of establishing a seizure, and does not imply there are discoverable facts that establish otherwise. Second, the allegations that Monroe was "coerced," that his belief was "objectively reasonable," and that the encounter "was not [ ]

> consensual" are legal conclusions, not facts, and are insufficient. The remaining two facts—that Officer Mooney was in uniform and he approached Monroe at his home—merely describe many consensual encounters, are insufficient to survive a Rule 12(b)(6) motion, and do not imply there are other discoverable facts that "raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555, 127 S. Ct. 1955. Thus, the district court did not err in dismissing Monroe's Fourth Amendment claim.

Id. at *6 (internal citations omitted).

With respect to the equal protection claim, the Fourth Circuit concluded that the officer did not approach the plaintiff based on his race, but based on the victims' descriptions. The court noted that an equal protection claim requires "'express racial classification,' which occurs when *the government* distinguishes among the citizenry on the basis of race," and concluded that "it is clear that the officers in this case made no such distinction when establishing the suspect's characteristics—any descriptive categorization came from the rape victims who described their assailant." *Id.* at *7. The court found this conclusion supported by *Iqbal*, where the Supreme Court "noted that Arab-Muslim men were responsible for the September 11 attacks, and '[i]t should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims.'" *Id.* at *8 (quoting *Iqbal*, 129 S. Ct. at 1951).

- ***Walker v. Prince George's County***, 575 F.3d 426 (4th Cir. 2009). The owners of a pet wolf initiated suit in state court against the county animal control officer and the county after the officer seized their pet wolf. The plaintiffs alleged civil trespass, violation of the Maryland Constitution, and violation of their Fourth Amendment rights under § 1983. *Id.* at 428. The defendants removed the case to federal court and moved for summary judgment. *Id.* The district court granted the defendants' motion for summary judgment because the officer was entitled to qualified immunity and the complaint failed to adequately plead a claim against the county under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), by failing to allege the county's policy, custom, or practice. *Walker*, 575 F.3d at 428. The plaintiffs appealed the grant of the defendants' motion for summary judgment on the Fourth Amendment § 1983 claim and the denial of their own motion for summary judgment on that claim, and also argued that they were entitled to summary judgment. *Id.* at 428–29. The Fourth Circuit affirmed.

  In discussing the *Monell* claim, the Fourth Circuit noted that "a municipality's liability 'arises only where the constitutionally offensive actions of employees are taken in furtherance of some municipal 'policy or custom,'" *id.* at 431 (citation omitted), but that the plaintiffs "'failed to make any allegations in their complaint in regards to the existence of the County's policy, custom, or practice, therefore failing to plead' a viable *Monell* claim," *id.* (citation omitted). The court rejected the plaintiffs' assertion that "a County policy to seize animals

without inquiring whether their owners have valid permits for those animals '[could] be inferred from Officer Jacobs' testimony' and that it should be 'presumed that the County never checks to see if owners lawfully possess wild or exotic animals before seizing them,'" because the plaintiffs "fail to explain the basis of their inference or the justification for their presumption." *Id.* The court noted: "Critically lacking is any support for the proposition that Officer Jacobs' common practice 'implemented an official government policy or custom.'" *Id.* (citation omitted). The court concluded that the allegations "'do not permit [us] to infer more than the mere possibility of misconduct," *Walker*, 575 F.3d at 431 (citing *Iqbal*, 129 S. Ct. at 1950), and "[t]his mere possibility is inadequate to subject the County to appellants' suit for monetary damages," *id.*

- ***Fed. Trade Comm'n v. Innovative Mktg., Inc.***, --- F. Supp. 2d ----, 2009 WL 2959680 (D. Md. Sept. 16, 2009). The Federal Trade Commission (FTC) brought suit under the Federal Trade Commission Act (FTCA) for alleged deceptive conduct in connection with the sale of software. *Id.* at *1. In response to the FTC's argument that "the *Iqbal* decision does not represent a 'sea change in the law of pleading,'" the court noted that "*Iqbal*'s importance cannot be minimalized," and that *Twombly* and *Iqbal* "represent a new framework for reviewing the sufficiency of complaints under Rule 8." *Id.* at *2 n.2. In denying the motion to dismiss, the court found that the factual allegations were sufficient, and rejected the defendant's assertion that a stricter pleading standard applied:

> In the face of such thorough pleading, D'Souza advocates for this Court to apply an *unduly stringent* pleading standard and dismiss the Complaint. Indeed, Defendant seems to argue for a pleading standard akin to the particularity requirement prescribed for claims of fraud under FED. R. CIV. P. 9(b)—a heightened standard that does not apply [to] section 5(a) claims under the FTC Act. Twombly *and* Iqbal *may have raised the bar for stating a claim under Rule 8, but not to the extent proposed* by D'Souza. *Rule 8 remains a liberal standard*—a complaint need only set forth a "short and plain statement" that gives a defendant fair notice of plaintiff's grounds for entitlement for relief. FED. R. CIV. P. 8(a)(2). Indeed, in *Iqbal*, the Court emphasized the appropriate approach under the plausibility standard by noting that it was not a "'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 129 S. Ct. at 1949 (quoting *Twombly*, 550 U.S. at 556). Stated otherwise, a plaintiff need only plead sufficient facts to "nudg[e]" a claim "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570.

Id. at *7 (additional internal citations omitted) (emphasis added). The court denied the motion to dismiss, finding that "[t]hrough its extensive factual pleadings, the FTC has positioned its claims against Marc D'Souza safely within the realm of plausibility." *Id.*

- ***Boy Blue, Inc. v. Zomba Recording, L.L.C.***, No. 3:09-CV-483-HEH, 2009 WL 2970794 (E.D. Va. Sept. 16, 2009). The court examined whether pleading on information and belief can be appropriate, and explained:

> This Court must therefore consider whether a pleading "upon information and belief," without further factual support, is sufficient to state an actionable claim. Pleading "upon information and belief" is appropriate when the factual basis supporting a pleading is only available to the [opposing party] at the time of pleading. *See, e.g.*, *Boykin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008) (holding that pleading upon "information and belief" is appropriate when the information is in the opposing party's possession); *Johnson v. Johnson*, 385 F.3d 503, 531 n.19 (5th Cir. 2004) ("'information and belief' pleadings are generally deemed permissible under the Federal Rules, especially in cases in which the information is more accessible to the defendant."). The Court finds that any facts establishing [one of the elements of tortious interference] could, at this stage of the proceedings, be entirely within the possession of the opposing parties. In this circumstance, a pleading "upon information and belief" survives a 12(b)(6) challenge. The dignity accorded "information and belief" pleadings has more limited application in other contexts.

  Id. at *2. The court noted that with respect to the allegations regarding the other elements of the claim, "[t]hey are nothing more than a listing of the required element with Defendant Zomba's or Sony Music's name inserted as the offending party," and concluded that "[s]tripped of such legal incantation, these allegations provide no factual support for the remaining elements of Plaintiff's tortious interference claim." *Id.* at *3.

- ***King v. United Way of Cent. Carolinas, Inc.***, No. 3:09CV164-MR-DSC, 2009 WL 2432706 (W.D.N.C. Aug. 6, 2009). The plaintiff alleged, among other claims, race, gender, and age discrimination and retaliation under § 1981, Title VII, and the Age Discrimination in Employment Act (ADEA). The court found that the allegation that "'upon information and belief . . . the [defendant's] decision [to terminate the plaintiff] was made, at least in part, on the basis of the Board's perception of the discomfort of the Charlotte community with the idea of an African-American woman earning so much money'" was insufficient because the only facts mentioning race in the complaint related to blogs and internet postings not authored by the defendants. *Id.* at *8. The court concluded that "Plaintiff's assertion that UWCC's decision to terminate her was based on community discomfort with her race/gender and compensation is precisely the type of factually-unsupported, conclusory allegation that the Court must disregard." *Id.* (citing *Iqbal*, 129 S. Ct. at 1951). The court also found that there were no factual allegations supporting the conclusion in the complaint that the plaintiff's interim replacement, who was white and male, was picked because the defendant "concluded that it was 'more palatable for a white man to receive a generous salary than a black woman.'" *Id.* at *9. The court stated: "The Complaint contains no other allegations,

conclusory or otherwise, that UWCC hired [the plaintiff's interim replacement] because of his race, gender, or age." *Id.* With respect to age discrimination, the only factual allegation was the plaintiff's date of birth and her age. *Id.* The court also dismissed the retaliation claim because "even having taken the Complaint's well-pleaded factual allegations as true, judicial experience and common sense dictate that it is more likely that UWCC terminated [the plaintiff's] employment because she could no longer lead UWCC effectively in the wake of the public reaction to the disclosure of her compensation and that UWCC chose Everett as her interim replacement because he is a respected local figure." *King*, 2009 WL 2432706, at *9.

- ***Fletcher v. Philip Morris USA Inc.***, No. 3:09CV284-HEH, 2009 WL 2067807 (E.D. Va. Jul. 14, 2009). The plaintiff alleged race and gender discrimination and retaliation under Title VII and race discrimination under § 1981 against his employer. The court concluded that the plaintiff had inadequately alleged discrimination under Title VII and § 1981 because although the plaintiff alleged an adverse employment action, there were no specific factual allegations that similarly situated employees, who were not members of a protected class, received more favorable treatment, or that the defendants acted with discriminatory intent. *Id.* at *6. The court found that "it would be difficult for a reasonable person to conclude that the factual allegations in the Amended Complaint even give rise to the *suggestion* of discrimination," noting that the decisionmakers involved in the adverse employment decisions were members of the same race as the plaintiff, and one was also a male, and the defendants replaced the plaintiff with a person of the same race and gender as the plaintiff. *Id.* at *7. The court found the retaliation claim insufficient as well because the court could "find no indication from the facts as pled that Plaintiff's race or gender played any role in the low-performance ratings that led to Plaintiff's internal complaint," and the complaint therefore did not constitute a protected activity under Title VII. *Id.* at *8. The plaintiff's EEOC charge did constitute a protected activity, but the retaliation claim still failed because the alleged adverse actions either did not rise to the level of a true adverse action or there was no causal connection alleged between the adverse action and the alleged retaliation. *Id.* at *9–10.

Fifth Circuit

- ***Gonzalez v. Kay***, 577 F.3d 600 (5th Cir. 2009). The plaintiff alleged that one of the defendants sent him a collection letter that violated the Fair Debt Collection Practices Act (FDCPA). The district court dismissed the case for failure to state a claim, but the Fifth Circuit reversed. "Gonzalez asserted in his complaint that the letter was deceptive in that the Kay Law Firm 'pretended to be a law firm with a lawyer handling collection of the Account when in fact no lawyer was handling the Account or actively handling the file.'" *Id.* at 602. The Fifth Circuit explained that "Gonzalez essentially contends that the Kay Law Firm is not actually a law firm at all but instead is a debt collection agency that used the imprimatur of a law firm to intimidate debtors into paying their debts." *Id.* at 602–03. The FDCPA, in relevant part, "prohibits '[t]he false representation or implication that any individual is an attorney or that any communication is from an attorney,'" and "'[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain

information concerning a consumer.'" *Id.* at 603–04 (citing 15 U.S.C. §§ 1692e(3), 1692e(10)). There was "no dispute that Gonzalez [wa]s a 'consumer' under the FDCPA and that Kay and the Kay Law Firm [we]re 'debt collectors' under the [FDCPA]." *Id.* at 604 (citing 15 U.S.C. § 1692a(3), (6)).

The court discussed the *Twombly*/*Iqbal* standard for dismissal in the "standard of review" section of the opinion, but did not cite those cases later in the opinion. The court examined the case law regarding letters under the FDCPA, and concluded that "the main difference between the cases is whether the letter included a clear prominent, and conspicuous disclaimer that no lawyer was involved in the debt collection at that time." *Id.* at 606. The court explained that some letters were not deceptive as a matter of law, some were so deceptive and misleading as to violate the FDCPA as a matter of law, and others fell in the middle. *Gonzalez*, 577 F.3d at 606–07. The Fifth Circuit concluded that the letter at issue fell in the middle ground, and that the district court had therefore prematurely dismissed the complaint. *Id.* at 607.

- ***Lehman Bros. Holdings, Inc. v. Cornerstone Mortgage Co.***, No. H-09-0672, 2009 WL 2900740 (S.D. Tex. Aug. 31, 2009). The court dismissed a counterclaim for attorneys' fees under state law, noting that the "allegations as to the breach [of contract supporting the request for attorneys' fees] [we]re scant." *Id.* at *5. The court concluded:

> To the extent Cornerstone alleges breach of contract, *it fails to plead sufficiently under the standards that applied even before* Twombly *and* Iqbal. Cornerstone has simply alleged that a contract was breached by a failure properly to service the loans and to give notice. *This bare-bones allegation neither provides fair notice of the claim nor of the grounds on which it rests*. Because the Rule 8 standard is not satisfied, dismissal with leave to amend under Rule 12 is appropriate.

Id. (emphasis added).

Sixth Circuit

- ***Tam Travel, Inc. v. Delta Airlines, Inc.*** (***In re Travel Agent Comm'n Antitrust Litig.***), --- F.3d ----, No. 07-4464, 2009 WL 3151315 (6th Cir. Oct. 2, 2009). The plaintiffs were travel agencies who alleged a § 1 conspiracy under the Sherman Antitrust Act, based on a series of uniform base commission cuts adopted by the defendants over a seven-year period. *Id.* at *1. The Plaintiffs alleged that one industry leader airline would reduce the commissions paid to travel agents, that competitor airlines would shortly follow suit, and that this pattern happened several times until eventually the commissions were reduced to zero. *See id.* at *1–2. The plaintiffs further alleged that the decision to cut commissions was contrary to the individual defendants' economic self-interests, and that the defendants had numerous opportunities to conspire. *Id.* at *2. The district court dismissed the complaint, finding that

with respect to some of the defendants, the plaintiffs failed to allege any conduct other than sporadic parallel conduct; that the plaintiffs failed to allege any parallel conduct as to one of the defendants; that several of the defendants had emerged from bankruptcy and their claims were therefore discharged; that the plaintiffs failed to allege sufficient facts to plausibly suggest an illegal agreement with respect to other defendants; and that the plaintiffs alleged no facts with respect to a holding company that did not itself pay any commissions. *Id.* at *3. The Sixth Circuit affirmed.

The Sixth Circuit explained that "conscious parallelism" is not prohibited under § 1, and that "[a] district court's early assessment of the sufficiency of a § 1 claim under FED. R. CIV. P. 12(b)(6) or FED. R. CIV. P. 12(c) addresses the dilemma of the extensive litigation costs associated with prosecuting and defending antitrust lawsuits." *Id.* at *5–6. The court rejected the plaintiffs' attempt to distinguish *Twombly*, concluding that the allegation of an agreement was "nothing more than a legal conclusion 'masquerading' as a factual allegation." *Tam Travel*, 2009 WL 3151315, at *7 (citing *Eidson v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007)). The court also found that the allegations regarding meetings in which the defendants had the opportunity to conspire did "not necessarily support an inference of illegal agreement." *Id.* The court noted that with respect to two of the defendants, the plaintiffs had alleged nothing more than parallel conduct, and that several other defendants were not even mentioned in the body of the complaint or described as linked to the conspiracy. *Id.* The court explained that if these latter defendants "'[sought] to respond to plaintiffs' [ ] allegations in the § 1 context, [they] would have little idea where to begin.'" *Id.* (quoting *Twombly*, 550 U.S. at 564 n.10).

The Sixth Circuit also rejected the argument that the allegations were sufficient to infer that discovery would reveal circumstantial evidence to suggest a conspiracy. *Id.* at *8. The court found that the defendants had asserted a "reasonable, alternative explanation for their parallel pricing behavior"—specifically, that new, alternate methods for purchasing airfare provided greater economic incentive to cut commission rates on a trial-and-error basis, and that it was simple and inexpensive for a leader airline to test the market with cuts and hope that its competitors would follow. *Id.* at *10. The court explained:

> We therefore hold that plaintiffs have failed to allege sufficient facts plausibly suggesting (not merely consistent with) an agreement in violation of § 1 of the Sherman Act because defendants' conduct "was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior." *Ashcroft v. Iqbal*, 129 S. Ct. at 1950. Pursuant to *Twombly*, district courts must assess the plausibility of an alleged illegal agreement before parties are forced to engage in protracted litigation and bear excessive discovery costs. *Twombly*, 550 U.S. 558–59. In this regard, we note that the plausibility of plaintiffs' conspiracy claim is inversely correlated to the magnitude of defendants' economic self-interest in making the cuts. We are not persuaded by plaintiffs' argument that defendants would

> not seek to reduce base commissions independently, especially during the late 1990s and into 2002, where changes in the marketplace provided consumers with alternate ticket-purchasing options. As the Court stated in *Twombly*, "there is no reason to infer that [these defendants] had agreed among themselves to do what was only natural anyway." 550 U.S. at 566.

Tam Travel, 2009 WL 3151315, at *10 (footnotes and additional internal citation omitted). The court concluded: "[E]ach defendant's decision to match a new commission cut was arguably a reasoned, prudent business decision. Moreover, if each defendant asked 'itself' whether it was 'better off' paying base commissions (paid by all) or not paying base commissions (eliminated by all), each defendant would plausibly elect the latter (from a purely economic standpoint)." *Id.* at *12. The court also rejected the allegations based on opportunity to conspire, finding that "[t]he fact that American and Continental gathered at industry trade association meetings during the seven-year period when defendants reduced commission rates should not weigh heavily in favor of suspecting collusion," and noting that a similar argument had been rejected in *Twombly*. *Id.* The court also held that "a mere opportunity to conspire does not, standing alone, plausibly suggest an illegal agreement because American's and Continental's presence at such trade meetings is more likely explained by their lawful, free-market behavior." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950).

In dissent, Judge Merritt asserted that *Twombly* and *Iqbal* had not radically changed pleading standards:

> In the recent *Twombly* and *Iqbal* cases, quoted and discussed at length by my colleagues in their majority opinion, the Supreme Court has *started to modify somewhat, but not drastically, the notice pleading rules* that have reigned under *Conley v. Gibson*, 355 U.S. 41, 45 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief"). These two cases *now require more than simple notice and conclusory statements of ultimate facts about the case*. Instead plaintiffs must plead "sufficient factual matter" to state a legal claim or cause of action that is not only "conceivable" but also "plausible," independently of the notice given and the legal conclusions stated—in short, a set of "well-pleaded factual allegations" that make the cause of action "plausible." *Iqbal*, 129 S.Ct. at 1949–51 (2009). *The Supreme Court majority has made clear that it is not making a major change in the law of pleading with* Twombly *and its progeny*.

Id. at *13 (Merritt, J., dissenting) (footnote omitted). Judge Merritt argued that the majority had misapplied the pleading standard:

> As with any other new, general legal standard, the nature and meaning of the newly modified standard can be understood and followed only by analyzing how the standard is applied in actual cases like this case. Here my colleagues have seriously misapplied the new standard by requiring not simple "plausibility," but by requiring the plaintiff to present at the pleading stage a strong probability of winning the case and excluding any possibility that the defendants acted independently and not in unison. My colleagues are requiring the plaintiff to offer detailed facts that if true would create a clear and convincing case of antitrust liability at trial without allowing the plaintiff the normal right to conduct discovery and have the jury draw reasonable inferences of liability from strong direct and circumstantial evidence.

Id. (Merritt, J., dissenting). Judge Merritt explained that "[i]f the *Twombly* pleading issue was 'close,' but insufficient, based only on similar stand-pat nonfeasance toward each other's historical territory, the allegations concerning the in unison, affirmative behavior of the airlines in this case are obviously sufficient," and noted that "[t]he factual allegations in this case create an overwhelming case for the plaintiff to get by a motion to dismiss on the pleading." *Id.* at *14 (Merritt, J., dissenting). Judge Merritt stated:

> To summarize, the complaint alleges that price cuts could not be made absent unilateral, follow-the-leader action by all of the defendants. It provides specific times and locations of numerous meetings attended by the defendants. Finally, and most importantly, the complaint ties the dates of those meetings with industry-wide simultaneous rate cuts that followed immediately thereafter. Reading these allegations as a whole, the complaint clearly satisfies the *Twombly* standard. In fact, the Supreme Court in *Twombly* noted that multiple competitors making "complex and historically unprecedented changes in pricing structure . . . for no other discernible reason" would properly state a claim under § 1 of the Sherman Act. 550 U.S. at 557 n.4. That appears to be exactly the situation here.

Tam Travel, 2009 WL 3151315, at *15 (Merritt, J., dissenting). Judge Merritt expressed concern that although few antitrust cases had been decided since *Twombly* and *Iqbal*, "district court judges across the country have dismissed a large majority of Sherman Act claims on the pleadings[,] misinterpreting the standards from *Twombly* and *Iqbal*, thereby slowly eviscerating antitrust enforcement under the Sherman Act." *Id.* (Merritt, J., dissenting) (citing *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D. Wash. Aug. 18, 2009); *Bailey Lumber & Supply Co. v. Ga.-Pac. Corp.*, No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. Aug. 10, 2009); *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D. Del. May 31, 2009)). Judge Merritt further explained that "[t]he uniformity needed for the rule of law and equal justice

to prevail is lacking," and that "[t]his irregularity may be attributed to the desire of some courts, like my colleagues here, to use the pleading rules to keep the market unregulated, while others refuse to use the pleading rules as a cover for knocking out antitrust claims." *Id.* (Merritt, J., dissenting) (citations omitted). The dissent elaborated:

> There are many, including my colleagues, whose preference for an unregulated laissez faire market place is so strong that they would eliminate market regulation through private antitrust enforcement. Using the new *Twombly* pleading rule, it is possible to do away with price fixing cases based on reasonable inferences from strong circumstantial evidence. As in this case, the proponents of this strategy propose to require either an express written agreement among competitors or a transcribed oral agreement to fix prices. Nothing less will do. Insider testimony, a strong motivation to collude, and aggressive, lock-step unanimity by competitors in pricing become insufficient to state a case. Over time, the antitrust laws fall further into desuetude as the legal system and the market place are manipulated to benefit economic power, cartels, and oligopolies capable of setting prices. This case is just one small step in that direction. But this direction is unlikely to be changed unless the Supreme Court steps in to make it clear that *Twombly* may not be used, as my colleagues propose, as a cover for repealing regulation of the marketplace through private antitrust enforcement.

Id. at *16 (Merritt, J., dissenting).

- ***Hensley Mfg. v. ProPride, Inc.***, --- F.3d ----, No. 08-1834, 2009 WL 2778220 (6th Cir. Sept. 3, 2009). The plaintiff asserted claims for trademark infringement and unfair competition under the Lanham Act, common law trademark infringement, breach of contract against one of the defendants, misappropriation of trade secrets against two other defendants, and tortious interference with business relations. *Id.* at *1. The district court dismissed the trademark infringement and unfair competition claims, finding that the fair use exception applied; dismissed the breach of contract claim, finding that it had to be based on a valid claim for trademark infringement; and declined to exercise supplemental jurisdiction over the remaining state law claims. *Id.* at *2.

In analyzing the trademark infringement claim, the Sixth Circuit found there to be insufficient factual allegations to support finding a likelihood of confusion:

> Here, the complaint does not allege facts sufficient to show that ProPride's use of the "Hensley" name creates a likelihood of confusion as to the source of its products. Hensley Manufacturing does not claim that ProPride has marked its trailer hitch products with the trademarks "Hensley," "Hensley Arrow," or even "Jim Hensley."

> The name of ProPride's product, the "Pivot Point Projection Hitch" or "3P Hitch," is not even remotely similar to the "Hensley" trademark. Instead, the complaint challenges ProPride's use of Jim Hensley's name in connection with its advertising of the 3P Hitch. Although Hensley Manufacturing alleges that this creates "a strong likelihood of confusion in the marketplace as to the source of origin and sponsorship of the goods of the Plaintiff and the Defendant," such a conclusory and "formulaic recitation" of the elements of a trademark infringement cause of action is insufficient to survive a motion to dismiss. *See Iqbal*, 129 S. Ct. at 1954 ("Rule 8 does not empower respondent to plead the bare elements of his cause of action . . . and expect his complaint to survive a motion to dismiss.").

Id. at *4. The court also found that even if the plaintiff had adequately alleged likelihood of confusion, the claim would fail under the fair use doctrine because "the complaint and attached exhibits show that ProPride's uses of Jim Hensley's name are descriptive" and the plaintiff "did not allege facts from which any inference of bad faith can be drawn . . . ." *Id.* at *6. The court also explained that because "the facts Hensley Manufacturing alleged in its complaint, as well as the attached exhibits, demonstrated that there was no likelihood of confusion and that the fair use defense conclusively applied as a matter of law," dismissal was appropriate. *See id.* The court found insufficient the plaintiff's argument that "'facts *may exist* that establish a level of consumer confusion' and that 'facts *may exist* that establish that 'Hensley' is not being used fairly and in good faith,'" because "mere speculation is insufficient." *Hensley Mfg.*, 2009 WL 2778220, at *6. The court concluded: "Simply put, Hensley Manufacturing failed to state a claim for relief that is 'plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570; citing *Iqbal*, 129 S. Ct. at 1949).

- ***Courie v. Alcoa Wheel & Forged Prods.***, 577 F.3d 625 (6th Cir. 2009). The plaintiff sued his employer and his union, alleging that they discriminated against him by settling his union grievance with an agreement that "branded him a racist." *Id.* at 628. The district court dismissed the complaint and the Sixth Circuit affirmed. *Id.* The complaint alleged that after the plaintiff called a fellow employee a derogatory name in front of management, his employer sent him a warning that it considered the term "'racially offensive.'" *Id.* The plaintiff filed a grievance with his union, "stating that he was not a racist and that other . . . employees of various races had also used the term." *Id.* The plaintiff sued in federal court, claiming his employer breached anti-discrimination provisions of the collective bargaining agreement, and that his union breached its duty of fair representation to him by entering into a settlement agreement; that the settlement violated Ohio state law; that he was defamed; and that the defendants were liable under the tort of intentional infliction of emotional distress when they settled the dispute without his consent. *Id.* at 629. The plaintiff's wife alleged loss of consortium. *Courie*, 577 F.3d at 629.

  In discussing the pleading requirements, the Sixth Circuit noted that "[t]he Supreme Court recently *raised the bar for pleading requirements* beyond the old 'no-set-of-facts' standard

of *Conley* . . . that had prevailed for the last few decades." *Id.* (citing *Iqbal*, 129 S. Ct. at 1979; *Twombly*, 550 U.S. at 555) (emphasis added). The court explained that "*Conley* itself had reflected a change away from 'code pleading' to 'notice pleading,' and the standard it announced was designed to screen out only those cases that patently had no theoretical hope of success." *Id.* (footnote omitted) (citing *Conley*, 355 U.S. at 45–46 ("'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'"); *Iqbal*, 129 S. Ct. at 1959 (Souter, J., dissenting) ("observing that '[t]he sole exception' to the *Conley* rule was for 'allegations that [were] sufficiently fantastic to defy reality as we know it; claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel'")).

In analyzing the complaint at issue, the Sixth Circuit explained that the complaint met the *Iqbal* standard with respect to pleading the existence of the settlement agreement, explaining:

> The Couries' legal arguments rest wholly upon the existence of a "settlement agreement" that possibly does not exist: all we have is an unsigned proposal from the [union] to [the employer]. Yet a complaint need only "contain sufficient factual matter" to be "plausible," *Iqbal*, 129 S. Ct. at 1949, and we cannot dismiss for factual implausibility "even if it [would] strike[ ] a savvy judge that . . . recovery is very remote and unlikely," *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955 (internal quotation marks and citation omitted); *see also Iqbal*, 129 S. Ct. at 1950 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."). Here, Courie has alleged that this settlement agreement exists and has provided an unsigned settlement proposal as an exhibit to his complaint in support. For purposes of his motion to dismiss, that is "sufficient" detail for us to assume that the agreement existed.

Id. at 630. But the court concluded that the claim that the union breached its duty of fair representation failed because "[t]here was . . nothing improper about the union negotiating an agreement whereby Courie admitted that he should not have called his coworker [the derogatory term] in exchange for the warning to be *stricken from his record*," and "[b]argaining for such an exchange was reasonable union action." *Id.* at 631. The court also concluded that the claim that the plaintiff's employer breached the collective bargaining agreement failed first because the other half of his hybrid Labor Management Relations Act claim failed, but also because he could not "prove discrimination because he cannot prove that he was singled out for discriminatory treatment considering that he was the only one who had been warned, and we already know, per his state claim, that the warning itself was permissible." *Id.* The court concluded that "[a]s a result[, the plaintiff] cannot point to any

similarly situated employee who had been treated better, and settling his grievance, save something outrageous, was thus permissible." *Courie*, 577 F.3d at 631. The court held that "[t]he district court properly found that Courie has not stated a claim to relief under § 301 that is plausible on its face." *Id.* The remaining claims could not prevail in light of the court's conclusion that the settlement agreement was not discriminatory. *Id.* at 632. The Sixth Circuit also concluded that the district court did not err in denying leave to amend because none of the plaintiff's proposed amendments would have made the claims viable. *See id.* at 633.

Seventh Circuit

- ***Cooney v. Rossiter***, --- F.3d ----, 2009 WL 3103998 (7th Cir. Sept. 30, 2009). The plaintiff lost custody of her two sons after a state court found that she suffered from "Munchausen syndrom by proxy." *Id.* at *1. She sued the state court judge (Judge Nordquist), the court-appointed representative for the children (Bischoff), the court-appointed psychiatrist for the children (Rossiter), the children's therapist (Klaung), and her ex-husband's attorney (Cain), alleging constitutional violations. The complaint alleged that "Bischoff 'orchestrated' a court order appointing defendant Rossiter as the children's psychiatrist and began a 'witch hunt' against Cooney by telling Rossiter that 'this may be a situation of Munchausen syndrome (on the part of the Mother).'" *Id.* The psychiatrist later completed his report and concluded that the plaintiff was showing signs of Munchausen syndrome by proxy, and Judge Nordquist granted the petition for protection of the children and temporarily transferred custody to the children's father. *Id.* The complaint alleged that "'numerous other conspiratorial acts occurred,'" including that Klaung "'made false statements'" to the Department of Children and Family Services that led to a finding that the plaintiff committed child abuse. *Id.* The Seventh Circuit concluded that Judge Nordquist was entitled to absolute immunity, and that Rossiter and Bischoff were also entitled to absolute immunity because the acts the plaintiff complained about all occurred in the course of Rossiter's and Bischoff's court-appoint duties, and the plaintiff did not allege that "Rossiter or Bischoff engaged in misconduct outside that course . . . ." *Id.* at *1, 2.

  The court explained that because Cain and Klaung were private persons, the plaintiff could only sue them under § 1983 by alleging that they agreed with a state officer to deprive her of her constitutional rights. *Cooney*, 2009 WL 3103998, at *2. The court examined the proper means of pleading such an agreement:

  > *Even before* Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2007), and* Ashcroft v. Iqbal*, --- U.S. ----, ----, 129 S. Ct. 1937, 1953, 173 L. Ed. 2d 868 (2009), a bare allegation of conspiracy was not enough to survive a motion to dismiss for failure to state a claim. E.g.*, *Loubser v. Thacker*, 440 F.3d 439, 443 (7th Cir. 2006); *Walker v. Thompson*, 288 F.3d 1005, 1007–08 (7th Cir. 2002); *Boddie v. Schneider*, 105 F.3d 857, 862 (2d Cir. 1997); *Young v. Biggers*, 938 F.2d 565, 569 (5th Cir. 1991). It was too facile an allegation. But it

> was a narrow exception to the notice-pleading standard of Rule 8 of the civil rules—a rare example of a judicially imposed requirement to plead facts in a complaint governed by Rule 8.
>
> In *Bell Atlantic* the Supreme Court went further, holding that in complex litigation a complaint must, if it is to survive dismissal, make plausible allegations. In *Iqbal* the Court extended the rule of *Bell Atlantic* to litigation in general. *Brooks v. Ross*, 578 F.3d 574, 2009 WL 2535731, at *5 (7th Cir. Aug. 20, 2009); *Hensley Mfg., Inc. v. ProPride, Inc.*, 579 F.3d 603, 2009 WL 2778220, at *8 n.4 (6th Cir. Sept. 3, 2009); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 2009 WL 2501662, at *4 (3d Cir. Aug. 18, 2009); *Moss v. U.S. Secret Service*, 572 F.3d 962, 969 n.7 (9th Cir. 2009).

Id. (emphasis added). That court explained that the "specific concern in *Bell Atlantic* was with the burden of discovery imposed on a defendant by implausible allegations perhaps intended merely to extort a settlement," and that in *Iqbal*, the Court was concerned that "allowing implausible allegations to defeat a motion to dismiss" would make "inroads into the defense of official immunity—which is meant to protect the officer from the burden of trial and not merely from damages liability." *Id.* at *3 (citing *Smith v. Duffey*, 576 F.3d 336, 339–40 (7th Cir. 2009)). The Seventh Circuit explained that "as the Court said in *Iqbal*, 'determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Id.* (citing *Iqbal*, 129 S. Ct. at 1950; *Courie v. Alcoa Wheel & Forged Products*, 577 F.3d 625, 2009 WL 2497928, at *2 (6th Cir. Aug. 18, 2009)).

The Seventh Circuit emphasized that the level of pleading required depends on the context:

> In other words, *the height of the pleading requirement is relative to circumstances*. We have noted the circumstances (complexity and immunity) that raised the bar in the two Supreme Court cases. This case is not a complex litigation, and the two remaining defendants do not claim any immunity. But it may be paranoid pro se litigation, arising out of a bitter custody fight and alleging, as it does, a vast, encompassing conspiracy; and before defendants in such a case become entangled in discovery proceedings, the plaintiff must meet a high standard of plausibility.
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> *Even before the Supreme Court's new pleading rule, as we noted, conspiracy allegations were often held to a higher standard than other allegations; mere suspicion that persons adverse to the plaintiff had joined a conspiracy against him or her was not enough*. The complaint in this case, though otherwise detailed, is bereft of any suggestion, beyond a bare conclusion, that the remaining defendants

> were leagued in a conspiracy with the dismissed defendants. *It is not enough (and would not have been even before* Bell Atlantic *and* Iqbal*) that the complaint charges that "Bischoff and Dr. Lyle Rossiter, with the aid of Judge Nordquist, Dan Cain, and Brian Klaung continued the ongoing violations of Plaintiff, Deborah's Constitutional rights." That is too vague*. With regard to Cain, the only specific allegations in the complaint are that he encouraged Bischoff to tell Rossiter to complete his report "expeditiously"; that he received Rossiter's report before Cooney did; and that he "took control" of the meeting in camera in which all the attorneys discussed the report with Judge Nordquist. The only specific allegation regarding Klaung is that he reported Cooney to the child welfare authority several months after she lost custody of the children. *No factual allegations tie the defendants to a conspiracy with a state actor*.

Id. (citations omitted) (emphasis added). The Seventh Circuit affirmed dismissal of the complaint.

- ***Brooks v. Ross***, 578 F.3d 574 (7th Cir. 2009). The plaintiff was a member of the Illinois Prison Review Board who voted in favor of parole for Harry Aleman, was indicted for misconduct and wire fraud in connection with the parole hearing, and was later acquitted. *Id.* at 577–78. The plaintiff filed suit under § 1983 and state law against various officials involved in the criminal action against him. *Id.* at 578. The district court dismissed the complaint for failure to state a claim, and the Seventh Circuit affirmed. *Id.* In analyzing the § 1983 due process claim, the Seventh Circuit examined the recent pleading decisions and concluded that notice pleading remains intact:

> We begin with Rule 8, which states in relevant part: "A pleading that states a claim for relief must contain: . . . a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a). The Rule reflects a *liberal notice pleading regime*, which is intended to "focus litigation on the merits of a claim" rather than on technicalities that might keep plaintiffs out of court. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002).
>
> In *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), the Court turned its attention to what was required of plaintiffs at the pleading stage. It concluded that plaintiffs' "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 555, 127 S. Ct. 1955. The Court was careful to note that this did not impose a probability requirement on plaintiffs: "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a

> recovery is very remote and unlikely." *Id.* at 556, 127 S. Ct. 1955. The Court did require, however, that the plaintiffs' claim be "plausible." In other words, "it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" supporting the plaintiff's allegations. *Id.*

Id. at *580–81 (emphasis added). The court concluded that any concern that *Twombly* had repudiated notice pleading "was put to rest two weeks later, when the Court issued *Erickson v. Pardus*, 551 U.S. 89, 93, 127 S. Ct. 2197, 167 L. Ed. 2d 1081 (2007)." *Id.* at 581. The court elaborated:

> *Erickson* reiterated that "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests" (internal quotation marks omitted) (omission in original). This court took *Twombly* and *Erickson* together to mean that "at some point the factual detail in a complaint may be so sketchy that the complaint does not provide the type of notice of the claim to which the defendant is entitled under Rule 8." *Airborne Beepers & Video, Inc. v. AT & T Mobility LLC*, 499 F.3d 663, 667 (7th Cir. 2007).
>
> *This continues to be the case after* Iqbal. That case clarified that *Twombly*'s plausibility requirement applies across the board, not just to antitrust cases. In addition, *Iqbal* gave further guidance to lower courts in evaluating complaints. It noted that a court need not accept as true "legal conclusions[, or t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *We understand the Court in* Iqbal *to be admonishing those plaintiffs who merely parrot the statutory language of the claims that they are pleading (something that anyone could do, regardless of what may be prompting the lawsuit), rather than providing some specific facts to ground those legal claims*, that they must do more. *These are the plaintiffs who have not provided the "showing" required by Rule 8*.
>
> So, what do we take away from *Twombly*, *Erickson*, and *Iqbal*? First, *a plaintiff must provide notice* to defendants of her claims. Second, courts must accept a plaintiff's factual allegations as true, but *some factual allegations will be so sketchy or implausible that they fail to provide sufficient notice* to defendants of the plaintiff's claim. Third, in considering the plaintiff's factual allegations, courts should not accept as adequate abstract recitations of the elements of a cause of action or conclusory legal statements.

Brooks, 578 F.3d at 581 (emphasis added). The court concluded that allegations that the defendants produced investigative reports, gave interviews, and were present and assisted in interviews was "just as consistent with lawful conduct as it [was] with wrongdoing," and that "[w]ithout more, [the plaintiff's] allegations [were] *too vague to provide notice* to defendants of the contours of his § 1983 due process claim." *Id.* at 581–82 (emphasis added).

The Seventh Circuit examined another paragraph in the complaint, which it concluded actually contained allegations of wrongdoing, but only in the form of conclusions. The paragraph from the complaint stated:

> Plaintiff is informed, believes and alleges that the Defendants while acting in concert with other State of Illinois officials and employees of the Attorney General's Office, Department of Corrections and Prisoner Review Board did knowingly, intentionally and maliciously prosecute Plaintiff and Ronald Matrisciano in retaliation for Plaintiff and the said Ronald Matrisciano exercising rights and privileges under the Constitutions and laws of the United States and State of Illinois.

Id. at 582 (quotation marks omitted). The court concluded that although this paragraph adequately pleaded personal involvement and unlawful conduct, it failed under *Iqbal* "because it is merely a formulaic recitation of the cause of action and nothing more," and "[i]t therefore *does not put the defendants on notice of what exactly they might have done* to violate Brooks's rights under the Constitution, federal law, or state law." *Id.* (emphasis added).

- ***Smith v. Duffey***, 576 F.3d 336 (7th Cir. 2009). The plaintiff sold a controlling interest in his company to a closely-held corporation (Dade Behring, Inc.), in exchange for, among other things, options to purchase 20,000 shares of Dade Behring's common stock at $60 a share. *Id.* at 336. The plaintiff also became an employee of the company, but his employment ended with the signing of an agreement in which "he received $1.4 million in cash and retained his stock options with their $60 exercise price, although the appraised value of the stock was only $11." *Id.* at 336–37. Dade Behring declared bankruptcy a few months later, and the plaintiff's stock options were extinguished in the reorganization. *Id.* at 337. The plaintiff sued the officers of Dade Behring who had negotiated the agreement with him, asserting that they knew about the impending bankruptcy that would propose cancelling his stock options and had a duty to disclose this to him. *Id.* The plaintiff alleged two theories: (1) that had he been told that the company was going to declare bankruptcy and that his stock options would be extinguished, he would have required more money to sign the termination agreement; and (2) that he was entitled to the value of the shares in the reorganized company that he would have owned had he been issued stock options in the reorganized company on the same terms as before the reorganization. *Id.* The Seventh Circuit found the latter theory "preposterous," and explained: "The company was broke, and the extinction of equity interests is the usual consequence of bankruptcy. Smith could not have enforced his options once bankruptcy was declared, and he had no right to receive stock and options in the reorganized company and would not have had that right even if he had continued as an employee." *Id.* With respect

to the first theory, the court described it as the "only remotely plausible argument," but concluded that it was unlikely the plaintiff would have succeeded in receiving more cash because "[h]ad the defendants told him the company was about to declare bankruptcy, he would have realized, if he didn't already, that his bargaining position was weak, because in bankruptcy he probably would get nothing at all." *Smith*, 576 F.3d at 337. The court explained that "the likeliest explanation of why the defendants did not tell Smith about the bankruptcy is that they assumed, and assumed he assumed, that the parlous state of the company—known to all and symbolized by the disparity between the appraised value of the stock ($11) and the exercise price of the stock options ($60)—made his retention of the stock options of no conceivable significance." *Id.* at 338.

The Seventh Circuit explained that it did not need to rely on *Twombly* or *Iqbal* to decide that the complaint was insufficient:

> In our initial thinking about the case, however, we were reluctant to endorse the district court's citation of the Supreme Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), fast becoming the citation du jour in Rule 12(b)(6) cases, as authority for the dismissal of this suit. The Court held that in complex litigation (the case itself was an antitrust suit) the defendant is not to be put to the cost of pretrial discovery—a cost that in complex litigation can be so steep as to coerce a settlement on terms favorable to the plaintiff even when his claim is very weak—unless the complaint says enough about the case to permit an inference that it may well have real merit. The present case, however, is not complex. Were this suit to survive dismissal and proceed to the summary judgment stage, it would be unlikely to place on the defendants a heavy burden of compliance with demands for pretrial discovery. . . .
>
> But *Bell Atlantic* was extended, a week after we heard oral argument in the present case, in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)—over the dissent of Justice Souter, the author of the majority opinion in *Bell Atlantic*—to all cases, even a case (*Iqbal* itself) in which the court of appeals had "promise[d] petitioners minimally intrusive discovery." *Id.* at 1954. Yet *Iqbal* is special in its own way, because the defendants had pleaded a defense of official immunity and the Court said that the 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.* (emphasis added).

> *So maybe neither* Bell Atlantic *nor* Iqbal *governs here*. It doesn't matter. It is apparent from the complaint and the plaintiff's arguments, without reference to anything else, that his case has no merit. That is enough to justify, under any reasonable interpretation of Rule 12(b)(6), the dismissal of the suit.

Id. at 339–40 (emphasis added).

- ***Hecker v. Deere & Co.***, 569 F.3d 708 (7th Cir. 2009). The plaintiffs were employees who alleged that their employer, and a 401(k) plan trustee and investment advisor, breached fiduciary duties under the Employee Retirement and Income Security Act (ERISA). On rehearing of its order affirming the district court's dismissal of the complaint, the court explained that the fact that the *Iqbal* opinion had been issued since its original decision did not change the result:

> Applying the pleading standards enunciated in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007), we concluded [in the original opinion] that these plaintiffs failed to state a claim for the kind of fiduciary misfeasance the Secretary describes. At the time we wrote, the Court had not yet handed down *Ashcroft v. Iqbal*, --- U.S. ---, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009). *Iqbal* reinforces *Twombly's* message that "[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." *Id.* at 1949. The Court explained further that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' FED. RULE CIV. PROC. 8(a)(2)." *Id.* at 1950.

Id. at 710–11. The court concluded that: "*this* complaint, alleging that Deere chose *this* package of funds to offer for its 401(k) Plan participants, with this much variety and this much variation in associated fees, failed to state a claim upon which relief can be granted." *Id.* at 711.

- ***Brown v. JP Morgan Chase Bank***, No. 08-1890, 2009 WL 1761101 (7th Cir. Jun. 23, 2009) (unpublished order). The plaintiff sued under § 1985(3), asserting that the defendant creditors conspired to violate his civil rights based on his race. The claims were based on the creditors moving in state court to vacate a foreclosure decree seven months after a bankruptcy dismissal, claiming they had just discovered that the automatic stay was in effect at the time of the foreclosure action. *Id.* at *1. The district court dismissed for failure to state a claim and the Seventh Circuit affirmed. The Seventh Circuit explained:

> Brown's complaint does not allow a plausible inference that

> the defendants are liable under § 1985. As is relevant here, a claim under § 1985 requires a racially motivated conspiracy to violate or interfere with a plaintiff's federally protected rights. Brown has not explained how either Chase's allegedly false statement or its unsigned certificate of service in its request to vacate the foreclosure decree, both filed several months after the bankruptcy action ended, violated or interfered with any federal right.
>
> Brown's grievance that Chase violated his civil rights by not dismissing the foreclosure action in August 2005 also does not state a claim. We have not held that the automatic stay imposes on creditors an affirmative duty to dismiss pending lawsuits, though at least one other circuit has so held. But in any case Brown's complaint does not "contain any factual allegation to plausibly suggest [that defendants had] discriminatory state of mind." *See Iqbal*, 129 S. Ct. at 1952. In *Iqbal*, the plaintiff filed a *Biven*[]*s* action against government officials claiming that they detained and abused him after the terrorist attacks of September 11, 2001, "on account of his religion, race, and/or national origin and for no legitimate penological interest." *Id.* at 1954 (internal quotation marks omitted). The Court held that Iqbal's bare-bones allegations were legal conclusions and therefore insufficient to state a claim for discrimination. *Id.* Brown's claim is at least as deficient: He gives us no "factual context," *see Iqbal*, 129 S. Ct. at 1954, or reasons to support his unexplained legal conclusion that Chase discriminated against him because of his race when, consistent with the stay, it refrained from moving ahead with its foreclosure action and merely neglected to dismiss it.

Id. at *2 (internal citations omitted).

- ***Mounts v. United Parcel Serv. of Am., Inc.***, No. 09 C 1637, 2009 WL 2778004 (N.D. Ill. Aug. 31, 2009). The plaintiffs, retired drivers for UPS, alleged retaliation and discrimination in connection with their formation of an organization that assisted current and retired UPS employees with filing complaints with the EEOC and with securing medical and retirement benefits. In considering the retaliation claims, the court noted that "[t]he level of facts required varies with the type of claim asserted," and that "[c]omplaints 'alleging illegal retaliation on account of protected conduct must provide some specific description of that conduct beyond the mere fact that it is protected.'" *Id.* at *4 (quoting *E.E.O.C. v. Concentra Health Servs., Inc.*, 496 F.3d 773, 781 (7th Cir. 2007)). The court noted that the remaining plaintiffs had alleged that they helped another plaintiff in the investigation regarding his charge of discrimination and that UPS removed them from the health plan for retired employees because of that assistance. *Id.* at *5. The court concluded that because the plaintiffs alleged that their assistance related to another plaintiff's discrimination under the ADEA and the ADA, and retaliation under Title VII, the allegations were sufficient to state a claim for

retaliation under those statutes. *Id.* The court also concluded that the remaining plaintiffs had adequately alleged discrimination under the ADEA because they alleged that they were over 40 years old and that UPS found them ineligible to participate in the health plan because of their age. *Id.* The court found that the plaintiffs failed to state a claim for discrimination under the ADA because they did not allege that they suffered from an impairment, let alone an impairment that substantially limited their ability to perform a major life activity. *Id.* at *6. The court denied leave to replead the discrimination claim under the ADA because the plaintiffs conceded that they were not UPS employees, and retired employees had no right to bring discrimination suits under Title 1 of the ADA. *Mounts*, 2009 WL 2778004, at *6.

- ***Fulk v. Village of Sandoval***, No. 08-843-GPM, 2009 WL 1606897 (S.D. Ill. Jun. 9, 2009). Police officers claimed they were fired in retaliation for reporting the mayor's misconduct. *Id.* at *1. The defendants claimed that the police officers were speaking pursuant to their official duties and that as a result, their words enjoyed no First Amendment protection. *Id.* at *2. The court concluded that although the plaintiffs pleaded that they complained as private citizens, not as part of their official duties, "[t]he bare allegation that they made the statements as private citizens is not sufficient to move this allegation from 'conceivable' to 'plausible' under the *Ashcroft* standard." *Id.* However, "[b]ecause of the recent change in federal pleading standards," the court granted leave to amend "to allege sufficient facts to show they acted as private citizens." *Id.*

Eighth Circuit

- ***Turner v. Sikeston Police Dep't***, No. 1:09CV92 LMB, 2009 WL 2836513 (E.D. Mo. Aug. 31, 2009). The plaintiff brought claims under § 1983, alleging violations of his constitutional rights. The plaintiff alleged that he was falsely arrested, that his home was unlawfully searched, that he was unlawfully retained in the county jail, that a police officer used a false affidavit that prompted the prosecutor's office to initiate a malicious prosecution, that after his arrest he was placed in unpleasant conditions, and that other defendants failed to properly supervise and train the police officer who searched the plaintiff's home and created the allegedly false affidavit. *See id.* at *2. The court noted that in evaluating a complaint, *Iqbal* requires engaging in a two-step inquiry. *Id.* at *1. The court explained that the plaintiff's "allegations are mostly conclusory and such conclusory allegations need not . . . be given an assumption of truth." *Id.* at *2 (citing *Iqbal*, 129 S. Ct. at 1950–51). The court noted that the complaint did not "identify whether the members of the prosecutor's office knew that defendant [police officer] Rataj's affidavit was purportedly false," and that the plaintiff's "allegations of misconduct with regard to the prosecutor's office are stated on 'information and belief.'" *Id.* The court concluded that the plaintiff's claims of false imprisonment, false arrest, and malicious prosecution failed to state a claim because "[a] prisoner may not recover damages in a § 1983 suit where the judgment would necessarily imply the invalidity of his conviction, continued imprisonment, or sentence unless the conviction or sentence is reversed, expunged, or called into question by issuance of a writ of habeas corpus." *Id.* (citations omitted). Regardless of this conclusion, the court found that the malicious prosecution claims against the prosecutors could not proceed because the plaintiff had "not alleged any facts

supporting his assertions that he was maliciously prosecuted," and because the prosecutors were entitled to absolute immunity. *See Turner*, 2009 WL 2836513, at *3 (citation omitted). The claims against the police department failed because the police department was not an entity that could be sued. *Id.* The claims regarding the conditions of the plaintiff's confinement failed because the plaintiff did not allege a person responsible and did not allege "that the purported deprivations denied him the minimal civilized measure of life's necessities and that defendants were deliberately indifferent to excessive risk to his health or safety." *Id.* (citations omitted). Finally, the court concluded that the claims of inadequate training failed to state a plausible claim because they were based on conclusory allegations. *See id.* (citing *Iqbal*, 129 S. Ct. at 1950–51). The court allowed the claim that the police officer illegally searched the plaintiff's home to go forward. *Id.*

Ninth Circuit

- ***Al-Kidd v. Ashcroft***, --- F.3d ----, No. 06-36059, 2009 WL 2836448 (9th Cir. Sept. 4, 2009). Al-Kidd and his wife were the subjects of FBI surveillance as part of a broad anti-terrorism investigation allegedly aimed at Arab and Muslim men. *Id.* at *1. In connection with the indictment of a different man (Sami Oman Al-Hussayen) by a federal grand jury for visa fraud and making false statements to U.S. officials, the U.S. Attorney's Office submitted an application to arrest al-Kidd as a material witness. *Id.* The application was supported by an affidavit executed by an FBI agent, which asserted that al-Kidd had received "'in excess of $20,000'" from Al-Hussayen, that al-Kidd had "'met with Al-Hussayen's associates'" after returning from a trip to Yemen, that al-Kidd had contacts with officials of the Islamic Assembly of North America (which Al-Hussayen was affiliated with), and that "'[d]ue to Al-Kidd's demonstrated involvement with the defendant . . . he is believed to be in possession of information germane to this matter which will be crucial to the prosecution.'" *Id.* The affidavit also asserted that al-Kidd was scheduled to take a one-way, first class flight to Saudi Arabia, and that the United States government was concerned about securing his appearance at trial if he traveled to Saudi Arabia. *Id.* at *2. In fact, al-Kidd had a round-trip coach ticket to study Arabic and Islamic law on a scholarship at a Saudi university. *Id.* at *1, 2. Based on the affidavit, a material witness warrant was issued and al-Kidd was arrested at the airport before he left on his trip to Saudi Arabia. *Al-Kidd*, 2009 WL 2836448, at *2. Al-Kidd was detained for 16 days at a variety of detention centers, transfer centers, and jails, was allegedly strip searched on multiple occasions, confined to high-security units, handcuffed and shackled during transfers between facilities, only allowed out of his cell one to two hours per day, and kept in a cell that was lit 24 hours a day. *Id.* After petitioning to the court, al-Kidd was released on the conditions that he live at his in-laws' home in Nevada, limit his travel to Nevada and three other states, report regularly to his probation officer and consent to home visits, and give up his passport. *Id.* Al-Kidd allegedly lived under these conditions for almost a year before being allowed to obtain his own residence. *Id.* Three months later he was fully released at the end of Al-Hussayen's trial. *Id.* Al-Kidd was never called as a witness in the Al-Hussayen trial. *Id.* Al-Kidd alleged that he separated from his wife, lost his job due to denial of security clearance from his arrest, and was unable to find steady employment. *Id.*

Al-Kidd asserted that Ashcroft, as Attorney General, "developed and promulgated a policy by which the FBI and DOJ would use the federal material witness statute as a pretext 'to arrest and detain terrorism suspects about whom they did not have sufficient evidence to arrest on criminal charges but wished to hold preventatively or to investigate further.'" *Al-Kidd*, 2009 WL 2836448, at *2 (footnote omitted). Ashcroft's complaint relied on Ashcroft's statement at a press conference that: "'Today, I am announcing several steps that we are taking to enhance our ability to protect the United States from the threat of terrorist aliens. These measures form one part of the department's strategy to prevent terrorist attacks by taking *suspected terrorists* off the street . . . Aggressive *detention* of lawbreakers and *material witnesses* is vital to preventing, disrupting or delaying new attacks.'" *Id.* at *3 (citation omitted) (emphasis added in complaint). The complaint also cited internal Department of Justice (DOJ) memoranda quoted in a report by the DOJ's Office of the Inspector General and public statements of DOJ and White House officials stating that suspects were held under material witness warrants to investigate the suspects. *Id.* The complaint also alleged "that the policies designed and promulgated by Ashcroft have caused individuals to be 'impermissibly arrested and detained as material witnesses even though there was no reason to believe it would have been impracticable to secure their testimony voluntarily or by subpoena,' in violation of the terms of § 3144." *Id.* The complaint also cited FBI Director Robert Mueller's statements, made in testimony before Congress, that listed "'major successes' in the FBI's efforts toward 'identifying and dismantling terrorist networks,'" including the arrest of al-Kidd. *Id.* Finally, the complaint alleged a policy of mistreatment of material witnesses and that Ashcroft "'knew or reasonably should have known of the unlawful, excessive, and punitive manner in which the federal material witness statute was being used,' and that such manner 'would also foreseeably subject' detainees 'to unreasonable and unlawful use of force, to unconstitutional conditions of confinement, and to punishment without due process.'" *Id.* at *4.

Al-Kidd sued, among others, Ashcroft, the United States, the FBI agents named in the affidavit used to support Al-Kidd's arrest, and government agencies and officers in their official capacities. *Al-Kidd*, 2009 WL 2836448, at *4. The complaint sought damages under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971), alleging violations of al-Kidd's Fourth and Fifth Amendment rights, and alleging a direct violation of the material witness statute. *Id.* The district court denied Ashcroft's Rule 12(b)(2) motion, finding that there were sufficient facts to establish personal jurisdiction over Ashcroft in Idaho, and denied Ashcroft's Rule 12(b)(6) motion, rejecting claims of absolute and qualified immunity. *Id.* Ashcroft appealed, and the Ninth Circuit affirmed in part and reversed in part.

In denying Ashcroft's claim of absolute prosecutorial immunity, the Ninth Circuit stated:

> We hold, therefore, that when a prosecutor seeks a material witness warrant in order to investigate or preemptively detain a suspect, rather than to secure his testimony at another's trial, the prosecutor is entitled at most to qualified, rather than absolute,

> immunity. We emphasize that our holding here does not rest upon an unadorned assertion of secret, unprovable motive, as the dissent seems to imply. *Even before the Supreme Court's decision in* Bell Atlantic v. Twombly *and* Ashcroft v. Iqbal, *it was likely that conclusory allegations of motive, without more, would not have been enough to survive a motion to dismiss*. *See, e.g.*, *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (facts pled must be accepted as true, but conclusory allegations need not be). *Twombly's* general requirement that "[f]actual allegations must be enough to raise a right to relief above the speculative level," 550 U.S. 555, applies with equal force to allegations that a prosecutor's actions served an investigatory function. In this case, however, al-Kidd has averred ample facts to render plausible the allegation of an investigatory function . . . .

Id. at *11 (footnote omitted) (emphasis added).

In analyzing Ashcroft's claim of qualified immunity with respect to the alleged Fourth Amendment violations, the Ninth Circuit concluded that al-Kidd had adequately pled violations of his Fourth Amendment rights:

> Al-Kidd alleges that he was arrested without probable cause pursuant to a general policy, designed and implemented by Ashcroft, whose programmatic purpose was not to secure testimony, but to investigate those detained. Assuming that allegation to be true, he has alleged a constitutional violation. Contrary to the dissent's alarmist claims, we are not probing into the minds of individual officers at the scene; instead, we are inquiring into the programmatic purpose of a general policy . . . , and finding that the purpose of the policy alleged in al-Kidd's first amended complaint is impermissible under the Fourth Amendment.

Id. at *16. The Ninth Circuit concluded that "al-Kidd's right not to be arrested as a material witness in order to be investigated or preemptively detained was clearly established in 2003." *Id.* at *20.

In considering the alleged violation of the material witness statute, the Ninth Circuit discussed the plausibility standard set out in *Twombly* and extended by *Iqbal*:

> Prior to *Bell Atlantic Company v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929, we held that a plaintiff "does not need to show with great specificity how each defendant contributed to the violation of his constitutional rights. Rather, he must state the allegations generally so as to provide notice to the defendants and

> alert the court as to what conduct violated clearly established law." Ashcroft argues that al-Kidd's allegations as to Ashcroft's personal involvement in the § 3144 Claim amount simply to "sheer speculation," and are insufficient to state a claim under *Twombly*.
>
> In *Twombly*, the Supreme Court held that an allegation of parallel conduct by competitors, without more, does not suffice to plead an antitrust violation under 15 U.S.C. § 1. While the Court expressly disclaimed any intention to require general "heightened fact pleading of specifics," and reaffirmed the holding of *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) (rejecting a fact pleading requirement for Title VII employment discrimination), it stated that, to avoid dismissal under Federal Rule of Civil Procedure 12(b)(6), a plaintiff must aver "enough facts to state a claim to relief that is plausible on its face."
>
> Since the argument and initial briefing in this case, the Supreme Court, in *Ashcroft v. Iqbal*, --- U.S. ----, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009), has clarified *Twombly's* reach to cases such as these. *Iqbal* concerned claims against a number of defendants, including FBI Director Mueller and Attorney General Ashcroft, made by Javaid Iqbal, a Muslim Pakistani who was part of the mass roundup of Muslim aliens on immigration charges following the September 11 attacks. Iqbal claimed that Mueller and Ashcroft were responsible for selectively placing detainees in their restrictive conditions on account of their race and religion. The Supreme Court found the allegations in the complaint insufficient to state a discrimination claim under the above-discussed *Twombly* "plausibility" standard. The Court held that a pleading "that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action'" is insufficient to state a claim under Rule 8 of the Federal Rules of Civil Procedure.

Al-Kidd, 2009 WL 2836448, at *21 (internal citations omitted). The court found that unlike the complaint in *Iqbal*, al-Kidd's complaint alleged sufficient facts for his claim alleging violation of the material witness statute to survive:

> In reviewing the complaint in *Iqbal*, the Court noted that the complaint did not contain any factual allegations claiming that Mueller or Ashcroft may have intentionally discriminated on the basis of race or religion. The Court concluded that bare assertions regarding an invidious policy were not entitled to the assumption of truth because they amounted to "nothing more than a 'formulaic recitation of the elements' of a constitutional discrimination claim." The Court noted that the alleged facts, even if accepted as true, were more compatible

on their face with lawful conduct.

> Here, unlike Iqbal's allegations, al-Kidd's complaint "plausibly suggest[s]" unlawful conduct, and does more than contain bare allegations of an impermissible policy. While the complaint similarly alleges that Ashcroft is the "principal architect" of the policy, the complaint in this case contains specific statements that Ashcroft himself made regarding the post-September 11th use of the material witness statute. Ashcroft stated that enhanced tactics, such as the use of the material witness statute, "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street," and that "[a]ggressive detention of lawbreakers and material witnesses is vital to preventing, disrupting or delaying new attacks." Other top DOJ officials candidly admitted that the material witness statute was viewed as an important "investigative tool" where they could obtain "evidence" about the witness. The complaint also contains reference to congressional testimony from FBI Director Mueller, stating that al-Kidd's arrest was one of the government's anti-terrorism successes—without any caveat that al-Kidd was arrested only as a witness. Comparatively, Iqbal's complaint contained no factual allegations detailing statements made by Mueller and Ashcroft regarding discrimination. The specific allegations in al-Kidd's complaint plausibly suggest something more than just bare allegations of improper purpose; they demonstrate that the Attorney General purposefully used the material witness statute to detain suspects whom he wished to investigate and detain preventatively, and that al-Kidd was subjected to this policy.
>
> Further, unlike in *Twombly* and *Iqbal*, where the plaintiffs alleged a conspiracy or discriminatory practice in the most conclusory terms, al-Kidd does not rely solely on his assertion that Ashcroft ordered, encouraged, or permitted "policies and practices [whereby] individuals have also been impermissibly arrested and detained as material witnesses even though there was no reason to believe it would have been [im]practicable to secure their testimony voluntarily or by subpoena." His complaint notes "one account" of material witness practices stating that "nearly fifty percent of those detained in connection with post-9/11 terrorism investigations were not called to testify." In a declaration filed in another proceeding well before al-Kidd's arrest, a DOJ official admitted that, of those detained as material witnesses, "it may turn out that these individuals have no information useful to the investigation."

Id. at *21–22 (internal citations and footnote omitted). The court concluded that the

complaint did not merely contain bare allegations that Ashcroft knew of the policy, but instead contained "allegations that plausibly suggest[ed] that Ashcroft purposely instructed his subordinates to bypass the plain reading of the statute," and that the allegations "clearly 'nudge[d]' al-Kidd's claim of illegality 'across the line from conceivable to plausible.'" *Id.* at *22 (quoting *Iqbal*, 129 S. Ct. at 1952). The court explained that the facts pleaded were more than sufficient to support the claim of illegal use of the material witness statute:

> [A]l-Kidd pleads facts that go much further than merely showing that he was detained under the material witness statute and did not testify. The pleadings show that Ashcroft explicitly stated that enhanced techniques such as the use of the material witness statute "form one part of the department's concentrated strategy to prevent terrorist attacks by taking suspected terrorists off the street." Other top DOJ officials stated that the material witness statute was viewed as an important "investigative tool," and that al-Kidd's arrest was touted as one of the government's anti-terrorism successes, without any mention that he was being held as a material witness. We disagree with the dissent, and hold that al-Kidd has plead[ed] that Ashcroft's "concerted strategy" of misusing the material witness statute plausibly led to al-Kidd's detention.

Id. at *23. The Ninth Circuit did note that "[p]ost-*Twombly*, plaintiffs face a higher burden of pleading facts, and courts face greater uncertainty in evaluating complaints," explaining that Rule 8 "'does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions,'" *id.* (quoting *Iqbal*, 129 S. Ct. at 1950), and that "[t]his concern applie[s] with great force in the civil rights context, where '[t]he basic thrust of the qualified-immunity doctrine is to free officials from the concerns of litigation, including 'avoidance of disruptive discovery,'" *id.* (quoting *Iqbal*, 129 S. Ct. at 1953), but concluded that "al-Kidd has met his burden of pleading a claim for relief that is plausible, and that his suit on the § 3144 claim should be allowed to proceed," *al-Kidd*, 2009 WL 2836448, at *23 (citing *Iqbal*, 129 S. Ct. at 1950). The court emphasized that the result might different on summary judgment:

> *Twombly* and *Iqbal* do not require that the complaint include all facts necessary to carry the plaintiff's burden. "Asking for plausible grounds to infer" the existence of a claim for relief "does not impose a probability requirement at the pleading stage; it simply calls for enough fact[s] to raise a reasonable expectation that discovery will reveal evidence" to prove that claim. *Twombly*, 550 U.S. at 556, 127 S. Ct. 1955. In this case, we hold that al-Kidd has pled "enough facts to state a claim to relief that is plausible on its face." *Id.* at 570.

Id. at *24.

With respect to al-Kidd's claim that he was mistreated while confined, the court concluded

that the claim failed because it contained only conclusory allegations, similar to those rejected in *Iqbal*. The court explained:

> [A]l-Kidd claims here that Ashcroft promulgated and approved the unlawful policy which caused al-Kidd "to be subjected to prolonged, excessive, punitive, harsh, unreasonable detention or post-release conditions." Contrary to the § 3144 claim, however, the complaint does not allege any specific facts—such as statements from Ashcroft or from high ranking officials in the DOJ—establishing that Ashcroft had personal involvement in setting the conditions of confinement.

Id. Although the complaint alleged that media reports and courts had noted the harsh conditions of confinement for material witnesses, the Ninth Circuit found that "[w]hile it is possible that these reports were sufficient to put Ashcroft on notice by spring of 2003 that there was a systemic problem at the DOJ with respect to its treatment of material witnesses, the non-specific allegations in the complaint regarding Ashcroft's involvement fail to nudge the *possible* to the *plausible*, as required by *Twombly*." *Id.* at *25. The court differentiated the pleadings with respect to the material witness statute, stating that "[u]nlike the § 3144 Claim, which specifically avers facts which could sustain the inference that Ashcroft 'set[ ] in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury' regarding the illegal use of the material witness statute, the complaint's more conclusory allegations regarding Ashcroft's involvement in settling the harsh conditions of confinement (which are very similar to the allegations in *Iqbal*), are deficient under Rule 8." *Id.* (internal citation omitted). The Ninth Circuit held that "al-Kidd has not alleged adequate facts to render plausible Ashcroft's personal involvement in setting the harsh conditions of his confinement, and has therefore failed to state a claim for which relief can be granted." *Id.*

Judge Bea concurred in part and dissented in part. Judge Bea would have held that qualified immunity protected Ashcroft from al-Kidd's claim of constitutional violations because there was no Fourth Amendment violation, and even if there was, "al-Kidd's right not to be arrested on an objectively valid, but pretextual arrest warrant was not 'clearly established' in March 2003 . . . " *Al-Kidd*, 2009 WL 2836448, at *29 (Bea, J., dissenting). With respect to al-Kidd's claim that his detention violated the Fourth Amendment and the terms of the material witness statute because of material misrepresentations and omissions in the affidavit supporting the warrant application, Judge Bea would have held that "as with his claim that Ashcroft is liable for the claimed wretched conditions of al-Kidd's confinement, as to which all of us agree his claim fails—al-Kidd has failed to allege facts sufficient to establish Ashcroft's personal liability for such conduct." *Id.* at *30 (Bea, J., dissenting) (citing *Iqbal*, 129 S. Ct. 1937).

- ***Delta Mech., Inc. v. Garden City Group, Inc.***, No. 08-15429, 2009 WL 2610796 (9th Cir. Aug. 26, 2009) (unpublished memorandum). The district court dismissed the plaintiff's complaint because it found that the plaintiff was not a third-party beneficiary to a settlement

agreement, and therefore was not entitled to bring a lawsuit for alleged breach of that agreement. *Id.* at *1. The Ninth Circuit found this to be error because "[t]he evidentiary record on this issue [of whether the plaintiff was a third-party beneficiary] demonstrates at this early stage of the case that whether Delta was or was not a third-party beneficiary is a genuine issue of material fact that might survive summary judgment." *Id.* The Ninth Circuit held that "[t]he factual content of the complaint and reasonable inferences therefrom are plausibly suggestive of a claim entitling Delta to relief." *Id.* (citing *Moss v. U.S. Secret Serv.*, No. 07-36108, 2009 WL 2052985, at *1–2 (9th Cir. July 16, 2009) (citing *Twombly*, 550 U.S. 544)).

Judge Ikuta dissented, stating that *Iqbal* requires applying a two-step process of identifying conclusions in the pleadings that are not entitled to an assumption of truth and then considering whether the factual allegations plausibly suggest entitlement to relief, and that under that test, there were not sufficient facts alleged to survive a motion to dismiss. *Id.* at *3 (Ikuta, J., dissenting) (citing *Iqbal*, 129 S. Ct. at 1950, 1951). Judge Ikuta elaborated:

> Setting aside Delta's conclusory legal allegation that it is an intended third-party beneficiary of the Class Action Settlement Agreement, the essence of Delta's factual allegations is that 1) defendants failed to issue certificates to eligible class members, 2) such failure was a breach of the Settlement Agreement, and 3) as a result, Delta was not compensated. *See* Settlement Agreement, Section 8.2.3. Because Delta does not allege that the Settling Defendants agreed in the Settlement Agreement to incur an obligation to Delta, the complaint's factual allegations do not allow the court to draw the reasonable inference that Delta was an intended third-party beneficiary of the Settlement Agreement or that the defendants are liable to Delta for a breach of that agreement. The language in Section 8 of the Settlement Agreement quoted by the majority does not "plausibly give rise to an entitlement to relief." *Iqbal*, 129 S. Ct. at 1950. Accordingly, the district court did not err in dismissing Delta's complaint.

Id. at *3 (Ikuta, J., dissenting).

- ***Moss v. U.S. Secret Serv.***, 572 F.3d 962 (9th Cir. 2009). The plaintiffs alleged that two Secret Service Agents violated their First Amendment rights by ordering that a demonstration critical of then President George W. Bush be relocated. *Id.* at 964. The plaintiffs sued under *Bivens*, alleging violations of their First, Fourth, and Fifth Amendment rights. According to the complaint, anti-Bush protesters assembled in front of an inn where President Bush was expected to visit, and just before the President's arrival, state and local police cleared the alleyway behind the inn and began restricting the movements of some of the demonstrators. *Id.* at 965. The complaint alleged that at the same time, police allowed hotel guests and diners to remain inside the inn without conducting a security screening. *Id.* A pro-Bush

demonstration assembled one block west of the anti-Bush demonstration and one block immediately west of the inn. *Id.* The Secret Service Agents allegedly directed state and local law enforcement to clear the street in front of the inn—where the plaintiffs were protesting—and move the people in that area east of the street on the east side of the inn. *See id.* The Agents stated that this was to ensure that nobody came within handgun or explosive range of the President. *Id.* The anti-Bush demonstrators were pushed by state and local police to the east side of Fifth Street, more than a block away from the inn (and farther than instructed by the Agents). *See id.* The plaintiffs alleged that the police used violent means to move the demonstrators, and that the pro-Bush demonstration continued without disruption. *Moss*, 572 F.3d at 965–66. The plaintiffs alleged that "the Agents' treatment of the anti-Bush demonstration in Jacksonville was but one instance of an officially authorized, *sub rosa* Secret Service policy," and that the Secret Service's guidelines and rules prohibiting discrimination based on protestors' views was an attempt to hide the actual policy from review. *Id.* at 966. The defendants moved to dismiss on the basis of qualified immunity, but the district court denied their motion to dismiss and the defendants filed an interlocutory appeal. The Ninth Circuit affirmed the dismissal, but remanded to permit the plaintiffs to replead to comply with *Twombly* and *Iqbal*.

The Ninth Circuit first discussed "recent developments in the Supreme Court's pleading jurisprudence, first in *Twombly*, then the Court's clarification of that holding in *Iqbal*." *Id.* at 968. The court explained that in *Twombly*, "[t]he Court cautioned that *it was not outright overruling* Conley v. Gibson, *the foundational 'notice pleading' case construing Federal Rule of Civil Procedure 8(a)(2)*, but explained that *Conley*'s oft-cited maxim that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief, *read literally*, set the bar too low." *Id.* (footnote and internal citation omitted) (emphasis added). Under these principles, the Ninth Circuit framed the question before it to be "whether Plaintiffs' allegation that the Agents ordered the relocation of their demonstration *because of* its anti-Bush message is plausible, not merely possible." *Id.* at 970. The Ninth Circuit explained the two-step process set out in *Iqbal*, and used that process to evaluate the complaint. *See id.*

The court concluded that several of the allegations were conclusory and not entitled to a presumption of truth, including the allegation of the Agents' impermissible motive, the allegation that "the Agents acted in conformity with an officially authorized *sub rosa* Secret Service policy of suppressing speech critical of the President," and the allegation of systematic viewpoint discrimination. *Moss*, 572 F.3d at 970. The court explained that "[t]he allegation of systematic viewpoint discrimination at the highest levels of the Secret Service, without *any* factual content to bolster it, is just the sort of conclusory allegation that the *Iqbal* Court deemed inadequate, and thus does nothing to enhance the plausibility of Plaintiffs' viewpoint discrimination claim against the Agents." *Id.* Turning to the factual allegations, the Ninth Circuit noted that the plaintiff had pleaded that the Agents ordered the relocation of the anti-Bush demonstrators but not of the pro-Bush demonstrators, and that the guests in the inn were not subjected to security screening or asked to leave, despite their proximity to the

President. *Id.* at 971. The court found that these assertions did not amount to a plausible claim:

> The complaint alleges that the Agents instructed state and local police to move "all persons" between Third and Fourth streets to the east side of Fourth Street, a position *roughly the same distance from the Inn's patio dining area as the Pro-Bush demonstration*, and that in issuing that order, the Agents explained their desire to ensure that no protesters remained in handgun or explosive range of the President. If the Agents' motive in moving Plaintiffs away from the Inn was—contrary to the explanation they provided to state and local police—suppression of Plaintiffs' anti-Bush message, then presumably, they would have ensured that demonstrators were moved to an area where the President could not hear their demonstration, or at least to an area farther from the Inn then the position that the pro-Bush demonstrators occupied. Instead, according to the complaint, the Agents simply instructed state and local police to move the anti-Bush protestors *to a location situated a comparable distance from the Inn as the other demonstrators*, thereby establishing a consistent perimeter around the President. This is not a plausible allegation of disparate treatment.
>
> Plaintiffs allege that they were ultimately driven more than three blocks away from the Inn, surrounded, and subjected to abusive police tactics, but *nowhere does their complaint allege, or even imply, that [the Secret Service Agents] had anything to do with how the local police carried out the initial order*. Without any allegation tying the Agents to the actions of the local police, we may not assume that either did anything beyond ordering Plaintiffs moved to the east side of Fourth Street. *See Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (stating that courts are not required to make "unreasonable inferences" or "unwarranted deductions of fact" to save a complaint from a motion to dismiss).
>
> Plaintiffs' allegation that the diners and guests inside the Inn were allowed to remain in close proximity to the President without security screening does not push their viewpoint discrimination claim into the realm of the plausible. Again, the crux of Plaintiffs' complaint is that the differential treatment of similarly situated pro-Bush and anti-Bush demonstrators reveals that the Agents had an impermissible motive—suppressing Plaintiffs' anti-Bush viewpoint. The differential treatment of diners and guests in the Inn, who did not engage in expressive activity of any kind and were not located in the public areas outside of the Inn, however, offers little if any support for such an

> inference. *See Menotti v. City of Seattle*, 409 F.3d 1113, 1130 (9th Cir. 2005) (holding that security zone exceptions permitting shoppers and employees, but not protestors, to enter a restricted area did not amount to discrimination on the basis of viewpoint because the two groups were not similarly situated).
>
> We conclude that Plaintiffs' complaint fails to plead facts plausibly suggesting a colorable *Bivens* claim against the Agents. The facts do not rule out the possibility of viewpoint discrimination, and thus at some level they are consistent with a viable First Amendment claim, but *mere possibility is not enough*. The factual content contained within the complaint does not allow us to reasonably infer that the Agents ordered the relocation of Plaintiffs' demonstration because of its anti-Bush message, and it therefore fails to satisfy *Twombly* and *Iqbal*.

Id. at 971–72 (internal record citations omitted) (emphasis added and original emphasis omitted).

Although the Ninth Circuit concluded that the complaint was insufficient, it held that the plaintiffs should have the opportunity to amend their complaint, noting that pleading standards had recently changed. The court explained that:

> Prior to *Twombly*, a complaint would not be found deficient if it alleged a set of facts consistent with a claim entitling the plaintiff to relief. *See Conley*, 355 U.S. at 45–46, 78 S. Ct. 99. Under the Court's latest pleadings cases, however, the facts alleged in a complaint must state a claim that is plausible on its face. As many have noted, *this is a significant change, with broad-reaching implications*. *See, e.g.*, A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 433 (2008) (characterizing *Twombly* as an abrupt and significant departure from the long-standing tradition of liberal notice pleading in the federal courts). Having initiated the present lawsuit without the benefit of the Court's latest pronouncements on pleadings, Plaintiffs deserve a chance to supplement their complaint with factual content in the manner that *Twombly* and *Iqbal* require.

Id. at 972.

- ***Westerfield v. Spinks***, No. 2:08-CV-1970-RCF, 2009 WL 3042418 (E.D. Cal. Sept. 15, 2009). In evaluating a *pro se* prisoner complaint alleging inadequate medical treatment, the court concluded that the complaint's allegation that the plaintiff was "left for dead by MTA Spinks" after he had a heart attack and was later rushed to the hospital and received medical

treatment, was "both inadequate and implausible." *Id.* at *2. The court explained that "[a]lthough ignoring an individual suffering a heart attack creates a condition posing a risk of serious harm, Westerfield does not offer any allegations concerning Spinks' knowledge of the danger or how he was brought to a hospital if he was being ignored." *Id.* The court concluded that "'[a] conclusory allegation to the effect that [Spinks] knew that [Westerfield] had a heart attack is insufficient. [Westerfield] must allege specific facts 'plausibly showing' that [Spinks] had the requisite mental state.'" *Id.* (quoting *Brown v. Lewis*, No. 2:07-cv-2433, 2009 WL 1530681, at *1 (E.D. Cal. Jun. 1, 2009)).[7]

- ***Elan Microelectronics Corp. v. Apple, Inc.***, No. C 09-01531, 2009 WL 2972374 (N.D. Cal. Sept. 14, 2009). In a patent infringement action, the court noted that "Apple's allegation of infringement in all three of the challenged counterclaims consists of nothing more than a bare assertion, made 'on information and belief that Elan 'has been and is currently, directly and/or indirectly infringing, in violation of 35 U.S.C. § 271' the specified patents 'through its design, marketing, manufacture and/or sale of touch sensitive input devices or touchpads, including but not limited to the Smart-Pad.'" *Id.* at *2. The court explained that "[w]hile the line between facts and legal conclusions is not always easy to draw, this pleading plainly falls within the prohibition against '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1949). With respect to the "plausibility" aspect of *Twombly*/*Iqbal*, the court noted that "[a]t this juncture, the allegations of fact are so sparse that it is difficult to analyze plausibility, although nothing in what has been alleged raises any significant plausibility concerns," but concluded that "[b]ecause the claims fail under *Iqbal's* 'first' principle, the Court [did not] need [to] further address this point." *Id.* The court noted that the Federal Circuit, in *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354 (Fed. Cir. 2007), had concluded that a *pro se* pleading based on conclusory allegations survived dismissal, relying on the pleading form for patent infringement. *Elan Microelectronics*, 2009 WL 2972374, at *2. The court concluded that "[i]t is not easy to reconcile Form 18 [for direct patent infringement] with the guidance of the Supreme Court in *Twombly* and *Iqbal*; while the form undoubtedly provides a 'short and plain statement,' it offers little to 'show' that the pleader is entitled to relief," but noted that "[u]nder Rule 84 of the Federal Rules of Civil Procedure, however, a court must accept as sufficient any pleading made in conformance with the forms." *Id.* (footnote omitted). The court found that since Form 18 addresses only direct infringement, and Apple asserted direct and/or indirect infringement, neither the *McZeal* case nor Form 18 supported allowing Apple's counterclaims to proceed. *Id.*

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[7] In *Brown v. Lewis*, the prisoner's complaint under § 1983, which alleged that the prison's medical technician and nurse failed to diagnose the plaintiff with a heart attack, was insufficient to allege the requisite mental state of deliberate indifference because the plaintiff must show that the defendants knew of and disregarded an excessive risk to the plaintiff's health. 2009 WL 1530681, at *1. The court also found that the complaint failed to allege whether the plaintiff was ever diagnosed with a heart attack or what led him to believe he had a heart attack, and did not describe how the alleged misdiagnosis injured him. *Id.* Finally, the complaint alleged no facts connecting the nurse to the incident. *Id.* Despite dismissing the complaint for the second time for failure to state a claim, the court granted leave to amend. *Id.* at *2.

In considering the impact of Rule 11(b)(3), the court noted that "*regardless of what knowledge may lie exclusively in the possession of Elan or others*, Apple should be able to articulate at least *some facts* as to why it is reasonable to believe there is infringement," and concluded that "[s]imply *guessing or speculating* that there may be a claim *is not enough*." *Id.* at *4 (footnote omitted) (emphasis added). But the court cautioned:

> This is not to say that Apple necessarily must *plead* any or all such facts to state a claim; indeed some of them could be protected by privilege or the work product doctrine. However, in at least some situations, a party might be able to plead a great number of circumstantial facts supporting a belief of wrongdoing, while still needing discovery to "confirm the evidentiary basis" of the allegations.

Id. at *4 n.5.

- ***McClelland v. City of Modesto***, No. CV F 09-1031 AWI dlb, 2009 WL 2941480 (E.D. Cal. Sept. 10, 2009). The plaintiff brought a civil rights action based on the execution of a search warrant at the plaintiff's home that resulted in injury to the plaintiff. *Id.* at *1. The plaintiff alleged that her Fourth and Fourteenth Amendment rights were violated under § 1983. *Id.* at *2. In evaluating the motions to dismiss, the court noted that "[a]lthough there is some debate as to whether the Supreme Court's decision in *Twombly* worked 'a sea change in the law of pleadings,' the fact remains that, since *Twombly*, *the requirement for fact pleading has been significantly raised*." *Id.* at *5 (citing *Moss*, 572 F.3d at 972) (emphasis added). The court dismissed some of the claims, but granted leave to amend. *Id.* In refusing to dismiss the plaintiff's negligence claim against the individual defendants, the court held that "[w]hile it is certainly possible that Plaintiff could have pled causation and duty of care with more particularity, the fact remains that Plaintiff has pled *facts* which, if proven, could support a determination by the finder of fact that the individual officers executing the search warrant acted unreasonably and without due care for Plaintiff's physical limitations." *Id.* at *10.

- ***Young v. City of Visalia***, --- F. Supp. 2d ----, No. 1:09-CV-115 AWI GSA, 2009 WL 2567847 (E.D. Cal. Aug. 18, 2009). The plaintiffs asserted civil rights violations under § 1983, alleging a search that exceeded the scope of a warrant and unlawful detention. *See id.* at *1–2. The court noted that "'[c]ontext matters in notice pleading. Fair notice under [Rule 8(a)] depends on the type of case.'" *Id.* at *2 (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008); citing *Iqbal*, 129 S. Ct. at 1950). The court noted that prior Ninth Circuit precedent regarding pleading municipal liability under § 1983 appeared to have been abrogated by *Iqbal*:

> [W]ith respect to municipal liability, the Ninth Circuit has held that, "a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct

> conformed to official policy, custom, or practice." *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir. 2007). However, *Iqbal* has made clear that conclusory, "threadbare" allegations that merely recite the elements of a cause of action will not defeat a motion to dismiss. *See Iqbal*, 129 S.Ct. at 1949–50. In light of *Iqbal*, it would seem that the prior Ninth Circuit pleading standard for *Monell* claims (i.e. "bare allegations") is no longer viable.[8]

Id. at *6. The court dismissed the claim "[b]ecause the Complaint contain[ed] insufficient facts that plausibly indicate[d] a valid *Monell* claim . . . ." *Id.* at *7.

- ***Doe ex rel. Gonzales v. Butte Valley Unified Sch. Dist.***, No. 09-245 WBS CMK, 2009 WL 2424608 (E.D. Cal. Aug. 6, 2009). The plaintiff brought suit under § 1983 against his teacher and the school district's superintendent, alleging violations of his civil rights because of sexual abuse and harassment allegedly committed by other students. *Id.* at *1. The plaintiff also sued the school district, alleging sexual discrimination, and asserted a state law negligence claim against the teacher and superintendent. *Id.* The teacher and superintendent moved to dismiss the § 1983 claim.

  The court granted the motion with respect to the substantive due process claim asserted on the basis of an exception to the rule that failure to protect from harm does not create a due process violation, finding that the conclusory allegation that the defendants had a special relationship with the plaintiff was not sufficient to establish the "special relationship" exception. *Id.* at *3. With respect to another exception—the "danger creation" exception—the court granted the teacher's motion to dismiss because there were no allegations of an affirmative act by the teacher that created or exposed the plaintiff to the risk of harm, but denied the superintendent's motion on this issue because the plaintiff alleged affirmative conduct and the superintendent's only response was that he was taking action pursuant to state law by educating the accused students. *Id.* at *4–5. The court dismissed the procedural due process claim because "nowhere d[id] plaintiff allege that he had a property interest in a safe school or that defendants' conduct amounted to a deprivation of that interest without proper procedural safeguards." *Id.* at *5.

  With respect to the equal protection claim, the court found that the "bare legal assertion that [the defendants] 'intentionally discriminated' again[st] him [wa]s insufficient to satisfy Rule 8 . . . and [could not] withstand a motion to dismiss." *Doe*, 2009 WL 2424608, at *6. The court also found the allegation that the superintendent "'fail[ed] to provide or obtain

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[8] *See also Lewis v. City of Fresno*, No. CV-F-08-1062, 2009 WL 2905738, at *10 (E.D. Cal. Sept. 4, 2009) (concluding that prior to *Twombly* and *Iqbal*, the allegation that "'Defendants . . . used and/or allowed official policies, procedures and/or practices to discriminate against Plaintiff on the basis of his race'" would have been sufficient to survive a motion to dismiss because the Ninth Circuit had held that "an allegation based on nothing more than a bare averment that the official's conduct conformed to official policy, custom or practice suffice[d] to state a *Monell* claim under § 1983," but that such an allegation was not sufficient under *Twombly* and *Iqbal*).

education for [the teacher]' d[id] not sound in unconstitutional discrimination toward plaintiff." *Id.* at *7. The court speculated as to a possible theory for liability, but explained, "[o]f course, plaintiff may very well have a different theory or no theory at all, and for this reason, the Supreme Court has made clear that district courts are not free to coax a hapless complaint into compliance with federal pleading standards." *Id.* (citing *Twombly*, 550 U.S. at 561–63). The court granted the motion to dismiss with respect to the equal protection claims. *Id.*

In considering whether to grant leave to amend, the court noted *Iqbal*'s effect on pleading standards and the federal forms:

> Although *Iqbal*'s majority opinion itself did not intimate any seachange, jurists and legal commentators have observed that *the decision marks a striking retreat from the highly permissive pleading standards* often thought to distinguish the federal system from "the hyper-technical, code-pleading regime of a prior era," 129 S. Ct. at 1949. *See, e.g.*, *Moss v. U.S. Secret Serv.*, --- F.3d ----, No. 07-36018, 2009 WL 2052985, at *8 (9th Cir. July 16, 2009); Adam Liptak, *9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 21, 2009, at A10.
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> Prior to *Iqbal*, many courts—including this court and, apparently, the Supreme Court itself—read Rule 8 to express a "willingness to 'allow [ ] lawsuits based on conclusory allegations . . . to go forward,'" *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)) (alteration in original). Indeed, for over half a century, district courts had been instructed that the "short plain statement" required by Rule 8 "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz*, 534 U.S. at 514 (quoting *Conley*, 355 U.S. at 47). Now, however, even the official Federal Rules of Civil Procedure Forms, which were touted as "sufficient under the rules and . . . intended to indicate the simplicity and brevity of the statement which the rules contemplate," FED. R. CIV. PROC. 84, have been cast into doubt by *Iqbal*. *See, e.g.*, FED. R. CIV. P. Form 9 (setting forth a complaint for negligence in which the plaintiff simply states, "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway").[9]

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[9] *Twombly* seemingly approved of the adequacy of pleading under Form 9, distinguishing the notice given in the model form from the notice given in the complaint in *Twombly*. *See Twombly*, 550 U.S. at 565 n.10 (noting that the lack of

Id. at *8. The court dismissed the complaint, but granted leave to amend. *Id.* at *9.

- ***Ibrahim v. Dep't of Homeland Sec.***, No. C 06-00545 WHA, 2009 WL 2246194 (N.D. Cal. Jul. 27, 2009). The plaintiff sued because her name was placed on a "no-fly list" and she encountered numerous difficulties as a result. In part, the plaintiff's suit involved discrimination claims against the San Francisco Airport, the City and County of San Francisco, the San Francisco Police Department, and two San Francisco police officers (collectively, the "San Francisco defendants"), and John Bondanella, an employee of the private corporation United States Investigations Services, Inc. The plaintiff alleged that the San Francisco defendants and Bondanella discriminated against her on the basis of her national origin and religious beliefs by detaining her. *Id.* at *8. The court concluded that the allegation that the plaintiff was placed on the non-fly list did not support the discrimination claim against these defendants because the list was compiled and maintained by the federal government, not the defendants. *Id.* at *9. The court found that the allegations that the plaintiff was arrested because she was Muslim and a Malaysian citizen and that the defendants acted in a discriminatory manner, with the intent to discriminate based on the plaintiff's religion and national origin, were conclusory statements that were not sufficient to survive a motion to dismiss. *Id.* The court explained:

> Ibrahim has not pleaded that defendants took action because of and not merely in spite of her being a Muslim and a Malaysian citizen. That plaintiff was Muslim and detained is not enough to draw an inference of discrimination under the *Iqbal* standard. No additional facts, such as derogatory statements, are alleged. Accordingly, as pled, the discrimination claims against San Francisco officers or Bondanella are insufficient.

Id. at *10. The court questioned whether *Iqbal* imposed a harsh standard:

> *A good argument can be made that the* Iqbal *standard is too demanding. Victims of discrimination and profiling will often not have specific facts to plead without the benefit of discovery. District judges, however, must follow the law as laid down by the Supreme Court*. Yet, the harshness is mitigated here. Counsel for the San Francisco defendants and Bondanella admit that plaintiff's Fourth Amendment claim can go forward. This means that discovery will go

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notice in the complaint in *Twombly* "contrasts sharply with the model form for pleading negligence," and that "[w]hereas the model form [9] alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time, the complaint here furnishes no clue as to which of the four ILECs (much less which of their employees) supposedly agreed, or when and where the illicit agreement took place"). The Court explained that "[a] defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin." *Id.*

> forward. During discovery, Ibrahim can inquire into facts that bear on the incident, including why her name was on the list. If enough facts emerge, then she can move to amend and to reassert her discrimination claims at that time.

Id. (emphasis added). The court also concluded that the allegation that one of the officers temporarily removed the plaintiff's hijab to search underneath did not adequately plead an equal protection violation. *Ibrahim*, 2009 WL 2246194, at *10.

- ***Consumer Prot. Corp. v. Neo-Tech News***, No. 08-1983-PHX-JAT, 2009 WL 2132694 (D. Ariz. Jul. 16, 2009). The plaintiff alleged a violation of the Telephone Consumer Protection Act of 1991 (TCPA), civil conspiracy, and aiding and abetting a violation of the TCPA, based on the plaintiff's receipt of an unsolicited fax advertising a stock. *Id.* at *1. The court cited both *Twombly* itself and pre-*Twombly* case law for the proposition that "a 'plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555; citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). The court applied the two-prong approach suggested in *Iqbal*, and concluded that while some allegations were conclusory, the allegations that the defendant knew the faxes were advertisements, participated in the preparation of the faxes, provided or obtained the fax numbers of the plaintiff and other class members, paid a third party for transmission, and/or knew that the faxes were not authorized, were factual and entitled to a presumption of truth. *Id.* at *2. The court explained that "unlike in *Ashcroft*, the factual allegations do not describe parallel conduct; rather they describe a clear violation of the TCPA." *Id.* The court also noted that "[o]n a motion to dismiss, we are required to assume that all general allegations embrace whatever specific facts might be necessary to support them," and concluded that the plaintiff was not required to detail how the fax constituted an advertisement. *Id.* at *3. With respect to the civil conspiracy claim and the aiding and abetting claim, the court found that the facts alleged, taken as true, supported both of those claims and were incompatible with any lawful behavior. *Consumer Prot. Corp.*, 2009 WL 2132694, at *4. The motion to dismiss was denied.

- ***Padilla v. Yoo***, 633 F. Supp. 2d 1005 (N.D. Cal. 2009). The plaintiff's claims arose out of his designation as an "enemy combatant" and his resulting detention. *See id.* at 1012. The plaintiff alleged that the defendant, the Deputy Attorney General in the Office of Legal Counsel for President George W. Bush, was responsible for the harsh treatment plaintiff received as an enemy combatant, which allegedly resulted from policies implemented under the defendant's counsel. *See id.* at 1014–15. Among the violations of rights that the plaintiff alleged were: denial of access to counsel, denial of access to court, unconstitutional conditions of confinement, unconstitutional interrogations, denial of freedom of religion, denial of the right to information, denial of the right to association, unconstitutional military detention, denial of the right to be free from unreasonable seizures, and denial of due process. *See id.* at 1016–17. The court concluded that the plaintiff had stated a sufficient *Bivens* claim. *Id.* at 1030. In considering qualified immunity, the court found that the allegations

contained "sufficient facts to satisfy the requirement that Yoo set in motion a series of events that resulted in the deprivation of Padilla's constitutional rights." *Id.* at 1034. The court distinguished *Iqbal*, explaining that "[h]ere, in contrast, Padilla allege[d] with specificity that Yoo was involved in the decision to detain him and created a legal construct designed to justify the use of interrogation methods that Padilla allege[d] were unlawful." *Padilla*, 633 F. Supp. 2d at 1034 (footnote omitted). With respect to the allegations of constitutional violations, the court concluded that "[t]he allegation that Padilla was denied any access to counsel for nearly two years [wa]s sufficient to state a claim for violation of his access to courts"; that Padilla had stated a claim for violation of the Eighth Amendment (although the claim had to be analyzed under the Due Process Clause of the Fourteenth Amendment); and that "[b]ecause there [wa]s no allegation in the complaint . . . that Padilla was ever made to be a witness against himself or that his statements were admitted as testimony against him in his criminal case, he ha[d] not stated a claim for violation of the Self-Incrimination Clause of the Fifth Amendment." *Id.* at 1035–36. The court concluded that qualified immunity did not apply because the violations alleged involved clearly established constitutional rights, and a reasonable federal officer could not have believed the conduct was lawful. *Id.* at 1038.

Tenth Circuit

- ***Bell v. Turner Recreation Comm'n***, No. 09-2097-JWL, 2009 WL 2914057 (D. Kan. Sept. 8, 2009). In a Title VII case alleging unlawful discrimination and retaliation, the court rejected the defendants' argument that the complaint failed to allege enough facts under *Iqbal*.[10] The court noted that:

> With respect to her discrimination claim, plaintiff alleges that her supervisor, Becca Todd, routinely treated plaintiff less favorably than she treated similarly situated white employees by assigning plaintiff

[10] The Northern District of Oklahoma has also confirmed that *Twombly* and *Iqbal* apply to employment discrimination cases. *See Coleman v. Tulsa County Bd. of County Comm'rs*, No. 08-CV-0081-CVE-FHM, 2009 WL 2513520, at *3 (N.D. Okla. Aug. 11, 2009). In *Coleman*, the court cited pre-*Twombly* case law for the propositions that conclusory allegations need not be accepted as true and that factual averments are necessary to adequately state a claim. *See id.* at *2 (citing *Erikson v. Pawnee County Bd. of County Comm'rs*, 263 F.3d 1151, 1154–55 (10th Cir. 2001); *Hall v. Bellmon*, 935 F.2d 1106, 1109–10 (10th Cir. 1991)). In considering the plaintiff's claims of retaliation and hostile work environment, the court noted that the complaint did "not reference a single date on which any event occurred, nor [did] it identify which of defendant's employees harassed her or describe any of the harassing statements," and that although the plaintiff alleged that the defendant took "'unreasonabl[e] disciplinary action' against her and subjected her to adverse employment action," she did not explain the disciplinary action. *Id.* at *3. The court stated that "[w]hile plaintiff is correct that *Twombly* does not impose a demanding pleading standard, she must still state a claim that is plausible on its face and allege enough facts to support a claim that defendant has unlawfully discriminated against her." *Id.* The court noted that the plaintiff did not provide "any factual allegations describing the alleged hostile work environment and, for her retaliation claims, she d[id] not even state how defendant allegedly retaliated against her." *Id.* The court found that "while *Twombly is not a demanding standard*, it does require plaintiff to allege some facts in support of her claims." *Id.* (emphasis added). The court noted that the complaint might have survived under *Conley*, but that "[t]he allegations . . . [w]ere so general that it is not possible for the Court to determine if plaintiff has stated a claim." *Coleman*, 2009 WL 2513520, at *3. The court granted leave to amend. *Id.*

> less desirable tasks; reducing plaintiff's hours while increasing the hours of white employees; subjecting plaintiff to heightened scrutiny in her job performance; and requiring plaintiff to adhere strictly to her work schedule while permitting white employees to arrive late and take extended breaks. She further alleges that her supervisor refused to socialize with plaintiff but routinely socialized with white employees and that her supervisor excluded plaintiff from certain activities that were made available to white employees. Finally, she contends that she received two written reprimands on February 7, 2009 on the basis of her race and that she was suspended and ultimately terminated on the basis of her race.

Id. at *3. The court found that these allegations were "more than sufficient to satisfy the pleading standards set forth in *Twombly* and *Iqbal*." *Id.* With respect to the retaliation claim, the court noted that the plaintiff alleged that she complained to her supervisor that she was being treated less favorably than the white lifeguards; that she complained in writing to her supervisor's supervisor that she was subject to racial discrimination; that one hour and fifteen minutes after the latter complaint, she was suspended; and that she was terminated upon returning to work after suspension. *Id.* The court concluded that "Plaintiff, then, has clearly alleged specific facts showing that she was treated less favorably than similarly situated white employees and that she suffered an adverse action and, with respect to her retaliation claim, that she complained to her employer about racial discrimination in the work place and that she suffered an adverse employment action as a result of that complaint." *Id.* The court explained that "[*n*]*othing more is required under the law*" and that "it is difficult to imagine what more the court could require of plaintiff in terms of pleading her claims with specificity." *Id.* (emphasis added).

- ***Clark v. Nweke***, No. 04-cv-02414-LTB-KMT, 2009 WL 3011117 (D. Colo. Sept. 16, 2009). The plaintiff alleged violations of the Eighth Amendment in connection with medical treatment he received in state prison. The plaintiff alleged that a prison doctor failed to provide necessary surgery in a timely manner, but the court concluded that the claim could not proceed because the plaintiff "failed to allege any facts showing that he had a need for 'immediate surgery' that was 'so obvious that even a lay person would easily recognize' it," *id.* at *4 (quoting *Sealock v. Colorado*, 218 F.3d 1205, 1209 (10th Cir. 2000)), and had therefore "failed to sufficiently allege that he had an objectively serious medical need for 'immediate surgery' . . . ," *id.* The court also concluded that the plaintiff failed make any allegations that the doctor "had 'sufficiently culpable state of mind.'" *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 833 (1970)).[11]

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[11] *See also Johnson v. Liberty Mutual Fire Ins. Co.*, --- F. Supp. 2d ----, 2009 WL 2868841, at *9–10 (D. Colo. Sept. 2, 2009) (in considering a complaint alleging that the plaintiffs' insurance company acted in bad faith in destroying evidence that the plaintiffs needed in a later lawsuit against a driver who hit one of the plaintiffs, the court noted that '[t]he only clear allegation by the Plaintiffs of Liberty's state of mind is the allegation that Liberty 'knew, or should have known, of [the] evidentiary significance of the Johnsons' claims' of the taillights," and concluded that, as

Eleventh Circuit

- ***Sinaltrainal v. Coca-Cola Co.***, 578 F.3d 1252 (11th Cir. 2009). The plaintiffs, who were trade union leaders, brought suit under the Alien Tort Statute (ATS) and the Torture Victims Protection Act (TVPA), "alleging their employers—two bottling companies in Colombia—collaborated with Colombia paramilitary forces to murder and torture Plaintiffs." *Id.* at 1257 (footnotes omitted). The plaintiffs' complaint named, among others, two Coca-Cola companies, and alleged that they were connected to the Colombian bottlers, and their employees, through alter ego and agency relationships. *Id.* "The [original] complaint alleged the systematic intimidation, kidnapping, detention, torture, and murder of Colombian trade unionists at the hands of paramilitary forces, who allegedly worked as agents of the Defendants." *Id.* at 1258. The plaintiffs ultimately filed four separate complaints. The plaintiffs did not allege that the defendants caused the violence, but asserted that the defendants capitalized on the hostile environment in Colombia and conspired with paramilitaries or local police to rid their bottling facilities of unions. *Id.* at 1265. The defendants moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction, and the district court ultimately dismissed all four complaints, finding that "each fell short of pleading the factual allegations necessary to invoke the court's subject matter jurisdiction under the ATS and the TVPA," and that "the allegations in all four complaints insufficiently pled a conspiracy between the local facilities' management and the paramilitary officers." *Id.* at 1260.

  In discussing the pleading standards, the court emphasized that "[f]actual allegations in a complaint need not be detailed but 'must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Id.* at 1261 (quoting *Twombly*, 550 U.S. at 555). The court also explained that "in *Iqbal*, the Supreme Court reiterated that although Rule 8 of the Federal Rules of Civil Procedure does not require detailed factual allegations, it does demand 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Sinaltrainal*, 578 F3d. at 1261(quoting *Iqbal*, 129 S. Ct. at 1949). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Id.* (citing *Iqbal*, 129 S. Ct. at 1949).

  "For subject matter jurisdiction to entertain Plaintiffs' ATS claims, the complaints must sufficiently plead (1) the paramilitaries were state actors or were sufficiently connected to the Colombian government so they were acting under color of law (or that the war crimes exception to the state action requirement applies) and (2) the Defendants, or their agents, conspired with the state actors, or those acting under color of law, in carrying out the tortious acts." *Id.* at 1266 (footnote omitted). With respect to pleading state action, the Eleventh Circuit held that the "conclusory allegation that the paramilitary security forces acted under

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explained in *Twombly* and *Iqbal*, this "entirely conclusory" allegation was not sufficient under Rule 12(b)(6)).

color of law [wa]s not entitled to be assumed true and [wa]s insufficient to allege state-sponsored action"; that "Colombia's mere 'registration and toleration of private security forces d[id] not transform those forces' acts into state acts'"; that "[a]llegations [that] the Colombian government tolerated and permitted the paramilitary forces to exist [we]re insufficient to plead the paramilitary forces were state actors"; and that the "naked allegation [that] the paramilitaries were in a symbiotic relationship with the Colombian government and thus were state actors" was conclusory and did not need to be accepted as true. *Id.* (citing *Iqbal*, 129 S. Ct. at 1951). The court noted that there was "no suggestion the Colombian government was involved in, much less aware of, the murder and torture alleged in the complaints," and held that "[t]he plaintiffs' 'formulaic recitation' that the paramilitary forces were in a symbiotic relationship and were assisted by the Colombian government, absent any factual allegations to support this legal conclusion, [wa]s insufficient to state an allegation of state action that [wa]s plausible on its face." *Id.* (citing *Iqbal*, 129 S. Ct. at 1950) (internal citation omitted). For this reason, the court found that dismissal of three of the complaints for lack of subject matter jurisdiction was appropriate.

With respect to the fourth complaint, the plaintiffs alleged a conspiracy between local police and the bottling facility's management. *Id.* at 1267. The Eleventh Circuit concluded that the plaintiffs' "attenuated chain of conspiracy fails to nudge their claims across the line from conceivable to plausible," *id.* at 1268 (citing *Twombly*, 550 U.S. at 570), explaining:

> First, while the plaintiffs allege "Aponte's[12] plan necessarily required the cooperation and complicity of the arresting police officers," we are not required to admit as true this unwarranted deduction of fact. Second, the plaintiffs' allegations of conspiracy are "based on information and belief," and fail to provide any factual content that allows us "to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 129 S. Ct. at 1949. Specifically, these plaintiffs allege "[t]he basis for the conspiracy was either that Aponte arranged to provide payment to the officers for their participation, or that the officers had a shared purpose with Aponte to unlawfully arrest and detain Plaintiffs because they were union officials and had been branded by Panamco officials as leftist guerillas." The premise for the conspiracy is alleged to be either payment of money or a shared ideology. The vague and conclusory nature of these allegations is insufficient to state a claim for relief, and "will not do." *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965.
>
> Furthermore, the complaint fails to allege when or with whom

[12] Aponte was the chief of security at the bottling facility at issue. The complaint alleged that Aponte falsely told police that he found a bomb in the facility and that the plaintiffs had planted the bomb, and that the police subsequently arrested the plaintiffs, treated them violently, and locked them in a dirty and dangerous prison. *Sinaltrainal*, 2009 WL 2431463, at *11.

> Aponte entered into a conspiracy to arrest, detain, and harm the plaintiffs. The scope of the conspiracy and its participants are undefined. There are no allegations the treatment the plaintiffs received at the hands of the local police and in prison was within the scope of the conspiracy. Additionally, assuming Aponte even conspired with the local police to arrest the plaintiffs, this action alone is insufficient to form the basis of an ATS claim, and there is no allegation the subsequent six-month imprisonment and mistreatment was part of the conspiracy. The *Garcia* plaintiffs, thus, fail to state a plausible claim for relief against the Panamco Defendants for a violation of the law of nations. *See* 28 U.S.C. § 1350. We conclude the district court did not err in dismissing the ATS claims in the *Garcia* complaint for lack of subject matter jurisdiction.

Sinaltrainal, 578 F.3d at 1268–69 (internal citation omitted).

The plaintiffs alleged the same facts with respect to their TVPA claims. *Id.* at 1269. In accordance with its holdings regarding the ATS claims, the court found the facts to be insufficient to state a claim under the TVPA:

> [T]he *Gil*, *Galvis*, and *Leal* plaintiffs fail to sufficiently plead the paramilitary forces were acting under color of law. Mere toleration of the paramilitary forces does not transform such forces' acts into state acts; moreover there are no allegations the Colombian government was aware of, much less complicit in, the murder and torture Plaintiffs allege in their complaints. Additionally, the *Garcia* plaintiffs fail to sufficiently allege the Panamco Defendants, or their agents, conspired with the local police in carrying out the alleged torture. The *Garcia* plaintiffs' vague and conclusory allegations of a conspiracy do not state a claim for relief that is plausible on its face, *see Iqbal*, 129 S. Ct. at 1950, and they fail to detail any factual allegations "to raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, 127 S. Ct. at 1965. We, therefore, vacate the district court's dismissal of the TVPA claims for want of jurisdiction and instruct the court to dismiss the TVPA claims for failure to state a claim upon which relief can be granted.

Id. at 1270 (additional internal citation omitted).

- ***Ansley v. Florida, Dep't of Revenue***, No. 4:09cv161-RH/WCS, 2009 WL 1973548 (N.D. Fla. Jul. 8, 2009). The plaintiff's employment discrimination claims failed to allege sufficient facts. The court noted that *Swierkiewicz* does not require "a complaint [to] allege with precision all the elements of a cause of action," *id.* at *1 (citing *Swierkiewicz*, 534 U.S. at 514–15), and explained that the complaint was insufficient:

> The plaintiff asserts claims of gender discrimination in violation of Title VII of the Civil Rights Act of 1964 as amended and disability discrimination in violation of the Florida Civil Rights Act. But the plaintiff does not say what the alleged reason—the pretextual reason—for the firing was. He does not even allege the reason was false; a reason can be true but still pretextual if it was not the real reason for the decision. He does not allege a factual basis for the conclusion that the others who were treated better were similarly situated. He does not allege his medical condition and thus does not allege a factual basis for his claim that it—or the defendant's perception of it—entitled him to protection under the Florida Civil Rights Act. He does not allege a claim under the Family and Medical Leave Act and does not explain how his father's illness—also unexplained—entitled the plaintiff to protection under the Florida Civil Rights Act.

Id. at *2. The court noted that "*[t]hese allegations might have survived a motion to dismiss prior to* Twombly *and* Iqbal," but held that "now they do not." *Id.* (emphasis added). The court stated that an employment-discrimination plaintiff "must allege facts that are either (1) sufficient to support a plausible inference of discrimination, or (2) sufficient to show, or at least support an inference, that he can make out a prima facie case under the familiar burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and its progeny." *Id.*

D.C. Circuit

- ***Atherton v. District of Columbia Office of Mayor***, 567 F.3d 672 (D.C. Cir. 2009). Two days after the plaintiff was sworn in as a D.C. Superior Court grand juror, he was permanently removed from grand jury service when an Assistant U.S. Attorney ("AUSA") who was presenting evidence to the grand jurors reported to a supervising AUSA (Daniel Zachem) that the jurors were complaining about the plaintiff. *Id.* at 676. Zachem discussed the issue with the juror officer (Suzanne Bailey-Jones), and Bailey-Jones "summarily and permanently removed Atherton from the grand jury for being 'disruptive.'" *Id.* The plaintiff's *pro se* complaint alleged that he was unlawfully removed from grand jury service because of his deliberative judgments and his Hispanic ethnicity, and asserted claims against Bailey-Jones, Zachem, the Director of Special Operations at the Superior Court (Roy Wynn), several other city and federal officials, the District of Columbia, and the Department of Justice Office of the Attorney General. *Id.* at 677. The complaint alleged constitutional violations of due process and equal protection against the District of Columbia defendants and the federal defendants under §§ 1983, 1985(3), and 1986, and *Bivens*, as well as a common law fraud claim. *Id.* The district court dismissed the complaint for failure to state a claim, finding that it failed to allege that any defendants other than Bailey-Jones and Zachem were directly involved in his dismissal, and that the plaintiff had failed to state a claim for municipal liability against the

District of Columbia. *Id.* The district court also dismissed the § 1985(3) claim without explanation; dismissed the § 1986 claim as time-barred; dismissed the official capacity claims under § 1983 against the municipality because Bailey-Jones was acting outside the scope of her authority in removing the juror; dismissed the individual capacity claims against the superior court clerk and Wynn because the allegations did not support any personal involvement by these defendants in the decision to remove Atherton from the jury; declined to exercise supplemental jurisdiction over the fraud claim alleged against the superior court clerk and Wynn; and found that the fraud claim against Zachem was barred by sovereign immunity because the Federal Tort Claims Act required substituting the United States for Zachem. *Atherton*, 567 F.3d at 680. Although the district court found that the complaint adequately stated due process and equal protection claims against Zachem and Bailey-Jones, it dismissed the claims against them under § 1983 and *Bivens* because they were entitled to absolute immunity. *Id.* The Eleventh Circuit reversed the dismissal of the due process claims against Bailey-Jones and Zachem because absolute immunity did not apply; affirmed the dismissal of the equal protection and § 1985(3) claims, and the due process claim against Wynn, for failure to state a claim; and affirmed the dismissal of the remaining claims. *Id.* at 677.

The D.C. Circuit discussed the pleading standards and affirmed that notice pleading is still effective, first noting that Rule 8 requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief' in order to survive a motion to dismiss,'" *id.* at 681 (quoting FED. R. CIV. P. 8(a)(2)), and then that "[a] complaint must give the defendants notice of the claims and the grounds upon which they rest, but '[s]pecific facts are not necessary,'" *id.* (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). With respect to a claim of invidious discrimination, the court pointed out that in *Iqbal*, the Supreme Court had required pleading that the defendant acted with discriminatory purpose, and that purposeful discrimination "'involves a decisionmaker's undertaking a course of action 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group.'" *Id.* (quoting *Iqbal*, 129 S. Ct. at 1948). The court emphasized that "[a] *pro se* complaint . . . 'must be held to less stringent standards than formal pleadings drafted by lawyers,'" *id.* (quoting *Erickson*, 551 U.S. at 94), but that "even a *pro se* complaint must plead 'factual matter' that permits the court to infer 'more than the mere possibility of misconduct,'" *Atherton*, 567 F.3d at 681 (quoting *Iqbal*, 129 S. Ct. at 1950).

The court concluded that the equal protection claim under § 1983 was not supported by sufficient facts:

> The only factual allegations in Atherton's complaint on his equal protection claim are that: (1) after a witness who could not speak English testified before the grand jury, Atherton openly thanked the witness in Spanish, Compl. ¶¶ 64-65; (2) "based on information, Atherton was the only semi-fluent Spanish speaking grand juror," *id.* at ¶ 67; and (3) Atherton is "half Mexican," *id.* From these facts, Atherton alleges that, "based upon information," his removal without

> cause from the grand jury was an act of discrimination against him "and Hispanics in particular because there were no other Hispanics on the jury." *Id.* at ¶ 73. He also alleges that the defendants conspired to illegally remove him from the grand jury "for ethnic purposes." *Id.* at ¶ 68. These spare facts and allegations are not enough to survive a motion to dismiss under *Iqbal* and *Twombly*. The complaint and supporting materials simply do "not permit the court to infer more than the mere possibility of misconduct," *Iqbal*, 129 S. Ct. at 1950, and this is insufficient to show that Atherton is entitled to relief. *See* FED. R. CIV. P. 8(a)(2). As the Court noted in *Iqbal*, "[w]here a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Iqbal*, 129 S. Ct. at 1949 (internal quotation marks and citation omitted). We therefore reverse the District Court's finding that Atherton stated claims of equal protection violations by Bailey-Jones and Zachem.

Id. at 688.

With respect to the 1985(3) claims, the court noted that Atherton was required to allege "'(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, . . . and (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in her person or property or deprived of any right or privilege of a citizen of the United States,'" *id.* (quoting *Martin v. Malhoyt*, 830 F.2d 237, 258 (D.C. Cir. 1987), but that "Atherton's complaint and supporting materials merely allege that Zachem, Bailey-Jones, and Wynn communicated about his removal before he was dismissed from the grand jury," *id.* The court concluded that "[t]hese bare facts clearly do not raise an inference that Zachem, Bailey-Jones, and Wynn were conspiratorially motivated by some class-based, invidiously discriminatory animus." *Id.* The court noted that "[t]he complaint also assert[ed] that the defendants 'conspired under color of law to illegally remove Atherton . . . for ethnic purposes,' and that Atherton was illegally removed from the grand jury in violation of the Constitution and D.C. law," *id.* (internal record citation omitted), but concluded that "these '[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice' to state a cause of action under § 1985(3)," *Atherton*, 567 F.3d at 688 (quoting *Iqbal*, 129 S. Ct. at 1949).

CIVIL RULES FORMS

Introduction

The Civil Rules Forms have stirred gradually growing interest in some Advisory Committee members. The pleading Forms illustrate pure notice pleading at its simplest. The evolution of pleading practice is itself a clear ground for reconsidering at least these Forms. Thinking about revising the pleading Forms leads to more general questions: How useful are the Forms in general? Should there be more, fewer, or no forms? Should the process for developing Forms follow the regular Enabling Act process, as has been the custom, or should some revised process be developed? It seems fair to suggest that the Forms have not commanded as regular or sustained attention as the Civil Rules themselves; the considerably abbreviated process used to revise the Forms in the Style Project is a recent illustration. What to do, if anything, is a fit subject for present discussion. Although this topic may appear on the same agenda as discussion of the decision in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009), and the Iqbal decision may have some bearing on the use and nature of pleading forms, many of the questions are independent of the Iqbal decision. The independent questions are explored here, leaving the narrower — and almost certainly premature — questions for discussion with the Iqbal case.

Civil Rule 84 signals the formal importance of the Forms in the present system: "The forms in the Appendix suffice under these rules and illustrate the simplicity and brevity that these rules contemplate."

The original Rule 84 stated only that the forms "are intended to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." It was amended in 1948 to provide that the forms "are sufficient under the rules." The 1948 Note explained that under the amendment "the practitioner using [the forms] may rely on them to that extent. The circuit courts of appeals generally have upheld the use of the forms as promoting desirable simplicity and brevity of statement. * * * And the forms as a whole have met with widespread approval in the courts." The Note further observed that in 1937, Professor Cook noted that "'. . . pleaders in the federal courts are not left to guess as to the meaning of [the] language' in Rule 8(a) regarding the form of the complaint. 'All of which is as it should be. In no other way can useless litigation be avoided.'"

Charles E. Clark, who continued to be Reporter at the time the 1948 amendments were proposed in 1946, later said that the Forms are the most important part of the rules on the question of how much detail Rule 8(a) requires: " * * * when you can't define you can at least draw pictures to show your meaning." Clark, Pleading Under the Federal Rules, 12 Wyo.L.J. 177, 181 (1958). The picture drawn by original Form 9 (Style Form 11) is illustrative. Paragraph 1 is an allegation of jurisdiction. Paragraph 2 read: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway." Paragraph 3 continued: "As a result plaintiff was thrown down and had his leg broken and was otherwise injured, and was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars." Form 9 received honorable mention in Bell Atlantic Corp. v. Twombly, 127 S.Ct. 1955, 1970 n. 10 (2007): "[T]he model form alleges that the defendant struck the plaintiff with his car while plaintiff was crossing a particular highway at a specified date and time * * *. A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer * * *."

The original Forms included complaints as Forms 3 through 18. They survived unscathed until the Style Project revisions in 2007, as shown by the dates that carried forward until 2007 — apart from a few fill-in-the-blank moments, specific dates ranging from 1934 to 1936 are set out in almost all the Forms. Apart from some modest concern about the increasingly archaic, if not

eccentric dates, it is difficult to guess whether this lack of attention reflected general satisfaction with the forms. It did not reflect comfortable acceptance of all. The Forms 16 and 17 complaints for patent and copyright infringement sparked particular concern — the copyright complaint, drafted during the life of the 1909 Copyright Act, went on without change after enactment of the 1976 Copyright Act until the Style Form adopted changes to reflect, however adequately, the new law. A Federal Circuit judge has recently described the patent complaint as an embarrassment, reviving concerns that had been put aside from trepidation in contemplating the task of revision.

The pleading forms provide an obvious focus of concern in light of the current upheaval in pleading practice. They will be addressed first. But the overall enterprise also deserves further consideration; a few opening questions will be noted at the end.

Pleading

The negligence form complaint may have survived Twombly. It is not at all clear whether it survives Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009). The Iqbal opinion says clearly that "legal conclusions" in a complaint are not to be accepted as true. "Formulaic" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. * * * [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged — but it has not 'show[n]' — 'that the pleader is entitled to relief.' Fed.Rule Civ.Proc. 8(a)(2)." Is "negligently" a legal conclusion, a threadbare recital of an element of the cause of action, or is it a well-pleaded fact because it is plausible that the defendant actually drove the vehicle, drove it negligently, caused injury, and so on?

If more is to be required of a negligence complaint, an obvious starting point is specification of the ways in which the defendant was negligent. There are many ways to be negligent in driving a car, and new ways will be devised. Pretrial conference and discovery practices enable a defendant to get a reasonably reliable list of the specific claims before trial starts. The pleading question is whether the defendant is entitled to at least a preliminary listing in the complaint — and whether requiring the listing will lead to routine recital of every theory that has ever been identified in the most comprehensive computer-stored form complaint. And the policy of free amendment also must be considered — what is accomplished by requiring allegations that the defendant was text-messaging while drunkenly driving a vehicle with no brakes if the plaintiff is to be freely allowed to amend to allege speeding through a red light while gazing at an attractive pedestrian?

The Form question follows the pleading question. If specifications of negligence are required — as at least some Code pleading states do — what would a Rules Form look like? An illustration of a few common varieties of negligence? A long blank: "The defendant was negligent in: *(provide details)*"?

Many of the other complaint Forms are similar to the negligence Form, now Form 11. Things begin to become more particular by Form 13, an FELA complaint. Some degree of specialized substantive knowledge appears at least as early as Form 14, which specifies seaman's wages "of $___ a month and found." Forms 18 and 19, for patent and copyright infringement, are noted above.

The question whether the pleading Forms should be addressed while pleading standards are in flux is not as simple as might appear. Maintaining the present Forms, and asserting that they "suffice under these rules," may be misleading. Attempting to revise them before new pleading practices become relatively secure, whether by revising Rule 8 or by growing case-law development, is obviously risky.

Abrogating the pleading Forms avoids the risks of attempting revision now or of maintaining them as memorials of enthusiasm for notice pleading. If those are the only reasons for abrogation — if it is useful to have pleading Forms — work could begin almost simultaneously on developing new Forms. An early beginning might well be sensible despite uncertainty as to the next stages of pleading practice. Attempting to develop Forms during the process of drafting new rules would provide a good test of the rules. Developing more specific forms, moreover, would likely require broad consultation with a considerable number of experts in each substantive area addressed. The task would be arduous and at times would likely be contentious.

A different set of reasons could be advanced for abrogating the pleading forms without undertaking to replace them. It should not be difficult to generate a more detailed negligence complaint, although some of the choices would be uncertain — does it suffice to allege that the defendant drove at a negligent speed? a negligently fast or slow speed? Or is that a mere legal conclusion, as compared to alleging a threshold speed of at least XY miles per hour, along with circumstances such as the applicable speed limit or other conditions that make that speed unreasonable? But such forms would provide little guidance for more complex cases. Consider, as one illustration, the task of generating a form complaint that would satisfy the Twombly tests for alleging facts sufficient to state a plausible claim of "contract, combination * * *, or conspiracy." A team of antitrust experts holding different perspectives would be required. Assuming a solid form could be developed, would it be of any particular use to someone attempting to draft for a real-world situation? Is it important to provide forms for at least the categories of cases that account for substantial shares of the federal docket, such as employment discrimination and "civil rights"? Would drafting such forms venture uncomfortably close to whatever zone it is that separates "general rules of practice and procedure" from impermissibly substance-specific rules, or the ever-present need to avoid abridging, enlarging, or modifying any substantive right?

These questions are affected by the role of the Forms. So long as Rule 84 says they suffice, and they carry the imprimatur of the Enabling Act process, the process must be as deliberate as the various occasions require. If the Forms were demoted by launching them through a different process, it might prove possible to develop more forms and achieve greater benefit even though the forms were not as elegant. One question would be whether, and how, to involve the Advisory Committee, and perhaps the Standing Committee. A more significant question would go to the value of unofficial forms. Lawyers have ready access to untold numbers of pleadings that have been tested in the crucible of litigation. Any variation of Judicial Conference and Administrative Office sponsorship would produce no more than a minuscule addition to the count. Is there any reason in experience to believe that quasi-official forms would add any value? Or is there reason for concern that too many lawyers would opt for the relative safety of aping the quasi-official forms, rather than draw inspiration from a panoply of more nearly apt forms floating in the world of easy e-research?

Other Forms

It does not take long to scan the full collection of Forms in the Civil Rules Appendix. The experience is a worthwhile reminder of the subjects covered. Some of them may be useful and noncontroversial. Forms 1 and 2 on caption and signature lines promote useful uniformity, unless Local Rules get in the way. So for the Forms 3 and 4 summonses. The Forms 5 and 6 request to waive service and waiver were drafted with care, and again seem quite useful. And so the list goes. Form 80, a Notice of Magistrate Judge's Availability, may be a particularly important example of a Form crafted to avoid undue pressure to consent to trial before a magistrate judge rather than a district judge.

Despite these encouraging examples, perusing the full set of Forms suggests other questions. Some of the Forms may not be useful. Form 40, for example, suggests it is sufficient to file a motion that, apart from the Form 1 caption and Form 2 signature line, reads in entirety: "The defendant

moves to dismiss the action because the complaint fails to state a claim upon which relief can be granted." Other forms prompt curiosity as to the reasons for picking this particular subject for a form, while ignoring closely related subjects. Form 9 provides a succinct example of a statement noting a party's death. Rule 25 covers a variety of related subjects — why is this the only one covered? For that matter, why single out Rule 25 at all?

The full set of Forms raises a broader question. The range is selective, approaching idiosyncratic. Can it be that these Forms address the most common and most important situations in which parties or courts will be helped by good and uniform forms? If these Forms are useful, would a substantially enlarged set be still more useful? If the Forms are seriously underinclusive, is that reason for enthusiastic expansion, or instead for reduction or even abolition?

The seemingly useful Forms suggest that there may be real value in providing at least the Rule 84 direction that the Forms suffice under the Rules. Probably confidence in some Forms should not carry further to mandate their use — the risk of unforeseen issues is not likely to be offset by the cost of frequent and consequential departures. But if it proves tempting to move any pleading forms outside the official status of Rule 84 Forms, there may be reason to retain Rule 84 for some set of Forms.

Process

Several variations on the Enabling Act process are scattered throughout the discussion of pleading forms. It may be useful to bring together some of the more salient variations:

We could carry on as we have, adopting and revising Forms in the same process as Rule text. This approach is consistent with lavishing detailed attention on specific Forms, as might well prove desirable for pleading Forms. The "miniconference" and "conference" practices that have proved invaluable might be considered, but it seems more likely that outside help could be sought by a process similar to that considered for developing discovery protocols. Relatively small teams of litigators with substantial experience in relevant substantive fields could be asked to develop models that would form the foundation for the later formal stages of consideration and recommendation. This approach is also consistent with the benign relative neglect that has characterized most of the Forms for long periods.

We could decide that some Forms are useful, and deserve the full Enabling Act process, while abandoning the attempt to provide pleading forms — either for the time required for pleading practice to shake out, or for the foreseeable future.

We could decide that Forms are a wonderful thing, and that it is so useful to generate so many of them that we should find a process that works free of the exhaustive Enabling Act procedures. That approach could coexist with Rule 84 if some forms were maintained as Official Rule 84 Forms, while others were relegated to some other process.

No doubt other variations should be considered. For now, it will be useful to begin the discussion, hoping to develop some sense of general direction. More detailed proposals will abide the event.

RULE 6(d): "3 DAYS ARE ADDED"

Some questions turn on high theory. Some do not. Experience is likely to prove the best guide in returning to the familiar questions posed by Civil Rule 6(d).

Rule 6(d) now reads:

> (d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Three days are not added if service is made under Rule 5(b)(2)(A) or (B) by handing the paper to the person, or by leaving it at the person's office or "dwelling or usual place of abode." Three days are added if service is made under Rule 5(b)(2)(C), (D), (E), or (F) — mail, leaving the paper with the court clerk if the person has no known address, sending by electronic means, or delivering by any other means that the person consented to in writing.

Criminal Rule 45(c) is an almost-verbatim duplicate of Civil Rule 6(d). Appellate Rule 26(c) is similar, but adds a wrinkle. Bankruptcy Rule 9006(f) is a variation. The parallels are no accident — these rules were revised in 2005 to achieve rough uniformity in time calculations. So now, any actual recommendations for change must be coordinated with the other advisory committees, perhaps directly and perhaps through a joint subcommittee or similar device.

The wisdom of the "3-days-are-added" provision has been explored repeatedly. In 1994 it was decided, in response to a question raised at a Standing Committee meeting, that there was no reason to extend the added time to 5 days.

The question next arose in conjunction with the 2001 amendments that added service by electronic means. Discussion focused on the question whether the nearly instantaneous transmission of most e-messages obviates the need for additional time. The decision to treat electronic service the same as postal mail rested in part on doubt whether e-mail is always transmitted immediately. The doubts were most important with respect to attachments — several participants commented that it may take two or three days to establish a mutually compatible system of transmitting attachments. Doubts of this sort are subject to reconsideration as technology marches on. Additional questions were raised about strategic calculations, resting on the perception that some lawyers will select whatever method of service is calculated to minimize the actual time available to respond. Again, questions of this sort are subject to reconsideration in light of changing circumstances, particularly the pressures that may make e-service virtually compulsory in many courts.

The Style Project considered whether this subject should be advanced for more-than-style revision, but nothing has happened yet.

The most recent occasion for discussion arose with the Time Computation Project. One of the potential virtues of the 7, 14, 21, and occasional 28-day periods widely adopted in the Rules is closing the count on the same day of the week as opened the count. Seven days from Monday is Monday, and so on. The added 3 days messes up this calculation, and, when the 3d day lands on a weekend or legal holiday, requires an extension to the end of the weekend-holiday period. Some of the public comments pointed out that Rule 6(d) defeats the desired simplicity.

The questions do not go away.

The case for adding 3 days when service is made by postal mail seems strong, unless we believe that most of the time periods provided by the rules are longer than needed. Mail often is

delivered on the next day, but that ambitious goal is not always met. The problem of delivery time could be addressed by dropping the 3-day extension and also dropping the provision that service by mail is complete on mailing. But there are good reasons to avoid the likely alternative of making service complete on delivery.

Adding 3 days when service is made on the court clerk may be no more than a token gesture — if the person has no known address, an extra 3 days may not mean much in a busy clerk's office. Perhaps the best case for adding this time is the obvious analogy — if extra days are added for mail, surely they should be added here as well.

Service by e-mail continues to be the subject of most discussion. Practical judgment based on experience is called for. Experience, moreover, may indicate the need for considering three separate questions: How often is service still accomplished outside electronic communication? When service is electronic, how often is it accomplished through the court's facilities? How often is it accomplished by counsel to counsel?

Reliance on electronic service is probably pervasive in most courts. Some courts encourage it, and at least a few virtually mandate it. The most notable exceptions are for pro se litigants. The more nearly universal electronic service is, whether as a matter of preference or compulsion, the less reason there is to worry about the influence of denying 3 added days on strategic choices about the mode of service.

Is service through the court's electronic facilities so reliable and instantaneous that there is no plausible argument for adding 3 days to protect against delayed or garbled transmission?

Similarly, is e-mail addressed by counsel to counsel so regularly received soon after transmission, and received in such shape that it can be promptly opened, and tended to with the alacrity likely to be stimulated by personal delivery, that the 3 added days are no more than a windfall extension of time periods that generally do not deserve extension? Will strategic calculation be advanced, impeded, or merely different if 3 days are added for service by mail or leaving with the court clerk, but not otherwise?

One possible outcome of these questions would be to distinguish between e-service through the court's facilities and counsel-to-counsel service. Drafting would likely lead to some change in Rule 5(b)(3), which now describes service through the court's facilities as service "under 5(b)(2)(E)." That will surely provide an occasion for reopening the question whether Rule 5(b)(2)(E) should continue to require the party's consent to e-service, a question that likely will soon be ripe in any event.

Delivery by any other means consented to in writing does not stir obvious passions. A party concerned about adding 3 days under the present rule need not ask others to consent. A party asked to consent under an amended rule that does not add 3 days can refuse consent. But the analogy to mail may offer some support for retaining the 3-day extension, particularly under the Appellate Rule 25(c)(1)(C) provision for service "by third-party commercial carrier for delivery within 3 calendar days." Consent is not required under the Appellate Rule, and the speediest — and most expensive — mode of delivery also is not required.

One final observation. The notes following Rule 6 show that it has been amended in 1948, 1963, 1966, 1968, 1971, 1983, 1985, 1987, 1999, 2001, 2005, and 2007. The Time Computation Project amendments are almost upon us. The steady progression of changes may reflect a need for constant adjustments, large or small, to reflect changed circumstances or better understanding. The

persistent fear of missed deadlines may stir lawyers' concerns and rulemaking sensitivity to those concerns. Whenever the Committee acts next, it will be optimistic to hope for long-term repose.

MEMORANDUM

DATE: January 20, 2006

TO: Advisory Committees

FROM: Judge Mark R. Kravitz, Chair
Time-Computation Subcommittee

RE: Time-Computation Template

Last year, the Standing Committee created a Time-Computation Subcommittee and charged it with examining the time-computation provisions found in the Appellate, Bankruptcy, Civil, Criminal, and Evidence Rules. Judge David Levi asked me to chair the Subcommittee, and he asked Prof. Patrick Schiltz, the reporter to the Appellate Rules Committee, to serve as the Subcommittee's reporter. The Subcommittee's main task is to attempt to simplify the time-computation rules and to eliminate inconsistencies among those rules.

A "time-computation rule" is not a deadline, but rather a rule that directs how a deadline is to be computed. Thus, Appellate Rule 27(a)(3)(A) — which provides that a response to a motion must be filed within eight days after service of that motion — is not a time-computation rule. But Appellate Rule 26(a)(2) — which provides that, in computing a deadline of less than 11 days, intermediate Saturdays, Sundays, and legal holidays should be excluded — is a time-computation rule.

The Subcommittee will focus on time-computation rules, not on deadlines. If changes to the time-computation rules are recommended, it will be up to the individual advisory committees to decide whether their respective deadlines should be adjusted or whether changes should be made to other rules, such as the rules that give courts the authority to alter deadlines.[1] The Subcommittee will likely act as a "clearinghouse" for information about such changes and help to coordinate the work of the advisory committees, but the Subcommittee will not itself address such topics as whether a defendant should have more than seven days to move for a judgment of acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A)

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[1] *See, e.g.*, FED. R. APP. P. 26(b); FED. R. BANKR. P. 9006(b); FED. R. CIV. P. 6(b); FED. R. CRIM. P. 45(b).

acquittal under Criminal Rule 29(c)(1) or whether the "safe harbor" of Civil Rule 11(c)(1)(A) should be longer than 21 days. Obviously, the expertise needed to address such questions resides in the advisory committees, not in the Subcommittee.

The ultimate goal of the Subcommittee is to recommend to the advisory committees a time-computation template containing uniform and simplified time-computation rules. The Subcommittee has spent the past four months working toward that goal. In early September, I circulated to the advisory committee chairs and reporters and then to the Subcommittee members a report drafted by Prof. Schiltz that listed all of the time-computation rules that are presently found in the Appellate, Bankruptcy, Civil, and Criminal Rules and that are obvious candidates for inclusion in the template. (The Evidence Rules have a few deadlines,[2] but no provisions about how to compute those deadlines.) Prof. Schiltz also identified three issues that are not now addressed by the rules of practice and procedure, but that might merit attention. A copy of Prof. Schiltz's report is attached.

On October 4, the Subcommittee met via conference call, reviewed all of the issues identified by Prof. Schiltz, and made tentative decisions about what should be included in the template. In November, Prof. Schiltz circulated a draft template that attempted to implement the Subcommittee's decisions. On December 14, the Subcommittee met again via conference call (the advisory committee reporters joined us), reviewed the draft template, and decided on a number of changes. Prof. Schiltz then drafted a revised template that incorporated all of those changes. That template was favorably reviewed by the Standing Committee at its meeting earlier this month.

The template is attached. At this point, we are asking that the advisory committees review the template and share any concerns or suggestions that they have. That input can be communicated through the advisory committee reporters or directly to Prof. Schiltz (pjschiltz@stthomas.edu) or me (Mark_Kravitz@ctd.uscourts.gov). Following the spring advisory committee meetings, the Subcommittee will review any comments that we receive and prepare a final template. We hope to present that final template to the Standing Committee at its June 2006 meeting.

Assuming that the template is approved by the Standing Committee, the advisory committees will then have to draft amendments to their respective time-computation rules. The advisory committees will also have to review their deadlines and decide whether to propose changes to those deadlines in light of the new time-computation rules. Our hope is to publish both the proposed changes to the time-computation rules and the proposed changes to the deadlines in August 2007, so that the bench and bar can consider them as a package. The tentative schedule for the time-computation project is thus as follows:

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[2]*See, e.g.*, FED. R. EVID. 412(c)(1)(A), 413(b), 414(b), 415(b).

Fall 2005	Time-Computation Subcommittee drafts template
January 2006	Template reviewed by Standing Committee
Spring 2006	Template reviewed by advisory committees
Late Spring 2006	Time-Computation Subcommittee reviews comments from Standing Committee and advisory committees and approves final template
June 2006	Standing Committee approves final template
Fall 2006	Advisory committees consider amendments to time-computation rules to reflect final template and begin work on revising deadlines
Spring 2007	Advisory committees approve amendments to time-computation rules and deadlines for publication
June 2007	Standing Committee approves amendments to time-computation rules and deadlines for publication
August 2007	Amendments to time-computation rules and deadlines published for comment

I wish to draw your attention to two additional issues. Both of these issues are identified in Prof. Schiltz's report, and both were discussed by the Subcommittee. For reasons that I will describe, though, the Subcommittee ultimately decided — and the Standing Committee agreed — that the issues should be addressed by other committees. At its January meeting, the Standing Committee indicated that it would appreciate guidance from the advisory committees on both of these issues.

1. *Accessibility of Clerk's Office.* Under both the template and the existing rules, "a day on which weather or other conditions make the clerk's office inaccessible" is treated like a Saturday, Sunday, or legal holiday for time-computation purposes. The question is whether the concept of "inaccessibility" should be rethought in light of the emergence of electronic service and filing. Should a clerk's office be deemed "inaccessible" if inclement weather closes the office, but the clerk's servers continue to operate, and thus electronic filing is possible? Alternatively, should a clerk's office be deemed "inaccessible" if the weather is fine but the clerk's servers go down and thus electronic filing is not possible? What if the servers go down for only an hour? Four hours? Eight hours?

This is a thorny problem raising important policy issues that will need to be discussed at length. This is also a problem that will benefit from the expertise of the members of the Subcommittee on Technology — the same Subcommittee that has in the past proposed rules governing electronic service and filing. For those reasons, this problem has been referred to that Subcommittee. It is likely, though, that this issue will eventually end up before the advisory committees, and, as I noted, the Standing Committee and the Subcommittee on Technology are now looking for guidance from the advisory committees on how to proceed.

2. *The "Three-Day Rule."* The "three-day rule" is found in Appellate Rule 26(c), Bankruptcy Rule 9006(f), Civil Rule 6(e), and Criminal Rule 45(c). It provides that, when a party is required to act within a prescribed period after a paper is served on that party, and the paper is served by any means except personal service, three days are added to the prescribed period.

Some have suggested that the three-day rule should be abolished. It complicates time computation by forcing parties to figure out whether they get three extra days to respond to a paper. In the past, parties have had difficulty grasping the fact that the three-day rule applies only when a deadline is triggered by the *service* of a paper, and not when a deadline is triggered by some other event, such as the *filing* of a paper or the entry of a court order. This difficulty, in turn, has caused parties to miss deadlines.

Another problem with the current version of the three-day rule is that it creates an incentive for parties to use mail service and to avoid other means of service. For example, when a party serves an opponent electronically, the opponent gets three extra days, even though, in the vast majority of cases, the opponent will receive the paper instantaneously. If the deadline is 10 days, the opponent will, as a practical matter, have 13 days to work on its response. If the party instead serves the opponent by U.S. mail, the paper will not be delivered for at least two or three days, giving the opponent only 10 or 11 days to work on its response.

The Subcommittee discussed the three-day rule and decided that it should not be abolished. The Subcommittee feared that, if it was abolished, parties would avoid personal service, electronic service, and service by commercial carrier, and opt instead for U.S. mail. The Subcommittee thought that it might make sense to apply the three-day rule only to service by U.S. mail, but the rules of practice and procedure were just amended in 2002 to extend the three-day rule to electronic service, reflecting a decision that the Standing Committee made on the recommendation of the Subcommittee on Technology. Our Subcommittee did not feel comfortable revisiting such a recent decision of the Standing Committee. However, at its January meeting, the Standing Committee indicated that it would like guidance from the advisory committees regarding whether its decision should be revisited.

Our Subcommittee was also reluctant to address the question of whether to modify the three-day rule because the question implicates several other issues. In many courts, electronic service and filing is now mandatory for most parties. Those parties will file and serve

electronically no matter what the three-day rule provides. The fact that mandatory electronic filing and service is likely to become pervasive within the next decade may have implications for whether the three-day rule should maintained. In addition, the three-day rule is necessary only because, under the rules of practice and procedure, service by U.S. mail is effective on mailing, service by commercial carrier is effective on delivery to the carrier, and service by electronic means is effective on transmission. If service were effective on some other event — such as *receipt* — then the justification for the three-day rule would disappear. The problems with the three-day rule may justify a reexamination of the rules regarding the effectiveness of service.

The Subcommittee determined, and the Standing Committee agreed, that this issue is best addressed, at least as an initial matter, by the advisory committees. If there is strong sentiment for change among the advisory committees, then either the Subcommittee on Technology or another subcommittee will likely be asked to coordinate work on this issue, as it is obviously important to maintain consistency among the rules of practice and procedure.

Thank you for your assistance with these matters.

To: Gale Mitchell/DCA/AO/USCOURTS,
Cc: John Rabiej/DCA/AO/USCOURTS,
Bcc:
Subject: Fw: 3-Day Rule
From: James Ishida/DCA/AO/USCOURTS - Wednesday 09/23/2009 11:10 AM

Professor Cooper and Judge Kravitz -

I hope this response is timely enough for inclusion in the October materials, if deemed appropriate. Before responding, I wanted to talk to my staff and gather a bit of empirical information.

E-service is routinely accomplished by using the court's facilities. According to the Administrative Office's website, every district (and bankruptcy) court in the country is now live on CM/ECF. To demonstrate the effectiveness of service via CM/ECF, I'm going to walk you through the process. The CM/ECF system generates a Notice of Electronic Filing ("NEF") each time a court entry is issued and every time an attorney-initiated filing is made. The NEF is transmitted to the email in-boxes of all (non-pro se) case participants nearly instantaneously with its generation. A log is made of received NEFs (*i.e.,* if an entry is issued in a case in which four attorneys have appeared, and no NEFs are rejected as undeliverable, the log will say that four NEFs were received). My programmer has examined data from two business days in September and determined that, on average, 5,000 NEFs were received each day.

Our court receives, on average, 20-30 undeliverable (or "bounceback") messages per day in response to undeliverable NEFs (these arrive within minutes of initial transmission). I have several individuals assigned check the bounceback log daily. These same individuals follow up on every undeliverable message within one business day (I don't know if that's a standard time frame. I'm a bit of a task master). My staff report that the vast majority of bouncebacks are associated with attorneys or support staff that have left a firm and failed to withdraw from a case (or some similar scenario).

Some of the bouncebacks are related to bad email addresses or spam filters (2-3 per day, on average). In the follow up contact by staff, addresses are corrected and spam filter issues resolved. Assuming resolution is possible, we will immediately re-transmit the NEF- so receipt will be within one business day of original transmission. If the attorney/individual cannot be reached to resolve the email address problem (or it cannot be otherwise resolved), we will mail a copy of whatever was not received (which would presumably then trigger the three days added provision for service by mail anyway).

From all of this what I see is 5,000 documents served electronically, and 2 -3 true electronic "undeliverables." I can't believe this isn't a better rate of receipt than the Postal Service provides when one buys a stamp.

Moving on to the remaining issues - I believe we have moved into an era in which e-service is routine. Our court permits exemptions from e-filing on a case-by-case basis, and I cannot recall the last time an exemption was granted. Because of the speed of transmission - and the speed with which we are notified of failed transmission - there seems little need to measure time from receipt (and what a mess that would be to measure and prove. I can almost hear the phone calls from attorneys arguing about what constitutes receipt) rather than transmission.

In my clerkly capacity, I'd like to see the question of consent to electronic service reconsidered. It's nearly impossible to blend consent to electronic service with mandatory electronic filing. Without required participation, however, we'd have a very low rate of attorney participation (or at least we would have the first few years). Since many (most?) courts require attorneys to e-file, there may be little reason to worry that abolishing the current version of three-day rule will create an incentive for parties to utilize the U.S. Mail for service (as noted on page 4 of the January 20, 2006, Memorandum).

So, there is my lengthy two cents on the matter of the "three days added" provision of Civil Rule 6(d). If I can provide additional information of any kind, I would be most happy to do so. Thank you for your consideration.

Kindest regards,

Laura Briggs, Clerk
S.D. Indiana
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"Edward H. Cooper" <coopere@umich.edu>

09/21/2009 02:58 PM

To

Laura_Briggs@insd.uscourts.gov

cc

Mark_Kravitz@ctd.uscourts.gov

Subject

Fwd: Re: 3-Day Rule

Laura,

These three messages and the attachment may give some sense of the context for

Mark's suggestion I might pester you with this.

The general question is whether the time has come to do something about the "3 days are added" provision of Civil Rule 6(d). The Committee has fretted about this periodically over the years. The last real look came when Rule 5(b)(2)(E) was added, making e-service effective on transmission but adding 3 days when time to respond is measured by service. Fears were expressed about the reliability of e-mail transmission, particularly with respect to opening attachments. There also was a concern that people might not consent to e-service if they thought they would have more time to respond after mail service because mail service generally takes less than 3 days to arrive. Whether the choice was right even then is of course open to question.

As the question comes back, many of the comments blithely ignore the provision of Rule 5(b)(2)(E) that requires consent to e-service. It seems to be assumed that in many courts e-service is mandatory; apparently at least some courts have local rules that effectively require consent. The questions are both present-day empirical and broader: have we in fact moved into an era in which e-service is routine, part from pro se cases? So routine that we can forget about strategic calculations with respect to time to respond? And so reliable that we need not worry about measuring time from transmission rather than receipt? (And who wants to make the time to respond turn on the time of actual receipt?)

In related fashion, is e-service now routinely accomplished by using the court's facilities? And does that routinely work without any significant number of failures? How quickly are failures corrected?

My suggestion to Mark was that if we are going to reconsider the "3 added days" for e-service, we should also reconsider the question whether consent should be required to authorize e-service. And, quite likely, reconsider the "3 added days" provision more generally.

This request can be immediate, in time for the fast-closing agenda book materials for the October meeting, or less pressed -- guidance in time for the October meeting will be just about as effective as getting something added to the agenda materials in the next day or two. Even if we decide to proceed at full speed, the October meeting will simply give a sense of direction for a proposal to be developed in time for the March meeting. Immediate thoughts are welcome if convenient in your busy schedule, but a more leisurely response also will be welcome. See you soon. All best, Ed

{Mark's response to my message:}
It is fine to add the memo. As to e-filing, it might be helpful to check with Laura Briggs, our clerk liaison.

"Edward H. Cooper" <coopere@umich.edu>

09/21/2009 12:19 PM

To

John_Rabiej@ao.uscourts.gov

cc

Mark_Kravitz@ctd.uscourts.gov

Subject

Re: 3-Day Rule

Mark & John:

If Mark is agreeable, and the production schedule permits, why not add this bit of wisdom to the Civil Rules agenda book? It's so far beyond three years that we can say going-on four. I'm still anxious about the "mandatory" e-filing and service; if we are going to rely on that at all in the Rule 6(d) deliberations -- and I think we will -- aren't we obliged to take on Rule 5(b)(2)(E) and 5(b)(3) at the same time? With a duty to consult not only the technology subcommittee (I suppose it still exists?) but also, perhaps some other Judicial Conference committee? Ed

At 11:50 AM 9/21/2009, John_Rabiej@ao.uscourts.gov wrote:

Professor Cooper:

While reviewing materials for a webinar that I will present for LexisNexis on the new time-computation rules, I came across the attached January 20, 2006, memorandum from Judge Kravitz, regarding his subcommittee's review of the three-day rule.

John