

COUNCIL ON COURT PROCEDURES

Minutes of Meeting of October 17, 1992

Oregon State Bar Center
5200 SW Meadows Road
Lake Oswego, Oregon

Present: Susan G. Bischoff Ronald L. Marceau
 Susan P. Graber Michael V. Phillips
 John E. Hart Charles A. Sams
 Lee Johnson William C. Snouffer
 Bernard Jolles Janice M. Stewart
 Henry Kantor Elizabeth Welch
 Winfrid K.F. Liepe

Excused: Richard C. Bemis
 Bruce C. Hamlin
 John V. Kelly

Absent: Richard L. Barron
 William D. Cramer Sr.
 Paul J. DeMuniz
 Lafayette G. Harter
 Richard T. Kropp
 Robert B. McConville

Also present were Maury Holland, Executive Director, and Gilma Henthorne, Executive Assistant. The following were also in attendance: Paul S. Cosgrove, Paul Duden, Phil Emerson, Lynda Gardner, William Gaylord, Phil Goldsmith, Bob Oleson, Chuck Ruttan, Roger Stroup, Charles Tauman, Charlie Williamson, and Larry Wobbrock.

The meeting was called to order by Chair Henry Kantor at 9:45 a.m.

The Chair announced that the meeting was an advertised public meeting and invited those members of the public present to make any statements they wished to make during the meeting.

Agenda Item No. 1: Approval of minutes of meeting held September 26, 1992. Consideration of this agenda item was deferred until the next Council meeting.

Agenda Item No. 2: Proposed amendments to Rule 69 (see memorandum attached to agenda) (Executive Director). The Chair

asked that Maury Holland summarize the background of the proposals with regard to Rule 69. Holland summarized as follows. In a recent letter from Judge Mattison to the Chair, Judge Mattison suggested that the Council might reconsider Rule 69 in light of a situation recently before him. In that situation, a defendant who had received notice of time and date of a trial failed to appear either personally or by counsel and without any excuse. Judge Mattison was prepared to refer the case out for a prima facie hearing, which would have led to the entry of default judgment. However, his attention was called to the 1990 case of Van Dyke in which the Court of Appeals had held in a similar situation that Rule 69 required 10-day written notice to the defendant before default could be entered. Judge Mattison's letter suggested that he regarded that requirement as unnecessary and wasteful. Holland reported that Judge Mattison also said in a telephone conversation with him that the customary practice of trial judges in Oregon, when confronted by situations of this kind, would be to assign the case for prima facie hearing and entry of default judgment with no notice to the defendant. Holland said that his check into the recent history of Rule 69 indicated that the existing notice requirement was added by the Council to Rule 69 A in 1988 at the recommendation of the Practice and Procedure Committee of the OSB. Prior to then, the only notice requirement in Rule 69 was part of 69 B(2) concerning default judgments rather than default orders.

Holland said that the Council now has before it two alternative proposals, one prepared by him (attached to the agenda for this meeting) that would perform some major surgery on Rule 69, and the other prepared by Dennis Hubel (see Mr. Hubel's letter dated October 16, 1992 attached) that would clarify Rule 52 A regarding postponements.

There followed general discussion about how to remedy the problem raised by Judge Mattison, a problem which the Van Dyke opinion indicates has been caused by some staff comment which specifically says that Rule 69, including its notice provision, is intended to cover situations such as this, i.e. where a defendant with notice fails to appear at trial.

Doubt was expressed whether changing the staff comment now would be effective, since such change would not affect the holding in Van Dyke.

Susan Graber expressed her preference for the Hubel approach, which would not deal with Rule 69 but would clarify that under Rule 52 A failure to appear is not good cause for a postponement. Graber added that she would not favor major changes to Rule 69 itself but thought that adding some language that would define "default" as not including a failure to appear might accomplish all that is needed. Jan Stewart suggested that the Council not take further action until Mr. Hubel can report

the outcome of the meeting of the OSB Practice and Procedure Committee on October 24. Win Liepe stated that in his opinion this problem has nothing to do with postponements, and therefore should be dealt with in the context of Rule 69. He suggested possibly adding a new section to Rule 69 dealing specifically with non-appearing parties. John Hart said that in Van Dyke the court's attention might not have been focused on Rule 52 A. Liepe indicated that whatever is done the rule should not force trial judges to hold full-scale trials when there is no need for it. William Snouffer expressed his opinion that Rule 69, not Rule 52, is the correct place to deal with this situation.

There followed a lengthy discussion concerning whether the problem identified by Judge Mattison had to do with scheduling and postponing trials or whether it was in the area of default. Further discussion was had on the question of what the consequences of a default should be and what kind of notice, if any, should be provided to defendants. Charles Sams said that any procedure that would require notice or further delay when a defendant fails to show up at trial would be extremely inefficient and expensive. Several members of the Council expressed doubt as to whether a failure to appear at trial should be considered a default in the same way as failures to plead or file responsive motions. Betsy Welch said that this particular problem is an extremely important one in domestic relations cases and pointed out that in those cases it was much harder to identify one party as the moving party since both parties may be seeking affirmative relief. When the discussion moved into the area of summary judgments, Liepe cautioned that the Council should stick with the specific problem of failures to appear at trial. Hart again noted that he tended to favor simply adding a new section to Rule 69 to deal specifically with this situation on its own terms.

The Chair expressed some concern about adequacy of notice to the Bar if the Council were now to do something substantially different from what was summarized in the September Advance Sheets. The Chair asked whether anyone present would work with Holland to do some redrafts in light of the discussion that had just taken place. Liepe and Snouffer offered to assist, and it was agreed that Mr. Hubel should be invited to participate.

Agenda Item No. 3: Proposed amendments to Rule 36 (Chair). The Chair asked whether all members had received a copy of a memorandum dated October 13, 1992 from Larry Wobbrock, et al (copy of memorandum and proposed amendments to Rule 36 attached to these minutes), on behalf of OTLA, concerning discovery-sharing and also whether everyone had in front of them an alternative proposal (attached to these minutes) prepared by Mike Phillips. Ron Marceau inquired about what the Advance Sheets had said about this topic. Holland responded that no draft amendment was published because none had been adopted by the Council, but

rather, there was a summarization of a procedure which would involve modification of protective orders under circumstances described in the summary.

The Chair reminded everyone that all actions up to this point are tentative and that the inclusion of a particular a topic in the September Advance Sheets would not commit the Council to take action; rather, inclusion of a topic meant merely that the topic remained under consideration.

Mr. Charles Ruttan, Portland, stated that some people concluded from the August 1 negative vote of the Council relating to this issue that the topic had been dropped. Holland noted that he had received quite a few telephone inquiries asking about the status of this issue and stated that his response had been that no specific draft proposal had been approved, in fact one draft had been disapproved, but that his understanding has been that the topic generally remains under consideration.

The Chair then asked Mr. Larry Wobbrock, Portland, to summarize the OTLA proposal and to add his own comments about it. Mr. Wobbrock noted that the earlier negative vote on August 1 occurred many months after the original submission of discovery sharing to the Council took place, and that he had not been present at the August 1 meeting. He added that the present draft proposal included with his memorandum of October 13, 1992 took account of some comments of Graber. Mr. Wobbrock emphasized that this proposal would not make any discovery materials public or available to the press. He said that the purpose was simply to increase efficiency and save costs by authorizing limited sharing of discovery materials. Mr. Wobbrock then introduced Mr. William Gaylord, Portland, to describe his experience in a litigation involving Honda ATVs. He emphasized that the problem with which the current draft would deal arises only in cases where there has been a protective order, because if there is no such order, any party or counsel is free to make whatever use he wants of discovery material. He stated that the question arises typically in mass tort cases where there may be thousands of victims who suffered injuries because of defective product or something of that kind. The policy question is whether it makes sense to require different lawyers for different injured parties who bring suits in various jurisdictions to go to the enormous expense and effort merely to obtain the same information that was obtained in a prior case. He added that protective orders are usually granted because the party seeking them persuades the judge that some of the information has to do with trade secrets or is competitively sensitive. Plaintiffs' lawyers and their clients are not in competition with the manufacturers and distributors who typically obtain protective orders.

Liepe raised a point of order to the effect that much of this presentation was a repetition of the philosophical pros and

cons. Without formally ruling on this point of order, the Chair asked witnesses to avoid repetition of philosophical pros and cons which the Council had heard earlier. Mr. Gaylord concluded his presentation by urging the Council to give close consideration to the proposed amendment to Rule 36 C. He also reminded the Council that it had been provided by OTLA with copious materials regarding developments in other jurisdictions in the area of shared discovery, as well as restrictions on secrecy orders, the latter of which is not part of the proposal before the Council.

Marceau then asked if anyone could respond to his question of what the respective roles of the Council and the legislature might be concerning this issue and also how someone could under their proposal show "good cause." Mr. Wobbrock responded that OTLA is asking the Council to take a modest first step by approving the discovery-sharing provision set forth in the draft proposal because this is a matter clearly having to do with the ORCP. There will also be an approach to the legislature during the coming session on the other issue, which everyone seems to agree goes beyond rules of procedure, having to do with secrecy orders and the like. With regard to the question about "good cause", his understanding of the cases is that it would require a very specific and particularized demonstration of serious competitive injury and not merely a repetition of the factors which led to the original protective order. Mr. Gaylord added that in order to establish good cause, more than competitive sensitivity would be required, and he mentioned as a possible example a case that might include esoteric patents. Mr. Gaylord acknowledged that a fear of being sued by other injured persons would certainly not constitute good cause.

Various members of the Council then addressed several questions to Messrs. Gaylord and Wobbrock.

The Chair then invited any persons who were opposed to the proposal to address their comments to the Council. Mr. Charles Ruttan, Portland, said that he had written a short letter (dated October 12, 1992, attached to these minutes) distributed that morning to the Council. Mr. Ruttan then submitted for the record a Harvard Law Review article dated December 19, 1991 which, he stated, gives a very complete overview of the campaign being conducted by the American Trial Lawyers Association to make fundamental changes in the area of discovery and sealing orders. Mr. Ruttan also called the Council's attention to an earlier letter of Paul Fortino dated June 12, 1992.

Mr. Paul Duden, Portland, commented that in his opinion this issue is substantive rather than procedural. Mr. Duden also raised the question of why discovery materials sought and denied in a litigation in one particular jurisdiction should become available because of sharing of substantially the same materials

that were produced in a parallel litigation in another jurisdiction. He wondered what the point would be of an Oregon judge granting a protective order and perhaps denying a motion to modify that order if substantially the same information could be obtained from a lawyer in a related litigation in another jurisdiction.

Mr. Roger Stroup, Portland, referred to a letter that he had written to some Council members. He stated that protective orders are no longer freely available as they once were, but usually require a very substantial showing in the first instance. He added that sharing discovery might have the effect of nullifying limitations in other states on what is discoverable according to the rules in those states.

Jolles asked what basis exists for resisting shared discovery that is not related to helping a defendant resist litigation. Mr. Duden responded that sometimes what is at stake is sensitive information such as income earned from a particular product or other information that may be discoverable in Oregon because of relevance to punitive damages that might not be discoverable in other states which have different ways of measuring punitive damages.

Mr. Charles Tauman, Portland, took issue with the objections to the proposal on the basis of interference with the laws of other states because such objections presupposed litigation in those states. One benefit of discovery sharing would be to discourage unmeritorious litigation and to encourage settlement of other related claims. He added that there is a popular perception that the American civil justice system is too inefficient and expensive. He expressed the belief that the citizens of Oregon would, if they could vote on this issue, support the discovery sharing proposal because it would avoid unnecessary litigation and also make litigation less expensive. Discovery sharing is consistent with the free flow of information generated in part at public expense.

Mr. Wobbrock responded to concerns about disclosure of information protected by an order that had been agreed to by stipulation. He stated the argument that a plaintiff would have to show a change in circumstances would involve serious inefficiencies for the court.

The Chair then asked members of the Council how they wished to proceed with this matter, pointing out that no motion was on the floor. He asked, in addition, whether the Council preferred to consider the general policy issues with regard to discovery sharing or whether it wanted to focus on a specific draft proposal. Marceau suggested that there be some discussion at the policy level. He expressed concern about the impact of post hoc modifications of protective orders on the willingness of

litigants to disclose information without undue resistance. If lawyers had to tell them that any protective order agreed to or obtained could be set aside unless they could carry a heavy burden of proof of good cause, which has been conceded, is quite difficult. Phillips responded that his alternative proposal addresses this concern by excluding stipulations and focusing only on protective orders that were contested.

Graber moved the adoption of the draft proposal as submitted by Larry Wobbrock. Jolles seconded the motion. Some members of the Council then raised the question of whether, in light of the fact that there had been a previous negative vote on this subject, it would be appropriate to reconsider the matter now and possibly vote to adopt some proposal. The Chair reminded the Council that anything done at this meeting, like anything that is done at any meeting prior to the December meeting of the Council, is tentative and can be reconsidered and revised at any point up to and including the December meeting. He explained that a vote to adopt the current proposal would be essentially a vote to place that matter on the agenda for the December 12th Council meeting. Liepe urged that some sort of vote be taken at this meeting one way or the other. Graber as the maker and Jolles as the seconder of the pending motion agreed to temporarily withdraw it in favor of a motion by Liepe, seconded by Phillips, that the Council consider the issue of shared discovery. The Chair then called for the question on the pending motion. The motion was carried on a vote of 7 in favor and 5 opposed.

The Council then resumed consideration of the prior motion by Graber, seconded by Jolles, that the Council approve the draft proposal submitted by Mr. Wobbrock. Graber stated that she preferred the Wobbrock proposal to the Phillips proposal because the former required that any agreement to be bound by a protective order must be in writing, because the Wobbrock proposal requires notice to the protected party, and because she understood the Wobbrock proposal to mean that a prior agreement to abide by a protective order might be good cause for not later coming in and changing it. She stated that she thought the Wobbrock proposal was a fair compromise between opposing interests. Stewart noted that Graber's interpretation of the Wobbrock proposal as related to modification of stipulated protective orders was not necessarily the same as Mr. Wobbrock's own interpretation. Graber agreed that this might be so, but said that it is the Council's understanding or interpretation that counts. She further stated that she regarded it as very important that, if a stipulation specifically deals with the possibility of the discovering party subsequently coming back and seeking modification of what had been agreed upon in order to engage in discovery sharing, it is essential that that agreement be binding so that it can be relied upon, unless there is good cause in the form of changed circumstances.

The Chair then called the question on the pending motion. The motion carried with 8 votes in favor and 5 opposed.

Agenda Item No. 4: Proposed amendments to Rule 32 (Janice Stewart). The Chair asked members of the Council whether in view of the lateness of the hour, they wished to proceed with consideration of the Rule 32 proposals or defer that discussion until the November meeting. Stewart responded that she would prefer putting the matter over until the November meeting in part because more members might be present. She asked that it be put at the top of the agenda for that meeting, and the Chair agreed that it would be. The Chair also stated that at the November meeting, there would be a discussion of meeting dates during the legislative session.

NEW BUSINESS

Discussion was deferred until another meeting regarding comment letters (attached to these minutes) from the following: Robert A. Browning, letter dated 10-1-92, regarding Rule 7; Judge R. William Riggs, letter dated 10-7-92, regarding Rule 32; Darcy Norville of Oregon Advocacy Center, dated 10-9-91, regarding Rule 32; Kent B. Thurber of Oregon Legal Aid Service, letter dated 10-16-91, regarding Rule 32; William E. Craig, letter dated October 16, 1992, regarding Rule 32; Robert L. Naash, letter dated 9-25-92, regarding Rule 68.

The meeting adjourned at 12:10 p.m.

Respectfully submitted,

Maurice J. Holland
Executive Director

MJH:gh

**ITEMS AVAILABLE FOR DISCUSSION AT 10-17-92 MEETING OF
COUNCIL ON COURT PROCEDURES AT OREGON STATE BAR CENTER
IN LAKE OSWEGO, OREGON**

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ATTACHMENTS TO MINUTES OF COUNCIL MEETING HELD
OCTOBER 17, 1992

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10300 S.W. Greenburg Road

October 1, 1992

Maurice J. Holland
Acting Executive Director
Council on Court Procedures
University of Oregon Law School
Eugene, Oregon 97403

RE: Proposed revisions to ORCP

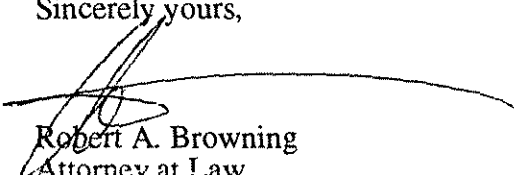
I have recently gotten caught up in my advance sheet reviews and became aware of the proposed revisions to ORCP. I have no germane comments as to any of the proposals, except to request that the "Lawyer Referral" wording be changed to read as follows:

"If you do not have an attorney and need help in finding an attorney to represent you in this action, you may call . . ." (Bold material is the suggested addition.)

I feel strongly that my proposed additional wording addresses a problem that I see in the initial proposal - the implication that a person needs to obtain a new attorney for a new legal action. I concur that a recommendation to obtain an attorney is appropriate, but I don't think the Bar, the Courts, or anyone else should suggest or recommend that a person with an established or former legal relationship seek out new counsel.

Thank you for your assistance and consideration of this point.

Sincerely yours,



Robert A. Browning
Attorney at Law

RAB:AO:26



R. WILLIAM RIGGS
JUDGE

STATE OF OREGON
COURT OF APPEALS
THIRD FLOOR
JUSTICE BUILDING
SALEM, OREGON
97310

RECEIVED
OCT - 9 1992

KANTOR AND SACKS
(503) 373-7124

October 7, 1992

Mr. Henry Kantor
Chair, Council on Court Procedures
Kantor and Sacks
1100 S.W. Sixth, Suite 1100
Portland, OR 97204

RE: Proposed Revisions to ORCP 32

Dear Mr. Kantor:

I write to urge the Council to adopt the amendment to ORCP 32 F(1) recommended by the majority to your class action subcommittee and to reject the formulation proposed by the minority report. Based on my experience as the trial judge in Best v. United States National Bank and Tolbert v. First National Bank, I believe that expanding the flexibility afforded trial courts concerning the giving of notice will both create efficiencies for trial courts and reduce costs for litigants. Conversely, retaining existing ORCP 32 F(1) and extending it to B(1) and B(2) class actions would be a step backward.

As the Council may know, Best and Tolbert were lawsuits which alleged that Oregon's two largest banks had assessed allegedly unlawful high charges on customers who wrote checks on insufficient funds. The plaintiff sought restitution of the alleged excessive charges. The class in each case numbered in the hundreds of thousands. The potential recovery of the average class member was probably under \$100.

I concluded that existing ORCP 32 F(1) required extensive notice be given to members of any class certified under ORCP 32 B(3). Accordingly, in Best and Tolbert, I ordered that notice to current checking customers be included with a monthly statement and that notice to former checking account customers be published at least three times in 12 different newspapers throughout the state. I understand that giving this notice cost plaintiffs approximately \$25,000. In addition, the defendant in Tolbert estimated that it had to pay \$6,000 in increased postage because of the inclusion of a notice in its statements.

Mr. Henry Kantor
October 7, 1992
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The court received hundreds of responses to the notice. This was due not only to the size of the classes but also to the fact that I believed, as long as we were communicating with the class, we should ask for certain information that might be of assistance in the future management of these cases. As a consequence, even those who desired to remain in the class were encouraged to respond to the notice by providing such information as the date they opened their checking account, whether they retained records from the class period and the approximate number of NSF charges they had paid during the class period. The processing of these responses took two people several full days. A substantial amount of court storage space was required to retain these records.

Not one member of either class exercised the option afforded by ORCP 32 F(1)(b)(vi) to appear in the litigation. To my knowledge, no one opted out of the cases in order to maintain an individual action.

I only ordered this kind of notice because I believed it to be required by existing ORCP 32 F(1). Nothing in my experience in Best and Tolbert has caused me to change my opinion that, in a case where every class member has a small individual stake, the kind of notice required by ORCP 32 F(1) is unnecessary, wasteful to the litigants' resources and a burden on the court. Had the amendment to ORCP 32 F(1) recommended by the majority of your class action subcommittee been in effect at the time I ordered the giving of notice in Best and Tolbert, it would have allowed me to exercise my discretion more sensibly to structure notice in a more meaningful and less costly fashion. I therefore urge the Council to adopt the amendment to ORCP 32 F(1) recommended by the majority of your class action subcommittee and to reject the proposal in the minority report.

Thank you for the consideration of my views.

Sincerely,



R. William Riggs

RWR:lac

OREGON
ADVOCACY
CENTER

October 9, 1992

Phil Goldsmith
Suite 1212
1100 S.W. Sixth Avenue
Portland, OR 97204

Re: Proposed Changes to Oregon's Class Action Rule, ORCP 32

Dear Phil:

As you know, Oregon Advocacy Center (OAC) is a private non-profit organization that provides legal representation to persons with mental disabilities. A great many of OAC's clients are low-income; Social Security disability or SSI benefits is the sole source of income for many.

OAC recently became aware of the Coalition's proposed reforms of ORCP 32. I understand that the Council on Court Procedure's class action subcommittee is currently considering the proposed changes, and considering an alternative proposal. As I understand it, the alternative proposal would require that notice be given to class members in all class actions, including those actions seeking only injunctive or other equitable relief. This latter proposal is of great concern to Oregon Advocacy Center, because such a rule could effectively preclude the maintenance of class action suits for injunctive relief on behalf of groups of low-income clients such as we represent.

Being a small, publicly funded organization with a broad mandate - to provide protection and advocacy and legal representation to persons with developmental disabilities and mental illness - OAC attempts to get the most "bang for our buck" in the cases we pursue in court. This means that we frequently represent groups of clients challenging policies or practices that affect many individuals similarly, and often bring our cases as class actions seeking injunctive relief. (Typically we refer out damages cases to the private bar.) Our clients do not have the financial resources that would enable them to comply with a mandatory notice requirement in all injunctive relief cases.


On behalf of Oregon Advocacy Center and our clients I would like to urge the Council's class action subcommittee to reject any proposed reforms of ORCP 32 that would dictate the giving of notice in injunction actions, and urge that the current discretionary notice provisions for these types of cases be retained. I would

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TOLL FREE 1-800-452-1694
FAX (503) 243-1738
625 BOARD OF TRADE BLDG.
310 SW FOURTH AVENUE
PORTLAND, OREGON 97204-2309

Phil Goldsmith
Page 2

very much appreciate it if you would communicate these concerns to the appropriate members of the Council. Thank you.

Sincerely,


Darcy Norville
Director of Litigation
Oregon Advocacy Center

MULTNOMAH COUNTY

**LEGAL
AID
SERVICE**

900 BOARD OF TRADE BUILDING
310 S.W. FOURTH AVENUE
PORTLAND, OREGON 97204

Terry Ann Rogers, Executive Director
Richard C. Baldwin, Director of Litigation

(503) 224-4086 (Main Office; TDD)
(503) 295-9496 (FAX)

KANTOR, AND SAKS

October 15, 1992

Henry Kantor, Chair
Council on Court Procedure
Kantor & Saks
1100 Standard Plaza
1100 SW Sixth Avenue
Portland, OR 97204-1087

**Re: Council on Court Procedure --
Proposed Changes to ORCP 32**

Dear Mr. Kantor:

As you know, Multnomah County Legal Aid Service (MCLAS) is a private nonprofit corporation which provides legal services to low-income people in non-criminal cases. There are currently in excess of 100,000 citizens in Multnomah County who are financially eligible for our services. We turn away approximately two out of three eligible clients due to inadequate resources. Historically, our program has filed a number of class action suits primarily to enforce our clients' rights to receive public benefits under federal law. We anticipate that a greater number of our class actions will be filed in state court in the years ahead. The availability of class action procedures allow our program (and other Legal Aid programs) to effectively enforce important rights of numerous clients who would otherwise have no representation. We are therefore most interested in your committee's deliberations on the proposed revisions to ORCP 32 governing class actions.

My understanding is that the majority of the Council on Court Procedures class action subcommittee have recommended the proposal submitted by the Coalition to Reform Oregon's Class Action Rule in favor of liberalizing notice requirements in ORCP 32B(3) class actions. We support this proposed liberalization of notice requirements.

We are, however, concerned about the minority report which apparently recommends extending costly notice requirements under ORCP 32F(1) to all state court class actions including injunction actions and similar equitable relief cases. This would pose grave problems for our clients. Our clients have no resources to finance the giving of

extensive notice nor does our program have the financial resources to do so. Because of a 44% decrease in our funding from the Oregon Law Foundation based on a corresponding decrease in interest on IOLTA accounts, we will have even less resources next year to support our litigation. Even without this shortfall, there is no room in our meager litigation budget for additional costs of litigation relating to notice requirements.

Oftentimes, a class action is the only way that large numbers of our clients are able to achieve a fair and efficient adjudication of their rights under complex state and federal entitlement programs. Our resources are such that we must carefully limit the number of class actions we prosecute on behalf of individuals who otherwise have virtually no access to our system of justice. (I have enclosed a copy of our program's policies pertaining to class actions for your information.) The significant costs incident to more stringent notice requirements would seriously undermine our ability to assert our clients' rights in important areas relating to public assistance, Medicaid, Social Security, food stamps, public housing, and many other important areas. We recently entered into a consent decree with Multnomah County in a class action which will result in the construction of a new juvenile detention facility in place of the substandard and deteriorated Donald E. Long Home. In retrospect, notification of the thousands of juveniles who were class members as proposed by the minority report would have been an undue if not impossible burden. Such a requirement would have significantly increased attorney fees and costs without any net benefit to the parties or the court.

We strongly urge the Council to not impose more stringent notice requirements where only equitable relief such as an injunction is requested by the plaintiff. Thank you for your consideration of these comments.

Sincerely,



RICHARD C. BALDWIN
Director of Litigation

RCB:elh

CLASS ACTIONS

Each specialty unit may decide, with prior approval of the program director and without interfering with the professional responsibility of the client's attorney, whether or not to initiate or defend any class action or suit without prior consultation with the Board wherein the specific client or clients of Legal Aid Service qualify, and

1. The case is within program priority guidelines;
2. The class relief which is the subject of the class action lawsuit is sought for the primary benefit of individuals who are eligible for Legal Aid services;
3. The director has approved the filing of the class action complaint;
4. All class action complaints shall be co-signed by the program director or the person designated by the director for such a purpose, in addition to the attorney(s) responsible for the case;
5. All requests for approval must be accompanied by a signed retainer.

In addition, Legal Aid Service attorneys may file a class action suit against the federal government or any state or local governmental entity provided that prior to the filing of the class action the Director has determined that:

- a. The governmental entity is not likely to change voluntarily and promptly its policy or practice in question and that eligible clients will continue to be adversely affected by the policy;
- b. The program has given notice to the prospective defendant of its intent to seek class relief; and
- c. Responsible efforts to resolve without litigation the adverse effects of the policy or practice have not been successful or would be adverse to the interests of the clients.

Because of the importance of the above policies, failure to observe them shall be a basis for dismissal from Legal Aid Service employment.

**Oregon
Legal
Services
Corporation**

Weatherly Building Suite 1000 516 S.E. Morrison Portland, OR 97214 (503) 234-1534 FAX: (503) 239-3837

October 16, 1992

Henry Kantor
Attorney at Law
1100 Standard Plaza Building
1100 S. W. Sixth Avenue
Portland, OR 97204

Re: Proposed Changes to ORCP 32

Dear Mr. Kantor:

I am writing to you about the proposal regarding classwide notice which has been submitted in a Minority Report from the Class Action Subcommittee to the Council on Court Procedures. I believe that this proposal could be devastating to our ability to adequately represent low income people.

As you may know, Oregon Legal Services (OLS) is a private non-profit organization which represents low income people throughout rural Oregon. Over the years, we have successfully litigated quite a large number of class actions, for the most part involving governmental benefits such as Aid to Families with Dependent Children, Medicaid, food stamps, and subsidized housing. It is not unusual for the classes in such cases to consist of thousands of people, and, in a few notable situations, tens of thousands.

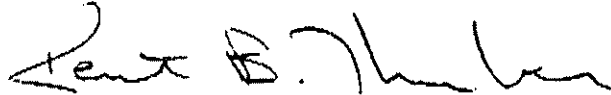
As I understand the proposal, individual notice would have to be given to class members in all class actions, even if only injunctive or other equitable relief was sought. Given the size of classes which are typical in public benefit litigation, such a requirement could easily prohibit OLS and other legal services organizations in Oregon from litigating these cases. All legal services organizations are under tremendous financial pressure, notwithstanding the success of such recent efforts as the Campaign for Equal Justice. We simply do not have the financial

Henry Kantor
October 16, 1992
Page Two

resources to provide individual notices in large cases. I fear that important and significant issues for low income Oregonians may not be litigated if such a requirement is imposed.

We therefore urge the Council to reject these proposed amendments.

Very truly yours,

A handwritten signature in black ink, appearing to read "Kent B. Thurber". The signature is written in a cursive style with a large initial "K" and a long, sweeping underline.

Kent B. Thurber
Attorney at Law

KBT:sew

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1895-1971
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1922-1985
ADMITTED IN OREGON
WASHINGTON*
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September 28, 1992

Mr. Maurice J. Holland
Acting Executive Director
Counsel on Court Procedures
University of Oregon
School of Law
Eugene, OR 97403

Dear Maurice:

Re: **Proposed revision to ORCP 36**
Our File No. : 100000

I am concerned about proposed ORCP 36C(2). If the predicate for obtaining a rule 36C order is, as stated in the rule, "to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense," a party unrelated to the case at hand should not have access to the protected materials without an appropriate showing of need in their particular case. There is no judicial or other economy served by relitigating the protection issues in the case subject to the order versus requiring the parties to raise the issues appropriate to protection in the new case.

The genesis of the proposed rule is not a procedural issue, but a substantive or policy concern of some as to the scope which should be afforded materials a court has deemed subject to protection. As such, this does not appear appropriate to be included in the rules.

Thank you for your consideration.

Very truly yours,



PAUL R. DUDEN

PRD/klv

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 AND WASHINGTON
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 AND CALIFORNIA
 ** RESIDENT, BEND OFFICE

October 12, 1992

Mr. Maurice J. Holland
 Executive Director
 Council on Court Procedures
 University of Oregon School of Law
 Eugene, OR 97403

Re: Proposed Revision to ORCP 36

Dear Mr. Holland:

It is my understanding that the Oregon Council on Court Procedures will, at its October 17, 1992 meeting, consider a proposal that would create a new subsection ORCP 36C.(2). There are numerous serious concerns to this proposal which should be seriously considered by the Council.

As I understand the original proposal, confidential documents subject to a protective order can nonetheless be disclosed from one lawyer to another, unless the party or person for whose benefit the protective order was issued could show "good cause" for not so disclosing. The shifting of the burden of proof in this regard is unjustified. Certainly a party seeking to obtain documents subject to a protective order should bear the burden of establishing a particularized need and the inability to access such documents through other means. There is simply no justification for a person or corporation being compelled to convince a court that further disclosure of confidential and proprietary documentation is not appropriate.

Further, the potential for such downstream disclosure will result in an understandably decreased level of cooperation between counsel at the documentary

Mr. Maurice J. Holland
October 12, 1992
Page 2

production stage. Under current Rule 36, most lawyers are not hesitant to divulge documents, provided that an appropriate protective order is in place. However, the likelihood of further disclosure by opposing counsel would seriously circumscribe and frustrate the underlying purposes of a protective order. As a result, minor skirmishes over production of documents will inevitably be escalated into full scale battles.

In short, the proposed revision to ORCP 36 is unnecessary and unwarranted. Under current practice, protective orders enhance full and complete pre-trial discovery and enable matters to more expeditiously be resolved. The promulgation of the proposal would be quite counterproductive to the underlying spirit and intent of Rule 36.

I appreciate the opportunity to present the above views to the Council for its consideration.

Very truly yours,



Charles D. Ruttan

CDR:spb
(GJCDA9-9.L11)

Oregon Trial Lawyers Association

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OCTOBER 13, 1992

MEMORANDUM TO: MEMBERS OF COUNCIL ON COURT PROCEDURES
FROM: LARRY WOBROCK, CHUCK TAUMAN, CHARLIE WILLIAMSON
RE: AMENDMENT TO ORCP 36(C)

We have asked Chair, Henry Kantor, that the Council reconsider the vote by which it rejected the amendment to ORCP 36C as several Council members (including Justice Graber who drafted the bulk of the amendment) were not at the meeting at the time the vote was taken.

We also enclose for your additional information copies of Public Citizen v. Liggett Group, Inc., 858 F.2d 775 (1st Cir. 1988), and In re "Agent Orange" Product Liability Litigation, 821 F.2d 139 (2nd Cir. 1987). As you can see from these opinions, the issues regarding settlement agreements and public disclosure of discovery material are far more wide-ranging than the very modest changes we have proposed.

While we do intend to go to the legislature to try to permit courts to override the terms of settlement agreements when the public interest in disclosure outweighs any private interest in secrecy, we would hope the Council would take the relatively modest step of permitting lawyers with similar cases to obtain each others' discovery materials, subject to applicable protective orders, without the necessity of full-blown hearings requiring such lawyers to show good cause in every case for such disclosure. Secrecy could be maintained if a person protected by the order can show good cause, which rarely exists, for not sharing such information.

As was indicated at the hearing on August 1, hearings requiring parties to show good cause for the sharing of information in every case are simply unnecessary, are draining on court time and resources, and a waste of time unless the party resisting disclosure really has a good reason why disclosure should not take place.

Your favorable action on this proposal will be greatly appreciated.

Thank you very much for considering this request.

AMENDMENT TO ORCP 36 C.(2)

C.(2). A party may disclose materials or other information covered by a protective order issued under subsection (1) above to a lawyer representing a client in a similar or related matter if the party first obtains a court order, after notice and an opportunity to be heard is afforded to the parties or persons for whose benefit the protective order has been issued. Disclosure shall be allowed by the court except for good cause shown by the parties or persons for whose benefit the protective order has been issued. No order shall be issued allowing disclosure unless the attorney receiving the material or information agrees in writing to be bound by the terms of the protective order.

(Renumber existing Rule 36C as 36C(1).)

PUBLIC CITIZEN, et al.,
Plaintiffs, Appellees,

v.

LIGGETT GROUP, INC., et al.,
Defendants, Appellants.

No. 88-1195.

United States Court of Appeals,
First Circuit.

Heard June 10, 1988.

Decided Sept. 28, 1988.

Tobacco company appealed from order of the United States District Court for the District of Massachusetts, A. David Mazzone, J., which modified protective order, which had been entered in litigation brought by survivors of smoker against tobacco company, to allow public interest group access to discovery documents. The Court of Appeals, Bownes, Circuit Judge, held that: (1) court had no power to impose new requirements on parties following judgment and expiration of time for appeal; (2) protective order was still in effect by its own terms; (3) court had power to modify the protective order; (4) public interest group had standing to seek to intervene; (5) district court had implicitly granted intervention; and (6) court properly found good cause for modification of the discovery order.

Affirmed in part and reversed in part.

1. Records ⇐32

Public has no right to demand access to discovery materials which are solely in the hands of private party litigants. Fed. Rules Civ.Proc.Rule 5(d), 28 U.S.C.A.

2. Federal Civil Procedure ⇐1611

By the time that district court acted on third party's request to view discovery materials, it lacked the power to impose any new requirements on the parties, as the action had been dismissed and the time for appeal had expired. Fed.Rules Civ.Proc. Rule 5(d), 28 U.S.C.A.

3. Federal Civil Procedure ⇐1261

Once case has been dismissed and the rights to appeal have lapsed, parties are under no obligation, legal or practical, to preserve discovery materials which they have obtained.

4. Federal Civil Procedure ⇐1271

For purposes of protective order which extended until 45 days after final adjudication or settlement of the claims, the claims were not "finally adjudicated" until the period for petitioning for certiorari or review of the Court of Appeals' decision expired.

See publication Words and Phrases for other judicial constructions and definitions.

5. Federal Civil Procedure ⇐1611

In support of its protective order covering discovery documents, district court had the power of enforcement at any point while it was in effect, including period after judgment, and had the power to modify order to provide for public access to the documents prior to expiration.

6. Federal Civil Procedure ⇐1271

Intervention is the procedurally correct course for third-party challenges to protective orders. Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.

7. Federal Civil Procedure ⇐1611

Fact that third party seeking to challenge protective order entered with respect to discovery documents had not intervened was not fatal to its claim where it had requested intervention in the alternative if district court thought that intervention was necessary and where court had afforded relief to it as if it were a proper party to the case, thus implicitly granting intervenor status. Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.

8. Federal Civil Procedure ⇐1271

Court did not abuse its discretion in treating motion for relief from protective order as timely even though it was not made until after action had been dismissed.

9. Federal Civil Procedure ⇐1271

Third party had standing to assert claim of access to documents by intervening to challenge protective order.

10. Records ⇐32

Public interest group had right of access to discovery documents in action brought against cigarette manufacturer by survivors of smoker. Fed.Rules Civ.Proc. Rule 26(c), 28 U.S.C.A.

11. Federal Civil Procedure ⇐1611

Even if extraordinary circumstances were required for modification of protective order to allow third-party access to the documents were required, district court did not err in modifying protective order, entered in action brought by survivors of smoker against cigarette company, in order to permit public interest group to obtain access to the discovery documents. Fed. Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

Samuel Adams with whom Joseph J. Leghorn, Warner & Stackpole, Boston, Mass., Donald J. Cohn, Webster & Sheffield, John J. O'Connell and Seth M. Lahn, New York City, were on brief, for defendants, appellants.

Richard P. Campbell, John A.K. Grunert, Timothy Wilton, Campbell & Associates, P.C., Boston, Mass., William H. Crabtree and Edward P. Good, Detroit, Mich., on brief for Product Liability Advisory Council, Inc. and Motor Vehicle Mfrs. Ass'n of the U.S., Inc., amici curiae.

Cornish F. Hitchcock, with whom, Alan B. Morrison, Washington, D.C., Public Citizen Litigation Group, Carolyn Grace and Shapiro, Grace & Haber, Boston, Mass., were on brief, for plaintiffs, appellees.

Before BOWNES and BREYER, Circuit Judges, and CAFFREY,* Senior District Judge.

BOWNES, Circuit Judge.

Liggett Group, Inc., and Liggett & Meyers Tobacco Co. (collectively "Liggett") appeal an order of the district court modifying an earlier protective order covering discovery materials produced by Liggett. Re-

* Of the District of Massachusetts, sitting by designation.

quest for the modification came from a group of public health organizations represented by Public Citizen Litigation Group ("Public Citizen").¹ Liggett contends that Public Citizen lacked standing to request modification, both because it failed to obtain status as an intervening party under Rule 24 of the Federal Rules of Civil Procedure and because it had no substantive right of access to the materials in question, and that it failed to establish adequate circumstances justifying the modification. We affirm in part but modify the district court's order.

I. BACKGROUND

A. *Initial Proceedings*

On August 26, 1980, Joseph C. Palmer died of lung cancer after having smoked cigarettes made by Liggett for a number of years. Three years later, Palmer's wife and mother filed a diversity action against Liggett in United States District Court for the District of Massachusetts. The Palmers asserted various state law claims against Liggett based on Liggett's allegedly inadequate warnings about the health risks of smoking.

Discovery began in 1984 and, during the course of discovery, three protective orders were entered by the district court. The first two orders, dated January 17, 1984, and January 25, 1985, pertained to the confidentiality of the plaintiffs' medical records. They are not at issue here. It is the third protective order, providing broad protection for documents produced by Liggett, which is the center of the current controversy.

This protective order grew out of plaintiffs' January 22, 1985 deposition subpoena directed to the custodian of documents at Arthur D. Little, Inc. ("Little"). Little is a private consulting firm that performed research work for Liggett in the early 1950's. Pursuant to the subpoena and by agreement of the parties, plaintiffs' counsel were permitted to inspect eighteen boxes of doc-

1. The organizations are American Cancer Society, American Heart Association, American Lung Association and American Public Health Association.

uments at Little's offices on January 30-31, 1985. Counsel began copying documents on February 1, 1985. On February 5, Liggett moved for a protective order under Rule 26(c) barring any nonlitigatory use of the Little documents and of all future discovery in the action. In support of its request, Liggett asserted that plaintiffs' discovery requests encompassed massive numbers of documents and that it would be "physically impossible for [Liggett] to designate individually each document containing confidential or secret information."

The plaintiffs opposed the protective order on the ground, among others, that Liggett had waived its claims to confidentiality by previously allowing counsel to review and copy the Little documents. The district court granted Liggett's motion and signed the protective order on February 25, 1985.

The order as approved had two components. The first is a blanket provision mandating that "[a]ll information produced or exchanged in the course of this civil action or any appeal arising therefrom . . . shall be used solely for purposes of this case." The second provides heightened protection for any materials explicitly designated by a party as "confidential." With regard to both categories of materials, the protective order provides that "[w]ithin forty-five days after the final adjudication or settlement of all claims in this case, counsel for the parties either shall return all documents produced, if so requested by the producing party, or shall destroy all such documents. All copies of all documents, and all information and notes derived from them, also shall be destroyed."

Subject to the restrictions of the protective order, plaintiffs' counsel copied approximately 1200 documents (one box full) from the eighteen boxes of Little documents to which the plaintiffs had access. None of these documents were ever designated by Liggett as confidential. The documents have remained in the possession of plaintiffs' counsel since that time.

On June 7, 1985, the *Wall Street Journal* wrote a letter to the district court expressing interest in seeing the Little doc-

uments and seeking advice on how best to proceed in obtaining a modification of the protective order. One week later, plaintiffs' counsel filed a "Notice of Intent to Disseminate [the Little] Documents" to the *Wall Street Journal*. In support of their proposed action, plaintiffs cited Liggett's failure to designate any documents as confidential and to articulate any reason why release of the documents would harm Liggett. Plaintiffs also pointed out that many of the documents had been marked as exhibits for trial and thus would be made public eventually anyway. Liggett opposed the plaintiffs' proposed action, arguing that the protective order was still in full force, and, on June 28, 1985, filed its own "Motion to Require Compliance With Protective Order."

In response, plaintiffs filed a motion for clarification or modification of the February 25 protective order. Plaintiffs argued that the order should be read as applying only to documents designated as confidential, because otherwise it would extend protection to information whether or not it qualified as confidential under the federal rules. At this point, the *Wall Street Journal* also sought leave to intervene in the action and filed its own request for clarification or modification. On July 16, 1985, the district court refused to modify the protective order and allowed Liggett's motion to compel compliance. It noted: "The dissemination of this material will not aid in the fair trial of this case. The trial is public and the *Wall Street Journal* is, of course, able to attend the trial." Plaintiffs' and the *Wall Street Journal's* motions were denied.

One week later, the *Wall Street Journal* moved for reconsideration of the district court order. The *Journal's* motion was based primarily on the decision in *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573 (D.N.J. 1985), handed down the day after the order to compel compliance was issued in this case. Like the Palmers' case, *Cipollone* involved state law claims that inadequate warnings by Liggett had caused the death of a Liggett cigarette smoker. In the cited decision in *Cipollone*, Judge Saro-

kin had substantially modified a protective order, previously approved by a magistrate, which was "identical" to the February 25, 1985 protective order in this case. *Id.* at 579. Judge Sarokin found that the provision extending blanket protection to documents not designated as confidential "overstep[ped] the bounds permitted by Rule 26(c)" and he accordingly modified the order to extend only to confidential information. *Id.* at 584. Although acknowledging that its analysis diverged from Judge Sarokin's, the district court in this case denied the motion to reconsider. It noted: "*Motion denied, without prejudice to renew.* The Sarokin opinion is now under appeal. This motion should be renewed following a ruling by the Third Circuit Court of Appeals."²

In April of 1986, Liggett moved to dismiss certain of plaintiffs' claims on the ground that they were preempted under the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 *et seq.* The district court denied the motion but certified the question pursuant to 28 U.S.C. § 1292(b), to this court, which reversed. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir.1987). We held that in passing the Act, Congress had struck a "carefully drawn balance between the purposes of warning the public of the hazards of cigarette smoking and protecting the interests of the national economy" and that permitting the interposition of state actions into the area would excessively disrupt the congressional scheme. *Id.* at 626 (quoting *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 187 (3d Cir.1986), *cert. denied*, 479 U.S. 1043, 107 S.Ct. 907, 93 L.Ed.2d 857 (1987)). The Palmers' state law claims were thus preempted.

In light of our opinion, Liggett moved in the district court to have the Palmers' com-

2. The Third Circuit eventually issued a writ of mandamus, noting errors in Judge Sarokin's analysis, and remanded for reconsideration. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108 (3d Cir.1986). On remand, Judge Sarokin modified his analysis with respect to documents designated as confidential, but nonetheless found that Liggett had failed to establish good cause for protection under Rule 26(c). Judge Sarokin also stuck by his original order striking

plaint dismissed and judgment entered for Liggett. Over the plaintiffs' objections, the district court granted the motion and entered judgment for Liggett on October 6, 1987. No appeal was taken.

B. *Public Citizen's Motion for Access to Discovery Materials*

On December 28, 1987, Public Citizen filed two motions in district court. In its first motion, Public Citizen sought interlocutory relief: an order mandating that the parties maintain and not destroy or return discovery materials in the *Palmer* case pending resolution of its second motion. This first motion was allowed by the district court the same day. The second motion sought a modification of the February 25, 1985 protective order such that all discovery materials could be freely disseminated, except for those documents in which Liggett had "good cause" for continued confidentiality. It also requested that the district court order the parties to file all discovery materials in court. The broad relief requested by Public Citizen seemingly applied to materials produced both by Liggett and the plaintiffs, but, in argument, Public Citizen made clear that it sought access only to the Little documents produced by Liggett.

Public Citizen based its access claim on Rules 5(d) and 26(c) of the Federal Rules of Civil Procedure. Rule 5(d) provides:

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 the court may on 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 respons-

down the blanket protection for undesignated documents. *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86 (D.N.J. 1986). The Third Circuit subsequently denied Liggett's petition for mandamus concerning that decision, and the Supreme Court denied a Liggett petition for certiorari on December 7, 1987. *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335 (3d Cir.), *cert. denied*, — U.S. —, 108 S.Ct. 487, 98 L.Ed.2d 485 (1987).

es thereto not be filed unless on order of the court or for use in the proceeding.

Rule 26(c) provides in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

Rule 5(d), Public Citizen argued, creates a presumption that all discovery materials will be available to the public because they will be filed in court. Moreover, under Rule 26(c), public access can be cut off through a protective order only upon the showing of "good cause." Especially in light of the district court's dismissal of the Palmers' claims in this case, Public Citizen asserted that good cause for the February 25, 1985 protective order no longer existed. Thus, it said, the order should be modified and Rule 5(d) filing of discovery materials ordered.

Public Citizen did not make a formal motion to intervene in the case pursuant to Rule 24. Rather, it sought to proceed informally under Rule 16(g) of the Local Rules of the United States District Court for the District of Massachusetts. Local

Rule 16(g) is based on Rule 5(d) of the Federal Rules, but it actually reverses in part the filing presumption of Rule 5(d), by providing that discovery materials ordinarily are *not* to be filed in court "unless so ordered by the court or for use in the proceeding." Essentially, Rule 16(g) codifies the local practice of district courts always ordering—as Rule 5(d) permits—that discovery materials otherwise subject to the Rule 5(d) filing requirement *not* be filed pursuant to Rule 5(d) unless the court asks that they be filed. To facilitate this scheme, Rule 16(g) provides that parties and nonparties may request that filing be ordered:

If for any reason a party or concerned citizen believes that any [discovery documents subject to the Rule 5(d) filing requirement] should be filed, an *ex parte* request may be made that such document be filed, stating the reasons therefor. The court may also order filing *sua sponte*.

Believing that Rule 16(g) thus obviated the need for obtaining formal intervenor status in order to request filing, Public Citizen sought relief as a nonparty. In the event the district court thought intervention necessary, however, Public Citizen did ask to be granted intervenor status and argued that intervention had been routinely granted in the past when nonparties sought access to judicial records.

Liggett opposed the motion on a number of grounds. It claimed first that Public Citizen could participate only as a Rule 24 intervenor and that the time for requesting intervention had passed. For this reason, Liggett said, Public Citizen lacked standing. Liggett also disputed Public Citizen's interpretation of Rule 5(d), maintaining that it created no general right of public access to discovery materials. Finally, Liggett argued that even if Public Citizen had standing to seek public access, there had been no showing of compelling need for a modification.

The district court held a hearing on January 28, 1988, with counsel for Liggett, Pub-

lic Citizen and the plaintiffs present.³ The court began by considering whether it still had jurisdiction over the matter, in light of its previous order of dismissal and judgment for Liggett on the merits. It found that jurisdiction did exist, because the outstanding protective order presented a live controversy extending past the dismissal of the underlying claims. The court also agreed with Public Citizen that there is a right of public access to discovery materials under the federal rules, a right that was especially strong in this case because of the important public health concerns surrounding the documents in question. Moreover, the court said, Liggett had failed to establish any compelling need for continuing the protective order. The court accordingly ordered that the eighteen boxes of Little documents to which the plaintiffs had access, along with the documents already in the plaintiffs' possession, be filed in court and made available to the public.⁴

The district court issued a stay pending appeal and this appeal followed.

II. THE DISTRICT COURT'S POWER

We begin our analysis, as did the district court, by examining the court's jurisdiction, or power, to issue discovery-related orders after the court dismissed the underlying claims and entered a judgment on the merits. In so doing, we think it is important to distinguish between two separate and distinct aspects of the district court's January 28, 1988 order which is under review: the modification of the protective order and the order that the parties file the discovery materials in court.

3. Although the plaintiffs had not filed a formal response to Public Citizen's request, the plaintiffs vigorously supported Public Citizen's efforts at the hearing. As they had previously, plaintiffs said that they were interested in disseminating to the public the Little documents in their possession.
4. Unsure whether Liggett actually had designated any discovery materials as confidential under the February 25, 1985 protective order, Public Citizen had, in its motion for modification, suggested that documents which Liggett maintained were confidential might be exempted

[1] Under Local Rule 16(g), the parties to this case were, as parties to cases in the District of Massachusetts generally are, excused from filing discovery materials in court. The effect of this nonfiling was to deny the public the right it would otherwise have had to inspect freely the discovery materials in this case, because the materials were not kept in any publicly accessible location. Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants. Rule 16(g) does not in any way limit the use or dissemination of discovery materials by *parties*. Indeed, the Supreme Court has noted that parties have general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, they are entitled to disseminate the information as they see fit. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31-36, 104 S.Ct. 2199, 2206-09, 81 L.Ed.2d 17 (1984); see also *Oklahoma Hospital Ass'n v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir.1984), cert. denied, 473 U.S. 905, 105 S.Ct. 3528, 87 L.Ed.2d 652 (1985). In this case, the only thing limiting the parties' rights to disseminate discovery materials was the protective order of February 25, 1985, which barred nonlitigatory use of the Little documents.

Prior to the entry of that order the situation was this: the parties were not required to release publicly the discovery materials by filing them, but they were free to disseminate them if they chose to do so. Cf. *Oklahoma Hospital Ass'n*, 748 F.2d at 1424 ("While it may be conceded that parties to litigation have a constitutionally protected right to disseminate information gained by them through the discovery pro-

from filing, subject to in camera review by the district court to insure that they were indeed confidential. At the hearing, however, it was brought out by plaintiffs that no designations had been made, and Public Citizen apparently abandoned its suggestion for document-by-document review of the materials. In any event, the district court ruled that Liggett's time for designating documents as confidential had passed and that only documents containing trade secrets would be exempt from the court's filing order.

cess absent a valid protective order, it does not follow that they can be compelled to disseminate such information." (citing *Seattle Times*, 467 U.S. 20, 104 S.Ct. 2199). The same situation would have again existed on January 28, 1988, if the district court had modified or vacated the protective order, but not ordered filing under Rule 5(d). Instead, however, in response to Public Citizen's request, the district court both modified the protective order by virtually eliminating it, *see* note 4 *supra*, and ordered filing, without much distinguishing between these two aspects of its order. Because we believe that the two aspects raise separate legal issues and concerns, we consider them individually.

[2] With respect to the filing aspect of the court's order, we believe that by the time the district court acted on January 28, 1988, it lacked the power to impose such new requirements on the parties. Accordingly, we vacate that part of the district court's order.

Our reasoning is simple. The district court's judgment of October 6, 1987, was a final dismissal on the merits, concluding the litigation between the Palmers and Liggett. It left no substantive issue unresolved and it contained no provisions for equitable relief that would have required ongoing supervision by the district court. Under these circumstances, we think that the court simply lacked power to impose any new, affirmative requirements on the parties relating to discovery. *See Cooper v. R.J. Reynolds Tobacco Co.*, 256 F.2d 464, 466-67 (1st Cir.) (once a district court dismisses a complaint and enters judgment, it lacks the power to grant a motion to amend the complaint), *cert. denied*, 358 U.S. 875, 79 S.Ct. 112, 3 L.Ed.2d 105 (1958); *Bailey v. Proctor*, 166 F.2d 392, 395 (1st Cir.1948) (a district court's jurisdiction to modify its own orders exists "as long as no final order has been issued"); *see also Littlejohn v. BIC Corp.*, 851 F.2d 673, 683 (3d Cir.1988) ("[A]bsent allegations of fraud or other

extraordinary circumstances, trial exhibits that were restored to their owner after a case has been completely terminated and which were properly subject to destruction by the clerk of court are no longer judicial records within the 'supervisory power' of the district court.").

To be sure, a district court has limited power to undo or alter a judgment after the judgment has been entered. Within strict time constraints, a court may amend a judgment under Rule 59. Courts may also correct clerical mistakes, Fed.R.Civ.P. 60(a), and even, for good reason, grant a party relief from judgment. Fed.R.Civ.P. 60(b). But no such relief was requested or granted here. The district court assumed, as did the parties, that the October 6, 1987 judgment was valid and final.

[3] It is important to note that the purpose of discovery is to enable parties to an action to obtain material "which is relevant to the subject matter in the pending action," a purpose that obviously can no longer be served once a case has been dismissed. Indeed, once a case has been dismissed and rights to appeal have lapsed, parties are under no obligation, legal or practical, even to preserve discovery materials they have obtained. In this case, for instance, both the plaintiffs and Liggett were free to destroy all the Little documents in their possession long before Public Citizen filed its motion, rendering any Rule 5(d) filing order meaningless.⁵ Thus, although the district court had the power under Rule 5(d) to order filing of discovery materials during the pendency of the action, we hold that the court's power did not extend to postjudgment action.

[4] Turning next to the district court's modification of the protective order, we think that an entirely different analysis applies. Unlike the filing order of January 28, 1988, the protective order was entered on February 25, 1985, long before the dismissal and judgment and at a time when the court clearly had the power to super-

5. Counsel for Public Citizen conceded at oral argument that the parties could have destroyed the discovery materials prior to Public Citizen's motion without violating the protective order or

any other legal requirement and that, in that case, Public Citizen would have been out of luck in seeking access.

wise and issue orders concerning discovery.⁶ Moreover, the protective order, by its own terms, extended until forty-five days after the "final adjudication or settlement" of the Palmers' claims.⁷ During the pendency of the protective order, including times after judgment, the order acted as an injunction, setting forth strict limitations on the parties' use of discovery materials.

[5] In support of this "injunction," the district court necessarily had the power to enforce the order, at any point while the order was in effect, including periods after judgment. As demonstrated by the court's order to compel compliance in the face of plaintiffs' expressed intention to provide the Little documents to the *Wall Street Journal*, violation of the protective order during its lifetime would have exposed the parties to contempt liability. Correlative with this power to enforce, the district court necessarily also retained power to modify the protective order in light of changed circumstances. The Supreme Court established long ago that even an injunction entered by consent of the parties—and this protective order was entered over the objections of the plaintiffs—is always modifiable.

Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need. . . . [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong.

6. On this appeal, no one has contended that the February 25, 1985 protective order was not a valid protective order at the time it was entered. We have assumed, without deciding, that it was indeed valid.

7. The Palmers' claims were not "finally adjudicated" until November 23, 1987, when the peri-

United States v. Swift & Co., 286 U.S. 106, 114-15, 52 S.Ct. 460, 462, 76 L.Ed. 999 (1932); see also *Coalition of Black Leadership v. Cianci*, 570 F.2d 12, 14 (1st Cir. 1978) ("There is little dispute that a sufficient change in circumstances is a meritorious reason for a court to modify an injunction or consent decree."); *Theriault v. Smith*, 519 F.2d 809, 810 (1st Cir.1975); *Food Fair Stores, Inc. v. Food Fair, Inc.*, 177 F.2d 177, 186 (1st Cir.1949). "When dealing with its equitable powers, a court possesses the intrinsic power to adapt the injunction to meet the needs of a 'new day.'" *Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1030 (9th Cir.1985), cert. denied, 474 U.S. 1059, 106 S.Ct. 802, 88 L.Ed.2d 778 (1986).

Consistent with this well-established rule, we think that the district court in this case had the inherent power to modify its February 25, 1985 protective order for so long as the order was in effect. We note that the courts and commentators seem unanimous in finding such an inherent power to modify discovery-related protective orders, even after judgment, when circumstances justify. *E.g.*, *Ex Parte Upperca*, 239 U.S. 435, 440, 36 S.Ct. 140, 141, 60 L.Ed. 368 (1915); *FDIC v. Ernst & Ernst*, 677 F.2d 230 232 (2d Cir.1982); *Krause v. Rhodes*, 671 F.2d 212 (6th Cir.), cert. denied, 459 U.S. 823, 103 S.Ct. 54, 74 L.Ed.2d 59 (1982); *United States v. GAF Corp.*, 596 F.2d 10, 16 (2d Cir.1979); *American Telephone & Telegraph Co. v. Grady*, 594 F.2d 594, 596-97 (7th Cir.1978), cert. denied, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979); *Olympic Refining Co. v. Carter*, 332 F.2d 260, 265-66 (9th Cir.), cert. denied, 379 U.S. 900, 85 S.Ct. 186, 13 L.Ed.2d 175 (1964); Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L.Rev. 1, 41-53 (1983); Note, *Non-party Access to Discovery Materials in*

od for petitioning for certiorari review of this court's preemption decision expired. See discussion *infra* at 785. Public Citizen's motion of December 28, 1987, was thus made during the allotted forty-five day period, while the protective order was still in effect.

Federal Court, 94 Harv.L.Rev. 1085, 1091-96 (1981).

In sum, although the court lacked power to impose new discovery-related obligations after dismissing the case on the merits, we find that, because the protective order was still in effect, the district court had the power to make postjudgment modifications to the protective order in light of changed circumstances. Accordingly, we move on to consider the propriety of the modification actually ordered.

III. STATUS OF THE NONPARTY MOVANTS

As previously noted, Public Citizen did not secure Rule 24 intervenor status in this case, but rather sought to participate informally under Local Rule 16(g) as a nonparty movant.⁸ In the district court, Liggett maintained that intervention was necessary and now, on appeal, challenges the district court's modification order on the ground that Public Citizen lacked standing because it was not granted intervenor status. Liggett also claims that Public Citizen was ineligible for Rule 24 intervention in any event because its motion was untimely. We find Liggett's procedural arguments unavailing.

The question of whether nonparty movants may obtain relief in a civil case appears to be one of first impression in this court. Prior third-party challenges to court closures and protective orders have involved either parties who did obtain formal intervenor status, *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 3-4 (1st Cir.1986); *In re San Juan Star Co.*, 662 F.2d 108, 112

(1st Cir.1981), or criminal cases where intervention is not available. *E.g.*, *In re Globe Newspaper Co.*, 729 F.2d 47, 50 n. 2 (1st Cir.1984); *see also Press Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) (third-party claim of access to criminal proceeding); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (same). We think this fact is significant in and of itself, for it demonstrates that, where intervention is available (*i.e.* civil cases), it is an effective mechanism for third-party claims of access to information generated through judicial proceedings. Like this case, both *Anderson* and *San Juan Star* involved challenges to protective orders covering discovery materials and, in each case, Rule 24 provided a workable means for mounting the challenge. Public Citizen has pointed to no circumstances in this case which made formal intervention impossible or impracticable.

[6] Relying on the language of Rule 24, the Fifth Circuit has previously held that intervention is "the procedurally correct course" for third-party challenges to protective orders. *In re Beef Industry Antitrust Litigation*, 589 F.2d 786, 789 (5th Cir.1979) (emphasis added). We agree. Rule 24(c) provides that "[a] person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought." Fed.R.Civ.P. 24(c) (emphasis added). The

8. Local Rule 16(g) is quoted *supra* at 779. Rule 24 provides in relevant part:

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by the parties.

(b) Permissive Intervention. Upon timely application anyone may be permitted to inter-

vene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

language of the rule is mandatory, not permissive, and the rule sets forth reasonable procedural requirements to insure that claims for intervention are handled in an orderly fashion. Especially in view of the failure to show that compliance with the rule would be unduly onerous or ineffectual, we are not willing to create a special category of non-Rule 24 intervention for third parties who wish to challenge protective orders through informal motion. Public Citizen should have been granted Rule 24 intervenor status before the district court acted on its motion for access to the discovery materials.

[7] We do not, however, view this error as fatal to Public Citizen's claim. We find two factors persuasive. First, although Public Citizen sought to proceed in the first instance without Rule 24 intervention, it did request, in the alternative, that it be granted intervenor status if the district court thought that intervention was necessary. Second, the district court did afford relief to Public Citizen as if it were a proper party to the case, thus implicitly granting it intervenor status. Under similar circumstances, other federal courts have been quite lenient in permitting participation by parties who failed to comply strictly with Rule 24. In *Beef Industry Antitrust Litigation*, 589 F.2d at 788-89, the Fifth Circuit, while setting down a prospective Rule 24 intervention requirement, was willing to overlook a failure to comply with Rule 24 in a discovery access case in light of "the fact that the district court's acts might be considered equivalent to authorizing intervention." The Third and Eighth Circuits have also overlooked a lack of formal compliance when the district court afforded relief to a nonparty and thus implicitly granted it intervenor status. *United States v. Criden*, 675 F.2d 550, 552 n. 2 (3d Cir.1982); *Roach v. Churchman*, 457 F.2d 1101, 1104 (8th Cir.1972); see also *Ex Parte Uppercu*, 239 U.S. 435, 441, 36 S.Ct. 140, 141, 60 L.Ed. 368 (1915) (a pre-federal rules case) (third-party assertion of right of access to discovery materials "requires no particular formality"). We think that a similar approach is appropriate here.

It is clear from the proceedings below that the district court considered Public Citizen to have a legitimate interest in seeking modification of the protective order. We have no doubt that, had the district court thought Rule 24 intervention necessary, it would have treated Public Citizen's motion as a request for intervention and granted it. That being so, no purpose would now be served if this court were to dismiss the appeal and send this case back to the district court for the rote procedural step of approving intervention. After a substantial delay, the case would still return to us in a similar posture for resolution of the substantive issue underlying this dispute. For purposes of this appeal, then, we will treat Public Citizen as having requested and been granted status as a Rule 24 intervenor. A caveat is, however, in order: "[W]e reiterate that a formal motion for intervention should have been filed pursuant to Rule 24(c). Future litigants should not attempt to use this opinion to circumvent the clear requirements of the rule." *Beef Industry Antitrust Litigation*, 589 F.2d at 789.

We turn next to Liggett's contention that, even if Public Citizen is treated as having requested intervention, its motion to modify was untimely as a matter of law because it was filed on December 28, 1987, twelve weeks after the judgment on the merits in this case and after the time for appeal from that judgment had expired. We begin our analysis with two fundamental principles. First, although Rule 24 requires that an application for intervention be "timely," the rule itself sets down no bright line standard for determining what constitutes timeliness. It has thus been held that "timeliness is to be determined from all the circumstances." *NAACP v. New York*, 413 U.S. 345, 366, 93 S.Ct. 2591, 2603, 37 L.Ed.2d 648 (1973); see also *Culbreath v. Dukakis*, 630 F.2d 15, 20 (1st Cir.1980). Second, timeliness determinations under Rule 24 are vested in the sound discretion of the district court. *NAACP*, 413 U.S. at 366, 93 S.Ct. at 2603. Here, the court found that Public Citizen's motion was timely, and we can overturn that ruling only if an abuse of discretion is demon-

strated. See *id.*; *Garrity v. Gallen*, 697 F.2d 452, 455 (1st Cir.1983).

It is also important to note that post-judgment intervention is not altogether rare. Numerous courts have allowed third parties to intervene in cases directly analogous to this one, many involving delays measured in years rather than weeks. *E.g.*, *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir.1985) (third party permitted to intervene after judicially-approved settlement in order to challenge a seal on court documents); *FDIC v. Ernst & Ernst*, 677 F.2d 230 (2d Cir.1982) (third party permitted to intervene and challenge a stipulated confidentiality order two years after a judicially-approved settlement); *Olympic Refining Co. v. Carter*, 332 F.2d 260 (9th Cir.) (third party permitted to challenge a protective order three years after the underlying litigation had terminated), *cert. denied*, 379 U.S. 900, 85 S.Ct. 186, 13 L.Ed.2d 175 (1964); *Mokhiber v. Davis*, 537 A.2d 1100, 1104-06 (D.C.1988) (third party permitted to intervene four years after a judicially-approved consent decree in order to challenge a protective order); *cf. United Airlines, Inc. v. McDonald*, 432 U.S. 385, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977) (permitting postjudgment intervention for purposes of appeal).

[8] Adopting the analysis of the Fifth Circuit in *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir.1977), this court in *Culbreath v. Dukakis* set down a four-part test for determining whether a motion to intervene is timely under the totality of the circumstances.⁹ 630 F.2d at 20-24. Applying the same standard to this case, we find no abuse of discretion in the district court's treatment of Public Citizen's motion as timely.

The first *Culbreath* factor to be considered is the length of time that Public Citizen knew or reasonably should have known of its interest in this case before it petitioned to intervene. 630 F.2d at 20.

⁹ In *Culbreath*, we upheld the district court's denial of intervention on timeliness grounds, but the facts there—attempted intervention on the merits four years after the litigation began and two months prior to submission of a con-

Analysis of this factor is somewhat complicated here. On the one hand, it is clear that Public Citizen knew of the underlying litigation in this case, and therefore implicitly knew of the protective order, long before judgment was entered in the district court. Public Citizen concedes as much and, in fact, Public Citizen represented the same organizations involved in this appeal as *amici* in the earlier appeal to this court on the issue of federal preemption. On the other hand, it is now well-established that it is not the simple fact of knowing that a litigation exists that triggers the obligation to file a timely application for intervention. Rather, the appropriate inquiry is when the intervenor became aware that its interest in the case would no longer be adequately protected by the parties. *United Airlines*, 432 U.S. at 394, 97 S.Ct. at 2469; *Legal Aid Society v. Dunlop*, 618 F.2d 48, 50 (9th Cir.1980); *Stallworth*, 558 F.2d at 264. By this standard, we have no trouble concluding that Public Citizen moved reasonably promptly.

To begin with, the very same request for modification of the protective order put forth by Public Citizen after judgment had been made by plaintiffs and the *Wall Street Journal* in 1985. In turning down those requests, the district court cited two factors: first, that many of the discovery documents in question presumably would be introduced at trial and made public at that time; and, second, that the very issue of the propriety of this protective order was being litigated in the *Cipollone* case in the Third Circuit, making it appropriate for the court to wait until after the Third Circuit litigation was resolved to decide the protective order issue in this case. Certainly, then, Public Citizen cannot be said to have been untimely for failing to act prior to the resolution of the issues underlying the court's two concerns.

With respect to the first factor, the possibility of trial could not be ruled out prior to October 6, 1987, when the district court

sent decree—are far different from those in the present case. We thus refer to *Culbreath* not for its holding *per se*, but for the timeliness test it established.

dismissed the claims and entered judgment. Moreover, even that judgment did not finally resolve the matter, for the plaintiffs had until November 5, 1987, to appeal the judgment, and the time for plaintiffs to petition for certiorari review of this court's preemption decision (upon which the dismissal was based) did not expire until November 23, 1987. Counting back from the December 23, 1987 filing date of its motion, Public Citizen's delay was, therefore, eight weeks or four weeks depending on which of these latter dates is used. If we refer to the second factor cited by the court—the *Cipollone* litigation—Public Citizen's delay is only three weeks, for, as we indicated in note 2 *supra*, the protective order aspect of the *Cipollone* case was not resolved until December 7, 1987. In the context of this case, which had been proceeding for well over four years, we do not think that this delay, on the order, of weeks was material.

The second *Culbreath* factor to be considered is the prejudice to existing parties due to Public Citizen's delay in intervening. 630 F.2d at 21. This factor encompasses the basic fairness notion that intervention should not work a "last minute disruption of painstaking work by the parties and the court." *Id.* at 22. For purposes of this factor, therefore, it is necessary to ask *why* a would-be intervenor seeks to participate, for if the desired intervention relates to an ancillary issue and will not disrupt the resolution of the underlying merits, untimely intervention is much less likely to prejudice the parties. Here, of course, Public Citizen's motion pertains to a particularly discrete and ancillary issue, as demonstrated by the fact that the merits of the case have been already concluded and are no longer subject to review. Because Public Citizen sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties in this case.

The analysis of the District of Columbia Court of Appeals in the recent case of

10. It is for precisely this reason that Liggett's citation to *Burney v. City of Pawtucket*, 728 F.2d 547 (1st Cir.1984), is misplaced. In *Burney*, we

Mokhiber v. Davis, 537 A.2d 1100 (D.C. 1988), is particularly relevant on this point. In *Mokhiber*, an investigative journalist petitioned to intervene in a civil case in order to gain access to discovery materials and related court filings, which had been placed under a protective order. Judgment in the case had been issued four years previously pursuant to a stipulation of settlement. Like Public Citizen in this case, the journalist in *Mokhiber* sought to modify the protective order to facilitate public access. Although the court eventually denied on substantive grounds the request for modification as to some of the discovery materials, it rejected the notion that intervention four years after settlement was untimely given the "special nature of the right" asserted.

[O]rdinary principles applicable to intervention do not work well here. The filing of a motion to intervene is simply recognized as an appropriate means of raising assertions of public rights of access to information regarding matters in litigation. "Intervention of this type may properly be termed *de bene esse*, to wit, action that is provisional in nature and for the limited purpose of permitting the intervenor to file a motion to be considered separately, requesting that access to proceedings or other matters be granted." *Commonwealth v. Fenstermaker*, 530 A.2d 414, 416 n. 1 (Pa. 1987).

[T]o the extent [a right of access] exists, it exists today for the records of cases decided a hundred years ago as surely as it does for lawsuits now in the early stages of motions litigation. The fact that a suit has gone to judgment does not in any sense militate against the public's right to prosecute a substantiated right to see the records of a particular case. Moreover, access to court records does not involve relitigation of the underlying dispute, so the rationale behind requiring extraordinary circumstances for postjudgment intervention does not as a rule apply to access claims.¹⁰

set down a hard and fast rule that intervention on the merits "is never timely.... if filed after rights to appeal have expired." *Id.* at 549. The

[T]he prejudice the parties would suffer from postjudgment access to court documents should not determine the timeliness of the intervention to assert [a] right of access. Instead, assuming an intervenor does assert a legitimate, presumptive right to open the court record of a particular dispute, the potential burden or inequity to the parties should affect not the right to intervene but, rather, the court's evaluation of the merits of the applicant's motion to lift the protective order—that is, the court's judgment as to whether, under the circumstances, the balance of equities favoring sealing overrides any presumptive right of access.

Id. at 1105–06. We find this analysis compelling and reject the notion that prejudice to the parties in this action would be grounds for denying intervention by Public Citizen.

The third and fourth *Culbreath* factors to be considered are the prejudice that would be suffered by Public Citizen if it were not allowed to intervene and the existence of extraordinary circumstances militating for or against intervention. 630 F.2d at 22, 24. Given our treatment of the first two factors, we need not dwell overlong on these considerations. It is sufficient to note that Public Citizen has asserted, on behalf of the public, a right to have the protective order modified such that the discovery materials may be publicly dis-

Burney rule does not, however, and was never intended to, apply to cases like this where a party does not seek to disturb the merits, but only to intervene on the separate issue of access to documents.

11. Although the plaintiffs did seek permission to disseminate the discovery materials at an earlier stage of the litigation and continue to support Public Citizen's claim, they took no steps on their own to have the protective order modified after judgment.
12. We have uncovered only one access case where standing was found lacking, but that case is clearly distinguishable. *Oklahoma Hospital Ass'n v. Oklahoma Publishing Co.*, 748 F.2d 1421 (10th Cir.1984), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3528, 87 L.Ed.2d 652 (1985), involved a protective order entered by stipulation covering documents solely in the hands of the parties. The court found that a third party lacked standing to attack the protective order because, even

seminated, and that, prior to Public Citizen's action, this interest was not being pursued by any of the parties to the case.¹¹ If Public Citizen's motion is found to be untimely, future intervention attempts will almost certainly also be found to be untimely, and the public's right of access will go untested. As the district court found, there is a strong public interest in the documents at issue, which concern an important public health issue.

[9] Having thus concluded that Public Citizen can be considered as a proper Rule 24 intervening party, we believe it has standing to pursue the public access claim here at issue. Courts, including this one, routinely have found that third parties have standing to assert their claim of access to documents in a judicial proceeding. *E.g.*, *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 354 (11th Cir.1987); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir.1986); *In re Globe Newspaper Co.*, 729 F.2d 47, 50 n. 2 (1st Cir.1984); *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir.1981); *see also* cases cited *supra* at 782, 784.¹²

IV. A RIGHT OF PUBLIC ACCESS TO DISCOVERY?

In assessing the claimed right of access in this case, it is helpful to begin by noting what is not being claimed. Unlike many prior litigants in this court and others,¹³

if the protective order were modified, the parties in possession of the documents would not, and could not be compelled to, disseminate the documents to the third party. *Id.* at 1424–25. Here, however, far from agreeing to the protective order, the plaintiffs to this action have opposed the protective order at every stage. Moreover, the plaintiffs have indicated clearly that they will disseminate the documents if permitted to do so. Because obtaining a modification of the protective order will, as a practical matter, guarantee Public Citizen access to documents in the plaintiffs' possession, Public Citizen has standing to seek the modification.

13. *See, e.g.*, *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 354–55 (11th Cir.1987); *Anderson v. Cryovac, Inc.*, 805 F.2d 1 (1st Cir. 1986); *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir.1981); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979); *Mokhiber v. Davis*, 537 A.2d 1100, 1109 (D.C. 1988) (collecting cases).

Public Citizen has not claimed that it has— independent of the federal rules—a general common law or first amendment right to inspect the discovery materials. Such a claim has been largely foreclosed by the Supreme Court's decision in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984), which must serve as the background for any claimed right of access to discovery materials.

In *Seattle Times*, members of a religious group sued the *Seattle Times* in state court for defamation and invasion of privacy. As part of its defense of that case, the *Seattle Times* sought to discover information regarding membership in and donations to the religious group during the previous five years. When the group resisted, the trial court compelled production, but entered a protective order under the state analog of Federal Rule 26(c) prohibiting the *Seattle Times* from disseminating or using the information in any way except as necessary to prepare and try its case. The *Seattle Times* then challenged the protective order as a prior restraint on speech in violation of the first amendment.

The Supreme Court rejected the *Seattle Times*'s claim and also rejected the suggestion that review of a protective order requires any heightened scrutiny under the first amendment. Although acknowledging that litigants do have limited first amendment rights concerning information obtained through discovery, the Court focused on the fact that discovery is "a matter of legislative grace" and that litigants gain access to discovery materials "only by virtue of the trial court's discovery processes." *Id.* at 31-32, 104 S.Ct. at 2207. Moreover, the Court said, protective orders "furthe[r] a substantial government interest unrelated to the suppression of expression." *Id.* at 34, 104 S.Ct. at 2208. Thus, where "a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the first amendment." *Id.* at 37, 104 S.Ct. at 2209-10.

As we said in *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 6-7 (1st Cir.1986), the *Seattle Times* decision has not completely eliminated the first amendment as a relevant consideration in reviewing protective orders. *Seattle Times* has, however, established that first amendment scrutiny of protective orders "must be made within the framework of Rule 26(c)'s requirement of good cause." *Anderson*, 805 F.2d at 7.

It is, therefore, very significant that Public Citizen has not asserted a common law or first amendment right of access independent of the federal rules. Rather, Public Citizen has based its claim on the federal rules, asserting that, under Rules 5(d) and 26(c), the public has a presumptive right of access to discovery materials unless good cause for confidentiality is shown, and that no good cause exists here. Nothing in *Seattle Times* or *Anderson* precludes such a claim. Discovery is "a matter of legislative grace," 467 U.S. at 32, 104 S.Ct. at 2207, but Public Citizen asks for no more than compliance with the legislative scheme embodied in the federal rules.

In seeking to defeat Public Citizen's claim, Liggett and *amici* Product Liability Advisory Council, Inc., and Motor Vehicle Manufacturers Association of the United States, Inc., have pointed to some expansive language in *Seattle Times*, *Anderson* and similar cases to bolster their claim that the public should not be afforded access to discovery materials. See, e.g., *Seattle Times*, 467 U.S. at 33, 104 S.Ct. at 2207 ("pretrial depositions and interrogatories are not public components of a civil trial"); *Mokhiber*, 537 A.2d at 1110 ("there exists no common law tradition of access to discovery materials as such"). Liggett and *amici* have used these statements to launch broad-based "policy" arguments to the effect that litigants have legitimate privacy interests in discovery materials and that permitting public access would undermine these privacy interests and excessively disrupt the litigation process. We acknowledge that our own *Anderson* opinion seemingly lends some support to this contention. 805 F.2d at 12 (permitting public access to discovery might actually make the civil discovery process "more complicat-

ed and burdensome than it already is"); see also Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1 (1983) (generally criticizing claimed rights of public access to discovery).

We think, however, that these arguments and authorities are misplaced here. All of the cases upon which Liggett and amici rely are cases where the claimed right of access was based not on the federal rules, but on the common law or the first amendment. They are cases where, in essence, litigants put forth common law and constitutional arguments in an effort to trump application of the federal rules standard for protective orders. In rejecting such arguments and adhering to the federal rules standard, courts sensibly have noted that a contrary result would lead to thwarting the interests of privacy and litigative efficiency which are embodied in the federal rules. But nothing in those opinions purported to elevate privacy and efficiency as factors to be considered over and above compliance with the federal rules. Rather, the point of the cases was that, because of privacy and efficiency concerns, the federal rules should be followed.

Thus, when in *Anderson* we noted that "[t]here was no tradition of public access to depositions before [passage of the federal rules in] 1938," we went on to say that now, under Rule 5(d), courts may require public filing of discovery requests and responses. 805 F.2d at 12. Likewise, in *Alexander Grant & Co. Litigation*, the Eleventh Circuit recognized that, on the one hand, "private litigants have protectable privacy interests in confidential information disclosed through discovery," but it added that the means for protecting that privacy interest is Rule 26(c), not judicial fiat. 820 F.2d at 355.

Liggett and amici would have us turn these cases on their heads by holding that privacy and litigative efficiency concerns ought to work independently of the federal rules, actually limiting a district court's ability to deny protection under Rule 26(c), even when no good cause is shown. We are not willing to do so. This case involves a claim of access to discovery materials

under the federal rules and we believe that the merits of the claim must be judged by the text of the rules and the applicable cases interpreting the rules. The rules themselves seek to accommodate concerns of privacy and litigative efficiency, and we find no reason for imposing additional judge-made constraints on the district court's control of discovery. Accordingly, we turn to consideration of the relevant federal rules.

[10] Centrally at issue is Rule 26(c), which permits a district court to issue protective orders covering discovery materials upon a showing of good cause:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense. . . .

As the Second Circuit has noted,

A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection. . . . Any other conclusion effectively would negate the good cause requirement of Rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.

In re Agent Orange Product Liability Litigation, 821 F.2d 139, 145-46 (2d Cir.), cert. denied, — U.S. —, 108 S.Ct. 239, 344, 98 L.Ed.2d 249 (1987), aff'g 104 F.R.D. 559, 567 (E.D.N.Y. 1985). Rule 26(c)'s good cause requirement means that, "[a]s a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." *American Telephone*

& *Telegraph Co. v. Grady*, 594 F.2d 594, 596 (7th Cir.1978), *cert. denied*, 440 U.S. 971, 99 S.Ct. 1533, 59 L.Ed.2d 787 (1979); *accord Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir.1980); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 38-41 (C.D. Cal. 1984); *Note, Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv.L. Rev. 1085, 1085-86 (1981). Rule 26(c) thus lends support to the right of access claimed by Public Citizen and found by the district court below.

We agree with the Second Circuit. It is implicit in Rule 26(c)'s "good cause" requirement that ordinarily (in the absence of good cause) a party receiving discovery materials might make them public. In this instance, Public Citizen wished to relieve the plaintiff of the burden of an order that prevented it from making public previously obtained discovery materials. Given the fact that Public Citizen directly benefitted from modification of that order, and for the reasons previously pointed out, we conclude that it had standing to intervene in the case and to ask the court to modify its pre-existing protective order.

V. STANDARD FOR MODIFYING PROTECTIVE ORDERS

[11] Although it is conceded that the governing standard for entry of a Rule 26(c) protective order is good cause, Liggett asserts that a different standard ought to apply when a court considers modifying an existing protective order. Liggett argues that parties to a protective order have legitimate reliance interests in its continued validity and finality. Citing to a Second Circuit opinion, Liggett claims that an existing protective order can be modified only on a showing of "extraordinary circumstance or compelling need." *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979); *see also Palmieri v. New York*, 779 F.2d 861 (2d Cir.1985). Not surprisingly, Liggett finds that no extraordinary circumstances are present here.

We think that Liggett's argument must be rejected. Even accepting that an extraordinary circumstances standard applies, we do not think that the district court erred in modifying the protective order. Control of pretrial discovery, including the entry or modification of a protective order, is a matter falling peculiarly within the discretion of the district court. *Agent Orange*, 821 F.2d at 147; *Krause v. Rhodes*, 671 F.2d 212, 219 (6th Cir.), *cert. denied*, 459 U.S. 823, 103 S.Ct. 54, 74 L.Ed.2d 59 (1982); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir.1980); 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2036, at 268 (1970). Here, the district court found that the dismissal on the merits constituted a significant change in circumstances warranting modification of the protective order. Under the circumstances, we cannot say that the court abused its discretion.

To begin with, the protective order modified by the district court was a blanket protective order, that is, it was an order extending broad protection to all documents produced by Liggett, without a showing of good cause for confidentiality as to any individual documents. Although such blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature over-inclusive and are, therefore, peculiarly subject to later modification. *See Manual for Complex Litigation, Second* § 21.431, at 53 & n. 60 (1985); *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 101 F.R.D. 34, 40-44 (C.D. Cal. 1984). Moreover, as the district court made clear in rejecting pretrial attempts to modify the protective order, the point of this protective order was to promote a fair trial, not to guarantee Liggett perpetual secrecy. *See supra* at 777 ("The dissemination of this material will not aid in the fair trial of this case. The trial is public and the *Wall Street Journal* is, of course, able to attend the trial."). The dismissal of the case on the merits eliminated the possibility of trial and was, therefore, a significant change in circumstances calling into question the necessity of the protective order. Under similar cir-

cumstances, the Second Circuit—the very court that crafted it—found that the extraordinary circumstances test was met. *Agent Orange*, 821 F.2d at 147–48 (upholding the district court's modification of a blanket protective order in light of a settlement of the underlying dispute).

It is argued that a protective order of this sort may lead a party to be more forthcoming in discovery. A protective order may induce a party, for example, to permit an opponent to go through its files, taking relevant material. The party would not insist upon screening the materials first because it would not fear that irrelevant or confidential material, protected by the order, would be made public. Insofar as a rationale of this sort underlay the original protective order, it would seem unfair later to remove that order's protection.

We do not accept this argument as controlling here, however, for one simple reason. As far as we can tell from this record, the particular documents that Public Citizen seeks are *not* documents that were irrelevant to the litigation nor do they contain trade secrets or other specially confidential material. Insofar as it applies to the documents they seek, the protective order did not rest upon the rationale just mentioned. Rather, the court initially protected those documents for a very different reason: namely, the court, believing that the documents would become public in any event during trial, wished to conduct that trial free of the pretrial publicity that might follow premature release of the documents. Liggett, of course, remained free, in respect to any particular document, to argue to the district court that the document in question either was irrelevant to the discovery request or should remain protected as a confidential document for some special reason (such as "trade secrets") that would have prevented its having been made public at trial.

Moreover, we are not convinced that the extraordinary circumstances standard professed by Liggett is applicable here in any event. For one thing, the *Martindell* case principally relied upon by Liggett is clearly distinguishable, having been based on poli-

cy concerns not applicable here. *Martindell* involved an attempt by the United States government as prosecutor to short cut its normal investigative procedures by obtaining sealed depositions in a shareholder derivative suit to which it was not a party. Pointing out the reliance interests of witnesses who testified pursuant to the protective order without invoking their fifth amendment right against self-incrimination, the Second Circuit refused to modify the protective order. 594 F.2d at 294–97; see also *Palmieri*, 779 F.2d at 863–66 (applying *Martindell* standard and denying a request by New York State to intervene in a private antitrust action to access sealed documents). "[W]hat was critical to *Martindell* . . . was the fact that 'the party seeking access . . . was the federal government, which . . . had at its disposal special investigatory powers not available to private litigants. . . .'" *Palmieri*, 779 F.2d at 866 (quoting *Wilk*, 635 F.2d at 1299–1300). This case, of course, does not involve government intervention and so, even according to the Second Circuit, the justification for the extraordinary circumstances test is not present.

Outside the area of government intervention, courts have applied much more lenient standards for modification. See e.g., *Wilk*, 635 F.2d at 1300 (holding that the court's prior invocation of the extraordinary circumstances test "was an unfortunate choice of words"); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir.1984) (suggesting that the good cause standard of Rule 26(c) governs modifications of protective orders). While we need not decide the matter definitively, we reject the "extraordinary circumstances" standard. In a case such as this, where the party seeking modification has pointed to some relevant change in the circumstances under which the protective order was entered, we think that a standard less restrictive than "extraordinary circumstances" is appropriate. We need not define how "less restrictive" the standard should be because we find that under these facts the district court had the legal power to modify its prior protective order: the reasons underlying the initial promulgation of the order in

respect to the particular document sought no longer exist; and the district court made a reasoned determination that public interest considerations favored allowing counsel to make those particular documents public.

VI. CONCLUSION

The district court's order is affirmed with respect to the modification of the protective order, but reversed with respect to the requirement that the parties file discovery materials in court. The parties are, therefore, free to disseminate discovery materials, but they are not obligated to make them publicly available by filing them in court.

SO ORDERED.



GRAPPONE, INC., Plaintiff, Appellee,

v.

SUBARU OF NEW ENGLAND, INC.,
Defendant, Appellant.

No. 87-1538.

United States Court of Appeals,
First Circuit.

Heard April 4, 1988.

Decided Sept. 30, 1988.

Imported car dealer brought antitrust action against regional distributor to challenge legality of distributor's action in tying receipt of cars to purchase of spare parts kit. The United States District Court for the District of New Hampshire, 534 F.Supp. 1282, Shane Devine, Chief Judge, entered judgment in favor of dealer. Dis-

tributor appealed. The Court of Appeals, Breyer, Circuit Judge, held that distributor's requirement to buy spare part kits as condition for dealer's receipt of cars was lawful under antitrust laws.

Reversed.

1. Monopolies \S 17.5(12)

Regional distributor of imported cars lacked significant market power and did not engage in per se, unlawful tying arrangement by requiring local dealer to buy manufacturer's part kits as condition for receiving cars; manufacturer's market share was miniscule, was likely fraction of 1% of all autos sold, and at most accounted for 3.4% of auto imports sold in dealer's state during year in question; only three of 64 dealers seriously protested distributor's efforts; dealer was required to pay \$1000 for unnecessary parts in each of the two combined kits for one year; and dealer sold five other brands. Sherman Anti-Trust Act, \S 1, 15 U.S.C.A. \S 1; Clayton Act, \S 3, 15 U.S.C.A. \S 14.

2. Monopolies \S 17.5(12)

Regional, import car distributor's tying arrangement that required dealers to purchase part kits as condition for receiving cars was valid under rule of reason; manufacturer's imports were small portion of market; no evidence indicated that replacement dealers would have entered part replacement market or that their failure to do so caused significant anticompetitive effect; distributor developed parts package only after dealers complained of parts supply shortages making it difficult to build market for cars; and manufacturer was small firm intending to break into industry. Sherman Anti-Trust Act, \S 1, 15 U.S.C.A. \S 1; Clayton Act, \S 3, 15 U.S.C.A. \S 14.

Harold E. Magnuson, Boston, Mass., (antitrust issues) and John W. Barto, Concord,

Cite as 821 F.2d 139 (2nd Cir. 1987)

Hughes v. Chesser, 731 F.2d 1489, 1490 (11th Cir.1984).

[7] Dorman's allegation that Higgins prepared the allegedly false report in conspiracy with the prosecutor is insufficient to forestall dismissal of his damage claims. First, the allegation is conclusory and hence could not save the complaint even if Higgins had no immunity. *E.g., Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir.1977) (per curiam). More fundamentally, since absolute immunity spares the official any scrutiny of his motives, an allegation that an act was done pursuant to a conspiracy has no greater effect than an allegation that it was done in bad faith or with malice, neither of which defeats a claim of absolute immunity. *See, e.g., Dennis v. Sparks*, 449 U.S. 24, 27, 101 S.Ct. 183, 186, 66 L.Ed.2d 185 (1980) (claim that judge conspired to corrupt his office was properly dismissed on grounds of absolute immunity) (dictum); *Ashelman v. Pope*, 793 F.2d 1072, 1078 (9th Cir.1986) (en banc); *Holloway v. Walker*, 765 F.2d 517, 522-23 (5th Cir.), *cert. denied*, — U.S. —, 106 S.Ct. 605, 88 L.Ed.2d 583 (1985).

In sum, to the extent that the complaint requested damages, the district court properly dismissed it on the ground that Higgins was entitled to absolute immunity.

C. The Request for Injunctive Relief

[8] In addition to his claim for money damages, Dorman requested that the court grant an injunction against "any use and or further use" of the presentence report. Although Dorman correctly contends that an official's entitlement to absolute immunity from a claim for damages does not bar the granting of injunctive relief, *see, e.g., Pulliam v. Allen*, 466 U.S. 522, 536-37, 104 S.Ct. 1970, 1977-78, 80 L.Ed.2d 565 (1984); *Heimbach v. Village of Lyons*, 597 F.2d 344, 347 (2d Cir.1979) (per curiam), it is clear that the district court properly dismissed Dorman's claim for injunctive relief.

First, the only defendant named in this action is Higgins. The presentence report is used principally by the court in sentencing and by the Parole Commission and the Bureau of Prisons. The report may also be

used by a defendant's probation officer after the defendant is released from prison. *See AO Presentence Report Monograph* at 1. There is no allegation that Dorman's probation officer is or will be Higgins, or that there is to be any use of the report by Higgins. Accordingly, no injunctive relief against Higgins was warranted.

Further, the complaint gives no indication that there is any likely use of the report from which Dorman is in imminent danger of harm. The complaint thus does not indicate that Dorman would be entitled to injunctive relief against anyone.

CONCLUSION

The judgment of the district court dismissing the complaint is in all respects affirmed.



In re "AGENT ORANGE" PRODUCT LIABILITY LITIGATION.

Nos. 1076, 1080, 1082, 1086, 1091, 1092, 1093, 1094, 1096, 1125, 1126 and 1257. Dockets 85-6061, 85-6143, 85-6145, 85-6151, 85-6167, 85-6287, 85-6289, 85-6293, 85-6295, 85-6375, 85-6377 and 86-6057.

United States Court of Appeals,
Second Circuit.

Argued April 10, 1986.

Decided June 10, 1987.

Following settlement in Agent Orange litigation, order unsealing materials produced or generated during discovery was entered by the United States District Court for the Eastern District of New York, Jack B. Weinstein, Chief Judge, and defendants appealed. The Court of Appeals, Miner, Circuit Judge, held that there was no abuse of discretion in unsealing the discovery ma-

materials despite contentions that order improperly altered a term of the settlement agreement, that the public had no right of access to the discovery materials, and that protective order could be modified only in extraordinary circumstances.

Affirmed.

1. Compromise and Settlement ⇐72

Order unsealing discovery materials obtained from defendants did not improperly alter term of settlement agreement, which provided for return to defendants of documents obtained during discovery, where defendants had ample indications that previously entered protective orders might be lifted, but never sought to be released from settlement agreement, and were aware that agreement could not prevent interested nonclass member parties from intervening to seek access to discovery materials, and to extent that district court "modified" settlement agreement, such incidental modification was not an abuse of discretion. Fed.Rules Civ.Proc. Rules 5(d), 26(c), 28 U.S.C.A.

2. Compromise and Settlement ⇐66

District judge generally should not dictate the terms of a settlement agreement in a class action but should approve or disapprove proposed agreement as it is placed before him.

3. Records ⇐32

Public has a presumptive right of access to discovery materials, and if good cause is not shown, discovery materials should not receive judicial protection and should be open to the public for inspection. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

4. Records ⇐32

Rule generally requiring that discovery materials be filed with district court embodies concern that general public be afforded access to discovery materials whenever possible, and that access is particularly appropriate where the subject matter of the litigation is of special public interest. Fed.Rules Civ.Proc.Rule 5(d), 28 U.S.C.A.

5. Records ⇐32

Even if documents produced for inspection pursuant to Rule 34 might not technically fall within the terms of rule requiring that all discovery materials be filed with the district court, there was no abuse of discretion in ordering unsealing, following settlement, of materials produced or generated during discovery, with procedure whereby defendants could seek continued protection for discovery material. Fed.Rules Civ.Proc.Rules 5(d), 34, 28 U.S.C.A.

6. Federal Civil Procedure ⇐1271

Whether to lift or modify a protective order is a decision committed to the sound discretion of the trial court. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

7. Federal Civil Procedure ⇐2397.4

Assuming that modification of protective order required showing of extraordinary circumstances, exceptionally pervasive protection granted defendants during pretrial stages of litigation, coupled with fact that they were never required to show good cause as mandated by rule, amount to the type of extraordinary circumstance warranting modification. Fed.Rules Civ.Proc.Rule 26(c), 28 U.S.C.A.

8. Federal Civil Procedure ⇐1271

District court was within its discretion to lift, following settlement agreement, protective orders with respect to discovery materials obtained from defendants during Agent Orange litigation, subject to showing, on individualized basis, of good cause for continued protection, in that any inconvenience to which defendants were subjected was outweighed by the enormous public interest in the litigation and the compelling need for class members and nonmembers alike to evaluate fully the efficacy of settling the litigation. Fed.Rules Civ.Proc. Rules 5(d), 26(c), 28 U.S.C.A.

Leonard L. Rivkin, Garden City, N.Y.
(Leslie R. Bennett, Barbara Petraglia Ak
Rivkin, Radler, Dunne & Bayh, Gard
City, N.Y., Cadwalader, Wickersham
Taft, Kelley Drye & Warren, Townley

Updike, New York City, Clark, Gagliardi & Miller, White Plains, N.Y., Budd, Lerner, Kent, Gross, Picillo, Rosenbaum, Greenberg & Sade, Short Hills, N.J., Shea & Gould, New York City, of counsel) for defendants-appellants Dow Chemical Co., Diamond Shamrock Chemicals Co., Hercules Inc., Monsanto Co., T H Agriculture & Nutrition Co., Thompson Chemicals Corp. and Uniroyal, Inc.

Cornish F. Hitchcock, Washington, D.C. (Alan B. Morrison, Public Citizen Litigation Group, Washington, D.C., John Catterson, Mark A. Harmon, Peter Sills, Bondy & Schloss, New York City, Barton F. Stichman, Vietnam Veterans of America Legal Services, Washington, D.C., of counsel) for intervenor-appellee Vietnam Veterans of America.

Robert Taylor, Portland, Me. (Harold L. Lichten, Barry A. Margolin, Jennifer Wriggins, Tureen & Margolin, Portland, Me., of counsel) for plaintiff-appellee Robert Grenier.

Ralph G. Elliot, Hartford, Conn., Jane E. Kirtley, Robert S. Becker, Reporters Committee for Freedom of the Press, Washington, D.C., Richard N. Winfield, Rogers & Wells, New York City, Henry L. Baumann, Steven A. Bookshester, David Barr, Barr & Teer, Washington, D.C., Katharine P. Darrow, Kenneth A. Richieri, New York City, J. Laurent Scharff, Pierson, Ball & Dowd, Bruce W. Sanford, Baker & Hostetler, Washington, D.C., of counsel, for amici curiae Reporters Committee for Freedom of the Press, Associated Press, Associated Press Managing Editors, National Ass'n of Broadcasters, Newspaper Guild, New York Times Co., Radio-Television News Directors Ass'n and Society of Professional Journalists, Sigma Delta Chi, in support of appellee Vietnam Veterans of America.

Before VAN GRAAFEILAND,
KEARSE and MINER, Circuit Judges.

1. In a related action heard together with the instant appeal, appellant Dow Chemical Company appealed the district court's order releasing discovery materials subject to the protective orders at issue to Robert Grenier, who individually had sued Dow Chemical in the United States

MINER, Circuit Judge:

Defendants-appellants Dow Chemical Company, Diamond Shamrock Chemicals Company, Hercules Incorporated, Monsanto Company, T H Agriculture & Nutrition Company, Inc., Thompson Chemicals Corporation and Uniroyal, Inc. (collectively the "chemical companies") appeal from an order of the United States District Court for the Eastern District of New York (Weinstein, Ch. J.) unsealing materials produced or generated during discovery in the Agent Orange litigation. The materials in question had been sealed pursuant to two prior protective orders of the district court.

In ordering the documents unsealed, the district court relied on the findings of Magistrate Scheindlin, who concluded that intervenor-appellee Vietnam Veterans of America ("VVA") and intervenor Victor J. Yannacone, as well as the Agent Orange Plaintiffs' Management Committee, which filed a brief in support of the VVA's motion, had a statutory right of access to the subject discovery materials by virtue of Fed.R.Civ.P. 26(c) and Fed.R.Civ.P. 5(d). In balancing the interests of the parties, Magistrate Scheindlin determined that the chemical companies should be required to demonstrate good cause for continuing the protective order as to any particular document or category of documents. Appellants contest the magistrate's determination and argue that the blanket protective orders should remain in force absent a showing of extraordinary circumstances or compelling need. We affirm.¹

BACKGROUND

The extensive procedural history and general background of the Agent Orange litigation is reported in *In re "Agent Orange" Product Liability Litigation* MDL No. 381, 818 F.2d 145 (2d Cir.1987), familiarity with which is assumed. Only

District Court for the District of Maine. Our affirmance of the district court's order unsealing the discovery materials in the Agent Orange litigation obviates the need to discuss the points raised in Dow Chemical's appeal.

those facts relevant to the protective orders at issue will be discussed here.

On February 6, 1981, Judge Pratt, then supervising the Agent Orange litigation, issued an order allowing the defendant chemical companies to designate as "confidential" any records that, in their estimation, contained "confidential developmental, business, research or commercial information." Any party receiving documents designated as "confidential" was required to refrain from disclosing them and to file them with the district court under seal, if filing was required. The documents were to be returned or destroyed at the end of the litigation. *See* Joint App. at 1689-95. Initial discovery involving the chemical companies took place pursuant to the February 6, 1981 order.

In May 1982, Special Master Schreiber, then supervising discovery in the litigation, orally issued a blanket protective order on all records produced or generated in discovery by any party, including the chemical companies and the government. The order provided that all documents and depositions were to be treated confidentially. In response to a motion filed on July 29, 1982, by CBS, Inc., the special master on October 14, 1982 signed a protective order incorporating procedures for dissemination of the discovery material, *see In re "Agent Orange" Product Liability Litigation*, 96 F.R.D. 582, 585-87 (E.D.N.Y.1983) (Special Master's Protective Order), and submitted a memorandum in support of the order to the district court.

The October 14, 1982 protective order provided that only "designated persons," e.g., parties, their attorneys, expert witnesses, and witnesses to depositions, would have unrestricted access to the discovery material. Under the terms of the order, those persons could disseminate discovery material to undesignated people only upon the authorization of the special master, following a review procedure. The party seeking to prevent dissemination had the burden of showing that good cause existed for continuation of the order with respect to the discovery material in question. *See* Fed.R.Civ.P. 26(c). The order also included

a clause indicating that the October 1, 1982 order did not supersede the February 6, 1981 order regarding production of confidential documents.

In his supporting memorandum, the special master noted that good cause for his order existed because of the "complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the June 1983 trial date." 96 F.R.D. at 583. He also concluded that the protective order did not unduly restrain firm amendment rights. Finally, he noted that "as discovery progresses and fundamental disputes are resolved, it may become desirable to lift this order." Joint App. at 175. Judge Pratt approved and adopted the special master's protective order. 96 F.R.D. at 585.

The October 14, 1982 protective order subsequently was modified on two occasions. First, on May 12, 1983, Judge Pratt granted summary judgment in favor of four of the chemical companies based on the government contractor defense. Judge Pratt directed the special master to consider whether the blanket protective order should be modified to permit disclosure of papers and exhibits filed in connection with the summary judgment motion. *In re "Agent Orange" Product Liability Litigation*, 565 F.Supp. 1263, 1277-78 (E.D.N.Y. 1983). The special master recommended that the October 14, 1982 protective order be lifted insofar as it related to "the material submitted with and referred to in the parties' summary judgment papers." *In re "Agent Orange" Product Liability Litigation*, 98 F.R.D. 539, 548 (E.D.N.Y.1983) (Special Master's Recommendation). Judge Pratt accepted and adopted the recommendation. *Id.* at 541. A further modification of the October 14, 1982 order, pursuant to a recommendation by the special master, was adopted by Chief Judge Weinstein who had assumed responsibility for supervision of the Agent Orange litigation. *In re "Agent Orange" Product Liability Litigation*, 99 F.R.D. 645, 646 (E.D.N.Y.1983). That modification permitted release, with the consent of the government, of both

employees' depositions and documents it had produced that were not otherwise subject to specific protective orders filed in the litigation.²

On April 23, 1984, two weeks before the trial was scheduled to commence, the parties filed their pretrial orders with the clerk, attaching all of the documents and depositions they intended to offer at trial. The orders and exhibit lists were filed publicly, and the sealed exhibits were filed in a locked room at the courthouse.

On May 7, 1984, several hours before the trial was to begin, the parties agreed to a tentative settlement, subject to the approval of the court. On June 11, 1984, a formal settlement agreement was filed. This agreement set forth in detail the terms of the settlement negotiated by the parties, subject to the approval of the district court. Paragraph 12 of the settlement agreement provided that

[t]he attorneys for the Class shall return to each defendant, respectively, all documents in their possession or control produced by that defendant, including microfilm and all copies, within 30 days after final judgment is entered in this action and is no longer subject to appeal or review, or if plaintiffs pursue claims against the United States within one year after the date of this Agreement, within 30 days after final adjudication of those claims, whichever is later.

Joint App. at 6694-95.

Before approving the settlement, Chief Judge Weinstein held Rule 23(b) fairness hearings throughout the United States. At a hearing held in New York on August 9, 1984, a representative of the VVA requested access to all of the Agent Orange discovery materials still subject to the protective orders. At the district court's direction, the VVA filed a motion returnable before Magistrate Scheindlin on August 31, 1984. Subsequently, the Agent Orange Plaintiffs' Management Committee and

2. At various times, the district court has entered specific protective orders designed to limit disclosure of particular categories of documents produced by the government, including medical files and records of the Veterans Administration, documents from a particular file of the

Victor Yannacone, Jr., counsel for certain plaintiffs in this litigation, joined in the VVA's motion.

Before the VVA's motion was argued, the district court issued a preliminary order on September 25, 1984, tentatively approving the settlement. *In re "Agent Orange" Product Liability Litigation*, 597 F.Supp. 740 (E.D.N.Y.1984) ("*Settlement Opinion*"). Chief Judge Weinstein addressed a number of concerns raised during the course of the fairness hearings, including the concern that there be no "cover-up" of information contained in the sealed files. *Id.* at 769-70. He observed that the veterans' concern about non-disclosure, "while understandable, is not an appropriate reason for rejecting the settlement." *Id.* at 770. The district court noted that it retained the power to order documents released despite the fact that they were sealed as part of a settlement. The court directed that until the Agent Orange litigation was completed, no documents should be destroyed. In addition, Chief Judge Weinstein directed that the parties "file all depositions and other papers obtained in discovery in a depository at the courthouse in accordance with directions to be provided by a Magistrate who will determine sealing and disposition subject to appeal to the court." *Id.*

The VVA's motion subsequently was argued before Magistrate Scheindlin, who ordered that non-privileged records subject to the February 6, 1981 and October 14, 1982 protective orders be unsealed. *In re "Agent Orange" Product Liability Litigation*, 104 F.R.D. 559, 562 (E.D.N.Y.1985) (Magistrate's Pretrial Order No. 33, dated December 17, 1984) ("*Protective Orders Opinion*"). Magistrate Scheindlin noted that the records at issue fell within two categories: records accompanying the parties' pretrial orders, which were filed with the clerk, stored in the courthouse, and

United States Department of Agriculture, and certain documents produced by the Environmental Protection Agency. See *In re "Agent Orange" Product Liability Litigation*, 99 F.R.D. 645, 649 (E.D.N.Y.1983).

later removed by the parties when the settlement was announced, and all other records produced during discovery, which the parties were required to file with the district court pursuant to the court's September 25, 1984 order. Judge Weinstein adopted Magistrate Scheindlin's order, *id.* at 562, but issued a stay pending final disposition of appeals from the district court's approval of the Agent Orange settlement. This appeal followed.

DISCUSSION

Appellants raise three arguments on appeal. First, they contend that the order unsealing the discovery materials improperly alters an integral term of the settlement agreement reached with the plaintiff class. Second, they claim that the public has no right of access to the discovery materials at issue. Finally, they argue that once a protective order has been entered and relied on, it can be modified only if extraordinary circumstances or compelling needs warrant the requested modification. We discuss appellants' contentions *seriatim*.

A. *Alteration of the Settlement Agreement*

[1] Appellants contend that paragraph 12 of the settlement agreement, providing for return to appellants of documents obtained during discovery, was an integral part of the agreement, and that the district court's order unsealing the discovery materials improperly alters a term of the settlement agreement. We disagree.

When Judge Pratt entered the February 6, 1981 order, he specifically limited its applicability to the pretrial stages of the litigation and indicated that the issue of confidentiality would again be addressed once the trial was scheduled to commence. Joint App. at 1695. As to the October 14, 1982 protective order, appellants were on notice virtually from the time it was issued that the district court's order might be lifted or modified. In his memorandum in support of the order, the special master noted that it might be desirable to lift the order "as discovery progresses and funda-

mental issues are resolved." *Id.* at 1750. Later, when questions were raised during the fairness hearings regarding whether veterans and the public would have access to all discovery materials, Chief Judge Weinstein directed the VVA to move to have the protective orders lifted. At the time he tentatively approved the settlement agreement, Chief Judge Weinstein emphasized the court's inherent power to order documents released, and he directed the parties to file *all* discovery materials at the courthouse. *Settlement Opinion*, 597 F.Supp. at 770.

Despite ample indications that the protective orders might be lifted, appellants never sought to be released from the settlement agreement, nor do they seek that relief here. Moreover, the terms of paragraph 12 contemplated that some of the protected materials eventually might be introduced into evidence during the plaintiff class' then-pending suit against the United States, and therefore would become part of the public record. Appellants also were aware that the materials, once discovered, could be introduced into evidence in many non-class suits then pending. More importantly, appellants doubtless were aware that, regardless of the terms of the settlement agreement reached between the chemical companies and the plaintiff class, such an agreement could not prevent interested non-class member parties from intervening to seek access to the discovery materials. We therefore have difficulty accepting appellants' assertion that "maintenance of the protective orders was a *sine qua non* of the settlement and was central to resolution of the litigation." Appellants' Reply Brief at 9 (emphasis in original).

[2] We recognize that the district judge generally should not dictate the terms of a settlement agreement in a class action. Rather, "he should approve or disapprove a proposed agreement as it is placed before him and should not take it upon himself to modify its terms," *In re Warner Communications Securities Litigation*, 798 F.2d 35, 37 (2d Cir.1986) (citing *Plummer v. Chemical Bank*, 668 F.2d 654, 655 n. 1 (2d Cir.1982)), subject to certain limited excep-

tions, *see, e.g., Jones v. Amalgamated Warbasse Houses, Inc.*, 721 F.2d 881, 884-85 (2d Cir.1983) (district court has discretion to modify attorneys' fee agreement submitted as part of proposed settlement of class action civil rights suit), *cert. denied*, 466 U.S. 944, 104 S.Ct. 1929, 80 L.Ed.2d 474 (1984); *Beecher v. Able*, 575 F.2d 1010, 1016 (2d Cir.1978) (district court has discretion to modify settlement agreement with respect to allocation of settlement proceeds when use of formula for allocation under agreement would lead to inequitable results). However, the language of the settlement agreement to which appellants direct our attention contains no reference to maintaining the confidentiality of the discovery materials, and our independent review of the agreement reveals no such clause. By its express terms, paragraph 12 mandates only that attorneys for the class must return to appellants any documents produced during discovery. Therefore, appellants did not bargain for or procure the continued confidentiality of the discovery materials by private agreement; rather, the confidentiality of those documents was ensured solely by independent judicial acts, i.e., the protective orders.

It is undisputed that a district court retains the power to modify or lift protective orders that it has entered. *See Palmieri v. New York*, 779 F.2d 861, 864-65 (2d Cir. 1985); *United States v. GAF Corp.*, 596 F.2d 10, 16 (2d Cir.1979); *see also* 8 C. Wright, A. Miller & F. Elliot, *Federal Practice and Procedure* § 2043, at 143-44 (Supp. 1986); *cf. United States v. Davis*, 702 F.2d 418, 422-23 (2d Cir.) (informal understanding of confidentiality), *cert. denied*, 463 U.S. 1215, 103 S.Ct. 3554, 77 L.Ed.2d 1400 (1983). Therefore, appellants can claim only that, by lifting the protective orders in this case, the district court effectively modified paragraph 12 in that counsel for the plaintiff class no longer are able to return the discovery materials to appellants once those documents become part of the public record. However, to the extent that the district court "modified" the settlement agreement, we hold that such an incidental modification was not an abuse of the

district court's discretion under the circumstances of this case, *cf. Beecher*, 575 F.2d at 1016; *Zients v. LaMorte*, 459 F.2d 628, 629-30 (2d Cir.1972) (district court overseeing settlement distribution has inherent power to accept late claims despite contrary terms of agreement), and we note that, despite this "modification," appellants have not sought rescission of the settlement agreement.

B. *Right of Access*

Magistrate Scheindlin, in an opinion adopted by the district court, determined that both Rule 26(c) and Rule 5(d) of the Federal Rules of Civil Procedure "require that discovery is presumptively open to public scrutiny unless a valid protective order directs otherwise," *Protective Orders Opinion*, 104 F.R.D. at 568, and that, as a result, appellee had a statutory right of access to the subject discovery materials. Appellee, joined by *amici curiae*, urges us to affirm the district court's order on constitutional, common law and statutory grounds. Because we hold that the statutory right of access relied on by the district court sufficiently supports the court's order, we need not discuss the other grounds raised on appeal.

[3] Rule 26(c) provides, in pertinent part, that "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. . . ." Fed.R.Civ.P. 26(c). A plain reading of the language of Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open to the public for inspection. *Cf. Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37, 104 S.Ct. 2199, 2209, 81 L.Ed.2d 17 (1984) (approving trial court's finding, under Washington state statute identical to

Rule 26(c), that party seeking protective order had shown good cause for issuance of order; implicit conclusion that information would have been available to public absent demonstration of good cause). Any other conclusion effectively would negate the good cause requirement of Rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order since the public would not be allowed to examine the materials in any event.

Fed.R.Civ.P. 5(d) requires that all discovery materials must be filed with the district court, unless the court orders otherwise. However, due to the volume of discovery materials in the Southern and Eastern Districts of New York, this requirement has been altered by local rule, which provides that "depositions, interrogatories, requests for documents, requests for admissions, and answers and responses shall not be filed with the Clerk's Office except by order of the court." SDNY, EDNY Civ.R. 18(a). See Scheindlin, *Discovering the Discoverable: A Bird's Eye View of Discovery in a Complex Multi-district Class Action Litigation*, 52 Brooklyn L.Rev. 397, 407 n. 35 (1986). Appellants disparage Rule 5(d) as merely a housekeeping rule, but an examination of the notes accompanying Rule 5(d) reveals substantive policy considerations underlying the Rule.

[4] The Advisory Committee note accompanying Rule 5(d) discloses that the Committee originally had contemplated incorporating into Rule 5(d) a procedure similar to that now in effect in the Southern and Eastern Districts, but decided instead to require filing of discovery materials 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." Fed.R.Civ.P. 5(d) advisory committee note. As Judge Mansfield, then Chairman of the Advisory Committee on Civil Rules, noted at the time of the Rule's amendment, the drafters of Rule 5(d)

anticipate[d] (and so stated in our committee notes accompanying the proposal) that a judge would not be expected to excuse parties from filing materials in any case in which the public or the press has 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.

N.Y. Times, Aug. 2, 1980, at 20, col. 4 (letter to the Editor). Moreover, when the Advisory Committee proposed amending Rule 5(d) in 1978 so that it would function similarly to Local Rule 18(a), it offered the following caveat:

any party may request that designated materials be filed, and the court may require filing on its own motion. It is intended that the court may order filing on its own motion at the request of a person who is not a party who desires access to public records, subject to the provisions of Rule 26(c).

Fed.R.Civ.P. 5(d) advisory committee note (1978 proposed amendments), *reprinted in* 77 F.R.D. 613, 623 (1978). The Advisory Committee notes make clear that Rule 5(d), far from being a housekeeping rule, embodies the Committee's concern that class action litigants and the general public be afforded access to discovery materials whenever possible. Moreover, we note that access is particularly appropriate when the subject matter of the litigation is of especial public interest, which certainly is true of the Agent Orange litigation. Therefore, we agree with Magistrate Scheindlin's determination, adopted by the district court, that Rule 5(d) and Rule 26(c) provide a statutory right of access to the discovery materials in question.

[5] Appellants raise an additional point regarding the scope of the district court's Rule 5(d) order, which required appellants to file all discovery materials with the court. They assert that documents produced for discovery and inspection in response to Rule 34 document requests are not "pa-

Cite as 821 F.2d 139 (2nd Cir. 1987)

pers" within the meaning of Rule 5(d). Rule 34, unlike other rules governing discovery, does not provide that responsive material be filed with the court and made part of the public record. See *In re Hal-kin*, 598 F.2d 176, 191 n. 26 (D.C.Cir.1979). However, the district court's order clearly required the filing of all discovery materials, including those made available for inspection. While such documents technically may not fall within the terms of Rule 5(d), we find no abuse of discretion in the district court's order in light of the district court's broad supervisory authority in class actions. It would make little sense to allow access to documents requesting inspection of discovery materials and documents facilitating the inspection of discovery materials, without allowing access to the discovery materials themselves. We emphasize that Magistrate Scheindlin set forth a procedure whereby appellants can seek continued protection for any discovery materials in the Agent Orange litigation. Appellants thereby can ameliorate the effect of the district court's order requiring the filing of all discovery materials and its subsequent order unsealing those materials.

C. Standard for Modifying Protective Orders

[6,7] As discussed above, there is no question that a Rule 26(c) protective order is subject to modification. Whether to lift or modify a protective order is a decision committed to the sound discretion of the trial court. *Krause v. Rhodes*, 671 F.2d 212, 219 (6th Cir.), cert. denied, 459 U.S. 823, 103 S.Ct. 54, 74 L.Ed.2d 59 (1982). Appellants contend that this circuit requires that "[o]nce a confidentiality order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' warrants the requested modification." *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir.1982) (per curiam) (citation omitted); see *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir.1985); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 295 (2d Cir.1979). Magistrate Scheindlin determined, however, that the

cases cited by appellants were inapplicable to the Agent Orange litigation, and concluded that the burden of proof should remain with the proponents of continued protection. We need not reach that issue, however, because, assuming without deciding that the *Ernst & Ernst* standard applies, appellee has demonstrated both that appellants reasonably could not have relied on the protective orders and that extraordinary circumstances warrant modification.

In each of the cases cited by appellants, the parties seeking the protective order relied on the *permanence* of that order. In *Martindell*, the parties entered a stipulation of confidentiality ensuring that the material provided would not be used for any purpose other than preparing for and conducting the litigation between them. *Martindell*, 594 F.2d at 293. In *Palmieri*, the protective order specifically was entered to prevent subsequent inquiry by a government agency, thereby encouraging settlement negotiations. *Palmieri*, 779 F.2d at 863. In *Ernst & Ernst*, the settlement expressly was made contingent upon a court order ensuring the confidentiality of the settlement terms. *Ernst & Ernst*, 677 F.2d at 231. In contrast, as discussed above, appellants in the Agent Orange litigation could not have relied on the permanence of the protective order. The February 6, 1981 order by its very terms was applicable solely to the pretrial stages of the litigation. Judge Pratt specifically indicated that the confidentiality issue would be reconsidered upon commencement of the trial. The fact that the litigation resulted in a settlement rather than a trial does not alter the temporary nature of the February 6, 1981 order. Similarly, appellants had ample warning that the October 14, 1982 order was of a temporary nature: Any reliance on such a sweeping, temporary protective order simply was misplaced.

More significantly, appellants never have been required to demonstrate good cause for shielding any document from public view. Under the February 6, 1981 order, appellants needed only to designate discovery materials as confidential to protect them. Under the October 14, 1982 order,

all materials were protected regardless of whether appellants themselves considered protection to be necessary. We conclude that the exceptionally pervasive protection granted appellants during the pretrial stages of this litigation, coupled with the fact that appellants never were required to show good cause as mandated by Rule 26(c), amounts to the type of extraordinary circumstances contemplated in our prior decisions. Although we believe that the unusual scope of the Agent Orange litigation warranted imposition of the protective orders at issue, we note that, had the district court not lifted the orders, we would be compelled to find that the orders had been improvidently granted because the district court never required appellants to make the requisite good cause showing. Improvidence in the granting of a protective order is yet another justification for lifting or modifying the order. *See Martindell*, 594 F.2d at 296. We are satisfied, however, that the district court properly entered the orders initially as temporary measures, and properly lifted them thereafter.

[8] Appellants argue that the cost of poring through the voluminous discovery materials in the Agent Orange litigation would be prohibitive. However, appellants would have had to bear that cost during the pretrial stages of the litigation except for the protective orders. The orders merely delayed a document-by-document assessment; they did not obviate the need for such an assessment. Moreover, appellants' assertion is somewhat disingenuous in that many of the discovery materials previously had been designated as confidential, and many more were examined and catalogued in preparation for trial. Any inconvenience to which appellants are subjected certainly is outweighed by the enormous public interest in the Agent Orange litigation and the compelling need for class members and non-class members alike to evaluate fully the efficacy of settling this litigation. Under the circumstances, we hold that the district court was well within its discretion to lift the protective orders at issue, subject to a showing, on an individualized basis, of good cause for continued protection.

CONCLUSION

Based on the foregoing, the order of the district court lifting the protective orders in the Agent Orange litigation is affirmed.



Harry N. ZEMSKY, Plaintiff-Appel

v.

The CITY OF NEW YORK, the Board of Education of the City of New York, Victor Vilareal, Alan J. Irgang, Sisti, Robert J. Leventhal, Peter R. Berg, Xavier Francis Ruggiero, L. Novelty and Magic Company, a Corporation, Doe One, Doe Two, Defendants-Appellees.

Nos. 855-857, Dockets 86-7614, 86-7616 and 86-7618.

United States Court of Appeals,
Second Circuit.

Argued March 3, 1987.

Decided June 12, 1987.

High school teacher brought rights action against, inter alia, school officials for allegedly failing to take disciplinary action against assaultive student. The United States District Court for Eastern District of New York, H. Bramwell, J., stayed some of teacher's claims pending disposition of related court proceedings, and dismissed remainder of teacher's claims, and teacher appealed. The Court of Appeals, Winter, Circuit Judge, held that: (1) teacher's §§ 1982, 1985, and 1986 claims were subject to dismissal absent allegation that teacher was deprived of his rights as result of racial, ethnic, or class-based animus; (2) teacher's § 1983 claims arising out of allegedly defamatory statements by school officials were properly dismissed absent

C(1) (renumbered existing section C)

C(2) No order limiting disclosure of information entered under ORCP 36 C(1) shall prohibit disclosure to a lawyer who

- a. submits to the jurisdiction of the Court
- b. agrees to be bound by the protective order, and
- c. represents a client in a similar or related matter

unless the person or party to be protected demonstrates good cause for such limitation. A stipulation will not satisfy this good cause requirement. The protective order may, however, require notice to the protected person or party of any intended disclosure, and set a time for such notice and a reasonable time in which the protected person or party may make the demonstration of good cause required by this section.

Georgia-Pacific Corporation

Law Department
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Telephone (503) 248-7284

VIA FACSIMILE

October 16, 1992

Maurice J. Holland
Acting Executive Director
Council on Court Procedures
University of Oregon School of Law
Eugene, OR 97403

Re: Comments on Proposed Amendment to Rule 36C(2)

Dear Mr. Holland:

Georgia-Pacific Corporation is concerned about the proposed amendment to Rule 36C(2) for 2 important reasons. First, the possibility of later disclosure of information provided pursuant to a protective order will adversely impact settlement negotiations. Georgia-Pacific is often willing to disclose commercially sensitive information under the terms of an appropriate protective order in order to settle cases which otherwise might result in protracted litigation. If the amendment to the rule as proposed is adopted, Georgia-Pacific would be considerably less willing to make such disclosures.

Secondly, the proposed rule amendment would further complicate discovery proceedings. The inability to rely on a negotiated protective order will result in many more trips to the presiding judge for rulings on specific objections which heretofore have been easily resolved with an appropriate protective order.

Thank you very much for the opportunity to provide these comments.

Very truly yours,



William E. Craig
Western Regional Counsel

WEC:glg

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** RESIDENT, BEND OFFICE

September 25, 1992

Maurice J. Holland
Acting Executive Director
Counsel on Court Procedures
University of Oregon School of Law
Eugene, Oregon 97403

Re: Proposed amendment to ORCP Rule 68

Dear Maury:

I disagree with the proposed amendment to ORCP 69(A) which would allow recovery for costs of documents only if they are admitted into evidence at trial, instead of the current rule which allows recovery of costs of documents used as evidence at trial. There may not be much of a distinction between "used as evidence" and "admitted into evidence". However, I can think of numerous instances where costs are necessarily incurred to obtain copies of documents which are used for necessary and proper purposes at trial but which may not themselves be introduced into evidence. For example, articles and publications by an expert witness which are inconsistent with the expert's opinions in a given case are often useful in impeaching or undermining the expert's current opinion. Transcripts of testimony given in other cases, or in earlier hearings in the same case, are often used for the purposes of both substantive evidence and impeachment even though those transcripts are not themselves introduced as exhibits. Costs may be incurred to obtain documents which are intended to be used as exhibits, but which later become unnecessary due to a change in the issues, or withdrawal of one or more parties or issues from the case, prior to the time that those documents would otherwise have been used. There are certainly other examples when necessary costs and disbursements were incurred

Maurice J. Holland
September 25, 1992
Page 2

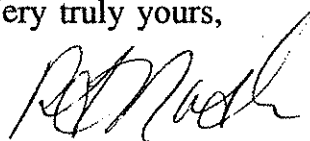
to obtain evidentiary materials which, for one reason or another, end up not being admitted into evidence. Trial judges should have discretion to decide what costs were reasonable and necessary as of the time they are incurred, and which therefore should be recoverable, without an arbitrary limitation allowing consideration only for documents actually admitted into evidence.

The rule as currently awarded is also somewhat confusing as to the phrase "expense of copying of any public record, book or document ... ". I have always understood the rule to allow recovery for the costs of copying any documents used as evidence, and not just public records. For example, it has always been my position that the cost of copying business records, medical records, etc., which are then introduced as exhibits are recoverable costs. I believe the council should issue a comment clarifying that recoverable costs include the cost of copying any documents, public or private, used as evidence.

The state of the law is also unclear as to whether the expense of taking perpetuation depositions is recoverable. The law appears well settled that the cost of discovery depositions are not recoverable, but the case law distinguishes between discovery depositions and perpetuation depositions, allowing recovery of the costs of necessary perpetuation depositions. Rule 68(A)(2) states that the expense of taking "depositions" shall not be allowed ... except as otherwise provided by "rule or statute". It would be helpful if a comment could be issued by the council on the subject of perpetuation depositions, and cross-referencing any other applicable rules or statutes addressing the issue of whether the costs of perpetuation depositions are recoverable. In a recent search I was unable to locate any rule or statute which specifically addresses the issue of whether perpetuation deposition costs are recoverable, so that final sentence of ORCP 68(A)(2) creates confusion.

Thanks for your attention. Best regards.

Very truly yours,



Robert L. Nash

RLN:slf

Dennis J. Hubel

Admitted in Oregon
and Washington

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October 16, 1992

VIA FACSIMILE AND REGULAR MAIL

Mr. Maury Holland
Executive Director, Council on Court Procedures
U of Oregon, Room 275A
School of Law

Thank you for providing me with a copy of the Agenda for the Council on Court Procedures meeting for Saturday, October 17, 1992, together with your October 5th memorandum regarding the ORCP 69 problems discussed at the September 26th meeting of the Council. As I agreed to do at that Council meeting, I have given some thought to and, by this letter, I am giving you my suggestions regarding a practical solution to the problem of a party failing to appear either in person or through counsel at the appointed hour for a trial. This assumes that the party has been given proper notice of the trial pursuant to whatever rules apply in the particular court.

First, I think it would be helpful if we removed this hypothetical situation from Rule 69 altogether. I believe that most trial attorneys [certainly all of those to whom I spoken about this since the September meeting] believe that the term default should be restricted to those situations where a party has failed to plead or appear by way of motion in response to the Complaint. Obviously, it does have some application to those situations where a party's pleadings have been stricken for whatever reason by order of the court and they are, therefore, no longer deemed to have entered an appearance. The confusion in this area, [see Judge Diez' comments in Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990) and Judge Mattison's letter] seems to stem from use of the term "default" in the situation where a party has not appeared for

Mr. Maury Holland
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the appointed trial date. Therefore, I suggest that the clause "or further defend" be either removed from ORCP 69 or be qualified to exclude appearance and defense at trial. It would be helpful to make a clear line of demarcation such that Rule 69 applies to defaults or failure to defend as required by the rules when it occurs prior to the day for trial. If it occurs on the day for trial, this should be handled by an amendment to ORCP 58 TRIAL PROCEDURE. I would suggest the addition of a paragraph E to ORCP 58 that reads as indicated on the enclosure to this letter. The purpose of this addition would be to clearly define and indicate that the trial court has the power and discretion to proceed with trial on the appointed date when the court record reflects that trial notices were mailed to the party or counsel for the party and that that party has failed to appear at trial.

It is neither practicable nor economical for the court or the parties to use the ten-day notice provision for defaults under ORCP 69 to handle the problem of the non-appearing party at trial. In any case, the party who is at trial will have incurred substantial attorney's fees, costs and potentially expert witness fees in preparation for the trial. If that party is forced, with the non-appearance of the defendant, to then give ten-days written notice of the prima facie hearing, the plaintiff will have incurred the expenses and, most likely, will incur additional charges for the delayed prima facie hearing. As an aside, how many busy trial judges will find a 1 - 3 hour block of time for the prima facie hearing within ten days in their schedule? It's hard to imagine a rational due process argument against allowing the appearing party to proceed to trial, put on their evidence in an abbreviated format (absent cross-examination from the non-appearing party) and obtain his or her judgment.

Likewise, a non-appearing plaintiff should not be allowed to complain about the court dismissing the plaintiff's case for failure to produce any evidence. Certainly, the defendant who is prepared for trial and incurred the expenses necessary to do so, should not be deprived of his or her opportunity to obtain a dismissal with prejudice of the plaintiff's claim at that time. If there is some reasonable explanation for the non-appearance of a defendant or a plaintiff, certainly the service of the judgment upon the non-appearing party or their counsel will trigger their use of the procedures already existing to remedy the result. See ORCP 64B(1) and C, ORCP 71.

Since the September meeting, I have re-read the Court of Appeals decision in Van Dyke v. Varsity Club, Inc., 103 Or App 99 (1990). I have been puzzled continuously by the statement of the court that -

Mr. Maury Holland
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"The trial court did not intend to act under ORCP 69, but, rather, intended with trial in the absence of defendant. However, the trial court had no authority to proceed in that manner."

Van Dyke, 103 Or App at 102.

I reviewed the Oregon Rules of Civil Procedure looking for something to suggest the trial court had no such authority. Unless ORCP 69 in its current form prohibits this procedure, I find nothing. It seems to be a strained interpretation of ORCP 69 to suggest it prohibits a trial judge from proceeding. On the other hand, ORCP 52A states,

"When a cause is set and called for trial, it shall be tried or dismissed unless good cause is shown for a postponement. At its discretion, the court may grant a postponement, with or without terms, including requiring the party securing the postponement to pay expenses incurred by an opposing party."

It strikes me that ORCP 52A is authority and, in fact, is mandatory in its command to the trial court to try the case when called for trial without consideration of whether a party appears or not. The staff comment for the Council on Section 52A, when it was adopted, indicates that the language of 52A is new. Apparently, in 1980, a modification to the second sentence of 52A was made according to the 1980 staff comment. The last clause of that sentence was apparently suggested by the case of Spalding v. McCaige, 47 Or App 129 (1980). I am enclosing a copy of the relevant portions of that opinion. Apparently, according to the Spalding opinion, prior to the enactment of ORCP 52A, when a party failed to appear at trial, the Court of Appeals felt that the trial judge was left with two choices: (1) To default the non-appearing party; or, (2) To postpone the trial. Spalding, 47 Or App at 137. It is not clear that any court has dealt with the significance of the first sentence of ORCP 52A mandating that the court case shall be tried or dismissed once it is set and called for trial. Certainly, the Spalding case did not resolve this as it acknowledged that ORCP 52A was enacted after the trial of that case.

I am concerned about your suggestion that the second full sentence of ORCP 69A be removed. This sentence requires ten-days written notice of a party's intent to seek "an order of default" if the party against whom the default is sought (1) has filed an appearance; or, (2) has provided written notice of intent to file an appearance. In practice, defaults are becoming more difficult to set aside. When this provision was added, we had certainty in

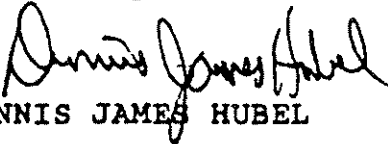
Mr. Maury Holland
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state court practice for the first time. The court didn't have to speculate about the parties' agreements regarding an extension any more. A defendant knew precisely how to automatically trigger a requirement for ten-days written notice of default. A plaintiff knew precisely how to automatically trigger an absolute deadline for the defendant to do something. This system has worked well. It should not be eliminated.

I indicated when I appeared at the Council's meeting in September that I appeared as the liaison representative of the Oregon State Bar Procedure & Practice Committee. Our Committee has not had a meeting since your September meeting and, therefore, these comments in this letter should not be construed as the position of the Procedure & Practice Committee. Rather, they are merely my thoughts and suggestions which I will review with the Procedure & Practice Committee at our next regularly scheduled meeting on October 24, 1992.

Thank you for your consideration.

Very truly yours,



DENNIS JAMES HUBEL

DJH:sb

cc: Henry Kantor, Esq.\via fax
Stephen C. Thompson, Esq.\via fax

Enclosures