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FOREWORD

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I

INTRODUCTION

Academic researchers are increasingly concerned that their work will be subpoenaed and their testimony will be compelled to aid in resolving disputes in which they are not involved. Subpoenas recently issued to scientists studying the effects of the Exxon Valdez oil spill on Alaskan communities and of cigarette advertising on children demonstrate the variety of research activities that may be affected. Subpoenas to compel researchers' testimony are more common in civil cases, but such subpoenas also have been issued in criminal proceedings. Unreported instances of such subpoenas likely far exceed those identified through news accounts or published court decisions. Should scholars who explore issues that later become topics of litigation be given special consideration when courts are asked to enforce such subpoenas?

Answering this question requires an analysis of the fundamental interests of science and of our legal system. The interest of the legal system in compelling testimony by reluctant witnesses is well recognized. All citizens, including scholars, have an interest in the correct resolution of legal conflicts and a corresponding duty to provide evidence that is essential to the resolution of such conflicts. This duty has been declared to be part of the compact that each citizen has with society and may be enforced by courts even though providing evidence may place personal relationships or well-being at risk.[1] Exceptions to

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1. *See, e.g.*, Blackmer v. U.S., 284 U.S. 421, 438 (1932) ("[O]ne of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his

this duty are recognized only where compelling countervailing interests are involved.[2]

Are such countervailing interests present when a court considers whether to compel evidence from a scholar who has not agreed to be an expert witness? Unlike the typical "occurrence" witness, the scholar has no individual involvement in the specific dispute before the court and can be subjected to greater burdens than occurrence witnesses or retained experts.[3] Scholars also are asked to testify as to their professional opinion regarding a disputed scientific or technical issue, a role traditionally filled by experts retained by the parties. Compelling evidence from unretained scholars can disrupt ongoing studies, jeopardize confidential communications with research participants, impose temporal and economic burdens, improperly discredit incomplete research, and undermine the independence that has been considered essential to the exercise of academic freedom. Do these interests justify a court's refusal to compel disclosure of scientific evidence?

Rule 45 of the Federal Rules of Civil Procedure addresses the legal standards governing a subpoena to scholars not retained as experts in civil litigation in federal courts. In 1991, Rule 45 was amended to recognize the unique circumstance of unretained experts by requiring that those wishing to subpoena an unretained expert show a substantial need, offer reasonable compensation, and comply with conditions and limitations specified by the court.[4] Prior to the amendments the rule did not address the role of unretained experts and courts were left to fashion an equitable result from the more liberal subpoena provisions of Rule 45.[5] The Advisory Committee Notes accompanying the amended rule acknowledge the growing problem of compelling unretained experts to

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testimony whenever he is properly summoned."). The traditional authority of the court to compel testimony is summarized in Paul D. Carrington & Traci L. Jones, *Reluctant Experts*, 59 LAW & CONTEMP. PROBS. 51, 53-55 (Summer 1996).

2. *See, e.g.*, Jaffee v. Redmond, 116 S. Ct. 1923 (1996) (psychotherapist-patient privilege); Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (attorney-client privilege).

3. *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 105 F.R.D. 577, 582 (E.D.N.Y. 1985) ("The expert not only suffers a loss of time from his or her job, like an ordinary witness; he or she also suffers a loss in divulging dearly won expertise.").

4. The relevant portion of the rule states:

> If a subpoena … (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, … the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

FED. R. CIV. P. 45(c)(3)(B); *see also*, Richard L. Marcus, *Discovery Along the Litigation/Science Interface*, 57 BROOK. L. REV. 381 (1991); David D. Siegel, *Federal Subpoena Practice Under the New Rule 45 of the Federal Rules of Civil Procedure*, 139 F.R.D. 197, 234 (1992).

5. The practice prior to the amendment is summarized in J. Graham Matherne, Note, *Forced Disclosure of Academic Research*, 37 VAND. L. REV. 585, 614 (1984) and Virginia G. Maurer, *Compelling the Expert Witness: Fairness and Utility Under the Federal Rules of Civil Procedure*, 19 GA. L. REV. 71 (1984).

disclose information and suggest that requiring their participation may deprive them of intellectual property without appropriate compensation.[6]

The courts are faced with the complex task of assessing the consequences on the flow of research information of compelling its disclosure for unintended purposes to resolve conflicts in litigation. The needs of the litigants for information to resolve a dispute is the precipitating incident, and the risk of depriving a litigant of a fair hearing demands the court's thoughtful attention. Society requires a free flow of information to aid scholarly inquiry, and courts must balance the effect of compelling disclosure of future research against the need for information in the litigation. The following papers are intended to offer guidance in an area where the wise course is often difficult to perceive.

II

OVERVIEW OF THE COLLECTION

The papers included in this issue of *Law and Contemporary Problems* offer a variety of perspectives on the problems that arise with a subpoena for information developed by scholars.[7] Judge Barbara Crabb begins by discussing the conflict from the perspective of a judge who is asked to quash such a subpoena.[8] Judge Crabb presided in one of the first instances of a subpoena for research information and is keenly aware of both the importance of academic freedom in encouraging fearless scholarship as well as the duty of all citizens to aid the courts in reaching a fair and accurate resolution of disputes. After discussing the balance that should be struck in weighing these competing interests, Judge Crabb suggests a number of approaches that courts and researchers should consider for narrowing the scope of the disclosure and ameliorating the burdens of providing the courts with necessary information.

Robert O'Neil then reviews the generally unwelcome reception that courts have afforded scholars' claims of a first amendment privilege and the fragile protection that is afforded research on controversial or sensitive issues.[9] He notes that the early optimism regarding such protection has proven unwarranted and suggests that greater protection might be found by building analogies to the role of journalists who require protection of confidential sources, particularly in states that have adopted shield laws to protect newsgathering. Despite rejection of claims of a broad scholar's privilege, Professor O'Neil suggests such claims will continue to be asserted as scholars who investigate the

6. FED. R. CIV. P. 45(c)(3)(B)(ii) advisory committee note ("A growing problem has been the use of subpoenas to compel the giving of evidence and information by unretained experts.").

7. Several authors of papers in this volume first gathered in 1991 to consider these issues at the Workshop on Judicially-Compelled Disclosure of Researchers' Data and Scholars' Testimony, convened by Franklin Zweig at Georgetown University School of Medicine. We are grateful for Dr. Zweig's assistance in facilitating our consideration of these issues.

8. Barbara B. Crabb, *Judicially Compelled Disclosure of Researchers' Data: A Judge's View*, 59 LAW & CONTEMP. PROBS. 9 (Summer 1996).

9. Robert M. O'Neil, *A Researcher's Privilege: Does Any Hope Remain?*, 59 LAW & CONTEMP. PROBS. 35 (Summer 1996).

most pressing issues of the day find such issues to be the topic of litigation.

Paul Carrington and Traci Jones contend that Rule 45 of the Federal Rules of Civil Procedure is adequate to balance the legitimate interests of scientists against those of our legal system.[10] They emphasize that the duty to give evidence is strongly rooted in our law; generally the court is entitled to every person's evidence in order to maintain public confidence in our judicial system and to enforce the law effectively. They also question whether the interests and concerns of scientific researchers are necessarily more weighty than those of other persons whose information is sought in litigation.

Elizabeth Wiggins and Judith McKenna report the findings of their study of nine cases in which researchers received subpoenas for information relevant to litigation.[11] Relying on telephone interviews and published accounts, they assess the time and expense required to respond to the subpoenas, the extent to which the required disclosures violated promises or expectations of confidentiality of individual research participants, the consequences of such breaches, and the consequences of releasing incomplete and unpublished research findings. While such issues have been addressed in individual accounts, their paper systematically examines such issues across a wide range of cases. Wiggins and McKenna conclude by offering suggestions for minimizing the burdens associated with compelling disclosure of research information without jeopardizing the legitimate interests of litigants.

Sheila Jasanoff describes the manner in which scientific findings are recognized by the scientific community and questions whether a subpoena for research records is likely to capture the complex process whereby individual findings come to be interpreted as scientific knowledge.[12] Scientific conclusions are based on more than the systematic compilation of individual observations. They are the product of a complex social process whereby such observations are translated through peer review and other consensus-building activities into generally accepted findings within and across scientific communities. The litigation process is not designed to assess such a consensus and tends to extract contrary as well as consistent observations from the theoretical and social context in which they were assessed. Often the result of such adversarial inquiry is the deconstruction of scientific knowledge through attacks on research methodology. Jasanoff cautions that a broad subpoena for research information is unlikely to reveal the complex process that supports experts' opinions and suggests techniques that permit skeptical inquiries into research findings without degenerating into an exercise in deconstruction.

Michael Traynor examines how researchers and research institutions may foresee and effectively counter an excessively broad subpoena for research in-

10. Carrington & Jones, *supra* note 1.

11. Elizabeth C. Wiggins & Judith A. McKenna, *Researchers' Reactions to Compelled Disclosure of Scientific Information*, 59 LAW & CONTEMP. PROBS. 67 (Summer 1996).

12. Sheila Jasanoff, *Research Subpoenas and the Sociology of Knowledge*, 59 LAW & CONTEMP. PROBS. 95 (Summer 1996).

formation.[13] He urges that the possibility of a subpoena be considered when the research is being designed. Promises of confidentiality should be offered sparingly and only when such promises are supported by statutory protection from legal process. Even if such statutory protection is not available, researchers may adopt procedures that will maintain the anonymity of the research data. In the event of a subpoena, suggestions are offered for negotiating restrictions on the scope of material that is to be disclosed and recovering costs of compliance, where appropriate. If agreement can not be reached, suggestions are offered for resisting compliance with the subpoena and developing a record for consideration by the courts of appeal.

Four commentators reflect on the issues presented in these papers. Steve Picou[14] and Paul Fischer[15] are research scientists who found their research snared by the litigation process. Bert Black[16] and Francis McGovern[17] are attorneys who are knowledgeable about the scientific process and have extensive experience with scientific evidence in litigation.

Steve Picou and his colleagues measured levels of community stress resulting from the Exxon Valdez oil spill in several Alaskan coastal villages as part of a grant from the National Science Foundation. After several local residents filed suit against Exxon, Exxon served Picou with a subpoena that sought all documents or other information including notebooks, letters, working papers, handwritten responses to a survey of village residents, and other raw material related to the ongoing study. Picou discusses his difficulty in disclosing information gained in such longitudinal qualitative field studies without compromising the privacy of respondents. Incomplete news accounts of negotiations over the extent of disclosure and related rumors in the participating communities greatly complicated the final stages of his study. Picou endorses a number of the suggestions made by other authors as a means of limiting improper disruption caused by litigation.

Paul Fischer was one of several researchers who had studied the responses of children to the "Old Joe Camel" cigarette ads. R.J. Reynolds, maker of Camel cigarettes, served subpoenas on Fischer and other researchers, requesting all research materials, including notes, correspondence, and the names of children interviewed in the studies. Reynolds and its advertising agencies were being sued in a California court and expected the surveys to be introduced to support allegations that such advertising induced children to take up smoking. Fisher's experience demonstrates the potential for harassment that can result

13. Michael Traynor, *Countering the Excessive Subpoena for Scholarly Research*, 59 LAW & CONTEMP. PROBS. 119 (Summer 1996).

14. J. Steven Picou, *Compelled Disclosure of Scholarly Research: Some Comments on "High Stakes Litigation,"* 59 LAW & CONTEMP. PROBS. 149 (Summer 1996).

15. Paul M. Fischer, *Science and Subpoenas: When do the Courts Become Instruments of Manipulation?*, 59 LAW & CONTEMP. PROBS. 159 (Summer 1996).

16. Bert Black, *Research and its Revelation: When Should Courts Compel Disclosure?*, 59 LAW & CONTEMP. PROBS. 169 (Summer 1996).

17. Francis E. McGovern, *Comment: Implementing a Taint Test to Address Problems Raised by Compelled Disclosure*, 59 LAW & CONTEMP. PROBS. 185 (Summer 1996).

from compelling disclosure of research information and the vulnerability of researchers who do not have the full support of their sponsoring institutions in resisting such disclosure.

Bert Black recasts the debate between scientists and litigants as a conflict over the development and use of knowledge for the optimal benefit of society. Both the scientist who promises research participants that their answers will remain confidential and attorneys who seek such information by subpoena argue that their interests are consistent with broader societal needs for information. Opportunities for misunderstanding are enhanced by the lack of familiarity by researchers and attorneys of the principles and customs of the opposing profession. An attorney may regard the scientist's claimed need for protection to be speculative, since the attorney's need for information arises in the context of a specific case and the consequences of disclosure on future research may be uncertain. But when a scientist is gathering information, the need for a promise of confidentiality to obtain responses to questions is immediate and the impact of such confidentiality on some unfiled case may be regarded by the researchers as speculative. Black places these issues in the broader context of society's need to optimize the development and use of knowledge. Black seeks to strike a new balance of interests. He proposes amendments to Rule 45 that would require a court to consider the impact of a subpoena on the research process, offer greater protection to the peer-review process, and protect the identity of individual research participants.

Francis McGovern notes that the line between disinterested scholars and interested parties is often blurred by corporate sponsorship of research. The typical characterization of the remote and disinterested scholar trapped by the litigation process sometimes fails to take into account previous relationships or alignment of professional interests between the scholar and the parties. McGovern relies on his experiences as a special master and court-appointed expert to pose four hypothetical cases in which varying levels of disclosure may be appropriate. He then suggests two novel mechanisms that would allow for a more sensitive balancing of interests. First, McGovern suggests that a court-appointed expert should structure discovery in a way that recognizes the sociological context of the findings. Such a practice will guard against the mindless deconstruction of scientific conclusions that concerns Jasanoff. Second, he suggests a staged-discovery process that first assesses whether the interests of the parties influenced the normal research process. More searching discovery would be permitted only when this initial inquiry reveals that scholarly research was being structured to recognize and accommodate litigation interests.

III

CONCLUSION

It is unlikely that scientists and attorneys will ever be of one mind about the extent to which research activities should be disclosed to further non-research purposes. But these authors and commentators demonstrate that there is con-

siderable opportunity for recognition of common societal interests and imaginative solutions to ameliorate the conflicts where the values of science and law appear to clash.