THE CHALLENGE OF ACHIEVING DISCOVERY FROM THIRD PARTY, NON-RETAINED EXPERTS

INTRODUCTION

There is an almost natural tension between science and litigation, arising from the inherent unpleasantness scientists must endure because of the demands of litigation.[1] Tensions between litigation and science can become particularly severe when discovery is directed at a non-party, non-retained expert, scientist, or researcher.[2]

Consider the following hypothetical: during products liability litigation, the plaintiff's expert takes the stand and testifies the defendant's product caused the plaintiff's injury. When asked to describe the basis for his opinion, the plaintiff's expert explains how he formed his opinion by relying upon a paper published by an independent researcher. The results of the research paper explain how the defendant's product causes the same type of injury suffered by the plaintiff. On cross-examination, the defense tries to impeach the foundational underpinnings of the expert's testimony by attacking the merits of the research paper the expert relied upon. However, since the expert only analyzed the research paper, the defendant's attorney is unable to identify any flaws in the underlying data supporting the independent researcher's conclusions in the paper. Therefore, the defendant is forced to accept the research presented as correct and it can be relied upon in the current litigation. The jury, accepting the expert's conclusions and reasoning, awards millions of dollars to the plaintiff.

This hypothetical highlights the need for the defendant's attorney to acquire the information used by the independent researcher. Because the expert relied heavily on the independent researcher's paper when forming an expert opinion, the defense can challenge the expert's opinion by disputing the research paper upon which the expert relied. In order to determine if there is a basis to dispute the research paper, the defendant needs the underlying data the independent researcher used to support the research paper. Once the defense obtains the underlying information, the information can be provided to their own experts to determine if and how the research paper's conclusions are

1. Richard L. Marcus, *Discovery Along the Litigation/Science Interface*, 57 BROOK. L. REV. 381, 382, 384 (1991) (commenting on the suspicion of litigation in the scientific community).

2. *Id.* at 394.

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challengeable. But first, in order to obtain the independent researcher's information, a subpoena must be issued to compel the independent researcher to turn over the information because the independent researcher is not a party, nor a retained expert to a party.[3]

Part I of this paper explains why the general rules regarding experts do not address this situation and then discusses a court decision in which the court was faced with a researcher in this situation. Part II discusses the 1991 amendments to the Federal Rules of Civil Procedure, a line of three cases that show the need for the rule and how, after twenty-five years, the amendments have not changed how the courts address this problem. Part III discusses the different arguments, both successful and unsuccessful, researchers have made to try to resist discovery, both inside and outside the Federal Rules of Civil Procedure. Finally, Part IV discusses the researcher scholar's privilege and what other changes can be made to better help and protect researchers.

I. WHY THE EXPERT DISCOVERY RULES FAIL

The goal in the hypothetical described above is for the corporation's attorney to gain discovery from the independent researcher in order to determine if there is a basis to question the opinions of the expert witness. Federal Rule of Civil Procedure 26 provides the general rule regarding discovery[4] and the specific rules regarding discovery from expert witnesses.[5] The expert witness, who was specifically retained by the plaintiff for trial, will have to disclose all the facts and data he considered when forming his expert opinion.[6] This disclosure will include the independent researcher's report, since it helped form the expert's opinion. However, since the expert witness never considered, viewed, or analyzed the underlying data supporting the independent researcher's report, the expert witness cannot disclose that information. The Federal Rules of Civil Procedure only require the disclosure of all information considered by the expert.[7] Further, the expert witness is physically incapable of turning over this information because the information has never been in the possession of the expert. Remember, while the expert has never seen this underlying information, the information is still critical to the expert's opinion because it was used by the independent researcher in developing the report upon which the expert relied.

3. FED. R. CIV. P. 45.

4. FED. R. CIV. P. 26(a)(1).

5. FED. R. CIV. P. 26(a)(2).

6. FED. R. CIV. P. 26(a)(2)(B)(ii). Disclosure must be accompanied by a written report if the witness is one retained or specially employed to provide expert testimony in the case. FED. R. CIV. P. 26(a)(2)(B). The report must contain the facts or data considered by the witness when forming the witness's opinions. FED. R. CIV. P. 26(a)(2)(B)(ii).

7. *Id.*

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Additionally, the corporation's attorney cannot obtain discovery from the independent researcher using Rule 26. Under Rule 26, discovery is only available from experts who may testify at trial as witnesses.[8] Rule 26 disclosure from experts does not extend to an expert who has not consented to participate in the lawsuit because the rule only applies to facts and opinions held by experts acquired or developed in anticipation of litigation.[9] The independent researcher is not an expert witness retained by the plaintiff or otherwise expected to testify. In fact, the independent researcher is not a witness because the researcher's only connection to the case is the researcher's report being used at trial by the expert witness. Thus, the independent researcher is a third party to the litigation, and a subpoena is required to compel the production of the underlying data in the possession of the independent researcher.[10]

However, what happens when the independent researcher refuses to provide the information and challenges the subpoena? What happens if the researcher refuses to become an expert witness to either party and therefore is not subject to the required expert disclosure? After all, most scientists would prefer to not suffer the demands of litigation and instead keep their distance.[11] Can the party compel the independent researcher to turn over their information? Does the party's need for the information override the fact that the subpoenaed researcher is a non-party and has no direct connection to the current litigation at hand?

A. Deitchman v. E.R. Squibb & Sons

The hypothetical situation discussed above is grounded in numerous real world examples where parties sought the underlying information supporting an independent researcher's published research.[12] One particularly illustrative

8. FED. R. CIV. P. 26(a)(2)(B) (applying to a witness giving expert testimony); FED. R. CIV. P. 26(a)(2)(C) (applying to witnesses giving testimony).

9. *In re* Snyder, 115 F.R.D. 211, 214–15 (D. Ariz. 1987).

10. FED. R. CIV. P. 45(a).

11. Marcus, *supra* note 1, at 387.

12. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1546 (11th Cir. 1985) (discussing a research center challenging a subpoena seeking the personal information regarding the participants used in the center's Toxic Shock Syndrome study suggesting the syndrome can be caused by a specific type of tampon); *In re* Am. Tobacco Co., 880 F.2d 1520, 1522 (2d Cir. 1989) (discussing tobacco companies seeking to compel the underlying data of two studies published by a non-party doctor suggesting a person exposed to both tobacco smoke and asbestos have a much higher likelihood of developing cancer); *In re Snyder*, 115 F.R.D. at 211–12 (discussing a car manufacturer seeking information from an author of a study suggesting certain vehicles are more hazardous than others).

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example is *Deitchman v. E.R. Squibb & Sons*.[13] Deitchman brought a pharmaceutical products liability action against E.R. Squibb & Sons, Inc. and other drug companies for a disease caused by exposure to the drug diethylstilbestrol (DES).[14] In connection with the litigation, Squibb issued a subpoena for the production of every document in the Registry for Hormonal Transplacental Carcinogenesis at the University of Chicago, maintained by Dr. Arthur Herbst.[15] This registry maintained records on the exact aspects of the plaintiff's disease, a type of cancer called adenocarcinoma.[16] Dr. Herbst tried to quash the subpoena claiming the information sought was confidential and privileged.[17]

Dr. Herbst was not a party to the case and would not testify at the trial.[18] His only connection to the case was the publication of a study suggesting an association between exposure to the drug DES and the cancer from which the plaintiff suffered.[19] Dr. Herbst created the registry to determine what caused this particular kind of cancer and the best means for treatment.[20] In order to establish the registry, Dr. Herbst requested medical records of women with this type of cancer, with his promise to keep the information confidential, from medical schools and hospitals throughout the world.[21] Dr. Herbst made these requests annually, to continually update the registry's information and gather more information regarding this type of cancer.[22]

The court, adopting a balancing standard used to assess disclosure of materials between parties, held that when protection from a subpoena is sought, the court must employ a balancing test to determine whether the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the claimed privilege.[23] In this context, the court said the nature of Dr. Herbst's and Squibb's competing hardships must be compared.[24]

13. Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 558 (7th Cir. 1984) (discussing drug companies seeking information from a study suggesting an association between cancer and the drug diethylstilbestrol).

14. *Id.* at 557.

15. *Id.* at 558.

16. *Id.* at 557–58.

17. *Id.* at 558.

18. *Deitchman*, 740 F.2d at 558.

19. *Id.*

20. *Id.*

21. *Id.* at 558–59.

22. *Id.* at 559.

23. *Deitchman*, 740 F.2d at 559 (quoting EEOC v. Univ. of Notre Dame du Lac, 715 F.2d 331, 338 (7th Cir. 1983) (addressing the disclosure of materials between parties)).

24. *Id.*

Dr. Herbst argued how disclosing the information would destroy his ability to continue the registry.[25] Dr. Herbst provided several affidavits from doctors who had provided the registry with information on the condition of confidentiality and would stop providing information if the confidentiality could be breached because of a subpoena.[26] Further, Dr. Herbst explained the importance of keeping the research confidential, the significance of his research, and the necessity for the registry to continue in order to further research this form of cancer.[27] Finally, even Squibb conceded that the loss of confidentiality would adversely affect Dr. Herbst and the registry.[28]

Squibb claims its hardship would be its inability to adequately defend itself at trial.[29] The plaintiff's experts universally and repeatedly relied upon Dr. Herbst's published articles to show the relationship between DES exposure and subsequent injuries in order to show causation.[30] Without the underlying registry data upon which Dr. Herbst's conclusions are based, Squibb argued it was unable to defend the issue of causation adequately.[31] Neither party disputed that Dr. Herbst's articles would be used against Squibb, and Squibb needed access to the underlying data to prepare its defense.[32] Allowing access to the underlying data supporting Dr. Herbst's findings would allow Squibb to critically scrutinize the credibility, accuracy, and validity of Dr. Herbst's statistics and conclusions.[33]

The court acknowledged this unique situation resulted in Squibb facing Dr. Herbst as a potential expert witness without him ever taking the stand or being subject to cross-examination.[34] Any expert called upon to refute Dr. Herbst's claims could be easily dismissed because he or she would not have viewed the collective information contained within the registry, unlike Dr. Herbst,[35] since the registry is the sole source of information concerning the association between DES and this particular form of cancer.[36] Thus, any denial of discovery would preclude Squibb from engaging in any meaningful cross-examination of plaintiff's experts' opinions, based almost exclusively on Dr. Herbst's articles.[37]

25. *Id.*
26. *Id.* at 560.
27. *Id.*
28. *Deitchman*, 740 F.2d at 560.
29. *Id.* at 561.
30. *Id.*
31. *Id.*
32. *Id.*
33. *Deitchman*, 740 F.2d at 562.
34. *Id.* at 561.
35. *Id.*
36. *Id.*
37. *Id.* at 562.

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The court concluded that for Squibb to properly defend the issue of causation, access to the registry's underlying data to analyze its accuracy and methodology is absolutely essential.[38] The court recognized the problem of confidentiality but also noted it was easily cured by simply expanding protection a little beyond the usual deletion of patient names.[39] The court explained when it is confronted with a motion to quash a subpoena, its duty is not to deny any discovery, but to reduce the demand to what is reasonable, considering the discoverer's needs and the discoveree's problems.[40] The court reasoned to give Squibb nothing would be an abuse of discretion and ordered the modification of the subpoena to protect the confidentiality of the registry's information while giving Squibb discoverable information at its sole expense.[41]

II. 1991 AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Deitchman was decided in 1984[42] and was just one case representing the growing trend of the use of subpoenas to compel the giving of evidence and information by unretained experts.[43] To address this trend, Rule 45 of the Federal Rules of Civil Procedure regarding subpoenas was amended in 1991.[44] These amendments included a completely new section of the rule[45] to protect witnesses from the misuse of a party's subpoena power.[46] While this amendment included many new and altered provisions, the relevant amended section for the unretained, independent researcher is:

> Rule 45. Subpoena
> (d) Protecting a Person Subject to a Subpoena; Enforcement
> (3) Quashing or Modifying a Subpoena
> (B) When Permitted. To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:
> (i) disclosing a trade secret or other confidential research, development, or commercial information; or

38. *Deitchman*, 740 F.2d at 563.
39. *Id.* at 560.
40. *Id.*
41. *Id.* at 564, 566.
42. *Id.* at 556.
43. FED. R. CIV. P. 45(c)(3)(B)(ii) advisory committee's note to 1991 amendment.
44. *See* FED. R. CIV. P. 45(c)(3)(B)(ii) advisory committee's note to 1991 amendment.
45. FED. R. CIV. P. 45(c) advisory committee's note to 1991 amendment.
46. FED. R. CIV. P. 45(c)(3) advisory committee's note to 1991 amendment.

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> (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.[47]

A. The Need for the Rule: Same Case, Three Times

Among the growing trend of using subpoenas to compel the researcher into providing the underlying data was Richard Snyder, who challenged a subpoena issued upon him by American Motor Corporation on three separate occasions.[48] American Motor Corporation subpoenaed Snyder's underlying data used to support his co-authored study for the Insurance Institute for Highway Safety.[49] Snyder's article, titled "On-Road Crash Experience of Utility Vehicles," analyzed accident reports and engineering studies of utility vehicles.[50] While most of the study's conclusions were on general characteristics of utility vehicle accidents, a few conclusions singled out certain vehicles, such as the Jeep, as being more hazardous than others.[51] American Motor Corporation needed the underlying data in order to contest the opposing experts' opinions about the safety of the Jeep vehicle, derived from the conclusions presented in Snyder's study.[52]

In *Buchanan v. American Motors Corp.*, the Sixth Circuit affirmed the district court's decision to quash the subpoena for the production of all the research data and documents related to the study.[53] The court began its reasoning by identifying Snyder as a stranger to the litigation currently pending, who is not an expert witness or adviser to any party involved in the litigation.[54] The court said the scope of discovery is in the sound discretion of the district court, and the district court did not abuse its discretion in quashing the subpoena on the grounds that the subpoena was unreasonably burdensome.[55] The court explained ordering compliance would require Snyder, an expert who has no direct connection with the litigation, to spend an

47. FED. R. CIV. P. 45(d)(3)(B). This section was originally under the (c) heading but the revisions in 2013 moved this to the (d) section. FED. R. CIV. P. 45(d) advisory committee's note to 2013 amendment.

48. Buchanan v. Am. Motors Corp., 697 F.2d 151, 151–52 (6th Cir. 1983); Wright v. Jeep Corp., 547 F. Supp. 871, 872–73 (E.D. Mich. 1982); *In re* Snyder, 115 F.R.D. 211, 211–12 (D. Ariz. 1987). American Motors Corporation is the owner and manufacturer of the Jeep brand. *See id.* at 212.

49. *Buchanan*, 697 F.2d at 152; *Wright*, 547 F. Supp. at 873; *In re Snyder*, 115 F.R.D. at 212.

50. *In re Snyder*, 115 F.R.D. at 212; *Wright*, 547 F. Supp. at 873.

51. *In re Snyder*, 115 F.R.D. at 212; *Wright*, 547 F. Supp. at 873.

52. *Buchanan*, 697 F.2d at 152; *Wright*, 547 F. Supp. at 873; *In re Snyder*, 115 F.R.D. at 212.

53. *Buchanan*, 697 F.2d at 152.

54. *Id.*

55. *Id.*

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unreasonable amount of time disclosing all of the raw data, including thousands of documents, accumulated over the course of a long and detailed research study.[56] Further, the court supported its reasoning with the observation that Snyder is not being called as an expert witness with observations concerning the accident or because no other experts are available, but because American Motors Corporation wants to prove Snyder's research study is not well founded.[57]

In *Wright v. Jeep Corp.*, the District Court for the Eastern District of Michigan ordered the subpoena be modified to reduce the burden on Snyder producing the requested documents with the payment of a reasonable fee for his information and services.[58] Initially the court began by describing the relationship between conclusions contained in research reports and the underlying data from which these conclusions are drawn.[59] The underlying data is analyzed, compared, and contrasted by the researcher to document and support the conclusions contained within the researcher's report.[60] The value of the conclusions turns upon the quality of the data, the methods of analysis used by the researcher, and the skill and perception of the researcher.[61] Thus, if the conclusions of a research effort are to be fairly tested, the underlying data must be available to others equally skilled and perceptive.[62]

With this relationship in mind, the *Wright* court then began its discussion by saying "'[t]he public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege."[63] As such, the court needed to determine if a public policy reason existed to prevent Snyder from being subject to the subpoena.[64] The court rejected Snyder's reasoning that he did not have to comply with the subpoena because of a court rule,[65] academic privilege,[66] and the First Amendment.[67] However, the court listened to Snyder's claim being subject to the subpoena

56. *Id.*

57. *Id.*

58. Wright v. Jeep Corp., 547 F. Supp. 871, 877 (E.D. Mich. 1982).

59. *Id.* at 874.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Wright*, 547 F. Supp. at 873 (quoting United States v. Nixon, 418 U.S. 683, 709 (1973) (quoting Branzburg v. Hayes, 408 U.S. 665, 688 (1972))).

64. *Id.*

65. *Id.* at 874 ("There is nothing in the federal rules that creates an exemption for the respondent [Snyder] from providing the relevant material requested.").

66. *Id.* at 875 ("The respondent [Snyder] offers no case to support an academic privilege. . . . This court is unwilling to create a new privilege that would shield academics from testifying.").

67. *Id.* ("[T]he court does not believe that compelling Professor Snyder to testify violates any first amendment rights.").

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would be burdensome, but did not quash the subpoena.[68] Instead, the court determined the solution was not to prevent disclosure because it is too burdensome but to lessen the burden in order to permit the information to become available.[69] The court explained every person is burdened by having to disclose knowledge he or she acquired for the purposes of litigation, even though it is acquired by accident.[70] But this burden can be lessened, favoring disclosure, if measures are taken, such as payment of a reasonable fee.[71] Thus, Snyder must still disclose his information, but the court would consider each parties' recommendation on how to lessen the burden.[72]

In *In re Snyder*, Snyder was once again faced with a subpoena from American Motors Corporation.[73] In *Snyder*, the District Court for the District of Arizona agreed with the Sixth Circuit, and quashed the subpoena[74] because it was unduly burdensome.[75] This court once again explained Snyder's relationship to the litigation and how the subpoena only sought the underlying information supporting the study, not Snyder's expert conclusions.[76] Analyzing the burden to Snyder, the court said the series of legal skirmishes American Motors Corp. had imposed on a researcher who is a stranger to each of their lawsuits might be enough on its own to establish the excessively burdensome discovery standard.[77] The burden of the subpoena was also unreasonable considering the collateral relationship to the litigation, the amount of self-impeaching material the report already contained, and the amount of information sought.[78] American Motors Corp. sought the production of virtually every piece of paper involved in the study, from the funding requests, data gathering, data analysis, peer review, and post publication comments.[79] The subpoena ordered Snyder to explain why any document was missing and its contents, which would have applied to everything because Snyder did not personally possess any of these documents.[80] Thus, the court quashed the subpoena for being unreasonably burdensome.[81]

68. *Wright*, 547 F. Supp. at 877.
69. *Id.*
70. *Id.* at 876.
71. *Id.* at 877.
72. *Id.*
73. *In re* Snyder, 115 F.R.D. 211, 211 (D. Ariz. 1987).
74. *Id.* at 216.
75. *Id.* at 214.
76. *Id.* at 212.
77. *Id.* at 214.
78. *In re Snyder*, 115 F.R.D. at 214.
79. *Id.* at 212.
80. *Id.* at 212. This lawsuit took place seven years after the study was published, where Snyder had since retired from the University of Michigan and moved to Arizona. *Id.* at 211–12. Further, the University of Michigan no longer possessed the information as well. *Id.* at 212.
81. *Id.* at 216

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1. The Court Recognizes the Problems Researcher's Face

The *Snyder* court also identified two main problems faced by researchers in this situation. First, the court explained that one of the greatest problems researchers face when parties seek to discover their underlying data supporting published research articles used by party experts is that no final judgment will ultimately decide the issue once and for all.[82] The potential for repetition and the lack of finality can create serious problems for a researcher whose work is relevant to many actions.[83] Neither of the parties ever need to file a claim against the researcher because they only seek a subpoena to discover the information the researcher used supporting the published article, not to hold the researcher liable in any way.[84] As a result, res judicata, the doctrine that prevents parties from re-litigating the same claim,[85] never applies because the researcher is never a party to the action.[86] Further, collateral estoppel, the doctrine preventing the re-litigating of an issue decided against a party in earlier litigation,[87] does not apply because the issue of discovery is not so essential to the dispute between the parties to apply.[88] In addition, there is no statutory limitation period for the relevance of the researcher's work because the research becomes relevant once a lawsuit is initiated.[89] Thus, the researcher is forced to defend himself from each subpoena on a case-by-case basis with the results of one decision having no preclusive effect on any subsequent decisions.[90]

Second, the court explained any solutions to the serious problems faced by Snyder are not available under the current rule of procedure and evidence.[91] The protections granted to expert witnesses are not available to Snyder because they only apply for facts known to and opinions held by experts and acquired or developed in anticipation of litigation.[92] In addition, the federal procedural and evidentiary rules simply do not address the question regarding if Snyder can be compensated when his participation is involuntary, and who has not

82. *Id.* at 214.

83. *In re Snyder*, 115 F.R.D. at 215.

84. *Id.* at 211 (non-party researcher being subpoenaed); Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1546 (11th Cir. 1985) (non-party research center being subpoenaed); *In re* Am. Tobacco Co., 880 F.2d 1520, 1522 (2d Cir. 1989) (non-party research doctor being subpoenaed).

85. *Res Judicata*, BLACK'S LAW DICTIONARY (10th ed. 2014).

86. *See In re Snyder*, 115 F.R.D. at 214.

87. *Collateral Estoppel*, BLACK'S LAW DICTIONARY (10th ed. 2014).

88. *In re Snyder*, 115 F.R.D. at 214.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 214–15.

witnessed the events giving rise to litigation.[93] The court explained the need for more certainty in the discovery of academic research when the potential for repetition and lack of finality can create serious problems for a researcher whose work is relevant to many actions.[94] The court called for members of the legal community to propose amendments to the existing rules of procedure that would increase certainty as to the scope of discovery from these involuntary expert witnesses.[95] The amendments would come four years later.[96]

2. Why the Different Outcomes?

One of the purposes behind the changes to Rule 45 in the 1991 amendments was to clarify the protections afforded to persons who are compelled to give information.[97] When analyzing these three decisions, it is easy to see the differences these amendments were trying to clarify. After all, these three cases all answered the same question in three different ways.[98]

The evolution of these three cases starts with *Buchanan v. American Motors Corp.* In *Buchanan*, the court clearly disfavored the subpoena ordering the deposition and production of documents from Snyder when the court did not even feel obligated to address the degree of need American Motors Corporation's had regarding discovery.[99] Further, the court appears to treat Snyder as an unwilling expert the court will not force to testify and give his opinions for or against a party. The court never refers to Snyder as a third party expert or as a researcher but instead repeatedly identifies Snyder as an expert witness who is a stranger to the litigation.[100] In this sense, the court is

93. *In re Snyder*, 115 F.R.D. at 215.

94. *Id.*

95. *Id.* at 216.

96. FED. R. CIV. P. 45(c)(3) advisory committee's note, 1991 amendment.

97. FED. R. CIV. P. 45 advisory committee's note, 1991 amendment, Purpose of Revision.

98. Buchanan v. Am. Motors Corp., 697 F.2d 151, 152 (6th Cir. 1983) (quashing the subpoena because Snyder was not an expert witness); *In re* Snyder, 115 F.R.D. 211, 214, 216 (D. Ariz. 1987) (quashing the subpoena because it was unduly burdensome); Wright v. Jeep Corp., 547 F. Supp. 871, 877 (E.D. Mich. 1982) (modifying the subpoena to reduce the burden faced by Snyder).

99. *Buchanan*, 697 F.2d at 151–52 (the court only states the reason why American Motors Corp. wants discovery but does not weigh this as a factor to be considered).

100. *Id.* at 151 ("seeks to subpoena appellee [Snyder], an *expert* residing in Michigan") (emphasis added); *Id.* at 152 ("Appellee [Snyder] is a *stranger* to the North Carolina litigation and is not an expert witness or adviser to any party") (emphasis added); *Id.* ("Assuming without deciding that the *expert* here . . . has neither an absolute nor qualified privilege") (emphasis added); *Id.* ("Compliance with the subpoena would require the *expert* who has *no direct connection* with the litigation") (emphasis added); *Id.* ("[W]e note that the *expert* is not being called because of observations . . . concerning the . . . accident . . . or because no other *expert witnesses are available*. Appellant [American Motors Corp.] wants . . . to prove . . . the *expert's* written opinions . . . are not well founded.") (emphasis added); *Id.* ("The District Court did not err

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considering Snyder as a typical expert witness, one who would be retained by one party to offer his opinion at trial. Instead, the court needed to consider Snyder as a witness, with key additional information for the expert witnesses to use at trial, who is also an expert in the same field as those expert witnesses. This difference leads to a complete quashing of the subpoena instead of the solutions reached later.

In *Wright*, the court starts off with a clear understanding of who Snyder is and his relationship to the litigation.[101] With this understanding, the court treats Snyder as a third party witness with information relevant to the litigation at issue,[102] unlike *Buchanan*'s treatment of Snyder as an unwilling expert.[103] While both courts use the unduly burdensome standard to reach their respective decisions,[104] this difference in the treatment of Snyder leads the *Wright* court to grant discovery, because Snyder is a third party with relevant information to the litigation.[105]

Finally, in *Snyder*, the court once again used the unduly burdensome standard and agreed with *Buchanan* to quash the subpoena.[106] However, unlike *Buchanan*, the *Snyder* court recognized Snyder's relationship to the litigation[107] and did not consider Snyder to be an unwilling expert witness. But while the *Snyder* and *Wright* courts agreed on Snyder's relationship to the litigation,[108] the *Snyder* court quashed the subpoena instead of reducing the burden like the *Wright* court.[109] A key difference was the difference in timing of these two cases.

in finding improper the practice of calling an *eminent expert witness (who is a stranger to the litigation)* under a burdensome subpoena . . .") (emphasis added).

101. *Wright*, 547 F. Supp. at 872–73.

102. *Id.* at 873.

103. *See supra* note 100.

104. *Buchanan*, 697 F.2d at 152; *Wright*, 547 F. Supp. at 876.

105. *Wright*, 547 F. Supp. at 876–77.

106. *In re Snyder*, 115 F.R.D. at 216.

107. *Id.* at 211–12.

108. *Id.*; *Wright*, 547 F. Supp. at 872–74.

109. *Wright*, 547 F. Supp. at 877. The Snyder court also disagreed with the Wright court's conclusion that if discovery were allowed, Snyder would be entitled to reasonable compensation. *In re Snyder*, 115 F.R.D. at 215; *Wright*, 547 F. Supp. at 877. The Wright court awarded the fee because it did not believe American Motors Corp. was entitled to the benefits of Snyder's research without paying for it. *Wright*, 547 F. Supp. at 877. In contrast, the Snyder court did not believe Snyder would be entitled to reasonable compensation because he was not an expert witness. *In re Snyder*, 115 F.R.D. at 215. Recognizing that American Motors Corp. only sought Snyder's first-hand knowledge of the underlying data, not his opinions, the Snyder court reasoned Snyder is an ordinary viewer witness to events that are only collaterally relevant to the current litigation. *Id.* Since the payment to expert witnesses is the only exception to the common law rule that witnesses are to be paid for their testimony, Snyder could not be paid because he is not an expert witness giving his opinion. *Id.*

One reason the *Snyder* court found the request for the underlying data burdensome was because the request was made seven years after the publication of the study.[110] During that time, Snyder had retired from the university where he performed his research, moved to Arizona and no longer possessed any of the information requested by American Motors Corporation.[111] However, the request in *Wright* was made two years after the publication of the study, while Snyder still worked for the university.[112] This means Snyder still had access to his research at the university and could still access the requested information. In addition, the *Snyder* court could not have reduced the burden on Snyder because it is impossible to reduce Snyder's burden of production when he does not have the documents.[113]

B. The Current State of the Law

One of the overriding purposes of the 1991 amendments to Rule 45 was "to clarify and enlarge the protections afforded [to] persons who are required to assist the court by giving information."[114] Specifically, the purpose behind the Rule 45(d)(3)(B)(i) amendments was to authorize the court to quash, modify, or condition a subpoena to protect a person from harmful disclosures of confidential information.[115] Further, the purpose behind the Rule 45(d)(3)(B)(ii) amendments was to provide "appropriate protection for the intellectual property of the non-party witness."[116] The committee recognized the growing problem of the use of subpoenas to compel the giving of evidence and information by unretained experts and created this rule to allow unretained experts to withhold their services and give assurance of reasonable compensation.[117] The amendment also allowed for the subpoena to be modified in order to accommodate different competing interests.[118]

Seemingly, the second part of this amendment would apply to the hypothetical situation referenced at the beginning of this article. The plaintiff sought to disclose the unretained expert's information that did not describe the specific injury resulting in litigation but resulted from the expert's own, independently conducted study. Further, when such underlying information is confidential or obtained because of the promise of confidentiality, the first part

110. *See In re Snyder*, 115 F.R.D. at 211–12.
111. *Id.*
112. *Wright*, 547 F. Supp. at 872–73.
113. *In re Snyder*, 115 F.R.D. at 212.
114. FED. R. CIV. P. 45 advisory committee's note, 1991 amendment, Purpose of Revision.
115. FED. R. CIV. P. 45(c)(3)(B)(i) advisory committee's note, 1991 amendment.
116. FED. R. CIV. P. 45(c)(3)(B)(ii) advisory committee's note, 1991 amendment.
117. *Id.*
118. *Id.*

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of the amendment should also apply. Thus, this amendment should make it easier for a researcher to defeat a subpoena in this situation.

In practice, these additions to the Federal Rules of Civil Procedure have done little to help unretained, third party experts or researchers from disclosing underlying information supporting their published conclusions.

First, the amendment has done nothing to change the standard used to determine whether or not discovery should be compelled. Before the amendment, the courts used a balancing test to determine whether or not to compel the researcher to disclose the underlying information.[119] As described in *Deitchman*, when protection from a subpoena is sought, the court must apply a balancing test to determine whether the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the claimed privilege.[120] After the 1991 amendment, the courts continued to use a balancing test to determine whether to compel discovery.[121] In *Cusumano*, the court artfully explained:

119. *In re* Am. Tobacco Co., 880 F.2d 1520, 1529 (2d Cir. 1989) (applying a balancing test of the need of disclosure against the privilege); Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) (balancing the need to obtain discovery against the need to maintain the confidentiality of the information); Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 559 (7th Cir. 1984) (performing a balancing test to determine if the need of disclosure outweighs the claimed privilege); Dow Chem. Co. v. Allen 672 F.2d 1262, 1275 (7th Cir. 1982) (balancing a privilege against important competing interests); Anker v. G.D. Searle & Co., 126 F.R.D. 515, 518 (M.D. N.C. 1989) (adopting a balancing test, the court weighs the need for discovery against the harm, prejudice or burden to the other party); *In re* Snyder, 115 F.R.D. 211, 215 (D. Ariz. 1987) (evaluating the subpoena requires the weighing of burdensomeness, relevance, alternative sources of the information, needs of the case, and the importance of the issues at stake); Wright v. Jeep Corp., 547 F. Supp. 871, 873 (E.D. Mich. 1982) (determining whether any public policy reasons exist to exempt a researcher from providing the requested materials).

120. *Deitchman*, 740 F.2d at 559.

121. Cusumano v. Microsoft Corp., 162 F.3d 708, 716 (1st Cir. 1998) (applying a balancing test weighing need against injury); *In re* Domestic Drywall Antitrust Litig., 300 F.R.D. 234, 239 (E.D. Pa. 2014) (balancing test requires a court to weigh the relevance, need, confidentiality, and other harm compliance would cause on the subpoenaed party); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. 4:12-mc-00508 JAR, 2012 U.S. Dist. LEXIS 147174, at *4 (E.D. Mo. Oct. 12, 2012) (balancing the relevance of the information, party's need, and hardship to the party subject to the subpoena); Retractable Techs., Inc. v. Int'l Healthcare Worker Safety Ctr., No. 3:11-MC-28, 2011 U.S. Dist. LEXIS 89402, at *8 (W.D. Va. Aug. 11, 2011) (applying a balancing approach); Crescenta Valley Water Dist. v. Exxon Mobil Corp., 269 F.R.D. 360, 363–64 (S.D. N.Y. 2010) (weighing the need of the party seeking the discovery against any undue hardships created by permitting it); *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., 249 F.R.D. 8, 12 (D. Mass. 2008) (applying a balancing test); Cable v. Weinman, 233 F.R.D. 70, 78–80 (D. Mass. 2006) (weighing the factors of relevance, privilege, cumulative evidence and undue burden); Bluitt v. R.J. Reynolds Tobacco Co., No. 94-2318, 1994 U.S. Dist. LEXIS 16933, at *4–7 (E.D. La. Nov. 21, 1994) (weighing the need for confidentiality against the need for disclosure).

> [W]hen a subpoena seeks divulgement of confidential information compiled by a journalist or academic researcher in anticipation of publication, courts must apply a balancing test. This test contemplates consideration of a myriad of factors, often uniquely drawn out of the factual circumstances of the particular case. Each party comes to this test holding a burden. Initially, the movant must make a prima facie showing that his claim of need and relevance is not frivolous. Upon such a showing, the burden shifts to the objector to demonstrate the basis for withholding the information. The court then must place those factors that relate to the movant's need for the information on one pan of the scales and those that reflect the objector's interest in confidentiality and the potential injury to the free flow of information that disclosure portends on the opposite pan.[122]

Therefore, even with the 1991 amendments, the researcher is still subject to a balancing test to determine if their need in resisting discovery outweighs the needs of the parties in litigation.[123]

The reasons courts continue to apply the balancing test after the amendment is because the amendment application itself is discretionary. The amendment tells the court is *may* modify or quash a subpoena. Since the amendment does not tell the courts they have to take one action or another, but instead lets the courts decide, the courts simply continued to exercise the discretion they had before the amendment.

Further, if the unretained, third party expert wants to challenge the subpoena, they must go to court and argue the uncertainty of a balancing test to determine whether or not they have to comply with the subpoena. To a person who is not related to the litigation, this may seem like a daunting, unnecessarily expensive and fundamentally unfair request. The researcher has no desire to be part of the case, because if they did, they could simply become

122. *Cusumano*, 162 F.3d at 716 (internal citations omitted); *see also In re Domestic Drywall Antitrust Litig.*, 300 F.R.D. at 239:

> The serve-and-volley of the federal discovery rules govern the resolution of a motion to quash. The subpoenaing party must first show that its requests are relevant to its claims or defenses, within the meaning of Federal Rule of Civil Procedure 26(b)(1). Next, the burden shifts to the subpoenaed nonparty who must show that disclosure of the information is protected under Rule 45(d)(3)(A) or (B). If the subpoenaed nonparty claims the protections under Rule 45(d)(3)(B) or asserts that disclosure would subject it to undue burden under Rule 45(d)(3)(A), it must show that disclosure will cause it a clearly defined and serious injury. This burden is particularly heavy to support a motion to quash as contrasted to some more limited protection such as a protective order. (internal citations omitted) (internal quotations omitted).

123. *Retractable Techs.*, 2011 U.S. Dist. LEXIS 89402, at *7–8 (noting Rule 45(c)(3)(B) allows a court to protect confidential information by modifying or quashing a subpoena, applying a balancing test to decide); Fanjoy v. Calico Brands, Inc., No. 2:06-mc-469, 2006 U.S. Dist. LEXIS 55158, at *12 (D. Utah Aug. 7, 2006) (noting Rule 45(c)(3)(B) allows courts to balance the needs of confidentiality against the need for disclosure).

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a retained expert for a party and be paid. Further, the independent researcher does not want to bear the cost of challenging a subpoena. Unlike the plaintiffs in litigation who chose to enter into a lawsuit and bear litigations expenses, or the defendants who may have been expecting litigation or at least have some control over its expense, an independent researcher has no such options. By being compelled by a subpoena, the researcher is forced to hand over the information, incurring the financial and potentially harmful research cost associated, or incur the cost of challenging the subpoena which may still result in the information being turned over. In addition, if the researcher obtained his or her information using confidentiality agreements, the researcher may be forced to spend money to challenge the subpoena or face liability for breaking those agreements.

Second, what little impact the amendment had was procedural in allowing the third party expert to combat the subpoena. Before the amendment, courts were not uniform on what procedural law(s) governed the ability for unretained, third party experts to challenge the subpoena. Courts allowed the third party experts to challenge the subpoena by treating the challenge as a regular motion to quash a subpoena,[124] by combining the Rule 26 and Rule 45 of the Federal Rules of Civil Procedure,[125] or by solely following Rule 26 of the Federal Rules of Civil Procedure regarding protective orders.[126] Such difference may be explained by one court that said the available Federal Rules of Civil Procedure simply do not address gaining discovery from this kind of expert.[127] Thus, the courts were left to fend for themselves and determine what procedural law applied.

After the amendment, most courts agreed the amendment now governed subpoenas seeking discovery from this type of expert.[128] However, the First

124. Buchanan v. Am. Motors Corp., 697 F.2d 151, 152 (6th Cir. 1983) (quashing a subpoena based on the subpoena being unreasonably burdensome); *Dow Chem. Co.*, 672 F.2d at 1266 (allowing the district court to decide how to enforce the subpoena); *Wright*, 547 F. Supp. at 872 (appealing a decision to quash a subpoena).

125. *Deitchman*, 740 F.2d at 559 (7th Cir. 1984) (applying both Rule 26 and Rule 45); Anker v. G.D. Searle & Co., 126 F.R.D. 515, 518 (M.D. N.C. 1989) (applying both Rule 26 and 45 when evaluating a challenge to a subpoena); Kennedy v. Conn. Dep't of Pub. Safety, 115 F.R.D. 497, 499 (D. Conn.1987) (using Rules 26 and 45 to quash the subpoena and seek a protective order); *In re* Snyder, 115 F.R.D. 211, 214 (D. Ariz. 1987) (using Rules 26 and 45 to quash the subpoena and seek a protective order).

126. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985) (using a Rule 26 protective orders to modify a subpoena). Rule 26(c) allows a party subject to discovery to move for a protective order and Rule 45(b) allows the subpoena to be quashed or modified. *Deitchman*, 740 F.2d at 559.

127. *In re Snyder*, 115 F.R.D. at 215.

128. *In re* Domestic Drywall Antitrust Litig., 300 F.R.D. 234, 239 (E.D. Pa. 2014) (applying Rule 45(d)(3)(B) in a balancing test); *Retractable Techs., Inc.*, 2011 U.S. Dist. LEXIS 89402, at *7–8 (applying Rule 45(c)(3)(B)); Crescenta Valley Water Dist. v. Exxon Mobil Corp., 269

Circuit in *Cusumano* continued to treat this issue under Rule 26 regarding discovery explaining discovery rules apply to subpoenas issued under Federal Rule of Civil Procedure 45.[129] In reality such distinctions of what procedural law(s) apply do not substantively matter. As explained above, the courts, both before and after the amendment, still apply a balancing test to determine the merits of the challenge. But one such difference the amendment makes is the clarity it provides. First, experts now know exactly what to do in order to challenge the subpoena in court, instead of guessing on what procedural law applies. Second, the rule provides a list of information subject to protection instead of relying on the more general undue burden reasoning generally required by both Rule 26 protective orders and Rule 45 protection from subpoenas.

Finally, this amendment only applies when the expert is a third party to the litigation. When the unretained researcher used a source for their research that is now a party to the litigation, the researcher is no longer a third party.[130] The researcher now has first-hand factual knowledge directly related to one of the parties in the litigation.[131] Such factual information describing specific events and occurrences involved in the dispute are not shielded by Rule 45(c)(3)(B)(ii).[132] Thus, the researcher is no longer a third party to the litigation but a fact witness, no longer protected by Rule 45(c)(3)(B)(ii).[133]

III. TRYING TO PROTECT THE INFORMATION

Researchers have attempted many different ways to protect themselves from being subject to the disclosure required by the subpoena.[134] Unfortunately for the researchers, most of these methods fail,[135] but some succeed in preventing discovery to varying degrees.[136]

A. Unsuccessful Attempts to Protect the Information

Several different attempts by researchers to resist discovery have been unsuccessful. Such unsuccessful attempts include the researchers claiming they

F.R.D. 360, 363 (S.D. N.Y. 2010) (applying Rule 45(c)(3)(B)(i)); *Fanjoy*, 2006 U.S. Dist. LEXIS 55158, at *6 (applying Rule 45(c)(3)(B)(i)); Bluitt v. R.J. Reynolds Tobacco Co., No. 94-2318, 1994 U.S. Dist. LEXIS 16933, at *4–5 (E.D. La. Nov. 21, 1994) (analyzing the applicability of Rule 45(c)(3)(B)).

129. Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998).

130. Cable v. Weinman, 233 F.R.D. 70, 77 (D. Mass. 2006).

131. *Id.*

132. *Id.*

133. *See id.*

134. *See infra* Part III. A–B.

135. *See infra* Part III. A.

136. *See infra* Part III. B.

are protected as researchers, protected by court rule, protected by the First Amendment, and protected by the expert's privilege.

1. Researcher Protection

The court in *Wright v. Jeep Corp.* refused to give academic researchers protection from being subject to a subpoena solely because they are academic researchers.[137] The court refused to recognize such an academic privilege when no support was provided to show that such a privilege is recognized.[138] The court was unwilling to create the privilege because privileges are the exception to the general duty of every citizen to provide evidence when necessary for justice and, as such, such exceptions are not lightly created or expansively construed.[139]

2. Court Rule

In *Wright v. Jeep Corp.*, Snyder again claimed he did not have to provide any documents because he was not a retained expert.[140] Snyder's argument was premised on the fact he did not fall within any of the subcategories specifically addressing the discovery of experts in the Federal Rules of Civil Procedure, and thus could not be compelled by them.[141] The court was quick to point out the error in Snyder's argument, explaining "the administration of justice requires testimony of all persons unless reasons are established to the contrary."[142] Since Snyder was not an expert under these rules, these procedures did not apply to him, and thus the only question for disclosure is if the material was relevant.[143] The Federal Rules of Civil Procedure state a party may obtain discovery regarding any matter which is *relevant to the subject matter involved* in the pending action.[144] Because there was a high probability Snyder's research would be used at trial, through expert witnesses, and the underlying facts of the study support the study's conclusions, the underlying facts are relevant to determine the validity of the expert's conclusions.[145] Therefore, nothing in the federal rules prevents the disclosure of the underlying information.[146]

137. Wright v. Jeep Corp., 547 F. Supp. 871, 875 (E.D. Mich. 1982).
138. *Id.*
139. *Id.*
140. *Id.* at 874.
141. *Id.*
142. *Wright*, 547 F. Supp. at 874.
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*

3. First Amendment

Once again in *Wright v. Jeep Corp.*, Snyder tried another basis for resisting the subpoena, claiming the First Amendment protection.[147] While the court agreed a court ordered subpoena provides enough government action to raise a constitutional question, the court determined the First Amendment did not apply.[148] The protection of the First Amendment affords the right to write and speak; it does not give a right to withdraw published material from public scrutiny.[149] Nor does the First Amendment give a right to refuse to disclose facts that are relevant in making a judgment as to the correctness of the published material.[150] Further, the court noted the limited protection given to reporters and writers under the First Amendment is given to preserve the flow of information from sources.[151] This protection is given to protect confidential sources, in order to not jeopardize the flow of information.[152] However, in *Wright*, the confidentiality of Snyder's sources were not at issue, thus there was no First Amendment concern.[153]

In addition, the court in *Wright* explained the possibility of being subpoenaed to testify exists for everyone.[154] At any time a person can see or hear something that will cause him or her to be subpoenaed to testify.[155] Every person is subject to a subpoena to tell or produce information about what he or she observed.[156] In many respects, an academic researcher is no different than any other witness who may be called upon to give evidence.[157]

4. Expert's Privilege

Some researchers in this discovery situation, still believing they are subject to the traditional and more common rule regarding experts, attempt to claim the expert's privilege to avoid the production demanded by the subpoena.[158] The expert's privilege is available to experts who have no personal connection to a case and gives the expert an absolute privilege to not be compelled to give his or her opinions at trial.[159] In one such case, *In re American Tobacco Co.*,

147. *Wright*, 547 F. Supp. at 875.
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.* at 876.
152. *Wright*, 547 F. Supp. at 876.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Wright*, 547 F. Supp. at 876.
158. *In re* Am. Tobacco Co., 880 F.2d 1520, 1527 (2d Cir. 1989).
159. *Id.* In diversity cases, the existence of a privilege is determined by state law, and this is the expert's privilege as defined by New York law. *Id.* Other states have a similar approach to the

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the court quickly dismissed such a claim of privilege by concluding that no expert is being asked to testify or to prepare a report for litigation.[160] Since the expert is not being compelled to give their opinions for litigation, the expert privilege does not apply.[161]

B. Some Protection Granted

Researchers are not completely helpless to resist discovery. Researchers can attempt to use any number of methods to quash the subpoena, included claiming the research scholar's privilege, journalist's privilege, attorney client privilege, and confidentiality. However, as illustrated by the following cases, these protections are very limited and often only applicable in certain specific situations. In fact, even though these methods may provide some relief to the researcher, often complete dismissal of such a discovery request is unattainable.

1. Research Scholar**'**s Privilege

The Research Scholar's Privilege protects researchers from disclosing their research.[162] This privilege is also called the researchers' privilege, academic privilege, or academic freedom privilege depending on the jurisdiction.[163] The research scholar's privilege can be considered a narrower version of the expert's privilege, but instead of preventing the expert researcher from disclosing opinions, the research scholar's privilege prevents the disclosure of

compelling of expert opinions at trial. Lombardo v. Gardner, 82 Pa. D. & C.4th 233, 242 (Pa. C.P. Lawrence Cnty. 2007) ("It is well established in Pennsylvania that an expert witness cannot be compelled to testify as to his opinion against his will."); Kridos v. Vinskus, 483 So. 2d 727, 731 (Fla. Dist. Ct. App. 1985) (an expert may not be compelled to testify purely because he is an expert, but only because he has information bearing rather directly on the case). Other jurisdictions have a more discretionary approach to compelling expert testimony. Mason v. Robinson, 340 N.W.2d 236, 242 (Iowa 1983) (before the court compels an expert to testify and absent any other connection to the litigation, the compelling party must demonstrate compelling necessity that overcomes the expert's and public's need for protection); Carney-Hayes v. Northwest Wis. Home Care, Inc., 699 N.W.2d 524, 534 (Wis. 2005) ("To compel an expert to testify involuntarily, a party must not only show a compelling need for the testimony but also present a plan of reasonable compensation.").

160. *In re Am. Tobacco Co.*, 880 F.2d at 1527–28.

161. *See id.*

162. *Id.* at 1528; *see* Dow Chem. Co. v. Allen, 672 F.2d 1262, 1275 (7th Cir. 1982) (discussing the privilege in terms of academic freedom but having the same effect of preventing the disclosure of research).

163. Frank C. Woodside, III & Michael J. Gray, *Researchers' Privilege: Full Disclosure*, 32 T.M. COOLEY L. REV. 1, 7 (2015). However, these privilege names can also refer to completely different privileges as well. EEOC v. Univ. of Notre Dame du Lac, 715 F.2d 331, 333–34 (7th Cir. 1983) (claiming academic privilege in the peer review process of determining the tenure status for a professor).

the information those opinions stem from. Currently, the Second and Seventh Circuits have expressly applied this privilege to successfully and unsuccessfully protect independent researchers and their underlying research data.[164] A key distinction used by courts when determining the success of this privilege is whether the research has been published yet or in the process of being prepared to be published.[165]

In *Dow Chemical Co. v. Allen*, the court touched upon such a privilege while discussing academic freedom, the ability for research to be carried on without interference from the government or community.[166] In *Dow Chemical Co.*, Dow Chemical Company sought the underlying information supporting several unfinished studies[167] suggesting a chemical compound Dow manufactures can be dangerous.[168] The court explained there were several reasons the researchers would face a chilling effect on their research when their studies had not yet been published.[169] First, enforcing the subpoenas before the studies had completed would leave the researchers with the knowledge, throughout the remainder of their studies, that their results were being actively scrutinized by a biased third party.[170] Such a burden on the researchers could be unnerving, discouraging and limit their fearlessness in pursuit of information.[171] Second, the premature disclosure of the underlying information would jeopardize both the studies and the researchers' careers.[172] Such disclosure would make the studies unfit for scientific publication, would bypass the peer review process, harm their credibility and risk total destruction of the research.[173] Therefore, the subpoena was quashed because any disclosure of the research data would be premature.[174]

In *In re NCAA Student-Athlete Name & Likeness Licensing Litigation*, a researcher challenged a subpoena requesting the underlying data and the

164. *Dow Chem. Co.*, 672 F.2d 1262 at 1276–77; *In re Am. Tobacco Co.*, 880 F.2d 1520 at 1529. While not expressly applying the research scholar's privilege, a District Court in the Eighth Circuit has acknowledged the validity of the policies supporting the privilege in its protection of research data before the study is published. *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. 4:12-mc-00508 JAR, 2012 U.S. Dist. LEXIS 147174, at *8–9 (E.D. Mo. Oct. 12, 2012).

165. *In re Am. Tobacco Co.*, 880 F.2d at 1529; *Dow Chem. Co.*, 672 F.2d at 1276; *In re NCAA*, 2012 U.S. Dist. LEXIS 147174, at *8.

166. *Dow Chem. Co.*, 672 F.2d at 1275.

167. *Id.* at 1273.

168. *Id.* at 1266.

169. *Id.* at 1276. The studies at issue were not completed or subject to peer review. *Id.* at 1268.

170. *Id.*

171. *Dow Chemical Co.*, 672 F.2d at 1276.

172. *Id.*

173. *Id.* at 1273.

174. *Id.* at 1278.

unpublished study, still in the peer review process.[175] The court applied a balancing test[176] and considered the fact that the article had not been published and was still subject to peer review.[177] The court explained peer review is a critical step in finalizing a research study, for it is only after this process that the academic piece considered finished.[178] Revealing an article before the peer review process is complete could reveal conclusions that will differ from the final, published article, thereby undermining the article and researchers credibility.[179] The court then granted the researcher's protective order in part to prevent premature disclosure but ordered the study and data be turned over once the peer review process was done.[180]

In *In re American Tobacco Co.*, the court held if the research scholar's privilege did exist, it did not apply.[181] American Tobacco was attempting to obtain the underlying data from a research doctor who published several studies suggesting a significant increase in the likelihood of cancer when smoking is combined with exposure to asbestos.[182] The court explained there would be no chilling effect on scientific research because the information requested was used for studies long since published.[183] The court noted the few times such a privilege had existed was to protect researchers from premature disclosure of their research.[184] Thus, the research scholar's privilege did not apply.[185]

2. Journalist Privilege

In *Cusumano v. Microsoft Corp.*, the court ruled academic researchers should be afforded protection similar to that which the law provides for journalists.[186] The court concluded the same concerns regarding discovery

175. *In re* NCAA Student-Athlete Name & Likeness Licensing Litigation, No. 4:12-mc-00508 JAR, 2012 U.S. Dist. LEXIS 147174, at *1. (E.D. Mo. Oct. 12, 2012).

176. *Id.* at *3.

177. *Id.*

178. *Id.*

179. *Id.*

180. *In re NCAA*, 2012 U.S. Dist. LEXIS 147174, at *4. For a discussion on the treatment of discovery regarding the peer review notes themselves, see *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., 249 F.R.D. 8, 12. (D. Mass. 2008). There, the court declined to allow the peer review comments to be discoverable in the interest of maintaining the confidentiality of the peer review process. *Id.* at 15.

181. *In re* Am. Tobacco Co., 880 F.2d 1520, 1529 (2d Cir. 1989).

182. *Id.* at 1522.

183. *Id.* at 1529.

184. *Id.* at 1528.

185. *Id.* at 1530.

186. Cusumano v. Microsoft Corp., 162 F.3d 708, 714 (1st Cir. 1998). The underlying action against Microsoft involved the U.S. Department of Justice charging Microsoft with federal

requests of journalists, the undermining of gathering and dissemination of information, also applied to academic researchers.[187] The court reasoned scholars are information gatherers and disseminators as well and if their research materials were freely subject to subpoena, sources would stop confiding in them.[188] As with reporters, a drying-up of sources sharply limits the information available to researchers, thus restricting their output.[189] Just as a journalist, stripped of his sources, would write fewer and less insightful articles, an academic, stripped of sources, would also write fewer and less insightful studies.[190] The court concluded such similarities of concern and function mandate a similar level of protection for journalists and academic researchers.[191] However, the court noted such protection is only available to the same extent available for journalists, usually just confidential information.[192]

In *Cusumano*, the academics were granted access to Netscape's employees and their business practices because of the academics promise of confidentiality.[193] The court applied a balancing test and determined the promise of confidentiality outweighed the need for discovery,[194] even though Microsoft had a legitimate need and use for the information.[195] The court reasoned scholars studying management practices depend upon the voluntary disclosures of industry insiders to develop the facts supporting conclusions.[196] These insiders lack a reason for divulging confidential business information such that the promises of confidentiality are needed to give a sense of security to facilitate the agreement to be interviewed.[197] Thus, allowing a competitor to have access to these interviews will not only harm these academics' future research efforts, but other researchers as well when promises of confidentiality can be defeated.[198]

antitrust violations for requiring computer manufactures to install Internet Explorer if they wished to install the Windows operating system on their computers. *Id.* at 710–11.

187. *Id.* at 714.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Cusumano*, 162 F.3d at 714.
192. *Id.* at 715.
193. *Id.* at 711.
194. *Id.* at 717.
195. *Id.* at 716.
196. *Cusumano*, 162 F.3d at 717.
197. *Id.*
198. *Id.*

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3. Attorney Client Privilege

Studies and published research papers do not just come from academic researchers associated with universities but from any person who has acquired information on a topic. Such information can be easily gathered over the course of one's career as a lawyer.

In *Cable v. Wienman*, an attorney published an article in the IPO Journal which stated the underwriting fees for services related to Initial Public Offerings (IPO) was fixed at 7%.[199] The litigation involved an antitrust action against banks for conspiring to fix underwriting fees for IPOs at 7%.[200] The attorney had formed his opinion about underwriting fees based on his twenty-five years of experience dealing with IPOs.[201] The attorney argued the information sought was protected by attorney client privilege.[202] The court agreed but identified certain situations where such a privilege would not apply.[203] Thus, since only the testimony of the attorney was sought to determine the factual underpinnings of the attorney's conclusions,[204] such a privilege could be easily invoked during the attorney's deposition if the privilege applied.[205]

4. Confidentiality

Researchers always raise the issue of confidentiality as a key reason why disclosure should not be allowed. Quite often, the party seeking disclosure will limit its request to allow the researcher to redact any confidential information in an attempt to avoid claims of confidentiality.[206] However, confidentiality is not always available, causing researchers, who still wish to prevent disclosure, to claim other reasons disclosure should not be granted.[207]

Confidentiality is used in a variety of ways depending upon the nature of the confidentiality, why confidentiality was obtained, and other facts surrounding the case. Most often, arguing confidentiality will only grant a researcher a protective order to protect the disclosure of the confidential information as demonstrated by the following cases:

199. Cable v. Weinman, 233 F.R.D. 70, 72–73 (D. Mass. 2006).

200. *Id.* at 72.

201. *Id.* at 73.

202. *Id.* at 78.

203. *Id.* at 78–79.

204. *Cable*, 233 F.R.D. at 76.

205. *Id.* at 80.

206. Dow Chemical Co. v. Allen, 672 F.2d 1262, 1277 (7th Cir. 1982); *In re Am. Tobacco Co*., 880 F.2d 1520, 1525 (2d Cir. 1989).

207. Wright v. Jeep Corp., 547 F. Supp 871, 875–76 (E.D. Mich. 1982) (requested material was not confidential, so the researcher tried to claim privilege and first amendment protection); *see also* Crescenta Valley Water Dist. v. Exxon Mobil Corp., 269 F.R.D. 360, 364–65 (S.D. N.Y. 2010) (arguing undue burden to prevent discovery).

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- *Deitchman v. E.R. Squibb & Sons*: The court issued a protective order to allow discovery while protecting any confidential medical information.[208]
- *Farnsworth v. Procter & Gamble Co.*: The court upheld a protective order allowing a research center to redact the personal information of women who participated in a research study.[209]
- *Kennedy v. Connecticut Department of Public Safety*: The court refused to quash the subpoena on the basis of confidentiality but allowed the researcher to redact the names of individuals who provided information on the basis of confidentiality.[210]
- *Fanjoy v. Calico Brands, Inc.*: To protect the confidentiality of the study's participants, the court ordered only the disclosure of age and genders of individual participants.[211]
- *Retractable Techs., Inc. v. International Healthcare Worker Safety Center*: Discovery was allowed because the protective order allowed for the protection of confidential information.[212]

Arguments made by researchers that the disclosure of any information, confidential or not, will destroy future efforts to collect data,[213] inhibit the researcher's ability to find future study participants,[214] or violate the confidentiality terms promised to the study participants in order to gain the participants' participation[215] are only effective at achieving a protective order, not quashing the subpoena. One court has said "quashing a subpoena is inappropriate where confidentiality interests can be safeguarded by means of a protective order."[216] Thus, when a protective order can be effective in safeguarding and minimizing any potential harm to confidentiality interests, such an order is the appropriate action to balance the competing interests of the researcher and the party seeking discovery.[217]

Defeating a subpoena on the sole basis of confidentiality is an almost insurmountable task. In a rare case, the sole reason of confidentiality was successfully used to prevent the discovery of underlying data in *Bluitt v. R.J.*

208. Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 564 (7th Cir. 1984).

209. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1546–48 (11th Cir. 1985).

210. Kennedy v. Connecticut Dep't of Public Safety, 115 F.R.D. 497, 501 (D. Conn. 1987).

211. Fanjoy v. Calico Brands, Inc., No. 2:06-mc-469, 2006 U.S. Dist. LEXIS 55158, at *13 (D. Utah Aug. 7, 2006).

212. Retractable Techs., Inc. v. Int'l Healthcare Worker Safety Ctr., No. 3:11-MC-28, 2011 U.S. Dist. LEXIS 89402, at *8–9 (W.D. Va. Aug. 11, 2011).

213. *Deitchman*, 740 F.2d at 559–60.

214. *Farnsworth*, 758 F.2d at 1547.

215. *Kennedy*, 115 F.R.D. at 501 (disclosing such individuals would needlessly jeopardize the important researcher-subject relationship); *Fanjoy*, 2006 U.S. Dist. LEXIS 55158, at *12–13; *Retractable Techs.*, 2011 U.S. Dist. LEXIS 89402, at *8.

216. *Retractable Techs.*, 2011 U.S. Dist. LEXIS 89402, at *8.

217. *See id.* at *8–9.

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Reynolds Tobacco Co.[218] The court explained how the requesting party was unable to show the necessary level of need, required by Rule 45(c)(3)(B), to overcome confidentiality because the opposing party's experts had not yet been shown to rely on the study.[219] Thus, instead of a protective order to maintain confidentiality, the court determined quashing the subpoena was appropriate, but the court left the issue open to review if the study would be relied upon by experts.[220]

Using confidentiality to quash a subpoena and dismiss the discovery request is more likely to be successful when combining it with other arguments. In *Cusumano v. Microsoft Corp.*, the researchers used confidentiality to help support their side of a balancing test after claiming a type of journalistic privilege.[221] The court explained the need for the researchers to maintain their promise of confidentiality to research participants, who otherwise would not have agreed to disclose any information.[222] The court used the need for confidentiality, along with other factors, including First Amendment values and the non-party status, to show that the researchers prevailed on the balancing test and quashed the subpoena.[223]

IV. RE-EXAMINING THE SITUATION

With the deck stacked against the researcher and the inevitable order compelling discovery waiting, what can researchers do to protect themselves?

A. Is the Research Scholar's Privilege Worth Revisiting?

Perhaps the most consistent and reliable tool researchers have used to defeat the discovery subpoena is the research scholar's privilege. When applied, the few courts that have addressed this privilege have consistently refused to allow discovery when the following elements are present:

1. Independent, Third Party Researcher;
2. The only connection between the litigation and the researcher, is the research currently being conducted by the researcher; and

218. Bluitt v. R.J. Reynolds Tobacco Co., No. 94-2318, 1994 U.S. Dist. LEXIS 16933, at *4, *8 (E.D. La. Nov. 21, 1994).

219. *Id.* at *4–5.

220. *Id.* at *7.

221. Cusumano v. Microsoft Corp., 162 F.3d 708, 716–17 (1st Cir. 1998).

222. *Id.* at 717.

223. *Id.* Compelling the disclosure of these research materials would reduce the free flow of information to the public, harming a fundamental First Amendment value. *Id.* The court also iterated non-parties have a different set of expectations in litigation and concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight. *Id.*

3. The researcher has not published the results of the research.[224]

The problem for researchers is the fourth element. As currently tailored and applied by the courts, the research scholar's privilege is only viable when the research has not been published. While this has helped a few researchers resist discovery, it does not help the vast majority of researchers who have already published their findings. Could researchers try and expand this privilege and protect the data once the research is published?

Probably not. The fourth element, the requirement that the research is not yet published, is the most important element and the reason why the privilege has been so successful at preventing discovery. Courts have continuously been persuaded by the harmful effects premature disclosure of research will have including: (1) subjecting the researchers to the knowledge their research will be scrutinized by biased third parties with opposite interests;[225] (2) jeopardizing the research studies and the researchers' careers;[226] (3) making the research data vulnerable to preemptive or predatory publication by others;[227] and (4) maintaining the peer review process to finalize and add credibility to a research study.[228] Several circuits, including the Second, Seventh, and Eighth, as well as various states including, California, Louisiana, and the District of Columbia, have found this reasoning to be persuasive and adopted a similar approach to the research scholar's privilege.[229] But once the research articles have been published, these harmful effects are no longer present to resist discovery.[230]

Privileges protect certain privacy interests the court has recognized as significant.[231] Privileges exist because there are public policy reasons the information should not be disclosed.[232] Privileges represent a compromise, a

224. Dow Chem. Co. v. Allen, 672 F.2d 1262, 1276–77 (7th Cir. 1982); *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. 4:12-mc-00508 JAR, 2012 U.S. Dist. LEXIS 147174, at *7–8 (E.D. Mo. Oct. 12, 2012) (finding a general research scholar's privilege would not apply, but noting these four elements are present and important in the decision not to grant discovery); *see also* Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 560 (7th Cir. 1984) (agreeing with the *Allen* court that such a privilege exists under these conditions).

225. *Dow Chem. Co*., 672 F.2d at 1276.

226. *Id.*

227. *In re* Am. Tobacco Co., 880 F.2d 1520, 1529 (2d Cir. 1989).

228. *In re NCAA*, 2012 U.S. Dist. LEXIS 147174, at *8.

229. *Dow Chem. Co*., 672 F.2d at 1262, 1276–77; *In re Am. Tobacco Co*., 880 F.2d at 1529; *In re NCAA*, 2012 U.S. Dist. LEXIS 147174, at *8–9; Humane Society of U.S. v. Superior Court, 214 Cal. App. 4th 1233, 1263 (Cal. Ct. App. 2013); *In re* Philip Morris, 706 So. 2d 665, 667–68 (La. Ct. App. 1998); Plough, Inc. v. National Academy of Sciences, 530 A.2d 1152, 1157–58 (D.C. 1987).

230. *In re Am. Tobacco Co.*, 880 F.2d at 1529.

231. Robert S. Catz & Jill J. Lange, *Judicial Privilege*, 22 GA. L. REV. 89, 95 (1987).

232. *Privilege*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/privilege [https://perma.cc/9RZF-ENSB].

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balancing of interests between one party's need to keep the information private and society's (and the court's) interest in ascertaining the truth.[233] In creating the research scholar's privilege, courts have recognized the privacy interest the researcher has in maintaining the research process. Further, such a privilege is reasonable when the public has yet to be exposed to the research itself.[234] But when the research is published, these privacy interests supporting the research scholar's privilege go away.

Once the research article is published, a researcher can no longer claim the integrity of the research process to prevent disclosure. While researchers have a right to protect their research when performing the research, they no longer have that right once the research is published. By publishing their research, they have publicly invited public thought and comment on their study and its conclusions. One way to comment on a study is to challenge it, for it is by challenging and testing scientific conclusions that they become accepted by both scientists and society. Challenging the result in litigation is but one way this can happen, with one court saying "[a]n important element in determining the validity of . . . studies [used at trial] might sometimes require an opportunity to test the information used in the studies."[235] While researchers may prefer their research to be challenged by other academics, in an academic setting, the reality is once a researcher has published their research, they do not have a right to prevent the questioning of their work in a manner or method they do not approve of. However, one court has recognized the judicial process may not be the best avenue to challenge scientific research, saying:

> The validity of opinions formed and expressed in the context of disciplines other than the law should be tested by the relevant discipline's requirements for validity or acceptability. This Court is unwilling to substitute the adversarial process of the judicial search for truth for the epistemological standards set by other disciplines.[236]

Further, the courts would be dissuaded from expanding the privilege because the privilege already properly protects researchers. It protects researchers from outside parties interfering with their research, thus letting the researchers come to their own conclusions. As currently construed, the privilege allows researchers to publish studies free from any bias except their own.

A cause for additional concern for the researcher is that the research scholar's privilege is not absolute and does not forever end the discovery inquiry. Once the research study has been published, the court is then free to order the disclosure of the information previously granted protection by the

233. Catz & Lange, *supra* note 231, at 95–96.

234. *See In re NCAA*, 2012 U.S. Dist. LEXIS 147174, at *7–8.

235. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985).

236. *In re* Snyder, 115 F.R.D. 211, 215–16 (D. Ariz. 1987).

privilege.[237] Such disclosure can still be subject to a protective order,[238] but such a result must seem like a loss when the researcher spent so much time and effort challenging the order to begin with.

B. Solution: Account for the Demand on the Researcher

As promising as the research scholar's privilege sounds, as currently applied, it is too narrow to protect the majority of researchers. Likewise, trying to expand the other arguments researchers have used to some success at defeating the subpoena (attorney-client privilege and journalist privilege) will fail because those situations are too unique and specific and unable to be generalized to researchers as a whole. In addition, confidentiality will also fail because its concerns are too easily accommodated with a protective order.

At first, the simple solution to this problem regarding discovery of third party researcher's underlying information would be to eliminate discovery from researchers in this situation. However, the Supreme Court has made clear such prohibition on discovery, and therefore the collection of evidence, would never be allowed in our judicial system.[239] Further, the courts recognize the legitimate need of the parties in litigation to obtain this information for trial.[240] The party seeking discovery needs the information for its trial preparation and defense.[241] These are very important interests and must not be unnecessarily infringed upon.[242] Without access to the information, the party seeking discovery is unable to defend against the claims raised by an expert witness addressing a critical matter in the litigation.[243] This information is necessary in order to perform a meaningful cross-examination of the expert witness.[244] The party seeking discovery is entitled to cross examine the expert witness on the data underlying their opinions.[245] Cross examination is a fundamental right of the judicial process and that right should never be restricted, except in the narrowest of circumstances to prevent its abuse.[246]

A solution to this problem cannot be found in a court doctrine but needs to come from the Federal Rules of Civil Procedure. The rules have already

237. *In re NCAA*, 2012 U.S. Dist. LEXIS 147174, at *10–11.

238. *Id.* at *11.

239. United States v. Nixon, 418 U.S. 683, 709 (1974); Blackmer v. United States, 284 U.S. 421, 438 (1932); Branzburg v. Hayes, 408 U.S. 665, 668 (1972).

240. *See* Deitchman v. E.R. Squibb & Sons, Inc., 740 F.2d 556, 563 (7th Cir. 1984) (to properly prepare a defense, access to the underlying data to analyze its accuracy and methodology is absolutely essential).

241. Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1547 (11th Cir. 1985).

242. *Id.*

243. *Deitchman*, 740 F.2d at 561.

244. *Id.*

245. *Id.*

246. *Id.* at 562 (citing Alford v. United States, 282 U.S. 687, 691 (1931)).

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acknowledged once before the problem of subpoenas being used to compel the disclosure of evidence and information by un-retained experts and researchers.[247] It is time they do so once again, but instead of only making alterations that result in superficial changes, the rules need to acknowledge the burden these lawsuits are placing on innocent third party researchers and give the researchers more consideration. By giving the researchers more consideration, the rules would be recognizing the undue hardship the researchers are facing from being subject to litigation while preserving the right for parties in a lawsuit to obtain evidence. Courts have continuously sung the praises of the public's right to every man's evidence[248] but also recognize non-parties are entitled to special consideration when subject to a subpoena.[249] It is time courts start giving that special consideration to non-parties instead of just calling upon such consideration only when they see fit.

The first way to give researchers more consideration in the litigation is the awarding of fees, both attorney fees and compensation for the information sought. By awarding attorney fees to the researcher, the rules are acknowledging the researcher is a third party to the litigation who, unlike traditional plaintiffs and defendants, has felt no injury or is subject to responsibility for that injury. The rules are recognizing the researcher is a completely detached third party who has no interest whatsoever to be subject to the demands and costs of litigation. Courts have already awarded attorney's fees when the subpoena creates an undue burden and expense on the researcher,[250] now it is time to recognize these discovery requests are inherently an undue burden on the researcher automatically deserving of attorney's fees. The ability to award the researcher attorney's fees gives the researcher some measure of confidence they have a right to challenge the discovery request and not be completely burdened by it. It gives the researcher a measure of security when being subjected to such an order.

Further, the researcher should be compensated for the information they disclose. Unlike traditional evidence, the underlying information supporting the study sought by the discovering party is the intellectual property of the researcher. The researcher dedicated a significant amount of time and effort to collect the information for the purpose of their intellectual and academic research. The researchers have a significant amount of interest in this information, which should not be freely given to others. Society has already recognized this kind of information is entitled to compensation because expert witnesses, who use this kind of intellectual property at trial, get paid for their

247. FED. R. CIV. P. 45(c)(3)(B)(ii) advisory committee's note to 1991 amendment.

248. United States v. Nixon, 418 U.S. 683, 709 (1974).

249. Cusumano v. Microsoft Corp., 162 F.3d 708, 717 (1st Cir. 1998).

250. Ebert v. C.R. Bard, Inc., No. 1:13-MC-277, 2014 U.S. Dist. LEXIS 48380, at *10 (M.D. Pa. Apr. 7, 2014).

knowledge and testimony. In addition, the comments to the 1991 amendments themselves indicate that one of the purposes of the changes was to see the researcher compensated[251] but with no language directly present in the rule allowing for compensation, very few courts have ever given it.[252] By granting the researcher compensation for their research, the court is acknowledging the interest the research has in the information and compensating the researcher for it. Such compensation lessens the burden felt by the researcher, prevents other parties from accessing the researchers' data for free, and once again gives the researcher some measure of security when being subject to such an order. Therefore, to better acknowledge the researcher and their innocent third party status, the Federal Rules of Civil Procedure need to be amended to allow these researchers to recover attorney's fees and compensation for their research.

Finally, the Federal Rules of Civil Procedure should also acknowledge the commitments and promises the researcher made in order to obtain their information and thus be amended to allow stronger protections of these promises. When the court compels the researcher to turn over the requested information, the court is favoring the conflict one set of citizens (the parties in the lawsuit) are having over the agreement another sets of citizens made (the researcher and the provider of the research data). Further, it appears the only reason the court is favoring the parties in the lawsuit is because they are in court. It is inherently unfair that an agreement between the researcher and the person who provide the researcher with information can be voided by the court simply because other parties are having a completely separate disagreement and, through the selection of their own experts, choose to tangentially involve the researcher's work. Therefore, the rules should be amended to better protect these promises by researchers.

251. FED. R. CIV. P. 45(c)(3)(B)(ii) advisory committee's note to 1991 amendment.

252. Of the following nine cases addressing this kind of researcher discovery and applying the 1991 amendments, only one allowed compensation: *In re* NCAA Student-Athlete Name & Likeness Licensing Litig., No. 4:12-mc-00508 JAR, 2012 U.S. Dist. LEXIS 147174, at *10 (E.D. Mo. Oct. 12, 2012). The rest did not even mention it or determined it was not appropriate. *In re* Domestic Drywall Antitrust Litig., 300 F.R.D. 234, 238, 251 (E.D. Pa. 2014) (discussing when compensation should be given); Ebert v. C.R. Bard, Inc., No. 1:13-MC-277, 2014 U.S. Dist. LEXIS 48380, at *9, *11 (M.D. Penn. Apr. 7, 2014); Retractable Techs., Inc. v. Int'l Healthcare Worker Safety Ctr., No. 3:11-MC-28, 2011 U.S. Dist. LEXIS 89402, at *1, *8 (W.D. Va. Aug. 11, 2011); *In re* Bextra & Celebrex Mktg. Sales Practices & Prod. Liab. Litig., 249 F.R.D. 8, 13, 15 (D. Mass. 2008); Weinman v. Cable, 427 F.3d 49, 52, 53 (1st Cir. 2005); Cable v. Weinman, 233 F.R.D. 70, 76, 80 (D. Mass. 2006); Fanjoy v. Calico Brands, Inc., No. 2:06-mc-469 DB, 2006 U.S. Dist. LEXIS 55158, at *6, 19–26 (D. Utah Aug. 7, 2006); Bluitt v. R.J. Reynolds Tobacco Co., No. 94-2318, 1994 U.S. Dist. LEXIS 16933, at *4, *8 (E.D. La. Nov. 21, 1994).

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CONCLUSION

Independent researchers who publish conclusions resulting from their academic studies inherently recognize their conclusions will be viewed and relied upon by others. But one consequence they may not realize is when their report is used by an expert in litigation, this subjects the researcher to be open to discovery requests for the information supporting the report's conclusions. Once the discovery request is made, the researcher has very little control. They are subjected to a balancing test, weighing the requesting parties need against whatever reasons the researcher can argue against discovery. The fact the researcher is a non-party to the case is only one factor benefiting the researcher but does not automatically dismiss the request.[253] Other factors the researcher may claim are confidentiality, privilege, and undue burden, but the court will weigh these interests and attempt to create a protective order to still allow some measure of discovery.[254] In order for the researcher to quash the discovery order, they must show overwhelming and convincing evidence that their interests outweigh those of the requesting party.[255] This is not easy to do and as a result, researchers are often ordered to turn over their information to a certain extent. What limited protection is provided by the research scholar's privilege, attorney client privilege, journalist privilege, and confidentiality are too circumstantial to properly protect researchers. While subjecting researchers to this discovery and litigation cannot be eliminated, the burden can be reduced by acknowledging the demand on the researcher, compensating them in the form of attorney's fees and cost of research, and protecting the promises the researchers made to receive their information. Such changes must come from the Federal Rules of Civil Procedure but until they do, independent scientific researchers are at the mercy of litigation they have nothing to do with, only increasing the inherent tension between science and litigation.

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253. Anker v. G.D. Searle & Co., 126 F.R.D. 515, 519 (M.D. N.C. 1989).

254. *Domestic Drywall*, 300 F.R.D. at 239, 246, 247.

255. *Id.* at 239.

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