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Civil Procedure Survey

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CIVIL PROCEDURE SURVEY

OVERVIEW

The Tenth Circuit decided three timely and significant cases in the course of calendar year 1992. In *Securities and Exch. Comm'n v. Thomas*,[1] the Tenth Circuit, in light of the increasing number of pro se litigants and the problems they create, held a pro se litigant to the same requirements of an ordinary litigant in regards to raising error on appeal. Displaying its diminishing tolerance for the growing number of discovery abuses, the court also levied the harsh, but increasingly more common, sanction of dismissal for a party's non-attendance at his own deposition in *Ehrenhaus v. Reynolds*.[2] Finally, recognizing the popular defendants' tactic of tying up litigation through endless venue transfer motions, the court upheld a venue transfer motion denial in *Scheidt v. Klein*,[3] despite factors that closely suggested transfer might have been appropriate.

Part I discusses the growing number of pro se litigants and the concerns they raise with special attention given to their duties on appeal. Part II looks critically at the options a court has available in order to deal with discovery abusers, most specifically the harsh sanctions of default and dismissal. Part III reviews the methods by which defendants seek changes in venue and the difficult burdens they must bear in order to effect a change or appeal a refusal of change.

I. PRO SE LITIGANTS AND THEIR BURDEN ON APPEAL: *SECURITIES AND EXCH. COMMISSION V. THOMAS*

A. *Background*

1. Pro Se Litigants Generally

With legal services quickly becoming priced beyond the reach of potential litigants, many plaintiffs are deciding to enter the courtroom pro se, or unrepresented. These plaintiffs suffer many disadvantages, procedurally and otherwise. Legal necessities like causation and damages are frequently beyond their thoughts. One who possesses no legal knowledge not only faces problems but also creates problems for others wrestling with his or her inadequacies, which may be significant at the pre-trial, trial and appellate stages.[4] Pro se litigants' pleadings may be filled with examples of technical ignorance, sometimes purposeful, of the rules governing their pleadings, motions and deadlines.[5] Many pro se plaintiffs are litigation seekers, shopping for a favorable forum, im-

1. 965 F.2d 825 (10th Cir. 1992).
2. 965 F.2d 916 (10th Cir. 1992).
3. 956 F.2d 963 (10th Cir. 1992).
4. Paul B. Zuydhoek, *Litigation Against a Pro Se Plaintiff*, 15:4 LITIGATION 13 (1989).
5. For an overview of the rules governing a party's conduct in the federal court system, see Title 28, United States Code — Judiciary and Judicial Procedure.

posing numerous filings for improper purposes such as harassment and remaining blissfully unconcerned with opponents' discovery requests. More than one court has grown plainly indignant with the number of frivolous pro se filings.[6] These litigants have been able to get away with conduct that the court would not have tolerated from a represented party.

This conduct manifests itself most strongly in the appellate arena. The number of pro se appellate filings has increased substantially[7] and many of these are filed without proper support in the form of procedural requirements or substantive accompaniments. One federal court of appeals has voiced its concern over the large number of frivolous pro se appeals.[8] But at the same time, the judiciary is cognizant of the difficult and often lengthy appellate process that a pro se litigant faces.[9] Scholars recognize the handicapped status of such an appellant[10] and to this end, the Clerk for the Federal Circuit publishes and distributes a handbook entitled "Guide to Pro Se Petitioners and Appellants."[11]

Courts evaluate a pro se litigant's conduct in a light dependent upon the stage of litigation. At the complaint stage, the Supreme Court holds pro se complainants to "less stringent standards" than attorneys and that dismissal at the pleading stage is inappropriate unless it is "beyond [a] doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[12] The judiciary recognizes that dismissals for pleading rule violations threaten both a pro se litigant's constitutional right of access to the courts and their statutory right of self-representation in civil cases[13] and will liberally construe complaints in their favor.

> A layman cannot be expected to realize as quickly as a lawyer would that a legal position has no possible merit, and it would be as cruel as it would be pointless to hold laymen who cannot afford a lawyer . . . to a standard of care that they cannot attain even with their best efforts.[14]

This liberal view does not end with the filing of a complaint, as the

6. *See, e.g.*, Bombalski v. United States, No. 91-285, 1991 U.S. Dist. LEXIS 16854, (W.D. Pa. Oct. 29, 1991), *aff'd*, 972 F.2d 1330 (3d Cir. 1992).

7. *See* Statistical Report of the Sixth Circuit as of June 30, 1990, Table 4a (covering specifically the Sixth circuit), *cited in* Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 928 (1990).

8. Gabel v. Lynaugh, 835 F.2d 124 (5th Cir. 1988).

9. Chief Judge Howard T. Markey, The Sixth Annual Judicial Conference of the United States Court of Appeals for the Federal Circuit, 122 F.R.D. 281 (1989).

10. Allen R. Prunty and Mark E. Solomons, Note, *Federal Black Lung Update*, 92 W. VA. L. REV. 849, 880 (1990).

11. Federal Circuit Rules of Practice Before the United States Court of Appeals for the Federal Circuit (1990). For further discussion on the difficulties pro se litigants face, see Burton R. Laub, *The Problem of the Unrepresented, Misrepresented and Rebellious Defendant in Criminal Court*, 2 DUQ. L. REV. 245 (1964); Maurice M. Garcia, Comment, *Defense Pro Se*, 23 U. MIAMI L. REV. 551 (1969).

12. Haines v. Kerner, 404 U.S. 519, 520-21 (1972).

13. *In re* Green, 669 F.2d 779, 785 (D.C. Cir. 1981).

14. Bacon v. American Fed'n of State, County and Mun. Employees, 795 F.2d 33, 35 (7th Cir. 1986).

courts allow pro se complainants to amend their pleadings "fairly freely."[15]

Notice and service are treated differently by the courts. In a case brought by a pro se litigant, twice failing to serve certain defendants forced dismissal of his suit. The court stated:

> [W]hile we are not unmindful of the special difficulties which confront pro se litigants, [Plaintiff], like all parties to litigation, cannot rely on his pro se status as a shield from all mistakes but must at some point bear the consequences of his procedural errors.[16]

Once filing is completed, the pro se plaintiff's status is not yet secured—the D.C. Circuit holds that a pro se party must receive special notice that failure to oppose a summary judgment motion will result in a judgment being entered against the pro se,[17] but the Ninth circuit disagrees.[18] Courts have dismissed pro se cases for failure to prosecute, but in one case only after the pro se failed to appear for deposition four times and was sternly warned of the pending dismissal.[19]

Courts may sanction the pro se litigant in any number of ways.[20] They are more likely to sanction a pro se litigant's misconduct when the litigant had actual notice of the meaning of procedural rules.[21] Even absent notice, however, a pro se litigant is still subject to Federal Rule of Civil Procedure 11 requiring that the party's pleadings be signed, certifying that the pleading is not interposed for any improper purpose.[22] The court is *obligated* to sanction any violations of Rule 11 "whether plaintiff is represented by counsel or, as here, brings his action pro se."[23]

The threshold the litigant must cross before being sanctioned varies. A court recently did not impose sanctions on a complaint even though it was "utterly frivolous", because no court had previously sanctioned the pro se plaintiff before.[24] Another court suspended a sanction order and gave the pro se complainant a chance to explain why she rea-

15. Holmes v. Godin, 615 F.2d 83, 85 (2d Cir. 1980). Any jury demand must generally be made within ten days of service of the last pleading that addresses an issue for which trial by jury is sought. FED. R. CIV. P. 38(b). A pro se plaintiff, however, is not held to strict compliance with that rule. Merritt v. Faulkner, 697 F.2d 761, 766 (7th Cir.), *cert. denied*, 464 U.S. 986 (1983).

16. Michelson v. Merrill Lynch, Inc., 619 F. Supp. 727, 741-42 (S.D.N.Y. 1985).

17. Hudson v. Hardy, 412 F.2d 1091 (D.C. Cir. 1968).

18. Jacobsen v. Filler, 790 F.2d 1362 (9th Cir. 1986).

19. Hepperle v. Johnson, 590 F.2d 609 (5th Cir. 1979). At trial, pro se litigants are treated the same as any other with no relaxation of evidentiary rules. Andrews v. Bechtel Corp., 780 F.2d 124, 140 (1st Cir. 1985), *cert. denied*, 476 U.S. 1172 (1986).

20. One should note that in civil rights actions at least one court has declined to impose sanctions because "[m]any people not trained in the law believe the Constitution provides broader civil rights protection than it in fact does." Redfield v. Wood, No. 1:90-CV-61, 1990 U.S. Dist. LEXIS 16176 (W.D. Mich. Nov. 30, 1990).

21. Mitchell v. Inman, 682 F.2d 886 (11th Cir. 1982).

22. Nixon v. Phillipoff, 615 F. Supp. 890 (N.D. Ind. 1985).

23. Sparrow v. Reynolds, 646 F. Supp. 824, 839 (D.D.C. 1986).

24. Scheck v. General Elec. Corp., No. Civ. A. No. 91-1594, 1992 WL 13219 (D.D.C. Jan. 7, 1992).

sonably believed that her complaint had merit.[25] One court goes so far as to require a "showing of malice" before sanctioning a pro se litigant.[26] Sanctioning is universal and not restricted to the federal district court system.[27]

2. Pro Se Litigants in the Appeals Process

Appellate courts give a great deal of scrutiny to a pro se litigant's filing of actions. Courts require pro se petitioners to take full responsibility for the propriety of their appeals.[28] A pro se's claim that the trial court allowed "a gang of criminals" to prevail was met with sharp criticism from the appellate judge who required the offender to show why double costs and reasonable attorney fees should not be assessed.[29]

It is federally mandated that a party be sanctioned for frivolous appeals.[30] One circuit court cast a jaundiced eye upon a pro se plaintiff's second attempt at their tax protest appeal, since the earlier claim had been rejected and plaintiffs had received a stern warning from that circuit to "throw in the towel."[31] "In the second round of what the [pro se party] apparently would like to make a fifteen round bout, we affirm and impose further sanctions which will hopefully result in a knockout punch to the litigation."[32] The stakes in the appellate process are also higher. Appellate courts uphold sanctions in amounts ranging upward of $100,000,[33] despite the pro se's proceeding *in forma pauperis*.[34] In addition to fees and costs, sanctions range from loss of commissary privileges for prisoners[35] to outright dismissal of the claim.[36]

Pro se appellants are afforded somewhat greater protection than attorney-represented appellants, but this protection is not free-ranging

25. Louisville v. Armored Transp. of California, No. C-90-0266 RCP, 1991 U.S. Dist. LEXIS 2523 (N.D. Cal. Feb. 26, 1991).

26. Cooper v. Adair, 1989 WL 50805 (E.D.N.Y. May 8, 1989), *aff'd*, 930 F.2d 909 (2d Cir. 1991).

27. *See, e.g.*, Casper v. Commissioner of I.R.S., 805 F.2d 902, 906 (10th Cir. 1986) (Tax Court upheld sanctions against unrepresented party).

28. Lewis v. Lenc-Smith Mfg. Co., 784 F.2d 829 (7th Cir. 1986) (requiring pro se to sign notice of appeal).

29. Mullen v. Galati, 843 F.2d 293 (8th Cir. 1988).

30. FED. R. APP. PROC. 38. *See, e.g.*, Lefebvre v. Commissioner, 830 F.2d 417, 420 (1st Cir. 1987). For additional examples of federal courts imposing sanctions on unrepresented parties under this rule, see Eric J.R. Nichols, Note, *Preserving Pro Se Representation in an Age of Rule 11 Sanctions*, 67 TEX. L. REV. 351 (1988)

31. Stelly v. Commissioner, 804 F.2d 868 (5th Cir. 1968)

32. *Id.*

33. Searcy v. Houston Lighting & Power Co., 907 F.2d 562, 565 (5th Cir. 1990) (affirming $109,335.30 sanction). *But see* Chitta v. Nueces County, 816 F.2d 676 (5th Cir. 1987) (per curiam) (refusing to impose sanctions).

34. Day v. Amoco Chems. Corp., 595 F. Supp. 1120, 1126 (S.D. Tex.) (awarding $10,000 in fees), *appeal dismissed*, 747 F.2d 1462 (5th Cir. 1984), *cert. denied*, 470 U.S. 1086 (1985). *In forma pauperis* is defined as "In the character or manner of a pauper." BLACK'S LAW DICTIONARY 712 (6th ed. 1990). Claims that they were poor will be met with the same response. McAfee v. 5th Circuit Judges, 884 F.2d 221, 223 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1141 (1990) (thirty-dollar sanction upheld).

35. Wideman v. McKay, 132 F.R.D. 62, 66 (D. Nev. 1990) (sanction for wholly groundless complaint).

36. Haugen v. Sutherlin, 804 F.2d 490 (8th Cir. 1986).

and pro se petitioners appear to have worn out their welcome at the appellate level. Courts currently impose sanctions without any prior warning[37] and the fact that a plaintiff proceeds pro se does not provide him an "unfettered license to wage an endless campaign of harassment" against his opponents.[38] The fact that a pro se party's error was quite possibly "[a] product of lack of legal sophistication" does not prevent the imposition of sanctions.[39]

One circuit states that "judges should adopt a posture of assisting pro se appellants whenever possible to ensure a just resolution on the merits."[40] Courts of appeal also have a duty to insure that pro se parties do not lose their vested right to an appellate hearing based on an ignorance of the procedural requirements.[41] The right to the appellate process and due process in general is an inherent one and courts must be cautious that when the pro se litigant is vested with these duties, he is not simultaneously stripped of his due process rights.[42]

This mandate, though, has its limits. Failure to file a timely notice of appeal will not be excused merely because of an appellant's pro se status.[43] The fact that a pro se appellant used business days rather than calendar days in calculating the time available for an appeal did not force one agency to bend the rules and view the filing as timely.[44] Errors have been occasionally forgiven, however, as where a pro se litigant filed a notice of appeal without the correct address but attempted preservation of his right to appeal by means of a letter to the district court,[45] and when an appellant filed her appeal with the wrong forum.[46] Errors are less fatal when they occur in brief preparation. The formal appellate brief requirements are not construed so strictly as to make a violation fatal to a pro se litigant's case.[47] At least one court has held that a pro se appellate brief filed by a plaintiff in a different action is admissible.[48]

What of the case, then, where the appellant files a notice of appeal and does not make any arguments of error? The duties of a represented

37. *See, e.g.*, Simmons v. Poppell, 837 F.2d 1243 (5th Cir. 1988) (implying that district court's finding of frivolousness provided ample warning).

38. Pfeifer v. Valukas, 117 F.R.D. 420, 423 (N.D. Ill. 1987). Lack of knowledge is no excuse. A pro se litigant may not argue ineffective assistance on appeal based on his limited resources for meaningful research. United States v. Smith, 907 F.2d 42, 45 (6th Cir.), *cert. denied*, — U.S. —, 111 S. Ct. 521 (1990).

39. Texas v. Gulf Water Benefaction Co., 679 F.2d 85, 87 (5th Cir. 1982)

40. Bryant v. United States Postal Serv., 837 F.2d 1097 (Fed. Cir. 1987) (table, text available in Westlaw).

41. *Balistreri*, 901 F.2d at 696.

42. For a further discussion of this issue, see Julie M. Bradlow, Comment, *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 U. CHI. L. REV. 659 (1988).

43. United States v. Merrifield, 764 F.2d 436, 437 (5th Cir. 1985).

44. Gostomski v. Commodity Trading Corp., Comm. Fut. L. Rep. (CCH) ¶ 23,784 (C.F.T.C. 1987).

45. Myers v. Stephenson, 781 F.2d 1036, 1038-39 (4th Cir. 1986).

46. Reece v. Veteran's Admin., 862 F.2d 321 (Fed. Cir. 1988).

47. *Balistreri*, 901 F.2d at 696.

48. Kassel v. Gannet Co., Inc., 875 F.2d 935 (1st Cir. 1989). *But see* Hardy v. Johns-Manville Sales Corp., 851 F.2d 742 (5th Cir. 1988) (statements from appellate briefs in another action not admissible).

litigant on appeal as they govern the raising of arguments are clear. The appellant must raise issues in the brief and press these issues.[49] The resulting arguments must be distinct and specific in the opening brief.[50] These arguments must give the appellee an opportunity to address them.[51] Ultimately, any argument not raised in the brief to a court of appeals has not been preserved for appeal.[52] One exception to this is when a public interest is involved.[53] Another exists for the issue of ripeness, which need not be argued to have a court of appeals consider the issue on appeal.[54] Proceeding pro se does not seem to create a third exception as courts are unanimous in their rejection of any kind of a duty to manufacture arguments for the appellant, whether that appellant is represented[55] or appearing pro se.[56]

B. *Tenth Circuit Opinion:* Securities and Exch. Comm'n v. Thomas.[57]

1. Facts

Roger Houdek, a defendant and appellant in the case, was enjoined by the district court from future violations of specific antifraud and registration provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.[58] Houdek appealed, claiming nonviolation of the Act.[59] Even though he was represented by counsel, he filed his brief pro se and entered the appellate process as a pro se litigant.[60] Houdek failed to provide a table of contents with page references, a table of cases and other authorities with page references, a statement of subject matter and appellate jurisdiction and a standard of review.[61] Most troublesome, though, was his failure to provide the court with any references to the voluminous record.[62]

2. Holding

The court found several violations of Federal Rule of Appellate Procedure 28 and the local 10th Circuit Rule 28.2.[63] The court recognized

49. Pearce v. Sullivan, 871 F.2d 61 (7th Cir. 1989).

50. Miller v. Fairchild Indus., Inc., 797 F.2d 727 (9th Cir. 1986), *appeal after remand,* 876 F.2d 718 (9th Cir. 1989), *opinion amended and superseded,* 885 F.2d 498 (9th Cir. 1989), *cert. denied,* 494 U.S. 1056 (1990).

51. Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692 (7th Cir. 1991).

52. Picco v. Global Marine Drilling Co., 900 F.2d 846 (5th Cir. 1990).

53. Continental Ins. Cos. v. Northeastern Pharmaceutical. & Chem. Co., 842 F.2d 977 (8th Cir.), *cert. denied* 488 U.S. 821 (1988).

54. Chemical Waste Mgmt. Inc. v. EPA, 869 F.2d 1526 (D.C. Cir. 1989).

55. Friedel v. City of Madison, 832 F.2d 965 (7th Cir. 1987).

56. National Commodity and Barter Ass'n v. Gibbs, 886 F.2d 1240, 1244 (10th Cir. 1989); Brinkmann v. Dallas County Deputy Sheriff Abner, 813 F.2d 744 (5th Cir. 1987).

57. 965 F.2d 825 (10th Cir. 1992).

58. *Id.* at 825-26. Houdek was the appellant in this case and was named as a defendant along with Thomas, who did not appeal.

59. *Id.* at 826

60. *Id.*

61. *Id.*

62. *Id.*

63. 10TH CIR. R. 28.2 states that "[W]ith respect to each issue raised on appeal, the party shall state where in the record the issue was raised and ruled upon.". F. R. APP. P.

its general lenience with pro se appellants but was unwilling to extend this to the immediate defendant's "total disregard" for the rules.[64] The court characterized the Appellant's argument as one that complains of district court wrongs without specifying the errors the court is now called upon to right[65] and then relies upon authority which holds that the court is not required to manufacture a party's argument when the party has not drawn attention to the lower court's errors.[66] The court declined to "sift through" the record and manufacture defendant's argument.[67]

C. *Analysis*

The Tenth Circuit recognized the court's policy of leniency towards those appellants acting pro se.[68] At the outset, however, it made clear the lack of forgiveness toward an attorney's total disregard for the rules[69] and was similarly not impressed by defendant's argument of error and refusal to point out the offending sections.

Looking to its prior decision in *National Commodity and Barter Ass'n. v. Gibbs*,[70] the court reiterated that it is "not required to manufacture a party's requirement on appeal when it has failed in its burden to draw our attention to the error below."[71] It should be noted that other circuit courts hold the same to be true, regardless of the appellant's representation status.[72]

The court reminded the appellant of his obligation to provide the court with the essential references to the record in order to carry his burden of proving the error.[73] This obligation is cited from its decision in *SilFlo, Inc., v. SHFC, Inc.*[74] and comports with other circuits' holdings.[75] At least one other court recognizes that this obligation is also owed to the Appellee in order to give that party an opportunity to address the arguments of error.[76] The *Thomas* court then ruled that it would not "sift through" the record in search of defendant's contentions of error.[77]

The court relied on Tenth Circuit caselaw, deferring to the trial

28 states that "[t]he brief of the appellant shall contain . . . appropriate references to the record."

64. *Thomas*, 965 F.2d at 826.

65. *Id.*

66. *Id.* (*citing* National Commodity & Barter Ass'n v. Gibbs, 886 F.2d 1240, 1244 (10th Cir. 1989)).

67. *Id.* at 827.

68. *Id.* at 825-26.

69. *Id.* at 826.

70. 886 F.2d 1240 (10th Cir. 1989).

71. *Thomas*, 965 F.2d at 826 (quoting *National Commodity*, 886 F.2d at 1244).

72. *See, e.g.*, Rivera v. Benefit Trust Life Ins. Co., 921 F.2d 692 (7th Cir. 1991); Pearce v. Sullivan, 871 F.2d 61 (7th Cir. 1989).

73. *Thomas*, 965 F.2d at 827.

74. 917 F.2d 1507, 1514 (10th Cir. 1990).

75. *See, e.g.*, *Pearce*, 871 F.2d at 61.

76. *Rivera*, 921 F.2d at 692.

77. *Thomas*, 965 F.2d at 827.

court's ruling.[78] The court also provided support for their deference by stating that even if they reviewed the brief, they "were of the firm opinion" that Defendant's arguments would be without merit.[79]

II. HARSH SANCTIONS FOR NONCOMPLIANCE WITH DISCOVERY: *EHRENHAUS V. REYNOLDS*

A. *Background*

Many articles have been published dealing with the abuses of discovery and court reactions to these abuses.[80] A court has several avenues available to them for dealing with the abuses.

1. Protections Against Abuse

Rule 26(g) applies Rule 11 certification requirements to discovery requests, responses and objections. Rule 26(g) imposes an affirmative duty on counsel to engage in pretrial discovery in a responsible manner.[81] The fact that a discovery request, response, or objection is informal will not remove it from Rule 26(g)'s scope.[82] Sanctions under this Rule are *mandatory* when the request, response or rejection is improper or interposed for an improper purpose.[83] These sanctions can range from attorney's fees[84] to dismissal and default.[85] Rule 26(g) provides that "[t]he nature of the sanction is a matter of judicial discretion to be exercised in light of the particular circumstances."[86]

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78. *Pearce*, 871 F.2d at 78 (relying on United States v. Downen, 496 F.2d 314, 319 (10th Cir.), *cert. denied*, 419 U.S. 897 (1974); *SilFlo*, 917 F.2d at 1514).

79. *Thomas*, 965 F.2d at 827.

80. *See, e.g.*, Michael Forrester, Note, *Dismissals for Discovery Abuse - Toward a New Standard in the District of Columbia*, 36 CATH. U. L. REV. 761 (1987); Richard W. Engel, Jr., Note, *Rule 61.01: Discovery Sanctions in Missouri*, 47 J. MO. B. 275 (1991).

81. Chapman & Cole v. Itel Containers Int'l B.V., 116 F.R.D. 550, 557 (S.D. Tex. 1987). The rule mandates the signing of each request for discovery or response or objection therto constituting that the signer has "read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after areasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive."

82. *Cf.* Markel v. Scovill Mfg. Co., 657 F. Supp. 1102 (W.D. N.Y. 1987) (letter seeking recusal, effectively treated as motion, held subject to Rule 11).

83. FED. R. CIV. P. 26(g) advisory committee's note (1983) ("Because of the asserted reluctance to impose sanctions on attorneys who abuse the discovery rules . . . Rule 26(g) makes explicit the authority judges now have to impose appropriate sanctions and requires them to use it.").

84. Hopei Garments, Ltd. v. Oslo Trading Co., Inc., No. 87 Civ. 0932, 1988 WL 25139 (S.D.N.Y. March 8, 1988).

85. Perkinson v. Houlihan's/D.C., Inc., 108 F.R.D. 667, 677 (D.D.C. 1985), *aff'd in relevant part*, 821 F.2d 686, 689 (D.C. Cir. 1987).

86. FED. R. CIV. P. 26(g). Note, however, that this rule does not generally apply to discovery motions. FED. R. CIV. P. 11, 26(g), advisory committee's note (1983). Rule 11 is generally not applicable to discovery papers. Zaldivar v. City of Los Angeles, 780 F.2d 823, 829-30 (9th Cir. 1986). It does, however, apply to discovery motions. *See, e.g.*, Greenberg v. Hilton Int'l Co., 870 F.2d 926 (2d Cir. 1989). In addition, false discovery

Another option to curtail discovery abuse is 28 U.S.C. § 1927.[87] Where rules are not being technically violated, but the proceeding is conducted in bad faith so as to delay or increase costs, § 1927 sanctions will properly be levied.[88] One example involved an attorney who prolonged a non-technical deposition for more than eight full days by improper objections, instructing his client not to answer and by injecting substantive testimony on his client's behalf. Counsel was properly sanctioned under § 1927.[89]

A court may also invoke its inherent powers to curb abuse that is otherwise not punishable under the Federal Rules.[90] Application of a court's inherent power is strongly indicated when counsel destroys potentially discoverable documents, regardless of their specific responsiveness to outstanding discovery requests.[91] Dilatory discovery tactics are also grounds for inherent power sanctions.[92] Inherent powers which include the powers to request silence and decorum in the courtroom are to be used sparingly and not as a substitute for the express powers of the court.[93]

Rule 37 affords courts a great deal of power that should not be diluted by resorting to inherent powers.[94] Rule 37 has essentially the same goals as inherent powers invocation — general deterrence and just compensation for violations.[95] It authorizes the court to penalize four specified categories of misconduct: (1) non-compliance with a discovery order;[96] (2) failure to admit in response to a request for an admission;[97] (3) specified misconduct in connection with depositions, interrogatories and requests for inspection;[98] and (4) failure to participate in framing a Rule 37(f) discovery plan.[99] This Rule, like Rule 26(g), is aimed squarely at preventing discovery abuse and is applied equally to winner and loser.[100]

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responses that later cause other court documents to be false will be sanctionable under Rule 11. Murray v. Dominick Corp. of Can., Ltd., 117 F.R.D. 512, 515-16 (S.D.N.Y. 1987).

87. This statute provides, in pertinent part, that "[a]ny attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct." 29 U.S.C. § 1927 (1988).

88. Yagman v. Baden, 796 F.2d 1165, 1187 (9th Cir. 1986).

89. Brignoli v. Balch, Hardy & Scheinman, Inc., 126 F.R.D. 462, 466 (S.D.N.Y. 1989).

90. Chambers v. NASCO, Inc., — U.S. —, 111 S. Ct. 2123 (1991). *See also*, Roadway Express, Inc., v. Piper, 447 U.S. 752 (1980) (sanctions for discovery abuse upheld under both Rule 37 and the court's inherent powers).

91. National Ass'n of Radiation Survivors v. Turnage, 115 F.R.D. 543, 554 (N.D. Cal. 1987).

92. Lipsig v. National Student Mktg. Corp., 663 F.2d 178, 181-82 (D.C. Cir. 1980).

93. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1987).

94. Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 COLUM. L. REV. 480, 496-97 (1958).

95. *In re* Agent Orange Prod. Liab. Litig., 818 F.2d 210, 212 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988).

96. FED. R. CIV. P. 37(b).

97. *Id.* at 37(c).

98. *Id.* at 37(d).

99. *Id.* at 37(g).

100. *See, e.g.*, Sheets v. Yamaha Motors Corp., 657 F. Supp. 319, 328 (E.D. La. 1987) ($25,000 sanctions imposed against defendant and in favor of plaintiff, whose claims were

The four categories of misconduct operate with certain conditions attached. Rule 37(b) sanctions may be imposed only for disobeying a valid discovery order.[101] One court took a very hard-line approach to discovery deadlines, holding that a hurricane was no excuse for failure to make discovery.[102] Many courts do not look for the deterrent effect and will accept a plausible excuse set forth by the party under sanction.[103] A party's unreasonable failure to admit the truth of any matter requested under Rule 36 gives rise to a remedy only applicable to the client, not counsel.[104]

Sanctions may be sought for three types of discovery abuse, even without a court order: (1) failure to appear at his or her properly noticed deposition; (2) failure to serve answers or objections to properly served interrogatories; and (3) failure to respond in writing to a properly served request for production or inspection.[105] Failure to appear is strictly construed and only causes sanctions to issue when a deponent "literally fails to show up for a deposition session."[106]

Another category sanctionable is a party's failure to serve answers or objections to interrogatories under Rule 33. The sanctions require a "total failure to respond."[107] A partial failure must be remedied with a motion to compel discovery under Rule 37(a).[108]

Rule 37(d) also specifies that a failure to respond to production or inspection request is sanctionable.[109] A response that denies a response is sanctionable,[110] as is a response containing misrepresentations denying the existence of requested materials.[111]

Failure to frame a discovery plan under Rule 37(f) may also be

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separately dismissed with prejudice), *aff'd in part and remanded in part*, 849 F.2d 179 (5th Cir. 1988).

101. Holcomb v. Allis-Chalmers Corp., 774 F.2d 398, 400-01 (10th Cir. 1985). The order in question does not need to be written, and may be oral. Professional Seminar Consultants, Inc. v. Sino Am. Tech. Exch. Council, Inc., 727 F.2d 1470, 1474 (9th Cir. 1984). Even an attorney's promise in open court to produce has been held to be the equivalent of an order. Charter House Ins. Brokers, Ltd. v. New Hampshire Ins. Co., 667 F.2d 600, 604 (7th Cir. 1981). An order, however, cannot otherwise be implied from the district judge's perceived intent. Salahuddin v. Harris, 782 F.2d 1127, 1131-32 (2d Cir. 1986).

102. Downer v. Aquamarine Operators, Inc., 701 S.W.2d 238, 42-43 (Tex. 1985), *cert. denied*, 476 U.S. 1159 (1986).

103. *See, e.g.*, Fjelstad v. American Honda Motor Co., 762 F.2d 1334 (9th Cir. 1985).

104. Apex Oil Co. v. Belcher Co. of New York, Inc., 855 F.2d 1009 (2d Cir. 1988).

105. FED. R. CIV. P. 37(d).

106. *Salahuddin*, 782 F.2d at 1131 (quoting S.E.C. v. Research Automation Corp., 521 F.2d 585, 588-89 (2d Cir. 1975)). In an exceptional situation, however, a bad faith refusal to answer a question at a deposition could be construed as a non-appearance. Plevy v. Scully, 89 F.R.D. 665, 666-67 (W.D.N.Y. 1981).

107. Laclede Gas Co. v. G.W. Warnecke Corp., 604 F.2d 561, 565 (8th Cir. 1979).

108. Fox v. Commissioner, 718 F.2d 251, 254 (7th Cir. 1983). The response to the discovery request must be a meaningful one and a simple letter stating that the party is "unable to respond" is sanctionable. Minnesota Mining and Mfg. Co. v. Eco Chem., Inc., 757 F.2d 1256 (Fed. Cir. 1985).

109. FED R. CIV. P. 37(d).

110. *Minnesota Mining*, 757 F.2d at 1260-61.

111. Fautek v. Montgomery Ward & Co., Inc., 96 F.R.D. 141 (N.D. Ill. 1982).

sanctionable,[112] even though these discovery plans do not appear frequently.[113] Once set out, a failure to participate in the plan fully is sanctionable.[114]

2. Sanctions Against Abuse

Federally prescribed rules exist in order to procure compliance with requests for discovery and to sanction, often harshly, those who fail to comply.[115] Once an action or failure to act has become sanctionable, the decision then is what sanction is applicable, if one is at all. This decision is entrusted to the trial court[116] and the discretion vested with the courts is broad,[117] yet restrained by the requirement that the sanction be "just"[118] and "specifically related to the particular claim or defense at issue in the discovery order."[119]

To determine the justness of sanctions, the appellate court will consider the trial judge's weighing of appropriate factors before imposing sanctions and whether the severity of the sanction is warranted by the conduct.[120] The Supreme Court provided guidance in holding that discovery sanctions are not to be imposed when the violation is due to a real inability to comply.[121] Other courts have made it clear that the inability may not be self-imposed.[122] The test for dismissal is not particularly harsh and only determines whether the district judge abused his discretion and whether the discovery abuse was in bad faith, deliberately intentional or willful.[123] Even the fact that a less strenuous sanction than dismissal could have been more appropriate will not make dismissal an abuse of the court's discretion.[124]

The types of sanctions provided for are numerous.[125] Fees and ex-

112. FED. R. CIV. P. 37(g).

113. *See* Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 134 (5th Cir. 1987) (noting fewer than 50 reported cases of courts implementing 26(f) discovery plans).

114. Nemmers v. United States, 681 F. Supp. 567 (C.D. Ill. 1988).

115. FED. R. CIV. P. 26(g), 37. For a general discussion of the application of these rules, see GREGORY P. JOSEPH, Sanctions: The Federal Law of Litigation Abuse §§ 25(e)(3), 40(a) (1989 & Supp. 1991); Maurice Rosenberg, *supra* note 94 at 485-86.

116. Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co., 110 F.R.D. 363, 367 (D. Del. 1986).

117. Fonseca v. Regan, 734 F.2d 944, 947 (2d Cir.), *cert. denied*, 469 U.S. 882 (1984).

118. Professional Seminar Consultants, Inc. v. Sino Am. Technology. Exch. Council, Inc., 727 F.2d 1470, 1474 (9th Cir. 1984).

119. *Id.*

120. *In re* Rubin, 769 F.2d 611, 615 (9th Cir. 1985).

121. National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 640 (1976) (per curiam). For an example of strict enforcement of this rule, see Searock v. Stripling, 736 F.2d 650, 653-54 (11th Cir. 1984).

122. Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1521-22 (11th Cir. 1986).

123. Boogaerts v. Bank of Bradley, 961 F.2d 765, 768 (8th Cir. 1992).

124. *Id.*

125. FED. R. CIV. P. 37. These sanctions may be: (1) an order specifying that designated facts be taken as established for purposes of the action; (2) an order precluding litigation of certain issues; (3) an order precluding the introduction of certain evidence; (4) an order striking out pleadings or part thereof; (5) an order staying further proceedings pending compliance with an order that has not been obeyed; (6) dismissal of the action in

penses, common sanctions, may be awarded against both clients[126] and attorneys[127]. Preclusion awards, those that bar a litigant from court, however, are carefully imposed by the courts.[128] They may either preclude a party from asserting their otherwise valid claim or defense,[129] or they may preclude a party from introducing a piece of evidence.[130] A court may also deem matters at issue admitted.[131] Another sanction available is that of contempt of court, which is a harsh measure and available only when a showing can be made that an order has been violated.[132] Contempt is often used by the courts as an alternative to entry of a default or dismissal.[133]

The most severe sanctions, and the ones of import here, are those of dismissal or default. These are draconian sanctions,[134] properly imposed only as last resort.[135] The Tenth Circuit holds that dismissal is a severe sanction applicable only in extreme circumstances and should be used as a weapon of last, rather than first, resort.[136] These sanctions are not appropriate when the violation "has been due to inability, and not to willfulness, bad faith or any fault of [the party]."[137] Courts construe this to require a showing of willfulness or bad faith before imposing the harsh sanctions of dismissal or default.[138] It must also be shown that less drastic alternatives will not achieve the necessary deterrent effect.[139] Dismissal or default are to be imposed only when there have been blatant, deliberate violations of orders or an established pattern of discovery abuse.[140] A single wilful violation or patterned noncompliance that does not cause serious prejudice is unlikely to sustain these

full or in part; (7) entry of a default judgment on some or all claims; (8) an order treating as contempt of court the failure to obey any discovery order except an order to submit to a physical or mental examination; (9) an award of reasonable expenses incurred in (i) making a successful, or opposing an unsuccessful motion to compel; (ii) proving at trial any matter which an opponent failed to admit in response to a request; (iii) moving for sanctions. *Id.*

126. J.D. Marshall Int'l, Inc. v. Redstart, Inc., 656 F. Supp. 830, 838 (N.D. Ill. 1987)

127. Home-Pack Transp., Inc. v. Donovan, 39 Fed. R. Serv. 2d (Callaghn) 1063, 1064-65 (D. Md. May 21, 1984) (magistrate's opinion).

128. Ferrara v. Balistreri & DeMaio, Inc., 105 F.R.D. 147, 151 (D. Mass. 1985).

129. *See, e.g.*, Libbi. v. Sears, Roebuck and Co., 107 F.R.D. 227, 229 (E.D. Pa. 1985) (party who refused to answer interrogatory concerning claim precluded from asserting that claim).

130. *See, e.g.*, Penk v. Oregon State Bd. of Higher Educ., 816 F.2d 458, 466 (9th Cir.), *cert. denied*, 484 U.S. 853 (1987) (court excluded statistical experts).

131. Rogers v. Chicago Park Dist., 89 F.R.D. 716, 719 (N.D. Ill. 1981).

132. Schlepper v. Ford Motor Co., 585 F.2d 1367, 1371 (8th Cir. 1978).

133. *See, e.g.*, Xaphes v. Merrill Lynch, Inc., 102 F.R.D. 545, 551-52 (D. Me. 1984) (assessing a $10,000 contempt fine).

134. *National Hockey League*, 427 U.S. at 643.

135. Poulis v. State Farm Fire & Cas. Co., 747 F.2d 863, 867-68, 870 (3d Cir. 1984).

136. Gocolay v. New Mexico Fed. Sav. & Loan Ass'n, 968 F.2d 1017, 1021 (10th Cir. 1992).

137. *National Hockey League*, 427 U.S. at 640.(quoting Societe Internationale v. Rogers, 357 U.S. 197, 212 (1958)).

138. *See, e.g.*, Ali v. Sims, 788 F.2d 954, 958 (3d Cir. 1986); Pressey v. Patterson, 898 F.2d 1018, 1023-24 (5th Cir. 1990) (requiring showing of bad faith).

139. *See, e.g.*, Batson v. Neal Spelce Assoc., Inc., 805 F.2d 546, 549-50 (5th Cir. 1986).

140. United States v. DiMucci, 110 F.R.D. 263, 266-67 (N.D. Ill. 1986).

drastic sanctions.[141]

In 1991, however, Judge Easterbrook of the Seventh Circuit convinced everyone that a new age of sanctioning had arrived. Sustaining a default judgment entered for tardy production of documents, he warned:

> For a long time courts were reluctant to enter default judgments, and appellate courts were reluctant to sustain those that were entered. Courts emphasized that litigants are entitled to decisions on the merits, and that default is a harsh sanction. Those times are gone . . . [D]istrict judges have become more aggressive in using their ultimate weapon to promote the efficient conduct of litigation. More power to them.[142]

A caution should be given here that the terms "dismissal" and "default" are not interchangeable. A plaintiff's failure to comply with discovery orders is properly sanctioned by dismissal of the suit and a defendant's failure is sanctioned by entry of a default judgment.[143]

A discovery decision or sanction propounded under any of the above powers is generally not appealable because it is not a final order within the meaning of 28 U.S.C. § 1291 and any party wishing to appeal such a decision must first defy the trial court's order and suffer contempt.[144] While discovery orders are generally not reviewable by mandamus, one court has issued a writ of mandamus to review a discovery order.[145] The collateral order doctrine[146] is normally not brought into play by a discovery order as these orders can generally be reviewed effectively on appeal from a final judgment.[147]

B. *Tenth Circuit Opinion:* Ehrenhaus v. Reynolds[148]

1. Facts

Appellant Reynolds filed a complaint in the United States District Court for the District of Colorado alleging securities fraud.[149] The appellees, as part of pre-trial discovery, deposed Ehrenhaus for three days during which he repeatedly attempted to invoke the attorney-client priv-

141. *See, e.g.*, Fjelstad v. American Honda Motor Co., 762 F.2d 1334 (9th Cir. 1985).

142. Metropolitan Life Ins. Co. v. Estate of Cammon, 929 F.2d 1220, 1224 (7th Cir. 1991).

143. Newman v. Metropolitan Pier & Exposition Auth., 962 F.2d 589, 591 (7th Cir. 1992) (Posner, J.).

144. *See, e.g.*, Sedlock v. Bic Corp., 926 F.2d 757-59 (8th Cir. 1991).

145. *In re* Von Bulow, 828 F.2d 94, 97 (2d Cir. 1987). *But see In re* Weisman, 835 F.2d 23, 27 (2d Cir. 1987) (refusing to issue writ of mandamus).

146. This doctrine permits an appeal from an interlocutory order, one that determines an issue completely separate from the merits of the action and which could not be given effective review on appeal from a final subsequent judgement. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-47 (1949).

147. Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978). *But see* Corporation of Lloyd's v. Lloyd's, 831 F.2d 33, 34 (2d Cir. 1987) (applying collateral order doctrine to allow appeal from order denying discovery).

148. 965 F.2d 916 (10th Cir. 1992).

149. *Id.* at 918.

ilege.[150] Ehrenhaus then alleged disagreement with his counsel and counsel moved to withdraw.[151] This motion was never ruled upon.[152] The remainder of Ehrenhaus's deposition was rescheduled and prior to the deposition the district court ordered that the deposition take place in the federal courthouse so that the judge could contemporaneously rule on any attorney-client privilege assertions.[153] A warning was also given to Ehrenhaus through his counsel that if he failed to attend the deposition, a motion would be expected from appellees for dismissal.[154] Ehrenhaus moved unsuccessfully for a protective order, once again delaying discovery.[155] The ruling magistrate warned counsel for Ehrenhaus that he would be subjecting himself to sanctions if he did not attend.[156]

2. Holding

Ehrenhaus did not appear at the deposition and appellees moved to have the complaint dismissed with prejudice.[157] The motion was granted and survived a hearing on the motion.[158] An order was ultimately issued dismissing the complaint with prejudice, with specific findings that Ehrenhaus had willfully violated the court's discovery order.[159] The Tenth Circuit found that the deciding judge had given appropriate thought to the factors necessary to affirm the district court's dismissal. The court set the framework for the case by holding the dismissal of a case to be within the court's discretion if it concludes that dismissal alone would satisfy the interests of justice.[160]

3. Analysis

The trial court relied upon Rule 37(b)(2) as grounds for dismissal of an action if one party fails to obey a discovery order under Federal Rule of Civil Procedure 37(b)(2)(c).[161] Because the trial court had this permission, the court applied the abuse of discretion standard in reviewing the district court's ruling.[162] The court did, however, recognize that dismissal is an extreme sanction appropriate only where the offense has been willful.[163] Additionally, the necessity of using dismissal only as a last resort and the attendant defeat of a litigant's rights that goes with the dismissal were recognized.[164]

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.* at 918-919.
154. *Id.* at 919.
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.* at 918.
161. *Id.* at 920.
162. *Id.*
163. *Id.*
164. *Id.* (citing Meade v. Grubbs, 841 F.2d 1512, 1520 n.6 (10th Cir. 1988)). This

The court then applied caselaw restricting the trial judge's discretion in imposing a sanction to requiring imposition of one that is both "just" and "related to the particular claim at issue in order to provide discovery."[165]

The court established five factors to be considered in determining justness, relying on past Tenth Circuit established conditions.[166] The first factor is the degree of actual prejudice to the defendant.[167] The court deferred, as it did with all factors, to the trial court's finding of prejudice in the form of delay and increasing attorney's fees.[168] Another factor examined is the amount of interference with the judicial process that arose from the violation.[169] The court found Ehrenhaus's willful noncompliance a flouting of the court's authority and properly supporting sanctions under this factor.[170] The third factor is the culpability of the litigant.[171] The court found the explicit consideration given this factor by the trial judge noted the bad faith and willfulness of Ehrenhaus's conduct.[172] These three factors were previously applied by the Tenth Circuit in *Ocelot Oil Corp. v. Sparrow Industries*.[173]

A fourth factor was imported from *Willner v. University of Kansas*,[174] an earlier case decided by the Tenth Circuit. This factor was advance warning given that dismissal was a likely sanction for noncompliance with the order.[175] Here Ehrenhaus was put on notice that his failure to attend would likely lead to a motion for dismissal.[176] The court explicitly found this sufficient to satisfy the fourth factor.[177]

The final factor, again gleaned from *Ocelot*, is the efficacy of lesser sanctions.[178] This factor was not satisfied as persuasively as the court would prefer. In dicta, the court construed the district judge's comments, equating them with the judge's belief that less than the full range of sanctions was available to him.[179] Of some satisfaction to the Tenth Circuit, however, was the belief that the dismissing judge knew he had the opportunity to deny the motion.[180]

Though the satisfaction of these factors does not equal the passing of a threshold test, the court should attempt a recording of this evalua-

caution is alive and well in the Tenth Circuit. *See* Gocolay v. New Mexico Fed. Sav. & Loan Ass'n., 968 F.2d 1017 (10th Cir. 1992).

165. *Ehrenhaus*, 965 F.2d at 920-21 (citing Insurance Corp. of Ireland v. Campagnie des Bauxites de Guinee, 456 U.S. 694 (1982)).

166. *Ehrenhaus*, 965 F.2d at 921.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Ocelot Oil Corp. v. Sparrow Indus., 847 F.2d 1458 (10th Cir. 1988).

174. Willner v. University of Kan., 848 F.2d 1023, 1030 (10th Cir. 1988).

175. *Ehrenhaus*, 965 F.2d at 921.

176. *Id.*

177. *Id.*

178. *Id.* (applying *Ocelot*, 847 F.2d at 1465).

179. *Id.*

180. *Id.* at 921-22.

tion.[181] This test is thorough as relating to private interests in the litigation at hand. At least one circuit, the Ninth Circuit, has adopted a three-part test looking only to prejudice, warning and consideration of other sanctions.[182] The Tenth Circuit may wish in the future to look at these situations similar to the manner of the Ninth Circuit. The Ninth Circuit looks to public interest factors such as the expeditious resolution of litigation and the courts' need to manage the docket, but also to the public policy of favoring disposition of cases on their merits.[183]

III. FORUM NON CONVENIENS DECISIONS, 1404(a) TRANSFERS AND THEIR APPEALABILITY: *SCHEIDT V. KLEIN*

A. *Background*

A *forum non conveniens* claim is different from one of transfer. Under the doctrine of *forum non conveniens*, a court dismisses the case rather than transferring it, allowing the plaintiff to simply refile elsewhere. A motion may also be brought under 28 U.S.C. § 1404(a) to transfer.[184] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."[185] Cases are no longer subject to dismissal under *forum non conveniens* if there is an alternative forum within the United States Federal Court System.

Forum non conveniens dismissals are harsher than § 1404(a) transfers.[186] For that reason, a greater degree of inconvenience is required for a *non conveniens* action to take place.[187] Consequently one district court in the Tenth Circuit has gone so far as to use *forum non conveniens* only in exceptional cases.[188] A statute of limitations may run before the plaintiff is able to refile and potentially stifling limitations exist as to where a plaintiff may refile under federal venue statutes because it may only be filed where the action was capable of originally being brought.[189]

The Supreme Court has listed the factors of both private and public interest that courts should consider when making *forum non conveniens* decisions.[190] The private interests delineated include the accessibility of evidence, ability to compel the attendance of witnesses, costs of trans-

181. *Id.* at 921.
182. Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067 (6th Cir. 1990).
183. *See* Adriana Intern. Corp. v. Lewis & Co., 913 F.2d 1406 (9th Cir. 1990).
184. 28 U.S.C. § 1404(a) (1988).
185. *Id.* § 1404.
186. For a discussion of transfers under 1404(a), see Michael J. Waggoner, *Section 1404(a), Where It Might Have Been Brought: Brought By Whom?*, 1988 B.Y.U. L. REV. 67 (1988).
187. SEC v. Savoy Indus., Inc., 587 F.2d 1149, 1154 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979).
188. Pioneer Prop., Inc. v. Martin, 557 F. Supp. 1354, 1361-62 (D. Kan. 1983).
189. For a discussion of federal venue possibilities, see David E. Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH L. REV. 82 (1968).
190. Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947).

porting witnesses, a view of the site and the enforceability of a judgment.[191] Factors of public interest to be considered include court congestion, burden of jury duty, local interest in the litigation, avoidance of conflicts-of-law issues and unfamiliar laws.[192] In the Court's words, "unless the balance [of private factors] is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed."[193] Courts are not to emphasize any one factor too heavily for fear of losing flexibility.[194]

These decisions often place a substantial burden on the party whose case has been dismissed or transferred. It is important to note that an order granting or denying a transfer under § 1404(a) is generally not in itself appealable, unless certified for interlocutory appeal under 28 U.S.C. § 1292(b) or a grant of a writ of mandamus.[195]

An appeal from the forum decision is not made without guidance. Federal courts may not attempt to determine what a state court would consider an appropriate forum[196] and may not, after dismissal, enjoin plaintiffs from filing an identical action in state court.[197] The doctrine of *forum non conveniens* is alive and well at the state court level where one state's courts may provide a more convenient site for litigation than that of the dismissing state.[198]

In 1981, the Supreme Court, in *Piper Aircraft v. Reyno*, found the doctrine of *forum non conveniens* applicable where the alternative forum was a foreign nation.[199] *Piper* provided guidance as to the standard to be used on appeal in reviewing the district court's decision, pronouncing it to be the clear abuse of discretion standard.[200] A court will grant substantial deference[201] where it is clear that the lower court considered all the relevant public and private factors as enunciated in the caselaw.[202] Some states have compiled statutory *forum non conveniens* fac-

191. *Id.* at 508.

192. *Id.* at 508-09.

193. *Id.* at 508.

194. Piper Aircraft v. Reyno, 454 U.S. 235, 249-50 (1981).

195. Cauwenberghe v. Biard, 486 U.S. 517 (1988). *But see* Kontoulas v. A.H. Robbins Co., 745 F.2d 312 (4th Cir. 1984) (holding order denying forum non conveniens dismissal appealable). For further discussion, see David E. Steinberg, *The Motion to Transfer and the Interests of Justice*, 66 NOTRE DAME L. REV. 443, 472-78 (1990).

196. Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 148 (1988).

197. *Id.* at 140.

198. *See, e.g.*, McClain v. Illinois Cent. Gulf R.R. Co., 520 N.E.2d 368, 374 (Ill. 1988) (dismissing case under *forum non conveniens* doctrine where Tennessee was strongly favored as a more convenient forum).

199. *Piper*, 454 U.S. at 235. For discussion of an international plaintiff's experience, *see* Jacqueline Duval-Major, Note, *One-Way Ticket Home: The Federal Doctrine of Forum Non Conveniens and the International Plaintiff*, 77 CORNELL L. REV. 650 (1992).

200. *Piper*, 454 U.S. at 257.

201. For a discussion of Supreme Court decisions requiring virtually complete deference to lower court rulings on forum non conveniens, see Hon. Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 748-54 (1982).

202. *Piper*, 454 U.S. at 257. *Cf.* Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 832 (1985) (such decisions by the trial court are subject to only cursory appellate scrutiny).

tors removing discretion from the trial court.[203]

The standard for finding error in refusing to transfer an action under § 1404(a) is also a "clear abuse of discretion."[204] When a motion to transfer has been filed, the moving party bears the burden of establishing the inconvenience of the present forum.[205] The plaintiff, having chosen the forum, will be favored in this action.[206] A court will not merely shift inconvenience from one party to another,[207] for what is convenient for one party will often prove to be equally inconvenient for their adversary.

B. *Tenth Circuit Opinion:* Scheidt v. Klein[208]

1. Facts

This appeal stems from a case involving fraud and breach of contract claims against the appellant involving his representation of the plaintiff in Tax Court proceedings.[209] Defendant filed two motions, both denied, seeking a change in venue pursuant to 28 U.S.C. § 1404(a).[210] The defendant asserted that the majority of contemplated witnesses resided in Florida, the pertinent documentary evidence was located in Florida, the conduct occurred in Florida and was to be assessed under Florida substantive law. For all these reasons, the less expensive and more convenient forum for the litigation in his view was in Florida.[211]

2. Holding

Defendant did not prove that (1) the witnesses were unwilling to come to trial in Oklahoma City, (2) deposition testimony would be unsatisfactory, or (3) that the use of compulsory process would be necessary.[212] Defendant also alleged that boxes of documents existed would have to be produced in support of the defense.[213] The court was unimpressed by these arguments and did not find error in the refusal to change venue.

C. *Analysis*

The first contention of error was the district court's denial of the

203. *See, e.g.*, N.Y. Bus. Corp. Law § 1314 (McKinney 1986).
204. Metropolitan Paving Co. v. International Union of Operating Eng'rs, 439 F.2d 300, 305 (10th. Cir. 1971).
205. Chrysler Credit Corp. v. Country Chrysler, Inc. 928 F.2d 1509, 1515 (10th Cir. 1991).
206. William A. Smith Contracting Co. v. Travelers Indem. Co., 467 F.2d 662, 664 (10th Cir. 1972).
207. ROC, Inc. v. Progress Drillers, Inc., 481 F. Supp. 147, 152 (W.D. Ok. 1979).
208. 956 F.2d 963 (10th Cir. 1992).
209. *Id.* at 965.
210. *Id.* 28 U.S.C. § 1404(a) (1988) authorizes a district court to transfer a case "to any other district or division where it might have been brought."
211. *Scheidt*, 956 F.2d at 965.
212. *Id.* at 966. *See ROC*, 481 F. Supp. at 152.
213. *Scheidt*, 956 F.2d at 966.

appellant's motions for venue transfer under § 1404(a).[214] The court made it clear that three distinct and challenging hurdles must be cleared before dismissal would be affirmed.[215]

The first condition precedent to a finding of error in the refusal to transfer under § 1404(a) is that there be a clear abuse of discretion at the trial level.[216] This opinion appears to be widely-held and well-settled.[217] In the instant case, the Tenth Circuit found that the district court did not abuse its discretion.[218] Second, the movant bears the burden of establishing the inconvenience of the existing forum.[219] Finally, unless the balance strongly favors the party attempting transfer, the forum in which the plaintiff chose to file should not be changed.[220]

The court, without the benefit of an individual analysis of these factors pointed out that the collective weight of these factors favored the plaintiff in this case. The defendant's assertions for venue transfer have listed, apparently the same ones suggested previously by the Tenth Circuit in *Chrysler Credit Corp. v. Country Chrysler, Inc.*.[221] Defendant's first contention was that the majority of contemplated witnesses reside in Florida.[222] The court did not argue with this, but rather looked unsuccessfully for one of four factors to be present: an indication of quality of materiality of the testimony of the Florida witnesses, a showing that affected witnesses were unwilling to come to trial at the designated venue, a showing that deposition testimony would be unsatisfactory, or a showing of need for compulsory process.[223] They found that the defendant's "meager showing" provided none of these.[224]

Defendant next contended that the relative documentary evidence was located primarily in Florida.[225] He never explained or substantiated why these documents could not be reviewed in Florida and the documents of import shipped to Oklahoma, the original venue site.[226] The fact that he did not describe or identify these documents did not help his case.

Defendant's weakest contention for transfer was that Florida substantive law was to be applied in the case which might more easily be done if the case were heard in Florida.[227] The court summarily dis-

214. *Id.* at 965.
215. *Id.*
216. *Id.* (citing *Metropolitan*, 439 F.2d at 305).
217. *See* Christine Melady Morin, Note, Review and Appeal of Forum Non Conveniens and Venue Transfer Orders, 59 GEO. WASH. L. REV. 715 (1991).
218. *Scheidt*, 956 F.2d at 966.
219. *Id.* at 965 (citing Chrysler Credit Corp. v. Country Chrysler, Inc., 928 F.2d 1509, 1515 (10th Cir. 1991)).
220. *Id.* (citing William A. Smith Contracting Co. v. Traveler's Indem. Co., 467 F.2d 662, 664 (10th Cir. 1972)).
221. *Chrysler Credit Corp.*, 928 F.2d at 1516.
222. *Scheidt*, 956 F.2d at 965.
223. *Id.* at 966 (applying *ROC, Inc.*, 481 F. Supp. at 152).
224. *Id.*
225. *Id.* at 965.
226. *Id.* at 966.
227. *Id.* at 965.

missed this contention because of the simplicity of the legal issues involved in the common law fraud and breach of contract claims.[228] Defendant's final contention was that Florida would be the less expensive and more convenient forum.[229] The court believed that the change of venue to Florida would do no more than shift the inconvenience from the defendant to the plaintiff. The Tenth Circuit continued to hold a mere shift of inconvenience is impermissible[230] and that the district court did not abuse its discretion in denying the transfer motion. *Scheidt* is in agreement with the Supreme Court's policy of granting virtually complete deference to the trial court in this matter.[231]

CONCLUSION

The cases surveyed illuminate the judiciary's increased awareness of the need to manage its docket effectively, while at the same time recognizing the need for litigation on the merits of cases. Improper tactics and frivolous motions are now being harshly dealt with by the Tenth Circuit.

As *Thomas* pointed out, courts are growing increasingly intolerant of the large number of frivolous pro se lawsuits filed and are rapidly stripping away the cloak of immunity that formerly existed protecting pro se litigants from their inadequacies.

Discovery is also coming under heightened scrutiny by the Tenth Circuit. Horror stories of discovery abuse are common and at least one major motion picture has been written about abusive and illegal discovery tactics in a product liability action.[232] Courts are now making it known to all parties involved that a dismissal or default judgment will be ordered more freely and earlier than it would have been several years ago. *Ehrenhaus* is just one of the first cases in the Tenth Circuit reflecting this.

The *Scheidt* case illustrated the courts' impatience with venue transfers. These no longer remain the viable delay-inducing, cost-increasing trial tactics they once were. The requirements are now being strictly adhered to and the defendant must have a compelling argument for overturning the plaintiff's choice of forum.

These three cases represent only a tiny fraction of the decisions touching on procedural issues decided this year by the Tenth Circuit. Yet, these cases, as a whole, indicate a judiciary possessing a heightened awareness of and reduced tolerance for improper conduct within its hallowed halls.

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228. *Id.* at 966.
229. *Id.* at 965.
230. *Id.* at 966 (citing *ROC, Inc.*, 481 F. Supp. at 152).
231. *See supra* text accompanying notes 203-04.
232. Class Action (Twentieth Century Fox 1991) (involving auto manufacturer's intentional obfuscation of critical discovery papers revealing knowledge of defects).