University of Michigan Journal of Law Reform

Volume 40

2007

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Lonny Sheinkopf Hoffman
University of Texas School of Law

ACCESS TO INFORMATION, ACCESS TO JUSTICE: THE ROLE OF PRESUIT INVESTIGATORY DISCOVERY

Lonny Sheinkopf Hoffman*

What is the relationship between access to information and access to justice? Private parties obviously have many publicly available points of access to the information they seek in order to file a lawsuit. Lawyers can talk to their clients and other willing witnesses. Documents can be gathered. Specific statutes may sometimes permit information to be obtained before a formal lawsuit is brought. On other occasions, however, information needed or desired will lie solely within the exclusive knowledge and control of another. The ability of private parties to compel the production of information, documents, or testimony before litigation rarely has been seriously considered as a factor bearing on access to court. Along with a lack of treatment of the doctrinal sources of authority, no attempt has been made by academic commentators or by those most closely involved in civil procedural reform to gather empirical evidence to determine how important the right to take presuit investigatory discovery is to the institution and maintenance of civil suits. This Article seeks to fill these vital gaps that exist in the literature and in the public debates, more generally, over access to justice. After examining the available authority in the federal and state courts, the author gathers and reports on original empirical research conducted on the use of presuit investigatory discovery by private parties. That data comes from Texas, where the state rule provides the broadest grant of authority to prospective litigants to invoke judicial process for investigatory purposes. The empirical evidence from Texas may reasonably be read as indicating widespread use of the state's presuit discovery rule: one out of two lawyer and judge respondents reported at least one experience in which a presuit deposition was taken. Relatedly, it appears that approximately sixty percent of the time the deposition was taken to investigate a potential claim before suit was filed; the remaining forty percent of depositions were secured for the purpose of perpetuating testimony. Examining the available data, the author argues that there are good reasons to believe that the perceived need to satisfy formal legal requirements for bringing suit, as well as the pull of practical considerations, may plausibly explain the use of the state's presuit discovery rule. Read in this manner, the

* Visiting Professor, University of Texas School of Law (2005–06); George Butler Research Professor of Law, University of Houston Law Center. I am indebted to many people for assistance. Thanks are due to Doug Laycock, Linda Mullenix, Joe Sanders, Charlie Silver, Steve Subrin, Neil Vidmar, and Patrick Woolley, and to the participants at the University of Texas School of Law's Drawing Board Luncheon and Loyola University Chicago School of Law's Faculty Scholarship Work-in-Progress Conference for their critical input and suggestions. I am also enormously grateful to Dr. Toshiyucki Yuasa for assisting me in performing some of the qualitative evaluation of the empirical survey data, and to Ruth McCleskey for her help in composing the surveys and compiling the results. Maya Karni and Conrad Hester provided excellent research assistance. Finally, thanks to Lisa Hobbs for giving me access to the Supreme Court Advisory Committee's working files and to Justice Nathan Hecht for graciously helping with the transmission of the survey to judges in Texas. The University of Texas Law School Foundation provided funding for this project.

empirical evidence suggests that an important relationship exists between access to information and access to justice.

INTRODUCTION

In his recent, best-selling book about instinctive reactions and human behavior, *Blink: The Power of Thinking Without Thinking*, Malcolm Gladwell briefly addressed the subject of medical malpractice lawsuits:

> Analyses of malpractice lawsuits show that there are highly skilled doctors who get sued a lot and doctors who make lots of mistakes and never get sued. At the same time, the overwhelming number of people who suffer an injury due to the negligence of a doctor never file a malpractice suit at all. In other words, patients don't file lawsuits because they've been harmed by shoddy medical care. Patients file lawsuits because they've been harmed by shoddy medical care and *something else* happens to them.
>
> What is that something else? It's how they were treated, on a personal level, by their doctor.[1]

Although his is a popular account rather than a scholarly one, Gladwell is right that several prior studies have shown that the number of claims actually filed is quite low as compared to the best estimates of the rates at which negligent and other actionable conduct may occur.[2] He is also correct that one factor shown to account for the decision of at least some plaintiffs to bring suit is the nature of the previous interpersonal relationship between pa-

1. MALCOLM GLADWELL, BLINK: THE POWER OF THINKING WITHOUT THINKING 40 (2005).

2. *See, e.g.*, PAUL C. WEILER ET AL., A MEASURE OF MALPRACTICE: MEDICAL INJURY, MALPRACTICE LITIGATION, AND PATIENT COMPENSATION 69–76 (1993) (referencing HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS, AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK (1990)) (estimating that patients were seven times more likely to be a victim of medical negligence than to file a medical malpractice claim); *see also* PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 24 (1985) (studying rates of negligence in California hospitals and concluding that "at most 1 in 10 negligent injuries resulted in a claim"); Lori B. Andrews, *Medical Error and Patient Claiming In a Hospital Setting* 12 (Am. Bar Found., Working Paper No. 9316, 1993) (studying negligence rates at a Chicago hospital and reporting that of 1047 patients who experienced a medical error, only thirteen filed a claim). *See generally* Michael J. Saks, *Medical Malpractice: Facing Real Problems and Finding Real Solutions*, 35 WM. & MARY L. REV. 693, 702–03 (1994) (discussing data reported by Weiler).

tient and doctor (or other caregiver).[3] In dramatically emphasizing the role of human instinctive reactions, however, Gladwell "thin-slices" other critical factors out of the litigation calculus.

Much work already has been done addressing barriers to access to justice. One of the principal, though certainly not exclusive, points of focus has been on the financial burdens and barriers to seeking legal redress, such as a party's ability to retain a lawyer to take her case.[4] In addition to financial considerations, other factors may account for whether one who is injured brings a claim for relief. Known factors, most of which have been addressed in the context of medical negligence claims, include lack of awareness that an injury was wrongful or actionable, social stigmas against bringing suit, prior communications and disclosures made to patients, and, yes, how the patient was treated, on a personal level, by his doctor.[5]

This Article explores another factor that may influence a prospective plaintiff's ability to initiate a claim for civil relief. In

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3. Gerald B. Hickson et al., *Factors that Prompted Families to File Medical Malpractice Claims Following Perinatal Injuries*, 267 JAMA 1359, 1361–63 (1992); Wendy Levinson et al., *Physician-Patient Communication: The Relationship with Malpractice Claims Among Primary Care Physicians and Surgeons*, 277 JAMA 553, 553 (1997) (examining how medical doctors communicated with their patients and suggesting the prudence of "specific and teachable communication behaviors associated with fewer malpractice claims for primary care physicians"); Marlynn L. May & Daniel B. Stengel, *Who Sues Their Doctors? How Patients Handle Medical Grievances*, 24 LAW & SOC'Y REV. 105, 110–11 (1990).

4. *See, e.g.*, CONSORTIUM ON LEGAL SERVS. AND THE PUB., ABA, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS: MAJOR FINDINGS FROM THE COMPREHENSIVE LEGAL NEEDS STUDY 3–10 (1994) (finding approximately two out of three potentially compensable civil claims not filed by moderate-income Americans and reporting that a majority of Americans did not seek help from the public justice system primarily out of concern about the expense of doing so or because seeking relief through the courts "would not help"); *see also* National Center of State Courts et al., A Market-Driven Approach to Civil Justice Reform (2000), http://a2j.kentlaw.edu/a2j/concept.cfm (on file with the University of Michigan Journal of Law Reform) ("For many consumers with legal disputes involving small amounts in controversy (e.g., less than $25,000), access to the courts for appropriate dispute resolution is more theoretic than real. For claims in excess of the jurisdictional limit of a small claims court, consumers are faced with the bewildering complexity of municipal or superior court procedures. . . . Because of these barriers, effective access to the courts often depends upon legal representation. Yet legal representation is unaffordable and, as a practical matter, unavailable to consumers in small stakes cases."). *See generally* DEBORAH L. RHODE, ACCESS TO JUSTICE (2004).

5. Ellen Wright Clayton et al., *Doctor-Patient Relationships*, *in* SUING FOR MEDICAL MALPRACTICE 50, 69 (Frank A. Sloan et al. eds., 1993) (noting that "problems with communication between doctors and patients were often crucial factors in precipitating individuals to file suit"); Marc Galanter, *Real World Torts: An Antidote to Anecdote*, 55 MD. L. REV. 1093 (1996); T. H. Gallagher et al., *Patients' and Physicians' Attitudes Regarding the Disclosure of Medical Errors*, 289 JAMA 1001 (2003); Andrews, *supra* note 2, at 7. *See generally* William L.F. Felstiner, Richard L. Abel & Austin Sarat, *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming . . .*, 15 LAW & SOC'Y REV. 631, 633–37 (1980–81) (describing elongated process from recognition of injury to institution of suit).

particular, it focuses on the relationship between access to information and access to justice. Private parties obviously have many publicly available points of access to the information they seek. Lawyers can talk to their clients and to willing witnesses. Documents can be gathered from willing sources. Specific statutes may sometimes authorize the production of information (and, less often, sworn testimony) before a formal lawsuit is commenced.

On other occasions, however, information needed or desired will lie solely within the exclusive knowledge and control of another. For this very reason, some courts have expressed reluctance to impose sanctions before there has been an opportunity for discovery where a claim is said to lack evidentiary support. This is especially true in certain kinds of cases, such as civil rights cases.[6] But civil rights claimants are hardly the only ones who may face difficulties accessing information before suit.[7] Put slightly differently, it is quite reasonable to believe that prospective claimants face different challenges and varying degrees of access to information, a phenomenon Robert Bone refers to as the problem of "asymmetric information."[8]

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6. *See, e.g.*, Oliveri v. Thompson, 803 F.2d 1265, 1279 (2d Cir. 1986) (refusing, in a civil rights suit based on police misconduct, to impose sanctions where "it is extremely unlikely that before formal discovery any citizen would or could be in possession of [sufficient] information" to support the claim and noting further that "if sanctions were to bar possible exploration of such claims, the [governmental] agency would be effectively immunized even if it were engaged in unconstitutional policies and practices"). *But see infra* text accompanying notes 131–147 (discussing ways in which formal impediments to suit, such as certification requirements, can deter the filing of claims where inadequate information is available at the outset of litigation).

7. *See* Randall S. Thomas & Kenneth J. Martin, *Using State Inspection Statutes for Discovery in Federal Securities Fraud Actions*, 77 B.U. L. REV. 69, 71–73 (1997) (discussing challenges in bringing shareholder derivative actions because corporate fraud is often difficult to detect without use of formal post-filing discovery, particularly after passage of the Private Securities Litigation Reform Act in 1995); Conrad M. Shumadine et al., *Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series*, 604 PLI/Pat 15 (2000) (observing that in libel actions against media defendants "evidence concerning the critical fault element lies with the defendant"). Several studies of closed-claim medical malpractice files have also shown that the desire to access information is one reason at least some claimants file suit. Hickson et al., *supra* note 3; William M. Sage, *Medical Liability & Patient Safety*, 22 HEALTH AFF. 26, 31 (2003); *see also* Bernard S. Black et al., *Stability, Not Crisis: Medical Malpractice Claim Outcomes in Texas, 1988–2002*, 2 J. EMPIRIAL L. STUDS. 207–259 (2005), *available at* http://ssrn.com/abstract=770844 (citing Hickson, et. al., *supra* note 3, and discussing patient desire for information before the suit).

8. *See* Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 542 (1997) (discussing informational imbalances between plaintiffs and defendants); *see also* Carl Tobias, *Rule 11 and Civil Rights Litigation*, 37 BUFF. L. REV. 485, 498 (1989) (observing that civil rights claimants "rarely will possess or be able to obtain information pertinent to their cases" and that "[c]oncomitantly, in numerous civil rights suits, considerable information important to the factual preparation of complaints that appear specific will be in the records or minds of government or corporate defendants and cannot be secured before these pleadings must be filed, becoming available only during discovery").

Yet, the ability of private parties to compel the production of information, documents, or testimony before litigation rarely has been seriously considered as a factor bearing on access to court. This ought to be at least a little puzzling since nearly all other decisions in the course of litigation—from a defendant's collection of sufficient facts to respond to the plaintiff's complaint,[9] to a plaintiff's bid to marshal her evidentiary proof to stave off premature dismissal by summary judgment,[10] to the shared interest of the parties in amassing adequate information to make informed decisions regarding voluntary settlement of the dispute[11]—are affected by a party's access to information.

Writing about the government's use of its administrative subpoena powers before formal proceedings have commenced, Graham Hughes made the point plainly: "Litigation depends on information."[12] The government may invoke its statutory subpoena powers to obtain information before instituting a criminal, civil, or administrative matter, but to what extent do private parties also have the right to compel information before litigation?

The scholarly literature provides few well-developed accounts of the extent to which the law recognizes the right of prospective claimants to invoke judicial process for investigatory purposes.[13] Beyond the lack of treatment of the doctrinal sources of authority, no attempt has been made by academic commentators or by those most closely involved in the shaping of the civil justice system's rules and institutional features—from legislatures and advisory rule

9. *See, e.g.*, FED. R. CIV. P. 8(b) (requiring that, as to each claim asserted, a defending party must admit or deny the averments or state that she lacks knowledge or information sufficient to form a belief as to the truth of the averment); Greenbaum v. United States, 360 F. Supp. 784 (E.D. Pa. 1973) (striking defendant's answer for failure to conduct a reasonable investigation in answering complaint).

10. *See, e.g.*, FED. R. CIV. P. 56(e) ("When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial.").

11. *See, e.g.*, Randall C. Grasso, *From Where I Sit: Tips for More Effective Negotiations at Mediation*, 23 THE ADVOC. 34 (2003) (detailing numerous ways in which information enables parties to maximize mediation and settlement processes).

12. Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Criminal and Civil Compulsory Process*, 47 VAND. L. REV. 573, 574 (1994).

13. Probably the best, notable exception is Nicholas A. Kronfeld, Note, *The Preservation and Discovery of Evidence Under Federal Rule of Civil Procedure 27*, 78 GEO. L.J. 593 (1990) (providing a well-researched doctrinal account of Federal Rule of Civil Procedure 27, paying careful historical attention to the sources on which the Advisory Committee's proposed language was based). *See also* Bone, *supra* note 8, at 553–76 (using game theory models to study "frivolous" litigation and briefly considering presuit investigation of information as one theoretical factor influencing litigant behavior). *See generally* Patrick E. Higginbotham, *Depositions or Other Discovery Before Action or Pending Appeal*, 6 MOORE'S FEDERAL PRACTICE § 27 (3d ed. 2006) (treatise examination of Rule 27).

committees, to state supreme courts and bar associations—to gather empirical evidence to determine how important the right to invoke judicial process before litigation for investigatory purposes is to the institution and maintenance of civil suits.

This Article seeks to fill these vital gaps in the literature over the role of presuit investigatory discovery and in the public debates, more generally, over access to justice. To this end, it examines the scope of rule- and common law-based authority in federal and state courts permitting presuit discovery. Part I reveals that formal investigatory discovery tools are rarely afforded to prospective litigants before litigation has commenced and that, where available, the privilege of using presuit discovery for investigatory purposes is given only episodically, for particular persons (or entities) in a limited number of contexts.

After developing a clearer picture of the cramped limits of presuit investigatory discovery, Part II assesses the significance of this finding in terms of the larger problem of access to the civil justice system. In other words, to what extent does it matter—both from the individual and institutional perspective—that most private parties, most of the time, are unable to invoke judicial process for investigatory purposes before suit? To answer this question, the Article considers empirical data on the use of presuit investigatory discovery by private parties. That data comes from Texas, where the state rule provides the broadest grant of authority to prospective litigants to invoke judicial process for investigatory purposes. The Texas data is primarily derived from two surveys created for purposes of this examination and sent to (i) approximately 6000 lawyer members of the Litigation Section of the State Bar of Texas and (ii) roughly 600 state district and county court judges, inquiring of their experiences with the rule that authorizes private litigants to conduct presuit discovery.[14] Along with these two surveys, this Article also considers the available (though incomplete) public data on the Texas rule. To my knowledge, no previous effort to collect this information has been made.

Probably the most important finding mined from the data concerns the frequency with which claimants employ Texas's rule. On this point, the data has much to tell. The empirical evidence from Texas indicates widespread use of the state's presuit discovery rule. Approximately one out of two lawyer and judge respondents reported at least one experience with a presuit deposition. Parties took the deposition to investigate a potential claim before filing

14. Results from the two surveys are available at http://www.law.uh.edu/faculty/lhoffman/article.

suit approximately sixty percent of the time; the remaining forty percent of presuit depositions were secured for the purpose of perpetuating testimony. On the assumption that prospective and actual litigants in Texas face roughly the same barriers to judicial access as claimants elsewhere, one plausible inference from these findings is that, if given the opportunity, prospective litigants in other jurisdictions would similarly make use of an expanded presuit discovery rule.[15]

The Article also considers what the data indicate about the relationship between informational access and judicial access. Certainly, the available data from Texas gathered thus far cannot be read to demonstrate definitively that the inability of prospective claimants elsewhere to use judicial process for presuit investigatory purposes impairs their ability to bring suit. Still, finding the rule's diffuse use by lawyers on behalf of prospective claimants is important because it raises, among other issues, the interesting question of why the investigatory discovery is being sought.

One possible explanation is that prospective claimants and their lawyers in Texas have been using the rule purely for strategic advantage, that they have not been compelled to do so in order to bring a lawsuit and that, even without the presuit discovery, they would still have sought legal redress. On this account, the data offer little insight into the role investigatory discovery may play in enabling prospective claimants to seek legal redress. Moreover, if resort to the rule has been largely unnecessary, then this further and more disturbingly suggests that lawyers and their clients may be treating the broad grant of investigatory discovery in Texas like a hunting or fishing license, allowing them to track down facts on which a claim *could* be based.

While it is not entirely implausible that the presuit discovery routinely sought in Texas has been unnecessary (which is to say, rarely needed in order to bring suit), there are good reasons to doubt that this explains the vast majority of presuit discovery practice in the state. A more plausible explanation may be that information sought before litigation was perceived by the lawyer or the prospective claimant (or both) to be necessary, either to satisfy formal legal requirements for the institution and maintenance of a claim, such as pleading or certification rules, or because practical considerations made prudent the marshaling of sufficient factual information at the outset to adequately assess the viability of pursuing a claim.[16]

15. *See infra* Part II.D.1.
16. *See infra* Part II.D.2.

Additionally, although the data reflect that there is widespread use of the Texas rule, in the sense that nearly one-third of lawyer respondents report having taken (or having received notice at least once that someone else had taken) a presuit investigatory deposition, the practice would still be appropriately characterized as quite limited when measured against the total volume of litigation. The absolute figures gathered on presuit discovery in Texas correspond with what lawyers interviewed for this paper revealed: a lawyer might have twenty-five to thirty live cases on her docket each year but only have had occasion to use (or receive notice that another was using) the presuit discovery rule once in about five years (that is, since the new rule went into effect in 1999).[17] These figures hardly make the case that lawyers in Texas routinely seize upon the broad grant of investigatory discovery to try to dig up buried facts on which a claim could be based.

Nonetheless, the available empirical evidence on the use of presuit discovery in the state remains incomplete and, as a result, I am reluctant to—and do not—draw any broad normative conclusions from it. Much additional work needs to be done to examine the role presuit discovery plays in litigation decision-making in particular jurisdictions and, probably even more precisely, in particular kinds of cases.

On the assumption, however, that rulemakers or legislators in other jurisdictions do decide in the future to expand the scope of presuit discovery, Part III explores some tentative lessons that the doctrinal and empirical analyses may offer. The existing doctrinal and empirical evidence suggests several safeguards worthy of consideration for the orderly and fair administration of justice for all participants.

* * *

One last point to make by way of introduction: while this Article does not urge an across-all-jurisdictions adoption of broader civil investigatory discovery, there is little doubt that even a sober examination of the subject is likely to provoke considerable controversy. It cannot be divorced from the larger context in which reform of the civil justice system inspires hotly contested debate. Those who regard increased access to the courthouse as a social good will look favorably on a finding that greater access to infor-

17. This is not to say, of course, that the incidence of use across the bar is uniform. From interviews with several lawyers conducted for purposes of this Article, it is clear that some are using the rule more frequently than others (copy of interview notes on file with author).

mation reduces barriers to the institution and maintenance of civil suits; those who are more dubious of the virtues of litigation will doubtless see it differently.

For those who begin with an immediate and visceral skepticism to allowing private parties use of formal process for investigatory purposes before suit, I want to suggest that it may be worth withholding judgment until the end of this examination and, for the journey along the way, keeping questions like the following in mind:

What, specifically, is abusive about permitting the investigation of facts before the filing of a formal lawsuit when the information sought is otherwise unavailable? If the prospective plaintiff has sufficient evidence to bring suit, but chooses instead to investigate further before filing (perhaps, for instance, to make certain that the claims do more than merely meet a minimum pleading threshold but bear significant evidentiary weight behind them), how is the defendant worse off? Is there some benefit to the defendant or to society by forcing the plaintiff to sue and use formal post-filing discovery to gather the information she seeks? If information lies solely in the possession of the potential defendant and this information, if known, would permit the injured party to bring a legitimate claim for relief, on what basis may the potential defendant complain about having to produce the information before a formal lawsuit has been brought against him? The taking of presuit discovery is more problematic when the prospective plaintiff lacks sufficient information to bring a case and there is no evidence solely in the defendant's possession that would support a legitimate claim for relief. But, and this really seems a critical point, how can we distinguish *ex ante* between this circumstance and those occasions when the defendant has committed some actionable wrong but only he knows it?

I. AUTHORIZATION FOR PRESUIT DISCOVERY IN CIVIL LITIGATION

In both state and federal practice, litigants have an array of discovery devices available to them after a suit has been initiated. Nearly all jurisdictions, by rule, statute, or common law, allow prospective parties to petition the court for discovery before filing a formal lawsuit. In most instances, however, the right to use discovery devices before litigation is narrowly tailored. Presuit discovery typically may only be taken to preserve witness testimony when there is a credible risk that the testimony may be lost if it is not recorded immediately. In several jurisdictions, the formal law permits

discovery before suit for the broader purpose of confirming the proper party to name as a defendant and/or to gather additional information when necessary to institute legal proceedings. Even in these forums, however, the formal law purports to disallow discovery for the broader investigatory purpose of determining whether a cause of action exists. Few jurisdictions stretch the presuit investigatory discovery entitlement to its farthest limit.

A. The Default Rule: Civil Presuit Discovery Limited to Perpetuating Testimony

1. Federal Rule of Civil Procedure 27

Federal Rule of Civil Procedure 27, as interpreted by nearly all courts and commentators, typifies the narrow scope of authority given to private litigants to conduct presuit discovery. The rule provides that "to perpetuate testimony regarding any matter that may be cognizable in any court of the United States" an oral or written deposition may be taken[18] "to prevent a failure or delay of justice."[19] The text of the rule is not self-evidently clear: to perpetuate for what purpose? The word *perpetuate*, standing alone, hardly resolves the matter since all testimony that is put into written (or video, or other electronic) form is testimony that has been perpetuated, if the term is understood by its ordinary meaning of "causing to continue" or "to keep in existence."[20]

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18. FED R. CIV. P. 27(a)(1). Subsection (a)(3) further provides that "depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35." While some courts have refused to allow requests for the production of documents or for physical or mental exams unless they are sought in connection with a deposition, most have read Rule 27 to allow Rule 34 or 35 discovery requests to proceed apace before the filing of a formal suit. Higginbotham, *supra* note 13, § 27.13, at 27–35.

19. FED. R. CIV. P. 27(a)(3). Another section of the rule, not relevant to the present discussion, provides that a deposition may also be taken pending appeal of a previously entered judgment. *See* FED. R. CIV. P. 27(b).

20. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 618 (4th ed. 2000). In a wonderful example, though, of lexicographic tail wagging, the Merriam Webster's 1996 edition of the Dictionary of the Law defines perpetuate as meaning:

> to preserve or make available (testimony) for later use at a trial by means of deposition esp. when the evidence so gathered would be otherwise unavailable or lost.
>
> NOTE: Courts will not allow the perpetuation of testimony at a pretrial proceeding if it appears to be an attempt to fish for useful material.

While the text may be susceptible to a broader interpretation, the federal courts have long and nearly unanimously found that Rule 27 authorizes a presuit deposition only when the petitioner has demonstrated that the witness's testimony might otherwise be lost if it is not taken immediately, such as when a witness may be suffering from a terminal illness or may be about to leave the jurisdiction's subpoena reach.[21] Rule 27, the courts routinely observe, "is not a substitute for broad discovery."[22] According to the prevailing understanding, this rule is not meant for investigating the facts in advance of drafting a complaint.[23] If the petitioner does not know the substance of the evidence she seeks to perpetuate, resort to the rule is unavailable.[24]

This restricted construction given to the language in Rule 27 is almost certainly consistent with the intent of its drafters. As Steve Subrin has shown, before the Federal Rules of Civil Procedure were adopted in 1938, there were few opportunities for private parties to invoke judicial process to compel the production of documents, information, or testimony before trial.[25] Section 639 of Title 28 of the United States Code provided the primary rule: testimony was to be given in open court.[26] Before the Federal Rules went into effect, the notion that one side could discover the facts supporting his adversary's case would have been unfamiliar to federal (and only slightly more familiar to state court) practitioners. A broad right to take discovery before formal legal proceedings were commenced would have raised significant concerns among many on the bench and in the bar that the information discovered could be used improperly to manufacture claims. Expressions of similar concern about the search for factual information echo down the centuries and are given voice in modern critiques that object to liberalization of presuit discovery.

DICTIONARY OF THE LAW 361 (1996). The Webster's legal dictionary definition thus hints at the narrow interpretation that the federal courts have routinely given to the words "to perpetuate testimony" in Rule 27.

21. *See generally* 8 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 2071, at 651 (2d ed. 1994); *see also* Higginbotham, *supra* note 13, § 27 (treatise examination of Rule 27).

22. Deiulemar Compagnia Di Navigazione v. M/V Allegra, 198 F.3d 473, 485 (4th Cir. 1999); *see also* Ash v. Cort, 512 F.2d 909, 911–12 (3d Cir. 1975) ("Rule 27 properly applies only in that special category of cases where it is necessary to prevent testimony from being lost. . . . Rule 27 is not a substitute for discovery. It is available in special circumstances to preserve testimony which could otherwise be lost.").

23. *See, e.g.*, *In re* Storck, 179 F.R.D. 57, 58 (D. Mass 1998).

24. *See, e.g.*, Nevada v. O'Leary, 63 F.3d 932, 936 (9th Cir. 1995).

25. Steve Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691 (1998).

26. 28 U.S.C. § 639 (1928) (repealed by Rules Enabling Act).

There were exceptions. Two code provisions, 28 U.S.C. § 644 and § 646, allowed pretrial depositions in law cases to record the testimony of a witness who would likely be unavailable at trial.[27] In addition, litigants in federal courts adjudicating cases in law could also invoke Equity Rules 47 and 58, the rules that authorized the use of equitable bills of discovery.[28] Even these procedures were quite limited, however; they certainly bear little in common with the discovery regime now found in Rules 26 through 37 of the Federal Rules of Civil Procedure.[29] A plausible case can be made that, before 1938, there were no recognized examples of cases where a court sanctioned use of the equitable bill of discovery to investigate potential claims or to help determine the proper party to sue.[30]

It is hardly surprising, then, given both the absence of any prior authorization for investigatory presuit discovery and the clear intent of the new rules to liberalize pleading practice, thereby lowering the threshold of facts needed to institute and maintain a civil suit,[31] that the Advisory Committee members did not conceive of Rule 27 as a presuit investigative tool. The 1937 Advisory Committee Note accompanying Rule 27 provides that the rule "offers a simple method of perpetuating testimony in cases where it is usu-

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27. These sections provided for deposition under dedimus potestatem and in perpetuam.

> In any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a dedimus potestatem to take depositions according to common usage; and any district court, upon application to it as a court of equity, may, according to the usages of chancery, direct depositions to be taken in perpetuam rei memoriam, if they relate to any matters that may be cognizable in any court of the United States. . . .

28 U.S.C. § 644 (1928) (repealed by Rules Enabling Act). Section 646 described the method for taking the deposition ordered and for sanctioning failures to comply with the court's order. *See* 28 U.S.C. § 644 (1928) (repealed by Rules Enabling Act). *See also* Subrin, *supra* note 25, at 698–99.

28. *See* Subrin, *supra* note 25, at 699–700.

29. ABA, FEDERAL RULES OF CIVIL PROCEDURE AND PROCEEDINGS OF THE INSTITUTE ON FEDERAL RULES 277–90 (William W. Dawson ed., 1938) [hereinafter CLEVELAND PROCEEDINGS] (comments of Edson Sunderland).

30. *See* Kronfeld, *supra* note 13, at 595–602 & n.20 (discussing the limited case law authority regarding use of presuit discovery before 1938 in the U.S. and in England, where preservation—not investigation—of evidence was the extent of the privilege given and noting further that the Advisory Committee drafters of Rule 27 "rejected the notion that [the rule could be used] when a petitioner with an apparently legitimate cause of action is unable to discover facts sufficient to frame a complaint with the requisite particularity.").

31. *See In re* Ferkauf, 3 F.R.D. 89, 90–91 (S.D.N.Y. 1943) (recognizing that the use of Rule 27 only for preservation of evidence purposes is consistent with the intent of rulemakers to lessen the pleading burden on parties for maintaining a claim for relief).

ally allowed under equity practice or under modern statutes."[32] The Note then cites three decisions and several state statutes, but offers nothing further about them.[33] In response to a question directed to him by a lawyer participating in one of the first conferences on the new Rules of Civil Procedure, Edson Sunderland, the Advisory Committee Member directly responsible for drafting Rule 27, spoke about the text of the rule and the intent of the rulemakers:

> Under the literal wording of the rule, the suggestion that you make [that the rule could be used "for the purpose of discovery"] might be possible. The rule provides that the petition shall show, first, that the petitioner expects to be a party to an action cognizable in the court of the United States, but is presently unable to bring it, or cause it to be brought, and he might urge that he is presently unable to bring the action because he doesn't know enough facts to draw his complaint. While that is a possible construction of the language, it was not the intention of the Committee to allow any such use of the rule.[34]

But if Professor Sunderland was willing to recognize that the language of the rule could be interpreted as permitting presuit discovery, even though this was not the drafters' intent, other members of the Committee were not. Judge William Mitchell, Chair of the Advisory Committee, followed Sunderland's comments by remarking, "I should feel badly if we have admitted for one minute that under Rule 27 a man can juggle around and take a discovery deposition before bringing a suit, when in the provisions on discovery we have explicitly stated he can't do that until the suit has been started."[35] Mitchell concluded, "It is certainly clear that the whole scheme of Rule 27 is inappropriate for obtaining information in an ordinary suit to enable one to draw a complaint."[36]

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32. FED. R. CIV. P. 27, 1937 advisory committee's note to subdivision (a).

33. Some courts have interpreted the cases cited by the Advisory Committee as evidence that the rulemakers' intent was to limit the use of presuit depositions to occasions when the witness's testimony would otherwise be lost and that no broader use of the rule to investigate potential claims was contemplated. *See, e.g., In re Ferkauf*, 3 F.R.D. at 90–91.

34. CLEVELAND PROCEEDINGS, *supra* note 29, at 292.

35. *Id.* at 293.

36. *Id.* In his opening remarks at the Institute, however, Mitchell conceded that

> [w]hat is said here at this meeting by members of the Advisory Committee must be taken with a grain of salt, for two reasons. The first is that officially nobody but the justices of the Supreme Court know what these rules mean. We have no right to speak for them, and what they say about the rules ultimately will control. Furthermore, I

Only in the rarest of occasions have courts departed from this predominant view of Rule 27's purpose.[37] The sole modern civil disobedient is *In re Alpha Industries, Inc.*[38] The petitioner in *Alpha Industries* manufactured military-style clothing and goods in the United States. Its national distributors were contractually bound not to sell outside of their territory. When Alpha discovered that another company, Mika Overseas Corp., was selling some of Alpha's products in Japan, Alpha sought a Rule 27 deposition of a representative from Mika to try to determine how Mika obtained the goods.[39] Petitioner's position was that the overseas exports were a result either of a breach of contract by one of its own distributors or were counterfeited by Mika. Thus, the Rule 27 deposition would allow it to determine who should be named as the proper defendant in a copyright or trademark infringement action under the Lanham Act.[40]

Mika argued, citing the prevailing interpretation of the rule, that a presuit deposition is not to be used as a method of discovery to determine whether a cause of action exists or, even if it is known that a cause of action exists, to determine against whom it may be brought.[41] The rule, Mika said should be limited to perpetuating testimony when a petitioner can show that the evidence sought is in danger of being lost or destroyed. Rejecting Mika's argument, the district judge granted the presuit deposition request. The court found convincing the argument that the presuit deposition was

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think it was Lord Bacon who said that a person who drafted a document was least qualified to interpret it, because he always had in mind what he intended to say rather than what he actually said.

Id. at 179.

37. *See, e.g.*, Bowles v. Pure Oil Co., 5 F.R.D. 300 (E.D. Pa. 1946) (expressing an early interpretation of Rule 27 suggesting that the only requirement under the rule is to show that there "is at least reasonable ground to believe that a cause of action exists, and can be proved if the necessary facilities are afforded him"). In *Reints v. Sheppard*, 90 F.R.D. 346 (M.D. Pa. 1981), the court commented in dicta that while investigatory presuit discovery is not the "type of discovery envisioned in Rule 27(a) of the Federal Rules of Civil Procedure, the court would be willing to grant such a request in a situation where plaintiff truly did not have knowledge of sufficient facts to plead his case." The court denied the Rule 27 request, however, because it found that the information sought in the case was not in the exclusive possession of the defendant. Two other modern cases treat Rule 27 more expansively than most, but in both instances the deponent's age and/or poor health were also cited as reasons for granting the petition. *See In re* Town of Amenia, N.Y., 200 F.R.D. 200, 202–03 (S.D.N.Y. 2001); *In re* Petition of Delta Quarries & Disposal, Inc., 139 F.R.D. 68, 69–70 (M.D. Pa. 1991).

38. *In re* Alpha Indus., Inc., 159 F.R.D. 456 (S.D.N.Y. 1995).

39. *Id.* at 456–57.

40. *Id.* at 457.

41. *Id.*

authorized if suit would otherwise be barred by the requirements of Rule 11:

> Petitioner cannot bring the suit immediately because Federal Rule of Civil Procedure 11 prohibits petitioner from bringing an action either against all of its many distributors—four in the U.S. and over a dozen worldwide—where it does not know the identity of the distributor(s) who may be in breach of the agreement with petitioner; or against respondent for selling counterfeit goods where petitioner cannot be sure whether respondent *is* selling counterfeit goods.[42]

Citing a passage from *Moore's Federal Practice* on Rule 27, the court concluded that "the danger of loss attendant upon all evidence through lapse of time" was sufficient to come within the rule since petitioner would be unable to bring suit until it learned how the goods came to be exported to Japan, a fact Alpha could not obtain except by recourse to Rule 27.[43]

Other courts have recognized a relationship between Rule 11 and Rule 27,[44] but rarely have similarly extended an investigatory right under Rule 27 to investigate potential claims or even to confirm the proper defendant to sue. Most have rejected the attempt to justify the presuit deposition by reference to the sanctions rule.[45] The best example is *In re Ford*,[46] where a presuit deposition was sought of the county sheriff by a woman whose father had been killed by the police. Her petition explained that she wanted to take the deposition to determine who had shot him and whether the shooting was justified. She took the position that Rule 11

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42. *Id.*

43. *Id.*

44. *See, e.g., In re* Town of Amenia, 200 F.R.D. 200 (S.D.N.Y. 2001) (granting Rule 27 petition where deposition was sought on matters relevant to town's claim for contribution for the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) landfill costs and observing that Rule 11 "must be read consistently with the exception to Rule 27"); *In re* Petition of Delta Quarries, 139 F.R.D. 68, 69 (M.D. Pa. 1991) (noting, in the course of granting a Rule 27 petition, that "the applications of Rule 11 have evolved significantly in recent years, and counsel's concerns with respect to his Rule 11 obligations are much appreciated . . . .").

45. *See, e.g., In re* Landry-Bell, 232 F.R.D. 266, 266, 267 (W.D. La. 2005) (denying leave to take a Rule 27 deposition of a person petitioner believed—but could not yet confirm—was responsible for harassing her by posting her picture and other personal information on adult websites and noting, *inter alia*, that "[d]espite the obvious sympathies that flow from the allegations of the Petition," and that "[t]he court is certainly sympathetic to Petitioner's plight," Rule 27 does not authorize a deposition for investigatory purposes).

46. *In re* Ford, 170 F.R.D. 504 (M.D. Ala. 1997).

precluded her from bringing an action before she had the deposition testimony she sought.[47]

Concluding that the decision in *Alpha Industries* misread the academic commentary from Professor Moore and mistakenly allowed a presuit deposition to be taken for investigatory purposes, the court was plainspoken and sensitive but, ultimately, unmoved by petitioner's dilemma:

> The court is not without sympathy for Ford. She is understandingly deeply troubled by and concerned about the shooting death of her father. If a law enforcement officer was at fault she desires to have him or her held accountable in a court of law. But, under Rule 11, she cannot file suit against any one without first having uncovered some 'evidentiary support' for holding the person liable or having obtained some preliminary evidence that there is likely to be some 'evidentiary support after a reasonable opportunity for further investigation or discovery . . . .' However, without the discovery incident to litigation, Ford is without the means to uncover whether her father was a victim of foul play in violation of a clearly established federal right. Her predicament is a 'Catch 22.' Indeed, she must feel that, under the rules established by our civil justice system, a law enforcement officer can get away with murder.[48]

In hindsight, the petitioner's decision to predicate her request for a presuit deposition on the claim that filing suit without securing the testimony would amount to a violation of the sanctions rule seems less than prudent. Would the district judge have allowed her to take discovery in the ordinary course of the litigation had she simply filed suit first? Or, would he have granted a dispositive motion and, correspondingly, sanctioned her for proceeding without adequate evidence? In the prevailing, cramped structure of Rule 27, the lesson of *In re Ford* for other prospective plaintiffs is unmistakable: punctilious compliance with Rule 11 comes with an unacceptably high risk.

Rule 27 expressly preserves independent actions to perpetuate testimony, a holdover from pre-merger days when the equitable bill of discovery was one of the only means by which discovery could be obtained. Rule 27(c) has been interpreted as permitting the maintenance of independent actions only for the same purpose for

47. *Id.* at 507–08.
48. *Id.* at 509.

which Rule 27 may be invoked: that is, to preserve testimony, not to investigate potential claims.[49] While nearly all federal courts hew to a narrow interpretation of Rule 27, on a few occasions federal judges have invoked a general inherent power to allow the maintenance of separate proceedings for broader discovery purposes. To understand these decisions, it is necessary to go back in time to 1970.

Before 1970, it was unclear whether the courts could order an inspection of tangible property in the control of a nonparty when it could not be easily brought to a deposition (like real property or a large piece of machinery).[50] In 1970, to address this uncertainty, the Advisory Committee added Rule 34(c) and a clarifying note explaining that "it is occasionally necessary to enter land or inspect large tangible things in the possession of a person not a party . . . . [T]his subdivision makes clear that Rule 34 does not preclude independent actions for discovery against persons not parties."[51] In this context, then, the independent action was another use of the old equitable bill of discovery procedure; that is, it allowed parties to bring a proceeding for the sole purpose of compelling the desired production of information when no Federal Rule of Civil Procedure could be used.[52] *Lubrin v. Hess Oil Virgin Islands Corp.*[53] illustrates how some courts seized the remaining equitable authority to permit broader presuit discovery for investigatory purposes.

In *Lubrin*, an employee was injured from exposure to chemicals released from a cargo manifold and tank. He asked his employer, the owner of the property where the equipment was found, to tell him who made the equipment and to give him permission to inspect it. When his requests were refused, he filed "an equitable action" against the employer to inspect the equipment and to obtain a Rule 30(b)(6) deposition of a corporate representative.[54] The information he sought was necessary, the court recognized, because the employee "[would] be unable to determine the manufacturer or supplier of the [] cargo manifold near tank without [the employer's] assistance."[55] Thus, he must "force a non-party in

49. *See supra* notes 21–24.

50. FED. R. CIV. P. 34(c) & advisory committee's note to 1970 Amendment Subdivision (c).

51. *Id.*

52. *See, e.g.*, Reilly Tar Chem. Corp. v. Burlington N. R.R. Co., 589 F. Supp. 275, 278–79 (D. Minn. 1984); Wimes v. Eaton Corp., 573 F. Supp. 331, 335–37 (E.D. Wis. 1983); Huynh v. Werke, 90 F.R.D. 447, 450 (S.D. Ohio 1981); Home Ins. Co v. First Nat'l Bank of Rome, 89 F.R.D. 485, 488–89 (N.D. Ga. 1980).

53. Lubrin v. Hess Oil Virgin Islands Corp., 109 F.R.D. 403 (D.V.I. 1986).

54. *Id.* at 404.

55. *Id.*

an anticipated tort suit to supply him with information he needs for determining whether a third-party may be liable for his injuries."[56] The court acknowledged that Rule 27 precluded a separate action for discovery purposes. Nonetheless, relying on the 1970 Advisory Committee Note to Rule 34, the court allowed the discovery finding that "the Federal Rules do not preclude equitable actions for the purpose of discovery."[57]

Further amendments in 1991 to Rules 34 and 45, however, probably have eliminated most—if not all—legitimate grounds for resort to an independent equitable action, which may be one reason that there are no other decisions like *Lubrin.* Rule 45 now expressly authorizes the issuance of a subpoena to a nonparty to compel the production of books, documents, or other tangible things, as well as the inspection of premises not in the possession of a party.[58] The 1991 Advisory Committee Notes suggest that there is almost no need for a court to invoke an inherent power outside of the Federal Rules to authorize an equitable discovery action.[59] Consequently, since 1991 courts typically decline to exercise their authority to allow the maintenance of equitable bills of discovery.[60] Where equitable bills have been allowed post-1991, the decisions rest on dubious legal grounds. For instance, in *Prudential Property & Casualty Insurance Co. v. American Plywood Ass'n,*[61] the federal magistrate judge permitted a "pure bill of discovery" for the purpose of obtaining information within the defendant's knowledge to

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56. *Id.*

57. *Id.* at 405.

58. FED. R. CIV. P. 45(a)(1)(C), (b)(1). Before 1991, a party could invoke Rule 45 to compel nonparties to produce documents and other tangible things for inspection, but the procedure was a bit cumbersome because the courts interpreted the rule to require that the production occur in the course of a deposition. Thus, a Rule 45 deposition was referred to as a "document deposition" because what usually happened was that the custodian of the records would simply show up at the designated time for the deposition and on the record produce the documents and swear to their authenticity. 8A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE, § 2209, at 392 (2d ed. 1994).

59. *See* FED. R. CIV. P. 34, 1991 advisory committee's note ("This amendment reflects the change effected by revision of Rule 45 to provide for subpoenas to compel non-parties to produce documents and things and to submit to inspections of premises. The deletion of the text of the former paragraph is not intended to preclude an independent action for production of documents or things or for permission to enter upon land, but such actions may no longer be necessary in light of this revision.").

60. *See, e.g.*, Franklin v. Turner, Civ. No. 92-891-FR, 1992 U.S. Dist. WL 252121, at *1 (D. Or. Sept. 25, 1992) (dismissing plaintiff's "equitable bill of discovery" following amendment of Rule 45 because, since "Rules 34 and 45 allow for the production of documents in the possession of third parties, [the petitioner] need not file a separate cause of action to obtain the material he seeks.").

61. Prudential Prop. & Cas. Ins. Co. v. Am. Plywood Ass'n, Nos. 932026CIV, 1994 WL 463527 (S.D. Fla. Aug 3, 1994).

aid in the drafting of a lawsuit.[62] The court relied on Florida state law that allowed such actions.[63] That petitioner's request would have been forbidden by Rule 27 was not addressed by the court (nor, apparently, was it raised by the defendant). While courts may have inherent power where the rules are not inconsistent, they are not supposed to act in contravention of an existing rule of procedure.[64]

2. Predominant State Practice Mirrors Narrowness of Federal Rule

Most states have adopted the federal version of Rule 27[65] and have given their state rule a similarly cramped interpretation. Even where textual variances exist in the state and federal rules, few courts have sanctioned any broader confirmatory or investigatory uses of presuit discovery. In Vermont, for example, Rule 27 has language slightly different from the federal rule:

> A person who desires to perpetuate testimony or to obtain discovery under Rule 34 or 35 regarding any matter that may be cognizable in any court of the state may file a verified petition in the superior court in the county of the residence of any expected adverse party.[66]

And, in a later section, the rule continues:

> If the Presiding Judge is satisfied that the perpetuation of the testimony or other discovery may prevent a failure or delay of justice, the judge shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions; or shall make an order designating or describing the persons from whom discovery may be sought under Rule 34 and specifying the objects of such discovery; or

62. *Id.* at *1, 4.

63. *Id.* at *2.

64. *See* Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1407 (5th Cir. 1993) (noting that "although a court may have inherent power to do that which is not specifically provided for in the Rules, it may not do that which the Rules plainly forbid").

65. *See, e.g.*, HAW. R. CIV. P. 27; IDAHO R. CIV. P. 27(a)(1)–(c); ME. R. CIV. P. 27; MASS. R. CIV. P. 27; MINN. R. CIV. P. DIST. CT. 27.01–03; MO. R. CIV. P. 57.02; MONT. R. CIV. P. 27 (a)–(c); NEB. R. CIV. P. 27; N.M. R. CIV. P. DIST. CT. 1-027; S.C. R. CIV. P. 27; UTAH R. CIV. P. 27; WASH. SUPER. CT. CIV. R. 27; W. VA. R. CIV. P. 27.

66. VT. R. CIV. P. 27(a)(1).

shall make an order for a physical or mental examination as provided in Rule 35(a).[67]

But if the rule's language, "to perpetuate testimony *or to obtain discovery under Rule 34 or 35 regarding any matter that may be cognizable in any court*,"[68] suggests to some that a broader use may be authorized,[69] there are no cases approving presuit investigatory discovery in Vermont.

A number of other states similarly have rules whose language varies from the federal rule, but whose courts continue to offer a cramped reading of the scope of authority to undertake presuit discovery for more than perpetuation purposes.[70]

B. Presuit Discovery for Confirmatory Purposes

By contrast to the predominant rule in most jurisdictions, some states permit presuit discovery not only to preserve testimony, but also to confirm the proper defendant to sue and/or the factual allegations that will be included in a suit. Among those that permit presuit discovery by prospective claimants for confirmatory purposes, two different sources of authority are invoked.

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67. VT. R. CIV. P. 27(a)(3).

68. VT. R. CIV. P. 27(a)(1) (emphasis added).

69. *Cf. Ex Parte* Anderson, 644 So. 2d 961, 965 (Ala. 1994) (observing that Alabama's presuit discovery rule was patterned after both the federal and Vermont rule and anticipating that if the question were presented squarely to it, the Vermont Supreme Court "might treat Vermont Rule 27 as a preaction discovery device available for purposes other than the perpetuation of evidence, if the production of the evidence would 'prevent a failure or delay of justice.'"); *see infra* text accompanying notes 83–86. *But see* McNett v. Alyeska Pipeline Servs. Co., 856 P.2d 1165, 1168–69 (Alaska 1993) (interpreting *In re Burlington Bagel Bakery, Inc.*, 549 A.2d 1044, discussed *infra* note 85, as not authorizing presuit investigatory discovery).

70. *See, e.g.*, McNett, 856 P.2d at 1167–69 (discussing ALASKA R. CIV. P. 27)); Block v Superior Court, 219 Cal. App. 2d 469 (1963) (discussing CAL. CODE CIV. § 2035.010); Rozek v. Christen, 387 P.2d 425 (Colo. 1963) (discussing COLO. R. CIV. P. 27); Frye v. Massie, 450 N.E.2d 411 (Ill. App. Ct. 1983) (discussing ILL. SUP. CT. R. CIV. P. TRIAL CT. 217); State v. Jablonski, 590 N.E.2d 598 (Ind. Ct. App. 1992) (discussing IND. K. TRIAL P. 27); Wiles v. Myerley, 210 N.W.2d 619 (Iowa 1973) (discussing IOWA R. CIV. P. 1.721–1.729); Meredith v. Wilson, 423 S.W.2d 519 (Ky. 1968) (discussing KY. R. CIV. P. 27.01–.03); *In re* Vermillion Parish Sch. Bd., 357 So. 2d 1295 (La. Ct. App. 1978) (discussing LA. CODE CIV. P. § 1429–1430); Allen v. Allen, 659 A.2d 411 (Md. Ct. Spec. App. 1995) (discussing MD. R. P. CIRC. CT. 2-204). *But see* ALA. R. CIV. P. 27, discussed *infra* at text accompanying notes 83–86.

1. Broader Grant of Authority by Rule

Some jurisdictions authorize a broader grant of presuit discovery for confirmatory purposes by rule. Section 3102(c) of the New York Civil Practice Rule, for example, provides:

> Before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.[71]

What it means to "aid in bringing an action" is the focus of many of the cases. The question has triggered substantive debate over the dangers of expanding the use of presuit discovery for purposes beyond merely preserving witness testimony. One of the principal arguments made by opponents of a more expansive presuit deposition rule is that lawyers may abuse it, such as by trying to discover a basis for suit that they did not previously possess. Justice Bergan wrote about this precise risk of an expansive reading of the state rule in 1957:

> If he does not have a describable sense of the wrong that he thinks hurts him, he ought not be allowed a judicial franchise to penetrate into another party's affairs, either by examination or inspection, to find out whether he ought to sue or ought not to sue. If such a practice be sanctioned, mere suspicion could invoke troublesome and expensive procedures against a party without any need of showing good cause; and without remedial protection to such a party; and what is perhaps worse, the opportunity for annoyance and intrusion with the aid of judicial power would be quite unlimited. The vaguest sort of apprehension could set in motion legal machinery with heavy impact on a purported adverse party; and there would be nothing vague about the weight of the impact.[72]

In an apparent nod to the kind of concerns expressed years ago by Justice Bergan, the courts in New York have interpreted the language in the state rule narrowly to preclude prospective plaintiffs from using presuit discovery to "fish" around to see if they have a legal claim to assert. Thus, even though section 3102 could be read even more expansively, the courts have attempted to limit the rule

71. N.Y. C.P.L.R. 3102(c) (Consol. 2006).
72. Stewart v. Socony Vacuum Oil Co., 3 A.D.2d 582, 583–84 (N.Y. App. Div. 1957).

so that it may not be used to investigate whether a cause of action exists, to confirm the proper party to sue, or to supplement factual allegations regarding a claim already known to exist. As an intermediate appellate court recently observed, "Pre-action discovery may be appropriate to preserve evidence or to identify potential defendants; however, it cannot be used by a prospective plaintiff to ascertain whether he has a cause of action at all."[73] This is a key limitation imposed on presuit discovery taken under the New York rule. When a section 3102 petition is filed "to aid in bringing an action," the restrictive interpretation by New York's courts means that the party seeking the discovery must demonstrate that she already possesses a cause of action. As a consequence, petitions for presuit discovery to gather relevant information about a prospective defendant's conduct or knowledge are denied, even when the petitioner's motive appears entirely reasonable.

For instance, *In re Pelley*[74] involved a suit brought after a fall on a public sidewalk. What the plaintiff believed—but did not have any evidence of before filing suit—was that the town knew of the defective condition of the sidewalk before her husband's accident but had not taken steps to repair it. To determine what the town knew, she filed a presuit disclosure petition under section 3102(c).[75] The court rejected the petition, noting that "the plaintiff desires to ascertain whether sufficient facts exist to create a meritorious cause of action" against the prospective defendant and that the rule "will not be permitted to merely enable plaintiff to ascertain whether facts exist sufficient to create a meritorious cause of action."[76] We do not know what happened to Mrs. Pelley, though one presumes that, after her failed bid to gather information presuit under section 3102(c), she may well have filed a traditional lawsuit against the town and used the discovery rules customarily available after suit is commenced to determine what actual knowledge the town had of the sidewalk's condition before the accident. It is difficult to see how the town was better off being named as a defendant.

73. Holzman v. Manhattan & Bronx Surface Transit Operating Auth., 271 A.D.2d 346, 347 (N.Y. App. Div. 2000).

74. *In re* Pelley, 252 N.Y.S.2d 944 (N.Y. Sup. Ct. 1964).

75. *Id.* at 945.

76. *Id.* at 945–46.

2. Authorization for Equitable Bills of Discovery When Text of Rule is Limited to Discovery for Perpetuation Purposes Only

Even when the state counterpart to Federal Rule of Civil Procedure 27 does not permit a broader use of presuit discovery, some courts have exercised equitable authority to allow presuit bills of discovery. Florida courts, for instance, recognize a prospective party's right to bring an equitable bill of discovery even though the state rule of procedure on presuit discovery, Florida Rule of Civil Procedure 1.290, only permits the preservation of testimony before suit when there is a demonstrable threat that it will be lost if not recorded immediately.[77] Yet, even as the state courts have not allowed the rule to be used as a general means of obtaining presuit discovery,[78] they have permitted a prospective claimant to institute an equitable bill of discovery to determine the proper party to sue or to gather additional factual information.

The leading Florida Supreme Court case explains that an equitable bill of discovery under state law "lies to obtain the disclosure of facts within the defendant's knowledge, or deeds or writings or other things in his custody, in aid of the prosecution or defense of an action pending or about to be commenced in some other court."[79] The court noted further that the existence of legislative acts separately authorizing discovery at law or in equity by other means than a bill in equity does not preclude the use of an equitable bill because of the court's common law authority. "Pure bills for discovery have so long been an acknowledged subject of equity jurisdiction that statutes purporting to give other and simpler means of obtaining that identical relief are not regarded as ousting the equity jurisdiction, at least in the absence of some clear legislative declaration to that effect."[80]

Florida courts have rarely exercised the full scope of such authority, however, finding that the equitable bill may not be used to investigate potential claims, only to gather information in support of claims already known to the prospective plaintiff. Relatedly, and as a further consequence of this more restricted interpretation of

77. FLA. R. CIV. P. 1.290; *see also* Home Ins. Co. v. Gonzales, 648 So. 2d 291, 292 (Fla. Dist. Ct. App. 1995) (observing that "the underlying purpose" of Rule 1.290 "is to prevent the loss or destruction of evidence prior to the commencement of suit").

78. *See, e.g.*, *Home Ins. Co.*, 648 So. 2d at 292.

79. First Nat'l Bank of Miami v. Dade–Broward Co., 171 So. 510, 510–11 (Fla. 1937).

80. *Id.* at 51; *see also In re* Ezell, 446 So. 2d 253, 254–56 (Fla. Dist. Ct. App. 1984) (finding that a statute authorizing a civil investigative demand did not preclude an equity bill). *But see* Trak Microwave Corp. v. Culley, 728 So. 2d 1177, 1778 (Fla. Dist. Ct. App. 1988) (denying a request for discovery because the information was otherwise obtainable in a pending federal lawsuit).

the court's equitable authority, it appears that a putative defendant cannot use the bill of discovery to gather information in anticipation of suit being filed against it.[81] Finally, most Florida courts have disallowed the use of the equitable bill to compel discovery from third-party witnesses against whom no claim is contemplated.[82] Thus, while the state recognizes the existence of an equitable action to compel some discovery in advance of filing a formal suit—notwithstanding that a comparable discovery request is unauthorized under the state rule of civil procedure allowing presuit discovery—the courts have narrowly defined the scope of the equitable action.

C. Investigative Use of Presuit Discovery

By contrast, the rule in two states, Alabama and Texas, allows for the investigation of a potential claim. The Alabama rule is limited in important ways that the Texas rule is not, however.

1. Interpreting the Alabama Rule

The Alabama rule does not authorize presuit discovery for investigatory purposes on its face, but state courts have so interpreted the rule. In *Ex Parte Anderson*,[83] a prospective plaintiff sought to use Alabama State Rule 27 to inspect written records in the possession of a third party in order to evaluate whether he possessed a potential cause of action. The Alabama Supreme Court held that his request was valid and emphasized differences in language between the state and federal rule:

> Alabama Rule 27, which is entitled "Discovery Before Action or Pending Appeal," specifically authorizes "discovery under Rule 34," without limiting the use of Rule 34 to that of perpetuating evidence. In fact, Alabama Rule 27 refers to "discovery" 15 times, never making the availability of Rule 34 as a discovery device contingent on the need to preserve evidence. The federal rule, on the other hand, is entitled "Depositions Before Action or Pending Appeal" and does not

81. *Cf. Home Ins. Co.*, 648 So. 2d at 292.

82. *See, e.g.*, Schwab v. Television 12 of Jacksonville, Inc., Civ. A. No. 91-07031, 1993 WL 169181, at *3 (Fla. Cir. Ct. Jan. 11, 1993) ("[A] Pure Bill of Discovery may not be used to obtain information, prior to the bringing of an action at law, from third-party witnesses.").

83. *Ex Parte* Anderson, 644 So. 2d 961 (Ala. 1994).

contain the word "discovery"; it focuses, instead, on the "perpetuation" of testimony and evidence.[84]

While the Alabama rule does not give a potential plaintiff "carte blanche" to "fish" for a cause of action, the court in *Anderson* said, "it nonetheless provides for preaction 'discovery under Rule 34,' regardless of any need to perpetuate evidence, provided that the requirements of the rule are met and that the trial court is satisfied that such discovery might serve to prevent a failure or delay of justice."[85] *Anderson* thus permits prospective plaintiffs in Alabama to use the state rule to obtain documents (and presumably would also permit a presuit mental or physical examination under Rule 35), though the case also seems to clearly preclude the taking of an oral deposition that is not coincident with the production of documents to investigate claims before suit. Perhaps for this reason, it appears that the Alabama rule is rarely used for presuit investigatory discovery.[86]

2. Texas Rule of Civil Procedure 202: The Broadest Grant of Civil Investigative Discovery Before Litigation

By express rule, Texas authorizes the broadest form of presuit discovery for private parties. As promulgated by the Texas Supreme Court in 1999, Texas Rule of Civil Procedure 202 authorizes the taking of a presuit deposition either to perpetuate testimony in an anticipated case or to investigate a potential claim. The rule provides that a person "may petition the court for an order

84. *Id.* at 964.

85. *Anderson* also discussed the comparable Vermont rule of procedure. The court noted that both the federal rule and Vermont rule served as models for the Alabama rule. *Id.* at 963. The court then quoted from the Reporter's Notes to the Vermont Rule which provides that the Vermont rule could be used "for perpetuation of testimony *or other appropriate discovery before action.*" *Id.* at 965 (citation omitted). *Anderson* concluded that "if the question was presented squarely to it, the Vermont Supreme Court might treat Vermont Rule 27 as a preaction discovery device available for purposes other than the perpetuation of evidence, if the production of the evidence would 'prevent a failure or delay of justice.'" *Id.* (citing *In re* Burlington Bagel Bakery, Inc., 549 A.2d 1044, 1045 (Vt. 1988) (observing that the Vermont rule "gives the presiding judge discretion to grant a petition for preaction discovery if he or she is satisfied that the perpetuation of the testimony or other discovery may prevent a failure or delay of justice") (internal quotations omitted)). As discussed earlier, however, no Vermont court has interpreted its state rule so broadly. *See supra* text accompanying notes 66–70.

86. Unfortunately, no additional empirical data on the Alabama state rule practice is available. There is some resistance to the expansive treatment of Alabama's Rule 27. *See, e.g.*, Stoor v. Turner, 727 So. 2d 38, 40 (Ala. 1998) (Lyons, J., concurring in part) (disagreeing with *Anderson*'s reading of Rule 27).

authorizing the taking of a deposition on oral examination or written questions either: (a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a potential claim or suit."[87]

Before 1999, two rules of civil procedure in Texas allowed a party to seek judicial approval to take a witness's deposition for two purposes before filing a formal lawsuit. The first and uncontroversial purpose, authorized by Rule 187, was to preserve a witness's testimony when securing the testimony by deposition could not wait until the filing of the lawsuit. A common example is when the witness is close to dying and the purpose is to preserve his testimony for future use in an anticipated case. This latter requirement—that the petitioner under Rule 187 had to aver that the testimony would be used in a future case she believed in good faith would be brought—served as a further limitation on the rule's use.

Another rule, Rule 737, allowed a deposition to be taken before suit for a different and more controversial purpose: namely, to investigate a potential claim.[88] The text of the rule made no reference to this investigatory ground, but courts had long recognized that the bill of discovery procedure referenced in Rule 737 was derived from equitable procedures that existed before codification of the rule. Rule 737 allowed presuit depositions to investigate potential claims without regard to whether the suit was anticipated, unlike Rule 187.[89] By requiring a witness to appear for deposition without a showing that suit was anticipated, and where the end was not merely to preserve testimony but to investigate a potential claim, Rule 737 was the more expansive of the state's presuit deposition rules. Moreover, in contrast to Rule 187, which set forth specific procedures for invoking the rule, including, most importantly, formal procedures for giving fifteen days notice before the Rule 187 hearing to all interested parties, Rule 737 was short and silent on such matters.

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87. TEX. R. CIV. P. 202.1(a)–(b).

88. As Justice Hecht and Robert Pemberton note in their discussion of the court's promulgation of the new rules in 1999, there was a third purpose that Rule 737 also authorized—the taking of postjudgment discovery—that has been mooted by Rule 621a and TEX. CIV. PRAC. & REM. CODE ANN. § 31.002 (Vernon 2005). *See* Nathan Hecht & Robert Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions*, § III. R.18 (1998) (on file with University of Michigan Journal of Law Reform), *available at* http://www.hbafam.org/articles/article001.html.

89. *Compare* TEX. R. CIV. P. 737 (repealed 1998), *and* TEX. R. CIV. P. 187 (repealed 1998); *see also* ALEX ALBRIGHT, HANDBOOK ON TEXAS DISCOVERY PRACTICE: THE NEW RULES GOVERNING DISCOVERY 295 (1999).

Defense lawyers said that in some instances presuit depositions were taken under Rule 737 to pin down a witness's testimony before the defendant was sued and often without notice to the adverse party.[90] Although the deposition was not admissible against the defendant if it was taken without notice under the rules of evidence, the effect of securing favorable testimony from a key witness was powerful in that it could be used as impeachment against the witness if the witness's story were to change. As a result, defendants often found themselves forced to settle earlier and on less favorable terms than if the presuit deposition had not taken place. Even when notice was given to the potentially adverse party, a related problem perceived by many in the defense community was that it was difficult to prepare a witness (or ask questions of a third-party witness) in the absence of a formal lawsuit with sufficiently detailed allegations of the nature of the dispute.[91]

The Supreme Court, its Advisory Committee on the Civil Rules, and the relevant state bar committees began looking in earnest at reform of the rules governing discovery in 1994. It was not until June 1998, however, that any attention was given to the presuit deposition rules. At that time, the court issued a second draft version of its proposed discovery rule changes. This version of the proposed rules, Tentative Draft No. 2 (T.D. No. 2),[92] basically recodified Rule 187 by moving it into the new discovery rules to be propounded, but made no substantive changes to the text of the rule.[93] No mention was made of Rule 737's bill of discovery procedure.

Probably prompted by the court's inclusion of recodified Rule 187, the State Bar's Committee on Court Rules (CRC) published a report that criticized Rule 737 and urged the Court to repeal the rule entirely. The CRC suggested that the water could be carried entirely by Rule 187 by modifying the rule to permit presuit depositions either to perpetuate testimony or to "obtain" new testimony. The benefit of bringing everything within Rule 187, the CRC maintained, was that it made the notice provisions of the rule mandatory to all presuit depositions and, furthermore, it required the averment that a suit was anticipated before the deposition

90. *See* Kenneth E. Shore, *A History of the 1999 Discovery Rules: The Debates and Compromises*, 20 REV. LITIG. 89, 181 (2000).

91. *Id.*

92. Supreme Court of Texas, *Tentative Draft No. 2 of proposed discovery rules*, in ALBRIGHT, *supra* note 89, at app. E, Rule 13.2 [hereinafter T.D. No. 2].

93. *See generally* Albright, *supra* note 89, at app. E.

could be taken—the two key features missing when investigatory presuit depositions were taken under Rule 737.[94]

Following CRC's release of its report, the Supreme Court adopted the state bar committee's recommendations in its third version of the proposed discovery rules, T.D. No. 3, which was issued for public comment on August 4, 1998.[95] At this point, plaintiffs' interest groups joined the debate, writing to the court to express their concerns with the proposed repeal of Rule 737. They argued, first, that the rules as they existed were adequate and not being abused.[96] Second, and more substantively, they argued that Rule 737 facilitated responsible lawyering. Presuit depositions to investigate potential claims "can both lead to more efficient litigation and few defendants being non-suited after expensive discovery," as one writer noted.[97] In many instances, others suggested, a deposition was necessary to determine if a suit should be filed.[98] Paula Sweeney, who at the time was President of the Texas Trial Lawyers Association, a plaintiffs' bar interest group, and a member of the Supreme Court's Advisory Committee (the state equivalent to the federal Advisory Committee for the Civil Rules), wrote that Rule 737 served as a valuable procedural tool to help reduce the filing of frivolous suits. "In many instances, Bills of Discovery [under 737] work to avoid lawsuits all together. . . . [T]he Court, by abolishing 737, takes away the plaintiff's mechanism for investigating facts in an attempt to avoid filing a frivolous lawsuit."[99] Another writer put it even more dramatically, "Abolishment of T.R.C.P. 737 further cripples the Plaintiffs' bar and invites frivolous lawsuits."[100]

If the rules were going to be amended, several prominent voices in the plaintiffs' bar argued, then a revitalized and stronger presuit deposition rule was necessary both to preserve testimony and to investigate potential claims. They particularly excoriated the draft

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94. *See generally id.* at app. H.

95. *See generally id.* at app. D.

96. *See, e.g.*, Letter from Paula Sweeney, President, Texas Trial Lawyer Association, to Texas Supreme Court Justice Nathan Hecht (Sept. 1, 1998) (on file with University of Michigan Journal of Law Reform); *see also* letter from Jack McGehee to Thomas R. Phillips (Sept. 22, 1998) (on file with the University of Michigan Journal of Law Reform) (commenting that "if it's not broke, please don't fix it").

97. *See* Letter from Michael W. Shore to Justices of the Texas Supreme Court and Robert H. Pemberton (Oct. 12, 1998) (on file with University of Michigan Journal of Law Reform).

98. *See, e.g.*, Letter from Joel Fineberg to Robert Pemberton (Sept. 3, 1998) (on file with the University of Michigan Journal of Law Reform).

99. *See* Sweeney Letter, *supra* note 96.

100. *See* Letter from John F. Dietze to Justice Nathan Hecht (Sept. 3, 1998) (on file with the University of Michigan Journal of Law Reform).

version that limited the new rule to cases in which a plaintiff could verify that a suit was anticipated.[101] Relatedly, they complained that requiring the petitioner to set forth the substance of the testimony she expected to elicit was too burdensome, since the testimony of a witness is often sought without any sense of what they will say.[102] In sum, they urged that if Rules 187 and 737 were repealed, the new rule should include language authorizing the taking of a deposition both to investigate a potential claim and to develop testimony in anticipation of a suit being filed.[103]

The Supreme Court reached a compromise of sorts in Rule 202. Under the new rule, presuit depositions are permitted either to perpetuate testimony in an anticipated case or to investigate a potential claim. The rule also requires that notice be given, where practicable, to any potentially adverse parties before the hearing on the petition. The notice provision was meant to serve as a safeguard against the kind of abuses defendants had complained of under the old rules, which seem to have been interpreted as not requiring notice. If notice is not properly given, Rule 202 authorizes the court to preclude use of the presuit deposition in a subsequent suit.[104]

The rule has been interpreted by courts as broadly as the language suggests.[105] As discussed above, a number of courts in other

101. *See, e.g.*, Sweeney Letter, *supra* note 96.

102. *See, e.g.*, Shore Letter, *supra* note 97. Furthermore, to the extent the draft of Rule 202 required all depositions to be taken in the county of the anticipated suit, the rule was problematic insofar as venue could not be determined if the suit was not yet anticipated. The court dealt with this critique by adding two different venue provisions into the rule: when suit is anticipated, then the Rule 202 deposition is taken in the county where the case will be filed; when suit is not anticipated, the deposition is taken in the county where the witness resides.

103. A further critique argued that the fifteen-day notice provision encumbered the process of gathering testimony precisely when the need for securing testimony promptly was paramount, such as testimony likely to be lost as a result of death, illness, or witness unavailability. *See, e.g.*, Shore Letter, *supra* note 97. However, the draft rule and final enacted rule permit the trial judge to modify the standard fifteen-day notice period "a[s] justice or necessity may require." Supreme Court of Texas, *Approval of Revisions to the Texas Rules of Civil Procedure*, *in* ALBRIGHT, *supra* note 89, at app. D, Rule 202.3(d); *see also* T.D. No. 2, *supra* note 92, at app. E.

104. *See* TEX. R. CIV. P. 202.5 & advisory committee's second note to the rule.

105. *See, e.g.*, City of Houston v. U.S. Filter Wastewater Group, Inc., 190 S.W.3d 242, 245 n.2 (Tex. App. Dist. 2006) (approving presuit deposition to gather facts relating to potential claim or even "a portion" of a claim under investigation within the jurisdiction of the state district court and rejecting an argument that the rule requires petitioner to plead a specific cause of action, noting it sufficient merely to "state the subject matter of the anticipated action, if any, and the petitioner's interest therein.") (quoting TEX. R. CIV. P. 202.2(e)); Valley Baptist Med. Ctr. v. Gonzalez, 18 S.W.3d 673, 678 (Tex. App. 1999) (en banc) ("The court is *required* to find that either allowing the discovery may prevent a failure or delay of justice in an anticipated suit, or that the likely benefit of allowing the deposition outweighs the burden or expense of the procedure."), *vacated on other grounds*, 33 S.W.3d 821 (Tex.

jurisdictions recognized presuit investigatory discovery could play such a role, but in most instances felt compelled to deny the desired discovery on the grounds that the governing rule did not allow it.[106] By contrast, the broader Texas rule is consistent with the idea that prohibitions or severe restrictions on a private party's ability to undertake presuit discovery are inconsistent with pleading and certification requirements and other front-end obligations imposed on plaintiffs in civil litigation.[107]

D. Other Specialized Statutory Provisions

Beyond these jurisdictional variances, some specific federal and state statutes permit formal processes to compel the production of information before the filing of lawsuits in particular kinds of matters. For instance, where documents are in the possession of public agencies that are not willing or able to produce the records without a subpoena, the information sought may also be obtained through a FOIA request.[108] In Delaware, investors may be able to use state inspection statutes to investigate cases of potential corporate fraud.[109] Other examples of specific rules or statutes

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2000) (holding that an order granting a presuit deposition is not immediately appealable when a suit is anticipated).

106. *See supra* Part I.A.

107. *See supra* notes 97–103; *see also* Nathan L. Hecht & Robert H. Pemberton, *A Guide to the 1999 Texas Discovery Rules Revisions* at G-17 (Nov. 18, 1998) (on file with the University of Michigan Journal of Law Reform), available at http://www.supreme.courts.state.tx.us/rules/tdr/disccle37.pdf (noting that plaintiffs' lawyers urged the court not to eliminate presuit deposition rule, *inter alia*, on the ground that investigating claims before suit "has become increasingly necessary in an era of sanctions for frivolous lawsuits, 'no evidence' summary judgment motions, and other heightened burdens on plaintiffs"); *see also* TEX. R. CIV. P. 166(a)(i), discussed *infra*, note 134.

108. *See generally, e.g.*, Freedom of Information Act, 5 U.S.C. § 552(b) (2000) (requiring disclosure by federal agencies of publicly available information when requested by a member of the public, but listing exceptions which may excuse the statutory disclosure obligation). What counts as within the bounds of a FOIA request varies with the state's enabling statute. *See, e.g.*, Howard Friedman, *Evaluating Police Misconduct Cases*, 33 TRIAL 44, 48 (1997) (suggesting that the following types of documents may be available under the Massachusetts statute: "settlement agreements (even confidential ones), police department rules and regulations, arrest logs, firearm discharge review board records, and internal investigations that exonerate a police officer").

109. DEL. CODE ANN. tit. 8, § 220 (1991); *see also* Thomas & Martin, *supra* note 7, at 88 (arguing that "investors who are concerned about potential corporate mismanagement or fraud and who have some evidence of wrongdoing can use state inspection statutes to dig deeper into suspect transactions"). The Delaware courts have approved use of the state inspection statute as an investigatory tool before litigation. *See, e.g.*, Guttman v. Jen-Hsun Huang, 823 A.2d 492 (Del. Ch. 2003); *In re* Walt Disney Co. Derivative Litig., 825 A.2d 275 (Del. Ch. 2003).

authorizing[110]—and in some cases mandating[111]—the use of process to compel the production of documents and information for investigatory purposes may be found. In total, across all jurisdictions there appear a number of specialized examples where presuit discovery for investigatory purposes is permitted, at least for certain kinds of claimants.

II. WHY THE ABSENCE OF PRIVATE PARTY INVESTIGATORY DISCOVERY MATTERS: CONSIDERING THE EMPIRICAL EVIDENCE FROM TEXAS

The use of presuit discovery for investigatory purposes in civil cases is rarely permitted by statute or procedural rule and is allowed only erratically by the courts. Given the limited scope of the prevailing regimes of formal presuit discovery, it is necessary to consider the importance of this condition relative to the larger problem of access to the civil justice system. To do so, Part II considers the available empirical evidence from Texas regarding the use of that state's presuit discovery for investigatory purposes by private parties.

Because Rule 202 of the Texas Rules of Civil Procedure is the broadest state grant of investigatory discovery to private parties, further inquiry into the rule's use and application by the bench and bar is particularly valuable. The Texas rule is also appropriate to study because, prior to the current incarnation of the presuit deposition rule in 1999, two former rules had authorized the taking of presuit depositions. In Rule 202, the Texas Supreme Court substantially modified the procedural requirements for taking presuit depositions in several respects. Promulgation of Rule 202 led to renewed focus and attention on presuit depositions after many years in which the enabling rules had languished in the obscurity of state procedure. Five years later,[112] we are in a position to

110. *See, e.g.*, FED. BANK. R. 2004 (authorizing any "party in interest" to petition the court to gather information before filing suit from "any entity" relating to "the acts, conduct, or property or to the liabilities and financial condition of the debtor, or to any matter which may affect the administration of the debtor's estate, or to the debtor's right to a discharge"); FLA. ST. ANN. § 400.0233(7) (LexisNexis 2005) (granting prospective claimants and defendants "informal discovery ... to obtain unsworn statements and the production of documents or things").

111. *See, e.g.*, FLA. ST. ANN. § 766.203 (mandating compliance with presuit investigation procedure in medical malpractice cases); *see generally* Nelly Khouzam, *Medical Malpractice: A Review of the Presuit Screening Provisions of the Florida Medical Malpractice Act*, 20 NOVA L. REV. 453 (1995) (detailed discussion of requirements under predecessor statute in Florida).

112. The survey data was collected in 2005, about five years after the implementation of Rule 202.

consider the experience among judges and lawyers with the new rule and to contrast it with the practice under the prior rules.

A. Description of the Available Data

To collect data for this project, one survey was sent to 6000 or so practicing lawyers and another to approximately 600 judges in the state. The lawyers were all members of the Litigation Section of the State Bar of Texas as of March 2005. A group e-mail message describing the survey and attaching a link to it was sent to all members of the section with current e-mail addresses on file. Thanks to the assistance of a sitting justice on the Texas Supreme Court, I was able to work with the Texas Center for the Judiciary in e-mailing the survey to state court judges. The judges to whom the survey was sent occupied a state court bench, either at the district or county court level, as of March 2005. It is clear that the list of judicial e-mail addresses I received was less than the total number of district and county court judges, but why some judges were on the list and others were not appears to have been random.

A draft of the initial survey questions was sent to a group of litigators in the state who agreed to read through them, take the survey on a preliminary basis, and provide feedback. The group was slightly more representative of the defense bar, but the plaintiff's perspective was certainly represented ably by several members. Following receipt of their comments, the survey questions were modified in several respects before being finalized and sent out.[113] The surveys advised recipients that they could answer anonymously. The only identifying information collected was the IP addresses of the computer terminals from where the surveys were transmitted.

After allotting several weeks for responses, I collected the survey results with the assistance of Ruth McCleskey at the University of Houston. The lawyer survey had approximately a 10% response rate (619 out of approximately 6000 surveys sent). The judge survey had approximately a 13% response rate (83 responses out of approximately 600 surveys sent). Thereafter, Dr. Toshiyuki Yuasa generously helped me code the responses and begin to analyze some of the results. Further qualitative analytic help came from the Information and Technology Services department at the University of Texas at Austin. The data was examined using SPSS, a general statistical data analysis program. Where applicable, Somers'D was

113. For links to the surveys and to the raw data collected see *supra* note 14.

used as a measure of ordinal association. In addition, some of the data was also assessed using the Pearson correlation coefficient for continuous data.

After receiving the initial survey responses, a follow-up survey (limited exclusively to two questions on the frequency of service or notice of presuit depositions by respondents) was sent to approximately 300 randomly selected members of the litigation section by email for the purpose of comparing the consistency of the initial survey responses. The second survey also increased the sample size by gathering responses from lawyers who did not respond to the initial survey. There were a total of 61 responses to this second survey or a response rate of 20%. There were no duplicate IP addresses with the responses previously received from the first lawyer survey.

Lawyers in the second survey reported receiving notice of a presuit deposition at least once at a somewhat higher rate (46%) than the reported experience in the first survey (34%). The responses of lawyers in the second survey to the question of experience in serving notice of a presuit deposition at least once were somewhat lower (25%) than the reported experience in the first survey (35%). Given differences in the sample sizes of the two surveys, the variation was within a normal range. There was a nonsignificant difference between the two survey groups, both in terms of the proportion of those who received notice that another had taken a deposition (chi square = 1.11, ns), as well as the proportion of those who had served at least one presuit deposition notice (chi square = 2.70, ns). Thus, the follow-up survey may be taken as some evidence that the reported experience among respondents to the initial survey was representative of the larger population of lawyers in the entire Litigation Section. The issue of extrapolating from these findings in the specific context of the data on frequency of use of the presuit deposition rule in Texas is addressed below.[114]

In addition to the lawyer and judge surveys, publicly available data on the rate of filing of Rule 202 petitions obtained by contacting the district clerks' offices in all major metropolitan areas in the state, was also collected. The discussion below incorporates this data.

114. *See infra* text accompanying notes Part II.C.1.

B. Data Limitations

It is important to recognize several limitations with the empirical data. Most obviously, the publicly available data on the use of Rule 202 was incomplete because it came from only two clerks' offices. Moreover, the two counties, Harris (Houston) and Bexar (San Antonio), are two of the largest counties in the state and, thus, may not reflect the experience in smaller counties. None of the other clerks' offices maintained similar information regarding Rule 202 filings.

There are good reasons for believing that the survey responses are reasonably representative of the population as a whole (particularly so in regard to the data on incidence of use). Nonetheless, the survey responses only reveal the respondents' experiences with absolute certainty. Any extrapolation from a survey of less than the whole population for which information is sought necessarily requires some degree of faith.

Another and even broader difficulty is that the data will never be able to answer fully how much access to information affects the ability of private parties to institute and maintain civil claims for relief. That is, the data cannot tell us that there will be *X* number of different outcomes under an expanded presuit discovery regime because we cannot know whether broader presuit discovery in any particular case would have uncovered information that otherwise would have been unavailable. Nor is there any way to quantify how many people who would not have sought legal redress will now be able to—and will—do so after being permitted to formally investigate their potential grounds for bringing suit. That said, if prospective claimants in Texas are in approximately the same position in terms of access to information before suit, plausible inferences can be drawn that suggest some important and previously overlooked lessons about the relationship between access to information and access to court.

C. Findings

Before launching the survey, my conjecture was that I would not find frequent use of Rule 202 by lawyers in Texas. The case law relating to the earlier rules (Rules 187 and 737) was relatively slim, and the new rule has only been in effect for about five years. Additionally, there are plausible reasons for believing that presuit discovery is not routinely necessary to institute and maintain most claims for relief. There are usually sources of publicly available in-

formation, and formal post-filing discovery rules generally permit supplementation of missing facts. Also, it is reasonable to expect that lawyers would be reluctant to invest considerable money in undertaking presuit discovery, especially when there is no guarantee that the investigation will ripen into a viable claim. In short, without bringing any empirical evidence to bear on the inquiry, one might speculate that Rule 202 would have received infrequent use. What the survey reveals is quite a different story, however.

1. How Frequently Are Lawyers Using Rule 202?

Of the 619 lawyer respondents, 215 (35%) reported that they had filed one or more Rule 202 petitions. Additionally, 209 (34%) indicated they had received notice of a Rule 202 petition filed by another person or entity. A cross-tabulation of the results reveals that, of those who reported that they had served at least one presuit deposition notice, 122 had never received notice of a petition. Correspondingly, of those who reported that they had received at least one presuit deposition notice, 120 reported that they had not affirmatively used the rule to secure a presuit deposition. Another 84 respondents reported experience with both serving and receiving notice under the rule. In sum, then, just about 53% of the 619 respondents (122 + 120 + 84) reported some experience, either serving and/or receiving notice of a presuit deposition, under the Texas rule.

The immediate question to address, of course, is the potential problem of selection bias: that is, whether those who responded to the survey were more likely to have been involved in Rule 202 discovery than the overall population of lawyers with a litigation practice in Texas. Self-selection bias, in short, impacts the extent to which the respondents to the survey were representative of the entire population of persons similarly situated. There are several good reasons for believing, however, that the data gathered from the surveys is generally representative of the experiences of the larger population of lawyers in the state.

First, the responses provided by the lawyers may be compared to the answers given by the judges. The judge survey results are generally consistent with the lawyer survey figures. Of the 83 judge

respondents, 58% (48 judges) reported that lawyers had sought a Rule 202 presuit deposition at least once.[115]

Second, the combined reported figures from the first and second surveys were generally consistent. Lawyers in the first survey reported slightly lower rates of receiving notice that someone else had initiated a Rule 202 deposition, while lawyer respondents in the second survey set reported slightly less experience with using the state's presuit deposition rule; these slight differences between the surveys were not statistically significant, however.

Finally, the lawyer and judge data are also generally consistent with the (albeit limited) information publicly available on the frequency of Rule 202 petition filings. The data from the lawyer survey show that there were at least 447 Rule 202 petitions initiated by the approximately 200 lawyers who reported some affirmative use of the rule. Lawyers also reported at least 340 instances in which a presuit deposition notice was received. The amount of overlap between the two reported categories is unknown; that is, we do not know how often the lawyer initiating the presuit deposition reported use of the rule and a lawyer in the same case also reported receipt of Rule 202 notice. As a result, it is not possible to say what portion, if any, of the total figure of reported invocations of the rule was also captured by the reported instances in which notice was received. It seems highly unlikely that there was complete overlap in the reporting, of course. But even when using the most conservative approach, the data reveal that there were at least 447 petitions filed by the lawyer respondents to the survey. The lawyer survey had approximately a 10% response rate. Thus, extrapolating the survey figures to measure the experience among all members of the Litigation Section would indicate that the members filed roughly 4,500 Rule 202 petitions[116] since the rule went into effect in 1999.

To test the reliability of extrapolation from the lawyer survey, it can be compared with the limited public information available from the offices of district court clerks that tracked the incidence of Rule 202 filings. Unfortunately, most clerks' offices do not track Rule 202 filings separately. Fortunately, two of the largest counties, Harris County (Houston) and Bexar County (San Antonio), do

115. Thirty percent of respondents (25 of 83) reported that more than three Rule 202 petitions had been filed with them. Thirty-one percent (26 of 83) reported that they had never had a Rule 202 petition filed in their court.

116. Membership in the Litigation Section varies from year to year, but since mid-2001 the section has averaged approximately 7,300 members (data on the section's membership on file with the University of Michigan Journal of Law Reform).

track the filings. They reported the following, as noted in Figure 1 below:

FIGURE 1[117]

YEAR	HARRIS COUNTY	BEXAR COUNTY
1999	Not reported	33
2000	126	27
2001	152	49
2002	191	46
2003	143	42
2004	135	36
TOTAL	747	233

This data shows that there have been 980 filings of Rule 202 petitions since 1999 in Harris County and Bexar County combined. Lacking data from the other counties, we can only guess at the frequency of filings there. For present purposes, though, the available figures may be extrapolated to the population of the state as a whole. According to the U.S. Census figures, as of 2005 there were roughly 3,700,000 residents of Harris County and another 1,500,000 in Bexar County, which represents nearly one fourth of the population of the entire state (approximately 23,000,000).[118] If a straight extrapolation model is used, then the 980 filings in these two counties would be representative of more than 4000 presuit deposition petitions filed statewide. This is generally in the same range as the data extrapolated from the lawyer survey.[119] Because there is no available data outside of these two counties, however, it is not possible to confirm a similar rate of filings elsewhere in the state.

117. Notes and data on file with University of Michigan Journal of Law Reform.

118. United States Census Bureau, http://www.census.gov/ (search the "Population Finder" and type "Harris County," "Bexar County," and "Texas" as individual searches).

119. One would expect that the rate of Rule 202 petitions would depend on the size of the population and the figures above bear out this expectation. The rate of filing in Harris County was more than three times the rate in Bexar County, consistent with the relative population sizes in the two counties. The validity of a statewide extrapolation would also presumably be impacted by the rate of filings in high population urban areas of the state as distinguished from lower population urban areas and rural areas, as noted earlier in the text.

2. Why Are Presuit Depositions Taken in Texas?

On this point, lawyer respondents indicated that Rule 202 is used about 40% of the time for the uncontroversial purpose of perpetuating a witness's testimony; the remaining 60% of the time, the rule apparently was used for investigating a claim before filing suit.[120] These figures are generally consistent with the information provided by the judges. Judge respondents indicated that approximately 60% of the time Rule 202 depositions were sought to investigate a potential claim or to obtain testimony in an anticipated suit. Correspondingly, judge respondents noted that approximately 30% of the Rule 202 petitions were for the purpose of preserving witness testimony. It is not clear from the judge respondent answers for what other purpose(s) the presuit deposition is being used by petitioners.

As part of their presuit discovery, lawyers sought to determine whether there was sufficient evidence to bring a lawsuit. In his work examining medical malpractice rates in Illinois, Neil Vidmar noted that filing a case sometimes "enables a plaintiff's lawyer to obtain medical records and other material and further investigation persuades the lawyer that there is insufficient evidence to continue the lawsuit."[121] One may expect a similar phenomenon where the information obtained through presuit discovery demonstrates that there is insufficient evidence to go forward. This could be because the lawyer is concerned that formal legal requirements may pose barriers to the prosecution of the case or because the weakness of the suit (and/or of obtaining an eventual recovery) is revealed. And, when lawyers conclude that the basis for filing suit is thin, theoretical work by Robert Bone and empirical studies conducted by Herbert Kritzer certainly suggest that powerful financial incentives exist (principally for contingency fee lawyers) not to pursue such cases.[122]

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120. To question number four of the lawyer survey, 38% of respondents reported that a Rule 202 deposition was necessary to perpetuate the witness's testimony. Additionally, question number five asked why respondents did not first file a lawsuit instead of seeking a presuit deposition. Answers were: to allow me to provide more detailed allegations in the petition (14.5%); to determine the proper party or parties to sue (22%); and to verify or refute information given to the lawyer by the client (21%). Collectively, these answers suggest that Rule 202 was used approximately 56% of the time for some investigatory purpose.

121. Neil Vidmar, *Medical Malpractice and the Tort System in Illinois*, 93 ILL. B.J. 340, 341 (2005) (*citing* NEIL VIDMAR, MEDICAL MALPRACTICE AND THE AMERICAN JURY: CONFRONTING THE MYTHS ABOUT JURY INCOMPETENCE, DEEP POCKETS AND OUTRAGEOUS DAMAGE AWARDS 69–92 (1995)).

122. *See generally* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004); Herbert M. Kritzer, *Contingency*

Before the promulgation of Rule 202, proponents of a broad presuit discovery authority in Texas argued, *inter alia*, that the rule served as a valuable procedural tool to help reduce the filing of nonmeritorious suits.[123] Ultimately, it is probably necessary to recognize that whether Rule 202 actually has reduced the filing of nonmeritorious lawsuits is unanswerable. It is unknowable whether Rule 202 is reducing the incidence of "frivolous" litigation because there is no objective antecedent measure of whether a lawsuit is "frivolous."[124] Several relevant points can be mined from the data, however.

Among lawyer respondents who initiated Rule 202 petitions, a majority reported that a prime purpose for taking presuit discovery was to make sure that the case they were going to subsequently file would be valid under the rules. While it is appropriate not to place too much value on this self-reported data by itself, more information is gained by considering the related question of how often suit was filed when a Rule 202 petition was denied. On this point, respondents reported that a lawsuit was not filed after a Rule 202 petition denial in a vast majority of cases; however, different respondents reported different rates. Among those who had filed at least one Rule 202 petition, 83% reported that they did not file suit after the petition was denied. Among respondents who had received notice of at least one Rule 202 petition, 34% reported that suit was filed even after the petition was denied. Even accounting for these differences, however, the data show that, most of the time, a denial of a Rule 202 petition was not followed by the filing of suit.

One interpretation of these findings is that parties may be treating the court's denial of the Rule 202 petition as an indication that there is no basis for bringing suit (indeed, such a message would presumably be amplified since so few Rule 202 petitions are denied, as seen below). Thus, the fact that a suit is only thereafter filed somewhere between 17 to 34% of the time suggests that one ameliorative effect of the presuit deposition rule is to reduce the incidence of nonmeritorious litigation. Of course, since Rule 202 petitions are denied so infrequently, this is a very small number of instances and so these positive results should not be overread.

Fee Lawyers as Gatekeepers in the Civil Justice System, 81 JUDICATURE 22, 27 (1997); Bone, *supra*, note 8.

123. *See supra* text accompanying notes 97–100.

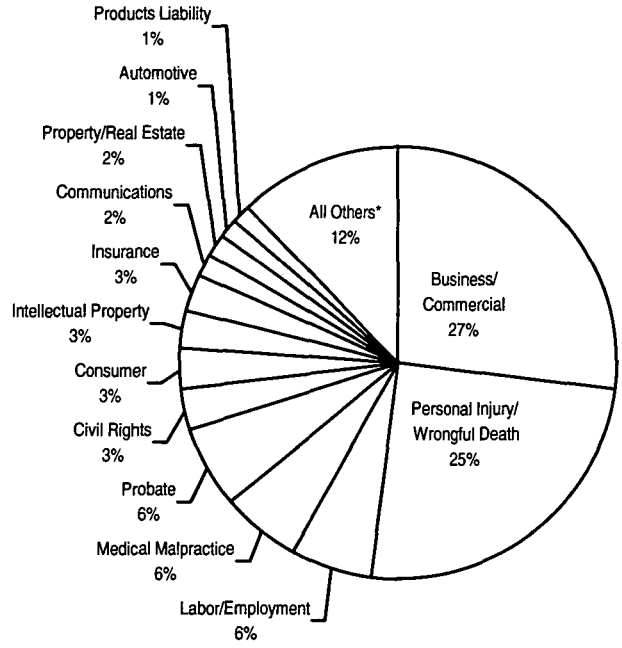
124. *See* Bone, *supra* note 8, at 527–28 (noting that obstacles to doing empirical work on the subject of "frivolous" suits include "the lack of a clear and generally accepted definition of a 'frivolous' suit" and "the tricky problem of how to determine whether any given suit is frivolous").

3. In What Kinds of Disputes Is the Presuit Deposition Rule Used?

Lawyer respondents who used the rule to serve a Rule 202 petition at least once reported the following information compiled in Figure 2a below:

FIGURE 2A:

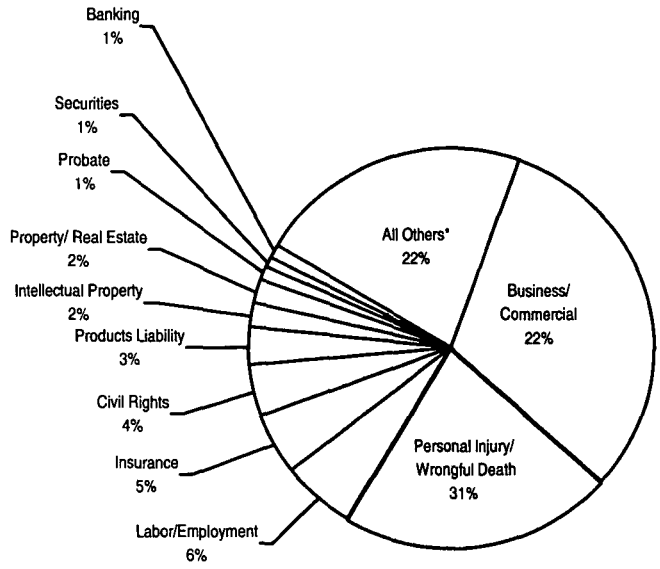
LAWYERS SERVING AT LEAST ONE RULE 202 PETITION—SUBJECT MATTER OF DISPUTE



* Besides "Other," categories registering less than 1% include Administrative, Agriculture, Antitrust, Banking, Environmental, Family Health, and Securities cases.

Lawyer respondents who received notice of at least one Rule 202 petition reported the following information, compiled in Figure 2b below.

FIGURE 2B
LAWYERS RECEIVING NOTICE OF AT LEAST ONE RULE 202 PETITION—SUBJECT MATTER OF DISPUTE

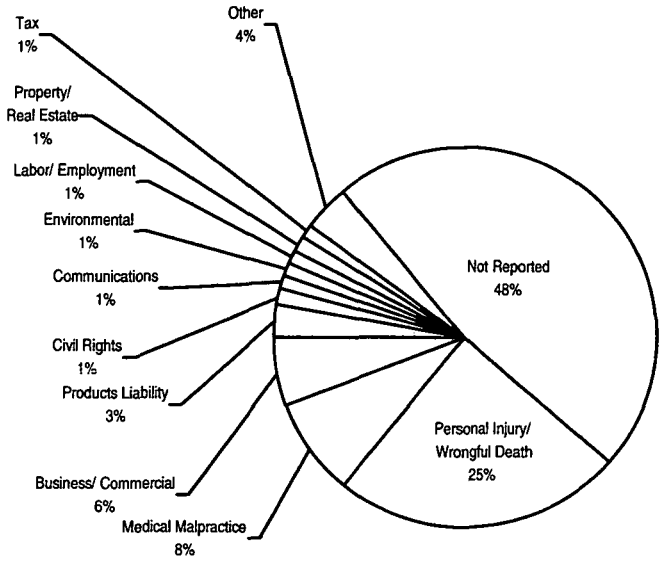


* Besides "Other," categories registering less than 1% include Administrative, Automotive, Bankruptcy, Communications, Consumer, Environmental, and Medical Malpractice cases.

As the charts above illustrate, lawyer respondents indicated that Rule 202 petitions were filed most frequently in business/breach of contract and commercial cases (27% of Rule 202 filings). Personal injury and wrongful death cases appeared as a close second at 25%. Thereafter, the drop-off was substantial.

The information reported by judges before whom at least one Rule 202 petition had been brought is represented in Figure 3.

FIGURE 3
JUDGE SURVEY RESPONSES—SUBJECT MATTER OF RULE 202 PETITIONS



As can be seen, in some instances the data was similar, with both lawyer and judge respondents reporting that approximately 25% of Rule 202 petitions were filed in personal injury and wrongful death cases, with another 6–8% in medical malpractice cases. The two surveys were not entirely consistent, however. The primary variance was in the high number of reported business/commercial cases by lawyer respondents and the significantly lower figure reported by judge respondents.

4. What Is the Grant/Denial Rate of Presuit Deposition Petitions?

According to lawyer respondents in the survey, Rule 202 petitions are granted almost as a matter of course. Approximately 70% of lawyer respondents reported that their Rule 202 petition was granted. Lawyers who reported receipt of a petition filed by another seeking to take a presuit deposition indicated almost as high a grant rate (nearly 60%). While the figures vary slightly, the general import of the answers is clear: when a presuit deposition is sought under Rule 202, lawyers report that the petition is granted

the vast majority of the time. Judge respondents report a similarly high grant rate.[125]

5. What Limitations Do Judges Place on Presuit Depositions?

Nearly 50% of lawyer respondents reported that the court set no limits or only applied the limitations for oral depositions generally applicable under the Texas Rules of Civil Procedure. The next highest answer given, by just over 20% of lawyer respondents, was that the court limited the scope of the subject matter for the presuit deposition. Another 12% reported that the court limited the length of the deposition.

Based on the lawyer survey results, it also appears that courts very rarely set any limitations on requests for the production of documents as part of the Rule 202 deposition. Just under 9% reported that the judge limited the scope of documents requested in connection with a Rule 202 petition and less than 5% reported that the judge did not allow the production of documents at all.[126]

Respondents to the judges' survey similarly reported few restrictions placed on Rule 202 depositions. Survey results indicated that on 19 of 77 occasions (25%), no limits at all were placed on Rule 202 depositions beyond those generally found in the Texas Rules of Civil Procedure for oral depositions. Respondents reported limiting the length of Rule 202 depositions 20% of the time; the scope of the subject matter was limited 30% of the time; and the scope of documents to be produced was limited only 13% of the time. Respondents reported that the production of documents was entirely disallowed in 5% of the cases.

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125. The judge survey data, not entirely complete, reflects that Rule 202 petitions were granted 53% of the time. Only 7% of judge respondents reported that they had ever denied a petition. The remaining petition rulings are unaccounted for; one explanation may be that they were resolved before the court was required to rule. If we focus on the 50 petitions for which detailed information was given by the judge respondents, then the grant rate reported by judges was 88% and the denial rate only 12%.

126. Although the answers given by lawyers who received notice of a Rule 202 petition invoked by someone else were very similar for the most part (e.g., 50% reported that the court placed no limits on Rule 202 deposition or applied limits from Texas Rules of Civil Procedure, 23% reported that the court limited the scope of the subject matter of the Rule 202 deposition, and 13% reported that the court limited the length of the Rule 202 deposition), one answer choice was anomalous: just under 10% reported that the court allowed the Rule 202 petitioner to request the production of documents. Other answers given by respondents to question number eighteen, pertaining to a petitioner's request for the production of documents for the Rule 202 deposition, however, were consistent with the data given by petitioners in question number seven (e.g., only 4% reported that the court did not allow the petitioner to request the production of documents).

6. What Impact, if Any, Has Rule 202 Had on Case Settlement Rates?

The role and impact of presuit discovery on settlement rates is a particularly interesting question, but hard to answer. The challenges in mining the data here are the same as previously encountered: it is difficult to measure objectively how much of an influence presuit discovery has on settlement. Moreover, since most cases settle, the real question is not whether the taking of presuit investigatory discovery eventually led to a private resolution of the dispute; instead, the critical inquiry is whether the case settled earlier or on different terms than it otherwise would have settled had no presuit discovery been taken.

Certainly, the data from the lawyer survey was inconclusive on the impact of Rule 202 on the settlement of disputes. Lawyer respondents were evenly split on whether the Rule 202 deposition substantially contributed to a settlement of the dispute. Additionally, of all respondents who were in the position of having received notice of a Rule 202 petition, the vast majority (77%) reported that the presuit deposition did not substantially contribute to an earlier settlement of the dispute, with 23% reporting that the deposition did substantially contribute to an earlier settlement.

Other data from the lawyer survey suggests that Rule 202 is having more of an impact on settlement of disputes. Question ten asked lawyer respondents, "If Rule 202 was taken, but no suit filed, why not?" In response to this inquiry, 40% said they did not file suit after the deposition because the dispute between the parties had been settled. No information was available to determine the reason why these disputes were settled before suit; the role of the presuit deposition in contributing to the presuit settlement is not known. Presumably, however, if a dispute between the parties had not reached a resolution before taking the deposition, but was subsequently resolved before a formal lawsuit was filed, then one plausible explanation is that the presuit deposition contributed to that result. In this connection, it may be worth focusing on the rate of presuit settlements reported in other contexts. For instance, Neil Vidmar and his coauthors' empirical work on medical malpractice litigation in Florida revealed that payments to injured parties were made in over 20% of all reported matters before litigation commenced and that, for settlements specifically involving

payments over $1 million, just over 10% settled before the filing of a formal legal suit.[127]

Given the high systemic and individual party costs attendant to the institution of civil litigation, further exploration of the factors that drive presuit settlement—and the influence that presuit investigatory discovery may bear on those factors—seems well justified.

D. Inferences

As suggested earlier, probably the most important finding to be mined from the data concerns the incidence of use of the rule. The empirical evidence from the Texas experience with presuit discovery may reasonably be read as indicating widespread use of the presuit discovery tool to investigate potential claims, with 31% of lawyer and judge respondents reporting some experience with a case in which a presuit deposition was taken for the purpose of investigating a potential claim before the filing of suit. What do these findings, then, indicate about the role of formal access to information in terms of access to court?

1. Use of Presuit Discovery by Prospective Claimants in Other Jurisdictions

One inference from the findings on the incidence of the rule's use in Texas is that, if given the opportunity, prospective litigants in other jurisdictions would also make use of an expanded presuit discovery rule for investigatory purposes. This study does not formally compare the relevant statutory and common law rules in Texas with those in other states. Nor does it consider other factors that can influence judicial access, such as the relative financial costs—as well as the availability of pro bono legal aid programs—associated with retaining legal counsel. Further work analyzing positional differences between prospective claimants in Texas and outside of the state is therefore necessary. That said, while there surely will be differences, the relative positions of prospective plaintiffs in Texas and elsewhere are likely to be approximately similar in terms of the other factors known to influence judicial

127. Neil Vidmar, Paul Lee, Kara MacKillop, Kieran McCarthy & Gerald McGwin, *Uncovering the "Invisible" Profile of Medical Malpractice Litigation: Insights From Florida*, 54 DEPAUL L. REV. 315, 348–49 (2005). Other studies have shown that many suits do settle early, after only limited discovery has taken place. *See, e.g.*, *Early Endings*, WALL ST. J., Feb. 11, 1994, at B5; *see also* Bone, *supra* note 8, at 569 n.144.

access. To the extent that further work does reveal that to be the case, diffuse use of presuit discovery to investigate potential claims by lawyers in Texas can plausibly be read as indicating that, if made available to them, prospective litigants in other jurisdictions would also employ presuit discovery for investigatory purposes.

2. Use of Presuit Discovery Rule in Texas May Suggest Impairment of Ability to Seek and Obtain Redress Where Comparable Authority Does Not Exist

We may also consider the hypothesis that the data on incidence of use of the Texas presuit discovery rule suggests that the lack of a comparable authority impairs the ability of civil claimants elsewhere to institute and maintain civil claims for relief. This hypothesis is neither proved nor disproved definitively by the available empirical data gathered for this study. The data on use of the rule shows that prospective claimants are widely using presuit discovery to investigate potential claims. The data does not explain why the rule is being used for this purpose.

One possible explanation is that prospective claimants and their lawyers routinely use the rule purely for strategic advantage and that, even without the presuit discovery, they would still be filing suit. This account cannot be entirely dismissed. For instance, the formal requirements for initiating a civil suit are typically not particularly great. Under the Federal Rules of Civil Procedure, the notice pleading standard adopted in 1938 has been generally understood to reflect a low bar for satisfying pleading requirements: all that is necessary is a short and plain statement of the claim showing the pleader is entitled to relief.[128]

It is certainly possible—indeed, it is probable—that some lawyers and claimants in the state have used the rule when presuit discovery was unnecessary for filing suit. There are, however, good reasons for concluding it unlikely that the vast majority of Rule 202 investigatory discovery undertaken in the state by lawyers and prospective claimants has been superfluous.

a. Formal Barriers to Entry

Formal barriers to the institution of civil litigation may account for the perceived need to gather additional information through

128. FED. R. CIV. P. 8; *see also* Conley v. Gibson, 355 U.S. 41 (1957).

compulsory process before suit. Over the last two decades and, with renewed recent fervor, legal reformers have raised a host of barriers against the institution and maintenance of civil litigation. Notwithstanding the low threshold of Rule 8 of the Federal Rule of Civil Procedure (and the comparably low pleading threshold in most jurisdictions), pleading requirements have been heightened by statutory reform[129] and by judicial decision-making across a wide range of cases, as Richard Marcus[130] and, more recently, Chris Fairman,[131] have shown. The Supreme Court's most recent word on notice pleading takes a further step, more surprising than small, in this direction.[132]

Consider, as one example, passage of the Private Securities Litigation Reform Act, by which Congress sought to curtail perceived litigation abuses in the securities field. While heightened pleading requirements and other additional legal reforms in the statute have made it harder for nonmeritorious suits to be maintained, Randall Thomas and Kenneth Martin have observed that under the PSLRA:

> the plaintiff will need to plead fraud with particularity without obtaining any nonpublic information from the defendants. Undoubtedly, some plaintiffs will be able to satisfy the heightened requirement that they state facts sufficient to establish a strong inference that the defendants acted with scienter—that is, with intent to defraud—without resort to the discovery process. In most cases, however, only in the unusual circumstance

129. *See, e.g.*, Private Securities Litigation Reform Act (PSLRA) of 1995 , Pub.L. 104–67, § 21D(b)(2), 109 Stat. 747, codified at 15 U.S.C. § 78u–4(b)(2) (2000) (imposing heightened pleading requirements in private securities fraud actions by, *inter alia*, requiring that complaints "state with particularity facts giving rise to a strong inference that the defendant acted with the required [fraudulent] state of mind"); *see also* Thomas & Martin, *supra* note 7, at 71 ("[B]y making it much more difficult for plaintiffs to litigate securities fraud class actions, PSLRA will also have the effect of eliminating some meritorious lawsuits that would otherwise deter securities fraud or punish wrongdoers.").

130. Richard Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998).

131. Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987 (2003); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 567–568, 596 (2002).

132. *See* Dura Pharmaceuticals, Inc. v. Broudo, 544 U.S. 336, 346 (2005) (finding dismissal of plaintiffs' federal securities claim proper on basis that plaintiff failed to adequately plead "loss causation" under Federal Rule of Civil Procedure 8, observing that "we assume, at least for argument's sake, that neither the Rules nor the securities statutes impose any special further requirement in respect to the pleading of proximate causation or economic loss"); *cf., e.g.*, Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) (reversing dismissal under Rule 12(b)(6) and observing, *inter alia*, that the "liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim").

> where the defendants have disclosed these facts in their own federal securities filings, or in the course of an ongoing federal investigation, would information sufficient to satisfy the pleading requirements become publicly available.[133]

Other barriers to access to the courts, such as changes in summary judgment practice,[134] the addition of mandatory early deadlines for expert witness reports,[135] and the imposition of caps on damages[136] may also make it harder for plaintiffs and their lawyers to bring and successfully maintain civil suits, especially where significant informational asymmetries exist between claimant and

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133. Thomas & Martin, *supra* note 7, at 71 (footnotes omitted).

134. In 1999, simultaneously with the promulgation of Rule 202, the Supreme Court of Texas modified the state's summary judgment rule to significantly lower the burden on the party without the burden of proof at trial to move for summary dismissal. TEX. R. CIV. P. 166(a)(i). Titled the "No Evidence Motion" the rule states:

> [A]fter adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

Id. For a general discussion of summary judgment practice in Texas following adoption of the "no evidence" motion, *see* Albright, *supra* note 89. *See generally* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the 'Litigation Explosion,' 'Liability Crisis,' and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003) (discussing and critiquing motions to dismiss and summary judgment practice under the federal rules).

135. *See, e.g.*, Texas Medical Liability Act, TEX. CIV. PRAC. & REM. CODE ANN. § 74.351 (Vernon 2005) (mandating service of plaintiff's expert reports against each defendant health care provider within 120 days after filing of suit); *see also, e.g.*, FLA. STAT. ANN. § 766.104 (West 2006) (providing that counsel in medical malpractice action must conduct a reasonable investigation to determine that a good-faith basis for suit exists and that for purposes of this statutory section, "good faith may be shown to exist if the claimant or his or her counsel has received a written opinion . . . of an expert").

136. Since 2000, state legislatures in Florida, Georgia, Mississippi, Nevada, Ohio, Oklahoma, Texas, and West Virginia have all placed caps on noneconomic damages in medical malpractice lawsuits. See FLA. STAT. ANN. § 766.118 (West 2006); GA. CODE ANN. § 51-13-1 (2006); MISS. CODE ANN. § 11-1-60 (2006); NEV. REV. STAT. § 41A.035 (West 2005); OHIO REV. CODE ANN. § 2323.43 (West 2005); OKLA. STAT. TIT. 63, § 1-1708.1F (2005); TEX. CIV. PRAC. & REM. CODE ANN. § 74.301 (Vernon 2006); W. VA. CODE § 55-7B-8 (2006). Most recently, the U.S. House of Representatives recently passed the Help Efficient, Accessible, Low-Cost, Timely Healthcare (HEALTH) Act of 2004, H.R. 4280, 108th Cong. (2004), by a margin of 229 to 197. As of this writing, the Senate has failed to take up the measure. The Bush Administration supports the imposition of a federal cap on damages in medical malpractice cases. *See* Press Release, White House, President Discusses Medical Liability Reform (Jan. 5, 2005) (on file with University of Michigan Journal of Law Reform), available at http://www.whitehouse.gov/news/releases/2005/01/print/20050105-4.html; *see generally* Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J. L. MED. & ETHICS 515 (2005).

defendant.[137] As discussed above, there is some evidence to suggest that the Texas presuit deposition rule is seen by both the plaintiffs' bar and the courts as a necessary investigatory tool to overcome these kinds of formal barriers to instituting and maintaining a civil claim for relief.[138]

Yet another obstacle that impedes access to the civil justice system—and one that bears special mention—has been the establishment of stiffer sanctions codes.[139] Indeed, one routine mandate in most modern sanction regimes that specifically places a particularly high premium on access to information at the front-end of a dispute is the directive that prospective plaintiffs conduct reasonable prefiling investigations.[140] While there is little data to demonstrate that tougher sanctions reduce meritless litigation, Georgene Vairo, Melissa Nelken, Carl Tobias, and others have shown that they likely have the effect of deterring some claimants, typically those with more limited resources.[141] In Texas, the specter

137. *See supra* text accompanying notes 6–8.

138. *See supra* text accompanying notes 96–105; *see also* Valley Baptist, 18 S.W.3d 673, 678 (Tex. App. 1999) (en banc) *rev'd and vacated*, 33 S.W.3d 821 (Tex. 2000) (suggesting that the Rule 202 procedure in Texas "generally benefits potential defendants overall by allowing plaintiffs to weed out unmeritorious claims through discovery without having to file suit . . .").

139. *See, e.g.*, FED. R. CIV. P. 11. The Lawsuit Abuse Reduction Act of 2005 (LARA) is the most current and important example of this kind of proposed legislative reform of procedure. The bill, which would not only amend and make more stringent the application of Rule 11 for all litigants in federal court but would also command the federal rule's application to all litigants in any state case involving interstate commerce, will by the force of its intended effect make it more difficult for claimants to prosecute civil suits. The Lawsuit Abuse Reduction Act, H.R. 420, 109th Cong. (2005). A nearly identical prior version of the bill passed the House of Representatives in September 2004 by a wide margin. *See* Todd. J. Gillman, *GOP Court-Reform Legislation Targets Edwards*, DALLAS MORNING NEWS, Sept. 19, 2004, at 24A. As of this writing, H.R. 420 has been voted out of the house judiciary committee and awaits further action in the House. No comparable bill has been introduced in the Senate but President Bush has expressed strong public support for lawsuit reform generally and this bill in particular. *See* Executive Office of the President, *Statement of Administration Policy: H.R. 420 Lawsuit Abuse Reduction Act of 2005* (Oct. 27, 2005) (on file with University of Michigan Journal of Law Reform), *available at* www.whitehouse.gov/omb/legislative/sap/109-1/hr420sap-h.pdf.

140. *See, e.g.*, FED. R. CIV. P. 11(b) (Rule 11 certification is that "to the best of the person's knowledge, information, and belief, *formed after an inquiry reasonable under the circumstances*" that the pleading motion or other paper satisfies the four conditions set forth in (b)(1)–(4)) (emphasis added)).

141. Melissa L. Nelken, *Sanctions Under Amended Rule 11—Some "Chilling" Problems in the Struggle Between Compensation and Punishment*, 74 GEO. L.J. 1313 (1986); Carl Tobias, *Rule 11 Recalibrated in Civil Rights Cases*, 36 VILL. L. REV. 105 (1991); Georgene M. Vairo, *Where We are and Where We are Going*, 60 FORDHAM L. REV. 475, 483 (1991) (observing that the 1983 version of Rule 11 was "used disproportionately against plaintiffs, and particularly in certain types of litigation such as civil rights, employment discrimination, securities fraud cases brought by investors, and antitrust cases brought by smaller companies"); Georgene M. Vairo, *Rule 11: A Critical Analysis*, 118 F.R.D. 189 (1988). The 1989 Report of the Third Circuit Task Force on Rule 11, led by Stephen Burbank, offered further empirical evidence of

of more robust sanctions practice led several commentators to predict that use of Rule 202 would rise with increases in efforts to impose sanctions in the state.[142]

Even where formal pleading and other front-end requirements on claimants do not objectively pose a significant barrier to entry, perceptions that judges in individual cases may be more willing to impose heightened pleading obligations or erect other barriers to access higher than the formal law might appear to require may influence the decision of prospective claimants to file or not file suit.[143]

The existence of these various formal requirements for instituting civil litigation provides reason to believe, therefore, that lawyers and prospective claimants seek presuit discovery not superfluously, but as a tool for gathering information before suit on the limited occasions when such information is otherwise inaccessible to them through all other publicly available sources. Indeed, the premise behind the assumption that investigatory discovery undertaken by lawyers in Texas has been mostly superfluous because formal requirements do not make necessary the collection of the information seems rather dubious on its face. After all, you usually don't ask permission to do something if you don't have to. My five-year-old son is still learning this lesson, but most lawyers and their adult clients likely understand that if the factual information they seek is publicly available, there is usually not going to be a good reason to petition the court to get it.

Moreover, consider the converse: if formal legal requirements are rarely a substantial impediment to bringing suit (and, thus, presuit discovery is rarely, if ever, needed to gather additional information to overcome these hurdles), then why would lawyers and their clients not simply file suit and take advantage of the recognized post-filing discovery methods? It is certainly far from clear what strategic advantages are to be gained from foregoing suit in favor of first pursuing formal presuit investigatory discovery. There are several obvious disadvantages to doing so, not the least of which being that, under the state's presuit discovery rule, the statutory limitations period does not appear to be tolled by the taking

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this dynamic. STEPHEN B. BURBANK, RULE 11 IN TRANSITION: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11 (1989).

142. *See* MICHOL O'CONNOR, DIANE M. GUARIGLIA & BYRON DAVIS, O'CONNOR'S TEXAS RULES: CIVIL TRIALS 1999, at 350 (1998).

143. *See*, Tobias, *supra* note 141, at 493–95 (discussing the disparate impact of Rule 11 sanctions practice); *accord* Vairo, *supra* note 141, at 483.

of a presuit deposition.[144] Furthermore, the costs of pursuing formal presuit discovery (which presumably will be borne, at least initially, by the prospective claimant's lawyer in most cases) are not likely to be seen as insubstantial, particularly when there is no guarantee that investigatory efforts will ripen into compensable claims.[145]

In sum, as formal barriers to entry are raised (or perceived to exist) against the successful institution and maintenance of civil actions, access to information at the beginning of a dispute may be considered necessary by prospective claimants and their lawyers before a suit may be initiated. It is plausible to believe, therefore, that the existence of these formal legal requirements may explain the decision of some lawyers and their clients to use the state's presuit discovery rules for investigatory purposes.

b. Incentives and Practical Demands to Act Beyond Minimum Requirements

Beyond formal barriers to entry, a second factor is that lawyers and prospective claimants may feel compelled to act beyond and without regard to the minimum standards set by the formal law. That is, however light or heavy formal burdens of pleading and proof may be, there are reasons to believe that in nearly all civil litigation contexts lawyers may well feel compelled to act for reasons that have nothing to do specifically with satisfying formal legal requirements.

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144. *See* Tandem Energy Corp. v. Texas, No. 14-03-00815-CV, 2003 WL 22349032, at *1 (Tex. App. Oct. 16, 2003) (per curiam) (discussing whether an order granting a petition to take presuit deposition was immediately appealable and characterizing it as "not an independent suit, but [] ancillary to an anticipated suit"); Texas v. Real Parties in Interest, 259 F.3d 387, 394–95 (5th Cir. 2001) (characterizing Rule 202 deposition under Texas law as "only an investigatory tool" but not addressing limitations issue directly); McCrary v. Kansas City S. R.R., 121 F. Supp. 566, 569 (E.D. Tex. 2000) (Rule 202 petition in Texas "is not a civil action within the meaning of [28 U.S.C.] § 1441 because it asserts no claim or cause of action upon which relief can be granted"); *In re* Hinote, 179 F.R.D. 335, 336 (S.D. Ala. 1998) ("Petition for Discovery Before Action" under Alabama Rule of Civil Procedure 27 "is a request for discovery, nothing more" and thus not a "civil action" within the meaning of the federal removal statute).

145. *Compare* Herbert M. Kritzer, *Contingency Fee Lawyers as Gatekeepers in the Civil Justice System*, 81 JUDICATURE 22, 27 (1997) (revealing that "lack of liability" and "inadequate damages" constitute 80% of the reasons why lawyers declined to represent a potential client on a contingency basis), *with* Kevin M. Clermont & John D. Currivan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 527, 571 (1978) (noting that "[s]ince contingency makes his fee depend on the outcome, the lawyer would shy away from any case with a probability of success so low that it makes the case a poor investment. Thus, it is not at all clear that a contingent fee encourages groundless speculative suits. Indeed, a contingent fee may be more effective than a certain fee in deterring such suits").

The first and most significant factor influencing this desire to gather information at the outset of a case is the need to evaluate a case's potential value. Consider the client who comes in seeking legal representation for injuries sustained following a medical procedure. The lawyer wants to assess the extent of the injuries, but this may or may not be readily apparent. The lawyer also wants to know whether, how strong, and against whom, a case for negligence can be made. The patient usually can gain access to her own medical records, but the records may be incomplete or incomprehensible. Sometimes hiring an outside expert to evaluate the records will suffice; sometimes it will not. Even if hiring an expert would be helpful and the lawyer can financially justify paying a consultant to examine the records, answers may not be apparent without further discovery.

This one brief example suggests what all experienced lawyers know: lawsuits are much easier to get into than to get out of. The ability to invoke formal discovery for investigatory purposes—to learn as much information as possible and as early as possible—thus may be seen as a vital opportunity for better evaluating the factual elements in a case. These factual elements may include an assessment of the scope of liability and damages.[146] Moreover, beyond liability and damages, other practical financial considerations influence a lawyer's decision to take a case. A principal issue is the financial solvency of the potential defendants. Lawyers, particularly those in solo or small firm private practice, are unlikely to be willing to throw money at a matter when there is no reasonable likelihood of recovering at the end.[147] More generally stated, for many lawyers the most important question at the outset of a representation comes down to this: "Is taking the case the right financial decision for me?"[148] To figure this out, it may often be perceived as necessary to gather as much information as possible and at the earliest possible time.

Another and probably equally powerful incentive driving lawyer and claimant decision-making is the goal of early and favorable resolution of the dispute.[149] Sometimes the marshaling of consider-

146. *See* Kritzer, *supra* note 145, at 22–23 (noting that the "contingency fee practitioner seeks cases that offer a high probability of providing at least an acceptable return, hoping to find some fraction of cases that present the opportunity to generate a significant fee").

147. *See id.* at 29 ("The contingency fee structure means that lawyers carry out this [gatekeeper] function in large part as an exercise in economic self-interest. That is, lawyers try to choose cases they believe will yield fees at least equal to what they could earn from either nonhourly fee cases or from other contingency fee cases.").

148. *See id.*

149. *Cf.* Geoffrey Harrison, *Settlement Through Summary Jury Trials*, 23 THE ADVOC. 22, 22 (2003) ("Settlement is the only legal way to eliminate litigation risk. Plaintiffs typically prefer

able proof at the outset of a case may convince the other side that the claims have merit or, more precisely, are more meritorious than they would otherwise have thought. Just as prosecutors amass the greatest possible volume of evidence to bargain from the strongest position in plea negotiations, private lawyers also may seek to establish the most compelling case to bargain from the strongest civil settlement position. Greater access to factual proof at the front-end translates into better opportunities for achieving an early and favorable resolution without judicial or administrative adjudication. It would hardly be surprising, then, to find presuit discovery being used to prepare cases well beyond what the lowest denominator demands in order to demonstrate to the court, to the other side, and to anyone else who may be listening the relative strength of the claims (or defenses) being asserted.

Collectively, these factors suggest that lawyers and prospective claimants in Texas, as in most jurisdictions, may be frequently motivated to gather factual information prior to suit in order to evaluate the legal and practical viability of filing and pursuing the claim to settlement or judgment.

All that said, even if the Texas rule is regularly used to gather necessary information otherwise unobtainable in order to satisfy formal requirements or address practical considerations, the empirical data cannot be read to definitively suggest that the absence of a comparable right for civil claimants elsewhere to engage in presuit investigatory discovery impairs their ability to access the civil courthouse. As suggested earlier, the Texas experience does indicate that there is some relationship between access to information and access to justice, but the data does not reveal how much of a factor access to information plays in litigant decision-making. Based on the current record, it cannot be determined whether broader presuit discovery in any particular case would have uncovered information that otherwise would have been unavailable. Nor can it be measured how many who would not have brought a lawsuit but for presuit discovery are now able to do so and are exercising that option. Despite these limitations, the findings relating to the widespread use of the Texas presuit discovery rule by lawyers and prospective claimants—along with the likelihood that the need to satisfy formal legal requirements and the pull of practical considerations may plausibly explain the incidence of use of the state's presuit discovery rule for investigatory purposes—is provocative enough to warrant further study.

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to eliminate the risk by settling for considerably more substantial relief than defendants typically care to pay. . . . Still, the vast majority of cases settle.").

III. THINKING NORMATIVELY ABOUT SAFEGUARDS IN AN EXPANDED PRESUIT DISCOVERY REGIME

There are a number of reasons to believe that the incidence of presuit discovery use in Texas is likely reflective of the need felt by lawyers and their clients to obtain information before suit through formal process when they cannot otherwise get what they need through informal means. Because the available empirical evidence is incomplete, however, we should be reluctant to draw any broad conclusions from it in terms of how significant a factor access to information is in accessing the civil courthouse. Much additional work still needs to be done to examine the role presuit discovery plays in litigation decision-making in places where it has been used for investigatory purposes.

This final portion of the paper, however, proceeds on the assumption that rulemakers and legislators in other jurisdictions have made the decision to expand the existing discovery regime. Evaluation of the experiential data on Texas presuit discovery practices offers some important normative insights about safeguards that ought to accompany a broadening of presuit discovery, should such an expansion be sought.

A. The Essential Role of Notice

The Texas experience underscores the importance of an express notice requirement for presuit discovery. During the debates over whether the existing presuit discovery rules should be amended, some in Texas argued that there were frequent abuses of the authority that permitted presuit investigatory discovery.[150] There certainly have been some examples of questionable presuit discovery petitions in Texas under Rule 202,[151] though the assertion of abuse is difficult to quantify and is certainly not readily observed from a reading of the reported decisions. What could and apparently did happen on occasion was that a deposition of a third-party witness was taken without notice to all target defendants and then, with the witness's testimony secured, the claimant was able to negotiate from a stronger bargaining position.[152] Approximately thirty percent of lawyers who responded to the survey reported that, on

150. *See supra* text accompanying note 91.

151. *See, e.g.*, Maro Robbins & Joseph S. Stroud, *Sex, Lawyers, Secrets at Heart of Sealed Legal Case*, SAN ANTONIO EXPRESS-NEWS, June 13, 2004, at 1A (reporting on Rule 202 petitions being sent to target defendants, prompting cash payments to discretely settle disputes).

152. *See supra* text accompanying notes 95–97.

at least one prior occasion, they subsequently learned of a deposition taken without advance notice under the former rules. If approximately one out of every three lawyers reported an experience where the prior rule was invoked to take a deposition without advance notice to a potentially adverse party, this would certainly seem to lend some support to the view that there were (at least occasionally) problems with insufficient notice that justified the Texas Supreme Court's promulgation of a new rule imposing an express notice requirement. Indeed, the perception of a notice problem apparently was one of the key factors that motivated the Texas Supreme Court to promulgate a revised rule that expressly mandates the provision of advance notice to all potentially adverse parties.[153] As discussed earlier, lawyers and judges report that presuit depositions now routinely proceed only after all potentially adverse parties have received notice.

The role of notice in an expanded regime of private presuit discovery may also be considered in light of the governmental experience with the exercise of its subpoena authority. In this connection, consider one of the most controversial aspects of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (the USA PATRIOT Act).[154] Section 213 authorizes "sneak and peek" warrants, allowing the FBI to conduct a search of a home or business without first notifying the target of the investigation.[155] Congress has also authorized most federal agencies to issue administrative subpoenas. In most instances, the enabling statute does not require

153. There is a textual argument to be made that Rule 202 only requires that notice be given to persons with interests expected to be adverse to the petitioner when the deposition is taken to perpetuate testimony and does not technically appear to similarly require notice when the deposition is taken for investigatory purposes. *Compare* TEX. R. CIV. P. 202.3(a) (directing that notice be given "on all persons petitioner seeks to depose and, if suit is anticipated, on all persons petitioner expects to have interests adverse to petitioner's in the anticipated suit"), *with* TEX. R. CIV. P. 202.1(a) (recognizing right to take presuit deposition "to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit") *and* TEX. R. CIV. P. 202.1(b) (recognizing right to take presuit deposition "to investigate a potential claim"). Whatever the merit of this reading, Rule 202.5 may obviate the distinction. TEX. R. CIV. P. 202.5 (recognizing that the court "may restrict or prohibit the use of a deposition taken under this rule in a subsequent suit to protect a person who was not served with notice of the deposition from any unfair prejudice or to prevent abuse of this rule"). In any event, no court in the state has been asked to excuse the failure to give notice of a presuit deposition taken for investigatory purposes when the adverse party's identity was known.

154. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 5, 8, 12, 15, 18, 20, 21, 22, 28, 31, 42, 47, 49, 50 U.S.C.).

155. *Id.* at § 213.

notice and prior judicial approval. Judicial review only occurs when the target seeks to quash the subpoena.[156] In many instances, if the subpoena is directed to a third party, the target of the investigation may not learn of the subpoena until after it has been served and the material or testimony taken.[157]

By contrast, an essential safeguard to an expanded regime of private presuit investigatory discovery would require that advance notice be given to all potentially adverse parties disclosing the initiation of presuit discovery. With advance notice, the attempt to invoke judicial process may be opposed and the court afforded an opportunity to rule on the request after a full briefing from all interested parties. By requiring advance notice to all potentially adverse parties, an expanded regime of private investigatory discovery would provide more meaningful opportunities for judicial oversight than is found with extant governmental subpoena practice.

B. On Judicial Oversight

If advance notice is important because it provides an opportunity to object to the discovery sought, the predicate assumption is that the courts will take seriously their oversight responsibilities. Alas, both the government subpoena experience and the experience in Texas suggest that existing models of presuit discovery suffer a lack of meaningful judicial oversight.

Although it is said that the discretion accorded by courts to authorize governmental subpoenas is not limitless,[158] in practical reality the scope of judicial power has been wide.[159] The lack of

156. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, REPORT TO CONGRESS ON THE USE OF ADMINISTRATIVE SUBPOENA AUTHORITIES BY EXECUTIVE BRANCH AGENCIES AND ENTITIES 7–9 (2002), *available at* http://www.usdoj.gov/olp/intro.pdf; *see generally* Hughes, *supra* note 12, at 587–95.

157. *See* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 750–51 (1984); *see also* Christopher Slobogin, *Subpoenas and Privacy*, 54 DEPAUL L. REV. 805, 811, 822–26 (2005) (noting, *inter alia*, that the third-party subpoena often "eliminates the target's ability even to challenge the government's action").

158. *See, e.g.*, Okla. Press Pub. Co. v. Walling, 327 U.S. 186 (1946); *see also* Wearly v. FTC, 616 F.2d 662, 665 (3rd Cir. 1980) (noting that "[t]he district court's role is not that of a mere rubber stamp, but of an independent reviewing authority called upon to insure the integrity of the proceeding" and that the court's responsibility is to remain "fully alive to the dual necessity of safeguarding adequately the public and private interest" in the issuance of the subpoena).

159. *See, e.g.*, United States v. Powell, 379 U.S. 48 (1964). To satisfy the *Powell* four-factor test to demonstrate good faith in the issuance of the subpoena, all that must be shown is that (1) the investigation is conducted pursuant to a legitimate purpose; (2) the information requested under the subpoena is relevant to that purpose; (3) the agency does not already

meaningful judicial review of governmental invocations of subpoena power undercuts a key theoretical foundation for the broad grant of authority for administrative subpoena power: namely, the separation of powers between legislative authorization to agencies to issue subpoenas from the judicial responsibility to enforce subpoena compliance.[160] In the post 9/11 era, debate has intensified over the grant of even greater investigatory power to government agencies. In particular, debate over the USA PATRIOT Act, and more recently, over revelations of the secret wiretapping program President Bush approved, which authorizes the National Security Agency to monitor the phone calls and email communications of U.S. citizens and residents without first obtaining a court-approved warrant to do so, has focused the attention of the country on both the perceived need for and potential dangers of governmental investigative subpoena authority without a corresponding judicial oversight role.[161]

The Texas experience also raises cause for concern about insufficient judicial attention to petitions to take presuit discovery. Lawyer and judge respondents both report that requests to take discovery before suit are granted almost as a matter of course. Although, by itself, the high percentage of grants does not prove inadequate judicial oversight, since the high grant rate could be explained by the robust exercise of professional judgment by the bar in bringing only appropriate presuit discovery petitions,[162] the figures do give cause for concern.

Thus, the governmental subpoena experience and data regarding Rule 202 in Texas suggest that if a broader grant of investigatory discovery is given to private parties in other jurisdictions, judges should maintain an active oversight role to ensure

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have the information it is seeking with the subpoena; and (4) the agency has followed the necessary administrative steps in issuing the subpoena. *Id.* at 57–58. Later cases have further announced that the courts must enforce the issued subpoena unless it is "plainly incompetent or irrelevant to any lawful purpose" of the agency. Endicott Johnson Corp. v. Perkins, 317 U.S. 501, 509 (1943).

160. *See* U.S. v. Bell, 564 F.2d 953, 959 (Temp. Emer. Ct. App. 1977) (noting that "[b]ifurcation of the power, on the one hand of the agency to issue subpoenas and on the other hand of the courts to enforce them, is an inherent protection against abuse of subpoena power").

161. *See, e.g.*, Eric Lichtbau, *FBI, Using Patriot Act, Demands Library's Records*, N.Y. TIMES, Aug. 26, 2005, at A11; Dahlia Lithwich & Julia Turner, *A Guide to the Patriot Act, Part 1: Should You Be Scared of the Patriot Act?*, SLATE, Sept. 8, 2003, http://www.slate.com/id/2087984/ (on file with University of Michigan Journal of Law Reform); ACLU, Reform the Patriot Act—Don't Expand It!, http://action.aclu.org/reformthepatriotact/primer.html (last visited November 28, 2006).

162. *Cf.* Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 5–6 & n.24–27 (1999); Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260 (1995).

that the tools are not misused. Moreover, just as government tracks the use of its subpoena authority, similar attention ought to be paid to private party discovery practices over time.[163] This would allow for a more meaningful public oversight of private investigatory discovery, beyond judicial oversight in individual cases. Neutral actors such as bar associations, outside interest groups, and the legal academy have an important role to play in this regard.

C. Conceiving Adequate Standards for Invoking Judicial Process

Judicial review is a vital safeguard for insuring against abusive investigatory discovery practices, but it is not enough. It is also necessary to establish *ex ante* credible standards to govern when judicial process may be invoked for discovery before suit.

Using the Texas experience as an initial guide, a presuit discovery rule can easily and appropriately require, as current Rule 202 does, that the petitioner set forth: (i) the subject matter of the anticipated action (when suit is anticipated) or the nature of the inquiry that prompts the petitioner to seek a deposition to investigate a potential claim; (ii) the petitioner's interest in the subject matter of the deposition or other discovery; (iii) the parties whom the petitioner anticipates will have adverse interests; (iv) the substance of the testimony the petitioner expects to get from the deponent or the written information or documents sought; and (v) the reason why the testimony, information, or documents are sought.

In addition to these five requirements, an essential sixth should be added: that petitioner demonstrate the information he seeks cannot otherwise be obtained. This latter requirement underscores that the invocation of judicial process prior to suit must be used only as a last resort, when the information needed cannot be obtained through other reasonable means.[164] In its absence, one

163. *Cf.* Presidential Threat Protection Act of 2000, Pub. L. No. 106-544, § 7, 114 Stat. 2715 (2000) (imposing requirement that there be an accounting of the frequency of use of governmental subpoena power to "ensure that administrative subpoena power is used and enforced consistently and fairly by executive branch agencies").

164. Even this list need not be exhaustive. A jurisdiction might, for instance, impose a bond requirement on petitioners seeking presuit discovery to protect against abusive tactics that are only revealed to be so after the deposition is completed. *Compare* Valley Baptist Med. Ctr. v. Gonzalez, 18 S.W.3d 673, 678 (Tex. App. 1999) (suggesting state court acted within its power to impose bonding requirement on Rule 202 petitioner), *reversed and vacated*, 33 S.W.3d 821 (Tex. 2000). Because I do not endorse in this paper a policy recommendation that all jurisdictions expand the scope of civil presuit discovery, I am agnostic on the merits of such a proposal. It may be sufficient to note, however, that imposing a bonding requirement may operate as too heavy a counterweight against using an expanded presuit discovery

could legitimately ask what purpose is served by permitting a prospective litigant to gather information through formal discovery methods. For instance, the ability to maintain a suit for declaratory relief may obviate the need for presuit investigatory discovery in some circumstances.[165] Petitioners seeking judicial approval of presuit discovery should have to demonstrate that the information they seek cannot otherwise be obtained, either through informal means or through other formal process.

Of course, rules authorizing the taking of presuit discovery for any purpose should also insist that the discovery petitions comport with certification requirements applicable to all pleadings, motions, and other papers filed in a case. It is appropriate, however, to reject a strict requirement that would treat the certification standard for taking presuit discovery as coterminous with minimum pleading obligations. That is, the applicable standard in the rule authorizing presuit discovery should recognize that one might be able to satisfy the governing certification standard and still appropriately invoke presuit discovery. For instance, under Rule 11 of the Federal Rules of Civil Procedure, a pleader must certify that the allegations have or likely will have some evidentiary support after a reasonable opportunity for further investigation or discovery. A potential claimant might be able to meet this standard without presuit discovery but nonetheless conclude that a presuit investigation is warranted, either to overcome other formal barriers to instituting a claim for relief or because it is prudent for some of the other practical reasons explored above.[166] There would seem few reasons not to allow the petitioner to engage in presuit discovery in these circumstances. This is especially true when she could otherwise simply proceed by filing suit and using traditional post-filing discovery devices.

Additionally, there may be occasions when one seeking presuit discovery cannot certify that the investigatory effort is likely to uncover some evidence to support a viable cause of action. Recognizing this possibility, the Texas rule does not require the person seeking presuit discovery to allege that a reasonable probability exists that the discovery sought will result in a viable claim. The rule provides only that a presuit deposition may be taken "(a) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (b) to investigate a

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tool. *See* Bone, *supra* note 8, at 575–76 (discussing policy implications of bonding requirements in litigation).

165. *See* Higginbotham, *supra* note 13, § 27.04 at 27–12.

166. *See supra* text accompanying notes 146–149.

potential claim or suit."[167] Tracking this approach, a prudent formulation need only require a good-faith basis for believing that the discovery may unearth facts that would support the filing of a viable claim.[168]

The concern in marking the threshold below that of the governing certification standard, such as in Rule 11, is that it would encourage abusive practices—"fishing" expeditions is the phrase often used. As discussed above, courts commonly cite this concern as the basis for narrowly reading rule- and statutory-based grants of presuit discovery for the purpose of perpetuation only.[169] This concern over fishing echoes a concern over permissive attitudes toward litigation (and dissatisfaction with overly expansive discovery devices, in particular).[170] The notion that a prospective party may go prospecting for a claim if too expansive a regime of investigatory discovery is permitted helps frame the essential tension in deciding the appropriate scope of the discovery right: if the petitioner need not even aver that the presuit discovery is likely to lead to a viable claim, then what keeps the investigation within reasonable limits?

What the "fishing" critique obscures, however, is that facts necessary to determine the nature and extent of a legal claim for relief may often not be known to the prospective plaintiff without access to formal judicial process to compel production of the information she otherwise cannot obtain.[171] This problem seems to be precisely

167. TEX. R. CIV. P. 202.1(a) & (b).

168. *Cf.* Thomas & Martin, *supra* note 7, at 82–83 (arguing that "shareholders would need to have some basis for their fraud claim and allege a proper purpose for inspection of corporate information" in order to use state presuit inspection statutes).

169. *See supra* Parts I.A and I.B.

170. *See generally* Elizabeth G. Thornburg, *Just Say "No Fishing": The Lure of Metaphor*, 40 U. MICH. J.L. REFORM 1 (2006) (tracing "fishing" critique in litigation generally and in discovery disputes in particular).

171. Discussing the heightened pleading requirements imposed by the PSLRA in securities fraud cases, Randall Thomas and Kenneth Martin observed:

> While deterrence of baseless lawsuits is a laudable goal, the courts are (or should be) concerned that this screen will block legitimate lawsuits that would remedy actual wrongdoing. Plaintiffs with an otherwise strong case may need a method of getting nonpublic corporate information in order to meet the pleading requirements for demand futility. They cannot use the normal discovery procedures to fully investigate corporate mismanagement or fraud unless the court finds that they have made allegations of wrongdoing sufficient to establish demand futility or wrongful refusal. However, they frequently cannot allege particularized facts sufficient to satisfy the court and obtain discovery in a derivative action without first examining internal corporate documents. Thus, the plaintiffs in a derivative suit frequently lose if the defendant files a motion to dismiss.

Thomas & Martin, *supra* note 7, at 82.

the reason that the Supreme Court, in the context of the grand jury subpoena, has recognized the need for giving wide latitude to the government in investigating potential violations of the criminal law. Thus, in *United States v. R. Enterprises, Inc.*,[172] the Court observed: "[T]he decision as to what offense will be charged is routinely not made until after the grand jury has concluded its investigation. One simply cannot know in advance whether information sought during the investigation will be relevant and admissible in a prosecution for a particular offense."[173]

To be sure, there may be valid reasons for distinguishing the prosecutor's role in enforcing the existing legal regimes from that of private plaintiffs in enforcing norms through the civil justice system. The foremost argument favoring such a distinction is that the government is entrusted with safeguarding the public interest and, correspondingly, can be trusted to act in the public's best interests more often than citizens will so act in private litigation. There are several responses to this point.

While it is certainly undeniable that the image of an enterprising plaintiff's lawyer fishing around for facts on which to base a claim is provocative, the objection that private presuit investigatory discovery inappropriately allows plaintiffs to "fish" for a claim proceeds from the *a priori* assumption that there are no facts on which a viable suit may be based. If we assume the target defendant has done nothing wrong and there is, therefore, nothing untoward to uncover through presuit discovery, then any costs borne by the target defendant and by society for abetting this kind of presuit discovery expedition are obviously too high.

Change the assumption, however, and the critique loses much of its force. If information lies solely in the possession of the potential defendant and this information, if known, would permit the plaintiff to bring a legitimate claim for relief (that is to say, an actionable wrong has occurred), one presumes that the arguments for proscribing presuit discovery are substantially muted.[174] There is

172. U.S. v. R. Enters., Inc., 498 U.S. 292 (1991).

173. *See also id.* at 299 (observing that "[g]rand juries are not licensed to engage in arbitrary fishing expeditions, nor may they select targets of investigation out of malice or an intent to harass").

174. *See* Bone, *supra* note 8, at 563 (developing predictive model of meritorious and nonmeritorious suits and observing that "[e]fficiency is not the only concern. Fairness is also relevant because wealth transfers can violate fairness norms. . . . [W]hen plaintiffs with meritorious suits drop, the resulting transfer of wealth systematically deprives plaintiffs of their entitlements"); *see also* Thornburg, *supra* note 170, at 50 (criticizing use of phrase "fishing expedition" and observing that "[i]n essence, the courts are deciding, without knowing what discovery would disclose, that no reasonable factfinder could rely on the information sought to support the inference the plaintiff needs, nor could the discovery reasonably be expected to lead to admissible evidence").

also a serious theoretical difficulty with the fishing critique insofar as it assumes it is possible to distinguish *ex ante* between those who say they have done no wrong and those occasions where some bad act has been committed but only the wrongdoer knows it. Finally, it is hardly clear that, as a practical matter, a lawyer would insist on taking a deposition before litigation without any prior basis or ground for suspecting wrongdoing on the part of another *and* would be able to successfully unearth the evidence she only hopes exists.[175]

Even if some will take advantage of an investigatory discovery privilege, isolated anecdotes of abusive behavior in the presuit period no more make the case against reform than do isolated anecdotes of abusive litigation tactics in the post-filing period. To the extent that the problem is unscrupulous lawyers filing dubious presuit discovery petitions, it is certainly unrealistic to expect professional certification obligations to give any greater pause to the lawyer when he acts before suit rather than after. Bad lawyers may be tempted to act badly in all contexts; this Hobbesian awareness hardly provides a basis for rejecting the right of all prospective parties to investigatory discovery before suit. The assertion that some lawyers may abuse the privilege of taking investigatory discovery does not support a convincing case against expanding presuit discovery unless it can be shown that the invocation of judicial process prior to suit is more susceptible to abuse than is the privilege now given to private parties to file suit and, thereafter, invoke judicial process for discovery purposes.

CONCLUSION

To date, debate over reform of the civil justice system has proceeded without any satisfactory treatment of the role access to information plays in the ability of private parties to seek legal redress. My goals in undertaking this study have been to describe the limited grants of formal investigatory discovery currently available to prospective parties and analyze empirical evidence relating to the use of rules that permit the taking of discovery for investigatory purposes before formal litigation has commenced.

Examining the data from Texas demonstrates that there are plausible reasons to believe that lawyers and prospective claimants in Texas, as in most jurisdictions, may frequently be motivated to gather factual information before suit to evaluate the viability of

175. *See* Kritzer, *supra* note 145, at 22–23.

filing and pursuing a case to settlement or judgment. The perceived need to satisfy formal legal requirements for bringing suit, as well as the pull of practical considerations, thus may plausibly explain the incidence of use of the state's presuit discovery rule for investigatory purposes. Read in this manner, the empirical evidence suggests that there is an important relationship between access to information and access to justice, even if the available data does not permit us to quantify how significant of a factor it may be.

Although the limited empirical data does not support a policy prescription at this time for expanding presuit discovery in all jurisdictions, there is value in thinking normatively about the role of safeguards to accompany an expansion of the right of private parties to invoke judicial process for investigatory purposes prior to suit, should such an expansion be sought by rulemakers or legislators in particular jurisdictions in the future. I have suggested that notice, judicial oversight, and the formulation of credible governing standards are all essential components to evaluate and study further.

Whether it is desirable to increase the opportunities for private parties to bring civil claims for relief depends greatly on one's orientation and attitudes about the civil justice system in general. Kevin Clermont and John Currivan have observed that opponents of the contingency fee may object that it overburdens the court system with too many lawsuits but that, from another perspective, the criticism is recast "as an argument for lightening court burdens by closing the courthouse doors to certain meritorious suits, especially suits brought by the poor."[176] A similar awareness applied to this study of presuit discovery may serve as a helpful reminder that, as with all procedural reforms, the real challenge is deciding how to balance the competing interests: private rights of recovery against privacy rights, affording access against fostering abuse.[177]

Ultimately, the goal of any responsible discovery regime is to strike the proper balance between the prospective litigant's right to invoke judicial process to investigate before suit and the risk that the right will be abused. To be sure, an expansive grant of

176. Clermont & Currivan, *supra* note 145, at 571.

177. *Cf.* Steve Subrin, *supra* note 25, at 745 (contrasting discovery challenges in modern-day procedure with those in the period when federal rules were first adopted and remarking that "[t]here is a real problem: how to permit discovery 'fishing' sufficient to reach just results without expeditions in which the costs of time, money and privacy outweigh the gains"); *see also* Bone, *supra* note 8, at 577 ("The goal of any regulatory scheme, whether it involves strict pleading, penalties or judicial screening, is . . . to strike a sensible balance between the benefit of reducing frivolous suits and the regulatory costs.").

investigatory discovery privileges places some faith in the plaintiffs' bar—or, more precisely, in the ethical and financial incentives that influence the decision-making of the plaintiffs' bar—not to abuse the process. On the other hand, a categorical judgment against presuit discovery for investigatory purposes presumes a different kind of faith: namely, in the capacity of the civil justice system, bounded as it presently is, to call those who commit wrongful acts to account for their wrongdoing.