

CONFIDENTIAL INFORMANTS IN PRIVATE LITIGATION:  
BALANCING INTERESTS IN ANONYMITY AND DISCLOSURE

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## CONFIDENTIAL INFORMANTS IN PRIVATE LITIGATION: BALANCING INTERESTS IN ANONYMITY AND DISCLOSURE

*Heightened pleading standards and limits on discovery in private securities fraud actions make confidential informants crucial in many cases. While courts have widely recognized the importance of confidential informants and the need to protect them from retaliation, they have not applied consistent standards for how informants must be identified in pleadings, and have failed to take into account substantial bodies of relevant caselaw when deciding whether to require that informants' names be disclosed in discovery.*

*This article offers a framework for when and how confidential informants should be identified, taking into account the competing interests in anonymity and disclosure. It offers a refined standard for identifying informants at the pleading stage that focuses on how the employee came to have the information pleaded, rather than on the employee's job title or duties. It also proposes use of in camera review of witness statements.*

*At the discovery stage, this article criticizes the use of the attorney work product doctrine as a basis for protecting informant identities. It argues that courts should perform a balancing analysis that directly weighs public policy and privacy interests in favor of informant anonymity against defendants' legitimate needs for disclosure. This approach is supported by numerous cases protecting the identities of informants and other types of witnesses under Fed. R. Civ. P. 26(c), and also finds support in the many cases construing the formal privilege applicable to government informants.*

*Finally, this article encourages plaintiffs to seek protective orders for informants early in litigation and briefly discusses protection for witness interview notes.*

### INTRODUCTION

Confidential informants are crucial to detecting and prosecuting corporate wrongdoing.<sup>1</sup> The threats of retaliation and harm to reputation, however, serve as strong disincentives to corporate employees who

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<sup>1</sup> See Part I.A. *infra*.

consider stepping forward.<sup>2</sup> While individuals who report misconduct to the government can generally rely on the “informant’s privilege” to preserve their anonymity, no similar privilege shields the identities of informants who speak to private plaintiffs or their counsel. As plaintiffs’ law firms – particularly in securities cases subject to the heightened pleading standards – have hired professional investigators and significantly expanded their pre- and post-filing investigations, the proper treatment of such private confidential informants has become increasingly important. Striking the proper balance between protecting informants’ identities and fair disclosure to defendants now has significant consequences for plaintiffs, defendants, private litigation as a means of enforcing the nation’s laws, the legal system’s commitment to broad discovery, and informants’ ability to perform their civic duty without professional martyrdom.

The competing interests in shielding and disclosing informants’ identities arise at three distinct stages of litigation:

- At the pleading stage, when informants’ statements are used to establish the legal sufficiency of a claim and defend a motion to dismiss, particularly in securities cases subject to the heightened pleading standards imposed by the Private Securities Litigation Reform Act of 1995<sup>3</sup> (“PSLRA”) and Rule 9(b) of the Federal Rules of Civil Procedures.

- During discovery, when Fed. R. Civ. P. 26(a) requires that the names of individuals “likely to have discoverable information” be provided and defendants’ interrogatories often specifically request disclosure of plaintiffs’ confidential informants.

- On a motion for summary judgment or at trial, when an informant’s testimony is proffered to a judge or jury for use in determining the merits of the controversy.

This article analyzes courts’ treatment of confidential informants at each of these stages. Part I evaluates confidential informants’ value in enforcement actions and informants’ need for anonymity. Parts II-IV addresses the pleading, summary judgment/trial, and discovery stages, respectively.

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<sup>2</sup> See Part I.B. *infra*.

<sup>3</sup> Pub. L. No. 104-67, 109 Stat. 737 (codified in scattered sections of 15 and 18 U.S.C.).

At the pleading stage, courts shield informants' names but require the plaintiff to provide some identifying information. Modest differences in courts' formulations of what information must be disclosed, however, significantly affect the protection that informants receive. *In camera* review of witness statements and supporting documentation provides one mechanism, proposed *infra*, for insuring that meritorious securities fraud cases proceed while protecting defendants from unsupported claims.

At the trial stage, the rule is simply stated: informants must always be named.

Finally, the discovery stage presents the most difficult issues in balancing the competing interests in anonymity and disclosure. The securities fraud cases on point have reached inconsistent results, and have generally failed to consider (or even acknowledge) the extensive caselaw governing the informant's privilege and the balancing analysis that courts use in other cases where public policy and privacy interests support protecting the identities of informants and other types of witnesses. Collectively, these cases provide a coherent and nuanced framework for balancing the competing interests in anonymity and disclosure for confidential informants in securities fraud and other private litigation.

## I. THE VALUE OF INFORMANTS AND THE NEED FOR PROTECTION

### A. *The Importance of Confidential Informants in Prosecuting Violations of Law*

Informants serve a crucial role in detecting and prosecuting wrongdoing. They have been described by a former FBI Director as “the single most important tool in law enforcement”<sup>4</sup> and have been recognized by the Supreme Court as “a vital part of society’s defensive arsenal.”<sup>5</sup> Even commentators who are critical of informant-related abuses recognize informants as “a necessary evil.”<sup>6</sup> Informants can be divided into two categories: the “vast majority”<sup>7</sup> who “trade[]

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<sup>4</sup> ROBERT M. BLOOM, *RATTING: THE USE AND ABUSE OF INFORMANTS IN THE AMERICAN JUSTICE SYSTEM* 158 (2002) (quoting William Webster).

<sup>5</sup> *McCray v. Illinois*, 386 U.S. 300, 307 (1967).

<sup>6</sup> Bloom, *supra* note 4, at 158.

<sup>7</sup> 26A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE & PROCEDURE* § 5702, at 354 (1992).

information for money or immunity from prosecution,”<sup>8</sup> and citizen informants, who “get[] nothing but an assurance of anonymity in return for the information provided.”<sup>9</sup> Corporate employee-informants, also called whistleblowers, are generally citizen informants, and perform what is arguably an especially important role by reporting wrongdoing that can inflict widespread harm and could otherwise be nearly impossible to detect.<sup>10</sup>

The importance of informants in securities law enforcement is illustrated by the Sarbanes-Oxley Act of 2002<sup>11</sup> (“SOX”) and the events leading to its enactment. The popular press extensively reported on the efforts of Sherron Watkins, a mid-level manager at Enron Corp., to report suspected fraud at the company,<sup>12</sup> and she was cited in SOX’s legislative history.<sup>13</sup> In turn, SOX has been described as “us[ing] whistleblower protection as a key component of enforcement of federal securities laws.”<sup>14</sup> SOX mandated a variety of measures to support and protect employees who report wrongdoing. First, it required audit committees to “establish procedures for . . . the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.”<sup>15</sup> Second, SOX enacted severe criminal penalties – comparable to those for witness tampering<sup>16</sup> – for “interference with the lawful employment or livelihood” of

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<sup>8</sup> *Id.* at 338.

<sup>9</sup> *Id.* at 339.

<sup>10</sup> See MARLENE WINFIELD, *Whistleblowers as Corporate Safety Net*, in WHISTLEBLOWING – SUBVERSION OR CORPORATE CITIZENSHIP? 21-31 (Gerald Vinten ed., 1994).

<sup>11</sup> Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.).

<sup>12</sup> See, e.g., Don Van Natta Jr. & Alex Berenson, *Enron’s Collapse: The Overview; Enron’s Chairman Received Warning about Accounting*, N.Y. Times, Jan. 15, 2002, at A6.

<sup>13</sup> S. Rep. No. 107-146 (2002).

<sup>14</sup> DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING: THE LAW OF RETALIATORY DISCHARGE vii (2d ed. 2004).

<sup>15</sup> SOX § 301, amending Section 10A of the Securities Exchange Act of 1934, 15 U.S.C. § 78f(m)(4) (2002).

<sup>16</sup> Compare 18 U.S.C. § 1512 (2002).

employees who provide information relating to a federal offense.<sup>17</sup> Finally, SOX established a civil remedy for employees of public companies who are the subject of retaliation. The statute<sup>18</sup> prohibits public companies<sup>19</sup> and their employees and agents from “discriminat[ing]” against an employee who provides information or otherwise assists an investigation by federal investigators, Congress, or the company itself into violations of (i) criminal mail, wire, bank or securities fraud statutes,<sup>20</sup> (ii) “any rule or regulation of the Securities and Exchange Commission,” or (iii) “any provision of Federal law relating to fraud against shareholders.” Significantly, the statute also affords the same protections to employees who “file, cause to be filed, testify, participate in, or otherwise assist in a proceeding” relating to the same subjects.<sup>21</sup> By its terms, this provision provides protection for individuals who participate in or otherwise assist private securities fraud actions.

Informants are especially valuable in private securities litigation. Because such cases are subject to a heightened pleading standard<sup>22</sup> and are subject to a discovery stay until the plaintiff has overcome a motion to dismiss,<sup>23</sup> informants are virtually the only means of obtaining non-public evidence of wrongdoing at a company and are often essential for avoiding early dismissal of an action.

#### *B. Informants’ Need for Protection*

The prevalence of retaliation against informants is widely acknowledged. SOX is only the most recent statute to prohibit retaliation against employees who report wrongdoing. By current count, thirty-five other federal statutes also contain explicit provisions protecting public

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<sup>17</sup> 18 U.S.C. § 1513(e) (2002).

<sup>18</sup> SOX Section 806(a), 18 U.S.C. § 1514A(a) (2002).

<sup>19</sup> Companies “with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l), or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78o(d)) . . . .” *Id.*

<sup>20</sup> *Id.* (referencing 18 U.S.C. §§ 1341, 1343, 1344 and 1348 (2002), respectively).

<sup>21</sup> SOX § 806(a)(2), 18 U.S.C. § 1514A(a)(2) (2002).

<sup>22</sup> *See infra* Part II.

<sup>23</sup> 15 U.S.C. §§ 77z-1(b)(1) and 78u-4(b)(3)(B) (2002).

and/or private employees from retaliation for reporting violations of laws, including numerous environmental statutes, laws governing other aspects of public health and safety, laws encouraging disclosure of public fraud and waste, and laws regulating the workplace,<sup>24</sup> most notably the Fair Labor Standards Act<sup>25</sup> (“FLSA”). In addition, forty-seven states have enacted statutes protecting public sector whistleblowers and seventeen states also provide some statutory protection for private sector employees who report illegal conduct.<sup>26</sup>

In addition to statutory provisions, the Supreme Court has held that the First Amendment protects public sector employees who criticize their employers,<sup>27</sup> and courts in many states have extended common law protection to employees who allege retaliation in response to their efforts to prevent or disclose unlawful practices.<sup>28</sup>

Summing up the policy underlying all of these protections in a case under the FLSA, the Supreme Court observed that “it needs no argument to show that fear of economic retaliation might often operate to induce aggrieved employees quietly to accept” misconduct by their employers.<sup>29</sup>

Courts have also recognized that the chilling effect of possible retaliation extends to former employees of a company. In *Hodgson v. Charles Martin Inspectors of Petroleum, Inc.*,<sup>30</sup> the Fifth Circuit pointedly rejected the district court’s conclusion that the possibility of retaliation against former employees in an FLSA enforcement action was “remote and speculative.” The court noted that (i) employers “almost invariably require prospective employees to provide the names of their previous employers as references when applying for a job,” (ii) a former employee “may be subjected to retaliation by his new employer if that employer finds out that the employee has in the past” cooperated in an

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<sup>24</sup> Westman & Modesitt, *supra* note 14, Appendix C.

<sup>25</sup> 29 U.S.C. §§ 201-219 (2000).

<sup>26</sup> Westman & Modesitt, *supra* note 14, at 67, 77.

<sup>27</sup> The leading case is *Pickering v. Board of Education*, 391 U.S. 563 (1968).

<sup>28</sup> Westman & Modesitt, *supra* note 14, at 132-38.

<sup>29</sup> *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 292 (1960).

<sup>30</sup> 459 F.2d 303, 306 (5th Cir. 1972).

enforcement action, and (iii) a former employee “may find it desirable or necessary to seek reemployment with the defendant.”<sup>31</sup>

While SOX provides important remedies for informants faced with retaliation, federal courts have repeatedly recognized that “the most effective protection from retaliation is the anonymity of the informer.”<sup>32</sup> As the Ninth Circuit has observed, informants (or informers<sup>33</sup>) are far better served “by concealing their identities than by relying on the deterrent effect of *post hoc* remedies under [a statutory] anti-retaliation provision.”<sup>34</sup> Other courts have consistently agreed.<sup>35</sup>

Briefly stated, many employees will step forward only if their anonymity is assured. As a result, developing appropriate legal standards to govern disclosure of informants’ identities is crucial to obtaining their assistance in the detection and prosecution of corporate wrongdoing.

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<sup>31</sup> *Id. Accord* Martin v. New York City Transit Authority, 148 F.R.D. 56, 63 (E.D.N.Y. 1993) (citing *Hodgson*).

<sup>32</sup> *Wirtz v. Cont’l Fin. & Loan Co. of West End*, 326 F.2d 561, 563-64 (5th Cir. 1964).

<sup>33</sup> Courts use the terms “informer” and “informant” interchangeably. *See* 26A Wright & Graham, *supra* note 7, § 5702, at 338. For consistency, this article uniformly uses the term “informant.”

<sup>34</sup> *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1071 (9th Cir. 2000) (citation omitted).

<sup>35</sup> *See* *Dole v. Local 1942, Int’l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989) (“The most effective means of protection, and by derivation the most effective means of fostering citizen cooperation, is bestowing anonymity on the informant, thus maintaining the status of the informant’s strategic position and also encouraging others similarly situated who have not yet offered their assistance.”) and *Mitchell v. Roma*, 265 F.2d 633, 637 (3d Cir. 1959) (“The statutory prohibition against retaliation provides little comfort to an employee faced with the possibility of subtle pressures by an employer, which pressures may be so difficult to prove when seeking to enforce the prohibition.”). *Accord* *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-40 (1978) (“Respondent’s argument that employers will be deterred from improper intimidation of employees who provide statements to the NLRB by the possibility of an [anti-retaliatory] charge misses the point of Exemption 7(A); the possibility of deterrence arising from post hoc disciplinary action is no substitute for a prophylactic rule that prevents the harm to a pending enforcement proceeding which flows from a witness’ having been intimidated.”).

## II. PROTECTION FOR INFORMANTS AT THE PLEADING STAGE

The protection of informants first arises at the start of litigation, when the complaint is drafted. In most types of cases, there is no basis for requiring a complaint to name confidential informants, or even to indicate that informants were the source of the complaint's allegations. In securities fraud cases, however, the PSLRA requires that a complaint "state with particularity all facts" supporting an allegation that a statement was misleading.<sup>36</sup> Rule 9(b), similarly, requires that "the circumstances constituting fraud or mistake shall be stated with particularity."

### *A. Courts Agree that Informants Need Not Be Named in a Securities Fraud Complaint*

While the phrase "all facts" could be construed to require that all sources be named and a few early district court cases so held,<sup>37</sup> most circuit courts have now considered the issue and all have ruled that informants need not be identified by name. Recognizing that such a requirement "could deter informants from providing critical information to investigators in meritorious cases or invite retaliation against them," the Second Circuit held in the leading case of *Novak v. Kasaks*<sup>38</sup> that "our reading of the PSLRA rejects any notion that confidential sources must be named as a general matter."<sup>39</sup> *Novak*'s approach has been endorsed by the First,<sup>40</sup> Third,<sup>41</sup> Fifth,<sup>42</sup> Seventh,<sup>43</sup> Eighth,<sup>44</sup> Ninth<sup>45</sup> and

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<sup>36</sup> 15 U.S.C. § 78u-4(b)(1) (2002).

<sup>37</sup> See *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 764 (N.D. Cal. 1997); *In re Nice Sys., Ltd. Sec. Litig.*, 135 F. Supp. 2d 551 (D.N.J. 2001).

<sup>38</sup> 216 F.3d 300, 314 (2d Cir.), *cert. denied*, 531 U.S. 1012 (2000).

<sup>39</sup> *Id.* at 313.

<sup>40</sup> *In re Cabletron Sys., Inc.*, 311 F.3d 11, 28-30 (1st Cir. 2002).

<sup>41</sup> *Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 146-47 (3d Cir. 2004).

<sup>42</sup> *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 351-52 (5th Cir. 2002).

<sup>43</sup> *Makor Issues & Rights, Ltd. v. Tellabs, Inc.*, 437 F.3d 588, 596 (7th Cir. 2006).

<sup>44</sup> *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 667-68 (8th Cir. 2001).

<sup>45</sup> *In re Daou Sys., Inc. Sec. Litig.*, 411 F.3d 1006, 1015 (9th Cir. 2005).

Tenth<sup>46</sup> Circuits. In four of these decisions, the circuit courts also specifically endorsed the Second Circuit's concern that naming informants could have a chilling effect.<sup>47</sup> The Seventh Circuit, for example, observed that "[a] bright line rule obligating the plaintiffs to reveal their sources has the potential to deter informants from exposing malfeasance. Such a rule might also invite retaliation."<sup>48</sup>

*B. Courts Disagree About How Informants Should Be Identified*

While courts now uniformly agree that confidential informants need not be identified by name in a complaint, the circuit courts do not agree on the type of identifying material that must be supplied. In *Novak*, the Second Circuit required that confidential sources be "described in the complaint with sufficient particularity to support the probability that a person in the position occupied by the source would possess the information alleged."<sup>49</sup> The Fifth and Seventh Circuits have adopted this formulation.<sup>50</sup> The First Circuit, by contrast, calls for "evaluation, inter alia, of the level of detail provided by the confidential sources, the corroborative nature of the other facts alleged (including from other sources), the coherence and plausibility of the allegations, the number of sources, the reliability of the sources, and similar indicia."<sup>51</sup> The Third Circuit has adopted substantially the same criteria as the First Circuit,<sup>52</sup> and the Ninth Circuit has also approved use of the First Circuit's criteria to "augment[]" the Second Circuit's approach in *Novak*.<sup>53</sup> The Tenth Circuit has adopted the loosest standard, rejecting a "per se rule that a plaintiff's complaint must always identify the source" in any manner.<sup>54</sup> Under the Tenth Circuit's approach, source information is more

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<sup>46</sup> *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1101 (10th Cir. 2003).

<sup>47</sup> *In re Cabletron Sys., Inc.*, 311 F.3d 11, 30 (1st Cir. 2002); *Cal. Pub. Employees' Ret. Sys. v. Chubb Corp.*, 394 F.3d 126, 147 (3d Cir. 2004); *Tchuruk*, 291 F.3d at 352-53; *Makor*, 437 F.3d at 596.

<sup>48</sup> *Makor*, 437 F.3d at 596.

<sup>49</sup> 216 F.3d at 314.

<sup>50</sup> *Makor*, 437 F.3d at 596 (quoting *Novak*); *Tchuruk*, 291 F.3d at 353 (adopting a substantially identical formulation).

<sup>51</sup> *Cabletron*, 311 F.3d at 29-30.

<sup>52</sup> *Chubb*, 394 F.3d at 147.

<sup>53</sup> *Daou*, 411 F.3d at 1015.

<sup>54</sup> *Kinder-Morgan*, 340 F.3d at 1101.

important for allegations that “are difficult to verify, such as allegations of secret meetings, the contents of private conversations, or alleged motivations,” than for allegations that “may be objectively verifiable,” such as “specific contract terms, the financial result of a transaction, or specific prevailing market conditions.”<sup>55</sup>

The manner in which informants are identified is important. Practice teaches that defendants often devote significant effort to ferreting out informants and are frequently successful in their efforts. Executive suites – where most actionable frauds are perpetrated – are small enough at most public companies that a job title or description of responsibilities will be the equivalent, for the insiders who matter, of naming the witness. At the same time, identifying an informant by job title or responsibilities poorly serves defendants’ interest in protection against meritless claims. As one court has noted, job titles convey little about actual job duties,<sup>56</sup> and formal job duties often say little about whether an employee would have been privy to senior-level communications evidencing actionable misconduct.

Of greater relevance than an employee’s job title or duties is an explanation of how the employee came to have the information pleaded. Junior employees in unlikely positions can provide credible (albeit hearsay) evidence of wrongdoing through friendship with a strategically-placed coworker. At the same time, a well-placed senior executive might have come to particular knowledge through unreliable office gossip, to which a court ought assign little weight.

The better approach is therefore to require specificity as to how the source came to possess the information pleaded, such as that the witness had direct access to relevant communications as a part of her job responsibilities or that the witness learned of the relevant facts through a close relationship with a co-worker who was directed to execute a part of the scheme.

This analysis is consistent with each of the appeals courts’ formulations cited *supra*. It fits well with the “totality of the circumstances” approaches of the First, Third, Ninth and Tenth Circuits, and also conforms to the Second, Fifth and Seventh Circuits’ approach

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<sup>55</sup> *Id.*

<sup>56</sup> *In re Northpoint Commc’ns Group, Inc. Sec. Litig.*, 221 F. Supp. 2d 1090, 1097 (N.D. Cal. 2002).

(applying the light gloss of reading “position” in the sense of “situation” as opposed to “post of employment”<sup>57</sup>).

C. *In Camera Review of Witness Interview Notes Serves the Interests of Plaintiffs, Defendants and the Court*

Whatever test is applied, determining the appropriate level of detail to use in describing informants remains a challenge for plaintiffs. The degree of particularity required to survive a motion to dismiss varies from judge to judge, based both on individual assessments of what “particularity” means and, inevitably, on the judge’s perception of the merits of the case. A plaintiff who provides too much detail risks “outing” its informants; a plaintiff who provides too little risks dismissal of the cause. The same drafting problem applies to supporting documentation, such as an incriminating email that reflects which recipient’s copy has been printed.

One remedy is for plaintiffs to proffer witness statements and supporting documentation for *in camera* review. *In camera* inspection of materials is, of course, “well established in the federal courts”<sup>58</sup> in connection with claims of privilege, and has been strongly endorsed by the Supreme Court in that context.<sup>59</sup>

Although supplementing a complaint with materials supplied *in camera* and *ex parte* is rare at best,<sup>60</sup> this fact is unsurprising given the norm of simple notice pleading under Fed. R. Civ. P. 8(a) and the recent vintage of widespread use of informants in private litigation. While “[o]ur adversarial legal system generally does not tolerate *ex parte* determinations on the *merits* of a civil case,”<sup>61</sup> similar concerns are not

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<sup>57</sup> THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1413 (3d ed. 1996).

<sup>58</sup> United States v. Zolin, 491 U.S. 554, 569 (1989).

<sup>59</sup> Kerr v. District Court, 426 U.S. 394, 405-06 (1976) (“this Court has long held the view that *in camera* review is a highly appropriate and useful means of dealing with” certain claims of privilege). See also *Zolin*, 491 U.S. at 568-69 (“this Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection”).

<sup>60</sup> Our research, in fact, found no reported examples.

<sup>61</sup> Vining v. Runyon, 99 F.3d 1056, 1057 (11th Cir. 1996) (summary judgment motion, quoting Application of Eisenberg, 654 F.2d 1107, 1112 (5th

implicated at the pleading stage. In addition, criminal law provides a clear precedent for use of *ex parte* materials supplied *in camera* to make a threshold showing of merit at the commencement of a case: such materials are routinely submitted to support the filing of a criminal complaint and issuance of an arrest warrant pursuant to Rules 3 and 4 of the Federal Rules of Criminal Procedure.<sup>62</sup> Under Fed. R. Crim. P. 4(a), an arrest warrant will issue upon “probable cause to believe that an offense has been committed and that the defendant committed it . . . .” The issuing judge, in turn, determines “probable cause” by considering the “totality-of-the-circumstances,” that is, “all the circumstances set forth in the [complaint or] affidavit before him, including the ‘veracity’ and ‘basis of knowledge’ of persons supplying hearsay information . . . .”<sup>63</sup> This determination is ordinarily made on an *ex parte* basis, and indeed often relies heavily on information supplied by anonymous informants.<sup>64</sup>

The similarity of *ex parte* probable cause determinations in criminal cases to the court’s task in evaluating the sufficiency of a securities fraud complaint was noted by the First Circuit in its decision approving the use of anonymous informants in securities cases.<sup>65</sup> The

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Cir. Unit B Sept. 1981) (alteration in original) (emphasis added)). Apparently the sole exception, noted in *Vining*, is when “the submissions involve compelling national security concerns or the statute granting the cause of action specifically provides for *in camera* resolution of the dispute.” 99 F.3d at 1057.

<sup>62</sup> The criminal precedent should *a fortiori* defeat any due process concerns, since “the guilt or innocence of a criminal defendant may be viewed as ‘qualitatively more significant’ than the outcome of civil litigation.” *Holman v. Cayce*, 873 F.2d 944, 947 (6th Cir. 1989).

<sup>63</sup> *Illinois v. Gates*, 462 U.S. 213, 233, 238 (1983). *See also* *United States v. Pardue*, 385 F.3d 101, 107 (1st Cir. 2004) (evaluating “probable cause” for an arrest).

<sup>64</sup> *See generally, Gates*, 462 U.S. 213 (discussing when use of informants’ testimony is permissible); 26A *Wright & Graham*, *supra* note 7, § 5714 (discussing when a criminal defendant is entitled to obtain disclosure of the identity of confidential informants whose statements had been used to establish probable cause to search or arrest).

<sup>65</sup> *In re Cabletron Systems, Inc.*, 311 F.3d 11 (1st Cir. 2002).

court described probable cause determinations as a “helpful analogy” to evaluating the sufficiency of complaints subject to the PSLRA.<sup>66</sup>

*In camera* review also serves judicial efficiency. The challenges of drafting a legally sufficient securities fraud complaint were fairly described by the Ninth Circuit in *Eminence Capital, LLC v. Aspeon, Inc.*:<sup>67</sup> “But how much detail is *enough* detail? When is an inference of deliberate recklessness *sufficiently* strong? There is no bright-line rule. Sometimes it is easy to tell, but often it is not. . . . In this technical and demanding corner of the law, the drafting of a cognizable complaint can be a matter of trial and error.”<sup>68</sup>

The Ninth Circuit cited these challenges as support for its holding that plaintiffs should be liberally granted leave to replead in securities fraud cases. No party, however, benefits from drafting and briefing *seriatim* amended complaints and motions to dismiss. By allowing plaintiffs to present all their supporting materials, *in camera* review reduces the need for trial-and-error pleading and lets the court evaluate the sufficiency of a complaint taking into account all support that the plaintiff has adduced for its allegations.

Finally, the statutory purposes underlying the PSLRA and Rule 9(b) support use of the *in camera* device. The PSLRA required detailed pleading “to curtail the filing of meritless lawsuits.”<sup>69</sup> Rule 9(b) similarly “gives defendants notice of the claims against them, provides an increased measure of protection for their reputations, and reduces the number of frivolous suits brought solely to extract settlements.”<sup>70</sup> At the same time, Congress, in enacting the PSLRA, characterized private securities litigation as “an indispensable tool” for injured investors,<sup>71</sup> and courts have cautioned that they “should be sensitive to the fact that

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<sup>66</sup> *Id.* at 30.

<sup>67</sup> 316 F.3d 1048 (9th Cir. 2003).

<sup>68</sup> *Id.* at 1052.

<sup>69</sup> H.R. Rep. No. 104-369, at 41 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730, 740.

<sup>70</sup> *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1418 (3d Cir. 1997) (Alito, J.).

<sup>71</sup> Joint Explanatory Statement of the Committee of Conference, Conference Report on Securities Litigation Reform, H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.), *as reprinted in* 1995 U.S.C.C.A.N. 730.

application of [Rule 9(b)] prior to discovery may permit sophisticated defrauders to successfully conceal the details of their fraud.”<sup>72</sup> As these statements indicate, the PSLRA seeks a balance that excludes unmeritorious cases while allowing valid claims to proceed. As the Supreme Court held in evaluating claims of privilege, “it would seem that an *in camera* review . . . is a relatively costless and eminently worthwhile method to insure that the balance . . . is correctly struck.”<sup>73</sup>

### III. PROTECTION FOR INFORMANTS AT THE TRIAL AND SUMMARY JUDGMENT STAGE

Due process mandates a simple rule for disclosure of informants’ identities at trial and for summary judgment: absent “acute national security concerns,”<sup>74</sup> anonymous testimony is never allowed and informants’ identities must therefore always be disclosed.<sup>75</sup>

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<sup>72</sup> Burlington Coat Factory, 114 F.3d at 1418 (internal quotations omitted). *See also* 2 JAMES W. MOORE, MOORE’S FEDERAL PRACTICE § 9.03[1][b] (3d ed. 2006).

<sup>73</sup> Kerr v. District Court, 426 U.S. 394, 405 (1976).

<sup>74</sup> Abouzeck v. Reagan, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) (also observing “[i]t s a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte*, *in camera* submissions.”).

<sup>75</sup> *See* Reich v. Great Lakes Collection Bureau, Inc., 172 F.R.D. 58, 62 (W.D.N.Y. 1997) (“The informer’s privilege does not override the government’s duty to disclose the identity of witnesses who will testify at trial.”); Hansberry v. Father Flanagan’s Boys’ Home, No. CV-03-3006 (CPS), 2004 WL 3152393, at \*4 n.9 (E.D.N.Y. Nov. 28, 2004) (declining *in camera* review of affidavit proffered on a summary judgment motion); Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939, 943 (5th Cir. 1964) (requiring disclosure of all witnesses, including confidential informants, shortly before trial). Although few decisions squarely address this issue, commentators, recognizing the fundamental due process dimension of the issue, describe it as a firm rule. *See* 26A Wright & Graham, *supra* note 7, § 5710, at 404-05 (“the government cannot assert the privilege to refuse to disclose the witnesses it will call at trial”); 2 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE §

Whether a witness' status as an informant need be revealed is less clear. One commentator suggests it does, stating that "the fact that he is an informer must of course be disclosed as a significant aspect of his credibility,"<sup>76</sup> while the Fifth Circuit, when confronted with the issue in an FLSA case, held that the informants did not need to be identified as such when lists of trial witnesses were exchanged.<sup>77</sup>

The proper rule should probably depend on the type of informant. If an informant receives a tangible benefit, such as money or immunity from prosecution, that information clearly goes to the informant's credibility. No similar justification, however, supports identification of a citizen informant who receives nothing but an assurance of anonymity.

#### IV. PROTECTION FOR INFORMANTS AT THE DISCOVERY STAGE

Discovery poses the hardest issues in balancing the competing interests in preserving informants' anonymity and compelling their disclosure. Absent a "lucky guess" by the defendant, withholding an informant's identity necessarily denies the defendant the chance to depose the informant, a result contrary to both the "broad and liberal" discovery contemplated by the Federal Rules of Civil Procedure,<sup>78</sup> and the principle that "the public has a right to every man's evidence."<sup>79</sup>

When evaluating whether a confidential witness must be identified during discovery, it is important to note what is at stake and what is not. Because "[t]rial by surprise is no longer countenanced,"<sup>80</sup>

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510:1 (6th ed. 2006) ("If the government calls the informer at trial, the witness' identity . . . must of course be disclosed").

<sup>76</sup> Graham, *supra* note 75, § 510:1.

<sup>77</sup> Wirtz v. Robinson & Stephens, Inc., 368 F.2d 114, 116 (5th Cir. 1966).

<sup>78</sup> Pacitti v. Macy's, 193 F.3d 766, 777 (3d Cir. 1999).

<sup>79</sup> Jaffee v. Redmond, 518 U.S. 1, 9 (1996) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN H. WIGMORE, EVIDENCE § 2192, at 64 (3d ed. 1940)) (internal quotation marks and ellipsis omitted)).

<sup>80</sup> *Reno Air Racing Ass'n, Inc. v. McCord*, 452 F.3d 1126, 1140 (9th Cir. 2006). *See also* *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 902 (6th Cir. 1988) (purpose of liberal discovery is to "make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent" (quoting *United States v. Proctor and Gamble & Co.*, 356 U.S. 677, 682 (1958))).

informants who a party intends to call at trial must be identified in response to a proper interrogatory during discovery.

Whether the identity of confidential informants can be learned through discovery therefore concerns a limited group of individuals: those who provided confidential information to the plaintiff or plaintiff's counsel, but who will not later be called as witnesses at trial. While limited, protection of this group of informants is crucial. As noted *supra*,<sup>81</sup> non-testifying informants are the principal source of non-public information that plaintiffs can rely on to meet the heightened pleading standards under Rule 9(b) and the PSLRA. In addition, informants often become willing to testify at trial only after they have developed a rapport with counsel and see that their testimony could contribute to successful prosecution of the lawsuit. Thus, even in the case of witnesses who later agree to testify, plaintiffs are far more likely to persuade a witness to have an initial conversation if they can represent that the conversation is likely to be protected (or, better yet, is the subject of a protective order, as discussed *infra*<sup>82</sup>).

Disclosure of confidential witnesses in discovery has been the subject of reported decisions in a number of securities cases. Until Judge Michael Baylson's decision earlier this year in *In re Cigna Corp. Securities Litigation*,<sup>83</sup> however, these cases evaluated protection of informants only on the basis of the attorney work product doctrine.<sup>84</sup> While the public interest in confidentiality for informants was discussed in some decisions, this interest was evaluated only in the context of determining whether the identity of such witnesses constituted protected attorney work product.<sup>85</sup>

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<sup>81</sup> See Part I.A.

<sup>82</sup> See Part IV.F.

<sup>83</sup> No. Civ. A. 02-8088, 2006 WL 263631 (E.D. Pa. Jan. 31, 2006).

<sup>84</sup> See cases discussed in Part IV.A. *infra*.

<sup>85</sup> *In re MTI Technologies Corp. Sec. Litig. II*, SACV 00-0745 DOC, 2002 WL 32344347, at \*5 (C.D. Cal. June 13, 2002); *In re Ashworth, Inc. Sec. Litig.*, 213 F.R.D. 385, 389 (S.D. Cal. 2002); *In re Aetna Inc. Sec. Litig.*, No. CIV. A. MDL 1219, 1999 WL 354527, at \*5 (E.D. Pa. May 26, 1999); *Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Sys., Inc.*, No. C01-20418JW, 2005 WL 1459555, at \*7 (N.D. Cal. June 21, 2005); *Miller v. Ventro Corp.*, No. C01-01287 SBA (EDL), 2004 WL 868202, at \*3 (N.D. Cal. Apr. 21, 2004).

Outside the securities context, however, several courts have focused directly on the public policy and privacy interests at stake. Their approach is consistent with the substantial bodies of caselaw that construe the government informant's privilege and evaluate the need for disclosure of the identities of other types of witnesses in situations where public policy or privacy concerns militate against the general policy of full disclosure.

*A. Attorney Work Product as a Basis for Protection*

Securities cases addressing protection of confidential informants on the basis of attorney work product split on whether informants' identities must be disclosed.

The justification for protecting informant identities as attorney work product was best articulated in *In re MTI Technologies Corp. Securities Litigation II*.<sup>86</sup> The court noted that the work product doctrine generally protects trial preparation materials, and explained that "if the identity of interviewed witnesses is disclosed, opposing counsel can infer which witnesses counsel considers important, revealing mental impressions and trial strategy."<sup>87</sup>

While the *MTI* decision has persuaded one sister California district court,<sup>88</sup> attorney work product has not carried the day elsewhere. In *In re Aetna Inc. Securities Litigation*,<sup>89</sup> Judge Padova of the Eastern District of Pennsylvania rejected a claim of work product protection for informants' names, on the grounds that such information either was not work product at all, or, in the alternative "at most has minimal work product content [and] the need for the information sought outweighs the minimal work product content that such information may have."<sup>90</sup> Judge Padova's analysis has persuaded three other district courts in published opinions.<sup>91</sup>

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<sup>86</sup> *MTI*, 2002 WL 32344347.

<sup>87</sup> *Id.* at \*3.

<sup>88</sup> *Ashworth*, 213 F.R.D. 385.

<sup>89</sup> 1999 WL 354527.

<sup>90</sup> *Id.* at \*2.

<sup>91</sup> *In re Theragenics Corp. Sec. Litig.*, 205 F.R.D. 631 (N.D. Ga. 2002); *Miller v. Ventro Corp.*, No. C01-01287 SBA (EDL), 2004 WL 868202 (N.D. Cal. Apr. 21, 2004); and *Plumbers & Pipefitters Local 572 Pension Fund v.*

Plaintiffs' lack of success in invoking the work product doctrine is unsurprising considering the doctrine is premised on the principle that "it is essential that a lawyer work with a certain degree of privacy"<sup>92</sup> and, by the express language of Fed. R. Civ. P. 26(b)(3), protects only "mental impressions, conclusions, opinions, or legal theories."<sup>93</sup> In this framework, there is simply no basis for according weight to the public policy in favor of detecting corporate wrongdoing or to informants' privacy interests.

In the cases cited *supra*, the courts have attempted to distinguish decisions reaching the opposite result by pointing to the number of individuals "likely to have discoverable information"<sup>94</sup> who were named by the plaintiffs in initial disclosures or in response to interrogatories. In *Aetna*, for example, the court noted that the plaintiffs had named roughly 750 individuals and observed that "[w]ithout the Court's intervention, Defendants would be forced to engage in a time-consuming and expensive effort to ferret out the veritable needle in the haystack."<sup>95</sup> In *MTI*, the court observed that the plaintiffs had listed only seventy-one current and former employees, "not even close to the unmanageable number present in *Aetna*."<sup>96</sup> Other courts have held 1,200 and "at least 165" names to be too many,<sup>97</sup> but "approximately 100" to be reasonable.<sup>98</sup> These attempts to draw a line of demarcation between a witness list that hides the ball to an acceptable degree, and one that hides the ball too well, are ill-advised. Requiring plaintiffs to name confidential informants, but conceal them among other persons with knowledge results in an unhappy compromise that forces defendants to depose third parties who may only be tangentially involved. Depending on the stakes of the litigation and the defendant's resources, the cost of

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Cisco Sys., Inc., No. C01-20418JW, 2005 WL 1459555 (N.D. Cal. June 21, 2005).

<sup>92</sup> Hickman v. Taylor, 329 U.S. 495, 511 (1947).

<sup>93</sup> Fed. R. Civ. P. 26(b)(3).

<sup>94</sup> Fed. R. Civ. P. 26(a)(1)(A).

<sup>95</sup> 1999 WL 354527, at \*4.

<sup>96</sup> In re MTI Technologies Corp. Sec. Litig. II, SACV 00-0745 DOC, 2002 WL 32344347, at \*4 (C.D. Cal. June 13, 2002).

<sup>97</sup> *Cisco*, 2005 WL 1459555, at \*5; *Miller*, 2004 WL 868202, at \*1-2.

<sup>98</sup> In re Ashworth, Inc. Sec. Litig., 213 F.R.D. 385, 390 (S.D. Cal. 2002).

deposing all witnesses may be prohibitive and therefore constitute a *de facto* denial of access to the informants. At the same time, hiding informants among other witnesses may not provide informants with adequate protection. Depending on how plaintiffs derive their list of persons with knowledge, even a list of 1,000 names may not effectively camouflage a senior informant or one with specialized knowledge or job duties.

The better approach, set forth *infra*, is therefore to develop principled rules for when informants must be named, and when their names may be withheld altogether. Securities plaintiffs' focus on attorney work product simply neglects the established framework for recognizing the public policy interests at stake – concerns that have been specifically acknowledged, as noted *supra*,<sup>99</sup> by a majority of the circuit courts that have considered pleading-stage disclosure of informants in PSLRA cases. Outside of the securities context, courts have readily acknowledged these interests when asked to shield the identities of informants and other individuals, as discussed in Part IV.D., *infra*.

*B. The Informant's Privilege as Precedent for Protection of Private Informants*

Although not addressed by any of the district court decisions discussed in Part IV.A., *supra*, the identities of confidential *government* informants have been protected since at least the nineteenth century.<sup>100</sup> The Supreme Court first recognized the “informant’s privilege” in its current form in 1957, holding in *Roviaro v. United States*<sup>101</sup> that informants’ identities were generally not subject to discovery to further “the public interest in effective law enforcement.”<sup>102</sup> The Court explained that “[t]he privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.”<sup>103</sup> While described as the “informant’s (or informer’s) privilege,” the Court in *Roviaro* explained that it “is in

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<sup>99</sup> See Part II.A.

<sup>100</sup> See 26A Wright & Graham, *supra* note 7, § 5702, at 340-41.

<sup>101</sup> 353 U.S. 53 (1957).

<sup>102</sup> *Id.* at 59.

<sup>103</sup> *Id.*

reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law."<sup>104</sup> Consistent with its purpose and function, the informant's privilege is applicable to government informants in civil cases, as well as in criminal prosecutions.<sup>105</sup>

Under *Roviaro*, the privilege is qualified, and when an informant's identity "is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."<sup>106</sup> In a criminal case, this standard "calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."<sup>107</sup>

Unlike most other privileges, such as attorney-client or psychotherapist-patient, which broadly protect the contents of communications, the informant's privilege protects only the identity of the informant, and shields documents only to the extent they "tend to reveal the identity of" an informant.<sup>108</sup> Thus, witness statements and similar materials are discoverable – subject to redaction to remove

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<sup>104</sup> *Id.*

<sup>105</sup> See *Brock v. On Shore Quality Control Specialists, Inc.*, 811 F.2d 282, 283 (5th Cir. 1987) ("Although *Roviaro* was a criminal case, the privilege uniformly has been applied in civil cases as well."). A compilation of civil cases can be found in Thomas J. Oliver, Annotation, *Application, in Federal Civil Action, of Governmental Privilege of Nondisclosure of Identity of Informer*, 8 A.L.R. FED. 6 (1971).

<sup>106</sup> *Roviaro*, 353 U.S. at 60-61.

<sup>107</sup> *Id.* at 62.

<sup>108</sup> *Id.* at 60 ("The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged."). See also *United States v. Sanchez*, 988 F.2d 1384, 1391 (5th Cir. 1993) (citing *Roviaro* for this proposition).

identifying information, and subject to any other applicable privileges and limitations on disclosure.<sup>109</sup>

A substantial body of criminal and civil caselaw following *Roviaro* has fully developed the parameters of the privilege. First, consistent with the due process principles noted *supra*, the identity of an informant who appears as a witness at trial must virtually *always* be disclosed.<sup>110</sup> When an informant is not called to testify, cases following *Roviaro* focus principally on the relationship of the informant to the crime charged or wrongdoing alleged. Ordinarily, disclosure is required in criminal cases if the informant is the only participant other than the accused, or is the only witness able to confirm or refute the testimony of government witnesses.<sup>111</sup> Disclosure is generally not required when the informant is a “mere tipster,” even if also a witness to the crime.<sup>112</sup> In cases that fall between these extremes, courts resort to balancing, as prescribed in *Roviaro*.<sup>113</sup>

In civil litigation, claims of privilege arise most often in wage and hour cases under the FLSA.<sup>114</sup> As in the criminal context, the requesting party can override the privilege by showing that its need for disclosure outweighs the government’s interest in confidentiality. This need is evaluated both by assessing the relationship between the

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<sup>109</sup> Disclosure of witness interview notes is discussed *infra* at notes 178-184 and in the accompanying text.

<sup>110</sup> See notes 74-75 and accompanying text.

<sup>111</sup> See *United States v. Martinez*, 922 F.2d 914, 920-21 (1st Cir. 1991); *Suarez v. United States*, 582 F.2d 1007, 1011 (5th Cir. 1978) (requiring disclosure if the informant “played an active and crucial role”). See generally *Graham*, *supra* note 75, § 510:1 and 26A *Wright & Graham*, *supra* note 7, § 5713, at 434-37.

<sup>112</sup> *Martinez*, 922 F.2d at 921; *Suarez*, 582 F.2d at 1011.

<sup>113</sup> *Suarez*, 582 F.2d at 1011; *United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir. 1995) (*Roviaro* balancing is based on “(1) the degree to which the informant was involved in the criminal activity; (2) how helpful the informant’s testimony would be to the defendant; (3) the government’s interest in non-disclosure”); 26A *Wright & Graham*, *supra* note 7, § 5713, at 438-39.

<sup>114</sup> See 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2019, at 301 n.11 (2d ed. 1994) (collecting cases), and the numerous FLSA cases cited in this article.

informant and the wrong alleged, as in criminal cases,<sup>115</sup> and also by directly evaluating the relevancy of the identity of the informant to the facts at issue in the case.<sup>116</sup>

*C. Extension of the Informant's Privilege to Private Informants*

The clear and well-defined nature of the informant's privilege invites extension from government informants to those who assist private plaintiffs, at least plaintiffs acting as "private attorneys general." While opponents of private enforcement actions argue that they lead to excessive litigation, interfere with public enforcement, and lack accountability,<sup>117</sup> these opponents do not question the significant deterrent effect of private litigation, and none of the arguments against private enforcement supports depriving plaintiffs of a tool that is essential to their ability to detect and gather proof of serious wrongdoing. Indeed, the asserted deficiencies of private actions may be ameliorated by enhancing plaintiffs' information-gathering tools.

In addition, in the case of private securities fraud actions, the Supreme Court has repeatedly recognized the important role of private enforcement actions,<sup>118</sup> and Congress, even while imposing limits on private actions in the PSLRA, stated in its legislative history that

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<sup>115</sup> See *Suarez*, 582 F.2d at 10012 (refusing disclosure of an informant in a civil tax enforcement case, noting that he was merely a "marginal observer of the activities" of the taxpayers); *Holman v. Cayce*, 873 F.2d 944, 947 (6th Cir. 1989) (refusing disclosure in a § 1983 action alleging a wrongful shooting by an arresting officer where "[t]here was no indication that the informant was an active participant in the burglary or a witness to it");

<sup>116</sup> *Wirtz v. Cont'l Fin. & Loan Co.*, 326 F.2d 561, 563 (5th Cir. 1964) ("It is perfectly plain that the names of informers are utterly irrelevant to the issues to be tried by the trial court."). *Accord* *Usery v. Ritter*, 547 F.2d 528, 531 (10th Cir. 1977) and *Brock v. On Shore Quality Control Specialists, Inc.*, 811 F.2d 282, 284 (5th Cir. 1987).

<sup>117</sup> The literature is summarized in Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 114-20 (2005).

<sup>118</sup> *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985) ("we repeatedly have emphasized that implied private actions provide 'a most effective weapon in the enforcement' of the securities laws and are 'a necessary supplement to Commission action.'" (citing *J.I. Case Co. v. Borak*, 377 U.S. 426, 432 (1964))).

“[p]rivate securities litigation is an indispensable tool with which defrauded investors can recover their losses without having to rely upon government action. Such private lawsuits promote public and global confidence in our capital markets and help to deter wrongdoing and to guarantee that corporate officers, auditors, directors, lawyers and others properly perform their jobs.”<sup>119</sup>

Decisions applying the current version of the privilege in civil cases further illustrate why extending the informant’s privilege is appropriate. Several of these courts have reasoned that “[s]ince the guilt or innocence of a criminal defendant may be viewed as ‘qualitatively more significant’ than the outcome of civil litigation,” the privilege should actually be stronger and yield less frequently in the civil context.<sup>120</sup>

While informants in civil litigation are less likely to face threat to life and limb, courts have recognized that the informant’s privilege “[a]lso recognizes the subtler forms of retaliation such as blacklisting, economic duress and social ostracism.”<sup>121</sup>

The fact that corporate misconduct – particularly, fraud and antitrust offenses – regularly gives rise to parallel criminal prosecutions and (private) civil cases further supports extension of the privilege and

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<sup>119</sup> Joint Explanatory Statement of the Committee of Conference, Conference Report on Securities Litigation Reform, H.R. Rep. No. 104-369, at 31 (1995) (Conf. Rep.), as reprinted in 1995 U.S.C.C.A.N. 730.

<sup>120</sup> *Holman v. Cayce*, 873 F.2d 944, 946 (6th Cir. 1989). See also *Dole v. Local 1942, Int’l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989) (“In civil cases the privilege, which limits the right of disclosure usually called for by the Federal Rules of Civil Procedure, is arguably greater since not all constitutional guarantees which inure to criminal defendants are similarly available to civil defendants.” (citations omitted)); *Management Information Technologies, Inc. v. Alyeska Pipeline Service Co.*, 151 F.R.D. 478, 483 n.2 (D.D.C. 1993) (“[i]t would seem rather incongruous for courts to decline to turn over such information in proceedings where a defendant’s liberty is at stake while providing such materials in a civil setting where monetary damages alone are involved”); *Matter of Search of 1638 E. 2nd Street, Tulsa, Okl.*, 993 F.2d 773, 775 (10th Cir. 1993) (in civil cases, “the informer’s privilege is arguably stronger, because the constitutional guarantees assured to criminal defendants are inapplicable”).

<sup>121</sup> *Dole*, 870 F.2d at 372.

demonstrates the lack of any good justification for applying different rules to governmental and non-governmental informants. It would be perverse indeed to hold that an indicted corporate officer facing years in prison and the loss of her reputation was barred by the privilege from obtaining the identities of informants located by prosecutors while her former employer, facing the loss of a few basis points of quarterly earnings in a class action, was entitled to broader discovery of the names of informants located by plaintiffs' counsel.

While these considerations underscore the appropriateness of protecting non-governmental informants in private litigation, the Supreme Court's privileges jurisprudence effectively forecloses formal expansion of the informant's privilege as the means to do so.

Rule 501 of the Federal Rules of Evidence provides that the federal law of privileges "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." The Supreme Court has recognized that this provision "authorizes federal courts to define new privileges."<sup>122</sup> However, the Court has repeatedly confirmed that "the public has a right to every man's evidence"<sup>123</sup> and that "there is a general duty to give what testimony one is capable of giving, and that any exceptions which may exist are distinctly exceptional, being so many derogations from a positive general rule."<sup>124</sup> Accordingly, the Court has held that evidentiary privileges "are not lightly created nor expansively construed,"<sup>125</sup> and has declined most invitations to create or expand privileges.<sup>126</sup>

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<sup>122</sup> Jaffee v. Redmond, 518 U.S. 1, 8 (1996).

<sup>123</sup> *Id.* at 9 (quoting United States v. Bryan, 339 U.S. 323, 331 (1950) (quoting 8 John H. Wigmore, *Evidence* § 2192, at 64 (3d ed. 1940)) (internal quotation marks and ellipsis omitted)).

<sup>124</sup> *Id.* (same parenthetical notes)

<sup>125</sup> United States v. Nixon, 418 U.S. 683, 710 (1974).

<sup>126</sup> See Univ. of Pa. v. EEOC, 493 U.S. 182 (1990) (rejecting academic peer review privilege); United States v. Gillock, 445 U.S. 360 (1980) (rejecting privilege for "legislative acts"); United States v. Zolin, 491 U.S. 554 (1989) (rejecting claim that *in camera* review of materials to determine applicability of crime-fraud exception would impair attorney-client privilege); Trammel v. United States, 445 U.S. 40 (1980) (holding that voluntary testimony by spouse was not barred by spousal privilege).

Under the leading Supreme Court case addressing the creation of new privileges, *Jaffee v. Redmond*, the common law analysis begins with an evaluation of the interests supporting the privilege.<sup>127</sup> While the interests in insuring the free flow of information from informants are manifest, they are mitigated by another factor cited later in *Jaffee* – the need for certainty and predictability in application of the evidentiary privilege. For many privileges, such as the psychotherapist-patient privilege at issue in *Jaffee* or the spousal privilege recognized in *Hawkins v. United States*,<sup>128</sup> the protected communications typically occur before litigation has commenced, and potentially before it is even anticipated. Accordingly, the interests at stake call for a clear rule to guide members of the public in their conduct. By contrast, contacts with informants occur in conjunction with litigation. As a result, the relevant facts can be presented to the presiding judge for a case-by-case determination with little harm to the relevant interests.

The other principal factor discussed in *Jaffee* was the consensus among the states.<sup>129</sup> Because *no* state apparently recognizes an informant's privilege for non-governmental informants, this factor weighs significantly against the recognition of an expanded privilege. The same is true of a third factor discussed in *Jaffee* – whether the privilege was included among those proposed by the Advisory Committee on Rules of Evidence in 1969.<sup>130</sup> The Advisory Committee made no provision for protection of non-governmental informants.<sup>131</sup>

While Supreme Court precedents therefore do not support expanding the informant's privilege, other decisions by circuit and district courts around the country reflect consistent use of a case-by-case, balancing approach to achieve a similar result.

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<sup>127</sup> 518 U.S. at 11.

<sup>128</sup> 358 U.S. 74 (1958).

<sup>129</sup> 518 U.S. at 12-13.

<sup>130</sup> *Id.* at 14-15 (citing inclusion of a psychotherapist-patient privilege among the Advisory Committee's proposed rules).

<sup>131</sup> Proposed Rule 510, rejected by Congress, would have codified the common law informant's privilege, but was limited to governmental informants. *See* Proposed Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 183, 255 (1972).

#### *D. Balancing the Interests in Anonymity and Disclosure*

All of the factors mentioned *supra*: the value of confidential informants in enforcement actions, informants' need for protection, the important role of private litigation, and the lack of justification for different standards of protection in government and private actions, argue in favor of protecting the identities of private confidential informants. In the absence of formal privilege, the few courts faced with demands for the disclosure of confidential witnesses outside the securities arena have provided this protection through a balancing analysis. Many other courts have adopted the same approach in other situations where public policy and privacy interests support the protection of witnesses' identities. As a number of these cases illustrate, balancing is often adopted by courts in lieu of creation of a new privilege.<sup>132</sup>

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<sup>132</sup> *E.g.*, Gill v. Gulfstream Park Racing Ass'n, Inc., 399 F.3d 391 (1st Cir. 2005) (rejecting privilege for private informant but remanding so that the trial court could perform a balancing analysis); Northwestern Memorial Hospital v. Ashcroft, 362 F.3d 923, 926-27 (7th Cir. 2004) (Posner, J.) (rejecting privilege for abortion records but quashing subpoena under balancing analysis); In re Sealed Case (Medical Records), 381 F.3d 1205, 1211 (D.C. Cir. 2004) (noting that "even where an evidentiary privilege is not available, a party may petition the court for a protective order" and remanding for a determination of whether such an order was proper); Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163 (E.D.N.Y. 1988) (rejecting scholarly journal peer review privilege but protecting identity of peer reviewer under balancing analysis), *aff'd*, 870 F.2d 642 (Fed. Cir. 1989); Virmani v. Novant Health Inc., 259 F.3d 284, 288 n.4 (4th Cir. 2001) (rejecting medical peer review privilege but noting that an order protecting the identities of third parties would be proper); Seales v. Macomb Co., 226 F.R.D. 572, 578-79 (E.D. Mich. 2005) (rejecting juvenile records privilege but redacting identifying information based on balancing analysis); Ross v. Bolton, 106 F.R.D. 22, 23 (S.D.N.Y. 1985) (finding that no private investigatory privilege existed but protecting investigatory records based on balancing analysis).

Such balancing differs significantly from the recognition of a new privilege because, under Rule 26(c), the party seeking protection bears the burden of persuasion, *see infra* footnote 161 and accompanying text. By contrast, in the case of the informant's privilege, as with others, "the

The First Circuit’s decision last year in *Gill v. Gulfstream Park Racing Ass’n, Inc.*<sup>133</sup> reflects the proper approach. In *Gill*, a racehorse owner sued a racetrack operator for defamation in connection with a private investigation into wrongdoing by the owner. The plaintiff subpoenaed documents from a (non-party) trade association that had initiated the investigation. The trade association opposed the subpoena on the grounds that the documents contained the names of confidential informants. The district court held the informant’s privilege inapplicable, and declined to protect the identities of the informants.<sup>134</sup> The First Circuit vacated and remanded. It agreed that the applicable state-law informant’s privilege did not apply, but held that the “[t]he ‘good cause’ standard in [Fed. R. Civ. P. 26(c)] is a flexible one that requires an individualized balancing of the many interests that may be present in a particular case.”<sup>135</sup> Under Rule 26(c), “[i]n particular, considerations of the public interest, the need for confidentiality, and privacy interests are relevant factors to be balanced.”<sup>136</sup> By failing to recognize and evaluate these interests, the First Circuit held that the district court had abused its discretion.<sup>137</sup>

A similar approach was adopted by Judge Sporkin in *Management Information Technologies, Inc. v. Alyeska Pipeline Service Co.*<sup>138</sup> There, the defendant sought discovery of sources who had allegedly provided the plaintiff with confidential company documents. Judge Sporkin discussed at length the risk of retaliation to which whistleblowers are exposed, and declined to order disclosure of the sources.<sup>139</sup> He described his ruling as “based on the Court’s balancing of the interest of third parties with the needs of the defendants to defend themselves in the present proceeding” and noted that the “identities of

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government is granted the privilege as of right.” *Dole v. Local 1942, Int’l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989).

<sup>133</sup> 399 F.3d 391 (1st Cir. 2005).

<sup>134</sup> *Id.* at 393-94.

<sup>135</sup> *Id.* at 402 (quoting *United States v. Microsoft Corp.*, 165 F.3d 952, 959-60 (D.C. Cir. 1999)).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 403.

<sup>138</sup> 151 F.R.D. 478 (D.D.C. 1993).

<sup>139</sup> *Id.* at 481-82.

the confidential informants . . . are at best marginally relevant to the issues at stake in this litigation.”<sup>140</sup>

In *In re Cigna Corp. Securities Litigation*,<sup>141</sup> a securities case, Judge Baylson focused directly on the value of and need to protect confidential informants, and held that while defendants were entitled to a list of all “persons with relevant knowledge,” including all informants, plaintiffs were not required to specifically identify their informants from among the universe of all persons with knowledge.<sup>142</sup>

Numerous other courts faced with discovery requests for witness identities have performed similar balancing of public policy and privacy interests against defendants’ need for disclosure. Recognizing the chilling effect of disclosure of witnesses’ identities on socially-valuable speech, courts have protected (i) the identities of doctors who reported wrongdoing by a pharmaceutical company sales representative to his employer, based on a concern that the representative might “seek reprisal against them if he learned their identities;”<sup>143</sup> (ii) the identity of a referee who evaluated a manuscript for a peer reviewed scholarly journal, based on the societal value of the peer review process,<sup>144</sup> (iii) the identities of judges and attorneys who provided adverse comments to a screening committee evaluating the performance of an attorney retained to provide services to indigent criminal defendants, based on the “important societal interest” of an effective evaluation process and chilling effect of disclosures;<sup>145</sup> (iv) the identity of a person who reported suspected child abuse, based on the societal value of such disclosures and the chilling effect of revealing the identity of reporters;<sup>146</sup> (v) the identities of doctors and hospitals who reported adverse reactions to drugs under a voluntary

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<sup>140</sup> *Id.* at 482-83.

<sup>141</sup> No. Civ. A. 02-8088, 2006 WL 263631 (E.D. Pa. Jan. 31, 2006).

<sup>142</sup> 2006 WL 263631, at \*3.

<sup>143</sup> *Ramirez v. Boehringer Ingelheim Pharm., Inc.*, 425 F.3d 67, 74 (1st Cir. 2005).

<sup>144</sup> *Solarex Corp. v. Arco Solar, Inc.*, 870 F.2d 642, 644 (Fed. Cir. 1989), *aff’g* 121 F.R.D. 163 (E.D.N.Y. 1988).

<sup>145</sup> *Mitchell v. Fishbein*, 227 F.R.D. 239, 245-47 (S.D.N.Y. 2005)

<sup>146</sup> *DeLeon v. Putnam Valley Board of Education*, 228 F.R.D. 213, 217-21 (S.D.N.Y. 2005)

reporting system operated by the Food and Drug Administration;<sup>147</sup> the (vi) identities of doctors and patients involved in medical peer reviews arising from incidents of possible medical error;<sup>148</sup> and (vii) the identities of academic tenure committee members and evaluators.<sup>149</sup>

Courts have also recognized the privacy interests affected by disclosure – interests possessed by confidential informants, as recognized in *Gill*<sup>150</sup> – and protected individuals’ identities from disclosure in a range of situations. Based on privacy concerns, courts have protected (i) abortion records identifying patients in litigation with the Department of Justice over the constitutionality of anti-abortion legislation;<sup>151</sup> (ii) the identity of residents in a group home for juveniles in a civil rights action arising out of improper conduct by employees at the home;<sup>152</sup> and (iii) the names of patients in a nursing home in a suit alleging overcharging for medications.<sup>153</sup>

Citing both public interests and privacy rights, courts have also protected the identities of participants in a study sponsored by the Center for Disease Control in a products liability action,<sup>154</sup> and the names of members of a private medical society in an action alleging anticompetitive conduct by the society.<sup>155</sup>

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<sup>147</sup> In re Eli Lilly & Co., Prozac Prod. Liab. Litig., 142 F.R.D. 454, 457 (S.D. Ind. 1992).

<sup>148</sup> Virmani v. Novant Health Inc., 259 F.3d 284, 288 n.4 (4th Cir. 2001).

<sup>149</sup> Schneider v. Northwestern Univ., 151 F.R.D. 319, 324 (N.D. Ill. 1993); Black v. New York Univ. Med. Ctr., No. 94 CIV. 9074 (SS) (NRB), 1996 WL 294310, at \*4 n.9 (S.D.N.Y. June 3, 1996).

<sup>150</sup> Gill v. Gulfstream Park Racing Ass’n, Inc., 399 F.3d 391, 402-03 (1st Cir. 2005).

<sup>151</sup> Northwestern Mem. Hosp. v. Ashcroft, 362 F.3d 923, 926-27 (7th Cir. 2004).

<sup>152</sup> Seales v. Macomb Co., 226 F.R.D. 572, 578-79 (E.D. Mich. 2005).

<sup>153</sup> Arenson v. Whitehall Convalescent and Nursing Home, Inc., 161 F.R.D. 355, 358 (N.D. Ill. 1995).

<sup>154</sup> Farnsworth v. Procter & Gamble Co., 758 F.2d 1545, 1546-47 (11th Cir. 1985)

<sup>155</sup> Marrese v. American Acad. of Orthopaedic Surgeons, 726 F.2d 1150, 1159-60 (7th Cir. 1984) (en banc) (Posner, J.), *rev’d on other grounds*, 470 U.S. 373 (1985).

Protection of private confidential informants also finds support in cases shielding investigatory materials of private industry trade groups that perform a regulatory function. In *Ross v. Bolton*,<sup>156</sup> the court recognized that the public interest in effective industry regulation by the National Association of Securities Dealers warranted protection for its investigative files.<sup>157</sup> Similar interests have been recognized, and similar protections afforded for investigative files of the New York Mercantile Exchange<sup>158</sup> and the New York City Board of Trade.<sup>159</sup>

One obvious precedent for protecting the identities of private informants – the reporter’s privilege – in fact provides little guidance because the current status of the privilege is unsettled.<sup>160</sup>

#### *E. Balancing as Applied to Confidential Informants*

To obtain a protective order pursuant to Rule 26(c), the moving party “has the burden of showing that good cause exists for issuance of that order.”<sup>161</sup> To meet this burden, a plaintiff seeking protection for its confidential informants is obligated to establish a threshold need for

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<sup>156</sup> 106 F.R.D. 22 (S.D.N.Y. 1985).

<sup>157</sup> *Id.* at 24.

<sup>158</sup> *Apex Oil Co. v. DiMauro*, 110 F.R.D. 490, 496-97 (S.D.N.Y. 1985).

<sup>159</sup> *DGM Investments, Inc. v. New York Futures Exch., Inc.*, 224 F.R.D. 133 (S.D.N.Y. 2004).

<sup>160</sup> See Wendy N. Davis, *The Squeeze on the Press*, 91 A.B.A. J., Mar. 2005, at 22 (describing courts’ recent trend away from protecting journalists). The D.C. Circuit’s decision last year in *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005) (as reissued Feb. 3, 2006), illustrates the current uncertainty surrounding the privilege. After postulating the existence of a common law privilege protecting reporters’ confidential sources, the panel held that such a privilege would not apply on the facts there. *Id.* at 1150. In separate concurring decisions, two members of the panel then proceeded to address whether such a privilege existed – and in carefully-reasoned decisions reached opposite conclusions. *Id.* at 1153-59 (Sentelle, J., holding no such privilege exists); *id.* at 1163-78 (Tatel, J., holding that such privilege does exist).

<sup>161</sup> *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 142 (2d Cir. 2004) (quoting *In re “Agent Orange” Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987)). *Accord Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 166 (3d Cir. 1993). See also 6 Moore, *supra* note 72, § 26.104[1], at 26-251.

protection. This should ordinarily take the form of an affidavit from an investigator averring that one or more persons (i) have informed the investigator that they have information concerning suspected wrongdoing by the defendant, (ii) are unwilling to provide such information due to a fear of retaliation or other injury if their identity is disclosed, and (iii) would be willing to provide such information if assured that their identity would be shielded from disclosure.

As discussed *supra*,<sup>162</sup> Rule 26(c) requires the trial court to “undertake ‘an individualized balancing of the many interests that may be present in a particular case.’”<sup>163</sup> In performing this balancing, “[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.”<sup>164</sup>

In the case of confidential informants, the public’s interest in disclosure of wrongdoing, together with the witness’ privacy interests, must be balanced against the defendant’s need to defend the action. When balancing these interests, it is important to recognize that the harm to be avoided through the order is the danger that potential witnesses will refuse to come forward – *i.e.*, the chilling effect of the fear of possible retaliation or harm to reputation, and not the threat of actual retaliation or other injury to the witnesses themselves. Even if a witness’ fear of adverse consequences is unfounded, such fear can nonetheless silence the witness and prevent disclosure of the wrongdoing. Accordingly, the absence of credible evidence of a threat should not impede issuance of a protective order based on a potential witness’ *bona fide* concerns, as presented to the court in an investigator’s affidavit. Focus on chilling effect, rather than the actual risk of harm, is consistent with the balancing

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<sup>162</sup> See Part IV.D.

<sup>163</sup> *Diamond Ventures, LLC v. Barreto*, 452 F.3d 892, 898 (D.C. Cir. 2006) (quoting *In re Sealed Case (Medical Records)*, 381 F.3d 1205, 1211 (D.C. Cir. 2004) (remanding because the district court failed to perform an appropriate balancing analysis)). *Accord* *Gill v. Gulfstream Park Racing Ass’n, Inc.*, 399 F.3d 391, 400-01 (1st Cir. 2005); *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1313 (11th Cir. 2001) (“Federal courts have superimposed a balancing of interests approach for Rule 26’s good cause requirement.”).

<sup>164</sup> *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). *Accord* *Rivera v. NIBCO, Inc.*, 384 F.3d 822, 827 (9th Cir. 2004). *See also* 6 Moore, *supra* note 72, § 26.102[1], at 26-246.

cases cited *supra*, none of which attempted to evaluate whether the fear of harm was well-founded.<sup>165</sup> The “difficulty of such proof”<sup>166</sup> further supports this view.

After the plaintiff has carried the initial burden of demonstrating a need for protection, the analysis performed under *Roviaro* provides well-developed guidance for balancing this interest against both the defendant’s interest in effectively opposing the claim and the judicial system’s policy in favor of liberal discovery.<sup>167</sup> Under *Roviaro*, as discussed *supra*,<sup>168</sup> courts look to the role of the informant, and an informant who played an active role in the wrongdoing is far more likely to be exposed than one who was a “mere tipster.”<sup>169</sup> In civil cases involving corporate wrongdoing, courts also directly evaluate the relevancy of the information possessed by the informant to the facts at issue in the case.<sup>170</sup>

Applying these principles, the Fifth Circuit refused to disclose the identity of an informant in *Brock v. On Shore Quality Control Specialists, Inc.*,<sup>171</sup> a case brought under the FLSA. The court observed that “[t]he issue to be tried in this case concerns the nature of the duties performed by these individuals, and whether the duties are, as claimed, administrative. The list of ‘all persons who have given information to the Department of Labor’ is ‘utterly irrelevant to the issues to be tried by the trial court.’”<sup>172</sup> Similarly, in *Usery v. Ritter*,<sup>173</sup> the Tenth Circuit refused disclosure in another FLSA case, noting that “[t]he record contains no showing by defendants of their need, or the reasons for their need, of the disclosure of the identity of the informants. The defendants know the job classifications, the pay rolls, and the type of work done by each

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<sup>165</sup> See *supra* notes 143-149 and 154-155.

<sup>166</sup> *Dole v. Local 1942, Int’l Bhd. of Elec. Workers*, 870 F.2d 368, 372 (7th Cir. 1989).

<sup>167</sup> See *supra* note 78.

<sup>168</sup> See notes 111-116 and accompanying text.

<sup>169</sup> See note 112.

<sup>170</sup> See *supra* note 116.

<sup>171</sup> 811 F.2d 282, 284 (5th Cir. 1987).

<sup>172</sup> *Id.* at 284 (citing *Wirtz v. Continental Finance & Loan Co.*, 326 F.2d 561, 563 (5th Cir. 1964)).

<sup>173</sup> 547 F.2d 528 (10th Cir. 1977).

employee. The government has specified individuals, classifications, and types of machines which it deems pertinent to its case.”<sup>174</sup>

In many cases, private informants are similarly situated to the government informants in *Ritter* and *On Shore Quality Control*. They have learned of wrongdoing either because they were personally directed to undertake improper actions or because they were informed of improprieties by fellow employees. As in the FLSA cases cited, the truth is within the knowledge of the defendants, and there is little legitimate need to obtain discovery from the informant. There may be situations where an informant played an active role in wrongdoing or had conversations with senior managers who are no longer available. In these situations, disclosure of the informant’s identity may well be required, but these instances will be the exception.

Thus, in most cases, a balancing analysis under Rule 26(c) will support shielding the identities of confidential informants from disclosure.

#### *F. Practice Issues in Protecting Informants’ Identities*

While protection of informants has often been litigated in the context of a Rule 37(a) motion to compel,<sup>175</sup> seeking a protective order under Rule 26(c) or moving to quash or modify a subpoena pursuant to Rule 45(c)(3)<sup>176</sup> provides benefits to plaintiffs beyond the usual postural advantages. First, a Rule 26(c) motion offers the opportunity to bring the importance of informants to the court’s attention early in a case and provides the occasion to allow witness statements to be tendered for *in camera* review in advance of a ruling on a motion to dismiss. Second, a protective order significantly enhances the ability of plaintiffs’ investigators to give comfort to potential informants regarding their risk of exposure. It also sets the “ground rules” for initial disclosures under Rule 26(a) and later discovery proceedings.

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<sup>174</sup> *Id.* at 531.

<sup>175</sup> Each of the decisions in the securities cases discussed in Part IV.A. *supra* involved motions to compel responses to interrogatories.

<sup>176</sup> The Rule 45 motion to quash “is similar to a motion for a protective order that discovery not be had under Rule 26(c), and is therefore judged under similar standards.” 9 Moore, *supra* note 72, § 45.50[2], at 45-73 to 45-74.

A protective order should provide that the plaintiff may withhold the identity of a witness in discovery if the witness requests anonymity, provided that the plaintiff discloses the existence of the witness to the defendant and reasonably identifies (i) the subject matter of the information provided, and (ii) how the source came to possess the information provided.

Because a defendant may choose to depose a non-party who has served as a confidential informant even if the informant has not been identified by the plaintiff, the order should also bar the defendant's counsel from inquiring in depositions whether a witness had voluntarily initiated contact with the plaintiff or provided information to the plaintiff or its investigators.

Insuring the flow of information from informants may also require an order that confidentiality agreements between the defendant and former employees do not bar the employees from providing information concerning the misconduct at issue, or that such agreements, to the extent they purport to bar communications concerning alleged wrongdoing, are void as against public policy.<sup>177</sup> A detailed discussion of when such orders are appropriate is beyond the scope of this article.

#### *G. Protection for Witness Interview Notes*

As discussed *supra*, the informant's privilege extends only to the identity of the informant, and shields documents only to the extent they tend to reveal the identity of an informant.<sup>178</sup> Given the similarity of the policies underlying the balancing analysis discussed *supra*, the protection afforded by balancing should not extend further.

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<sup>177</sup> See *In re JDS Uniphase Corp. Sec. Litig.*, 238 F. Supp. 2d 1127, 1137 (N.D. Cal. 2002) (holding that the defendant's confidentiality agreements were "so broad that they cover information that cannot possibly be considered confidential. To the extent that those agreements preclude former employees from assisting in investigations of wrongdoing that have nothing to do with trade secrets or other confidential business information, they conflict with the public policy in favor of allowing even current employees to assist in securities fraud investigations."). See also *United States v. Cancer Treatment Ctrs. of Am.*, 350 F. Supp. 2d 765, 773 (N.D. Ill. 2004) (False Claims Act's "strong policy of protecting whistleblowers who report fraud against the government" barred counterclaim against employee for breach of confidentiality agreement).

<sup>178</sup> See note 108 and accompanying text.

While interests in confidentiality cannot justify withholding suitably redacted witness interview notes, such notes are entitled to protection as attorney work product, whether recorded by an attorney<sup>179</sup> or an investigator.<sup>180</sup> Rule 26(b)(3), which codifies the work product doctrine, ordinarily allows disclosure “upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party’s case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.” While withholding the identity of an informant effectively prevents the defendant from obtaining the “substantial equivalent” of the statement by way of deposition,<sup>181</sup> notes of witness interviews are “opinion work product” entitled to heightened protection. In *Upjohn Co. v. United States*,<sup>182</sup> the Supreme Court held that “[f]orcing an attorney to disclose notes and memoranda of witnesses’ oral statements is particularly disfavored because it tends to reveal the attorney’s mental processes.”<sup>183</sup> Accordingly, “[n]otes and memoranda of an attorney, or an attorney’s agent, from a witness interview are opinion work product entitled to almost absolute immunity.”<sup>184</sup>

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<sup>179</sup> Rule 26(b)(3).

<sup>180</sup> *United States v. Nobles*, 422 U.S. 225, 238-39 (1975) (“attorneys often must rely on the assistance of investigators and other agents in the compilation of materials in preparation for trial. It is therefore necessary that the [work-product] doctrine protect material prepared by agents for the attorney as well as those prepared by the attorney himself.”).

<sup>181</sup> See generally 8 Wright, Miller & Marcus, *supra* note 114, § 2026, at 375. As a general rule, “discovery of work product will be denied if a party can obtain the information he seeks by deposition.” *In re Int’l Sys. and Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1240 (5th Cir. 1982).

<sup>182</sup> 449 U.S. 383 (1981).

<sup>183</sup> *Id.* at 399-400.

<sup>184</sup> *Baker v. General Motors Corp.*, 209 F.3d 1051, 1054 (8th Cir. 2000). See also *In re Cendant Corp. Sec. Litig.*, 343 F.3d 658, 663 (3d Cir. 2003) (core or opinion work product “receives greater protection than ordinary work product and is discoverable only upon a showing of rare and exceptional circumstances”).

## CONCLUSION

Sound public policy warrants protecting the identities of non-testifying confidential informants from disclosure absent a showing of genuine need by the defendant. This principle should be regularly applied in securities and other private attorney general litigation.