NEW YORK STATE-FEDERAL JUDICIAL COUNCIL

Report on the Coordination of Discovery Between New York Federal and State Courts

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ADVISORY GROUP TO THE NEW YORK STATE-FEDERAL JUDICIAL COUNCIL

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Introduction

This Report examines the opportunities for New York State and federal courts to coordinate with each other on discovery issues when plaintiffs bring "related cases" in both courts (i) against one or more of the same defendants, and (ii) allege claims involving a "single event" (or transaction) or "common course of conduct."[1] Cases that are prime candidates for joint coordination include mass tort (products liability, mass disasters, and mass toxic torts) and commercial cases.[2] This Report seeks to encourage such coordination.

The potential benefits of discovery coordination are significant. Fact and expert witnesses can avoid sitting for repetitive depositions in multiple jurisdictions, saving all parties time and money and reducing the burden on courts from uncoordinated proceedings. Coordinated document production allows for development of shared document databases, which reduces duplicative document production, allows for cost-sharing, and enables parties to use discovery material obtained in related State and federal matters. Coordination among State and federal judges ensures consistency as to the same or similar discovery issues (thus preventing

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[1] William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State & Federal Courts*, 78 VA. L. REV. 1689, 1690 (1992); *see also* Manual for Complex Litigation § 20.31 (4th ed.) (discussing "innovative efforts to coordinate" discovery, and thus "reduce the costs, delays, and duplication of effort," in "related cases brought in both federal and state courts" that involve either "numerous claims arising from a single event, confined to a single locale" or claims that "arise from widespread exposure to harmful products or substances dispersed over time and place").

[2] *See* Helen E. Freedman, *Coordination of Litigation Within New York & Between Federal & State Courts*, in 3 Robert L. Haig, *Commercial Litigation in New York State Courts* 55-56 (4th ed. 2015).

gamesmanship that might impede settlement).[3] By engaging in such coordination, New York State and federal courts also can make New York a more attractive center for all types of litigation, especially commercial litigation.

In 1992, Judge Jack Weinstein of the Eastern District of New York observed that "[j]oint federal-state cooperation" on discovery and other issues was "still in its infancy."[4] That same year, retired federal Judge William Schwarzer, director of the Federal Judicial Center, published a law review article, in which he and his co-authors identified just one set of cases where New York courts had engaged in federal-state discovery coordination. In that litigation, Judge Weinstein and New York Supreme Court Justice Helen Freedman (i) "required litigants to inform each other of related actions pending in the other system, and provided for joint listing of and attendance at depositions"; (ii) "designated a federal magistrate to settle discovery disputes for both courts"; and (iii) "sat together on numerous occasions" to resolve such disputes.[5]

Since then, there have been other instances of discovery coordination involving New York State and federal courts. This Report identifies eight examples of such coordination, four of which are detailed below in Section I and the remainder of which may be found in Appendix A. Although several of the examples concern coordination between New York State or federal courts and non-New York State or federal courts, such examples provide helpful guidance as to how New York judges can coordinate with each other (and with other courts).

As discussed in Section II, the increase in federal-state discovery coordination may be attributed, in part, to steps taken by New York State courts (at least in the Commercial

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3 James G. Apple, et al., *Manual for Cooperation Between State & Federal Courts*, Federal Judicial Center, at 16 (1997), *available at* https://bulk.resource.org/courts.gov/fjc/stfedman.pdf.

4 *In re DES Cases*, 789 F. Supp. 552, 563 (E.D.N.Y. 1992).

5 Schwarzer, *supra* note 1, at 1709-12.

Division) to conform certain discovery rules with federal discovery rules. This report recommends that those rules be extended beyond the Commercial Division to other State courts, and that individual judges and courts, both federal and State, implement relatively modest additional rulemaking and practical changes in order to remove certain remaining challenges and facilitate greater coordination with their federal or State counterparts on discovery issues.[6] For example, federal and State court judges in related matters should consider coordinating discovery by, *inter alia*, implementing parallel case management orders, sharing rulings, and holding joint hearings. Federal and New York State courts should consider adopting rules that would require parties to disclose any related cases at the outset of discovery and require judges in related matters to consult with one another. Finally, federal and State courts can implement discrete changes to common law to harmonize existing differences between federal and State discovery law where appropriate and necessary to coordinate discovery.

I. Recent Examples of Federal-State Discovery Coordination

Recently, more New York courts have endeavored to coordinate discovery efforts with their federal or State counterparts. Common methods of discovery coordination include:

- *Joint or Parallel Scheduling or Case Management Orders*: Scheduling and case management orders provide a basic vehicle for coordination. By issuing such orders jointly or in parallel, federal and State court judges in related cases can ensure that they are on the same page as to the timing of discovery and procedures for written discovery and depositions.

- *Joint Discovery Hearings*: Federal and State court judges can hold joint hearings to address discovery motions and other issues, ordinarily if the issue arises in both

[6] Formal legislation that would require federal-state discovery coordination has repeatedly failed. *See* Freedman, *supra* note 2, at 1047. Accordingly, this Report focuses on non-legislative changes that the courts can make to help facilitate coordinated discovery.

federal and State court. Those hearings are a useful forum to discuss guidelines for depositions, privilege, and confidentiality designations. Judges also can hold joint *Frye-Daubert* hearings to determine the admissibility of expert testimony.[7] Joint hearings can be in person or via videoconference or teleconference,[8] involve joint or separate deliberation, and result in issue joint or separate (but consistent) rulings.

- *Sharing of Rulings:* As a basic practice, to avoid conflicts in rulings on the same discovery issues, judges in related cases can share orders in advance of their issuance to ensure that they are aligned as much as possible as to those issues.

- *Special Masters*: Federal and State courts, through joint or parallel orders, can appoint the same special master to establish standards and procedures for discovery as well as to resolve discovery disputes in related cases. Special masters, among other things, may serve as a natural bridge between those courts and help to minimize duplication and conflict over the same discovery issues.

- *Document Depositories*: Judges can direct that parties in their cases maintain depositories of discovery materials that other judges (and parties) in related cases may easily access, either physically or electronically.

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[7] *See, e.g.*, *infra* Appendix A at 6-7. Judges have found that parallel *Frye-Daubert* "diffused some of the natural tension that can exist between the state and federal courts where there are concurrent proceedings" and were "vastly more efficient than having substantially similar hearings in multiple jurisdictions." Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 634 (2006).

[8] The location and technological facilities of the federal and State courthouses where the judges involved in the hearing sit may dictate the judges' choice of what type of hearing to hold. For example, if the federal and state courthouses are located in the same city, the judges may choose to hold a joint, in-person hearing. Conversely, if the courthouses are located outside the same city, the judges may choose to hold the hearings via telephone, or via videoconference if the courthouses' technology permits.

The following examples illustrate how, in recent years, federal and State courts have implemented those and other methods of discovery coordination.[9]

A. MBIA Insurance Restructuring Litigation

In 2009, a putative class of MBIA Insurance policyholders sued parent company, MBIA Inc., and other MBIA entities in federal court over the February 2009 restructuring of MBIA Insurance, which the policyholders alleged was a fraudulent conveyance.[10] Several banks brought a similar lawsuit against those defendants in New York State court.[11] Judge Richard Sullivan of the Southern District of New York and Justice Barbara Kapnick of the New York Supreme Court Commercial Division presided over the federal and State cases and coordinated on various aspects of discovery.

For scheduling, Judge Sullivan issued a scheduling order directing that "[d]iscovery and discovery scheduling in this case shall be coordinated with discovery in the state plenary action . . . so as to avoid duplication between the cases."[12] (A copy of Judge Sullivan's scheduling order is appended hereto as Appendix B.)[13] Justice Kapnick, in turn, issued a parallel scheduling order providing the same direction.[14] The parallel scheduling orders

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9 The examples cited in this Report are limited to coordination on discovery issues and do not address opportunities for coordination on substantive, non-discovery issues.

10 *Aurelius Capital Master* v. *MBIA Ins. Corp.*, No. 09-CV-2242 (S.D.N.Y.).

11 *ABN AMRO Bank N.V.* v. *MBIA Inc.*, No. 601475/2009 (N.Y. Sup. Ct.).

12 Amended Case Management Plan & Scheduling Order at 1, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. July 27, 2011), ECF No. 65.

13 Appended to this Report as Appendices B-F is a selection of sample court orders reflecting various methods of discovery coordination.

14 Scheduling Order at 1, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Aug. 15, 2011), NYSCEF No. 117.

also set the same deadlines for, among other things, document requests and depositions.[15]

For document discovery, both judges also coordinated their rulings and, at one point, held a joint discovery hearing. Judge Sullivan, for instance, limited the scope of the plaintiffs' requests for post-May 2009 documents and set a March 2010 cutoff date for such documents.[16] Justice Kapnick noted that her scheduling order had "directed that discovery in the instant cases be coordinated with discovery in the Federal Action," and thus issued an order adopting Judge Sullivan's order as to the same category of documents.[17]

Later on, in March of 2012, both judges held a joint discovery hearing in Judge Sullivan's courtroom to address the separate issue of a subpoena for documents from a third-party (the New York Department of Financial Services).[18] As Judge Sullivan said of the hearing with Justice Kapnick, "our goal is to be on the cutting edge" of federal-state discovery coordination.[19] Following the hearing, the judges rendered the same ruling in parallel orders, addressing issues of the scope and burden of the subpoena, the response time for the subpoena,

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15 *See* Amended Case Management Plan & Scheduling Order at 2-3, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. July 27, 2011), ECF No. 65; Scheduling Order at 1-3, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Aug. 15, 2011), NYSCEF No. 117.

16 Order at 1, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Aug. 13, 2010), ECF No. 57.

17 *See* Order at 3-4, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Feb. 16, 2012), NYSCEF No. 148 ("With respect to the post-May 2009 document requests, defendants are directed to make the same document production to the plaintiffs in this case as they made to the plaintiffs in the Federal Action. Plaintiffs are directed to make a reciprocal production . . . .").

18 *See* Order at 2, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Mar. 5, 2012), NYSCEF No. 157; *see also* Transcript of Hearing at 118:5-7, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Mar. 9, 2012), ECF 100 ("Let me thank Justice Kapnick and her staff for coming over. Next time we'll return the favor and go over there if we do this again.").

19 *See* Transcript of Hearing at 5:21-22, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Mar. 9, 2012), ECF 100.

and the privilege log to accompany the subpoena responses.[20]

As to depositions, Judge Sullivan and Justice Kapnick also endeavored to coordinate their discovery efforts. For example, both judges permitted the plaintiffs to conduct a maximum of "two-day depositions" of MBIA's chief executive officer and chief financial officer as well as "one-day depositions" of two other MBIA executives, before April 15, 2012.[21] Neither judge, however, required that the plaintiffs depose those individuals only once for purposes of the separate federal and State cases.

B. Madoff "Feeder Funds" Litigation

Starting in 2009, after the collapse of Bernie Madoff's Ponzi scheme, various federal and State enforcement actions as well as private lawsuits were brought against so-called "feeder funds," which invested with Madoff on behalf of their clients.[22] These enforcement actions and private class action lawsuits were litigated in the Southern District of New York. In addition, related private derivative and individual lawsuits against the feeder funds (and an accounting firm) were brought in Florida and New York State courts.[23]

As directed by Justice Stephen Bucaria of the New York Supreme Court Commercial Division and Magistrate Judge Andrew Peck of the Southern District of New York, parties to the principal derivative lawsuit in New York State court agreed to coordinate discovery

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[20] *See* Order 1-2, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Mar. 13, 2012), ECF No. 96; Order 2-3, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Mar. 13, 2012), NYSCEF No. 163.

[21] *See* Order at 2, *Aurelius*, No. 09-CV-2242 (S.D.N.Y. Mar. 13, 2012), ECF. No. 97; Order at 2, *ABN AMRO*, No. 601475/2009 (N.Y. Sup. Ct. Mar. 13, 2012), NYSCEF No. 162.

[22] *See In re Beacon Assocs. Litig.*, No. 09-cv-777, 2013 WL 2450960, at *1 (S.D.N.Y. May 9, 2013).

[23] *See id.*

in their case with the *In re Beacon Associates Litigation* in the Southern District of New York.[24] Under their stipulation and proposed order, parties in New York State court adopted the same schedule as the one in federal court and committed to "the avoidance of multiple depositions of the same witnesses or duplicative document requests, requests for admission and interrogatories."[25]

For purposes of written discovery, the New York State court plaintiff agreed not to serve document requests on any parties that also were defendants in federal court, until that plaintiff had reviewed "documents produced as initial disclosures by parties to *Beacon*"; and that such requests would only include "specific documents not found in the initial disclosures in *Beacon*."[26] The New York State court plaintiff also agreed only to serve interrogatories and requests for admission that "do not duplicate interrogatories or requests for admission already served by the plaintiffs in *Beacon*."[27]

For depositions, the New York State court plaintiff also agreed to "confer with the plaintiffs in *Beacon* regarding a method of coordinating the taking of depositions," and that such coordination would address issues including "the allocation of time among counsel for the parties in *Beacon* and in [the State court case]."[28]

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[24] *See generally* Stipulation And [Proposed] Order Governing Disclosure, *In Re Beacon*, No. 1:09-cv-00777 (S.D.N.Y. Mar. 9, 2011), ECF No. 253. The available record reflects no attempt to coordinate discovery with the Florida State court case, *Glicker* v. *Ivy Asset Management Corporation*, No. 502010CA029643XXXXMB (Fla. Cir. Ct.). Whereas *Beacon* and the New York State court case were filed in 2009, the Florida State court case was not filed until end of 2010 and, thus, likely had not yet reached the discovery stage.

[25] Stipulation And [Proposed] Order Governing Disclosure at 1-2, 5-6, *In Re Beacon*, No. 1:09-cv-00777 (S.D.N.Y. Mar. 9, 2011).

[26] *Id.* at 2-3.

[27] *Id.* at 3.

[28] *Id.* at 4.

C. Litigation Relating to WorldCom's Collapse

Starting in April 2002, after the collapse of WorldCom, numerous individual and class action lawsuits were filed against WorldCom executives and others associated therewith.[29] In August 2002, after WorldCom filed for bankruptcy, the defendants were able to remove many of the cases in State court to federal court as related to WorldCom's bankruptcy proceedings.[30] Over 100 cases were consolidated and then transferred to the Southern District of New York as federal multidistrict litigation, but six cases were remanded back to various State courts, including Alabama, Illinois, and Pennsylvania.[31]

At the outset of discovery, Judge Denise Cote of the Southern District of New York reached out to judges in three of the State court cases that were "nearing the discovery phase," attaching her scheduling order and notifying those judges of her plan to issue an "order for the coordination of discovery" in the federal multidistrict litigation.[32] To "avoid[] unnecessary duplication of discovery while fully preserving the rights of all litigants," Judge Cote proposed to coordinate discovery with the State courts,[33] which those courts generally

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29 *See In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d 527, 530 (S.D.N.Y. 2004), *rev'd sub nom. Ret. Sys. of Alabama v. J.P. Morgan Chase & Co.*, 106 F. App'x 754 (2d Cir. 2004).

30 *Id.* at 530.

31 *Id.* at 530-31, 531 n.3.

32 *In re WorldCom, Inc. Sec. Litig.*, No. 02-cv-3288, 2003 WL 22962509, at *1 (S.D.N.Y. Dec. 17, 2003).

33 *Id.*

agreed to do.[34] Thereafter, Judge Cote released a proposed discovery coordination order and gave all parties an opportunity to comment on the proposal before she issued the final order.[35]

Judge Cote's final discovery coordination order,[36] appended hereto as Appendix C, gave guidance on all aspects of discovery for the cases proceeding in both federal and State courts. In terms of written discovery, the order permitted documents and responses to interrogatories and requests for admission produced in the federal multidistrict litigation to be used in the State court cases as long as the parties in State courts adhered to Judge Cote's confidentiality order with respect to such discovery.[37] At the same time, the discovery coordination order provided that, after examining the information produced in the federal multidistrict litigation, parties in State courts could "serve non-duplicative supplemental document requests, interrogatories, and requests for admission."[38]

In terms of depositions, Judge Cote's discovery coordination order required parties to make "every effort" to take depositions once and stated that each deposition should last no longer than three eight-hour days.[39] Furthermore, pursuant to the order, counsel for the lead plaintiffs in the federal multidistrict litigation would take the lead in deposing the defendants'

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34 *See In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d at 536 (in response to Judge Cote's proposal, "[t]he judges presiding over each of those [State court] actions have generally coordinated the discovery in those actions with the discovery in the *Securities Litigation*"), *rev'd sub nom. Ret. Sys. of Alabama v. J.P. Morgan Chase & Co.*, 106 F. App'x 754 (2d Cir. 2004).

35 *See In re WorldCom, Inc. Sec. Litig.*, 2003 WL 22962509, at *1-2.

36 *In re Worldcom, Inc. Sec. Litig.*, No. 02-cv-3288, 2004 WL 817355, at *2 (S.D.N.Y. Jan. 30, 2004).

37 *Id.* at *1-2.

38 *Id.*

39 *Id.* Under Federal Rule of Civil Procedure 30(d)(1), the presumptive duration of depositions is "1 day of 7 hours," but district courts are permitted to order longer depositions. In this case, the duration of depositions, as specified by Judge Cote, exceeded the presumptive duration.

witnesses; the plaintiffs in State courts, however, would have additional time at the end "to conduct non-repetitive questioning on topics not covered."[40]

Not all efforts at coordination succeeded, however. The State courts agreed to coordinate their discovery, including the scheduling thereof, with Judge Cote's federal multidistrict litigation. But, in a self-professed effort to secure a larger settlement, the plaintiffs in the remanded Alabama State court case sought to thwart such coordination by requesting an earlier trial date than the one in the federal multidistrict litigation.[41] Even though the Alabama State court judge had agreed to coordinate discovery with Judge Cote, that judge also accepted the earlier trial date.[42] Judge Cote responded by enjoining the case in Alabama State court under the exception to the Anti-Injunction Act, 28 U.S.C. § 2283, citing, among other things, the fact that "the schedule in the Alabama Action will derail the schedule in [the federal multidistrict litigation]."[43] But, on appeal, the Second Circuit overturned the injunction, holding that the exception to the Anti-Injunction Act "does not permit a district court . . . to enjoin state court proceedings simply to preserve its trial date."[44]

D. Manhattan Investment Fund Fraud Litigation

In 2000, investors in the Manhattan Investment Fund sued the manager of the fund, along with the fund's broker-dealer and accounting firms, in both federal court and New

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40 *In re Worldcom, Inc. Sec. Litig.*, 2004 WL 817355, at *1-2.

41 *In re WorldCom, Inc. Sec. Litig.*, 315 F. Supp. 2d at 538.

42 *Id.* at 536, 547 n.28.

43 *Id.* at 541, 545, 551.

44 *See Ret. Sys. of Alabama* v. *J.P. Morgan Chase & Co.*, 106 F. App'x 754 (2d Cir. 2004); *Ret. Sys. of Ala. v. J.P. Morgan Chase & Co.*, 386 F.3d 419, 421, 431 (2d Cir. 2004). The Alabama State court case settled shortly after the issuance of the Second Circuit decision, instead of proceeding to trial. *See 3 Banks Settle Alabama Worldcom Suit*, BLOOMBERG NEWS, Oct. 2, 2004, at C4.

York State court based on allegations of securities fraud.[45] Citing the "interest of judicial economy," Judge Cote and Justice Helen Freedman of the New York Supreme Court Commercial Division, who presided over the respective cases, resolved to coordinate discovery through parallel discovery orders.[46]

Judge Cote and Justice Freedman required counsel for the federal and State court plaintiffs to "propound joint discovery requests concerning those parties and issues common to the Federal Actions and the State Action."[47] The judges also opted to resolve any joint discovery disputes "pursuant to the procedures of the Federal Court" and to require parties to conduct depositions "pursuant to the Federal Rules of Civil Procedure and as ordered by Judge Cote."[48] At depositions, "in addition to the time afforded counsel in the Federal Actions," parties in the State court case would "be afforded a reasonable period of time to ask non-duplicative questions and to inquire as to issues specific to the State Action."[49]

At the same time, Justice Freedman permitted the State court plaintiff to "propound supplemental, non-duplicative discovery requests . . . that address[ed] issues and parties specific to the State Action."[50] Justice Freedman retained the power to resolve any issues pursuant to New York State court procedures with respect those supplemental requests.[51] Justice

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45 *Cromer Fin. Ltd.* v. *Berger*, 137 F. Supp. 2d 452, 460 (S.D.N.Y. 2001).

46 *See* Coordination and Pretrial Discovery Order at 1, *Scotia Nominees* v. *Berger*, No. 600320/2000 (N.Y. Sup. Ct. 2001); 2 N.Y. Prac., Com. Litig. In New York State Courts § 15:12 (3d ed.) (2014).

47 Coordination and Pretrial Discovery Order at 2, *Scotia Nominees*, No. 600320/2000 (N.Y. Sup. Ct. 2001).

48 *Id*. at 2-3.

49 *Id*. at 3.

50 *Id*. at 2.

51 *Id*.

Freedman also permitted the State court plaintiff "to notice additional depositions with regard to issues and parties specific to the State Action" which, if "conducted solely in the State Action," were to be "conducted pursuant to the rules of the State Court."[52]

II. Proposals for Change To Foster Greater Federal-State Discovery Coordination

The above examples demonstrate that federal-state discovery coordination works and should be encouraged. Even without any legislative changes, New York State and federal courts can and have achieved such coordination. Proactive judicial action has been crucial to achieving this goal. In particular, federal judges with authority over multi-district litigations often are in a prime position to take the lead on such coordination, as are judges overseeing consolidated actions within New York.[53] Federal and State judges should take additional strides towards coordinating cases, including requiring parties to inform the court of related cases, encouraging parties to negotiate and submit proposed federal-state coordination orders, reaching out to judges overseeing related cases, maintaining a constant dialogue with those judges throughout the course of the litigation, and issuing joint orders or orders consistent with those issued by judges in related matters.

As described below, in addition to these proactive measures by judges, slight changes in the rules and other minor practical changes will further encourage coordination of federal and State discovery.

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52 *Id*. at 3.

53 As encouraged in a 2013 report by ten current and former federal and state judges, "With mutual respect and two-way communication [between state and federal judges sitting on related cases], these challenges [concerning differing state and federal rules] can be overcome. The key is to keep apprised of the progress of the litigation as a whole. Doing so will enable [the judge] to conserve resources, exploit efficiencies in discovery, and avoid one or more parties taking an unfair advantage." Federal Judicial Center, *Coordinating Multijurisdictional Litigation A Pocket Guide for Judges* 13 (2013).

A. Harmonization of State and Federal Discovery Rules

The non-legislative harmonization of many of the courts' discovery rules has aided such coordination.[54] The basic standards for discoverable information, as applied by New York State and federal courts, are largely the same. New York's "material and necessary in the prosecution or defense of an action" standard for discovery under N.Y. C.P.L.R. § 3101(a) closely resembles the "relevant" and "proportional to the needs of the case" standard under recently amended Federal Rule of Civil Procedure 26(b). However, while Rule 26 lists a number of factors that federal courts should consider in assessing whether discovery is "relevant and proportional,"[55] the CPLR does not contain an analogous list of factors. Instead, New York trial courts have "broad discretion"[56] to determine whether discovery sought is "material and necessary," utilizing a test of "usefulness and reason."[57] New York courts should consider applying the factors listed in Rule 26 in assessing whether discovery is "material and necessary" in order to promote consistency between State and federal discovery rulings.[58]

As to specific discovery issues such as depositions, interrogatories, and privilege logs, certain differences between federal discovery rules and those of New York State courts no

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54 Even in 1992, Schwarzer and his co-authors observed that "[j]udges who coordinate proceedings find that state and federal discovery rules are usually compatible." Schwarzer, *supra* note 1, at 1712.

55 These factors include "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1).

56 *Geffner* v. *Mercy Med. Ctr.*, 83 A.D.3d 998, 998-99 (N.Y. App. Div. 2d Dep't 2011).

57 *Allen* v. *Crowell-Collier Publishing Co.*, 21 N.Y.2d 403, 406-07 (N.Y. 1968).

58 This Council has already made extensive recommendations on how New York State and federal courts can harmonize differing rules concerning pre-litigation obligations to preserve electronically stored information. *See generally* Advisory Group to the New York-State Federal Judicial Council, *Harmonizing the Pre-Litigation Obligation to Preserve Electronically Stored Information in New York State and Federal Courts* (Sept. 2010).

longer exist, at least in the Commercial Division of the New York Supreme Court ("Commercial Division"). Indeed, in January 2006, the Commercial Division promulgated rules for the Division that eliminated most substantive differences that would otherwise impede federal-state discovery coordination.[59]

For example, the Commercial Division rules, like the federal rules, now typically limit depositions to a number of ten lasting only seven hours each.[60] For interrogatories, the Commercial Division rules similarly provide that a party may only make 25 interrogatory requests, absent a specification to the contrary in the preliminary conference order.[61] Under both the Commercial Division rules and Local Rules for the Southern and Eastern Districts of New York, privilege logs may group entries for documents together, rather than logging those documents individually.[62]

Mass tort cases, one of the main candidates for coordinated discovery,[63] typically do not fall under the Commercial Division's jurisdiction.[64] However, mass tort cases generally

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59 Commercial Division - N.Y. Supreme Court, NEW YORK STATE UNIFIED COURT SYSTEM, https://www.nycourts.gov/courts/comdiv/history.shtml (last accessed Jan. 19, 2016).

60 Fed. R. Civ. Pro. 30(a)(2), (d); N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70, Rule 11-d(a).

61 Fed. R. Civ. P. 33(a)(1); N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70, Rule 11-a(a).

62 S.D.N.Y. & E.D.N.Y. Local R. 26.2(c); N.Y. Comp. Codes R. & Regs. tit. 22, § 202.70 Rule 11-b(b). Categorization of privilege log entries "can greatly reduce the cost of privilege review and logging." Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 FED. CTS. L. REV. 19, 54 (2009).

The U.S. District Courts for the Western and Northern Districts of New York should consider amending their local rules to similarly allow for a categorical approach to privilege log entries.

63 *See* Federal Judicial Center, *supra* note 3, at 16 (the type of litigation that presents opportunities for discovery coordination "[t]ypically . . . involves mass tort claims").

64 *See* Robert L. Haig, *New York State Creates a Commercial Division*, 64 Def. Couns. J. 17, 18, 20 (1997) (New York rejected the idea of having the Commercial Division accept

are governed by Case Management Orders that, like the Commercial Division rules, eliminate most substantive differences that would otherwise impede federal-state discovery coordination.

Nonetheless, for any cases that do not involve mass torts or are not governed by the Commercial Division rules,[65] differences in State and federal discovery rules persist that might frustrate efforts by New York State and federal courts to coordinate discovery. For example, the rules that apply in non-Commercial Division cases specify no limits on the number and length of depositions or the number of interrogatories, nor do those rules provide for the grouping of privilege log entries. At best, those rules provide that a trial court has "broad power to regulate discovery to prevent abuse" pursuant to N.Y. C.P.L.R. § 3103(a).[66] The CPLR's lack of any such limits in those cases can lead to differences with respect to the resolution of those discovery issues in federal and State courts.

Although the New York State constitution and laws prevent State courts from amending the CPLR,[67] there are two paths for harmonizing discovery rules between federal courts and non-Commercial Division State courts where the cases call for coordination. *First*, the New York Chief Administrative Judge has authority to adopt discovery rules similar to the

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"complex tort cases," and left the resolution of those cases to *non*-Commercial Division judges who are "best able to deal with them").

[65] The newly adopted Commercial Division rules clarify what actions may come before the Commercial Division. To qualify, the principal claims asserted in those actions must fall within a specified category (such as breach of contract, professional malpractice, and disputes relating to commercial banks or financial institutions) and, for most of those categories, meet a county-specific monetary threshold. This threshold varies from $50,000 in a few counties to $500,000 in New York County. Shareholder derivative suits and commercial class actions do not need to satisfy a monetary threshold to be assigned to the Commercial Division. *See* N.Y. Comp. Codes R. & Regs. tit. 22, §§ 202.70(a), (b).

[66] *See, e.g.*, *Samide* v. *Roman Catholic Diocese of Brooklyn*, 16 A.D.3d 482, 483 (N.Y. App. Div. 2d Dep't 2005).

[67] Vincent C. Alexander, *The CPLR at Fifty: A View from Academia*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 664, 677 (2013).

newly adopted Commercial Division rules that would apply to non-Commercial Division cases being coordinated with federal cases.[68] *Second*, as an alternative, individual State courts presiding over coordinated actions could apply the newly adopted Commercial Division rules through a case management order. Through either of these approaches, New York State courts could extend the Commercial Division rules for discovery to *all* cases that seem to be good candidates for coordinated discovery, thereby facilitating such coordination.

B. Notice of Related Cases and Discovery Orders

New York Supreme Court rules provide that Supreme Court justices "shall consult" with the judges in related cases "proceeding in Federal courts or in the courts of other states"; and, where appropriate, those justices "may require that discovery . . . proceed jointly or in coordination with discovery in the Federal or other states' actions."[69] But that requirement is limited, applying only where several related cases already have been filed and "coordinated" in New York State court.[70] And there is no analogous requirement for federal judges. Moreover, neither federal courts, nor New York State courts, require that judges notify their federal or State counterparts in related cases of discovery orders that they have entered.

The consequence is a dearth of information at the outset that otherwise would facilitate federal-state discovery coordination. Until now, the burden has been on proactive judges to request that parties notify the court of any related federal or State court cases, to reach

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68 The Chief Administrative Judge has the authority to issue administrative rules not inconsistent with the CPLR without prior legislative approval, a power on which the Chief Administrative Judge relied to promulgate the newly adopted Commercial Division rules. *Id.* at 677-78.

69 N.Y. Comp. Codes R. & Regs. tit. 22, § 202.69(c)(3).

70 *Id.* § 202.69(c).

out to the judges in those cases, and to share their discovery orders therewith. That burden is not properly placed on the courts, and might discourage judges from engaging in coordination.

Federal and New York State courts, therefore, should (i) educate judges of their inherent power to require litigants to notify the court of any related cases, and (ii) consider adopting rules that would require *parties* to disclose any related cases at the outset of discovery and, as the New York Supreme Court rules do now, require all judges to consult their federal or State counterparts in such cases.[71] There also should be a requirement that the judges of any related cases disclosed by parties be added to an automated distribution list or some other system[72] for receiving discovery orders in a given case.

C. Appointment of Special Masters

Under Federal Rule of Civil Procedure 53, federal courts may appoint a special master compensated by the parties to, *inter alia*, "address pretrial and posttrial matters that cannot be effectively and timely addressed by an available district judge or magistrate judge of

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[71] The Local Rules for the Southern District of New York impose a "continuing duty of each attorney appearing in any civil or criminal case to bring promptly to the attention of the Court all facts which said attorney believes are relevant to a determination that said case and one or more pending civil or criminal cases should be heard by the same Judge, in order to avoid unnecessary duplication of judicial effort." SDNY Local Rule 1.6; *see also* EDNY Local Rule 50.3.1. ("A civil case is 'related' to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge."). This rule, however, is limited for purposes of consolidating or coordinating cases filed within the federal district. Likewise, New York State case opening papers require parties to notify the court of any related actions so that the courts can determine whether such cases should be coordinated or consolidated under Section 202.69 of the Uniform Rules for New York State Trial Courts.

[72] In the *General Motors* litigation, for instance, Judge Jesse Furman of the Southern District of New York directed the parties to maintain a website with relevant information, including court orders, that would be accessible to State court judges in related cases. *See infra* at Appendix A.

the district."[73] Federal judges have utilized this rule to appoint special masters specifically to oversee discovery.[74] In contrast, New York State judges must obtain the parties' consent to appoint a referee (New York's term for a special master) compensated by the parties to oversee discovery.[75] This divergence hinders the ability of State and federal judges to appoint a single special master to oversee discovery in all related matters.

Amendment of the CPLR would permit New York State judges to appoint special masters absent consent of the parties. But even without formal legislative changes, in cases involving the same parties, federal and State judges can appoint the same special master, who would derive income from the parties in the federal action. If the parties in the federal and State action differ, judges can encourage the parties in the State action to accept and fund the special master by (i) educating the parties on the benefits of appointing a special master,[76] (ii) inviting the parties to nominate candidates for special master, or (iii) allowing the parties to provide input on the extent of the special master's duties and authority. Finally, even if the parties in the State

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73 Fed. R. Civ. P. 53(a)(1).

74 *In re World Trade Ctr. Disaster Site Litig.*, 598 F. Supp. 2d 498, 501-02 (S.D.N.Y. 2009) (appointing special master to oversee discovery); *In re AOL Time Warner, Inc. Sec. Litig.*, No. 06-cv-0695, 2006 WL 1997704, at *1 (S.D.N.Y. July 13, 2006) (same).

75 *Surgical Design Corp.* v. *Correa*, 309 A.D.2d 800, 800 (N.Y. App. Div. 2d Dep't 2003); *see also Csanko* v. *County of Westchester*, 273 A.D.2d 434 (N.Y. App. Div. 2d Dep't 2000).

The New York Code of Rules and Regulations does allow the Chief Administrator of the Courts to authorize the creation of a program for use of special masters in designated courts; however, all special masters must serve *pro bono*. 22 N.Y. C.R.R. § 202.14. Pursuant to this authority, Chief Judge Prudenti instituted a pilot program in the Commercial Division that allows complex discovery issues to be referred to special masters, upon consent of the parties. *See* Administrative Order of the Chief Administrative Judge of the Courts, dated August 4, 2014. The program began September 2, 2014 and lasts for 18 months. *Id*. at 1.

76 A special master can ensure consistency in discovery rulings and save the parties substantial time and money by resolving discovery disputes quickly and efficiently without the need to resort to expensive motions, letters, and hearings. David R. Cohen, *The Judge, the Special Master, and You*, 40 Litigation 32, 35 (2014).

court action do not consent to fund a special master, federal and State judges can nonetheless appoint a special master who agrees to serve *pro bono*.[77]

D. Privilege

Privilege is an important area in which federal and State courts should seek to coordinate rulings. Conflicting privilege rulings between federal and State courts could potentially render some rulings "meaningless," as a single ruling that a document is not privileged would allow "the contents of the documents [to] become known and available in all jurisdictions."[78] Fortunately, the federal and State approaches to attorney-client and work product are largely similar, thus facilitating coordinating of those issues.

There appears to be no practical difference between federal and State approaches to attorney-client privilege. In fact, because New York law is "substantially similar to the federal doctrine" on this topic,[79] New York courts have applied federal precedent when ruling on questions of attorney-client privilege under New York law.[80]

Similarly, federal and New York State law employ largely similar approaches to attorney work product. The CPLR distinguishes between "materials prepared by an attorney, while acting as an attorney, which contain his or her legal analysis, conclusions, theory, or

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77 Freedman, *supra* note 2, at 1069 (noting that CPLR 4301 and 3104 "provide for the appointment of referees to supervise discovery or for other limited, purposes, but the state court cannot compel payment of these adjuncts).

78 *Id*. at 1048.

79 *HSH Nordbank AG New York Branch v. Swerdlow*, 259 F.R.D. 64, 70 n.6 (S.D.N.Y. 2009).

80 *Charter One Bank, F.S.B.* v. *Midtown Rochester, L.L.C.*, 191 Misc. 2d 154, 165 n.10 (N.Y. Sup. Ct. 2002) ("The New York Court of Appeals described the attorney-client statute as a mere re-enactment of the common-law rule; thereby allowing federal precedent to be reviewed in assessing the application of this privilege." (internal quotation omitted)).

strategy," which are absolutely privileged,[81] and other documents generated for litigation, which may be disclosed "'only upon a showing that the party seeking discovery has [a] substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means.'"[82] Federal courts employ a similar approach. Opinion work product, comprised of the "mental impressions, conclusions, opinions, or legal theories of an attorney," is subject to heightened protection.[83] Though such protection is not absolute like under New York law, opinion work product nonetheless "enjoys a near absolute immunity" under federal law and can only "be discovered only in very rare and extraordinary cases," such as where the work product is in aid of a criminal scheme or where the attorney's opinions themselves are at issue.[84] In contrast, "ordinary" or "fact" work product under federal law, like under State law, is subject to qualified privilege that may be overcome if a party demonstrates "substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means."[85]

In contrast, State and federal courts do differ in their approach to bank examination privilege. New York has a broad *statutory* bank examination privilege belonging to the New York State Banking Department which prevents the disclosure of any information "concerning or arising out of" a bank examination, unless the Superintendent concludes that "the

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81 *Geffner* v. *Mercy Med. Ctr.*, 125 A.D.3d 802 (N.Y. App. Div. 2d Dep't 2015).

82 *Matter of New York City Asbestos Litig.*, 109 A.D.3d 7, 12-13 (N.Y. App. Div. 1st Dep't 2013) (quoting N.Y. C.P.L.R. § 3101(d)(2)).

83 *In re Grand Jury Subpoena Dated July 6, 2005*, 510 F.3d 180, 183 (2d Cir. 2007) (quoting *United States* v. *Adlman*, 134 F.3d 1194, 1197 (2d Cir. 1998)).

84 *P. & B. Marina, Ltd. P'ship* v. *Logrande*, 136 F.R.D. 50, 57 (E.D.N.Y. 1991), *aff'd sub nom. P&B Marina Ltd.* v. *LoGrande*, 983 F.2d 1047 (2d Cir. 1992) (quoting *In re Murphy*, 560 F.2d 326, 336 (8th Cir. 1977)).

85 Fed. R. Civ. P. 26(b)(3)(A); *Anilao* v. *Spota*, No. 10-cv-32, 2015 WL 5793667, at *11-12 (E.D.N.Y. Sept. 30, 2015).

ends of justice and the public advantage will be subserved by the publication" of that information.[86] The Superintendent's decision not to release such information is subject to an "arbitrary or capricious" standard of judicial review in New York State court.[87]

But the same information does not appear to be protected by New York's statutory privilege in federal courts. On the contrary, federal courts have refused to apply New York's statutory privilege, and instead have applied the bank examination privilege under federal common law.[88] Unlike New York's statutory privilege, the federal privilege may be subject to judicial review based on a multi-factored balancing test.[89] Indeed, in one case, a federal court applied that balancing test and permitted the discovery of New York State Banking Department materials, even though the banking department maintained that those materials were privileged.[90]

Without formal legislative changes to the federal rules, C.P.L.R., or New York banking law, there appears to be no way to entirely resolve differences in approach to bank examination privilege. Yet, even without fully harmonizing their approaches, courts still can coordinate their efforts by appointing a special master to resolve issues of bank examination privilege in related cases and by sharing rulings and, if possible, issuing parallel rulings on that issue.

Another area in which State and federal courts diverge in their approach to privilege is their ability to issue non-waiver orders that are binding in subsequent litigation.

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86 N.Y. Banking Law § 36(10).

87 *Clark* v. *Flynn*, 9 A.D.2d 249, 251 (N.Y. App. Div. 1st Dep't 1959)

88 *Rouson ex rel. Estate of Rouson* v. *Eicoff*, No. 04-cv-2734, 2006 WL 2927161, at *4 (E.D.N.Y. Oct. 11, 2006).

89 *See, e.g.*, *In re Franklin Nat. Bank Sec. Litig.*, 478 F. Supp. 577, 582-83 (E.D.N.Y. 1979); 11 Am. Jur. 2d Banks and Financial Institutions § 1156.

90 *Eicoff*, 2006 WL 2927161, at *2-8.

Under Federal Rule of Evidence 502(d), if parties enter into an agreement providing that the intentional production of privileged information shall not constitute a waiver of that privilege, and a federal court incorporates that agreement into a court order, that order binds not only parties to the instant litigation, but also non-parties in any subsequent actions brought in either federal or State court.[91] Unfortunately, there is no equivalent to Rule 502(d) in New York State courts.[92] New York judges may enter non-waiver agreements into an order, but that order would not be controlling in other actions.

Even without a State equivalent to Rule 502(d), judges overseeing coordinated litigation can nonetheless enter joint orders providing that a disclosure in any one of the related actions does not waive any privilege in any other related action, either federal or State. Moreover, parties in State actions may choose to produce documents in a related federal action, pursuant to a Rule 502(d) order issued by a federal judge. Those documents could be produced into a central document depository, which is made accessible to parties in the State action. In the *General Motors* litigation, for example, plaintiffs in a State action moved to compel production of certain potentially privileged documents from defendants (who were also defendants in the federal MDL).[93] Defendants agreed to produce certain of those documents into a central document depository created in the MDL "expressly conditioned on the entry of a Rule 502(d)

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[91] Federal Rule of Evidence 502(d) has also been utilized effectively by judges to help to avoid inconsistent rulings in coordinated litigation. In the *General Motors* litigation, Judge Furman noted that under Federal Rule of Evidence 502(d), his ruling "on the question of waiver is binding on other courts throughout the country" and therefore "will help prevent inconsistent rulings in related actions." *In re Gen. Motors LLC Ignition Switch Litig.*, 80 F. Supp. 3d 521, 526 (S.D.N.Y. 2015); *see infra* Appendix A at 3-4.

[92] *New York State Bar Association: Best Practices in E-Discovery in New York State and Federal Courts*, dated July 2011, at 24, *available at* http://www.nysba.org/Sections/Commercial_Federal_Litigation/ComFed_Display_Tabs/Reports/Ediscovery_Final5_2013_pdf.html.

[93] *In re Gen. Motors*, 80 F. Supp. 3d at 525.

order," which Judge Furman granted.[94] Plaintiffs were able to access the documents via the MDL document depository, and defendants were able to secure the protections of a Rule 502(d) order.

A final area in which State and federal rules on privilege and work product diverge concerns inadvertent disclosure of privileged or work product material. Federal Rule of Evidence 502(b) provides that disclosure of otherwise privileged or protected information in a federal case does not constitute a waiver in federal or state proceeding if "(1) the disclosures was inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error . . . ."[95] Although the CPLR does not have a similar rule providing that inadvertent disclosure in state court does not constitute a waiver in state court proceedings, State Courts involved in coordinated actions could require similar non-waiver provisions in case management orders or in court-executed confidentiality orders.[96]

E. Interrogatories

Although, at least in the Commercial Division, the New York State rules on interrogatories are now similar—if not identical—to the federal rules, one difference remains

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94 *See* Letter to the Honorable Jesse M. Furman and the Honorable Kathryn J. Tanksley, dated Nov. 12, 2014, *In re: General Motors LLC Ignition Switch Litigation*, No. 14-md-2543 (S.D.N.Y. Nov. 12, 2014) (ECF No. 397); *In re Gen. Motors*, 80 F. Supp. 3d at 525.

95 Federal Rule of Evidence 502(c) provides that "[w]hen the disclosure is made in a state proceeding and is not the subject of a state-court order concerning waiver, the disclosure does not operate as a waiver in a federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a federal proceeding; or (2) is not a waiver under the law of the state where the disclosure occurred."

96 The New York State-Federal Judicial Council has previously recommended that New York adopt a law codifying the federal rules applicable to inadvertent waivers of privilege. *See* New York State-Federal Judicial Council, *Report on the Discrepancies between Federal and New York State Waiver of Attorney-Client Privilege Rules* at 12-13 (Jan. 2014).

that could frustrate efforts to coordinate this form of discovery. In the Southern District of New York, interrogatories may not be used except for specified purposes unless a party demonstrates that interrogatories are "a more practical method of obtaining the information sought than a request for production or a deposition."[97] In contrast, New York State courts have held that a trial court's preference for other forms of discovery over interrogatories may constitute reversible error.[98]

There is a potential solution: when related federal and State cases are involved, New York trial courts should expressly consider the value of coordinating discovery when evaluating whether to issue orders preferring other forms of discovery over interrogatories. In turn, New York appellate courts should weigh the value of coordinating discovery as a factor in reviewing such decisions. By taking that factor into account, New York State courts can adjust on a case-by-case basis their approach to interrogatories to foster coordination with federal courts.

F. Confidentiality

Federal and New York State court rules on confidentiality differ in two ways. The first difference is merely superficial. Federal rules authorize courts to protect parties from "annoyance, embarrassment, oppression, or undue burden or expense" and provide specific protection against the disclosure of "a trade secret or other confidential research, development, or

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[97] S.D.N.Y. Local R. 33.3(b). Pursuant to S.D.N.Y. Local R. 33.3(a), parties are permitted to serve interrogatories "seeking names of witnesses with knowledge of information relevant to the subject matter of the action, the computation of each category of damage alleged, and the existence, custodian, location and general description of relevant documents, including pertinent insurance agreements, and other physical evidence, or information of a similar nature." After the conclusion of other discovery, parties are permitted to serve "interrogatories seeking the claims and contentions of the opposing party." S.D.N.Y. Local R. 33.3(c).

[98] *See, e.g.*, *Barouh Eaton Allen Corp.* v. *Int'l Bus. Machines Corp.*, 76 A.D.2d 873, 874 (N.Y. App. Div. 2d Dep't 1980).

commercial information."[99] New York rules only expressly protect parties from "unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts."[100] In practice, however, New York courts have interpreted their rules to cover trade secrets and otherwise confidential information.[101] Although this apparent difference likely has no real effect on discovery coordination, it can easily be resolved by New York State courts adopting a rule that formalizes their existing practice of recognizing the protection of trade secrets and otherwise confidential information.

The second difference is more significant. Although federal and New York State court rules both require parties seeking protective orders to show that they are entitled to protection,[102] the burdens of such a showing vary, depending on whether the requests relate to trade secrets and otherwise confidential information. Federal courts generally require the movant to show a "particular need for protection," but "ultimately weigh[] the interests of both sides in fashioning an order."[103] New York State courts likewise "balance the parties' competing interests."[104] But, if the requests relate to trade secrets and otherwise confidential information, New York State courts employ a burden-shifting framework. Once the movant has shown that the information constitutes a trade secret or otherwise confidential information, New York State

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99 Fed. R. Civ. P. 26(c).

100 N.Y. C.P.L.R. § 3103.

101 *See* Patrick M. Connors, McKinney's C.P.L.R. Practice Commentary C3103:4 ("The need for [the] concealment [of trade secrets] is not categorized anywhere in the CPLR, but rather left to the ad hoc protection of the court by protective order under CPLR 3013(a)."); *see also Mann ex rel. Akst* v. *Cooper Tire Co.*, 33 A.D.3d 24, 27-28 (N.Y. App. Div. 1st Dep't 2006).

102 *See Duling* v. *Gristede's Operating Corp.*, 266 F.R.D. 66, 71 (S.D.N.Y. 2010); *Mann*, 33 A.D.3d at 30-31.

103 *Duling*, 266 F.R.D. at 71.

104 *Accent Collections, Inc.* v. *Cappelli Enter., Inc.*, 84 A.D.3d 1283, 1283 (N.Y. App. Div. 2d Dep't 2011).

courts require the non-movant to "show that the information appears to be indispensable and cannot be acquired in any other way,"[105] and only then do the courts "balance" the parties' competing interests.[106]

To eliminate differences in the burden of obtaining a protective order, federal courts, in cases involving coordinated discovery, should consider applying a burden-shifting rule that requires the non-movant to show that a trade secret or otherwise confidential information is indispensable and could not be acquired in any other way and, thus, conform the federal rule to the existing New York rule.[107]

G. Preservation of Electronically Stored Information

Federal and New York courts diverge on the state of mind necessary to impose sanctions for spoliation of electronically stored information. Under recently amended Federal Rule of Civil Procedure 37, severe sanctions against the party who spoliates (such as an adverse inference jury charge, a presumption that the lost information was unfavorable to the party, or dismissal of the action), may be imposed "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation."[108] In contrast, the New York Court of Appeals recently ruled that sanctions such as an adverse inference may be imposed upon a finding of simple negligence, so long as the party seeking sanctions establishes that the

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105 *Mann*, 33 A.D.3d at 30-31; *see also Conley & Son Excavating Co., Ltd.* v. *Delta Alliance, LLC*, 120 A.D.3d 1604, 1605 (N.Y. App. Div. 4th Dep't 2014).

106 *Mann*, 33 A.D.3d at 33.

107 There is no Second Circuit precedent that would prohibit federal courts from adopting the New York burden-shifting rule. *See Seattle Times Co.* v. *Rhinehart*, 467 U.S. 20 (1984) ("Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.").

108 Fed. R. Civ. P. 37(e)(2).

destroyed documents are relevant.[109] This divergence could potentially lead to inconsistent repercussions for spoliation of evidence in related federal and State cases.

In order to promote consistency among rulings in related actions, State judges should be cognizant of this divergence when ruling on spoliation motions for electronically stored information, at least in instances in which related federal cases are pending. Though New York permits sanctions in instances of ordinary negligence, State judges should nonetheless exercise their "broad discretion to provide proportionate relief to a party deprived of lost or destroyed evidence"[110] to limit the imposition of severe sanctions to instances in which the party controlling the evidence intentionally deprived the opposing party of the use of the evidence.

H. Costs

The "general rule" in New York State courts has long been that "the party seeking discovery should bear the cost incurred in the production of discovery material." *Waltzer* v. *Tradescape & Co., L.L.C.*, 31 A.D. 302, 304 (N.Y. App. Div. 1st Dep't 2006). This rule contrasts the federal rule, under which the "presumption is that the responding party must bear the expense of complying with discovery requests." *Zubulake* v. *UBS Warburg, LLC*, 217 F.R.D. 309, 316 (S.D.N.Y. 2003). Both federal and State courts have broad discretion to alter these default rules to prevent undue burden or expense. *See id.* at 316 (noting that the responding party may "invoke the district court's discretion under Rule 26(c) to grant orders protecting it from undue burden or expense") (internal quotations and alterations omitted); CPLR 3103(a) (the court may "make a protective order denying, limiting, conditioning or regulating the use of any disclosure device" in order to "prevent unreasonable annoyance,

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109 *Pegasus Aviation I, Inc.* v. *Varig Logistica S.A.*, No. 603076/2008, 2015 WL 8676955 (N.Y. Sup. Ct. Dec. 15, 2015).

110 *Id.*

expense, embarrassment, disadvantage, or other prejudice"). But the differences between the default rule for federal and State courts could present a barrier to coordination between courts under the different regimes. For example, the scope of discovery under the federal system expressly considers "whether the burden or expense of the proposed discovery outweighs its likely benefit," Fed. R. Civ. P. 26(b)(1), a factor not mentioned in CPLR 3101. Some courts have opined that such considerations are not necessary under a requester-pays system, because a litigant that must pay for the productions it requests "has a strong incentive to formulate its discovery requests in a manner as minimally burdensome as possible." *T.A. Ahern Contractors Corp.* v. *Dormitory Auth.*, 875 N.Y.S.2d 862, 868 (N.Y. Sup. Ct. 2009).

This conflict has been removed in the First Department, which has expressly adopted the federal rule. *See U.S. Bank Nat'l Ass'n* v. *GreenPoint Mortg. Funding, Inc.*, 94 A.D.3d 58, 63-64 (N.Y. App. Div. 1st Dep't 2012) (adopting a rule "consistent with the Federal Rules of Civil Procedure" that "the producing party [will] bear the initial cost of searching for, retrieving and producing discovery") (citing *Zubulake*, 217 F.R.D. at 317-18). Of course, to the extent that other courts follow the First Department, this issue will evaporate. But for now, the prevailing law in other departments is the traditional New York rule. *See, e.g.*, *Rubin* v. *Alamo Rent-A-Car*, 190 A.D.2d 661, 663 (N.Y. App. Div. 2d Dep't 1993) (holding that "it is the party seeking discovery of documents who should pay the cost of their reproduction") (alteration omitted). Federal and State courts seeking to coordinate discovery who encounter this conflict will likely be required to compromise between the values reflected in each system. But in most cases, it is likely that an acceptable and equitable solution lies within the discretion granted to both courts. New York State courts in the Second, Third, and Forth Departments should

consider following the First Department in adopting the federal rule when coordinating with federal courts.

III. Conclusion

The authors of this Report do not purport to identify all issues with respect to federal-state discovery coordination, but have attempted to highlight some of the main issues, including ways in which such coordination may be achieved and potential rule-based and/or practical changes to foster more coordination in the future. The authors recommend that the following modest changes be implemented in order to foster federal-state discovery coordination:

Changes Implemented by Individual Judges

- Federal and State court judges should require litigants to notify the court of any related cases, regardless of where the cases are filed.

- In related matters, federal and State judges should consider implementing joint or parallel scheduling or case management orders, sharing rulings, holding joint discovery hearings, holding joint *Frye-Daubert* hearings, appointing special masters to establish procedures for discovery and resolve discovery disputes, ordering the creation of joint document depositories, and encouraging depositions to be taken only once for purposes of both State and federal litigation.

- Judges should consider entering joint orders providing that a disclosure in any one of the related actions does not waive any privilege in any other related actions, either federal or State. Likewise, in coordinated cases, State Court judges should also consider adopting, though a case management or so-ordered confidentiality

order, Federal Rule of Evidence 502(b)'s protections for inadvertent disclosure of privileged or protected materials. Judges should also consider directing parties in State actions to produce documents into a central document depository in a related federal action, in order to avail themselves of the protections of an order under Federal Rule of Evidence Rule 502(d).

Changes in Rules

- The New York Chief Administrative Judge should consider extending the recently adopted Commercial Division rules eliminating most substantive differences that would otherwise impede federal-state discovery coordination to other New York State courts hearing cases that are good candidates for coordinated discovery. (Non-Commercial Division judges could also extend the Commercial Division rules to coordinate cases through case management orders.)

- Federal and New York State courts should consider adopting rules that would require parties to disclose any related cases at the outset of discovery, require all judges to consult their federal or State counterparts in related matters, and provide for the creation of an automated distribution list or other system for receiving discovery orders in related cases.

- New York State courts should consider adopting a rule that formalizes their existing practice of recognizing the protection of trade secrets and otherwise confidential information in discovery in order to mirror federal standards of confidentiality.

- The U.S. District Courts for the Northern and Western Districts should consider amending their local rules to align with the Commercial Division and Southern and Easter District Rules of allowing litigants to group entries for documents together, rather than logging those documents individually.

Changes in Common Law

- In determining whether information is "material and necessary" and therefore discoverable, New York State courts should consider applying the factors listed in Federal Rule of Civil Procedure 26.

- In reviewing trial court decisions favoring certain forms of discovery other than interrogatories, New York State courts should weigh as a factor the value of coordinating discovery when related federal and State cases are involved.

- In fashioning protective orders in cases involving coordinated discovery, federal courts should consider applying a burden-shifting rule that mirrors the existing New York rule and requires the non-movant to show that a trade secret or otherwise confidential information is indispensable and could not be acquired in any other way.

- In deciding spoliation motions for electronically stored information, State courts should consider imposing severe sanctions only in instances in which the party controlling the evidence intentionally deprived the opposing party of the use of the evidence—the standard under federal law.

- In allocating costs of discovery between the parties, coordinating State Courts should consider adopting the federal rule generally requiring the producing party to bear the costs of their productions.

By identifying these discrete issues, the authors hope that federal and State courts in New York increasingly will come to view coordinated discovery as an achievable goal, if not the norm, in related cases involving multiple jurisdictions.

APPENDICES

APPENDIX A

OTHER EXAMPLES OF FEDERAL-STATE DISCOVERY COORDINATION

A. General Motors Ignition-Switch Litigation

After recalling vehicles based on an ignition-switch defect in 2014,[1] General Motors was sued in both federal and State courts (*e.g.*, Kentucky,[2] California,[3] Tennessee[4]).[5] Most of the federal cases were transferred to the Southern District of New York for a multidistrict litigation ("MDL") before Judge Jesse Furman.[6]

To "further the just and efficient disposition of each proceeding," Judge Furman issued a Joint Coordination Order,[7] appended hereto as Appendix D, which directed coordinated discovery with related cases, including the ones in State court. Among other things, the order provided for the "dissemination of information and Orders" between and among that proceeding and related cases, by requiring the creation of a website which would contain "Court Orders, Court opinions, Court minutes, Court calendars, frequently asked questions, [C]ourt transcripts, the MDL docket, current developments, information about leadership in the MDL, and appropriate contact information."[8] Judge Furman also required the website to have a section accessible only to judges in related cases.[9]

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1 *See In re Gen. Motors*, No. 14-md-2543, 2015 WL 221057, at *1 (S.D.N.Y. Jan. 15, 2015).

2 *In re Gen. Motors*, No. 14-md-2543, 2015 WL 3776385 (S.D.N.Y. Jun. 17, 2015).

3 *In re Gen. Motors*, No. 14-md-2543, 2014 WL 6655796 (S.D.N.Y. Nov. 24, 2014).

4 *In re Gen. Motors*, No. 14-md-2543, 2014 WL 4636459 (S.D.N.Y. Sept. 17, 2014).

5 Joint Coordination Order at 1, *In re Gen. Motors*, No. 14-md-2543 (S.D.N.Y. Sept. 24, 2014), ECF No. 315.

6 *In re Gen. Motors*, 26 F. Supp. 3d 1390, 1390-91 (J.P.M.L. 2014).

7 Joint Coordination Order at 2, *In re Gen. Motors*,No. 14-md-2543 (S.D.N.Y. Sept. 24, 2014), ECF No. 315.

8 *Id.* at 7.

9 *Id*. at 7-8.

In terms of document discovery, the Joint Coordination Order directed lead counsel to create an "electronic document depository" accessible to counsel in coordinated cases.[10] Recognizing that creating such a depository would be costly, Judge Furman provided for the entry of an "order for the equitable spreading of depository costs among users."[11]

As for non-document discovery, the Joint Coordination Order encouraged witnesses to be deposed only once for both federal and State litigation by permitting witnesses in a deposition to be questioned by counsel from all related actions.[12] Judge Furman instructed that any depositions beyond those taken in the MDL may be taken in a coordinated action "only upon leave of the court in which the Coordinated Action is pending" and only upon a showing of good cause as to "why the discovery sought could not have been obtained in coordinated discovery in the MDL Proceeding."[13] Likewise, Judge Furman prohibited MDL counsel from re-deposing any witness deposed in a coordinated action without a showing of good cause and permission from the court.[14] The Joint Coordination Order permitted counsel in the MDL proceeding to use depositions taken in coordinated cases "as if they had been taken under the applicable discovery rules of the MDL Court," and correspondingly provided that counsel in the coordinated cases should be permitted to use depositions taken in the MDL proceeding "as if they had been taken under the applicable civil discovery rules of the respective jurisdictions."[15] Thus far, the Joint Coordination Order has successfully ensured that witnesses are deposed only once for purposes of both State and federal litigation.

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10 *Id*. at 3.

11 *Id.*

12 *Id*. at 9.

13 *Id*. at 10.

14 *Id*.

15 *Id*. at 5.

Judge Furman encouraged the parties to engage in joint, coordinated written discovery by permitting counsel in coordinated actions to submit requests for documents, interrogatories, depositions on written questions, and requests for admission "to be propounded in the MDL."[16] Any additional written discovery in the coordinated actions would be permitted "only upon leave of the court" for good cause shown, "including [a showing as to] why the discovery sought could not have been obtained in the MDL Proceeding."[17] Judge Furman also permitted counsel to receive interrogatories, requests for admission, document requests, and responses thereto from related cases.[18]

As for privilege issues, Judge Furman, at one point, cited Federal Rule of Evidence 502(d)[19] in addressing the issue of whether the defendant's disclosure of an otherwise privileged document in the federal multidistrict litigation waived its attorney-client and work product privilege as to other materials for use in that litigation and related cases.[20] In resolving this specific privilege waiver issue in favor of the defendant, Judge Furman commented that since "Rule 502(d) provides that this Court's ruling on the question of waiver is binding on other courts throughout the country," his ruling "will help prevent inconsistent rulings in related actions."[21]

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16 *Id*. at 11-12.

17 *Id*. at 12.

18 *Id*. at 4-5.

19 Fed. R. Evid. 502(d).

20 *In re Gen. Motors*, 2015 WL 221057, at *3.

21 *Id.* Among other things, the rule, adopted in 2008, provides that the federal court's resolution of a privilege waiver issue relating to "disclosure *connected with the litigation pending before the court*" is binding on "any other federal or state proceeding." Fed. R. Evid. 502(d) (emphasis added). The federal court may also resolve a privilege waiver issue relating to disclosure "made in a state proceeding," but only if such disclosure "is not the subject of a state-court order concerning waiver." *Id.* at 502(c).

B. ReNu with MoistureLoc Litigation

In and around 2006, purchasers of ReNu with MoistureLoc contact lens solution sued manufacturer Bausch & Lomb for alleged defects relating to that product, claiming, among other things, breach of warranty, deceptive trade practices, and strict products liability.[22] The federal lawsuits brought by various purchaser classes proceeded as multidistrict litigation before Judge David Norton of the District of South Carolina.[23] Separately, other purchasers brought a set of lawsuits in New York State court which came before Justice Freedman.[24]

As a general matter, Judge Norton and Justice Freedman issued parallel (and sometimes joint) orders, committing to "full cooperation" on discovery issues in their respective cases "to conserve scarce judicial resources, eliminate duplicative discovery, serve the convenience of the parties and witnesses, and promote the just and efficient conduct of this litigation."[25] The judges not only ordered the same discovery schedule,[26] but also provided for the reciprocal use of any discovery produced in federal and New York State court.[27]

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22 *See In re Bausch & Lomb Contact Lens Solution Prod. Liab. Litig.*, No. 06-mn-77777 (D.S.C.); *In re New York Renu with MoistureLoc Prod. Liab. Litig.*, No. 766000/2007 (N.Y. Sup. Ct.).

23 *See In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C.).

24 *See In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct.).

25 Case Management Order at 10, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Dec. 21, 2006), ECF No. 20; *see also* Case Management Order at 1, *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. Aug. 31, 2007), NYSCEF No. 20 ("Plaintiffs and defendants in this litigation shall work to coordinate to the extent practicable depositions and document discovery with the MDL proceeding involving ReNu® with MoistureLoc© . . . .").

26 *See* Case Management Order at 1-2, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Nov. 14, 2007), ECF No. 74; Case Management Order at 1-2, *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. Nov. 15, 2007), NYSCEF No. 7.

27 *See* Case Management Order at 10, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Dec. 21, 2006), ECF No. 20 ("[A]ll discovery conducted in these proceedings may be utilized in any related state court action, in accordance with that state's laws and rules of evidence, and vice versa . . . .").

In terms of document discovery, Judge Norton and Justice Freedman designated plaintiffs' steering committees and directed the committees to create and administer document depositories "available to plaintiffs in any other related litigation."[28] Additionally, the judges held joint discovery hearings (in both South Carolina and New York) with all parties to discuss issues relating to "electronic discovery," and to adopt "uniform rules to govern redaction of documents produced in discovery as well as claims of privilege with respect to documents sought to be obtained in discovery by plaintiffs."[29] Those judges also appointed a New York law professor as special master to supervise "document discovery with respect to claims of confidentiality, privilege, and the redaction of documents," and to issue related rulings subject to *de novo* review by both judges.[30] (A copy of the joint order appointing the special master is appended hereto as Appendix E.)

Judge Norton and Justice Freedman also held a joint hearing and issued orders and supplemental protocols to address depositions. Among other things, the judges directed parties in the federal and New York State court cases to (i) cross-notice their depositions of fact

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[28] Case Management Order 3, *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. Aug. 31, 2007), NYSCEF No. 20; *see also* Case Management Order at 8, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Dec. 21, 2006), ECF No. 20 (requiring the "Plaintiffs Steering Committee" to make a document depository that is available to plaintiffs in any state court litigation"). The federal plaintiffs were directed to bear their own costs with respect to the document depository, but the New York State court plaintiffs were permitted to shift such costs through an "appropriate cost-sharing provision." *Id.* at 8-9.

[29] Minute Entry, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Apr. 19, 2007), ECF No. 51; Notice of Hearing, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Aug. 28, 2007), ECF No. 66; Joint Order Appointing Special Master, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Nov. 26, 2007), ECF No. 77.

[30] Joint Order Appointing Special Master, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Nov. 26, 2007), ECF No. 77. Although N.Y C.P.L.R. 3014 "does not specify that review shall be undertaken *de novo*," parties agreed that this standard would apply to review of the special master's rulings in New York State court as well. *Id.*

witnesses "to avoid such witnesses being deposed more than once";[31] (ii) put "dual captions (NY and MDL)" on deposition notices and transcripts;[32] (iii) produce all discovery 30 days prior to the depositions;[33] and (iv) limit depositions to no longer than 14 hours over 2 days.[34] (A copy of the joint supplemental deposition protocol is appended hereto as Appendix F.)

In July 2008, the consolidated state cases were transferred to Justice Shirley Werner Kornreich, who continued the efforts at coordination first implemented by Justice Freedman. Judge Norton and Justice Kornreich jointly presided over a *Frye-Daubert* hearing in June 2009. Although Judge Norton followed the federal *Daubert* standard,[35] while Justice Kornreich followed the state *Frye* standard,[36] both judges held that plaintiffs' expert witnesses should be excluded.[37]

C. Zyprexa Litigation

Starting in and around 2004, users of the drug Zyprexa brought thousands of lawsuits against Eli Lilly & Company relating to alleged injuries from using the company's drug Zyprexa. Many of those cases were consolidated into federal multidistrict litigation before

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31 Case Management Order, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Feb. 9, 2007), ECF No. 31; Case Management Order, *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. Aug. 31, 2007), NYSCEF No. 20.

32 Minute Entry, *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. Apr. 19, 2007), ECF No. 51; *see also* Supplemental Deposition Protocols (Joint Order), *In re Bausch & Lomb*, No. 06-mn-77777 (D.S.C. May 4, 2007), ECF No. 53; Supplemental Deposition Protocols (Joint Order), *In re New York Renu*, No. 766000/2007 (N.Y. Sup. Ct. May 7, 2007), NYSCEF No. 22.

33 *Id.*

34 *Id.*

35 *Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

36 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

37 *In re Bausch & Lomb Contact Lens Sol. Prod. Liab. Litig.*, 906 N.Y.S.2d 778 (Sup. Ct. 2009) *aff'd*, 87 A.D.3d 913 (N.Y. App. Div. 1st Dep't 2011); *In re Bausch & Lomb, Inc. Contact Lens Solution Prods. Liab. Litig.*, No. 06-mn-77777, 2009 WL 2750462 (D.S.C. Aug. 26, 2009).

Judge Weinstein.[38] Other cases proceeded in at least the following states: Alabama, California, Georgia, Indiana, Maine, Mississippi, Missouri, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, and West Virginia.[39]

In light of the sprawl of state court cases, Judge Weinstein took initial steps to coordinate discovery across the board by directing parties in the federal multidistrict litigation to "send a letter to the litigants in, and judges for, each of the state court cases indicating that this court intends to provide for coordinated discovery on the underlying scientific and related issues."[40] The letter proposed that State court parties and judges consider stipulating to being "bound by discovery in the MDL cases," to "receive notice of any discovery in the MDL cases," and/or to "participate in any discovery in [the MDL] cases."[41]

It is unclear from the available record whether any of those parties or judges ever responded to Judge Weinstein's proposals. Nonetheless, Judge Weinstein continued in discovery coordination efforts to whatever extent he could on his end. For one, Judge Weinstein directed parties and a court-appointed special master[42] in the federal multidistrict litigation (i) to share with the State court judges copies of discovery-related orders from that litigation, and (ii) to provide Judge Weinstein with similar orders from those judges.[43]

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38 *In re Zyprexa Prods. Liab. Litig.*, No. 04-MD-1596 (E.D.N.Y.).

39 *See, e.g.*, Letter, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. June 18, 2004), ECF No. 17; Letter, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Jan. 17, 2006), ECF No. 356.

40 Order at 2, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Apr. 19, 2004), ECF No. 2.

41 *Id.*

42 Order at 1, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Dec. 10, 2004), ECF No. 119.

43 *See, e.g.*, Letter at 1, 3, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Oct. 19, 2006), ECF No. 853 (defendant sharing protective order); Letter at 1, *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. Apr. 28, 2006), ECF No. 453 (special master sharing "two discovery orders I have recently issued" and a "final discovery schedule").

As for document discovery, Judge Weinstein directed the federal MDL plaintiffs' steering committees to maintain a "depository in Mount Pleasant, South Carolina" of "documents, deposition exhibits, and deposition transcripts" to be made "available free of charge to litigants in state cases," provided those litigants adhered to Judge Weinstein's protective order and other orders with respect to such discovery.[44] Judge Weinstein noted that, "[g]iven the 'touch of a button' nature of today's advanced technology," the discovery in that depository could be accessible electronically.[45]

As for depositions, Judge Weinstein directed that "[n]o witness should be deposed on the same subject more than once in MDL 1596," which should "extend[] to state court Zyprexa personal injury actions."[46] The special master's "Deposition Guidelines" also provided for the cross-noticing of "[a]ny deposition in this MDL . . . by any party in any Zyprexa-related action pending in state court" (and vice versa), and ordered that:

> Counsel for plaintiffs in the MDL shall use their best efforts to *coordinate the scheduling of depositions* with counsel for state court plaintiffs in order to minimize the number of times that a witness shall appear for a deposition. In a coordinated deposition, the Special Master expects counsel for plaintiffs in the MDL and counsel for state court plaintiffs to *cooperate in selecting the primary examiners*. . . . It is the intent of this Order that counsel for MDL plaintiffs shall be the primary examiners in a deposition coordinated with a state court proceeding, but that *counsel in the state court proceeding have sufficient opportunity to question the deponent so that the deposition may be used in the state proceeding* for all purposes consistent with the state's procedure.[47]

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44 *In re Zyprexa Prods. Liab. Litig.*, 239 F.R.D. 316, 316 (E.D.N.Y. 2007).

45 *In re Zyprexa Prods. Liab. Litig.*, 467 F. Supp. 2d 256, 264 (E.D.N.Y. 2006).

46 *In re Zyprexa Prods. Liab Litig.*, No. 04-md-1596, 2004 WL 3520248, at *5 (E.D.N.Y. Aug. 18, 2004) (noting, however, that the order "does not bind any state court litigant for who this Court does not have jurisdiction").

47 Case Management Order No. 15 (Deposition Guidelines) at 5; *In re Zyprexa*, No. 04-MD-1596 (E.D.N.Y. May 15, 2006), ECF No. 527 (emphasis added).

D. Rezulin Litigation

In 2000, after Warner-Lambert Company withdrew its diabetes drug Rezulin due to reports of liver failure caused by that drug, the company faced a class action and hundreds of individual lawsuits in federal court and thousands more in various State courts brought on behalf of Rezulin users.[48] The federal cases were consolidated and transferred as multidistrict litigation to Judge Lewis Kaplan of the Southern District of New York.[49]

Judge Kaplan, in turn, issued a deposition protocol which, among other things, lay the groundwork for coordination between the federal multidistrict litigation and the State court cases. The deposition protocol provided for the cross-noticing of depositions in the federal multidistrict litigation in any "coordinated proceeding pending in a state court."[50] The deposition protocol also established procedures for "any counsel in any related federal or state action and/or state court coordinated proceeding" (i) to "suggest matters for inquiry" for the depositions, and (ii) to further examine deponents on "non-redundant matters," after the principal examination had ended.[51] Finally, the deposition protocol permitted the use in the federal multidistrict litigation of "depositions previously or subsequently taken in any other Rezulin litigation in federal or state courts."[52] Although indicating that the use in the State court cases of depositions taken in the federal multidistrict litigation was "reserved to each individual state court," the

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48 *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 62, 69 (S.D.N.Y. 2002).

49 *See In re Rezulin Prods. Liab. Litig.*, No. 00-cv-2843, 2000 WL 1530005, at *1 (S.D.N.Y. Oct. 16, 2000).

50 *In re Rezulin Prods. Liab. Litig.*, No. 00-cv-2843, 2001 WL 123729 (S.D.N.Y. Feb. 14, 2001).

51 *Id.* at *2.

52 *Id.* at *11.

deposition protocol also indicated that parties in the federal multidistrict litigation would not otherwise object to such use.[53]

[53] *Id.* at *11-12.