DISCOVERING DISCOVERY: NON-PARTY ACCESS TO PRETRIAL INFORMATION IN THE FEDERAL COURTS 1938–2006

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In the modern era, the pretrial process is critical to the disposition of almost all litigation. The vast majority of cases never go to trial. Those which are contested at trial and upon appeal are often decided upon the results of the information gather before trial. This is true in both private litigation and in public interest cases where "private attorneys general" may only function effectively with court-enforced discovery. Despite the significance of the Article III courts to our society, transparency in their processes for resolving civil disputes has been severely compromised. Threats to openness emanate from multiple sources.

This article considers the legal history and case law of one aspect of openness in the federal courts: public access to discovery material gathered by parties engaged in federal litigation. The public, the press, researchers, and various others have legitimate interests in this information. This right should include pretrial material unprotected by valid protective orders issued under the Federal Rules of Civil Procedure.

INTRODUCTION

De Tocqueville noted in the 1840's that law, lawyers and the legal system are peculiarly central ingredients in the functioning of American democracy. "Scarcely any political question arises in the United States that is not resolved, sooner or later, into a judicial question."[1] Major public policy issues are rou-

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1. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 290 (Henry Reeve ed.,

tinely decided within the context of civil litigation in the United States. *Brown v. Board of Education*[2] and its progeny are classic examples. More recent battles have included: the liability of tobacco companies to smokers and to governments for smoking related illnesses,[3] damages to consumers of pharmaceutical products, the lethal combination of Ford Explorer vehicles and Bridgestone/Firestone tires, and corporate governance issues impacting entire industries.[4]

In the modern era, the pretrial process is critical to the disposition of almost all litigation. The vast majority of cases never go to trial. Those which are contested at trial and upon appeal are often decided upon the results of the information gathered before trial. This is true in both private litigation and in public interest cases where "private attorneys general" may only function effectively with court-enforced discovery.[5]

Despite the significance of the Article III courts to our society, transparency in their processes for resolving civil disputes has been severely compromised. Threats to openness emanate from multiple sources. While civil trials are normally open to the public and the press,[6] only a minute number of the cases

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Vintage Books 1945) (1795).

2. 347 U.S. 483 (1954).

3. *See generally* CARRICK MOLLENKAMP ET AL., THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS (1998).

4. *See, e.g.*, Mark Curriden, *Power of 12*, A.B.A. J., Sept. 2001, at 36 (cataloging and describing litigation involving Fen-phen, Tylenol and other drugs, HMOs, children's pajamas, and numerous other cases forcing businesses and government to change the way they operate).

5. At the federal level, Patrick Higginbotham has observed:

> Congress has elected to use the private suit, private attorneys-general as an enforcing mechanism for the anti-trust laws, the security laws, environmental laws, civil rights and more. In the main, the plaintiff in these suits must discover his evidence from the defendant. Calibration of discovery is calibration of the level of enforcement of the social policy set by Congress.

Patrick Higginbotham, *Foreward*, 49 ALA. L. REV. 1, 4–5 (1997).

6. Although the Supreme Court has not explicitly extended the First Amendment right of access to civil proceedings, it has acknowledged a history of access, and lower courts actually have recognized such a right. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 n.17 (1980) ("Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open."); *see, e.g.*, Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1073–74 (3d Cir. 1984) (holding that in corporate proxy litigation, the district court should not have denied the public, including two newspaper companies, access to portions of a hearing and its transcripts based on both common law and a constitutional right of public access to civil trials).

entering the federal court system are tried.[7] The vast bulk of cases are resolved by negotiated settlements—often not filed in court at all, or filed and sealed[8]—or decided by dispositive pretrial motions.[9] Since 1980, little-noticed procedural rule changes have made the most important parts of the discovery process a private preserve. Aggregation of similar cases[10] and multi-district litigation increase the significance of these trends.

In addition, increasingly numerous alternate dispute resolution ("ADR") processes—e.g., court ordered mediation and/or arbitration—operate outside public view or knowledge.[11] These mechanisms often keep disputes from entering the court system. Contractually enforced ADR, including consumer or employment complaints, can hide patterns of abuse by a corporation or an entire industry.[12] These and other processes rob the

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7. Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 MARQ. L. REV. 141, 141 (2000) ("The percentage of civil cases proceeding to trial in the federal courts plunged from 8.5% of all pending civil cases in [1973] to just 2.3% in [1999]."); *see also* Hope Viner Samborn, *The Vanishing Trial*, A.B.A. J., Oct. 2002, at 24, 26 (comparing ten percent of civil cases filed in 1970 that resulted in trial with 2.2% in 2001).

8. One insurance defense attorney noted he had not "put a settlement together in the past five to six years that [lacked] a confidentiality clause." Blanca Fromm, *Comment: Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 676 (2001) (quoting California lawyer Glenn Gilsleider).

9. Mollica, *supra* note 7, at 143–44 (reviewing twenty volumes of the Federal Reporter from 1973 and from 1997–98 and reporting a marked increase in summary dispositions of civil cases).

10. *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000) (describing formal and informal methods of aggregating claims and defenses of related cases).

11. ADR emerged in the 1970's in both optional and mandatory forms. In 1978, Congress approved three court-annexed arbitration programs for federal district courts. *See* Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2172 (1993). The Judicial Improvements and Access to Justice Act (JIAJA) established a general structure for the federal court-annexed arbitration program. *Id.* at 2177. In these proceedings, the federal rules of evidence are inapplicable, and there is no requirement that arbitrators issue findings of fact or conclusions of law. *Id.* at 2181. If a party in arbitration fails to request a trial within thirty days of the arbitrator's decision, the conclusions bear the same force as a trial judgment and may not be appealed. *Id.* at 2185. Most districts also require the party requesting a trial to post bond for the arbitrator's fees and costs. *Id.* at 2183.

12. *See Corporate Responsibility: Hearing Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the S. Comm. on Commerce, Science, and Transportation*, 108th Cong. 19 (2002) (statement of Joan Claybrook, Presi-

public of a crucial function of the judicial process: bringing to light issues of vital public interest that could otherwise be hidden from view by powerful private parties.[13] The effects of these developments have been profound.

This article considers the legal history and case law of another aspect of openness in the federal courts: public access to discovery material gathered by parties engaged in federal litigation. The public, the press, researchers, and various others have legitimate interests in this information absent considerations warranting the entry of a Federal Rule of Civil Procedure 26[14] protective order. In *Nixon v. Warner Communications, Inc.*,[15] the Supreme Court recognized a right to inspect and copy public records and documents. This right should include pretrial material unprotected by valid Rule 26 protective orders. Underlying this right are important policies ensuring public health and safety, promoting public respect for the judicial process, and assuring that judges perform their duties in an honest and informed manner.[16] Unelected and given life tenure, federal judges are only truly accountable through public and professional scrutiny of their decisions.

> 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.[17]

A close examination of the history of Rule 5 and the case law surrounding public access reveals a complicated set of legal

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dent, Public Citizen, testifying that financial companies were forcing consumers to arbitrate claims of securities fraud, hiding widespread abuse by the industry).

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

14. FED. R. CIV. P. 26 (Hereinafter, specific rules will be referred to as "Rule ___").

15. 435 U.S. 589, 597 (1978).

16. Republic of the Phillipines v. Westinghouse Elec. Corp., 949 F.2d 653, 660, 664 (3d Cir. 1991).

17. United States v. Amodeo, 71 F.3d 1044, 1048 (2d Cir. 1995). *See also* Globe Newspaper Co. v. Pokaski, 868 F.2d 497, 502 (1st Cir. 1989) (without access to documents that lead to "full understanding" of a proceeding, public would not be in a "position to serve as an effective check on the system").

principles and an evolving jurisprudence. Part I discusses the significance of access to information obtained through discovery. This section examines the value of having third parties obtain pretrial materials and the interests of litigants, particularly defendants, in shielding such information from public view. Part II examines the history of the development of modern discovery in the federal courts. In 1938, the newly-created Federal Rules of Civil Procedure ("FRCP") provided the opportunity to obtain relevant information before trial concerning claims and defenses. Beginning in the 1970s, cross-cutting trends, often based upon a perception of "discovery abuse"[18] substantially limited these opportunities. Part III relates the history of Rule 5, specifically focusing on the requirement to file discovery materials in court. The little noticed 2000 amendment to Rule 5 now prohibits filing discovery except upon specific court order, reversing the prior position of that Rule. Part IV surveys federal case law pertaining to public access to pretrial information during the periods when Rule 5 reflected these various filing requirements. In addition, this section examines federal court response to access arguments based upon common law or First Amendment claims. The Article concludes with a recommendation that Rule 5 should return to its pre-2000 form, requiring filing of discovery material except where a court relieves the parties of this obligation. Not only would this encourage balanced procedural decision making on access—something Rule 26 protective order jurisprudence already requires—but also protect the interests of unrepresented parties and the public.

18. *See* American Bar Ass'n, ABA Litigation Section Special Committee on Abuse of Discovery: Report to the Bench and Bar, 92 F.R.D. 137 (1977) (recommending limits on scope of discovery use of various discovery devices, and more judge-managed discovery); Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L., 153, 161–62 (1999) (surveying post-1970 efforts at discovery containment).

I. ACCESS TO INFORMATION GATHERED DURING PRE-TRIAL PROCEDURES

As far back as 1933, asbestos claims were routinely sealed by courts upon request of defendants, depriving workers and others of knowledge of preventable injuries.[19] In cases involving drugs and defective products, the dissemination of vital information relevant to public health and safety has often been blocked.[20] In January 2002, the *Boston Globe* reported that for more than ten years, the Archdiocese of Boston secretly settled child molestation claims against at least seventy priests.[21] After the *Boston Globe* published its investigative report, hundreds of new victims came forward and reports across the country surfaced of priests' sexual abuse and misconduct.[22] Bridgestone and Firestone employed judge-enforced confidentiality orders in cases across America to hide information about injuries and deaths linked with the tread separation of their tires. As a result, for nearly a decade, the public and government agencies had little inkling of the issue and consumers continued to buy the potentially deadly tires.[23]

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19. PAUL BRODEUR, OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL 113 *et seq.* (1985) (describing the aftermath of early asbestos settlements); Coalition for Consumer Rights, *Secrets that Kill: Dangers Buried in the Courthouse*, Mar. 2000.

20. *See Courts Secrecy, Its Impact on Public Health and Safety, and the Sunshine in Litigation Act: Hearing on S. 1404 Before the S. Judiciary Comm. on Courts and Administrative Practice*, 103d Cong. (1994) (detailing consequences of denying public access to discovery in, and settlement of, cases involving the Shiley heart value, Prozac, and numerous other products).

21. Walter V. Robinson, *Scores of Priests Involved in Sex Abuse Cases Settlements Kept Scope of Issue Out of Public Eye*, BOSTON GLOBE, Jan. 31, 2002, at A1.

22. Walter V. Robinson, *Hundreds Now Claim Priest Abuse, Lawyers Report Flood of Alleged New Victims*, BOSTON GLOBE, Feb. 24, 2002, at A1; Brooks Egerton & Reese Dunklin, *Bishops' Record in Cases of Accused Priests*, DALLAS MORNING NEWS, June 12, 2002, at 24A (reporting accusations of pedophilia, sexual abuse, or harassment by priests in forty-one states).

23. Between 1992 and 2000, 271 people died in accidents linked to Ford Explorer/Firestone Tire failure and more than 800 were seriously injured. *See Class Action Status Given to Ford and Firestone Suits*, N.Y. TIMES, Nov. 29, 2001, at C4. For more than eight years, Bridgstone/Firestone Tires had been negotiating confidentiality agreements with respect to information regarding the lethal combination of the Ford Explorer Sport Utility Vehicles and its tires. *See, e.g.*, *Sealed Court Records Kept Tire Problems Hidden*, USA TODAY, Sept. 19, 2000, at 16A. Many of the individual cases were transferred to the Indiana District Court handling these consolidated cases and an agreement requiring secrecy was required of anyone wishing to share in the discovery. *In re* Bridgestone/Firestone, Inc., 198 F.R.D. 654, 657 (S.D. Ind. 2001). Eventually the discovery documents were leaked

Among the common problems in these and other cases is the lack of access to materials gathered in discovery and the secret settlements of cases involving a wide variety of legal wrongs.[24] While courts undoubtedly exist to resolve disputes between private parties,[25] the judicial branch is an integral public institution, no more or less so than the executive or legislative branches. Therefore, the work of courts should be open unless specific and compelling reasons exist to draw a curtain in front of their operations. Only an open judicial branch can preserve public trust and foster effective monitoring.[26] The Supreme Court has noted "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[27]

Moreover, many cases in American courts have a distinctly public nature. As Judge Posner has noted, "[t]he parties to a lawsuit are not the only people who have a legitimate interest in the record compiled in a legal proceeding."[28] This public na-

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to the press and showed how many tire/tread separations had been reported to Firestone. *See* Keith Bradsher, *Documents Show Firestone Knew of Rising Warranty Costs*, N.Y. TIMES, Sept. 8, 2000, at C1. The secrecy enforced with respect to discovery and settlement delayed the recall of these tires for years. *See* Thomas A. Fogarty, *Can Courts' Cloak of Secrecy Be Deadly?*, USA TODAY, Oct. 16, 2000, at 1B.

24. With respect to secret settlements, see S.C. FED. DIST. LOCAL R. 5.03; Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confidentiality in the Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283 (1999).

25. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 431 (1991) (contending court's "primary mission" is to resolve disputes among litigants); Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 469–70 (1991) (arguing primary role of courts is to resolve disputes and decide cases, not to "give expression to 'public values'").

26. Nixon v. Warner Commc'ns, Inc., 435 U.S. 589, 597 (1978) (recognizing a general right to inspect and copy public records and documents, including judicial records and documents); *In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45 (E.D. Mich. 1985).

> Access to pretrial documents furthers several important functional goals of society. Court proceedings can be evaluated by individuals who are informed about the issues. Access to pretrial documents lessens the likelihood of private or public graft or judicial ignorance. Pretrial access to information helps the public better understand judicial proceedings and public confidence in the judicial system as a whole can be enhanced. These functional needs of society must be balanced against the functional needs of the judicial system. As a result, the scope of public access may need to be narrowed and its timing deferred.

Id. at 54.

27. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980).

28. Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943,

ture of litigation emerges in a variety of contexts: (a) private suits involving product safety, corporate governance, and other issues of concern to society;[29] (b) suits by or against government or government agencies;[30] (c) class actions and other representative actions, which, by definition, involve the specific substantive rights of large groups of people;[31] and (d) "private attorney general" suits "to prevent [a government] official from acting in violation of his statutory powers."[32]

There may be legitimate reasons, e.g., trade secrets or highly personal information, to restrict access to the information gathered in litigation. In these instances, parties may seek a protective order to keep the results confidential. This is expressly permitted by Rule 26, but the moving party must show good cause as to why an order should be granted.[33] Parties often agree to such protective orders, and, as a result, a ju-

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944 (7th Cir. 1999).

29. *See* products and events described *supra* notes 2–4 and accompanying text.

30. *See, e.g.*, Mullins v. City of Griffin, 886 F. Supp. 21, 22–23 (N.D. Ga. 1995) (holding municipality not entitled to a protective order of confidentiality of settlement in civil rights lawsuit filed against it).

31. The public nature of these actions is represented by Rule 23(d)(2), which provides that a court may require that the class receive notice and an opportunity to intervene in various aspects of the litigation, and Rule 23(e), which requires class members to be notified of proposed dismissal or compromise. FED. R. CIV. P. 23(d)(2); FED. R. CIV. P. 23(e).

32. Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943), *cert. granted*, 319 U.S. 739 (1943), *order vacated*, 320 U.S. 707 (1943). These cases typically involve a statutory cause of action granted to individuals injured by conduct Congress wishes to proscribe, often combined with statutory attorney fees for the prevailing plaintiff. In this content, the public nature of such a suit exists even when a plaintiff seeks compensatory damages rather than simply injunctive relief. Newman v. Piggie Park Enters, 390 U.S. 400, 401–02 (1968) (per curiam). "Unlike most private tort litigants, a civil rights plaintiff seeks to vindicate important civil and constitutional rights that cannot be valued solely in monetary terms." City of Riverside v. Rivera, 477 U.S. 561, 574 (1986).

33. FED. R. CIV. P. 26(c). Rule 26(c) identifies eight kinds of protective orders that a district court might issue, but the list is nonexclusive and courts have wide discretion to order other appropriate discovery restriction. Such an order is appropriate where "justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." *See* CHARLES ALAN WRIGHT ET AL., PRACTICE AND PROCEDURE § 2036 (2d ed, 1997) (quoting FED. R. CIV. P. 26(c)); Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36 (1984) (noting that "trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery"). *See generally* Carrie Menkel-Meadow, *Whose Dispute Is It Anyway?: A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2684 (1995) (addressing privacy issues in settlement of cases).

dicial examination of whether good cause actually exists never takes place. Despite initial agreement, one of the parties may seek relief from, or third parties may intervene to challenge, such private agreements.[34] Absent a protective order, a plaintiff or defendant has the right to disseminate information obtained during discovery so long as the purpose for sharing is lawful.[35] Moreover, if the discovery is filed in court, as Rule 5 required for many years, the information is publicly available.

Although parties, particularly plaintiffs, may be willing to trade access to pre-trial information for litigation or monetary concessions by defendants, this does not answer the fundamental question. When there is a demonstrable public interest in the information in question, a party may have no right to sell nondisclosure.[36] It is the federal court discovery rules—

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34. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 821 F.2d 139 (2d Cir. 1987); San Jose Mercury News, Inc. v. U.S. District Court, 187 F.3d 1096 (9th Cir. 1999).

35. Exum v. U.S. Olympic Comm., 209 F.R.D. 201, 205 (D. Colo. 2002) ("Parties to litigation have a First Amendment right to disseminate information they obtained in discovery absent a valid protective order."); Federal Trade Comm'n v. Digital Interactive Assocs., Inc., 1996 WL 912156 (D. Colo. 1996) (emphasizing that in ruling on motion for a protective order, court "begins with the premise that a party to litigation has a Constitutionally protected right to disclose the fruits of discovery to non parties absent a valid protective order entered by a court"); Oklahoma Hosp. Ass'n v. Oklahoma Publ'g. Co., 748 F.2d 1421, 1424 (10th Cir. 1984) (noting constitutionally protected right to disseminate information obtained through discovery); Harris v. Amoco Prod. Co., 768 F.2d 669, 683–84 (5th Cir. 1985) ("A party may generally do what it wants with material obtained through the discovery process, as long as it wants to do something legal.").

36. *See generally* Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal or Something in Between?*, 30 HOFSTRA L. REV. 783 (2002) (analyzing arguments against contracting for secrecy in federal litigation). Even confidentiality duties imposed on professionals are abrogated under certain circumstances. For example, communications between attorneys and their clients are protected, but societal interests may override these duties where public health or safety is involved. *See, e.g.*, N.Y. Civ. Prac. L&R § 4503, 4505 (McKinney 1992). A "compelling interest in public health" takes precedence, for example, over the attorney-client privilege claimed by the defendant in written communications between counsel and firm executives. Sackman v. Liggett Group, Inc., 920 F. Supp. 357, 365 (E.D.N.Y. 1996), *vacated*, 167 F.R.D. 6 (E.D.N.Y. 1996) (reversed to permit interveners to be heard on discoverability of the documents in question). *See also* Leonen v. Johns-Manville, 135 F.R.D. 94, 100 (D.N.J. 1990). Indeed, lawyers are not alone in this duty to sometimes disclose information that may have come into their possession. Physician-patient privileges and employer-employee confidentiality contracts are analogous. *See, e.g.*, Brillantes v. Superior Court of L.A. County, 58 Cal. Rptr. 2d 770 (Cal. Ct. App. 1996) (holding state's interest in fraud investigation outweighed doctor privilege); People v. Bhatt, 611 N.Y.S.2d 447 (N.Y. Sup. Ct. 1994) (recognizing exception to privilege in context of Medicare fraud investigations); McCormick on Evidence, at 225.

including protective orders—which govern the obligation to produce information. Even in the case of trade secrets, "a privilege to disclose may . . . be given by the law, independently of the [owner's] consent, in order to promote some public interest."[37] Once discovery is filed in court, it should be available unless sealed by a neutral judge. Unfortunately, stipulated protective orders are often approved pro-forma by overburdened courts anxious to avoid time consuming inquiries into discovery disputes.

Opponents of public access to discovery information often claim that this potential availability will make court proceedings dramatically slower and more expensive.[38] Defendants, in particular, may arguably resist more forcibly discovery requests, diverting court time to collateral matters. This argument is overstated. First, contemporary discovery is already often a brass knuckled affair. Each request for information is typically treated as narrowly as possible, every claim of privilege or irrelevance is asserted as broadly as possible.[39]

> The general principle guiding discovery requests for documents is that defense counsel may not flatly lie or hide documents, but they are entitled to be "aggressive," make the plaintiff's lawyer "work for what he wants," and withhold from relieving the plaintiffs' lawyers of the burden of preparing his own case.[40]

Second, even more important, open discovery files in appropriate circumstances are consistent with the modern trend to have

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37. RESTATEMENT OF TORTS § 757 cmt. d (1939). *See* Lachman v. Sperry-Son Well Surveying Co., 457 F.2d 850, 854 (10th Cir. 1972) (while nondisclosure agreement in contract proper, public policy prevented enforcement). The Restatement (Second) of Agency likewise recognizes that the duty of loyalty, owed by an agent to a principal, includes a privilege to reveal confidential information necessary to protect "a superior interest of himself or of a third person." RESTATEMENT (SECOND) OF AGENCY § 395 cmt. f (1957).

38. *See, e.g.*, Marcus, *supra* note 25, at 484 ("public access would disrupt orderly trial preparation by fomenting opposition to broad discovery").

39. Robert W. Gordon, *The Ethical Worlds of Large-Firm Litigators: Preliminary Observations*, 67 FORDHAM. L. REV. 709, 712 (1998).

40. *Id. See also* Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Discovery*, 36 CLEV. ST. L. REV. 17, 18–19 (1988) (opining that discovery "gives impetus and opportunity to the baser litigational instincts of delay, deception, and unbridled confrontational advocacy"). "Where the object always is to beat every plowshare into a sword, the discovery procedure is employed variously as weaponry." MARVIN E. FRANKEL, PARTISAN JUSTICE 18 (1980).

judges manage caseloads to prevent delay and reduce costs.[41] As case managers, judges need information provided by filed discovery, and statutory reform has magnified this function.[42]

The Manual for Complex Litigation recommends sharing discovery material,[43] which promotes efficiency and fairness.[44] Information sharing avoids duplication of effort and allows refinement in the language of discovery requests, achieving greater accuracy and specificity. Similarly situated claimants and defendants may pool documents, including deposition and trial transcripts, share research and availability of experts, and create other economic efficiencies. Defendants routinely engage in joint efforts,[45] and there are now well-publicized examples of plaintiffs using similar tactics.[46] The significance of third-party access to pretrial materials may also be inferred from the very aggressive efforts by defendants to block dissemination of discovery information.[47] Third parties often accept the confidentiality conditions agreed to by the original litigants in order to receive information needed for their own cases. Such a coerced choice should not be permitted.

Finally, secrecy proponents often note that local federal district courts had promulgated rules barring or excusing par-

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41. *See* FED. R. CIV. P. 16(b) (requiring judges to set time limits for certain events in all cases except those exempted by local rule).

42. *See* S. REP. NO. 101-416, at 16 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6803, 6819. The report of the Senate Judiciary Committee, from which the CJRA emanated, explains that the Act was to increase the "benefits of enhanced case management" because "greater and earlier judicial control over civil cases yields faster rates of disposition." *Id.* *See also* JAMES S. KAKALIK ET AL., AN EVALUATION OF JUDICIAL CASE MANAGEMENT UNDER THE CIVIL JUSTICE REFORM ACT 3 (1996) (evaluating statutorily mandated case expense and delay plans).

43. MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.432 (noting that "substantial savings in time and expense may often been achieved").

44. FED. R. CIV. P. 1 ("just, speedy, and inexpensive determination of every action" are the objectives of the federal rules of civil procedure). *See also* United Nuclear Corp. v. Cranford Ins. Co., 905 F.2d 1424, 1427–28 (10th Cir. 1990) (allowing access to discovery in the interest of "saving time and effort in the collateral case").

45. Erichson, *supra* note 10, at 401–08 (outlining defense attorneys' coordination of strategy and sharing of information in a wide variety of cases and contexts).

46. *Id.* at 386–96.

47. *See, e.g.*, Stuart E. Rickerson, *Corporate Counsel's Guide to the New Rules*, 61 DEF. COUNS. J. 192, 196 (1994) (maintaining that pursuit of protective orders is advisable for defendants); Daniel Boyd Smith, *Anti-Dissemination Orders in Product Liability Suits*, 5 AM. J. TRIAL ADVOC. 507, 512 (1982) (describing defendant's attempts to curtail dissemination of information).

ties from filing discovery materials unless ordered to do so, even while Rule 5(d) required filing. While there were many of these local rules,[48] their validity was suspect. Since its promulgation in 1938, Rule 83 forbade district court initiatives inconsistent with the national rules.[49] Despite this, local rules often deviated from the federal rules in many particulars. During the 1980s, the Judicial Conference inaugurated a Local Rules Project to compile information about this phenomenon.[50] The report questioned the authority of district courts to order that discovery material not be filed and concluded such rules or orders are only permitted when strong public or private interests compel waiving the filing requirement.[51]

The issue of whether discovery was to be filed in court was openly and vigorously debated during the consideration of a proposed amendment to Rule 5(d) in 1978 and explicitly rejected by the final changes implemented in 1980.[52] The 1980 amendment did provide courts the opportunity to dispense with filing in an individual case, rather than on a general basis.[53]

II. THE DEVELOPMENT OF DISCOVERY IN FEDERAL COURTS

Access by parties in a lawsuit to information held by others—modern discovery—has not always been available. The English common law system was characterized by rigid, writ-dominated pleadings, restricted parties, and limited issues.

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48. *See* Marcus, *supra* note 25, at 466, n.56 (listing local rules permitting parties not to file some or all discovery materials in court unless so ordered by the court or if materials are needed in connection with motion proceeding).

49. Original Rule 83 provided that "[e]ach district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice *not inconsistent with these rules.*" WRIGHT ET AL., *supra* note 33, at § 3151 n.1 (emphasis added) (quoting original Rule 83).

50. *See* Committee on Rules of Practice and Procedure of the Judicial Conference of the U.S., *Report of the Local Rules Project* (1988) [hereinafter "*Local Rules Project Report*"] (finding approximately 5,000 local rules and concluding many conflicted with the national rules). *See, e.g.*, A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567, 1572 (1991) (finding "rampant inconsistency between local and national rules"). In addition, Congress, in 1988, revised the statutory provisions on local rule and required each federal appellate court, through its judicial counsel, to examine and regulate local rules of districts courts within its circuit. 28 U.S.C. § 2071(c) (1988).

51. *See Local Rules Project Report*, *supra* note 50, at 1–7. The Local Rules Project urged the Advisory Committee to consider amending the federal rule. *Id.* at 92.

52. *See infra* Part IV.C.

53. FED. R. CIV. P. 5(d).

These restrictions undergirded a court process structurally antithetical to information gathering tools. In "legal" cases, parties had to identify the specific materials they sought in discovery.[54] Even under Field Codes in American states, a plaintiff could not begin discovery unless he or she could independently substantiate facts stated in a complaint.[55] There was little opportunity to examine documents that might be relevant and useful, or to use depositions, interrogatories, or other information gathering tools[56] to facilitate the proof of an existing or new theory of the case.[57] In 1911, the U.S. Supreme Court denounced as a "fishing bill" any effort by a party to "pry into the case of his adversary to learn its strength or weakness."[58] On the other hand, the practices in equity courts provided the basis for modern discovery devices.[59]

The adoption of the FRCP in 1938 marked a new approach and epoch. Charles Clark, former President of the Association of American Law Schools and the drafter of the Federal Rules was fond of quoting Frankfurter: "[n]ew winds are blowing on old doctrines, the critical spirit infiltrates traditional formulas . . . ."[60] The Federal Rules simplified pleading,[61] liberalized joinder of parties and claims,[62] and emphasized ease of litiga-

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54. *See* 6 JAMES WM. MOORE, ET AL., MOORE'S FEDERAL PRACTICE § 26 (3d ed. 2001) (describing discovery procedures at common law).

55. Geoffrey C. Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2241 (1989). "Under the codes, a plaintiff could not even get into discovery unless she could independently substantiate such suspicions, for substantiation had to be manifested in a complaint that stated 'facts.'" *Id.* In his 1928 work on code pleadings, Professor Clark described twenty-eight states as having adopted the Field Code; none of the remaining jurisdictions still adhered completely to common law pleading. CHARLES E. CLARK, HANDBOOK OF THE LAW OF CODE PLEADING 19-20 (1928).

56. *See generally* GEORGE RAGLAND, JR., DISCOVERY BEFORE TRIAL (1932) (describing discovery devices and procedures used in various American jurisdictions in 1932).

57. *See, e.g.*, *In re* Uranium Antitrust Litig., 480 F. Supp. 1138, 1155 (N.D. Ill. 1979) ("[T]he heart of any American antitrust case is the discovery of business documents. Without them, there is virtually no case.").

58. Carpenter v. Winn, 221 U.S. 533, 540 (1911).

59. *See generally* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

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

61. FED. R. CIV. P. 8.

62. FED. R. CIV. P. 13, 14, 18–24; Stephen N. Subrin, *How Equity Conquered*

tion rather than technical legal pleading. These changes in the pretrial process were mutually reinforcing. Generally, notice pleading had to be supplemented by open discovery. Another major theoretical and practical feature of the 1938 procedural revolution was elimination of varied pleading requirements for different types of cases. Professor Clark insisted that principles of uniformity and simplicity and the merger of law and equity required the same rules for all cases.[63]

Most scholars give the credit for the innovative discovery concepts embodied in the FRCP to Professor Edson R. Sunderland.[64] Sunderland was a scholar engaged in the real world. He had consistently advocated expanding discovery techniques.[65] Professor Subrin notes that the initial draft of the Federal Rules distributed for public comment "included every type of discovery that was known in the United States and probably England up to that time."[66] Responding to this new spirit, the Supreme Court wrote in 1946:

> No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.[67]

The original Federal Rules, however, still had significant limits upon discovery. Production and examination of docu-

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Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. PA. L. REV. 909, 982–91 (1987).

63. *See* ADVISORY COMM. TRANSCRIPT (Nov. 14, 1935), noted in Subrin, *supra* note 62, at 977.

64. *See, e.g.*, Subrin, *supra* note 59, at 734, 736.

65. *See, e.g.*, Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863 (1933).

66. Subrin, *supra* note 59, at 718.

> If one adds up all of the types of discovery permitted in individual state courts, one finds some precursors to what later became discovery under the Federal Rules; but . . . no one state allowed the total panoply of devices. Moreover, the Federal Rules, as they became law in 1938, eliminated features of discovery that in some states had curtailed the scope of discovery and the breadth of its use.

Id. at 719.

67. Hickman v. Taylor, 329 U.S. 495, 507 (1947); *see also* United States v. Procter & Gamble Co., 356 U.S. 677, 682–83 (1958) (discovery together with the fair trial procedures make trial less a game of blind man's bluff and more a fair contest).

ments, for example, were available only if ordered by the judge upon showing of "good cause."[68] Over time, restraints on access to documents were gradually limited,[69] and other changes continued to expand discovery. In 1946, the Federal Rules were amended to make clear that even inadmissible material was discoverable so long as it was "reasonably calculated to lead to the discovery of admissible evidence."[70] In 1948, the requirement of leave of court for taking depositions was eliminated[71] as were limits on the number or scope of interrogatories.[72] At the same time, the standard for document production and inspection was eased from documents "material to the case" to documents "related to the case."[73] In 1970, insurance policies were explicitly made discoverable,[74] and enforcement of the motion to compel was expanded to apply to all discovery devices except mental and physical exams under Rule 35.[75]

Liberalized discovery was consistent with the general trends in federal civil procedure. An opportunity to engage in meaningful pretrial information-gathering is the counterpart to notice pleading[76] and an essential element in a just dispute

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68. AM. BAR ASS'N, RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURT OF THE UNITED STATES WITH NOTES AS PREPARED UNDER THE DIRECTION OF THE ADVISORY COMMITTEE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 74 (William W. Dawson ed., 1938). "Upon motion of any party showing *good cause* therefor and upon notice to all other parties, the court . . . may . . . order any party to produce . . . documents . . . which constitute or contain evidence material to any matter involved in the action . . . ." *Id.* (emphasis added). "Inspections [of documents] had always been strictly regulated by the court and the potential free invasion of files had always been feared." WILLIAM GLASER, PRE-TRIAL DISCOVERY AND THE ADVERSARY SYSTEM 33 (1968).

69. In 1970, the requirement for prior judicial approval for document discovery was removed entirely in the federal courts. *See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 527 (1970).

70. This language is now found at the end of FED. R. CIV. P. 26(b)(1).

71. *See* Advisory Committee on Rules for Civil Procedure, *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States*, 5 F.R.D. 433, 453 (1946).

72. *See id.* at 461.

73. *Id.* at 463.

74. *See Proposed Amendments to the Federal Rules of Civil Procedure Relating to Discovery*, 48 F.R.D. 487, 487 (1970).

75. *See id.* at 538.

76. *Hickman*, 329 U.S. at 507–08 (holding discovery process provides information for trial and pleadings merely give notice). The term "notice pleading" may well be inaccurate because in actual court practice complaints (and counterclaims) must give "fair notice of what the plaintiff's claim is and the grounds upon which it rests." 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1202 (3d. ed. 2004) (quoting Conley v. Gibson, 335 U.S. 41, 58

resolution system.[77] Improved discovery creates better access to courts and facilitates greater social justice. Cases are no longer decided on "sporting" rules that allow surprise evidence and hidden traps for the unwary or misled.[78] The long struggle to establish the liability of the tobacco companies for damages caused to smokers, their public and private insurers, and the public would have been inconceivable without access to information possessed mainly by the industry. The production of documents and/or electronically stored information is typically a plaintiff's best means of obtaining evidence to prove a case that would not be otherwise demonstrable or to transform merely compensatory damages into a punitive award. Equity-derived access to information allows equity-derived remedies, developed for this purpose in institutional reform cases.[79]

Since 1970, the tide has changed. The thrust of the amendments to the federal rules since then has been toward containing the cost and time expended on the exchange of pretrial information. In 1983, a clause in Rule 26(a), which previously provided that the frequent use of discovery mechanisms was not to be limited was deleted and a sentence was added to Rule 26(b) permitting courts to limit discovery. New Rule 26(g) encouraged judges to impose appropriate sanctions for discovery abuse[80] and explicitly barred disproportionate discovery.[81] In 1993, new automatic disclosure provisions were introduced, and explicit limits on depositions and interrogatories were codified.[82] Amendments to the federal rules expanded the role of

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(1957)).

77. *See, e.g.*, FED. R. CIV. P. 8(a); Conley v. Gibson, 355 U.S. 41, 47–48 (1957) (noting pretrial information gathering and issue defining are critical to the structure of modern litigation and these rest upon appropriate discovery methods).

78. *See, e.g.*, Subrin, *supra* note 62, at 945.

79. *See* Abraham Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–96 (1976); Owen Fiss, *The Social and Political Foundations of Adjudication*, 6 LAW & HUM. BEHAV. 121 (1982) (describing "structural reform" litigation and judges, particularly federal judges, who use historic equity powers to expand rights).

80. *See* FED. R. CIV. P. 26 (advisory committee notes to the 1983 amendments); Richard L. Marcus, *Reducing Cost & Delay: the Potential Impact of the 1983 Amendments to the Federal Rules of Civil Procedure*, 63 JUDICATURE 363 (1983).

81. *See* FED. R. CIV. P. 26(b)(2).

82. *See* FED. R. CIV. P. 26(d), 26(f). Rule 30 was revised to require leave of court if more than ten depositions were desired. Amended Rule 33 limited the number of interrogatories to thirty. *See Amendments to the Federal Rules of Civil Procedure*, 146 F.R.D. 40 (1993).

judges early in litigation by requiring the approval of discovery plans.[83] The 2000 amendments went even further to restrict the scope of discovery under Rule 26(b)(1).[84]

The issue of access to pretrial information centers on Rule 5. Analysis of the debates over the text of Rule 5 between 1938 and the present and federal court analysis of third party access to discovery materials shed considerable light on the strength of claims for openness. I turn next to those tasks.

III. HISTORY OF RULE 5 AND FILING OF DISCOVERY

A. The Initial Rule

In the beginning, Congress created the Rules Enabling Act, authorizing the Supreme Court to promulgate rules of practice and procedure for the federal courts.[85] Soon afterward, a committee of practitioners and academics produced a draft set of rules. Among its innovative features was the orientation toward the procedural rules used in equity rather than in common law; this orientation included new means of obtaining information before trial.

In 1936, the Advisory Committee on Civil Rules submitted three drafts of a rule designated Rule 6, which addressed service and filing, with commentary on each draft.[86] The following year, the Advisory Committee proposal appeared as Rule 5.[87]

> Rule 5. Service and Filing of Pleadings and Other Papers
>
> (a) Service: When Required. Every order required by its terms to be served, *every pleading subsequent to the original complaint* unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard *ex parte*, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, *and similar paper* shall be served upon each of the parties affected thereby.

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83. *See* FED. R. CIV. P. 26(a)(1)(A), (B).

84. *See* FED. R. CIV. P. 26(b)(1) (information without leave of court now only available when "relevant to a claim or defense" of party in place of the prior broader "relevant to the subject matter" of the dispute).

85. *See* 28 U.S.C. § 2072 (2005).

86. WRIGHT & MILLER, *supra* note 76, § 1142.

87. *Id.* at n.1.

> . . .
>
> (d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.
>
> (e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court . . . .[88]

The term "similar paper" in Rule 5(a) was intended to avoid a restrictive list of litigation papers required to be served and hence filed in court, and this term was judicially construed to extend to a large variety of documents not specifically mentioned.[89] Since its adoption in 1938, Rule 5 has governed service of all papers and pleadings subsequent to service of the summons and complaint (covered by Rule 4). As such, Rule 5 focuses on the interchange of information between parties to a lawsuit and the orderly filing of those papers in court where access to the information may be obtained.[90]

The original federal discovery rules contained variations that could result in different filing requirements. Rule 30 (Depositions),[91] Rule 33 (Interrogatories),[92] and Rule 36 (Request for Admission)[93] all explicitly required service on parties and filing in court, while Rule 34 (Document Inspections and

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88. FED. R. CIV. P. 5(a), (d)–(e) (1938) (emphasis added).

89. *See, e.g., In re* Aucoin. 150 B.R. 644 (D. LA) (1993) (similar paper applied to Bankruptcy filings); *In re* Sasson Jeans, Inc. 86 B.R. 336 (D.N.Y. 1988) (bankruptcy filings); Sec. and Exch. Comm'n v. VTR, Inc., 410 F. Supp. 1309 (1975) (contempt proceedings). Rule 5 also required the service of papers on all parties "affected thereby." This language later produced disputes regarding which parties were entitled to notice of proceedings taking place during the lawsuit and various documents. This problem was eliminated in 1963 by the deletion of the words "affected thereby" in order to promote a "full exchange of information among the parties." WRIGHT & MILLER, *supra* note 76, § 1142.

90. WRIGHT & MILLER, *supra* note 76, § 1411, n.4.

91. FED. R. CIV. P. 30(a) (1938).

92. FED. R. CIV. P. 33 (1938) ("Any party may serve upon any adverse party written interrogatories to be answered by the party served, or if the party served is a public or private corporation or a partnership or association, by any officer thereof competent to testify in its behalf.")

93. FED. R. CIV. P. 36(a) (1938) ("At any time after the pleadings are closed, a party may serve upon any other party a written request for the admission by the latter of the genuineness of any relevant documents described in and exhibited with the request or of the truth of any relevant matters of fact set forth therein.")

Entry upon Land) did not.[94] It seems fair to conclude, however, that from their inception, the service/filing and discovery rules mandated that information gathered during the pretrial period be filed in court absent affirmative action by a court. Once filed in court, this information was presumptively open to examination by anyone unless a Rule 26 protective order was obtained. Discussion of the case law under Rule 5 until 1970, when it was amended, is in Section V.A.

Because of the multiplicity of bodies dealing with changes to the FRCP, a brief road map of the amendment process may be helpful. In accordance with the Rules Enabling Act of 1934,[95] amendments to federal rules go through a hierarchical path in the United States Judicial Conference. Amendments are drafted by the relevant advisory committee, later considered by the Standing Committee on Rules and Practice, and then submitted to the Judicial Conference.[96] If the Judicial Conference approves, the amendments are considered by the United States Supreme Court.[97] The Court may reject or modify proposed revisions and promulgates them prior to May 1st.[98] The High Court then submits the amendment to Congress, which has until December 1st to modify or reject the proposed change.[99] If Congress fails to act, the amendment is final.

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94. FED. R. CIV. P. 34 (1938).

> Upon motion of any party showing good cause therefor and upon notice to all other parties, the court in which an action is pending may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books . . or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring . . . .

95. Presently codified at 28 U.S.C. §§ 2072–74 (2003).

96. The advisory committee is appointed by the Chief Justice of the United States. *See* U.S. Courts website, http://www.uscourts.gov/review.htm (last visited May 19, 2006) (hereinafter "U.S. Courts website"). The Standing Committee is appointed in the same way as the advisory committee, i.e., in the sole discretion of the Chief Justice. 28 U.S.C. § 2073. The Judicial Conference is composed of the Chief Justice, the Chief Judges of the U.S. Courts of Appeals, and a district judge from each circuit. *See id.*

97. *See* U.S. Courts website, *supra* note 95.

98. *Id.*

99. *Id.*

B. The 1970 Amendment to Rule 5(a)

The 1970 revision of Rule 5 began with a proposal in 1967 by the Advisory Committee on Civil Rules. Although there was an initial discussion of an amendment to Rule 5 at the Advisory Committee meeting, the members decided not to vote on a proposal without public comment.[100] In November 1967, the Advisory Committee published a Preliminary Draft of Proposed Amendments.[101] The proposed addition to Rule 5 is in bold:

> Rule 5. Service and Filing of Pleadings and Other Papers.
>
> (a) Service: When required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of the numerous defendants, **every paper relating to discovery required to be served upon a party unless the court otherwise orders,** every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.
>
> . . .
>
> (d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter.

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100. MINUTES OF THE MARCH 1967 MEETING OF THE ADVISORY COMMITTEE ON CIVIL RULES 40–41 (1967). Unfortunately, the minutes do not provide the actual change that the committee discussed. *Id.* Judge Thomsen, a committee member, argued that it was "a mistake to change Rules just offhand because some think it's a good idea, without the reporter having looked for the snakes . . . . I don't think we ought to publish changes of Rules which are just brought at a meeting here, when nobody has had a change to think about them." *Id.* Another committee member stated that he would vote against a change to the Rule, and the committee ended up not making any changes to Rule 5 at that time. *Id.*

101. *Preliminary Draft of Proposed Amendments to Rules of Civil Procedures for the United States District Courts Relating to Deposition and Discovery*, 43 F.R.D. 211 (1967). The Preliminary Draft was published by both the Standing Committee and the Advisory Committee. *Id.* at 213. The draft noted that the proposed amendments were a result of consideration by the Advisory Committee. *Id.* The proposals were also a result of a field study of the operation of the existing discovery rules conducted by the Columbia University Project for Effective Justice. *Id.* at 217. The advisory committee noted that all parties must be served with all papers relating to discovery to inform all parties of the progress of litigation. *Id.*

> (e) Filing With the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court . . . .[102]

The proposal made explicit what had been implicit, i.e., that all discovery was to be served on each party and, pursuant to Rule 5(d), filed with the court. The Standing Committee met from July 17–19, 1969, to discuss the change to Rule 5(a) and ratified the proposal.[103] The Supreme Court approved the amendment and submitted it to Congress.[104] Because Congress took no action,[105] Rule 5 now explicitly required court filing of all discovery material.

Rule 5(a) and the discovery rules were changed to require that service of all discovery papers be made on all parties regardless of which party produced the information, unless the district court ordered otherwise.[106] Exceptions could be made by the district court if discovery was voluminous or there were many parties.[107] A court's power to excuse filing was codified in the 1980 amendments to Rule 5(d).[108] With regard to access to discovery, the Advisory Committee note to the 1970 amendment recognized that problems might be created for district courts when discovery papers become voluminous.[109]

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102. REPORT TO THE ATTORNEY GENERAL CONCERNING PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE RELATING TO DEPOSITION AN DISCOVERY (Nov. 1, 1968). "We propose no change in this Rule as drafted by the Advisory Committee." *Id.* at 2, 4.

103. MINUTES OF THE JULY 17–19, 1969 MEETING OF THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE 2 (1969). The Committee noted that there were comments from lawyers complaining that certain parties in multi-party disputes would be excluded from some discovery exchanges. The October, 1969 Report by the Standing Committee on Rules of Practice and Procedure was published in 48 F.R.D. 487 (1970). Report of the Standing Committee on Rules of Practice and Procedure to the Judicial Conference, Oct., 1969.

104. 48 F.R.D. 487, 491 (1970). Justices Black and Douglas dissented from the amendments and from the Court's action in sending them to Congress. *Id.* at 459. There was no explanation of why these Justices dissented. *See id.*

105. 48 F.R.D. 459, 491-92 (1970).

106. The explicit purpose of this amendment was to respond to complaints that parties in a multiple party suit did not receive certain discovery materials because the materials did not pertain directly to them. FED. R. CIV. R. 5(a) advisory committee's note (1970).

107. 48 F.R.D. 487 at 492.

108. *See infra* Part IV.C; *see also* 85 F.R.D. 521 (1980).

109. *Id.*

Moreover, taken as a whole, it was clear the FRCP required discovery to be filed. The introductory language of Rule 5(a), "except as otherwise provided in these rules," recognized that other parts of the FRCP may provide for different service provisions. Several other rules, e.g., Rule 45(c) subpoenas and Rule 77(d) entry of orders in judgments, did indeed specify service in a different fashion. Section V.B. will discuss the case law relating to access to discovery between 1970 and 1980.

C. The 1980 Amendment to Rule 5(d)

1. The Initial 1978 Proposal

As we have seen, filing of all discovery was historically required by the FRCP and explicitly required by the 1970 Amendment to Rule 5. In June of 1977, the Federal Judicial Center published a *Survey of Local Civil Discovery Procedures*, highlighting perceived problems regarding discovery.[110] Later that year, a report by the Special Committee for the Study of Discovery Abuse of the ABA's Litigation Section supported a FRCP amendment that would eliminate the required filing of depositions because of cost and storage concerns.[111] The Committee specifically did not support non-filing of other discovery material—interrogatories, requests for admissions, and requests for production.[112] "Generally, the cost of filing copies of, and requisite storage for, these types of papers should not be burdensome."[113] In fact, the Committee noted that it is beneficial for courts to have these documents in order to prepare for pretrial conferences and for other purposes.[114]

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110. The survey focused on consumption of judicial resources, attorneys' lack of diligence in expediting litigation and the "abuse" of the pre-trial process. Thad M. Guyer, *Survey of Local Civil Discovery Procedures* (Federal Judicial Center 1977).

111. *Report of the American Bar Association Special Committee for the Study of Discovery Abuse*, Section of Litigation (1977) A.B.A. LIT. REP. *microformed on* CI-7701-35 (Records of the U.S. Judicial Conference). "The committee recognizes that the cost of providing additional copies of transcripts of oral depositions can be considerable and that storage problems may exist with respect thereto. This committee therefore, endorses the amendment to the extent that it would dispense with the necessity of filing depositions upon oral examination." *Id.*

112. *Id.* "The committee believes, however, that interrogatories, requests for admissions, answers to each, and requests for production should continue to be filed with the court." *Id.*

113. *Id.*

114. *Id.* "Additionally, the court would be assisted by having these discovery

The rulemaking process applicable to the 1980 amendments to the civil rules required the Advisory Committee to circulate drafts of proposed amendments to bench and bar and to schedule and conduct public hearings if appropriate. In March of 1978, a proposed change to Rule 5(d) was published in the Federal Rules Decision.[115] Additions to the existing Rule 5 are bolded:

> (d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter**[.], but, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings.**[116]

The proposal would have fundamentally altered practice under Rule 5 by forbidding filing of discovery materials except those ordered to be filed by the district court or "used in the proceeding."[117] The Judicial Conference Civil Rules Committee circulated the proposal, together with other suggested, far more controversial discovery amendments, for public comment,[118] and there were many responses.[119]

The amendment reflected the views of a number of district court judges and court clerks regarding the burden presented

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papers accessible to it so that the court could more fully prepare for pretrial conferences and other hearings relating to the action." *Id.*

115. Preliminary Draft of Proposed Amendments to the Federal Rules of Procedure, 77 F.R.D. 613, 622 (1978).

116. *Id.*

117. *Id.*

118. WINIFRED R. BROWN, FEDERAL RULEMAKING: PROBLEMS AND POSSIBILITIES 17 (Federal Judicial Center 1981).

119. *Id.* at 18, n.40.

> Comments were received from various bar associations, practicing lawyers, the Department of Justice, clerks of court, the National Shorthand Reporters Association, the NAACP Legal Defense and Educational Fund, the General Counsel of the NAACP Special Contribution Fund, the Institute for Public Representation (Georgetown University Law Center), the American Civil Liberties Union, various associations of newspaper publishers and editors, Legal Aid and Services Associations, the Migrant Legal Action Program, and the Public Citizen Litigation Group.

Id. at 18. There was originally only a ninety day public comment period. Due to requests for extension, the final date for comment was November 30 rather than July 1 of 1978.

by the requirement to file all discovery and to serve it on all counsel.[120] Some district courts had adopted local rules limiting the filing of interrogatories and other discovery devices.[121] The proposal generated sharp debate and controversy from members of the legal community and the press. Public hearings were held for two days in Washington and Los Angeles in October and November 1978, where twenty-five representatives expressed their views.[122] There is no public record of these oral comments.[123] However, there is a record of the written comments. The Standing Committee received nineteen written responses, nine in favor and ten in opposition to the proposed amendments.[124]

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120. WRIGHT & MILLER, *supra* note 76, at 1152, n.3.

121. WRIGHT & MILLER, *supra* note 76, at 1152, n.4.

122. Letter from Walter Mansfield, Chairman of the Advisory Committee on Civil Rules to Judge Thomsen, Chairman of the Committee on Rules of Practice and Procedure (June 14, 1979), *microformed on* CI–8201 (Records of the U.S. Judicial Conference).

123. The Federal Judicial Center report did not contain specific sources regarding the hearings. Brown, *supra* note 118, at 19–20, n.42. However, this report did note the witnesses present at each hearing:

> Witnesses at the Washington hearings were: representatives of the American Bar Association; the National Shorthand Reporters Association; the NAACP Legal Defense and Education Fund; the National Council of the United States Magistrates; a New York admiralty law firm; the bar associations of the cities of New York and of Philadelphia; Special Counsel to the National Commission for Review of Antitrust Laws and Procedures; two clerks of court; a patent attorney; and a private practitioner specializing in complex litigation. Witnesses in Los Angeles were: representatives of the American Bar Association and of the Los Angeles County Bar Association; the chairman of the Ninth Circuit Judicial Conference Ad Hoc Committee on Discovery; two private practitioners; and the two directors of an Arizona State University study of discovery.

Id. Also, microfiche materials from the Notre Dame library did not contain a public record of the hearings. All information pertaining to the public hearings was taken from the Federal Judicial Center Report. All microfiche materials were obtained form the Notre Dame Library using the indexes provided by the Administrative Office of the U.S. Courts.

124. Many of the letters simply agreed with the proposed changes. *See, e.g.*, Letters from Eugene Gordon and Carmon Stuart to Judge Thompsen, Chairman of the Standing Committee on Rules of Practice and Procedure (Oct. 6, 1978), *microformed on* CI–7606 (Records of the U.S. Judicial Conference); Letter from the American College of Trial Lawyers (Aug. 16, 1978), *microformed on* CI–7607 (Records of the U.S. Judicial Conference); Committee on Federal Courts of the New York State Bar Association report to Joseph F. Spaniol, Jr., Secretary of the Committee on Rules of Practice and Procedure (Nov. 29, 1978), *microformed on* CI–7603 (Records of the U.S. Judicial Conference). Others agreed with the proposed changes and recommended additional changes of their own. *See, e.g.*, Letter

A number of the negative comments were quite detailed. The American Newspaper Publishers Association, for example, emphasized the public's right of access to information concerning the government and the judicial system. The Publisher's Association opposed the proposed change to Rule 5(d) because members of the press who cover court proceedings regularly check discovery materials for information.[125] This submission quoted the Supreme Court in *Cox Broadcasting Co. v. Cohn*,[126] describing the public's reliance on the press to provide vital information, and concluded the "[First] Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."[127]

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from Robert Jenkins, Professor at Campbell College School of Law (Nov. 10, 1978), *microformed on* CI–7603 (Records of the U.S. Judicial Conference) (agreeing with the proposal and suggesting adding that Rule 34 materials should also not be filed); Comments by the Discovery Abuse Committee of the National Conference of Special Court Judges (June 10, 1978), *microformed on* CI–7513–94 (Records of the U.S. Judicial Conference) (supporting the drafted change to Rule 5, but asking that responses to requests for admissions be exempted from the nonfiling proposal); Letter from the Community Legal Aid Society to the Committee on Rules of Practice and Procedure (June 19, 1978), *microformed on* CI–7607 (Record of the U.S. Judicial Conference) (making minor suggestion to the proposal about whether a court has discretion to deny a party's motion).

The letters in opposition to the proposed changes cited various reasons for their disapproval. *See, e.g.*, Letter from Allen Barrow, Chief Judge of the Northern District of Oklahoma, to the Committee on Rules of Practice and Procedure (June 15, 1978), *microformed on* CI–7607 (Records of the U.S. Judicial Conference) (arguing that the proposed amendment would cause increased paperwork due to requests for requiring filing; arguing that the amendment would also delay the trial process); Letter from Ann Broadwell of the Legal Aid Society of San Mateo County, California, to Roszel C. Thomsen, Chairperson of the Committee on Rules of Practice and Procedure (May 24, 1978), *microformed on* CI–7609 (Records of the U.S. Judicial Conference) (stating that the proposed rule makes it difficult for a party to use discovery other than the discovery that party has engaged in, which makes multi-party litigation difficult); Letter from Walter Schaefer to the Committee on Rules of Practice and Procedure (Aug. 11, 1978), *microformed on* CI–7607 (Records of the U.S. Judicial Conference) (stating that the proposal is confusing because it was unclear whether filing would be prohibited or simply not required); Letter from Richard Schmidt, American Society of Newspaper Editors, to the Committee on Rules of Practice and Procedure (Nov. 30, 1978), *microformed on* CI–7712 (Records of the U.S. Judicial Conference) (opposing the proposal due to the public use of discovery filings).

125. Letter from Richard Schmidt, American Society of Newspaper Editors, to the Committee on Rules of Practice and Procedure (Nov. 30, 1978).

126. 420 U.S. 469, 491–92 (1975).

127. Associated Press v. United States, 326 U.S. 1, 20 (1945).

The ACLU vigorously opposed the 1978 proposal, stressing the common law right of public access to judicial records[128] and the constitutional protection of access to discovery materials.[129] Perceived storage problems could not justify an abridgement of these rights.[130]

> [I]n our present society[,] many important social issues become entangled to some degree in civil litigation. Indeed certain civil suits may be instigated for the very purpose of gaining information for the public. . .. Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not be kept from the public.[131]

Finally, the ACLU pointed out that adoption of the proposal violated public policy. The critical problem with the proposed change was that it "suggest[ed] that private litigation simply is none of the general public's business, and that information collected, *in anticipation of* court proceedings is not 'public' information at all, unless and until it is actually used in those proceedings."[132] The federal rules already provided sufficient protection for parties' privacy interest through protective orders available upon a showing of good cause. The ACLU thus argued that the proposed change would shift the burden regarding access to discovery materials from the parties to the public, contrary to federal statutory provisions which support the public's access to information.[133]

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128. Letter from ACLU to the Advisory Committee on Civil Rules, 2–6 (Dec. 5, 1978), *microformed on* CI-7601 (Records of the U.S. Judicial Conference).

129. *Id.* at 7–15. *See Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceeding*, 91 HARV. L. REV. 1899 (1978).

130. ACLU letter, *supra* note 128, at 7 (citing cases favoring the public right of access including Nixon v. Warner Commc'ns, Inc., 435 U.S. 589 (1978); Chicago Council of Lawyers v. Bauer, 522 F.2d 242 (7th Cir. 1975)).

131. ACLU letter, *supra* note 128 (citing Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1958)) (stating that taking a deposition "shall be open to the public as freely as are trials in open court; and no order excluding the public from attendance on any such proceedings shall be valid or enforceable."); Alliance to End Repression v. Rochford, 75 F.R.D. 431 (N.D. Ill. 1976).

132. ACLU letter, *supra* note 128. The First Amendment protects the free flow of information, and the ACLU asserted that discovery materials must be included in protected information. *Id.*

133. *Id.* (citing Privacy Act, 5 U.S.C. § 552(a) (2004); Government in the Sunshine Act, 5 U.S.C. § 552(b) (2004); Freedom of Information Act, 5 U.S.C. § 552 (2004)).

2. The Revised 1979 Proposal

The negative public response to the initial 1978 proposal persuaded the Advisory Committee to submit a revised draft amendment in February 1979. The new proposal follows. The material in bold indicates additions to, and the italicized material indicates deletions from, the original 1978 proposed amendment to Rule 5.

> (d) Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter*[.],but, unless filing is ordered by the court on motion of a party or upon its own motion, depositions upon oral examination and interrogatories and requests for admission and the answers thereto need not be filed unless and until they are used in the proceedings.*
>
> **but the court may on a motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto not be filed unless on order of the court for use in the proceeding.**[134]

The critical difference, of course, is that the 1978 proposal prohibited filing of discovery absent judicial order, while the 1979 proposal retained required filing of discovery absent a court order.

Judge Walter Mansfield, Chair of the Advisory Committee on Civil Rules, credited the change in the proposal to amend Rule 5(d) to adverse comments following its original publication. He noted three reasons for jettisoning the 1978 changes. First, the original proposal would create difficulty for multiparty litigants who do not attend all depositions to obtain the recorded deposition. Second, the proposal would create an "unconscionable burden" requiring a court order for access to discovery materials. Third, public interest lawyers had argued that the initial 1978 proposal would be likely to increase, not to decrease, costs.[135]

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134. 85 F.R.D. 521, 525 (1980).

135. Letter from Walter R. Mansfield to Judge Roszel Thomsen, Chairman of the Standing Committee on Rules of Practice and Procedure (June 14, 1979) (sum-

Proponents of the original 1978 proposal then initiated an organized campaign to reverse this decision. Carmon J. Stuart, a clerk in the Middle District of North Carolina, wrote a letter to other clerks on February 20, 1979, encouraging them to ask their judges to write in opposition to the 1979 revised draft.[136] Nineteen judges, three clerks, and the New York County Lawyers' Association wrote to the Committee on Rules of Practice and Procedure in opposition to the 1979 revised draft of the amendment to Rule 5(d).[137] All but one were submitted within just three weeks after Mr. Stuart's letter.

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mary of reasons for change in the final draft of the amendment).

136. Letter from Carmon J. Stuart to Clerks of the U.S. District Courts (Feb. 20, 1979), *microformed on* CI-7805-90 (Records of the U.S. Judicial Conference) (explaining the changed proposal and encouraging other clerks to oppose the revised draft):

> Talk to your chief judge; show him this material if you like; and urge him to write a letter, supporting this amendment . . . . If your chief judge is not available, any judge will do. Two judges are better than one. Draft a letter for him and take it with you when you present this idea to him. You know better than he does how much the unnecessary filing of this material costs the courts in terms of space and personnel time (or, if you are not receiving it, how much it will cost you if you are ever required to receive it).

Id. Mr. Stuart included a letter from Judge Gordon of his own court soliciting other judges to respond. The responses by the chief judges basically followed the scheme that Mr. Stuart and Judge Gordon requested. *See id.*

137. Letter from Anthony Alaimo, Chief Judge, Southern District of Georgia (Mar. 5, 1979), *microformed on* CI–7805–39 (Records of the U.S. Judicial Conference); Letter from Charles Banta, Clerk, Middle District of Louisiana (Mar. 5, 1979), *microformed on* CI–7805–51 (Records of the U.S. Judicial Conference); Letter from James Battin, Chief Judge, District of Montana (Mar. 9, 1979), *microformed on* CI–7805–12 (Records of the U.S. Judicial Conference); Letter from Howard Bratton, Chief Judge, District of New Mexico (Mar. 12, 1979), *microformed on* CI–7804–91 (Records of the U.S. Judicial Conference); Letter from Walter Craig, Chief Judge, District of Arizona (Mar. 2, 1979), *microformed on* CI–7805–73 (Records of the U.S. Judicial Conference); Letter from John Curtin, District Judge, Western District of New York (Mar. 7, 1979), *microformed on* CI–7805–41 (Records of the U.S. Judicial Conference); Letter from Edward Devitt, Chief Judge, District of Minnesota (Mar. 23, 1979), *microformed on* CI–7804–85 (Records of the U.S. Judicial Conference); Letter from Franklin Dupree, Judge, Eastern District of North Carolina (Mar. 8, 1979), *microformed on* CI–7805–28 (Records of the U.S. Judicial Conference); Letter from Clarkson Fisher, Judge, District of New Jersey (Mar. 13, 1979), *microformed on* CI–7804–89 (Records of the U.S. Judicial Conference); Letter from Edward Gignoux, District Judge, District of Maine (Mar. 5, 1979), *microformed on* CI–7805–44 (Records of the U.S. Judicial Conference); Letter from Eugene Gordon, Chief Judge, Middle District of North Carolina (Feb. 20, 1979), *microformed on* CI–7806–53 (Records of the U.S. Judicial Conference); Letter from James Greilsheimer, New York County Lawyers' Association (Feb. 28, 1979), *microformed on* CI–7805 (Records of the U.S. Judicial Conference) (objecting to the initial proposal due to public interest in ac-

Despite this campaign, the Advisory Committee supported the revised 1979 draft, rather than the original amendment to Rule 5(d). Of significance to later developments, the Committee took explicit note of public access, explaining that "such [discovery] materials are sometimes of interest to those who may have no access to them except by requirement of filing, such as members of a class, litigants similarly situated, or the public generally."[138] In the end, the amendment continued the mandatory filing requirement, but it permitted a court order prohibiting filing of discovery materials.

The Supreme Court approved the 1979 amendment to Rule 5(d) and submitted it to Congress in August of 1980.[139] The history of the proposal in Congress demonstrates the support for public access to discovery information and the fear that even the revised amendment might jeopardize that right. A letter to Senator Edward Kennedy, Chairman of the United States Senate Committee on the Judiciary, from Charles Bailey, Editor of the Minneapolis Tribune, June 23, 1980, expressed the concern that even the revised proposal would create the same problems regarding public access as the initial 1978 proposal.[140] Similarly, a *New York Times* editorial, July

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cess to discovery materials); Letter from Robert Kauffman, Clerk, Southern District of Illinois (Mar. 12, 1979), *microformed on* CI–7805–03 (Records of the U.S. Judicial Conference); Letter from Samuel King, Chief Judge, District of Hawaii (Mar. 6, 1979), *microformed on* CI–7805–26 (Records of the U.S. Judicial Conference); Letter from Robert Maxwell, Chief Judge, Northern District of West Virginia (Feb. 22, 1979), *microformed on* CI–7805–83 (Records of the U.S. Judicial Conference); Letter from James A. McWhorter, Clerk, Southern District of West Virginia (Mar. 8, 1979), *microformed on* CI–7805–16 (Records of the U.S. Judicial Conference); Letter from Marshall Neill, Chief Judge, Eastern District of Washington (Mar. 9, 1979), *microformed on* CI–7805–14 (Records of the U.S. Judicial Conference); Letter from David Porter, Judge, Southern District of Ohio (Aug. 1, 1979), *microformed on* CI–7610–91 (Records of the U.S. Judicial Conference); Letter from Otto Skopil, Chief Judge, District of Oregon (Mar. 12, 1979), *microformed on* CI–7804–93 (Records of the U.S. Judicial Conference); Letter from Albert Stephens, Chief Judge, Central District of California (Mar. 9, 1979), *microformed on* CI–7805–01 (Records of the U.S. Judicial Conference); Letter from Warren Urbom, Chief Judge, District of Nebraska (Mar. 5, 1979), *microformed on* CI–7805 (Records of the U.S. Judicial Conference); Letter from James Von der Heydt, Chief Judge, District of Alaska (Mar. 1, 1979), *microformed on* CI–7805–57 (Records of the U.S. Judicial Conference); Letter from Laughlin Waters, District Judge, Central District of California (Mar. 7, 1979), *microformed on* CI–7805–30 (Records of the U.S. Judicial Conference).

138. 85 F.R.D. 521, 525 (1980). The Advisory Committee note recognized that although discovery materials must be filed, they are often unused.

139. *Id.* at 521.

140. Letter from Charles Bailey, Editor of the Minneapolis Tribune, to Edward

22, 1980, criticized even the revised amendment's ability to prevent public access to discovery materials.[141] Robert Drinan, Chair of the House Subcommittee on Criminal Justice, made explicit his understanding that the proposed change would not encourage waiver of filing and that a limit on filing would occur only when the balance between private and public interests favored the private interests.[142] Gerald Hegel, President of the Association of Records Managers and Administrators, Inc., wrote to Chief Justice Warren Burger suggesting the use of low cost records centers to deal with the purported administrative burden of discovery materials.[143] Joseph Spanio, Deputy Director of the Administrative Office of U.S. Courts responded "[T]he general rule that all such documents are required to be filed remains in effect. All documents must be filed unless the court directs otherwise."[144] Finally, Senator Kennedy warned:

> It is the expectation of the Senate Judiciary Committee that relief sought under amended Rule 5(d) will be authorized on a case-by-case basis and only in circumstances when the court has explicitly determined that it is unlikely that the proceeding will be of interest to the general public, members of a class, or litigants similarly situated, and when the court has determined that the pretrial materials in a particular proceeding are very voluminous.[145]

Others in Congress expressed similar concerns.[146]

Kennedy, Chairman of the United States Senate Committee on the Judiciary (June 23, 1980), *microformed on* CI–7712 (Records of the U.S. Judicial Conference).

141. *Paper Justice*, N.Y. TIMES, July 22, 1980, at A18.

142. Letter from Robert Drinan, Chairman of the Subcommittee on Criminal Justice, to Joseph Spaniol, Deputy Director of the Administrative Office of the United States Courts (June 24, 1980), *microformed on* CI–8207–87 (Records of the U.S. Judicial Conference).

143. Letter from Gerald Hegel, President, Record Manager & Administrators, to Chief Justice Warren Burger (July 18, 1980), *microformed on* CI–8207–91 (Records of the U.S. Judicial Conference).

144. Letter from Joseph Spanio to Gerald Hegel (July 31, 1980), *microformed on* CI8207-87 (Records of the U.S. Judicial Conference).

145. Letter from Edward Kennedy, Chairman of the Senate Judiciary Committee, to William Foley, Director of the Administrative Office of the United States Courts (July 29, 1980), *microformed on* CI–8207–85 (Records of the U.S. Judicial Conference).

146. *See, e.g.*, Letter from Dennis DeConcini to William Foley (July 25, 1980), *microformed on* CI-7712 (Records of the U.S. Judicial Conference) ("Other members of the Senate Committee on the Judiciary have expressed their concern to me

In response, William Foley, the Director of the Administrative Office of the U.S. Courts, wrote to Senator Kennedy:

> The rule does contemplate that relief from the requirement of filing unnecessary discovery materials will be authorized on a case-by-case basis and then only when the court has determined that it is unlikely that the proceeding will be of interest to the general public, members of a class, or litigants similarly situated. . . . The Advisory Committee Note states that the discovery "materials are sometimes of interest to those who may have no access to them except by a requirement of filing . . . ." The district courts are thus advised to take these interests into consideration and to process rule 5(d) motions in accordance with normal motions practice.[147]

Judge Mansfield defended the revised draft[148] noting that the amendment would not dispense with the discovery filing requirement. Rather, filing would be required unless the court, on its own motion or on a motion of one of the parties, decided that the public interest would not be served by filing of discovery materials. Judge Mansfield further stated that it was expected that:

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over the application of Rule 5(d) and it will be my intention as Chairman of the Improvements in Judiciary Machinery Subcommittee to monitor the application of the Rule, and to possibly solicit your assistance in that endeavor.").

147. Letter from William Foley, Director of the Administrative Office of the United States Courts, to Edward Kennedy, Chairman of the Senate Judiciary Committee (Aug. 26. 1980), *microformed on* CI–8207–82 (Records of the U.S. Judicial Conference). *See also* Letter from Sherman Cohn, Professor of Law, Georgetown University Law Center, to the Editor of the *New York Times*, (July 25, 1980), *microformed on* CI–7713 (Records of the U.S. Judicial Conference) (also criticizing the article's comments on the limitation of public access); Letter from Judge Mansfield to members of the Advisory Committee on Federal Civil Rules (July 31, 1980), *microformed on* CI–8210-62 (Records of the U.S. Judicial Conference) (providing a copy of *Paper Justice*); Letter to the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules from Joseph Spaniol (Aug. 26, 1980), *microformed on* CI–7712 (Records of the U.S. Judicial Conference) (providing information pertaining to the amended Rule 5(d)); Letter to all federal judges, U.S. magistrates, circuit executives, and clerks of court from Joseph Spaniol (Aug. 26, 1980), *microformed on* CI–7712 (Records of the U.S. Judicial Conference) (providing copies of correspondence regarding the amended Rule 5(d)).

148. Letter from Judge Mansfield to Max Frankel, Editor of the *New York Times* (July 23, 1980), *microformed on* CI–8210–62 (Records of the U.S. Judicial Conference) (criticizing the article *Paper Justice* by explaining the intended application of the Rule).

> [A] judge would not be expected to excuse parties from filing materials in any case in which the public or the press had an interest, such as a Watergate or similar scandal. Moreover, should the public importance of the material not appear until after filing has been excused, it is expected that the judge, upon motion of the press or other interested persons, would order the parties to file the documents for inspection.[149]

In an attempt to study the application of the new Rule 5(d), the district courts were directed by the Administrative Office to submit information about the application of Rule 5(d) in practice.[150]

D. The 2000 Amendment to Rule 5

As we have seen, prior to 2000, Rule 5(d) required discovery materials to be promptly filed with the court.[151] One clear reason for that requirement was to guarantee public access to information discovered pretrial. The costs incurred by this procedural rule were explicitly acknowledged. Many districts, however, had adopted local rules or orders barring parties from filing discovery.[152] The next change to Rule 5 did away with public access.

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149. *Id.* The following additional correspondence pertained to the amendment submitted to Congress: Report to the House Committee on the Judiciary from the American Law Division (June 30, 1980), *microformed on* CI–7713–7714 (Records of the U.S. Judicial Conference) (providing a survey of the local rules regarding discovery materials); Letter from Philip Pratt, U.S. District Judge, to Judge Mansfield (July 9, 1982), *microformed on* CI–8207–81 (Records of the U.S. Judicial Conference) (stating that local rules prohibiting discovery would subvert the intent of the amended 5(d)).

150. Letter from James McCafferty to the clerks of the U.S. District Courts (Apr. 17, 1981), *microformed on* CI–7714 (Records of the U.S. Judicial Conference) (requesting more information on the application of the amended 5(d), and including a table on district court orders pertaining to Rule 5(d)); Letter from Joseph Spaniol to all clerks of the U.S. District Courts (Oct. 20, 1980), *microformed on* CI–7714 (Records of the U.S. Judicial Conference) (requesting information to evaluate the impact of the amended Rule 5(d)). The responses showed there were a total of only forty-five orders entered dispensing the filing requirement in the following districts between November, 1980 and February, 1981: the Central District of Illinois, the District of Kansas, the Western District of Kentucky, the District of Maine, the District of New Jersey, the District of New Mexico, the Western District of Pennsylvania, the District of Puerto Rico, and the Middle District of Tennessee.

151. FED. R. CIV. P. 5(d), advisory committee's note, 1980.

152. Laurie Kratky Doré, *Secrecy by Consent: The Use and Limits of Confiden-*

In 1996, the Judicial Conference Advisory Committee, which monitors the Federal Rules of Civil Procedure, began a re-examination of the discovery rules. Concerns about the costs and usefulness of pretrial investigation prompted this re-examination.[153] The Advisory Committee sought to "focus on the architecture of discovery rules and determine whether modest changes could be effected to reduce costs of discovery, to increase its efficiency, to restore uniformity of practice, and to encourage the judiciary to participate more actively in case management."[154] A Discovery Subcommittee was appointed to explore possible revisions to the rules.[155] The Subcommittee collected and compiled information regarding the pretrial process and commissioned two major studies to gather empirical data from practicing attorneys about discovery.[156] A conference was also held at the Boston College Law School in September of 1997.[157] After evaluating the results of the studies and receiving responses from academics, the bar, and interested institutions, the Discovery Subcommittee recommended that the Advisory Committee propose amendments to the rules of discovery.[158]

In March of 1998, the Advisory Committee met and recommended a change in Rule 5(d) as part of an overall discovery

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tiality in the Pursuit of Settlement, 74 NOTRE DAME L. REV. 283, 325, n.170 (1999); Jack H. Friedenthal, *Secrecy in Civil Litigation: Discovery and Party Agreements*, 9 J.L. & POL'Y 67, 80 (2000); *See, e.g.*, N.D. & S.D. Iowa L.R. 15(a) (requiring that discovery materials not be filed). "There [we]re indications that even in districts that d[id] not have local rules barring filing, nonfiling [wa]s a routine habit with many attorneys." 181 F.R.D. 18, 38 (Feb. 1999).

153. Whether there is "abuse of discovery" and what constitutes "abuse" is fiercely contested, but these topics are beyond the scope of this article. *See, e.g.*, Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529 (2001).

154. Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules to the Honorable Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999) http://www.uscourts.gov/rules/Reports/CV05-1999.pdf (last visited Feb. 18, 2007).

155. Carl Tobias, *Congress and the 2000 Federal Civil Rules Amendments*, 22 CARDOZO L. REV. 75, 77 (2000).

156. 181 F.R.D. at 25. The Subcommittee was chaired by Judge David F. Levi of the District Court for the Eastern District of California. The studies were conducted by the Federal Judicial Center ("FJC study"), and the RAND Corporation Institute for Civil Justice ("Rand study").

157. *Id.* at 35; *Transcript of the "Alumni" Panel on Discovery Reform*, 39 B.C. L. REV. 809 (1998).

158. Tobias, *supra* note 154, at 78.

"package."[159] Rule 5 was the tail on that much larger dog. Additions are bolded.

> (d) FILING; CERTIFICATE OF SERVICE. All papers after the complaint required to be served upon a party, **["shall"] must** be filed with the court within a reasonable time after service, but . . . **disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents or to permit entry upon land, and (iv) requests for admission.**[160]

This was, of course, a revival of the initial 1978 proposal and debate. The Advisory Committee on Rules of Practice and Procedure, chaired by Judge Paul Niemeyer, heard testimony from more than 300 witnesses at three public hearings in Baltimore, Chicago and San Francisco and received more than 300 written comments submitted by the public.[161] After considering the public comments and making a small number of changes, the Standing Committee submitted the package of discovery amendments to the Judicial Conference.

In September of 1999, the Judicial Conference tendered these amendments to the Supreme Court which approved the package and forwarded it to Congress. Congress took no action, thus ratifying the changes.[162]

After the 2000 amendments, Rule 5(d) read:

> All papers after the complaint required to be served upon a party, together with a certificate of service, must be filed with the court within a reasonable time after service, but disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: (i) depositions, (ii) interrogatories, (iii) requests for documents

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159. 181 F.R.D. at 39.

160. MOORE'S FEDERAL PRACTICE—CIVIL § 5APP.10 2000 Amendment to Subdivision (d) (LEXIS 2005).

161. Memorandum from Paul V. Niemeyer, *supra* note 153, at 3 "[T]he process pursued in connection with the discovery rules package created an unusually well-informed Committee that acted most selectively to adopt a modest, balanced package to address identified problems in a manner comfortable to the practicing bar and to the courts." *Id.*

162. *Id.*

> or to permit entry upon land, and (iv) requests for admission.[163]

The pre-2000 Rule *required* discovery materials to be filed unless exempted by the court, while the revised Rule *prohibits* discovery materials from being filed unless they are "used in a court proceeding,"[164] with minor exceptions.[165] Un-filed information is now managed by the parties' attorneys and is no longer assumed to be part of the judicial record. [166] In supporting a motion or in other proceedings, parties may refer to, or rely upon, only those discovery materials specifically filed.[167]

A number of justifications were given for the 2000 amendment: (1) the preexisting inconsistency of local rules and the lack of a uniform national standard;[168] and (2) the expense and burden of the filing requirement. Previously, many districts had local rules limiting or excusing filing of discovery, creating disparity among districts.[169] "[T]he collective wisdom reflected in so many local rules strongly supports the conclusion that routine filing of all discovery materials is inappropriate."[170]

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163. FED. R. CIV. P. 5(d).

164. 1 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE § 5.33[2] (3d ed., 1997). "Used in the proceeding" is synonymous with "relevant to a court procedure," ensuring that all relevant material is presented to the court in connection with the particular procedure at hand. While this phrase includes most activities in connection with a lawsuit, it most notably does not include depositions. *Id.* While the Committee note declares that a court can order the filing of discovery materials, regardless of whether they are used in a court proceeding, this is not made explicit in amended Rule 5(d). Rule 5 also supersedes and invalidates all the local court rules pertaining to the filing or nonfiling of discovery materials. FED. R. CIV. P. 5(d) advisory committee's note.

165. FED. R. CIV. P. 26(a)(3) (providing no Rule 5 exemption for the disclosure and exchange of lists of trial evidence) and Rule 35 Requests for a Physical or Mental Examination. *Id.*

166. MOORE, *supra* note 163, at 5.33[3][a].

167. *Id.*

168. Proposed Amendments to the Federal Rules of Civil Procedure and Evidence, 181 F.R.D. 18, 50 (Admin. Off. of the United States Courts, Feb. 1999) (preliminary draft) "There is no apparent reason to have different filing rules in different districts." 181 F.R.D. at 50. At the Boston conference in 1997, former Advisory Committee member John Frank stated that "[T]the biggest task of the Committee at this moment is to try to achieve uniformity. The variance—not merely between states in the one case, but among districts, . . . makes us realize what was meant to be a fundamental premise of the Rules, names a uniform system for the federal courts, simply doesn't exist." 39 B.C. L. REV. at 811.

169. FED. R. CIV. P. 5(d). 2000 amendment advisory committee note.

170. 181 F.R.D. at 50.

Another motivation, however, behind the 2000 amendment was to reduce the cost and burdens allegedly imposed by the filing requirement. The Advisory Committee noted problems caused by limited storage space and tedious administrative burdens in handling large volumes of paper.[171] The amended rule "will require filing of the materials used—the most common illustrations will be uses to support motions, including summary judgment motions, or use at trial."[172]

Comments submitted by the public generally supported changing Rule 5's filing requirement. The American College of Trial Lawyers, for example, stated, "[i]t [the filing exemption] will not only reduce costs and expenses for the clerk's office, but also reduce filing and copy expenses of the parties."[173] The Federal Magistrate Judge's Association Rule Committee noted "[t]he amendment is a progression of changes that have occurred since 1990 with a recognition of the costs imposed on parties as well as the court by the required filing of discovery materials that are never used in the action."[174]

There was, however, also opposition to abolishing the filing requirement of the pre-2000 Rule, particularly the loss of public access to discovery information. The Public Citizen Litigation Group ("Public Citizen"), a national public interest law firm, opposed the amendment because "[f]iling of discovery materials is particularly important where the suit involves a class action, or issues of broad public importance, or allegations of official misconduct."[175] Similarly, the District of Columbia Bar suggested that the Advisory Committee make clear that the amendment was "not intended to change the principle in the current Federal Rules that discovery materials should be available to the public when the public interest in access outweighs any countervailing privacy or other interest."[176] District Judge David L. Piester also commented that it was in the

171. Paul V. Niemeyer, Advisory Committee on Civil Rules Memorandum, at 4 (May 11, 1999), http://www.uscourts.gov/rules/Reports/CV05-1999.pdf [hereinafter *Memorandum*]. "[F]iling adds burdens and expenses not only on the courts but also on the parties." 181 F.R.D. at 38.

172. 181 F.R.D. at 39.

173. *Memorandum, supra* note 170, at 4.

174. *Id.* at 7.

175. *Id.* at 4. *Public Citizen* suggested the phrase "must not be filed" be replaced with "need not be filed" in order to provide parties with the choice of incurring costs of filing discovery materials. *Id.*

176. *Id.* at 4.

public interest to allow access to discovery relevant to public matters, especially in products liability cases.[177]

In the end, the Rule 5(d) filing requirement was removed. The reasons for this hardly seem compelling and technological changes would seem to obviate any real necessity for change. In addition, this amendment removed a key argument for public access to discovery material, often affirmed by cases. I turn now to how such arguments were treated in the federal case law between 1938 and the present.

IV. FEDERAL COURT CASE LAW ON ACCESS TO DISCOVERY

A. Public Access to Discovery Prior to 1970

The requirement to publicly file discovery with the court was only implicit in the FRCP until 1970, but access to this material, and conversely the ability of parties to disclose and use it, was widely permitted by courts prior to that date.[178] For instance, in the widely cited *Olympic Refining v. Carter* case,[179] antitrust plaintiffs sought to depose a government attorney who was involved in a prior case in which the government had brought an antitrust action against the same defendants.

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177. *Id.* at 4. Judge Piester suggested that the amendment include a provision requiring non-filed documents to be made available by the parties for inspection, subject to the power of a court protection order. *Id.*

178. *See, e.g.*, United States v. Am. Radiator & Standard Sanitary Corp., 388 F.2d 201, 204 (3d Cir. 1967) (reversing district court's grant of injunction staying federal civil antitrust action during pendency of criminal antitrust action based on the same events, stating "we know of no rule or equitable principle that protects a defendant in a pending criminal prosecution from the disclosure, by another person in a separate civil action, of evidence which may later become part of the prosecution's case against him."); Olympic Ref. Co. v. Carter, 332 F.2d 260 (9th Cir. 1964); Essex Wire Corp. v. E. Elec. Sales Co., Inc., 48 F.R.D. 308 (E.D. Pa. 1969); Brown v. Bullock, 29 F.R.D. 184 (S.D.N.Y. 1961) (concluding that plaintiff may proceed with production); *In re* Am. Anthracite and Bituminous Coal Co., 22 F.R.D. 504 (S.D.N.Y. 1958); *In re* Mosher, 248 F.2d 956, 957 (C.C.P.A., 1957) (stating that it is "clear that at common law, no special interest had to be shown for a member of the public to gain access to judicial records."); Leonia Amusement Corp., v. Loew's Inc., 18 F.R.D. 503, 508 (S.D.N.Y. 1955) (stating that a party to an action "should be able to use [information gained in discovery] in any way which the law permits."); Sagorsky v. Malyon, 12 F.R.D. 486 (S.D.N.Y. 1952) (concluding that federal court plaintiff may proceed with depositions intended to be used in state court action); Desversky v. Republic Aviation Corp., 2 F.R.D. 183 (E.D.N.Y. 1941); *but see* Beard v. N.Y. Cent. R.R. Co., 20 F.R.D. 607 (N.D. Ohio 1957). *See infra* note 194 for cases after 1970 with similar holdings.

179. 332 F.2d 260, 261 (9th Cir. 1964).

Plaintiffs also requested the government attorney produce documents from the prior litigation.[180] The original case had been settled by a consent decree by the time *Olympic* was pending, and the discovery material in the earlier case had been sealed by stipulation of the parties.[181] The government sought to vacate the prior protective orders to permit access for use in the pending action.[182] The Ninth Circuit granted the motion, stating:

> In the federal judicial system trial and pretrial proceedings are ordinarily to be conducted in public . . . . The purpose of the federal discovery rules, as pointed out in *Hickman v. Taylor*, is to force a full disclosure.[183]

The Ninth Circuit further observed that because "all these documents had been filed in the district court in the government case, Olympic could have examined the filed originals and would not have to seek copies from a government official were it not for the existence of certain protective orders . . . ."[184]

Discovery access opponents have focused on the term *pretrial proceedings* in this and other cases as limited to discovery materials used in judicial action rather than to normal discovery between parties, or what is sometimes referred to as *raw fruits of discovery*.[185] In *Olympic*, however, no reference is made to preliminary hearings or other judicial involvement in either case utilizing information gleaned from discovery. Rather, the court's discussion of pretrial proceedings simply

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180. *Id.* at 262 (noting that the requested documents included "answers, amended answers, and supplemental answers to defendants' interrogatories and all documents and papers related thereto.").

181. *Id.* at 261.

182. *Id.*

183. *Id.* at 264 (*internal citations omitted*).

184. *Id.* at 262.

185. *See* United States v. Hooker Chemicals and Plastics Corp., 90 F.R.D. 421, 426 (W.D.N.Y. 1981) (declining to impose a protective order on information that had yet to be submitted with any pre-trial or substantive motions, stating "[u]se of the discovery fruits disclosed in one lawsuit in connection with other litigation, and even in collaboration among plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure."); *In re* Agent Orange Prod. Liab. Litig., 104 F.R.D. 559, 565 (E.D.N.Y 1985) ("The second category of documents represents the raw fruits of discovery. These documents have never been filed with the Court."); *Id.* at 570 ("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." (quoting *Nonparty Access to Discovery Materials in Federal Courts*, 94 HARV. L. REV. 1085, 1092 (1981))).

references information gained by parties in FRCP-enforced information gathering. The discovery material sought included "answers to . . . interrogatories and all documents and papers related thereto."[186] This material was available because "all of these documents *had been filed.*"[187]

Although an antitrust case, *Olympic* did not rely on the special antitrust disclosure statute that requires depositions in government antitrust litigation to be "open to the public as freely as are trials in open court."[188] At most, the court saw the statute as reflective of pre-existing policies, including those embodied in the FRCP. Nor did other courts in this pre-1970 era limit access to discovery in antitrust matters. For instance, *Essex Wire Corp. v. Eastern Electric Sales Co.*,[189] was a contract dispute in which plaintiffs sought to disregard informal "secrecy provisions" agreed to during the course of a deposition and to reveal to third parties various details of the disputed contract.[190] Citing *Olympic*, the court stated: "as a general proposition, trial and pre-trial proceedings of the federal judicial system are ordinarily conducted in public."[191] Numerous other cases from this period acknowledge the right to access discovery.[192]

During this historical period, judges were often involved in the conduct of discovery. Many cases permitted discovery despite the fact that a party intended to use the discovery in either a parallel state action or a related proceeding in another federal court or even in state cases.[193] In *Sagorsky v. Malyon*,

186. Olympic Ref. Co. v. Carter, 332 F.2d 260, 262 (9th Cir. 1964).

187. *Id.* (emphasis added).

188. *Id.* at 264 (citing 15 U.S.C. § 30 (repealed 2002)). The *Olympic* court supported access for third parties by reference to the Federal Rules, the open nature of trials, and the Supreme Court's *Hickman* ruling: "[t]his basic policy has been specifically applied in the field of Government antitrust litigation."

189. 48 F.R.D. 308, 310 (E.D. Pa. 1969).

190. *Id.*

191. *Id.* "Pre-trial proceedings" are not defined, but here, as in *Olympic*, there is no mention of any other pretrial hearings or motions involving the court so as to distinguish between "pretrial proceedings" and "discovery material." *Id.*

192. *In re* Am. Anthracite and Bituminous Coal Co., 22 F.R.D. 504, 508 (S.D. N.Y. 1958) ("[I]t is no objection to the examination that the deposition may be used in some other action or proceeding if it is relevant to the pending action."). Deseversky v. Republic Aviation Corp, 2 F.R.D. 183 (E.D. N.Y. 1941), decided soon after the adoption of the FRCP, provides a similar example in the context of a shareholders' derivative action.

193. *See* Deering Milliken Research Corp. v. Leesona Corp., 27 F.R.D. 440 (E.D.N.Y. 1961) (approving federal court discovery sought to be used in parallel

for example, the court permitted discovery, noting that the parallel state court action "does not, in the absence of a showing of bad faith . . . deprive a plaintiff of the right to avail itself of the deposition-discovery procedure under the Federal Rules of Civil Procedure."[194] Another decision notes that "[i]t is settled law that discovery processes are proper even though the depositions may be used in some collateral proceeding."[195]

These results do not mean that pretrial information was always available to third parties or could be used for any purpose. The vast majority of cases were resolved on the basis of whether good cause had been shown for a protective order under Rule 26(c). Parties may well have legitimate privacy, business or other interests which might justify denying access and many cases so held.[196] Courts are routinely engaged in balancing these interests. An illustrative example from this period is *Essex v. Wire Corp.*,[197] which upheld the release of information generated during discovery but maintained the protection of specific contract terms on the basis of the potential competitive disadvantage imposed on the party by their release.[198] "[I]f this information were disclosed, the moving party would suffer great competitive disadvantage and irreparable harm."[199]

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patent claim action); Brown v. Bullock, 29 F.R.D. 184 (S.D.N.Y 1961) (federal court discovery utilized in state court proceeding under Investment Company Act claim); *In re* Am. Anthracite and Bituminous Coal Co., 22 F.R.D. 504 (S.D.N.Y 1958); Leona Amusement Corp. v. Loews Inc., 18 F.R.D. 503 (S.D.N.Y. 1955) (refusing protective order over defendants objection that discovery was sought for use by other attorneys); Sagorsky v. Malyon, 12 F.R.D. 486 (S.D.N.Y 1952) (permitting federal court discovery in insurance claim in state court action); Deseversky v. Republic Aviation Corp., 2 F.R.D. 183 (E.D. N.Y. 1941) (permitting use of discovery in separate proceeding in stockholders action).

194. 12 F.R.D. 486, 487 (S.D. NY 1952). There were, to be sure, a few contrary decisions. In *Union Carbide Corp. v. Filtrol*, 278 F. Supp. 553, 559 (D.C. Cal. 1967), Mobil Oil Corporation, a non-party to a patent action, sought to modify existing protective orders to gain access to filed information. The court denied Mobil's request, distinguishing other cases because they were antitrust matters. *Id.* at 559.

195. Deering Milliken Research Corp. v. Leesona Corp., 27 F.R.D. 440, 441 (E.D.N.Y. 1961) (citing *American Anthracite* and *Deseversky supra* note 186).

196. *See* Carr v. Monroe Mfg. Co., 431 F.2d 384 (5th Cir. 1970); Covey Oil Co. v. Cont'l Oil Co., 340 F2d 993 (10th Cir. 1965); Int'l Prods. Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963); Alliance to End Repression v. Rochford, 75 F.R.D. 431 (N.D. Ill. 1976); United States v. Lever Bros. Co., 193 F. Supp. 254 (S.D.N.Y. 1961).

197. Essex Wire Corp. v. E. Elect. Sales Co., Inc., 48 F.R.D. 308 (E.D. Pa. 1969).

198. *Id.* at 312.

199. *Id.* at 310.

B. From 1970–1980

As discussed earlier,[200] Rule 5 was amended in 1970 to make explicit that discovery materials must be filed in court. The Rule was next amended in 1980 and the cases between 1970–80 presented a greater variety of factual circumstances than earlier cases. The debate about the use of, and access to, discovery became more vigorous, but the case law, with few exceptions, followed the pre-1970 pattern.[201] Some cases specifically approved disclosure of discovery information for general public release.[202] In *Williams v. Johnson & Johnson*,[203] for example, defendant sought to prohibit the plaintiff from releasing depositions generated in litigation over the contraceptive Ortho Novum because the company claimed plaintiffs were "promoting litigation" and because the deposition had already been used by the author, Barbara Seaman, in the book *The Doctor's Case Against the Pill*.[204] The motion for a protective order was

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200. *See supra* Part III.B.

201. *See In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979); Am. Tel. & Tel. Co. v Grady, 594 F.2d 594 (7th Cir. 1978) (treating non-party government request to vacate protective order as a matter of first impression and granting request to disclose previously protected discovery); Gen. Dynamics v. Selb Mfg., 481 F.2d 1204 (8th Cir. 1973) (requiring defendant in civil action to respond to interrogatories despite claim of self incrimination under the 5th amendment); Patterson v. Ford Motor Co., 85 F.R.D. 152 (W.D. Tex. 1980); Parsons v. Gen. Motors, 85 F.R.D. 724 (N.D. Ga. 1980); Krause v. Rhodes, 535 F. Supp 338 (N.D. Ohio 1979); Burgess Const. Co. v. Willamette-Western Corp., 80 F.R.D. 477 (D. Alaska 1978) (permitting state of Alaska, as non-party, to access discovery material); Am. Ben. Life Ins. Co. v. Ille, 87 F.R.D. 540 (D. Okla. 1978); Reliance Ins. Co. v. Barron's, 428 F. Supp. 200 (S.D.N.Y. 1977) (denying plaintiff's motion for a protective order that sought to limit corporate record discovery to the action); Alliance to End Repression v. Rochford, 75 F.R.D. 431 (N.D. Ill. 1976); Johnson Foils Inc. v. Huyck, 61 F.R.D. 405 (N.D.N.Y. 1973) (denying defendant's motion for a protective order sought on basis of plaintiff's use of discovery in a separate forum); Williams v. Johnson & Johnson, 50 F.R.D. 31 (S.D.N.Y. 1970); *but see In re* Beef Indus. Antitrust Litig., 457 F. Supp. 210 (N.D. Tex. 1978).

202. *In re* Halkin, 598 F.2d 176, 188 (D.C. Cir. 1979). "Generally speaking, when a party obtains documents or information through the discovery process, he can use that information in any way which the law permits. . . .[t]he implication is clear that without a protective order materials obtained in discovery may be used by a party for any purpose, including dissemination to the public." *Id.* at 188 (internal quotation omitted).

203. 50 F.R.D. 31 (S.D.N.Y. 1970).

204. *Id.* at 33.

denied.[205] The court stated that "by simple docketing in the court, this deposition would become public material."[206]

The cases from this period also support the principle that filed discovery material ceases to be available only when protected by a valid protective order. An example is *Alliance to End Repression v. Rochford*,[207] which held that some specific information regarding Chicago Police surveillance tactics warranted protection from access by non parties but otherwise, "*all documents filed* and proceedings held in federal civil litigation are open as a matter of public record."[208] Similarly, *American Telephone and Telegraph v. Grady*[209] involved a government request, as a third-party, for information generated in discovery in antitrust litigation between AT&T and MCI. The information was sealed by stipulated protective order.[210] The district court granted the government's motion to vacate the protective order noting "pretrial discovery must take place in the public unless compelling reasons exist for denying public access to the proceedings."[211]

Krause v. Rhodes,[212] another well known and widely cited case, enunciated similar doctrinal principles. The dispute over access to discovery occurred after the original case was settled.[213] Citing the "historic" nature of the Kent State shootings underlying the case, plaintiffs intended to turn over pretrial information to the Yale University library as well as to the Ohio Historical Society.[214] The discovered material included grand

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205. *Id.*

206. *Id.* The case makes no mention of pretrial proceedings or other motions that would undercut the court's equating of "docketing" with the deposition's status as "public material." *Id.*

207. 75 F.R.D. 431 (N.D. Ill. 1976).

208. *Id.* at 433 (emphasis added).

209. 594 F.2d 594 (7th Cir. 1978).

210. *Id.* at 595.

211. The importance of the *AT&T* holding is enhanced by the fact that by this time, courts had become more reluctant to treat the government as simply another third-party. *See, e.g.*, Martindell v. Int'l Tel. & Tel., 594 F.2d 291 (2d Cir. 1979) (denying government access to information and noting its "awesome investigative powers.").

212. 535 F. Supp. 338 (N.D. Ohio 1979). The case involved the civil suits brought by the relatives of individuals killed in the Kent State shootings.

213. *Id.* at 342.

214. *Id.* at 343. Material produced by the Ohio Highway Patrol and the Ohio National Guard had already been turned over to the Kent State University library. *Id.* at 351. The court did state that "Although they are in the constructive custody of the court, these discovery materials would only be part of the 'official court records open to the public' to the extent they have entered the public do-

jury testimony, FBI interview reports, testimony of witnesses before state grand juries, police radio logs, witness statements, photographs and eighty-three depositions.[215] Relying heavily on *Halkin*, the court permitted disclosure of most of this information, except material that qualified under the protective order standard.[216]

C. From 1980–2000

Section III.C. described the history of the 1980 amendment to Federal Rule 5(d).[217] While the initial proposed rule change would have made discovery non-fileable except where a court so ordered, vigorous opposition forced a change in the final form of the amendment to require filing except when a court ordered it otherwise. In 2000, Rule 5(d) was amended to explicitly forbid filing of discovery. In the interim, many district courts adopted local rules which were contrary to the 1980 version of the rule. Practice likewise varied.

A substantial body of federal case law developed during these twenty years regarding access to, and use of, discovery material. These cases included a United States Supreme Court ruling and numerous decisions in the lower courts. Three major themes defined the debate: claims of access based upon the First Amendment, the common law, and the Federal Rules. Courts discussed these themes in a nuanced and careful way, often reaching conflicting results. The following sections follow these three threads.

1. First Amendment Right of Access

In *In re Halkin*,[218] the D.C. Circuit held that a trial court protective order barring dissemination of approximately three thousand pages of CIA and NSA information operated as a

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main. Only the latter materials would be subject to the common-law right to inspect and copy, a general right recognized in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597-99, 98 S. Ct. 1306, 1311-12, 55 L.Ed.2d 570 (1978)." *Id.* at 347.

215. *Id.* at 347.

216. *Id.*

217. *See supra* notes 109–147 and accompanying text. The public controversy over this seemingly technical change reflects the importance attached, at least then, to public access to pretrial discovery.

218. *In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979).

prior restraint, violating the First Amendment.[219] In addition to the usual considerations for issuance of a protective order, a court "must take account of the important public interests in the functioning of the discovery process, and the unique characteristics of that process, as well as the First Amendment interest in unfettered expression."[220] The district court's order was "seriously infirm," because it had "made no evaluation of the First Amendment interests at stake."[221]

In *Seattle Times Co. v. Rhinehart*,[222] the Supreme Court overruled *Halkin*'s First Amendment conclusions. Rhinehart, a founder of an unusual religious organization called the Aquarian Foundation,[223] filed suit against the *Seattle Times* based on published articles which allegedly subjected him to "public scorn, hatred and ridicule."[224] In the course of discovery, the defendant newspaper sought information from Rhinehart that included tax returns and lists of members of, and donors to, the Aquarian Foundation.[225] Rhinehart resisted disclosure of this information and sought a protective order.[226] The paper opposed the protective order on First Amendment grounds because it intended to "continue publishing articles about [Rhinehart.]"[227] The trial court prohibited publication or dissemination of the discovered material under Rule 26(c) of the state rules.[228] The *Seattle Times* appealed.[229]

Recognizing the "unique position that such orders occupy in relation to the First Amendment,"[230] the Supreme Court first determined that a protective order does not present "the kind of classic prior restraint that requires exacting First Amendment scrutiny."[231] Protective orders further a "substantial government interest," namely the court's support and con-

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219. *Halkin*, 598 F.2d at 185 ("A judicial order restraining speech casts the judge in a role comparable to that of a censor.").
220. *Id.* at 191.
221. *Id.* at 196.
222. Seattle Times Co. v. Rhinehart, 467 U.S. 20 (1984).
223. *Id.* at 22. It held beliefs in life after death and contacting the dead through mediums. Rhinehart was the primary medium. *Id.*
224. *Id.* at 23.
225. *Id.* at 24.
226. *Id.* at 25.
227. *Id.*
228. *Id.* at 27.
229. Rhinehart v. Seattle Times, Co., 654 P.2d 673 (Wash. 1982).
230. Seattle Times Co. v. Rhinehart, 467 U.S. 20, 34 (1984).
231. *Id.* at 33.

trol over liberal discovery and the prevention of abuse of the discovery process.[232] "[W]here, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), 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."[233] As a result, no unconstitutional "prior restraint" is created when a trial court specifically evaluates individual private interests and issues a protective order.[234] It was thus clear that despite public filing of discovery, a court may make an individual determination to keep discovered material sealed. At the same time, the Court recognized that parties also 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."[235]

2. A Presumptive Common Law Right of Access

During 1980–2000, the "common law" right of access to discovery information was increasingly seen by courts as independent of the First Amendment. Courts routinely used a balancing test assessment of whether the common law right provided third-party access, despite various other factors that would otherwise have placed the information out of reach.[236]

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232. *Id.* at 35.

233. *Id.* at 37. The plaintiffs had submitted evidence of threats and harassment. *Id.* at 26. This was more than sufficient proof to warrant protection from further dissemination. *Id.* at 37. Justice Powell, a long-time opponent of broad discovery, wrote that "pretrial depositions and interrogatories are not public components of a civil trial" and emphasized that trial courts may control discovery as well as trial. *Id.* at 33 & n.19.

234. *Id.* at 33. The Court also commented on the impact of the filing requirement:

> Jurisdictions that require filing of discovery materials customarily provide that trial courts may order that the materials not be filed or that they be filed under seal. Federal district courts may adopt local rules providing that the fruits of discovery are not to be filed except on order of the court. Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court.

Id. at n.19 (internal citations omitted).

235. Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 780 (1st Cir. 1988) (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31–36 (1984)).

236. Such as protective orders, assertions of attorney-client privilege, and the

Often, the dispute arose following the filing and sealing of the discovered information.

For instance, in *West Virginia v. Moore*,[237] the State sought "civil recovery for certain alleged corrupt acts" from former state governor Arch Moore[238]. The former governor was deposed twice and the case was settled. After settlement, a newspaper and the Associated Press intervened seeking access to the depositions.[239] The court found that the depositions themselves had never been filed, and thus were not judicial documents subject to a right of access.[240] However, regarding the excerpts filed under seal with motions, the court granted access holding that they could only remain under seal "if countervailing interests heavily outweigh the public's interest in access."[241]

Similarly, in *Hagestad v. Tragesser*, the Oregon State Bar sought access to sealed records, including a deposition, regarding Hagestad's allegations of sexual abuse against an attorney, Tragesser.[242] The case had been settled. The State Bar, maintaining its own disciplinary action, argued that the "district court abused its discretion by sealing its file and, thus, denying the State Bar access to the court's records."[243] The Circuit court did not evaluate the matter simply by determining whether the sealing order met the good cause standard under Rule 26. Instead, the court addressed the strong presumption of access that attaches to judicial documents, describing a separate balancing approach that begins with a presumption of access and weighs the "public interest in understanding the judicial process" against "whether disclosure of the material could result in improper use of the material."[244] Further, "the district court must base its decision on a compelling reason and articulate the factual basis for its ruling."[245]

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work product doctrine.

237. 902 F. Supp. 715 (S.D. W.Va. 1995).

238. *Id.* at 716.

239. *Id.*

240. *Id.* at 717.

241. *Id.* at 718 (quoting Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988)).

242. 49 F.3d 1430, 1431–32 (9th Cir. 1995).

243. *Id.* at 1434.

244. *Id.* (quoting EEOC v. Erection Co., Inc., 900 F.2d 168, 170 (9th Cir. 1990)).

245. *Id.* The circuit court remanded the case, directing the district court to make findings in support of sealing the record. *Id.* at 1435. *See also In re* Perrigo Co., 128 F.3d 430, 440 (6th Cir. 1997) (denying access to an internal investigative

a. Determining What Is a Judicial Document

During 1980–2000, the common law right increasingly came to be characterized as the right to "judicial documents," a term subject to varying definitions across the federal courts. Numerous cases routinely describe the right of access as a "pervasive . . . right to inspect and copy public records and documents, including judicial records and documents."[246] This right, "which antedates the Constitution . . . is now beyond dispute."[247] But what defines a "judicial document?" The circuit courts developed a series of inconsistent answers to this question.[248] If a document was in fact filed, it was publicly available.[249]

One court summarized the split among the circuits regarding the "judicial document" definition as follows:

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report prepared by a corporation because there were "myriad" laws and regulations regarding corporate reporting and the public had alternative means of accessing the information).

246. Leucadia, Inc. v. Applied Extrusion Tech., Inc., 998 F.2d 157, 161 (3d Cir. 1993) (internal quotations omitted); *see also* San Jose Mercury News, Inc. v. U.S. Dist. Court-N. Dist. (San Jose), 187 F.3d 1096, 1102–03 (9th Cir. 1999); Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 945 (7th Cir. 1999); United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 780–81 (3d Cir. 1994); FTC v. Standard Fin. Mgmt Corp., 830 F.2d 404, 408 (1st Cir. 1987); *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987); Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986); Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc., 800 F.2d 339, 343 (3d Cir. 1986); Brown & Williamson Tobacco Corp. v. FTC, 710 F.2d 1165, 1177–78 (6th Cir. 1983).

247. Leucadia, 998 F.2d at 161 (internal quotations omitted).

248. *See* Doe v. Blue Cross Blue Shield of Md., 103 F. Supp. 2d 856, 857 n.1 (D. Md. 2000) (noting that "the consensus among other Courts of Appeal is that the documents must in some way have been filed with the court"). The Doe court further found that "[a]ny party, or the public at large, may of course seek access to documents filed with the Court." *Id.* at n.2. Other courts, on the other hand, held that material becomes a judicial document "when a court uses it in determining litigants' substantive rights." West Virginia v. Moore, 902 F. Supp. 715, 717 (S.D. W.Va. 1995) (quoting *In re* Policy Mgmt. Sys. Corp., Nos. 94-2254 & 94-23411995, WL 541623 (4th Cir. Sept. 13, 1995)); *see also* Cryovac, 805 F.2d at 13 ("[T]he common law presumption does not encompass discovery materials. The courts have not extended it beyond materials on which a court relies in determining the litigants' substantive rights.").

249. Doe, 103 F. Supp. 2d at 857. In *Doe*, the parties conducted a significant amount of discovery without filing the documents with the court; the effect of the court's decision was that the intervenors were not permitted access to 20,000 pages that had been exchanged but not filed. *Id.*

> Some circuits adopt the view that any document on file with the court is a judicial document. Other circuits take the view that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to right of public access;" rather, the document must be "relevant to the performance of the judicial function and useful in the judicial process." [250]

b. Stage of the Proceeding

The "judicial document" determination (and consequently the right of access under the common law approach) was increasingly described in terms of the stage of the proceeding and the use made of the discovery information. Some courts concluded that the production of discovery, even absent any filing with the court, produced a "weak" right of access which, by the time information was submitted with dispositive motions, was a strong right. Other courts based their "judicial document" finding on the "technical" question of simply whether the material had been filed.[251]

Courts in the D.C. Circuit defined a judicial document according to "the role it plays in the adjudicatory process."[252] Others described the common law right of access as subject to variable strength, based on its particular use in adjudication.[253] On the other hand, in *In re Adobe Systems*,[254] the dis-

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250. *Moore*, 902 F. Supp. 2d at 717 (internal citations omitted).

251. *See, e.g.*, *Pansy*, 23 F.3d at 782.

252. *In re* Application of A.H. Belo Corp., 66 F. Supp. 2d. 47, 48 (D.D.C. 1999) (citing United States v. El-Sayegh, 131 F.3d 158, 163 (D.C. Cir. 1997)).

253. Cumberland Packing Corp. v. Monsanto Co., 184 F.R.D. 504, 505 (E.D.N.Y. 1999).

> [A] "judicial document" [is] material filed with the court that is "relevant to the performance of the judicial function and useful in the judicial process." How strong a "presumption of access" is accorded a document will vary with its role in the adjudicatory process. Evidence introduced at trial is given an "especially strong" presumption of access. Likewise, a document submitted as the principal basis for a dispositive motion is given a strong presumption. . . . Documents that play no role in the performance of Article III functions, such as materials exchanged during discovery, are given no presumption of access.

Id. (internal citations omitted); *see also* SEC v. Thestreet.com, 273 F.3d 222 (2d Cir. 2001). The case, decided after the 2000 amendment to Rule 5(d) balancing, described the basic approach:

> [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

trict court, relying on *Brown & Williamson Tobacco Corp. v. FTC*,[255] stated that the Sixth Circuit also holds that a "public right of access attaches when a document is filed."[256] The court described a continuum of access rights, noting the presumption of access is "weakest regarding documents produced by a party or witness *but not filed with the court.*"[257] The presumption is "stronger" when documents are filed, "stronger yet" when relied upon in a dispositive motion, and "strongest" when used in evidence at trial.[258]

3. Access Based on the Federal Rules

Though a "common law" rationale was often applied, cases decided between 1980–2000 also included discussion of a presumption of access to discovery material created by the combination of the Rule 5(d) filing requirement and the Rule 26 good cause provision. Courts, not surprisingly, recognized that the rules may both create access and deny or limit it. Consequently, though noting the presumption for access, courts typically decided whether a Rule 5(d) right existed on the basis of whether the protective order was properly granted according to Rule 26(c). When no such protective order was in place, Rule 5 alone provided access.

This was the conclusion in the leading case discussing the right of access under the FRCP. In *In re "Agent Orange,"*[259] a

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> filed by a party seeking action by the court, or, indeed, than any other document which is presented to the court to invoke its power or affect its decisions."

Id. at 232 (quoting United States v. Amodeo, 71 F.3d 1044, 1050 (2d Cir. 1995)) (emphasis in original). The testimony in question "did not directly affect an adjudication nor does it significantly determine litigants' substantive rights. To this extent, the documents are similar to material related to settlement discussions and documents, which we have concluded do not carry a presumption of public access." *Id.* at 233 (internal quotations and citations omitted).

254. *In re* Adobe Sys., Inc. Sec. Litig., 141 F.R.D. 155 (N.D. Cal. 1992).

255. 710 F.2d 1165 (6th Cir. 1983).

256. *In re* Adobe Sys., 141 F.R.D. at 160.

257. *Id.* at 157 (emphasis added).

258. *Id.* at 157–58.

259. *In re* "Agent Orange" Product Liability Litigation, 104 F.R.D. 559, 568 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139, 145–46 (2d Cir. 1987); *see also In re* Coordinated Pretrial Proceeding in Petroleum Products Antitrust Litigation, 101 F.R.D. 34, 41 (C.D. Cal. 1984) (noting that the rules create a right "as to filed documents that have never been submitted into evidence, read into the record or submitted in connection with a pretrial motion" but that "the public access interest is rela-

class of Vietnam veterans brought a product liability action against private and governmental defendants.[260] Judge George C. Pratt entered an order permitting the private defendants to file under seal any records containing "confidential developmental, business, research or commercial information."[261] A blanket order with respect to all documents and depositions in the case was then entered by the special master overseeing discovery, who found good cause for his order based upon the case's "complexity," "emotionalism," and the "number of documents yet to be reviewed."[262] Government documents, including medical records, were made subject to a separate order.[263] The court ordered a partial lifting of the protective orders based upon the use of portions of the discovery material in summary judgment motions.[264] The court then treated what it referred to as "the raw fruits of discovery,"[265] concluding that the federal rules presumptively make discovery open, subject only to the Rule 26 good cause standard.[266] Rule 5(d) mandates that all discovery material be filed with the court unless the court orders otherwise because "such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally."[267] No good cause had been demonstrated, and the material was released.[268]

Similarly, in *In re Consumers Power Co.*, the court provided a thorough discussion of Rule 5(d), shortly after the 1980

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tively weak and is grounded only in the Federal Rules—it does not derive from either the first amendment or the common law").

260. *In re* "Agent Orange" Product Liability Litigation, 818 F.2d 145, 148 (2d Cir. 1987).

261. *In re* "Agent Orange," 104 F.R.D. at 563.

262. *Id.*

263. *Id.*

264. *Id.* at 564.

265. *Id.* at 565.

266. *Id.* at 567.

267. FED. R. CIV. P. 5(d) (1982) advisory committee's note (Rule 5(d) amended 1991 & 2000). "Of course, federal district courts may adopt local rules that direct the parties *not* to file discovery materials except on order of the court. . . . Thus, both Rule 26(c) and Rule 5(d) require that discovery is presumptively open to public scrutiny unless a valid protective order directs otherwise." *In re* "Agent Orange," 104 F.R.D. at 568 (emphasis in original).

268. Some of the protective orders were entered on the basis of factors that are not part of the Rules definition of good cause (i.e. "complexity," "emotionalism," and the "number of documents yet to be reviewed"). *In re* "Agent Orange," 104 F.R.D. at 563.

amendment.[269] The court noted that "a deposition is a public document freely open to inspection after it is filed with the clerk."[270] Recognizing that the 1980 amendments to Rule 5(d) permitted the court to preclude filing, and the local rules merely delayed filing, the court stated that the local rules were intended to address "serious problems of storage" and not to "reduce third party access to pretrial discovery."[271]

> The Advisory Committee Notes acknowledge the interests of those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally. Accordingly, this amendment and a change in Rule 30(f)(1) continue the requirement of filing. . . .[272]

In *Public Citizen v. Liggett Group, Inc.*,[273] another widely cited case, access to discovery information was sought to discovery materials not previously designated as confidential. The court equated the filing requirement of Rule 5(d) with the right of access and discussed contrary local rules:

> Under Local Rule 16(g), the parties to this case were . . . excused from filing discovery materials in court. The effect of this nonfiling was to deny the public the right it would oth-

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269. *In re* Consumers Power Co. Sec. Litig., 109 F.R.D. 45, 50 (E.D. Mich. 1985). The court, as in many cases, granted the press standing to intervene for the purpose of seeking access. *Id.* at 51.

270. *Id.* at 50.

271. *Id.* (internal quotation omitted).

272. *Id.* (internal quotation omitted); *accord* Leary v. Geoghan, Nos. 99-0371 & 99-1109, 2001 WL 1902393 at *6 (Mass. Super. Nov. 26, 2001).

> As discussed earlier in this decision, Rule 5(d)(1) of the Massachusetts Rules of Civil Procedure specifically requires parties to file Rule 33(a) and Rule 36 discovery. Rule 5(d)(2) provides that depositions and Rule 34 discovery will not be filed unless the court otherwise orders. The purpose of Rule 5(d)(2) is not to imbue a party with a general privilege of non-disclosure of depositions and Rule 34 discovery, but rather was enacted for administrative purposes only—namely, to ease the paper storage burden in the offices of the clerks of courts. The plain language of Rule 5(d)(2) makes it abundantly clear that the storage space problems should not trump the right of the public to request that depositions and Rule 34 discovery be filed. In fact, the rule provides that a citizen may request, and the court should consider, whether depositions and Rule 34 discovery should be filed in all public case files, not in just a particular case.

Id.

273. 858 F.2d 775 (1st Cir. 1988).

> erwise have had to inspect freely the discovery materials in this case, because the materials were not kept in any publicly accessible location. . . . 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.[274]

Because the case had settled, court was without jurisdiction to require the parties to file discovery material sought by the intervenors,[275] but the court permitted them to seek modification of the protective order based on the presumption of access arising solely from Rule 26(c).[276] If good cause was not shown, the discovery material may be open for inspection by anyone. Any other result would negate the clear Rule 26 requirement for a protective order.[277]

San Jose Mercury News, decided on the eve of the 2000 amendment to Rule 5(d), expressly found the federal rules-based right sufficient to unseal discovery material protected by stipulation of the parties.[278] The district court permitted dis-

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274. *Id.* at 780 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 31–36 (1984)).

275. *Id.* at 781.

276. *Id.* at 789.

277. *Id.* (citing *In re* "Agent Orange" Product Liability Litigation, 821 F.2d 139, 145–46 (2d Cir. 1987). United States v. Hooker Chem. & Plastics Corp., 90 F.R.D. 421, 426 (W.D.N.Y. 1981), echoed this.

> Use of the discovery fruits disclosed in one lawsuit in connection with other litigation, and even in collaboration among plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure. . . . We perceive no intention in the Federal Rules that incidental benefits of liberal federal discovery should not accrue to litigants in state courts who are pursuing ancillary lawsuits, provided there is no attempt to exploit the federal litigation discovery process *solely* to assist litigation in a foreign forum.

Id. *See also* United States *ex rel.* Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co., 944 F.2d 1149, 1158–60 (3d Cir. 1991) (holding that federal rules create presumption of access to civil discovery materials sufficient to satisfy False Claims Act provision barring *qui tam* actions based on publicly disclosed information); Wilk v. Am. Med. Ass'n, 635 F.2d 1295, 1299 (7th Cir. 1980); Am. Tel. & Tel. Co. v. Grady, 594 F.2d 594, 597 (7th Cir. 1978); Doe v. William Shapiro, Esquire, P.C., 852 F. Supp. 1256, 1257 (E.D. Pa. 1994) ("The filing of a document with the court gives rise to a presumptive right of public access."); *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34, 38–41 (C.D. Cal. 1984).

278. San Jose Mercury News, Inc. v. U.S. Dist. Court-N. Dist. (San Jose), 187 F.3d 1096, 1103 (9th Cir. 1999). The case involved a sexual harassment suit brought by two Mountain View, California, female police officers. The defendants conducted an investigation of the claim and after the suit was brought resisted

covery of defendants' internal report and also entered a protective order, stipulated by the parties, apparently without a showing of good cause.[279] After granting intervention, the appellate court acknowledged the newspaper's right of access based on the federal common law, and the Federal Rules of Civil Procedure; however, the court left the issue of whether the First Amendment was applicable to a prejudgment right of access to court records for another day.[280]

"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."[281]

D. From 2000–2006

While decisions during the period from 1980 through 2000 often considered the right of access under three separate rationales—the First Amendment, the FRCP, and the common law—after 2000 this discussion has been largely displaced. The opportunity to examine pretrial information is increasingly constricted.

Following *Seattle Times*, a First Amendment claim has no greater deference than the Rule 26(c) standard for granting a protective order.[282] Courts also concluded that the 2000 amendment's elimination of the filing requirement under Rule 5(d) did away with any claim based on that rule. For instance, in *Securities and Exchange Commission v. Thestreet.com*,[283] the court held that there was no presumption of filing all discovery materials or public access to materials that were not filed.[284]

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disclosure of the report. *Id.* at 1098.

279. *Id.* at 1098, 1103.

280. *Id.* at 1102. "We have expressly recognized that the federal common law right of access extends to pretrial documents filed in civil cases . . . Other circuits have expressly recognized that the common law right reaches documents filed in connection with motions for summary judgment." *Id.* (internal citations omitted).

281. *Id.* at 1103 (internal citations omitted). The court remanded the case to the district court to determine the propriety of the intervention. *Id.*

282. *See supra* text accompanying notes 221–31.

283. 273 F.3d 222 (2d Cir. 2001).

284. *Id.* at 233, n.11. Further, the court stated that "the rule now *prohibits* the filing of certain discovery materials unless they are used in the proceeding or the court orders filing." *Id.* (emphasis in original).

To the contrary, Rule 5(d) now prohibited filing discovery materials in most instances.[285]

Similarly, in *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*,[286] the circuit court criticized the trial court's conclusion that documents filed with the court are judicial records and subject to access by the press.[287] Notwithstanding that access to discovery material in the *Bridgestone/Firestone* litigation was sought in the district court prior to the 2000 amendment to Rule 5(d), the court concluded the filing requirement created no right of access.[288] "The prospect of all discovery material being presumptively subject to the right of access would likely lead to an increased resistance to discovery requests."[289] Although an argument can still be made that, absent a judicially-created protective order, discovery material is still open, that position appears weak.

Cases after 2000, however, still grapple with various common law presumptions regarding access. Courts note that no presumption of access attaches to documents merely produced during discovery or used only with non-dispositive pretrial motions; such material is now not considered a "judicial document," and consequently is not subject to the common law presumption of access.[290] For instance, in *Thestreet.com* the court stated that:

> The Confidential Testimony is deposition discovery material, which we have concluded are documents that play no role in the performance of Article III functions. The testimony did not directly affect an adjudication nor does it significantly determine litigants' substantive rights. To this extent, the documents are similar to material related to settlement discussions and documents, which we have concluded do not carry a presumption of public access.[291]

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285. *Id.*
286. 263 F.3d 1304 (11th Cir. 2001).
287. *Id.* at 1312.
288. *Id.*
289. *Id.* at n.10.
290. *See, e.g.*, Phillips v. Gen. Motors Corp., 307 F.3d 1206, 1213 (9th Cir. 2002); Gulino v. Bd. of Educ. of City School Dist. of City of New York, No. 96 Civ. 8414 (CBM), 2003 WL 1878235, at *2 (S.D.N.Y. 2003) ("'Judicial documents,' . . . are items filed with the court that are relevant to the performance of the judicial function and useful in the judicial process.").
291. SEC v. Thestreet.com, 273 F.3d 222, 233 (2d Cir. 2001) (internal citations

The rise of agreed-upon "umbrella" protective orders, in conjunction with local rules excusing filing, has left significant amounts of material both under seal and un-filed.[292] Third-party access is increasingly available only upon intervention under Rule 24. In these circumstances, a good cause determination with respect to a specific document is not made until someone challenges the arrangement, and material is never filed until the case is subject to at least pre-trial motions. Third-parties, consequently, have few means other than knowledge of the action itself and their own speculation to discern whether information of public importance is being generated by a case.

The Manual for Complex Litigation provides a clear description of the procedures employed:

> Umbrella orders provide that all assertedly confidential material disclosed (and appropriately identified, usually by stamp) is presumptively protected unless challenged. Such orders typically are made without a particularized showing to support the claim for protection, but such a showing must be made whenever a claim under an order is challenged.[293]

If such material were both filed with the court and "protected" by virtue of nothing more than the parties own use of a stamp, the requirements of Rule 26(c) are effectively ignored. But the litigation most likely to include voluminous discovery and consequently a willingness to permit the parties to exchange usually thousands of documents "under seal" without court involvement will often be that in which the public interest is the highest.

Bridgestone/Firestone illustrates this conundrum. "[I]n what has become commonplace in the federal courts, the parties stipulated to a protective order allowing each other to designate particular documents as confidential and subject to pro-

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and quotations omitted). In denying access to material submitted with only pre-trial motions in *Phillips*, the Ninth Circuit stated that "it makes little sense to render the district court's protective order useless simply because the plaintiffs attached a sealed discovery document to a nondispositive sanctions motion filed with the court." 307 F.3d at 1213.

292. After 2000, this situation became the norm under amended Rule 5(d). FED. R. CIV. P. 5(d) (2000).

293. FED. JUD. CTR., MANUAL FOR COMPLEX LITIG. § 11.432 (4th ed. 2004).

tection under Federal Rule of Civil Procedure 26(c)7."[294] Discovery in the case was not filed in accord with the court's local rules.[295] The press (including the *Washington Post*, *Los Angeles Times*, and CBS Broadcasting) intervened under Rule 24 for the purpose of seeking access to materials obtained in discovery.[296] Here, however, every document produced in discovery had been submitted to the court in conjunction with pre-trial motions.[297]

The Eleventh Circuit reversed the district court conclusion that "because the documents were filed with the court they are judicial records and therefore subject to the common-law right of access."[298]

> Such an approach does not distinguish between material filed with discovery motions and material filed in connection with more substantive motions. . . . 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. This means that the Firestone documents filed in connection with motions to compel discovery are not subject to the common-law right of access.[299]

Conversely, where pretrial material is submitted with a dispositive motion, the presumption favors access. In *Lugosch v. Pyramid Company of Onondaga*,[300] the appellate court described such discovery material as subject to the "highest" presumption of access.[301] In reversing the district court, the circuit court held that the availability of such documents is presumed upon filing; it was not proper for the district court to hold resolution of the access decision in "abeyance" pending the resolution of the summary judgment motion.[302] While *Lugosch*

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294. Chicago Tribune, Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1307 (11th Cir. 2001).
295. *Id.* at 1308 (citing S.D. Ga. L.R. 26.6).
296. *Id.*
297. *Id.* at 1312. The court found it "significant" that the material had been submitted with these motions entirely by the plaintiffs, and not at all by Firestone. *Id.*
298. *Id.*
299. *Id.* at 1312–13.
300. 435 F.3d 110 (2d Cir. 2006).
301. *Id.* at 123.
302. *Id.* at 126. The court further refused to conclude that documents submit-

allowed access to material when used to support a judicial determination on the merits of a case, even this has been narrowed in other cases. Some courts have looked to whether the summary judgment motion was denied, thereby postponing the merits decision of the case, and concluded that in such instances the presumption is not as strong.[303]

Even more restrictively, the Second Circuit established a "general and strong presumption against access to documents sealed under protective order when there was reasonable reliance upon such an order" in *Thestreet.com*.[304] The court reached this conclusion despite the fact that the protective order in this case was a privately agreed upon umbrella order lacking any judicial determination of good cause.[305] This suggests that private parties, in furthering their own interests, may bar public inspection.

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ted with a summary judgment motion might receive different weights of presumption "based on the extent to which they were relied upon in resolving the motion." *Id.* at 123 (citing *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig., 101 F.R.D. 34, 43 (C.D. Cal. 1984)) ("If the rationale behind access is to allow the public an opportunity to assess the correctness of the judge's decision . . . documents that the judge *should* have considered or relied upon, but did not, are just as deserving of disclosure as those that actually entered into the judge's decision."). *See also id.* (citing FTC v. Standard Fin. Mgmt. Corp., 830 F.2d 404, 409 (1st Cir. 1987)) ("Once those submissions come to the attention of the district judge, they can fairly be assumed to play a role in the court's deliberations.").

303. *See In re* NBC Universal Inc., 426 F.Supp. 2d. 49, 53-54 (E.D.N.Y. 2006) (quoting United States v. Amodeo, 71 F.3d 1044, 1049 (2d Cir. 1995) ("Where a district court denied the summary judgment motion, essentially postponing a final determination of substantive legal rights, the public interest in access is not as pressing.")); United States v. Graham, 257 F.3d 143, 151 (2d Cir. 2001) ("Conversely the presumption of access to documents that do not serve as the basis for a substantive determination-such as documents submitted on a motion for summary judgment which is denied, thus leaving a decision on the merits for another day-is appreciably weaker.").

304. SEC v. Thestreet.com, 273 F.3d 222, 231 (2d Cir. 2001). *See also* Bayer AG and Miles, Inc. v. Barr Labs., Inc., 162 F.R.D. 456, 461 (S.D.N.Y. 1995) (quoting Palmieri v. New York, 779 F.2d 861, 866 (2d Cir. 1985)); Crothers v. Pilgrim Mortgage Corp., No. 95 CIV. 4681(SAS), 1997 WL 570583, at *5 (S.D.N.Y. Sept. 11, 1997) ("[T]he *Martindell* standard should not apply where a private non-party asserts its own interests to modify a sealing order for at least two reasons.").

305. *TheStreet.com*, 273 F.3d at 225 ("Under the October 2000 Order, each party had the right to designate material as 'confidential information' if it believed in good faith that the material should be so classified."). While the court recognized the potential for conflicting presumptions when a party "reasonably relies" on discovery material subject to a protective order but later attaches it to a dispositive motion, it avoided this issue, concluding that the parties in this case had not reasonably relied on the protective order. *Id.* at 234.

Other courts, however, have not gone this far. In *Diversified Group v. Daugerdas*,[306] the media sought access to documents, including deposition testimony, submitted under seal by both sides in support of and opposing summary judgment motions.[307] The defendants objected to granting access to the material. The court disagreed, holding that when the materials are submitted to the Court for making a judicial determination the presumption regarding discovery materials shifts.[308]

A comparable exception to denying access has been carved out for similarly situated parallel litigants, traditionally allowed access to pretrial information. In *In re Enron Corporation Securities, Derivative & "ERISA" Litigation*,[309] the court dealt with access presumptions in light of modern electronic filing methods. Enron-related cases were consolidated under the Multi-District Litigation transfer statute, which included the establishment of a litigation website (the "ESL" website), accessible only by parties to the case and which served as an electronic repository of "depositions and related exhibits."[310] The Texas State Board of Public Accountancy, charged by statute with "investigating alleged audit failures that may have led to Enron's collapse" moved to intervene in the case to gain access to discovery material after "some accountants . . . refused to provide . . . copies, based on the Court's confidentiality orders."[311] The court noted that pretrial discovery material carries no presumption of access and that the parties had relied upon the court's standing orders regarding the confidentiality of material on the ESL website.[312] Nor had the documents sought by the Texas board been filed with the court or submitted to the court in support of motions or rulings by the court.[313] Intervention by the Texas board, which would have the effect of granting the Board access to the ESL website and consequently

306. 304 F. Supp. 2d 507 (S.D.N.Y. 2003).
307. *Id.* at 510.
308. *Id.* at 515 (citing Byrnes v. Empire Blue Cross Blue Shield, No. 98 Civ. 8520 BSJ MHD, 2000 WL 60221, at *5 (S.D.N.Y. Jan. 25, 2000) (noting an exception to the rule regarding the presumption that attaches to discovery documents where the documents are included in summary judgment motion papers submitted to the court) ("Moreover, the Court relied upon all the materials submitted to it in rendering its opinion on the summary judgment motion.")). *Id.*
309. 229 F.R.D. 126 (S.D. Tex. 2005).
310. *Id.* at 128.
311. *Id.*
312. *Id.* at 128–29.
313. *Id.* at 128, n.5.

all depositions in the case, was granted because a more "flexible" approach regarding intervention was required.[314] "[T]he fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public."[315] Consequently, the Board was granted access by virtue of intervention.[316] However, while the Texas Board was permitted to intervene as parallel litigants, the board was also made subject to the existing confidentiality orders, essentially continuing to shield the information from any general public access.[317]

In *Foltz v. State Farm Mutual Auto. Insurance Co.*,[318] the district court had sealed the files and removed the entire litigation from the court's computer system.[319] The circuit court addressed the motions for access by third parties, including a public interest group, contesting two protective orders.[320] One protective order was a privately agreed upon blanket order treating all discovery material as confidential.[321] The appellate court remanded, instructing the district court to "require State Farm to show good cause under Federal Rule of Civil Procedure 26(c) for continuing protection against the collateral litigants of materials produced in discovery but not made part of the court record."[322]

CONCLUSION

Beginning in 1991, Rule 5 authorized district courts to adopt local rules permitting filing by fax.[323] In 1993, the rule was amended to allow filing by any electronic means, not just fax.[324] Early on, few courts authorized electronic filing.[325] The

314. *Id.*at 131.
315. *Id.* at 131 (quoting San Jose Mercury News, Inc. v. U.S. Dist. Court N. Dist. (San Jose), 187 F.3d 1096, 1103 (9th Cir. 1999)).
316. *Id.*
317. *Id.*
318. 331 F.3d 1122 (9th Cir. 2003).
319. *Id.* at 1128.
320. *Id.* at 1138. The first order concerned "the very narrow issue of whether plaintiff's counsel should be disqualified." *Id.* The court upheld the order, recognizing that the material was subject to the attorney-client privilege and stating that "[w]e see no conceivable policy reason to serve up such information on a silver platter." *Id.*
321. *Id.*
322. *Id.* at 1139.
323. FED. R. CIV. P. 5(e) (1992); 1 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 5.31[1][b] (Matthew Bender 3d ed. 2005).
324. FED. R. CIV. P. 5(e) (2000).

federal courts are now rapidly being equipped with technology that can accommodate electronic filing.[326] Effective December 2006, Rule 5 was amended to authorize electronic filing of all papers.[327]

The Advisory Committee commented on this change: "Amended Rule 5(e) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing."[328]

The Case Management/Electronic Case Files ("CM/ECF") system gives federal courts the ability to maintain electronic case files and offer electronic filing of court documents.[329] This system allows both attorneys and the public to view court dockets and case files online.[330] Each court determines for itself to whom it will issue filing logins and passwords.[331] Although individuals may not be allowed to file on CM/ECF, they may still be able to view CM/ECF files through the Public Access to Court Electronic Records ("PACER") program.[332] However, some courts restrict online viewing as well.[333]

The implementation of electronic filing in the federal courts produces marked advantages over paper filing.[334] Elec-

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325. MOORE ET AL., *supra* note 322, § 5.31[2][a].

326. *Id.*

327. *Supreme Court Approves Rule Changes on E-Discovery, Unpublished Opinion Citation*, 74 U.S. L. WK. 2617 (2006).

328. *See* Proposed Amendments to the Federal Rules of Civil Procedure, http://www.uscourts.gov/rules/comment2005/CV_Rule_5e.pdf (last visited Feb. 18, 2007). On April 12, 2006, the U.S. Supreme Court submitted amendments to the Federal Rules of Civil Procedure to Congress. *See* http://www.supremecourt us.gov/orders/courtorders/frcv06p.pdf (last visited Feb. 18, 2007).

329. CM/ECF Frequently Asked Questions, www.uscourts.gov/cmecf/cmecf_ faqs.html (last visited Feb. 18, 2007).

330. *Id.*

331. *Id.*

332. *Id.*

333. MOORE ET AL., *supra* note 8, § 5.31[7][c]. Courts do not have to make files available online, as long as the public is able to physically access records from the courthouse. *Id.* § 5.34[3][d].

334. LEONIDAS MECHAM, ADMIN. OFFICE OF THE U.S. COURTS, ELECTRONIC CASE FILES IN THE FEDERAL COURTS: A PRELIMINARY EXAMINATION OF GOALS, ISSUES, AND THE ROAD AHEAD 3 (1997) (Discussion Draft), http://www.uscourts. gov/casefiles/ecfmar97.pdf. Problems noted with the paper filing system included the following: paper files are cumbersome to organize, difficult to retrieve quickly, and are subject to the access limitations of normal business hours; paper files are usually only available to one person at a time, limiting the ability of a panel of

tronic filing improves judge, court staff, and public access to case files; decreases court costs through increased productivity and efficiency; reduces physical handling, maintenance, and copying of files; improves docketing, scheduling, case management, and statistical reporting; and enhances accuracy and efficiency in record maintenance.[335] Furthermore, the newly adopted amendments to the civil rules will increase efficiency in the discovery of electronically stored information.[336]

Prior to implementing CM/ECF, the Judicial Conference studied privacy and public access issues relevant to electronic filing. The concern regarding privacy was that court participants would be subject to an increased risk of "identity theft, stalking, and predatory business practices" due to the ease of access and increase in accessible information.[337] To address this concern, the Judicial Conference had its Committee on Court Administration and Case Management examine issues relating to privacy and public access to electronic case files.[338] The committee, through its Subcommittee on Privacy and Public Access to Electronic Case Files, began its study in June 1999 and received information from experts and academics in the privacy arena, as well as judges, clerks, and government agen-

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judges of their clerks to access or work on files at home; and paper files require multiple copies to file, distribute, maintain and store, all of which must be done manually with a risk that files will be lost or misfiled. *Id.*

335. Judge Arthur Monty Ahalt, JusticeLINK, *Prince George's County, Maryland Electronic Filing Pilot*, http://www.ncsc.dni.us/NCSC/TIS/TIS99/CTC6/JudgesSuper/CTC6SuperEfiling.htm (last visited Jan. 17, 2003) (on file with author).

336. *Id.*

337. *Witnesses Advocate Balanced Approach For Federal Courts' Document Access Plan*, 69 U.S. L. WK. 2576 (2001). In 2005, an article analyzed the state of electronic filing in the U.S. federal courts and offered judges advice on handling electronic filing. David K. Isom, *Electronic Discovery Primer for Judges*, 2005 FED. CTS. L. REV. 1, http://www.fclr.org/articles/2005fedctslrev1(noframes).htm. The article addressed the tension between secrecy and public access regarding electronically filed discovery. *Id.* at 30. Isom did not address whether discovery material must be filed; rather, he emphasized that courts must balance the competing interests of secrecy and access. *Id.* at 31. Because of electronic filing, "[l]itigants will be even more reluctant to file information that they know may become instantly accessible and distributable throughout the world. The press, the public and information vendors will also find the information more valuable and useful. Courts will be asked to be the arbiters of these intense competing interests." *Id.*

338. Jud .Conf. Comm. on Court Admin. and Case Mgmt., *Report on Privacy and Public Access to Electronic Case Files* (2001), http://www.privacy.uscourts.gov/Policy.htm [hereinafter Judicial Committee Report].

cies.[339] The subcommittee recommended that documents in civil case files be made available electronically to the same extent that they are available at the courthouse.[340] The Judicial Conference has adopted these recommendations, but they are not binding on the courts.[341] The experience of those courts that have been making their case file information available through PACERNet is that there have been virtually no reported privacy problems as a result."[342] CM/ECF systems are now in use in 89% of federal courts, including 88 of the 94 district courts.[343]

These technological changes make clear that issues about access to pretrial information gathered by discovery should be evaluated on the merits, not on the basis of spurious claims of burden upon clerks' offices. There can be honest disagreement on whether the public should have access to this information. My view is that legitimate concerns about privacy, business interests, and other considerations may be dealt with by federal courts in the same manner as they now routinely handle these issues under protective order requests. Unfortunately, the 2000 amendment to Rule 5(d) has short circuited this debate. We should now move toward reasoned arguments to decide this important question.

339. *Id.*

340. *Id.* However, the subcommittee recommended that Social Security cases be excluded from electronic access and that personal identifiers (such as social security numbers, dates of birth, financial account numbers, and names of minors) be modified or partially redacted. *Id.*

341. About CM/ECF, *supra* note 329.

342. Judicial Committee Report, *supra* note 338.

343. About CM/ECF, *supra* note 329.