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Proposed Changes To The Federal Rules Seek To Accommodate Electronic Discovery

By James W. Richgels
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Although the current Federal Rules of Civil Procedure clearly permit discovery of electronically stored information (e.g. Fed. R. Civ. P. 34(a)), they do not contain provisions specifically governing the discovery of that information. Accordingly, there is a perception that the current Rules do not adequately address the "distinctive features" of electronic discovery, most prominently, "the exponentially greater volume that characterizes electronic data," that makes electronic discovery "more burdensome, costly, and time-consuming." Civil Rules Advisory Committee, Report of the Civil Rules Advisory Committee, Proposed Amendments Involving Electronic Discovery (August 9, 2004). Prompted by the growing prevalence of cases involving electronic discovery, the Civil Rules Committee has published for comment several proposed amendments to the Federal Rules of Civil Procedure that seek to address this perceived deficiency. *Id.* The Committee's proposed changes would amend and alter Rules 16, 26, 33, 34, 37, and 45. *Id.* This article briefly highlights and discusses the most significant proposed changes, and identifies possible areas of the proposed Rules that may become the focus of future discovery disputes if the changes are adopted.[1]

One significant change would add the following language to Rule 26(b)(2):

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery. Fed. R. Civ. P. 26(b)(2) (Proposed Draft August 9, 2004).

[1] This article discusses only the most significant changes. Other proposed changes include (briefly): An amendment to Rule 16 would state that the scheduling order can address electronic discovery and may adopt any agreement between the parties regarding protection against waiving privilege. Fed. R. Civ. P. 16(b) (Proposed Draft August 9, 2004). Changes to Rule 26 would require that, at their discovery conference, the parties "discuss any issues relating to preserving discoverable information," any issues relating to electronic discovery, and any issues relating to the protection against waiving privilege. Fed. R. Civ. P. 26(f) (Proposed Draft August 9, 2004). Changes to Rule 33 include the option to respond to an interrogatory by producing electronically stored information, and changes to Rule 34 would address the format for the production of electronically produced information. Fed. R. Civ. P. 33(d), 34(a)(ii) (Proposed Draft August 9, 2004). Finally, changes to Rule 45 would permit the subpoenaing of electronically stored information and exempt from production information that is not "reasonably accessible" and allow a person subpoenaed who inadvertently discloses privileged information to assert privilege (the standard and procedure are identical to those proposed as amendments to Rule 26(b)(2) and 26(b)(5)(B) and discussed below.) Fed. R. Civ. P. 45(d)(1)(B),(C) and 45(d)(2)(B) (Proposed Draft August 9, 2004)

(See Rules on page 4)

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Welcome to Chief Deputy Clerk Joel Turner

Written by Margery Tibbetts and Jean Steele
Brennan, Steil & Basting, S.C.

Joel Turner, Chief Deputy Clerk for the Western District of Wisconsin

A warm welcome to Joel Turner. Joel became the Chief Deputy Clerk for the Western District of Wisconsin on August 23, 2004. As Chief Deputy Clerk, Joel will assist in the day-to-day administration of court operations with an emphasis on integrating information technology into the court's system and program.

It is too early to predict exactly what technology project Joel will tackle first. Currently, he is analyzing the current system both internally and externally. The Western District Clerk's Office is extremely interested in enacting an electronic filing program for the Bar. Joel is analyzing that and establishing the implementation process. He predicts that will take over the next eighteen months. A specific program has not been selected yet, but whatever is chosen by the Clerk's Office, it will be in line with other national programs.

Prior to joining the Western District Clerk's Office, Joel served as the Assistant Circuit Executive of Automation for the Second Judicial Circuit for the Federal Court of Appeals in New York. During his seven-year tenure there, Joel's expertise included use of technology to enhance the court's operations and improve access to the court information for the bar and for the public. Over the past two years, Joel modernized that Court's case management system by developing an application and reporting system that streamlined the case processing and allowed the court to manage its caseload in a more efficient manner.

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President's Commentary

By
James R. Troupis
President
Western District of Wisconsin Bar Association

Among members of the trial bar there is little more important than clarity of rules and expectations. "Call the outside pitch a strike, that's fine, just call it a strike every time." In the converse, there is nothing more frightening to a trial lawyer than the prospect of unknown 'rules'—the 'judge-made' law of the day. In light of these universally held principles, the recent resurgence of criticism from both the left and the right of what is perceived as legislating from the bench is certainly no surprise.

While I chaired the Governor's Judicial Selection panel we would, as a group, discuss what characteristics we considered essential to the judges we would be recommending. While some characteristics valued by one member might be weighted differently by another panel member, the one attribute mentioned by everyone was the requirement that a judge not make the law. The attorney must be given the latitude to try the case.

There is nothing more distressing than spending months preparing a case, developing discovery answers, undertaking document investigation, preparing witnesses, all intended to address an issue clearly spelled out in pleadings, the law or court rulings, only to have the court change the rules on the eve (or during) trial. The jury, the court decides, will not be allowed to hear that evidence. The twin principles—clarity and consistency—are pillars supporting an effective judicial trial system.

So, it was with some interest that I watched the usual assortment of Sunday morning issues programs recently and heard discussions about interrogation of international terrorists and heard a uniform belief—from the right and left—of the need for clear and consistent rules applicable to interrogation. While there were the expected differences of opinion, one could glean from all the cacophony a single consist lament; vacillation on what is appropriate conduct will jeopardize our security. Unable to discern what rules now apply, interrogators are today left with nothing but fear of consequences not for the terrorist, but for the interrogator. Setting aside one's opinion of what forms of interrogation are appropriate, there can be little debate that the rules must be known if there is to be any chance of success. We can not jeopardize our security and we must not create an unnecessary element of fear for the military and intelligence community.

In these contexts of life and death, everyone, not just the trial lawyer, comes to appreciate the importance of a judiciary that is clear and consistent over time. The rules applied by the trial court (and all courts) can not be changed to fit the facts or personal opinion of the court.

Of course, a criminal/terrorist context provides a dramatic backdrop for a debate on certainty in judicial decision making, but our business relationships are no less affected. The certainty of contract we know makes it possible for whole economies to emerge. The certainty of tort law assures a level of safety. A change in how to interpret a patent, how to address contractual obligations or when a class might be certified may have monumental consequences, even life and death when they affect basic research decisions, capital investment or recovery of losses.

In this context, recent comments criticizing attorneys, legislators and the public who suggest that judges ought not 'make the law' seem strangely out-of-place. The criticism argues that when an attorney speaks-out against a court's failure to uniformly apply the law, that lawyer will cause the public to have less faith in our justice system. That criticism entirely misses the point.

Welcome Joel Turner

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The system he developed included electronic case access, record scanning and mediation tracking.

Joel was recognized by Chief Judge John M. Walker for his outstanding response and dedication in bringing the court's systems back on line after September 11th. Since then, Joel has been extensively involved in disaster recovery and co-op planning. Joel has spoken nationally on the subject. Prior to Joel's promotion to Assistant Chief Executive, he served for two years as the System Manager for the Federal Court of Appeal in New York. Prior to that, Joel worked for two years on Wall Street for a foreign investment bank as a systems analyst. Prior to that, he worked for two years at Exxon Corporation as a support specialist.

Joel's wife, Wendy, was a medical editor for Castle Connoly Graduate Medical Publishing prior to their moving to Madison. Currently, Wendy is establishing herself as a freelance medical editor and type setter. Joel's hobbies include reading, hiking and photography.

Joel reports that he is looking forward to bringing his knowledge and experience in the judiciary to the Western District of Wisconsin. He shares the vision of the current Clerk of Court that the Clerk's office's function is to provide service and support to the Court and the Bar.

President's Commentary

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From lawyers everywhere there is a consistent belief that the system of justice works precisely because trial judges apply rules consistently and with clarity. While it is axiomatic that our adversarial system of justice demands respect for strongly held differences of opinion, differences in factual interpretation and even differences in the interpretation of a given law or rule, it is equally important that the resolution of those differences be achieved with a high measure of certainty and clarity. As with the importance of attorney participation in the election process (a topic I addressed in a prior column) as counsel we must be conscious of the principles and actions which instill faith in our system our justice. Clarity and certainty are two of those principles. A lack of uniform application of the law has precisely the opposite impact. A non-lawyer public that understands little else, understands the need to call the same pitch the same way every time whether that pitch is in a courtroom or at the home of the Brewers.

Rules

Continued from page 1

The above change addresses the difficulty of locating, retrieving, and identifying responsive electronic information due to the large amounts of data that may be stored in electronic data storage systems, the different systems and forms archival data may be stored in, and the significant effort that may be required to retrieve certain types of unused data stored in difficult-to-access formats. *Id.*, Rules Committee Note.

The most significant potential area of dispute surrounding this change is: when is electronically stored information "reasonably accessible?" That determination is dependent on "a variety of circumstances," including: whether access to the information requires substantial effort and cost and whether the party routinely uses the information (if the party does so it would most likely be considered reasonably accessible, although the reverse is not necessarily true.) *Id.* Furthermore, technological developments may change what is reasonably accessible, because as technology changes, the ease with which certain electronic information can be retrieved can increase or decrease. *Id.*

What constitutes "good cause" sufficient for the Court to order production of information that is not reasonably accessible is also a potential issue of contention. "[T]he good cause analysis would balance the requesting party's need for the information and the burden on the responding party." *Id.* The general principles in the current Rule 26(b)(2) can be applied to determine whether obtaining certain information is warranted, and "the rule should be used to discourage costly, speculative, duplicative, or unduly burdensome discovery of computer data and systems." *Id.* Ultimately the determination of what are the proper limits of the proposed rule are left to "judicial decisions in specific situations," and the general principles governing discovery set forth in Rule 26(b)(2). *Id.* Accordingly, although not directly addressing electronic discovery, current case law will aid in the resolution of any dispute regarding these standards.

A second significant change to Rule 26 addresses the increased difficulties of privilege review caused by large volumes of electronic information. The following text would be added to Rule 26:

> (B) Privileged information produced. When a party produces information without intending to waive a claim of privilege it may, within a reason able time, notify any party that received the

> information of its claims of privilege. After being notified, a party must promptly return, sequester or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) [currently Rule 26(b)(5)] with regard to the information and preserve it pending a ruling by the court. Fed. R. Civ. P. 26(b)(5)(B) (Pro posed Draft August 9, 2004).

The proposed Rule provides a procedure whereby a party who has inadvertently disclosed privileged information can assert a claim of privilege regarding that information and demand the return or destruction of the information pending resolution by the Court (if necessary) of the claim of privilege under the current Rule 26(b)(5). The most significant practical question is what is a "reasonable time" within which to notify a party of the inadvertent disclosure of privileged information.

"Many factors" determine whether notice has been given within a reasonable time, and can include: the date on which the producing party learned of the production, the extent of the use the other party has made of the information disclosed, the difficulty in determining that the material was privileged, and the magnitude of production. *Id.*, Rules Committee Note. The Committee Note does not provide any further guidance, nor offer any guidelines regarding the above factors or how they should be weighed. *Id.* Finally, although drafted to address deficiencies regarding the production of electronic discovery, it is interesting to note that the rule would apply to *all* discovery. *Id.*

Finally, a proposed change to Rule 37 would limit the circumstances under which a court may impose discovery sanctions:

> (f) Electronically Stored Information. Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
> (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and
> (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system. Fed. R. Civ. P. 37(f), (Proposed Draft August 9, 2004).

The proposed change acknowledges that in the course of ordinary use computer systems routinely delete information, and that it is proper to design efficient information storage systems that do just that. *Id.*, Rules Committee Note. Two potential areas of dispute are: what is the "routine operation" of a computer system and what are "reasonable steps" to preserve information?

The intent for which a computer operation is created or initiated appears to be the key characteristic of "routine operation." An operation whose only purpose is the destruction of information would likely not be a routine operation, while an operation that destroyed information incidental to achieving some other purpose likely would be (for example, automatically overwriting unused data in order to improve the operating efficiency of a system would likely be a routine operation.) "[R]outine operation" is a deliberately open-ended description that seeks to encompass all the ways that a piece of stored information may disappear "without a conscious human direction to destroy that information." *Id*. However, "different considerations would apply if a system were deliberately designed to destroy litigation-related material." *Id.* There is no reference to prior case or other discovery principles that the Rules Committee believes may provide guidance. *Id.*

Whether or not a party took reasonable steps to preserve electronically stored information is determined by the general scope of discovery, as set forth in Rule 26(b)(1), modified by the proposed Rule 26(b)(2) exempting from discovery electronically stored information that is not "reasonably accessible." *Id.* "In most instances," a party that attempts to preserve information that is discoverable without a court order (i.e. that is "reasonably accessible") has acted reasonably. *Id.* A party's knowledge of the nature of any potential litigation also determines if its efforts were reasonable. Generally, a party should attempt to preserve all records and electronic files that concern subjects that are pertinent to, or likely to have relevant information regarding the litigation. *Id.* In any case, the reasonableness of any preservation efforts should include consideration of the features and characteristics of a party's electronic information storage system, as what specific steps are reasonable "vary widely depending on the nature of the party's electronic information system and the nature of the litigation." *Id.* No guidance is provided regarding the precise interaction between those two factors (for example, what level of disruption of a party's routine computer operations and disruptions to general operations caused thereby is reasonable relative to the scope and breadth of pending potential litigation, etc.). *Id.*

The above proposed changes are posted for public comment until February 15, 2005 at www.uscourts.gov/rules.

Whether To Remove Federal Question Cases To Federal Court: Opportunities & Pitfalls for Defendants[1]

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Just one reason that defendants should consider removal whenever it is available.

Statistically, defendants fare better when cases are removed to, than initiated in, federal court. Potentially, defendants fare just as well by removing cases rather than leaving those cases in State court. If so, just through removal, plaintiff win-rates drop by twenty percent.

A 1998 study showed that "the plaintiff win-rate in removed federal civil cases is 36.7 percent compared to an overall win-rate in federal civil cases of 57.9 percent." Breeden & Noblesville, "Federal Removal Jurisdiction And Its Effect On Plaintiff Win-Rates," 46 *Res Gestae* 26 (Sept. 2002) citing Clermont & Eisenberg, "Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction," 83 *Cornell L. Rev.* 581 (1998). Because data regarding relevant State court cases was inadequate, Clermont & Eisenberg could directly compare only federal court cases. Recognizing that, for removal purposes, the "meaningfulness of the comparison depends on the assumption that the win rate in original federal cases approximates the win rate in comparable state cases," they determined, through other studies, that federal and state court win rates for plaintiffs were sufficiently similar to assume that the same win rate observation applies to removed cases, i.e., using removal as the variable, the win rate decline would be the same. 83 Cornell L. Rev. at 595-99.

Statistically, plaintiffs' win rates in removed cases may be twenty percent lower than if those same cases were left in state courts. This makes removal a critical decision for defendants in each State court case in which removal is possible. Clermont & Eisenberg caution that this effect may result from a "Case Selection" factor, i.e., that "some cases may be selected for removal because they are weak cases, compared to cases filed initially in federal court, and that this could lower the plaintiff win-rate in ways that carry no predictive messages." 83 Cornell L. Rev. at 602-06. Compelling statistically-based arguments, however, demonstrate that this "Case Selection" factor has a minimal impact on the disparity in the win-rates and, instead, a "Forum Impact" factor is largely, if not entirely, the cause. 83 Cornell L. Rev. at 599-602.

To the extent the "Forum Impact" factor is the cause, defendants accrue definitive benefits from removal – on the assumption that plaintiff consciously chose the State court forum: "By removal, the defendant defeats the plaintiff's forum advantage, inducing such changes as dislodging the plaintiff's lawyer from a familiar and favored forum, and more generally reversing the various biases, costs and other kinds of inconveniences, disparities in court quality, and differences in procedural law that led the plaintiff to prefer state court. So, removed cases have lower win rates than those in which the plaintiff chooses the forum, whether the plaintiff elects state or federal court. … [R]emoved cases comprise those cases in which forum matters most, or at least those in which the parties agree in thinking that forum matters most, because removed cases are those in which both sides have tried to forum-shop." 83 Cornell L. Rev. at 599. If the "Case Selection" factor is significant, defendants should still assume that, through the "Forum Impact" factor, removal may substantially increase their advantage. With that assumption, defense counsel should, whenever available, assess the opportunities and pitfalls of removal.

[1]Views, and errors, in this article – and in the additional comments of AAG Sweeney - are personal and not attributable to the Department of Justice. No surprise that AAG Sweeney is more succinct than I. The focus is on defense analysis of removal based on federal question jurisdiction under 28 U.S.C. §§ 1441 *et seq.* Two alternate removal avenues are not addressed, i.e., removal may be grounded on (a) on diversity jurisdiction, as to which decisional law is extensive, complicated and worthy of a separate article and (b) the All Writs Act, 28 U.S.C. § 1651(a), if state claims may interfere with a prior federal order, (*see* Hoffman, "Removal Jurisdiction and the All Writs Act," 148 *U. Pa. L. Rev.* 401 (1999)).

Removal must be prompt and procedures must be properly followed.

To be safe, assure that (a) removal occurs within 30 days after the first defendant is served, (b) all served defendants join in removal, (c) a clear federal basis for removal appears in the removal papers, and (d) all procedures are properly followed. These restrictions make sense, since defendants are provided a golden opportunity, through removal rights, to essentially override the plaintiff's forum decision and instead select a more favorable forum (presuming defendants would not choose to remove unless federal court was perceived as more favorable).

Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc., 526 U.S. 344 (1999), ending a plaintiff game of starting the clock before the race began through "courtesy copies," confirmed that removal periods instead begin with formal service. In multiple defendant settings, exceptions may allow removal more than thirty days after the first service date. *Boyd v. Phoenix Funding Corp.*, 366 F.3d 524 (7th Cir. 2004). Avoid problems, however, by assuming that removal must occur within 30 days after actual service on the first served defendant. Avoid burdening your client with the unpleasant task of having to fit – like the defendant in *Boyd* - within some exception. Instead, if possible, remove within time periods that cannot be questioned. Remands based on untimely removal are generally not appealable. *E.g., Phoenix Container, L.P. v. Sokoloff*, 235 F.3d 352, 353 (7th Cir. 2000). If the district court errs on a close timeliness question, that will provide little solace as you return to State court on a failed removal.

"As a rule, removal requires a petition joined by all defendants." *E.g., Matter of Amoco Petroleum Additives Co.*, 964 F.2d 706, 711 (7th Cir. 1992).
A fictitious party, by definition, can hardly be required to join in the removal. "Nominal parties need not join the petition," but a defendant who is not "nominal" and simply refuses to join can defeat removal even if all other defendants affirmatively seek removal. *E.g., id.*, 964 F.2d at 711. Properly effecting removal in a case with multiple defendants - particularly where separately represented - can take time. Removal decisions should be made, and preparations commenced, sooner rather than later.

State court civil actions are removable if the complaint discloses any federal law claim. law. *Fedor v. Cingular Wireless Corp.*, 355 F.3d 1069, 1071 (7th Cir. 2004). Plaintiffs with state and federal claims may avoid removal by pleading only state law claims. *Fedor*, 355 F.3d at 1071. A plaintiff controls the complaint and may, by "eschewing claims based on federal law, choose to have the cause heard in state court." *Hart v. Wal-Mart Stores, Inc. Associates' Health and Welfare Plan*, 360 F.3d 674, 682 (7th Cir. 2004). The major exception is the "complete preemption" rule, i.e., if federal law completely preempts the area, omitting mention of any federal question does not avoid removal. *Hart*, 360 F.3d at 682. Otherwise, potential federal defenses to state law claims are not grounds for removal. *Fedor*, 355 F.3d at 1071.

Be sure that the removal papers clearly identify one or more federal questions pled in the complaint. When removal papers do not establish federal jurisdiction, remand is obligatory, and appeal from that remand is securely blocked. *Rubel v. Pfizer Inc.*, 361 F.3d 1016, 1019 (7th Cir. 2004). Federal courts must inquire *sua sponte* whenever the propriety of removal is in question. *Voelker v. Porsche Cars North America, Inc.*, 353 F.3d 516, 521 (7th Cir. 2003).

Venue is governed by the initial State filing. Removal is to the federal district in which the state court action is pending, but removing to the wrong district should result in transfer, not remand. *E.g., S.W.S. Erectors, Inc. v. Infax, Inc.*, 72 F.3d 489, 493-94 (5th Cir. 1996); *Wagenknecht v. Wal-Mart Stores, Inc.*, 1995 WL 617479, *1 (N.D.Ill. Oct 13, 1995).

Due date for substantive response in removed cases.

A responsive pleading is due within the later of (a) twenty days after service or (b) five days after removal. *Silva v. City of Madison*, 69 F.3d 1368 (7th Cir. 1995), cert. denied, 517 U.S. 1121; Fed.R.Civ.P. 81(c). Breaching these time limits due to unawareness of these requirements is not excusable neglect. E.g., *Speiser, Krause & Madole P.C. v. Ortiz*, 271 F.3d 884,886 (9th Cir. 2001). Removal within 30 days after service of summons will ordinarily substantially shorten the time applicable in Wisconsin courts (i.e., 45 days after service). If you remove, make sure to recalculate the due date for response based on Fed.R.Civ.P. 81(c) - which is a **maximum** of thirty-five days after service and may be a shorter time period.

(See Federal Questions on page 8)

Federal Questions

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If remand is requested, take it very seriously.

When remands are based on timely raised defects in removal procedure or on lack of subject-matter jurisdiction, appeal is generally barred. *Rubel*, 361 F.3d at 1019. This provides a balance between allowing removal and avoiding undue disruption of State court processes. *Hart*, 360 F.3d at 682. Defendants may thereby, without recourse, have their forum selection choice reversed, and find themselves in the unenviable position of litigating before the very state court judge from which, as that judge will be fully aware, removal was unsuccessfully taken. Remand also has tangible costs. If removal was improper, the plaintiff may be presumptively entitled to fees incurred in obtaining remand. *Sirotzky v. New York Stock Exchange*, 347 F.3d 985, 987 (7th Cir. 2003). While, to obtain fees, a plaintiff must show that the remand order was correct, the plaintiff need not show that removal was in bad faith. *Id*. Minimize remand risks by removing properly. If remand is requested, do not rest on those efforts and assume that the district court will deny the remand request. Take it very seriously.

Bottom line.

Removal is a powerful defense tool that should be carefully considered and consciously evaluated whenever federal question removal may be available. Because it is such a powerful tool, expect resistance and assure that you take steps to keep yourself well within the range of proper removal. Stay far from the boundaries that might, unexpectedly, become cliffs.

ADDITIONAL COMMENTS

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As a general rule, federal courts have more experience with federal claims than State courts. Federal judges have more resources than State court judges, particularly in the critical area of law clerks. Other advantages that the federal court may have over state court for defendants include a more well-developed and frequently used summary judgment process, more explicit instruction of juries, and the six or seven person civil jury.

On a local level, it is obvious that claims move more rapidly in the Western District than in Wisconsin circuit courts. This is, as a general matter, another defense advantage because usually defendants have more knowledge about the facts of a civil case than do plaintiffs. In addition, the fact that the Western District juries are drawn from a wider cross-section of Wisconsin rather than just from Dane County may be more beneficial to Madison area defendants depending on the facts of the case.

Protective Orders and the Presumption of Open Proceedings

By Michael J. Modl

The public's right to access federal court proceedings and records is well-established. This right is rooted in common law traditions that even predate the First Amendment to the United States Constitution. Courts have characterized the public's right of access to judicial proceedings and documents as a rebuttable presumption. Adams v. Ardcor Div. of American Roll Tooling, 196 F.R.D. 345 (E.D. Wis. 2000). To rebut the presumption of openness, the party seeking a protective order must demonstrate that the public denial of access to records is essential to preserve higher values. Additionally, any such order must be narrowly tailored to serve the specific interest being protected.

During the course of commercial litigation, counsel for both parties generally submit to the court a stipulated protective order. Rule 26(c)(7) permits a court, upon a showing of good cause, to enter a protective order that protects trade secret or other confidential research, development or commercial information. Parties must demonstrate good cause to justify denying public access to records which are part of a federal judicial proceeding, including records which would be filed with the court. Even though parties have stipulated to a protective order, the district court must independently determine if good cause exists prior to entry of such an order. A movant seeking a protective order or a party seeking a stipulated protective order, in overcoming the presumption in favor of openness of judicial proceedings, must show with specificity, and not merely conclusory statements, that good cause exists for issuance of the specific protective order.

The Seventh Circuit has made clear that district court judges are required to independently review any proposed protective order to assure that good cause exists for the issuance of the specifically requested order. In Jepson, Inc. v. Makita Electric Works, Ltd., 30 F.3d 854 (7th Cir. 1994), the Seventh Circuit examined a district court judge's obligations to independently determine whether good cause exists for the issuance of a protective order to protect information in a commercial case. During the litigation between Jepson and Makita, Makita served a 30(b)(6) notice of deposition on Black & Decker Corporation. The parties to the litigation, but not Black & Decker, had stipulated to an agreed interim protective order prior to the deposition. Makita and Black & Decker entered into a stipulated protective order, but never obtained court approval of that protective order. At the Black & Decker employee's deposition, Black & Decker counsel designated the entire deposition as confidential and Makita's counsel did not challenge the designation.

In proceedings before the United States International Trade Commission (ITC) wherein Black & Decker claimed that Makita was "dumping" professional power tools in the United States at less than fair market value, Makita suggested to the ITC that there was deposition testimony which may be relevant to the proceeding. Black & Decker subsequently filed a motion for enforcement of the protective order in the district court and for sanctions, claiming that Makita had violated the interim protective order. The trial court agreed and granted sanctions. On appeal, the Seventh Circuit reversed.

The Seventh Circuit noted that the general rule is that pretrial discovery "must take place in the *[sic]* public unless compelling reasons exist for denying the public access to the proceedings." Jepson, 30 F.3d at 858. Noting the growing tendency throughout federal and state courts, particularly in commercial cases, for litigants to agree to seal documents produced during discovery, as well as pleadings and exhibits filed with the court, and the court's normal response to ratify such agreements, the Seventh Circuit ruled that in the context of protective orders, the court must do more. Rule 26(c) requires a showing of good cause and absent such a showing, discovery materials, such as those in question, should not receive judicial protection. The Jepson court noted that the interim protective order, by its own terms, contained no explicit or implicit reference to "good cause" and the record was void of any specific finding of good cause by the district court. Additionally, prior to awarding sanctions, the record did not indicate that the court reviewed the deposition transcript to determine that it, in fact, contained confidential information. The court of appeals, in reviewing the deposition testimony, concluded that at least a portion of the testimony did not contain trade secrets or confidential research, development or commercial information. Accordingly, the court of appeals reversed the imposition of sanctions against Makita's counsel.

Several years later in Citizens First Nat. Bank v. Cincinnati Ins. Co., 178 F.3d 943 (7th Cir. 1999), the Seventh Circuit again invalidated a protective order which allowed the parties to designate as confidential any document which they "believed to contain trade secrets or other confidential or governmental information, including information held in a fiduciary capacity." Citizens, 178 F.3d at 944. Judge Posner, writing for the Citizens court, observed the important interest in public accessibility to federal court legal proceedings. The court observed that the public pays for the courts and therefore has an interest in what goes on at all stages in the judicial proceedings. Id. at 945. The district court judge is the "primary representative of the public interest in the judicial process and is duty bound therefore to review any request to seal the record (or part of it)." Id.

The Citizens court concluded that the protective order was too broad. The court was particularly troubled by the language "believed" to contain trade secrets or confidential information. The court noted that the term "believe" is a "fudge." The language of the protective order making confidential "all governmental information" was "absurdly overbroad." The court further concluded that the protective order was invalid for the additional reason that it was not limited to pretrial discovery, but also sealed documents after they were introduced at trial. The court noted that prior case law encourages umbrella protective orders because it permitted litigants to expeditiously process complex commercial litigation matters. Judge Posner, however, in a quarter page string cite, noted that most cases now endorse a presumption of public access to discovery materials.

In drafting a stipulated protective order, counsel should make certain that the stipulation and protective order, on its face, sets forth good cause for issuance of the protective order. Counsel should make certain that the protective order is no broader in scope than necessary to protect the confidentiality of information for which the public's interest in disclosure is outweighed by other legitimate interests. The protective order should include a provision which allows either party or the public to challenge the designation of material as confidential under the order. Proposed stipulated protective orders that make confidential all business-related documents or all governmental documents clearly are inappropriately broad and counsel should expect that the court will return the stipulated protective order unsigned with direction that counsel redraft the order to satisfy the requirements of the Jepson and Citizens decisions.

State Law Library Website Wins "Webbie"

The Wisconsin State Law Library (WSLL) website has won the 2004 Wisconsin Library Association (WLA) "Webbie" award for Best Reference Site. The award was announced November 3 during the WLA annual conference in Lake Geneva. The WSLL website was one of nine nominees in the Best Reference Site category.

The WSLL website http://wsll.state.wi.us , launched in March 1999, provides access to Wisconsin, federal, tribal, and other states' online legal resources such as statutes, regulations and case law. It also includes an index of over 300 legal topics, each with links to relevant web resources and pertinent statutes and regulations. The library's catalog and monthly newsletter are available, as well as links to legal forms, law reviews, and a wide variety of directories and general reference tools. The website is designed and maintained by WSLL staff members Elaine Sharp, Technical Services Librarian, and Amy Crowder, Web Resources Librarian/Cataloger.

The WLA Media and Technology Section awarded "Webbies" in four different categories plus best of show. A complete list of recipients is available at http://www.wla.lib.wi.us/mats/webbies/default.asp .

The Wisconsin State Law Library, an agency of the Supreme Court of Wisconsin, serves the legal information needs of judges, government officers and employees, attorneys, and the public by maintaining an extensive legal collection and providing reference and research assistance, document delivery services, and instruction in the use of print and electronic legal research tools. The Library is located at 120 Martin Luther King Jr. Blvd. in downtown Madison. Library hours are 8 a.m. to 5 p.m. Monday through Friday. For more information call 608-266-1600 or visit the Library's web site http://wsll.state.wi.us.

Western District News

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