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TRENDS IN PROTECTIVE ORDERS UNDER FEDERAL RULE
OF CIVIL PROCEDURE 26(c): WHY SOME CASES
FUMBLE WHILE OTHERS SCORE

JACQUELINE S. GUÉNÉGO

INTRODUCTION

As the stakes in modern civil litigation grow larger, discovery exploitation and abuse have become commonplace in the American legal system.¹ Although the liberal discovery rules² were adopted in the hopes that full disclosure of relevant information would implement the goals of Federal Rule of Civil Procedure 1,³ ironically, these rules have become the means of undermining Rule 1's fundamental goal of securing "the just, speedy, and inexpensive determination of every action."⁴

The Federal Rules, however, do provide parties or other persons involved in discovery with a means of curtailing discovery. Under Rule 26(c),⁵ a federal court may grant a protective order limiting,⁶ eliminat-

1. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34-35 (1984); Amendments to Fed. R. Civ. P., 446 U.S. 995, 999 (1980) (Powell, J., dissenting); Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 1 (1983) [hereinafter Marcus, *Myth and Reality*]; Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219, 219 (1978) [hereinafter Pollack, *Discovery Abuses*]; Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order*, 60 N.Y.U. L. Rev. 1137, 1137 (1985) [hereinafter Note, *Dissemination of Discovered Material*]; Note, *The Emerging Deterrence Orientation in the Imposition of Discovery Sanctions*, 91 Harv. L. Rev. 1033, 1033 (1978) [hereinafter Note, *Deterrence Orientation*].

2. See Fed. R. Civ. P. 26-37.

3. See Pollack, *Discovery Abuses*, *supra* note 1, at 220; McLaughlin, *Discovery and Admissibility of Expert Testimony*, 63 Notre Dame L. Rev. 760, 761 (1988); Note, *Deterrence Orientation*, *supra* note 1, at 1033.

4. Fed. R. Civ. P. 1; see Marcus, *Myth and Reality*, *supra* note 1, at 1; Pollack, *Discovery Abuses*, *supra* note 1, at 221-22; Note, *Dissemination of Discovered Material*, *supra* note 1, at 1142; Note, *Deterrence Orientation*, *supra* note 1, at 1036.

5. Fed. R. Civ. P. 26(c). Rule 26(c) provides in pertinent part:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential, research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

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

6. See Fed. R. Civ. P. 26(c)(2)-(5), (7)-(8).

ing,⁷ or shielding discovery from public disclosure⁸ upon a showing of "good cause."⁹ Because of its inherent ability to ease what could otherwise be vexatious discovery, Rule 26(c) is now implemented with increasing frequency.¹⁰

To obtain a protective order, the moving party has the burden of demonstrating good cause.¹¹ Rule 26(c), however, does not define "good cause."¹² Nor does the rule provide any authority or guidelines for lifting or modifying a protective order.¹³ Thus, practitioners and judges are faced with the challenge of applying a single, vaguely-defined¹⁴ standard to a myriad of procedural and factual settings. This has resulted in inconsistent rulings.

While inconsistencies are not harmful per se, they can lead to detrimental results. In protective order litigation, inconsistencies waste judicial resources by forcing the parties and the courts to litigate what should be commonplace discovery issues. Notwithstanding the entry or denial of the protective order, this additional litigation increases costs, slows down the judicial process, and generally subverts Rule 1's goals.

Without question, clarity in the area of protective orders is needed. This Note presents a thorough study of the relevant factors assessed by courts when faced with a motion to enter, lift, or modify a protective order, based upon a comprehensive review of reported and unreported

7. See Fed. R. Civ. P. 26(c)(1).

8. See Fed. R. Civ. P. 26(c)(5), (7)-(8). In addition, the rule's preamble provides that the court "may make any order which justice requires." Fed. R. Civ. P. 26(c).

9. Although "good cause" is a well established legal term, it lacks precise definition. Simplistically, the phrase means a "[s]ubstantial reason, one that affords a legal excuse." Black's Law Dictionary 623 (5th ed. 1979). The phrase "depends upon [the] circumstances of [the] individual case" and "its existence lies largely in [the] discretion of [the] . . . court." *Id.* Because it is difficult to clarify in concrete terms, "its meaning must be determined not only by [the] verbal context of statute in which [the] term is employed but also by [the] context of [the] action and procedures involved in type of case presented." *Id.* "[I]t generally signifies a sound basis or legitimate need to take judicial action." *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987).

10. See Marcus, *Myth and Reality*, *supra* note 1, at 1-2; Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 Harv. L. Rev. 1085, 1089 (1981) [hereinafter Note, *Nonparty Access*]; Arthurs, *Defendants Fight Back on Data Sharing*, Legal Times, July 16, 1984, at 1, col. 3 [hereinafter Arthurs, *Defendants Fight Back*]. In fact, protective orders are so prevalent that the Manual for Complex Litigation not only recommends use of the protective order in complicated cases, it includes a sample confidentiality order. See Manual for Complex Litigation, Second, §§ 33.42-43, at 316-19 (1985); see, e.g., *Alexander Grant & Co.*, 820 F.2d at 356 (as the Manual for Complex Litigation states, umbrella protective orders greatly ease the burdens associated with discovery); *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122-23 & nn.18-19 (3d Cir.) (same), *remanded* 113 F.R.D. 86 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

11. See Fed. R. Civ. P. 26(c).

12. See *id.*

13. See *id.* Despite the lack of authority from the rule itself, all courts agree that a court-entered protective order can be modified by parties to the action or by other persons. See *infra* notes 131-132 and accompanying text.

14. See *supra* note 9.

federal circuit and district court decisions. Part I examines the factors that courts consider when only one party moves for a protective order. Part II assesses the phenomenon of stipulated blanket protective orders and examines what, if any, showing is needed to justify the entry of these orders. Part III explores the problems that arise when courts are faced with a motion to modify or lift protective orders. This Note concludes that while there are no hard and fast rules to establish good cause for the entry of a protective order, courts appear ready and willing to look at a wide array of factors to determine exactly what "justice requires."¹⁵

I. UMBRELLA PROTECTIVE ORDERS OBTAINED BY MOTION

Although many protective orders are entered by stipulation,¹⁶ a significant number are sought by motion.¹⁷ In such contested motions, most courts reject "broad allegations of harm" and, instead, require that a movant demonstrate a particular need for the protection "by specific examples or articulated reasoning."¹⁸ The harm illustrated must be "significant, [and] not a mere trifle."¹⁹

A. Obtaining Protection for Non-Confidential Information: The Corporate Defendant's Nemesis

1. Serving Rule 1 Interests

When corporations are hailed into court, they are well aware that many corporate secrets may be revealed as a result of discovery.²⁰ The disclosure of information to a competitor, or the public dissemination of discovered information in a highly charged product liability case, can make a party reluctant to swap sensitive material when presented with a

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

16. See *infra* notes 116-117 and accompanying text.

17. See Marcus, *Myth and Reality*, *supra* note 1, at 2. For a definition of motion practice, see *infra* note 119.

18. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.), *remanded*, 113 F.R.D. 86 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); see *National Hand Tool Corp. v. United States*, No. 89-11-00636, 1990 Ct. Int'l Trade LEXIS 320, at *6 (Ct Int'l Trade July 23, 1990); *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990); *Hawley v. Hall*, 131 F.R.D. 578, 584 (D. Nev. 1990); *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 129 F.R.D. 483, 484 (D.N.J. 1990); *Brown v. Smythe*, No. 90-3815, 1991 WL 183578, at *4 (E.D. Pa. Sept. 12, 1991); *Macario v. Pratt & Whitney Canada, Inc.*, No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *5 (E.D. Pa. Dec. 20, 1990); *Colantuoni v. Macomber*, No. 89-2244, 1990 U.S. Dist. LEXIS 1999, at *2 (D.D.C. Feb. 26, 1990); *In re the Exxon Valdez*, No. A89-095, 1990 U.S. Dist. LEXIS 7999, at *4 (D. Alaska Feb. 2, 1990); *New Eng. Sav. Bank v. First Commercial Corp.*, No. 88-2570, 1989 U.S. Dist. LEXIS 9296, at *7 (D.N.J. Aug. 9, 1989).

19. *Cipollone*, 785 F.2d at 1121.

20. See Note, *Dissemination of Discovered Material*, *supra* note 1, at 1145; Marcus, *Firms' Secrets are Increasingly Bared by Courts*, Wall St. J., Feb. 4, 1991, at B1, col. 3 [hereinafter Marcus, *Firms' Secrets*]; Arthurs, *Defendants Fight Back*, *supra* note 10, at 1, col. 4.

discovery request.²¹ Widespread disclosure of corporate secrets can allegedly impact stock prices,²² public image,²³ and competitive standing.²⁴ Consequently, discovery can become protracted and bitter, thus increasing the already skyrocketing cost of litigation.

Not surprisingly, corporate defendants often move for a protective order, arguing that Rule 1 interests—namely, speed and financial economy—are best served by the entry of a protective order prohibiting the dissemination of any material exchanged through discovery.²⁵ In light of the desire to ease the exchange of massive amounts of documents and to reduce the need for diligent court supervision, some courts accept this proposition outright, despite opposition by the other party.²⁶

Other courts, while finding that easing case management may comply with Rule 1, determine that this efficiency does not comport with the

21. See, e.g., *Smith v. BIC Corp.*, 869 F.2d 194, 196 n.1 (3d Cir. 1989) (defendant in products liability action sought protective order to prevent disclosure of material sought to be discovered); *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 737 (Fed. Cir. 1987) (nonparty in patent infringement action sought protective order to prevent disclosure of material sought to be discovered by competitor); *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 337 (3d Cir.) (defendant in products liability action sought protective order to prevent disclosure of material sought to be discovered), *cert. denied*, 484 U.S. 976 (1987); *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 650 (D. Md. 1987) (same); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del. 1985) (defendant soft drink company vehemently opposed disclosure of documents providing secret formulae and ingredients); see also Note, *Dissemination of Discovered Material*, *supra* note 1, at 1145 (noting that defendants frequently move for protective orders to protect privacy interests, to avoid adverse publicity and to avoid competitive disadvantage).

22. See, e.g., *Smith*, 869 F.2d at 201 (defendants alleged that information that had already been revealed in *New York Times* article caused stock to drop 33%); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 90 (D.N.J. 1986) (defendants alleged that information that had already been disclosed was cause of "wide gyrations in the value of defendants' stock"), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

23. See, e.g., *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1546 (11th Cir. 1985) (nonparty alleged that disclosure of the names of participants in survey would harm nonparties' reputation and ability to conduct future research); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (defendants alleged that disclosure of contents of special committee's report would harm its public image in the banking industry and local community), *cert. denied*, 460 U.S. 1051 (1983); *Bradway v. American Nat'l Red Cross*, 132 F.R.D. 78, 79 (N.D. Ga. 1990) (defendant alleged that disclosure of blood collection procedures would cause harm to its reputation as safe collector of blood).

24. See, e.g., *American Standard Inc.*, 828 F.2d at 740-41 (nonparty alleged that it would suffer irreparable economic harm if its research and development information were divulged to its competitors); *Coca-Cola Bottling Co.*, 107 F.R.D. at 298-99 (defendants alleged serious competitive harm if its secret formulae were revealed).

25. See *Cipollone*, 113 F.R.D. at 92; *In re the Exxon Valdez*, No. A89-095, 1990 U.S. Dist. LEXIS 7999, at *2 (D. Alaska Feb. 2, 1990).

26. See, e.g., *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 777 (1st Cir. 1988) (court of appeals noted that district court had granted defendant's request for protective order due to plaintiff's expansive discovery request), *cert. denied*, 488 U.S. 1030 (1989); *Tavoulareas v. Piro*, 93 F.R.D. 24, 29-30 (D.D.C. 1981) (court granted nonparty's request for protective order because protective order would "serve the interests . . . of the [c]ourt" with respect to discovery matters and was therefore a proper factor to consider).

language of Rule 26(c) calling for protection of "person[s] or part[ies]."²⁷ According to these courts, Rule 1 interests alone do not take into account how disclosure will work "a significant harm" to the movant.²⁸ Furthermore, if facilitating case administration is the proper benchmark, a protective order will enter simply upon the request, because logically, it almost always initially streamlines discovery.²⁹

2. Discovery Sharing

Denial of a motion for a protective order can result in the dissemination of discovery to other litigants or potential litigants, thus feeding the litigation boom. Consequently, the propriety of discovery sharing has come under considerable fire by defendants.³⁰ They argue that discovery sharing is used as a device to pound defendants into quick settlements³¹ because the practice can have an injurious affect on parallel litigation in which the defendants are involved,³² and can spur frivolous litigation by

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

28. See *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 89 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987). In *Cipollone*, the defendant, an international tobacco manufacturer, requested a broad blanket order prohibiting the dissemination of confidential and non-confidential material. The defendant asserted that the order would facilitate discovery by streamlining litigation. Judge Sarokin rejected this "public policy" argument because Rule 26(c) did not authorize courts to make such policy decisions. See *id.* at 92. Moreover, this argument had nothing to do with the harm the defendants would suffer without the order. See *id.* at 93-94.

Judge Sarokin then expressed his discomfort and concern with "wholesale designation of confidentiality by defendants." *Id.* He indicated that umbrella orders placed undue burden on plaintiffs' attorneys by forcing plaintiffs to seek sanctions against defendants for a bad faith "confidentiality designation." The defendant's economic strength and size made resisting or pursuing discovery significantly easier than it was for the plaintiff. See *id.*; see also *John Does I-VI v. Yogi*, 110 F.R.D. 629, 632 (D.D.C. 1986) (although there is a belief that blanket orders serve interests of judicial economy, court acknowledged that blanket orders "often create more problems than they solve").

This concern and castigation of umbrella protective orders was echoed in *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 129 F.R.D. 483 (D.N.J. 1990), in which the court stated "when, as here, consent is unavailing, the movant seems unwilling or unable to make the required showing—appearing to believe that a [blanket] protective order should be available for the asking." *Id.* at 485 n.4; see also *Exxon Valdez*, No. A89-095, 1990 U.S. Dist. LEXIS 7999, at *2-*5 (D. Alaska Feb. 2, 1990) (defendant's reasons for needing protective order were broad and conclusory and did not detail how dissemination would cause significant harm to its competitiveness and financial status).

29. See Note, *Nonparty Access*, *supra* note 10, at 1089-90; *infra* notes 118-122.

30. See Marcus, *Firms' Secrets*, *supra* note 20, at B1, col. 3; Arthurs, *Defendants Fight Back*, *supra* note 10, at 5, col. 2. Discovery sharing usually involves several different plaintiffs who bring separate lawsuits against the same defendant alleging similar causes of action. See Note, *Dissemination of Discovered Material*, *supra* note 1, at 1138. Today, information markets—markets for the sale or barter of discovered material—have been established to facilitate discovery sharing. See *id.*

31. See Note, *Dissemination of Discovered Materials*, *supra* note 1, at 1147; see also *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) (court recognized that protective order helped prevent discovery from becoming a club "by threatening disclosure of matters which will never be used at trial.").

32. See, e.g., *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981) (defendants unsuccessfully argued that without a protective order

encouraging plaintiff's attorneys to network the fruits of discovery to other claimants.³³ Moreover, by allowing outside litigants to ride on the coat tails of others, these "meretricious claimants"³⁴ are given an unfair advantage when preparing for litigation.³⁵ Finally, because discovery can involve the exchange of information that is not necessarily admissible at trial, much irrelevant information can be swapped that can have an injurious impact on privacy interests.³⁶ Therefore, to eliminate discovery sharing, defendants frequently move for protective orders relying on the above arguments as grounds for good cause.

While this argument has met with limited success,³⁷ a majority of courts reject these factors and enthusiastically embrace the practice of

preventing dissemination they would be detrimentally effected in other lawsuits); *Macario v. Pratt & Whitney Canada, Inc.*, No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *9 (E.D. Pa. Dec. 20, 1990) (same).

33. See, e.g., *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990) (defendants unsuccessfully argued that without a protective order preventing dissemination, others might piggy-back their disclosure proceedings on top of the present action); *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 651 (D. Md. 1987) (same); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 93 (D.N.J. 1986) (same), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (same); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153 (W.D. Tex. 1980) (same); *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 410 (N.D.N.Y. 1973) (same); *Macario*, No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *7 (E.D. Pa. Dec. 20, 1990) (same); *Adams v. Schmid Laboratories, Inc.*, No. 86 C 4783, 1987 U.S. Dist. LEXIS 14065, at *2-3 (E.D. Ill. Feb. 5, 1987) (same); see also *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 219-20 (D. Mont. 1986) (defendants were granted protective order although court agreed with "majority" of courts that discovery sharing did not form any part of defendant's showing of good cause).

34. *Deford*, 120 F.R.D. at 651.

35. See Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 Wis. L. Rev. 1055, 1059 (1985); *Arthurs, Defendants Fight Back*, *supra* note 10, at 1, col. 4; see also *infra* note 43 and accompanying text (discussing the non-discoverable benefits of discovery sharing).

36. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35-36 (1984).

37. See, e.g., *Seattle Times Co.*, 467 U.S. at 37 (trial court did not abuse discretion in granting protective order prohibiting the use of discovery materials beyond the present action); *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989) (same); *Milsen Co. v. Southland Corp.*, 15 Fed. R. Serv. 2d 1268, 1268 (N.D. Ill. 1972) (good cause for blanket order was shown because plaintiff's attorney intended to reveal information to others who anticipated litigation with defendants).

Seattle Times Co. involved a libel action between the founder of a religion and a newspaper. The Supreme Court held that the trial court did not abuse its discretion in finding good cause for the protective order when the respondent demonstrated that dissemination of information would place members of the foundation in physical danger, as well as hurt its fund-raising activities. See *Seattle Times Co.*, 467 U.S. at 26-27.

The Supreme Court, however, did not prohibit the practice of discovery sharing in *Seattle Times Co.*. Instead, it foreclosed the argument that there was a First Amendment right of access to discovery information. See *id.* at 32-33. The Court held that the First Amendment was not offended if a movant could show: (1) good cause why a protective order preventing dissemination outside the instant action should issue; (2) that the protective order was limited to the context of pretrial discovery; and (3) that the protective order did not restrict dissemination of information gathered from other sources. See *id.* at 37.

discovery sharing.³⁸ These courts assert that although discovery is not a public component of civil trials,³⁹ Rule 26(c) presumes public access to discovery materials unless good cause is shown.⁴⁰ Courts and commentators further reason that cooperation among litigants in connected, albeit separate lawsuits, better promotes Rule 1 interests and therefore discovery sharing cannot constitute any part of the defendant's good cause demonstration.⁴¹ This practice allows parties to obtain vital information without paying the prohibitive costs associated with formal discovery.⁴² The time and money expended trying to compel a reluctant

38. See *supra* notes 32-33; see also *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (protective orders should be modified to allow private litigants to share in another's discovery unless it would "tangibly prejudice substantial rights of the party opposing modification").

39. See *Seattle Times Co.*, 467 U.S. at 33 & n.19. As the Court in *Seattle Times Co.* explained, most discovery takes place in private, at the convenience of those involved. Most jurisdictions that require parties to file discovery materials usually permit the court to order that they not be filed or be filed under seal. Some jurisdictions provide that discovery materials are not to be filed except if ordered by the court. See *id.* Therefore, even though Rule 26(c) creates the presumption that, absent good cause, discovery is to be public, realistically the reverse is true. See also Marcus, *Myth and Reality*, *supra* note 1, at 11-15 (arguing that under the Federal Rules the public has neither the right nor the opportunity to observe discovery).

40. See Fed. R. Civ. P. 26(c). As the Second Circuit explained in *In re "Agent Orange" Prod. Liab. Litig.*:

[a] plain reading of . . . Rule 26(c) demonstrates that the party seeking a protective order has the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, . . . if good cause is not shown, the discovery materials in question should not receive judicial protection and therefore would be open [for public inspection]. . . . Any other conclusion effectively would negate the good cause requirement of Rule 26(c): Unless the public has a presumptive right of access to discovery materials, the party seeking to protect the materials would have no need for a judicial order [because] the public would not be allowed to examine the materials in any event.

821 F.2d 139, 145-46 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987); *accord* *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

41. See, e.g., Note, *Dissemination of Discovered Material*, *supra* note 1, at 1140-42 (discussing how Rule 1 interests are better served through discovery sharing); Note, *Non-party Access*, *supra* note 10, at 1096 & nn. 55-59 (discussing cases which find that discovery sharing comports with Rule 1's goals). *But see* Arthurs, *Defendants Fight Back*, *supra* note 10, at 5, cols. 2-3 (discussing how discovery sharing wastes judicial resources and increases litigation costs).

42. See generally, Note, *Dissemination of Discovered Materials*, *supra* note 1, at 1149-61 (discussing how discovery sharing can decrease the prohibitive costs of litigation in products liability actions). Indeed, that blanket protective orders generally favor economically stalwart defendants over relatively impecunious plaintiffs is well appreciated by courts. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1114 n.8 (3d Cir.), *remanded*, 113 F.R.D. 86 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); *Macario v. Pratt & Whitney Canada, Inc.*, No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *7 (E.D. Pa. Dec. 20, 1990). Thus, courts are influenced by the societal, procedural and economic status of the parties, as well as the public's interest and will balance the relative interests of each in deciding whether to issue a protective order. Hence, the court may determine that a protective order will do just that, protect. See, e.g., *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 739 (Fed. Cir. 1987) (court of appeals affirmed the district court's grant of a protective order to

party to come forward with the requested information is obviated by access to previous discovery. Moreover, the party granted access to the material has the benefit of examining information that has been analyzed already by a similarly positioned party. Communication between related litigants can be established, enabling attorneys to share vital yet non-discoverable material like the settlement value of a particular case and the availability of experts.⁴³ Finally, through the use of shared discovery, potential litigants are better able to analyze the merits of their claims, presumably equipping them with sufficient information to draft pleadings more accurately.

Ironically, courts that deny defendants protective orders⁴⁴ often rely on Rule 1 to rebut a defendant's good cause argument. Barring a bad faith purpose for the litigation on the part of the discovering party,⁴⁵ most courts agree that discovery sharing serves Rule 1 interests and does not constitute good cause for the entry of a protective order.⁴⁶

3. Embarrassment

Rule 26(c) provides that the court may protect a person or party from, among other things,⁴⁷ annoyance or embarrassment.⁴⁸ In complex litigation, corporate defendants frequently argue that, absent a protective order, plaintiffs will release sensitive (although not confidential) material to

nonparty who was deposed by three largest competitors); *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1546-47 (11th Cir. 1985) (defendant denied access to names of women who participated in nonparty's study on Toxic Shock Syndrome). Or, the court may determine that a protective order protects those who need it the least. *See, e.g., Macario*, No. 90-3906, 1990 U.S. Dist. 17411, at *7 (E.D. Pa. Dec. 20, 1990) (in lawsuits where the resources of the parties are uneven, protective orders can present an insurmountable burden); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 93-94 (D.N.J. 1986) (court took into account defendant's economic strength and plaintiff's economic weakness in structuring the protective order), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987). Merely stating that one is trying to protect the privacy interests of others, however, may not be enough to persuade the court that a protective order is warranted. *See, e.g., Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 481 n.18 (S.D.N.Y. 1982) (defendant bank's conclusory assertion that its employees would be harmed if discovery remains unrestricted was not appropriate means of establishing good cause); *Grogan v. Osborne*, No. 87 Civ. 7024, 1988 U.S. Dist. LEXIS 4011, at *3 (S.D.N.Y. May 5, 1988) (court believed defendant's request for protective order to prohibit access to patient files was really an attempt to shield himself from publicity).

43. *See Note, Seattle Times: What Effect on Discovery Sharing?*, *supra* note 35, at 1058-59.

44. *See supra* notes 27-29 and accompanying text.

45. *See Note, Nonparty Access*, *supra* note 10, at 1096.

46. *See, e.g., Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 220 (D. Mont. 1986); *Trans Pac. Ins. Co. v. Trans-Pac. Ins. Co.*, 136 F.R.D. 385, 391 (E.D. Pa. 1991). *But see Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989) (protective order preventing plaintiff from sharing discovery with other litigants was not abuse of discretion).

47. Rule 26(c) also permits the court to protect a person or party from "oppression" and "undue burden and expense." *See Fed. R. Civ. P. 26(c)*.

48. *See id.*

the public.⁴⁹ Widespread circulation of information not intended for public "eyes," defendants argue, can expose the movants to additional law suits⁵⁰ and also provide ammunition for competitors to exploit.⁵¹ Consequently, dissemination of these "private matters"⁵² will injure financial and competitive standing, reputation, and public image.⁵³

Because the release of non-public information almost always has some tendency to embarrass,⁵⁴ courts generally stand by the assertion that:

embarrassment is usually thought of as a nonmonetizable harm to individuals, [and therefore] it may be especially difficult for a business enterprise whose primary measure of well being is . . . monetizable, to argue for a protective order on this ground.⁵⁵

In light of the presumption of public access created by Rule 26(c),⁵⁶ courts weigh any harm alleged against this premise. Thus, allegations of financial harm must be sufficiently demonstrated. Merely asserting a fall

49. See *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990); *Hawley v. Hall*, 131 F.R.D. 578, 584 (D. Nev. 1990); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 89-90 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 473 (S.D.N.Y. 1982); *Tavoulaareas v. Piro*, 93 F.R.D. 24, 28 (D.D.C. 1981); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982); *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153 (W.D. Tx. 1980); *Adams v. Schmid Laboratories, Inc.*, No. 86 C 4783, 1987 U.S. Dist. LEXIS 14065, at *3 (N.D. Ill. Feb. 6, 1987).

50. See *supra* note 32 and accompanying text.

51. See *Cipollone*, 113 F.R.D. at 90; *Tavoulaareas*, 93 F.R.D. at 29.

52. *Joy*, 692 F.2d at 893.

53. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 26-27 (1984) (movant argued that revelation of non-public information would impair religious foundation's ability to collect donations); *Smith v. BIC Corp.*, 869 F.2d 194, 201 (3d Cir. 1989) (movant argued that revelation of non-public information led to 33% drop in stock price); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (movant argued that revelation of non-public information would damage public image and reputation in banking industry and community), *cert. denied*, 460 U.S. 1051 (1983); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 90 (D.N.J. 1986) (movant argued that revelation of non-public information was linked to fluctuations in stock price), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 480 (S.D.N.Y. 1982) (revelation of non-public material had already harmed the defendant vice-president in his personal life and business dealings); *Adams v. Schmid Laboratories, Inc.*, No. 86 C 4783, 1987 U.S. Dist. LEXIS 14065, at *2 (N.D. Ill. Feb. 5, 1987) (revelation of non-public information would increase litigation and harm the defendants financially); *cf. In re the Exxon Valdez*, No. A89-095, 1990 U.S. Dist. LEXIS 7999, at *2 (D. Alaska Feb. 2, 1990) (defendant did not want information obtained through discovery available to public because the case was already "tinged with sensationalism").

54. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.), *remanded*, 113 F.R.D. 86 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

55. *Id.* But see *Seattle Times Co.*, 467 U.S. at 36-37 (trial court did not abuse discretion in finding good cause for the entry of a protective order to shield the dissemination of the names of members of and financial contributors to a religious organization); *Tavoulaareas v. Piro*, 93 F.R.D. 24, 29 (D.D.C. 1981) (public disclosure would reveal both sensitive and confidential documents that would cause nonparty movant competitive harm).

56. See *supra* notes 39-40 and accompanying text.

in stock prices⁵⁷ or a tangible drop in business productivity⁵⁸ has been considered "broad and conclusory," falling short of the required "significant harm."⁵⁹ Though not literally articulated, the general refusal to grant protective orders to prevent the public circulation of nonconfidential or even scandalous material may evidence the courts' distaste for using the judicial process as "public relations" management.

Nevertheless, there remains an opportunity for litigants to publicly circulate information that is potentially damaging to the reputation and privacy of those not directly implicated by the litigation.⁶⁰ In these instances, if the movant can present the court with the particularly damaging documents or with affidavits attesting to the incendiary nature of the information sought and the harm anticipated, generally courts will grant protection.⁶¹ This is particularly true if the movant can prove that discovery subjects employees or associates to some real harm, physical or

57. See, e.g., *Smith v. BIC Corp.*, 869 F.2d 194, 201 (3d Cir. 1989) (attorney's hearsay statement that on the day a *New York Times* article appeared describing alleged defects in BIC lighter the company's stock prices fell 33% does not rise to the level of significant harm to financial and competitive position); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 90 (D.N.J. 1986) (defendant's statement that press coverage of litigation has resulted in wide gyrations in stock prices does not rise to level of significant harm), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

58. See, e.g., *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 424-25 (W.D.N.Y. 1981) (assertion that business would suffer if nonconfidential material was publicized was too conclusory for court to evaluate claim of need for umbrella order); *In re the Exxon Valdez*, No A89-095, 1990 U.S. Dist. LEXIS 7999, at *5-*6 (D. Alaska Feb. 2, 1990) (protective order denied because single conclusory affidavit asserting that competitive harm would occur was not factually substantiated).

In *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471 (S.D.N.Y. 1982), the defendant, a former vice-president of Chase Manhattan, claimed injurious effects to his business and personal life from the publicity generated by plaintiff's charges of sexual misconduct. See *id.* at 480. The harms included a lull in the growth of his business which had grown steadily up to that point, the apprehension that two of his clients expressed with respect to continuing a business relationship with him, the loss of two potential clients as a result of the notoriety, and postponement of a scheduled teaching post. See *id.* Nevertheless, the court rejected the defendant's argument that these exigencies warranted a blanket protective order. The court believed that much of the information would be garnered through sources outside pretrial discovery and other alternatives, including more narrowly tailored protective orders, would adequately protect the defendant when the time arose. See *id.* at 481.

59. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.), *remanded*, 113 F.R.D. 86 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987). But see *McCarthy v. Barnett Bank*, 876 F.2d 89, 91 (11th Cir. 1989) (fear of adverse publicity, among other things, was an adequate justification for the entry of confidentiality order); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355-56 (11th Cir. 1987) (same).

60. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 35 (1984); *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1546 (11th Cir. 1985).

61. See, e.g., *Seattle Times Co.*, 467 U.S. at 26-27 (protective orders granted when affidavits from members of religious foundation demonstrated how disclosure would hurt membership and income of foundation); *Farnsworth*, 758 F.2d at 1546-48 (protective order granted when nonparty demonstrated that release of names of women who participated in Toxic Shock Syndrome study would embarrass participants and inhibit future studies).

otherwise.⁶² Recognizing that discovery abuse can encompass more than just delays and expense, the court may be prompted to shield documents produced through discovery to protect privacy interests.⁶³ Indeed, the rule makers drafted Rule 26(c) broadly enough to authorize the court to fashion protective orders to curtail such burdens if good cause is demonstrated.⁶⁴

If, however, the court believes that the information will be disseminated anyway, or that the assertion on behalf of others is really a ploy to shield oneself from embarrassment,⁶⁵ it will deny the motion.

4. Jeopardizing Fair Trial

Movants frequently assert that unfettered disclosure will jeopardize the movant's right to a fair trial. This assertion is particularly prevalent in cases involving scandalous accusations.⁶⁶ Movants maintain that a

62. See, e.g., *Seattle Times Co.*, 467 U.S. at 26-27 (affidavits detailing threats and attacks to religious foundation members were sufficient to establish good cause); *Farnsworth*, 758 F.2d at 1546 (court entered protective order to prevent disclosure of names of women who participated in Toxic Shock Syndrome survey by giving personal, potentially embarrassing information to the Center of Disease Control); *Zwack v. Kraus Bros.*, 237 F.2d 255, 260 (2d Cir. 1956) (protective order prohibiting transmittal of deposition testimony to Hungary was supported by good cause because transmission placed plaintiff's brother in physical danger).

Generally, most allegations of physical harm are stated in terms of harassment. The majority of harassment protective orders are sought to prevent or restrict the taking of depositions. Rule 26(c) specifically authorizes courts to fashion protective orders to shield parties from the burdens attendant to the taking of a deposition. See Fed. R. Civ. P. 26(c). Analysis of these types of protective orders is beyond the scope of this Note, however, which specifically focuses on protective orders and document production.

63. See *Seattle Times Co.*, 467 U.S. at 34-35.

64. In particular, Rule 26(c) provides that the court "may make any order which justice requires to protect a party or person from annoyance [and] . . . oppression." Fed. R. Civ. P. 26(c).

65. See, e.g., *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 481 n.18, 482 (S.D.N.Y. 1982) (court determined that: 1) protective order would not prevent disclosure because much information was garnered through means outside discovery process and would be revealed at trial anyway; and 2) bank's conclusory allegation that it and its employees had been and would continue to be injured as a result of the publicity stemming from sexual harassment charges against bank vice-president were not the "most appropriate means of establishing that protective order was warranted"); *Grogan v. Osborne*, No. 87 Civ. 7024, 1988 U.S. Dist. LEXIS 4011, at *3 (S.D.N.Y. May 5, 1988) ("[A]lthough it is not stated, the facts of this case give rise to the inference that Doctor Osborne is also concerned that he may be embarrassed by dissemination of his session notes.").

66. See, e.g., *Hawley v. Hall*, 131 F.R.D. 578, 584 (D. Nev. 1990) (civil rights suit against mayor and city councilman); *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 423-24 (W.D.N.Y. 1981) ("Love Canal" toxic tort litigation); *In re the Exxon Valdez*, No. A89-095, 1990 U.S. Dist. LEXIS 7999, at *1 (D. Alaska Feb. 2, 1990) (suit brought in relation to Prince William Sound oil spill from the Exxon Valdez); *Grogan*, No. 87 Civ. 7024, 1988 U.S. Dist. LEXIS 4011, at *5-*6 (S.D.N.Y. May 5, 1988) (patient sues psychologist for sexual misconduct).

In addition, this argument has been asserted by tobacco manufacturers in products liability actions. See, e.g., *Baker v. Liggett Group, Inc.* 132 F.R.D. 123, 126 (D. Mass. 1990) (products liability suit against tobacco manufacturer); *Cipollone v. Liggett Group*,

fair and objective disposition of these cases will be difficult because the volatile atmosphere will prejudice the trier of fact against the moving party.⁶⁷

The mere fact that litigation has gained publicity, however, does not warrant issuing a protective order.⁶⁸ "On the contrary," as one court stated, "it may well be reason to issue a protective order only most reluctantly."⁶⁹ This is particularly true if the movant has successfully litigated similar cases without the benefit of a protective order.⁷⁰ Moreover, if the parties have consented to a bench trial, thus eliminating jury bias, the court will likely deny the motion.⁷¹ Finally, even if a jury trial has been requested, adequate precautions can be taken to ensure that the jury will be impartial.⁷²

In sum, in corporate defense cases, absent consent by both parties, obtaining wholesale designation of all discovered information as confidential is difficult.

Inc., 113 F.R.D. 86, 92 (D.N.J. 1986) (same), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987).

67. See *Baker*, 132 F.R.D. at 126; *Hawley*, 131 F.R.D. at 584-85; *Cipollone*, 113 F.R.D. at 92; *Hooker Chem. & Plastics*, 90 F.R.D. at 426; *Exxon Valdez*, No. A89-095, 1990 U.S. Dist. LEXIS 7999, at *2 (D. Alaska Feb. 2, 1990); *Grogan*, No. 87 Civ. 7024, 1988 U.S. Dist. LEXIS 4011, at *4-5 (S.D.N.Y. May 5, 1988).

68. See, e.g., *Baker*, 132 F.R.D. at 126 (court rejected defendants' claim that pretrial publicity would impair fair trial); *Hawley*, 131 F.R.D. at 585 (less drastic measures than entry of blanket protective order can be taken to ensure fair trial); *Exxon Valdez*, No. A89-095, 1990 U.S. Dist. LEXIS 7999, at *2 (D. Alaska, Feb. 2, 1990) (rejected argument that fairness requires that documents be protected because case is tinged with sensationalism); *Cipollone*, 113 F.R.D. at 92 (court satisfied that appropriate precautions can be taken to ensure fair trial without entry of blanket order); cf. *International Union v. Garner*, 102 F.R.D. 108, 113 (M.D. Tenn. 1984) (protective order not granted to defendant because "[s]ignificantly, defendant has not asserted interests in fair trial rights"). *But see Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988) (court of appeals recognized that district court had made it clear that it denied pretrial attempts to modify protective order "to promote a fair trial"), *cert. denied*, 488 U.S. 1030 (1989).

69. *Hooker Chem. & Plastics*, 90 F.R.D. at 426.

70. See *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990).

71. See *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981).

72. See *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 92 (D.N.J. 1986), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 481 (S.D.N.Y. 1982); *Grogan v. Osborne*, No. 87 Civ. 7024, 1988 U.S. Dist. LEXIS 4011, at *4-5 (S.D.N.Y. May 5, 1988).

The Supreme Court, in fact, has set forth a number of methods to ensure the impartiality of juries. These methods include: (1) stricter rules governing the use of the courtroom by newsmen; (2) insulating witnesses from the press; (3) proscribing extrajudicial statements by any lawyer, party, witness, or court official; (4) changing venue to a place less exposed to the intense publicity; (5) postponing trial to allow public attention to subside; (6) using searching questions on prospective jurors to screen out those with fixed opinions relating to the case; (7) using emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. See *Sheppard v. Maxwell*, 384 U.S. 333, 358-363 (1966).

B. *Protection for Trade Secrets and Other Confidential Information: 26(c)(7)—The Corporate Defendant's Fair-Weather Friend*

Most of Rule 26(c) mandates how discovery may be restricted, limited, or eradicated altogether.⁷³ Only Rule 26(c)(7) actually specifies what *type* of information may be limited.⁷⁴ Under this provision, the court may order that "trade secret[s] or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."⁷⁵

When a party argues that discovery can continue but requests that the information only be disclosed in a certain way or to certain persons, courts engage in a three-pronged inquiry. The first prong asks whether the matter sought to be protected is a trade secret⁷⁶ or other confidential research, development, or commercial information which should be protected.⁷⁷ The second inquiry looks at whether disclosure would result in a "cognizable harm."⁷⁸ The final prong demands that the party show good cause for the protective order by demonstrating a "clearly defined and serious injury."⁷⁹

If, however, the party asks for a protective order to eliminate discov-

73. See Fed. R. Civ. P. 26(c)(1)-(6),(8).

74. See Fed. R. Civ. P. 26(c)(7).

75. *Id.*

76. This inquiry is determined by state law. See *Smith v. BIC Corp.*, 869 F.2d 194, 199 (3d Cir. 1989). According to the Restatement of Torts § 757 comment b, the following factors should be examined to determine if the information is a trade secret: (1) the extent to which the information is known outside of the business; (2) the extent to which the information is known to those involved in the business; (3) the extent of measures taken to guard the secrecy of the information; (4) the value of the information to the business and its competitors; (5) the amount of effort or money expended by the owner developing the information; and (6) the ease or difficulty with which the information could be properly acquired or duplicated by others. See Restatement of Torts § 757 comment b (1939). Numerous courts and commentators have adopted the Restatement's guidelines. See *Smith*, 869 F.2d at 200; *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981); Note, *Dissemination Discovered Materials*, *supra* note 1, at 1146 n.62; see also *Cuno Inc. v. Pall Corp.*, 117 F.R.D. 506, 508 (E.D.N.Y. 1987) (relying on the first five factors).

77. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 873-75 (E.D. Pa. 1981); *Cuno Inc.*, 117 F.R.D. at 507. Cases pertaining to the protection of trade secrets and other confidential information demonstrate that this subject-matter grouping is broad enough to include a wide variety of business information including, but not limited to: design information (drawings, patents, blueprints, design and material changes), see *Smith*, 869 F.2d at 200; marketing strategy information (sales, customer lists), see *Duracell Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578 (N.D. Ga. 1989); financial strategy information (internally generated investigatory work, analyses, correspondence), see *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 326 (S.D. Fla. 1985); see also *Zenith Radio Corp.*, 529 F. Supp. at 890 n.42 (listing various types of business information protected under 26(c)(7)).

78. See *Zenith Radio Corp.*, 529 F. Supp. at 889; *Cuno Inc.*, 117 F.R.D. at 507.

79. *Zenith Radio Corp.*, 529 F. Supp. at 891; accord *Smith*, 869 F.2d at 197; *Cuno Inc.*, 117 F.R.D. at 508; *Waelde*, 94 F.R.D. at 28; see *Macario v. Pratt Canada, Inc.*, No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *4 (E.D. Pa. Dec. 20, 1990).

ery, the court first asks the requesting party to answer the first and second prongs described above. If prongs one and two are properly demonstrated, the burden shifts to the party seeking discovery to demonstrate that discovery is relevant and necessary.⁸⁰

1. Demonstrating Good Cause: Revelation to Competitors

Generally, “[t]here is no absolute privilege for trade secrets and similar confidential information.”⁸¹ Therefore, merely alleging competitive harm does not guarantee the issuance of a protective order. Although an applicant may present the court with examples of specifically harmful documents,⁸² a movant still needs to demonstrate that a clearly defined and serious injury to its business will result from disclosure.⁸³

Because disclosure of Rule 26(c)(7) material has a tangible impact on a business’s financial well-being⁸⁴—the primary concern of a business enterprise—corporate defendants have greater ease establishing a clearly

80. See *American Standard, Inc. v. Pfizer*, 828 F.2d 734, 741 (Fed. Cir. 1987); *Centurion Indus., Inc. v. Warren Steurer & Assocs.*, 665 F.2d 323, 325 (10th Cir. 1981); *Duracell, Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578 (N.D. Ga. 1989); *Empire of Carolina, Inc.*, 108 F.R.D. at 326; *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del. 1985); see also Fed. R. Civ. P. 26(b)(1) (providing for discovery of unprivileged material “which is relevant to the subject matter involved in the pending action.”).

81. *Centurion Indus., Inc.*, 665 F.2d at 325 (quoting Federal Open Market Comm. v. Merrill, 443 U.S. 340, 362 (1979)); see *Cuno Inc. v. Pall Corp.*, 117 F.R.D. 506, 507 (E.D.N.Y. 1987); *Coca-Cola Bottling Co.*, 107 F.R.D. at 292; see also Fed. R. Civ. P. 26(c) advisory committee’s note (“The courts have not given trade secrets automatic and complete immunity against disclosure, but have in each case weighed their claim to privacy against the need for disclosure. Frequently, they have been afforded a limited protection.”).

82. One court has suggested that the movants needed to articulate not only which documents require protection, but also provide the court with background information so that it may assess whether these documents are entitled to protection. See *Macario*, No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *6 (E.D. Pa. Dec. 20, 1990). In some instances, however, as when the amount of documents is so voluminous as to make this type of showing burdensome, the applicant will be unable to make such a particularized showing. Thus, “if the injury that would flow from disclosure is patent, either from consideration of documents alone or against the court’s understanding of the background facts,” the court is best able to determine if a protective order is warranted. *Zenith Radio Corp. v. Matsushita Elec. Indus. Corp.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981). In short, “[t]he court’s common sense is a helpful guide.” *Id.*

83. See *United States v. International Business Machs. Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975). A bald statement that disclosure would cause substantial harm if revealed is an example of the typical, broad declaration that falls short of good cause. See *National Hand Tool Corp. v. United States*, No. 89-11-00636, 1990 Ct. Int’l Trade LEXIS 320, at *2 (Ct. Int’l Trade July 23, 1990).

84. See, e.g., *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 290 (D. Del. 1985) (“disclosure of trade secrets in litigation . . . could ‘become . . . the means of ruining a honest and profitable enterprise’”) (quoting 8 J. Wigmore, *Evidence* § 2212, at 155 (McNaughton rev. 1961)); *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 415 (M.D.N.C. 1991) (“commercial information . . . can be the lifeblood of a business”); *Duracell Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578 (N.D. Ga. 1989) (“In a competitive market, an entity’s commercial information, its strategies, techniques, goals and plans can be its life blood.”).

defined and serious injury to their businesses when the litigation involves a competitor.⁸⁵ A movant⁸⁶ involved in litigation with a competitor can argue that, armed with this information, its competitor can incorporate pricing, marketing, sales or financial data for its own use.⁸⁷ This will give it a decided business advantage over the movant, and possibly obstruct the movant's expansion by seizing on vulnerabilities⁸⁸ revealed by the information. As courts recognize, a protective order denying discovery⁸⁹ or limiting access to counsel⁹⁰ can minimize this risk of harm.

Thus, because most courts recognize that disclosure to one's competitors is more harmful than disclosure to noncompetitors,⁹¹ an applicant who can demonstrate that its industry is competitive, and that the confidential information sought will undoubtedly be revealed to a competitor,⁹² stands a good chance of obtaining some form of protection for the

85. See *United States v. United Fruit Co.*, 410 F.2d 553, 556 (5th Cir.), *cert. denied*, 396 U.S. 820 (1969); *Coca-Cola Bottling Co.*, 107 F.R.D. at 299; *Amsted Indus., Inc. v. National Castings, Inc.*, No. 88 C 924, 1988 U.S. Dist. LEXIS 9413, at *2 (N.D. Ill. Aug. 19, 1988). Compare *Duracell Inc.*, 126 F.R.D. at 579 (movant granted protective order because disclosure of information to competitor would cause irreparable harm) and *American Standard, Inc. v. Pfizer*, 828 F.2d 734, 739-41 (Fed. Cir. 1987) (same) with *Coca-Cola Bottling Co.*, 107 F.R.D. at 299 (movant denied protective order because adversary was not a competitor) and *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 29 (E.D. Mich. 1981) (defendants denied protective order because their adversary was a government agency and not a competitor).

86. A movant can include a nonparty who is subpoenaed by either litigant. Because discovery is a long and expensive endeavor, courts are particularly sensitive to the plight of nonparties faced with unreasonable discovery requests regardless of whether they were made by a competitor. See *American Standard Inc.*, 828 F.2d at 738; *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 669 F.2d 620, 623 (10th Cir. 1982); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 894 (E.D. Pa. 1981); *Tavoulaareas v. Piro*, 93 F.R.D. 24, 28 (D.D.C. 1981).

87. See, e.g., *American Standard Inc.*, 828 F.2d at 740-41 (party's request for research and development information would place other party at competitive disadvantage); *Georgia Television Co. v. TV News Clips, Inc.*, 718 F. Supp. 939, 953 (N.D. Ga. 1989) (party's request for documents which included invoices and monitoring logs would place other party at a competitive disadvantage); *Duracell Inc.*, 126 F.R.D. at 578-80 (party's request for marketing, strategy, sales, and customer lists, research and development information, as well as financial statements, would place other party at a competitive disadvantage).

88. See, e.g., *American Standard Inc.*, 828 F.2d at 740-41 (disclosure of pricing information would enable all of competitors to remove movant's competitive edge); *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 415 (M.D.N.C. 1991) (disclosure of marketing strategies and financial information would decrease defendant's already declining market share in a competitive industry); *Duracell Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578-79 (N.D. Ga. 1989) (disclosure of marketing and financial information would enable large competitor to force defendant, a small company, out of the industry).

89. See *American Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 738-39 (Fed. Cir. 1987).

90. See *Georgia Television Co.*, 718 F. Supp. at 953; *Amsted Indus., Inc. v. National Castings, Inc.*, No. 88 C 924, 1988 U.S. Dist. LEXIS 9413, at *2 (N.D. Ill. Aug. 19, 1988).

91. See *supra* note 85 and accompanying text.

92. See *American Standard Inc.*, 828 F.2d at 740; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 890 (E.D. Pa. 1981); *Duracell Inc. v. SW Consultants, Inc.*, 126 F.R.D. 576, 578-79 (N.D. Ga. 1989); see also *Amsted Indus., Inc. v. National Castings, Inc.*, No. 88 C 924, 1988 U.S. Dist. LEXIS 9413, at *2 (N.D. Ill. Aug.

documents in question.⁹³

Any attempt to show serious competitive disadvantage, however, may be undermined by the age of the material in question.⁹⁴ Although the staleness of the material sought to be safeguarded is not conclusive, it is a factor which must be overcome by a detailed illustration of how the documents in question, if released, will work a cognizable harm to the applicant's present competitive standing.⁹⁵ Because of the rapid advances in technology, financing, and marketing strategy, the need for protection is diminished substantially with the passage of time.⁹⁶

2. Revealing Secrets to Non-Competitors

Like movants seeking to prevent disclosure of information to competi-

19, 1988) (in patent infringement case between direct competitors, court rejected plaintiff's version of protective order that would have allowed plaintiff's employees to advise attorney on technical matters, because the competitive harm to defendant outweighed the need for disclosure).

93. See, e.g., *Georgia Television Co. v. TV News Clips, Inc.*, 718 F. Supp. 939, 952-53 (N.D. Ga. 1989) (protective order granted because affidavit of senior manager detailed how disclosure to competitor would place defendants at disadvantage); *Brittain v. Stroh Brewery Co.*, 136 F.R.D. 408, 415-17 (M.D.N.C. 1991) (protective order granted to small company with declining market share because information would have value to competitors); *Duracell Inc.*, 126 F.R.D. at 578 (protective order granted to small company trying to break into market dominated by plaintiff because revelations would give plaintiff ammunition to squeeze defendant out of industry); *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 326 (S.D. Fla. 1985) (information which memorialized defendant's bargaining position in its current negotiations with another party to action would place it at tremendous disadvantage and justified protective order); cf. *Culligan v. Yamaha Motor Corp., U.S.A.*, 110 F.R.D. 122, 125 (S.D.N.Y. 1986) (defendant's request for a protective order in products liability action denied because plaintiff was "not a competitor and ha[d] no interest in the research data except as it relate[d] to this case"); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 293, 299 (D. Del. 1985) (motion for protective order prohibiting discovery denied because plaintiffs were Coca Cola bottlers, not competitors, and had no incentive to reveal formulae). But see *Kleinerman v. United States Postal Serv.*, 100 F.R.D. 66, 69-70 (D. Mass. 1983) (defendants' request for protective order to prevent dissemination of information to plaintiff, a competitor, was denied because plaintiff's need for the information outweighed the harm to the defendants).

94. See *Zenith Radio Corp.*, 529 F. Supp. at 891.

95. See *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 654 (D. Md. 1987).

96. See, e.g., *Brittain*, 136 F.R.D. at 416 (three-year-old documents undercut defendant's position that disclosure would result in competitive harm); *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 129 F.R.D. 483, 485 (D.N.J. 1990) (thirty-year-old documents undercut defendant's position that disclosure would result in competitive harm); *Deford*, 120 F.R.D. at 653-54 (ten-year-old documents undercut defendant's position that they were valuable asset); *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 575 (E.D.N.Y. 1985) (documents, many of which were over ten years old, undercut defendant's position that disclosure would result in competitive harm), *aff'd*, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (ten-year-old information undercut defendant's position that information was confidential); *United States v. International Business Machs. Corp.*, 67 F.R.D. 40, 48-49 (S.D.N.Y. 1975) (three-to fifteen-year-old documents undercut defendant's position that disclosure would result in competitive harm); *Rosenblatt v. Northwest Airlines*, 54 F.R.D. 21, 23 (S.D.N.Y. 1971) (one-year-old document undercut defendant's position that disclosure would result in competitive harm).

tors, defendants involved in litigation with non-competitors frequently seek protective orders shielding or exempting all trade secrets or confidential information sought to be discovered.⁹⁷ These applicants argue that their competitive or financial condition will be irreparably impaired should any confidential material be disclosed.⁹⁸

Simply alleging financial harms, however, usually will not establish good cause,⁹⁹ because much of the alleged anticipated harm is linked to

97. *See, e.g.*, *Smith v. BIC Corp.*, 869 F.2d 194, 196-97 (3d Cir. 1989) (defendant in products liability action sought protective order for design, safety test and accident information); *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989) (defendant in products liability action sought protective order for confidential information relating to processes and policies of company); *Sanders v. Shell Oil Co.*, 678 F.2d 614, 618 (5th Cir. 1982) (defendant in litigation concerning Title VII violation sought protective order for confidential business information); *National Hand Tool Corp. v. United States*, No. 89-11-00636, 1990 Ct. Int'l Trade LEXIS 320, at *8 (July 23, 1990) (plaintiff in customs denial action sought protective order for procedure, source and costs of materials, labor and equipment); *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 219 (D. Mont. 1986) (defendant in breach of contract action sought protective order for "internal financial information submitted to the United States Department of Justice"); *Fireman's Fund Ins. Co. v. ECM Motor Co.*, 132 F.R.D. 39, 41 (W.D. Pa. 1990) (defendant in products liability action sought protective order for underwriter's laboratory file on different motor manufactured by defendant); *Nestle Foods Corp.*, 129 F.R.D. at 484 (defendant in breach of contract action sought protective order for "proprietary business/ commercial information"); *Turick v. Yamaha Motor Corp., USA*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988) (defendant in products liability action sought protective order for "trade secrets and other confidential research"); *Deford*, 120 F.R.D. at 651 (defendant in product liability suit sought protective order for certain "genuinely confidential documents"); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D.N.J. 1986) (defendant in products liability action sought protective order for all information produced or exchanged in the action), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); *Culligan v. Yamaha Motor Corp., USA*, 110 F.R.D. 122, 126 (S.D.N.Y. 1986) (defendant sought protective order for research, development information and documents reflecting communication with Consumer Products Safety Commission); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del. 1985) (defendant in breach of contract action sought protective order for famous "Coke" formula); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981) (defendant in products liability action sought protective order for post-marketing studies, pre-marketing standards and animal testing); *Tavoulaareas v. Piro*, 93 F.R.D. 24, 28-29 (D.D.C. 1981) (nonparty in libel action sought protective order for any confidential internal documents); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (defendant in products liability action sought protective order for trade secrets and other confidential information); *Parsons*, 85 F.R.D. at 725 (defendant in products liability action sought protection for rear-end impact crash tests and design and manufacturing information); *Macario v. Pratt & Whitney Canada, Inc.*, No. 90-3906, 1990 U.S. Dist LEXIS 17411, at *5 (E.D. Pa. Dec. 20, 1990) (defendant in products liability dispute sought protective order for technical testing data and reports).

98. *See supra* note 97.

99. *See, e.g.*, *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 129 F.R.D. 483, 484-85 (D.N.J. 1990) (defendants unsuccessfully alleged that they would suffer financial and competitive harm if proprietary business and commercial information was revealed); *Turick*, 121 F.R.D. at 35 (same); *Deford v. Schmid Prods. Co.*, 120 F.R.D. 648, 653-54 (D. Md. 1987) (defendants unsuccessfully alleged that they would suffer harm if confidential material were disseminated to others because defense cost would rise); *Cipollone*, 113 F.R.D. at 90 (defendant unsuccessfully alleged that stock prices were gyrating because discovery information was being leaked to the press); *Coca-Cola Bottling Co.*, 107 F.R.D.

discovery sharing,¹⁰⁰ overwhelmingly deemed a valid Rule 1 interest.¹⁰¹ Therefore, it is difficult for a movant to establish that this disclosure will wreak the same level of financial and competitive devastation as would direct disclosure to a competitor.¹⁰²

Nonetheless, defendants occasionally are able to obtain Rule 26(c)(7) motions even though the litigation does not involve competitors.¹⁰³ In a few cases, these motions were granted in conjunction with a denial for a broader blanket protective order.¹⁰⁴ In others, the court found that,

at 296 (defendant unsuccessfully sought protective order for secret "Coke" formula, a highly valued asset of the company, which, if revealed, would result in serious competitive harm); *Waelde*, 94 F.R.D. at 28-30 (defendant unsuccessfully alleged that revelation of trade secrets would result in competitive harm); *Ward*, 93 F.R.D. at 580 (defendant unsuccessfully alleged that revelation of confidential information would result in financial harm because it would help increase frivolous lawsuits); *Parsons v. General Motors Corp.*, 85 F.R.D. 724, 725 (N.D. Ga. 1980) (defendant unsuccessfully alleged that disclosure of confidential information would put them at a competitive disadvantage); *Macario*, No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *5-*6 (E.D. Pa. Dec. 20, 1990) (defendants unsuccessfully alleged that they would suffer competitive harm if protective order were not entered). *But see Fireman's Fund Ins. Co.*, 132 F.R.D. at 41 (although defendant presented unsupported assertions of harm, court felt it patently obvious that revelation of information in question would be detrimental competitively to the defendant and granted a protective order); *Tavoulareas v. Piro*, 93 F.R.D. at 29 (nonparty successfully alleged that revelation of confidential information would result in competitive harm); *Culligan*, 110 F.R.D. at 125 (same).

100. *See Kamp Implement Co.*, 630 F. Supp. at 220; *Nestle Foods Corp.*, 129 F.R.D. at 486; *Turick*, 121 F.R.D. at 35; *Deford*, 120 F.R.D. at 652; *Waelde*, 94 F.R.D. at 30; *Ward*, 93 F.R.D. at 580; *Parsons*, 85 F.D.R. at 726; *Macario*, No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *6-*7.

101. *See supra* notes 38-43 and accompanying text.

102. *See supra* notes 84-93 and accompanying text.

103. *See, e.g., Smith v. BIC Corp.*, 869 F.2d 194, 201 (3d Cir. 1989) (defendant in products liability action granted protective order for confidential and trade secret information); *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989) (same); *Sanders v. Shell Oil Co.*, 678 F.2d 614, 618 (5th Cir. 1982) (defendant in Title VII litigation granted protective order for confidential business information); *Snowden v. Connaught Laboratories, Inc.*, 136 F.R.D. 694, 699 (D. Kan. 1991) (defendant in products liability action granted protective order for trade secret information covered by another confidentiality agreement with a nonparty); *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990) (defendant in products liability action granted protective order for confidential and trade secret information); *Fireman's Fund Ins. Co. v. ECM Motor Co.*, 132 F.R.D. 39, 41 (W.D. Pa. 1990) (same); *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 94 (D.N.J. 1986) (same), *mandamus denied*, 822 F.2d 335 (3d Cir.), *cert. denied*, 484 U.S. 976 (1987); *Culligan v. Yamaha Motor Corp., USA*, 110 F.R.D. 122, 125 (S.D.N.Y. 1986) (same); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 299 (D. Del. 1985) (defendant in breach of contract case granted protective order for confidential and trade secret information); *Tavoulareas v. Piro*, 93 F.R.D. 24, 30 (D.D.C. 1981) (nonparty in libel action granted protective order for any confidential internal documents).

104. *See, e.g., Smith*, 869 F.2d at 202 (defendant granted protective order shielding confidential information but denied protective order shielding nonconfidential, embarrassing information); *Snowden*, 136 F.R.D. at 699-700 (defendant granted protective order shielding confidential information that was covered by another confidentiality agreement with a nonparty, but denied a protective order for other nonconfidential information); *Baker*, 132 F.R.D. at 126 (same); *Cipollone*, 113 F.R.D. at 94 (same); *John Does I-VI v. Yogi*, 110 F.R.D. 629, 633 (D.D.C. 1986) (court denied a broad protective order concealing all information but gave narrower protective orders for real proprietary infor-

although the movant made only conclusory showings of harm, other factors militated against removing protection.¹⁰⁵

These cases in which the defendant was able to obtain a protective order to prevent the exposure of confidential information, but was unable to obtain a protective order for information that would embarrass, highlight the philosophy that protective orders should not operate as judicially sanctioned public relations management. In such instances, the party must take its punches from the public and other litigants. When others would be given an unfair competitive advantage, however, a protective order is appropriate and necessary.

3. Protecting the Public Good by Denying Discovery of Confidential Information

Although the overwhelming majority of cases dealing with Rule 26(c)(7) motions attempt to establish financial harm,¹⁰⁶ some movants argue that the harm from disclosure will result in overall harm to the public-at-large.¹⁰⁷ These movants are generally involved with the public, either through law enforcement¹⁰⁸ or through public service.¹⁰⁹

Protective orders are granted generally to governmental units on a va-

mation); *cf. Culligan*, 110 F.R.D. at 125 (court denied defendant's request that discovery not be had at all, reasoning that "appropriate confidentiality order[s]" would protect trade secrets); *Coca-Cola Bottling Co.*, 107 F.R.D. at 299 (same).

105. *See, e.g., Scott*, 868 F.2d at 792 (although defendant had made only a conclusory showing of cause, discovery orders are reversed rarely for an abuse of discretion); *Sanders* 678 F.2d at 618 (same); *Fireman's Fund Ins. Co.*, 132 F.R.D. at 41 (although defendant had made only conclusory showing of harm, given the nature of the documents, the court was persuaded that injury was "patent" and protective order was entered). In *Tavoulareas*, 93 F.R.D. 24 (D.D.C. 1981), the court found "that Mobil has adequately specified the harm likely to result absent a protective order." *Id.* at 29. In addition, the court noted that other factors such as "the interests of the parties, the litigation and the [c]ourt" evidenced that a protective order was the only efficient means of handling the "enormous volume of materials sought." *Id.* A number of years later, the defendant attempted to modify the protective order. *See Tavoulareas v. Washington Post Co.* 111 F.R.D. 653, 654 (D.D.C. 1986). Although the court denied the motion, it acknowledged that Mobil had made only a "prima facie" showing of business harm when the order was initially entered. *See id.* at 659 n.8.

106. *See, e.g., supra* notes 84-97, 103-05 and accompanying text (dealing with cases under Rule 26(c)(7) which attempted to establish financial harm).

107. *See Santiago v. Fenton*, 891 F.2d 373, 378 (1st Cir. 1989); *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985); *Krause v. Rhodes*, 671 F.2d 212, 216 (6th Cir.), *cert. denied*, 459 U.S. 823 (1982); *McLin v. City of Chicago*, 133 F.R.D. 527, 528 (N.D. Ill. 1990); *Bradway v. American Nat'l Red Cross*, 132 F.R.D. 78, 79 (N.D. Ga. 1990); *O'Leary v. Village of Elmhurst*, No. 86 C 997, 1989 WL 18333, *2, *6 (N.D. Ill. Mar. 2, 1989).

108. *See, e.g., Sanchez v. City of Santa Ana*, 936 F.2d 1027, 1033 (9th Cir. 1990) (police department moves for protective order); *Santiago*, 891 F.2d at 377 (same); *Krause*, 671 F.2d at 216 (various governmental enforcement units move for protective orders); *McLin*, 133 F.R.D. at 528 (police department moves for protective order); *O'Leary*, No. 86 C 997, 1989 WL 18333, at *3 (N.D. Ill. Mar. 2, 1989) (same).

109. *See Farnsworth*, 758 F.2d at 1546 (Center for Disease Control moves for protective order); *Bradway*, 132 F.R.D. at 78 (Red Cross moves for protective order).

riety of grounds ranging from a qualified privilege,¹¹⁰ to undue burden from an overly broad discovery request,¹¹¹ to the need to protect legitimate law enforcement interests.¹¹² With regard to public service groups and protective orders, the paucity of case law makes it impossible to predict what showing is necessary to demonstrate good cause. The few courts that have considered a public service group's request for a protective order have focused on what would be in the best interests of those whom the group seeks to assist.¹¹³

110. See *Sanchez*, 936 F.2d at 1034.

111. See *Santiago v. Fenton*, 891 F.2d 373, 378 (1st Cir. 1989).

112. See, e.g., *Krause v. Rhodes*, 671 F.2d 212, 216 (6th Cir.) (defendants in civil suit stemming from the Kent State University killings urged court unsuccessfully not to lift protective order to protect, among other things, legitimate law enforcement interests), *cert. denied*, 459 U.S. 823 (1982); *McLin v. City of Chicago*, 133 F.R.D. 527, 528, 529 (N.D. Ill. 1990) (revealing information might inhibit the filing of citizen complaints, subvert police officers' interest in maintaining the secrecy of false complaints, chill effective police work, and lead to a greater number of baseless complaints).

113. For example, in *Bradway v. American Nat'l Red Cross*, 132 F.R.D. 78 (N.D. Ga. 1990), the Red Cross argued that a protective order was needed to prevent widespread disclosure of its policies and procedures for the collection, processing and distribution of blood. The Red Cross feared that revealing its former blood collecting procedures would lead to public confusion and consequently a drop in the blood supply. See *id.* at 79. The Red Cross argued further that other blood collecting organizations would be confused by this outdated information and depend on it which, in turn, would also harm the public. See *id.*

The court, however, thought otherwise. Revelation of the former procedures would "highlight[] how Red Cross ha[d] improved its practices and procedures" and therefore would increase public confidence in blood collection procedures. See *id.* Similarly, the court dismissed the assertion that other agencies would not be able to discern that the information disseminated was outdated. Although the "Red Cross has an important mission," it did not have the right to "dictate what information the public [was] capable of understanding." *Id.*

If, however, a movant requests access to the identities of persons who have participated in some form of health related procedure, courts have determined that the public would be harmed by widespread disclosure. In *Bradway*, the plaintiff also asked for the names of all blood donors to assist her in her quest to discover from whom she had contracted the AIDS virus. While the court sympathized with her need to know, it felt that the national blood supply and the privacy interests of those donors would be severely jeopardized by revealing the names to anyone, even under a protective order. Therefore, discovery was completely precluded. See *id.* at 80.

Similarly, in *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985), the court upheld the district court's grant of a protective order barring discovery of the names of those who participated in the Center for Disease Control's Toxic Shock Syndrome survey. See *id.* at 1546. Although the defendant's reason for wanting the information was valid—to assist in its trial preparation—the CDC's primary reason for keeping the information secret outweighed it. See *id.* at 1547. The CDC argued, and the court agreed, that revealing the identities of the participants who took part in this survey—which required the revelation of highly personal and potentially embarrassing questions concerning medical histories, sexual practices, contraceptive methods, etc.—would impinge on the CDC's future ability to compile information. See *id.* at 1546, 1547. Therefore, the court determined that because of the justified expectation of privacy when highly personal and embarrassing information is given for medical research, a protective order would be granted, denying access to names of participants in CDC's Toxic Shock Syndrome survey. See *id.* at 1547-48.

II. UMBRELLA PROTECTIVE ORDERS ENTERED BY CONSENT OF THE PARTIES

Unlike when corporate defendants are hauled into court by products liability claimants or other relatively impecunious plaintiffs, when a corporation brings suit against another corporation *each* side has valuable information that it needs to keep confidential.¹¹⁴ Thus, absent a protective order, each side will be reluctant to swap sensitive information when presented with a discovery request.¹¹⁵

Therefore, before two or more corporate entities square off in the judicial arena, they will frequently stipulate to a blanket or umbrella protective order.¹¹⁶ This is particularly true in complex litigation, where discovery can involve the production of thousands of documents.¹¹⁷ Consent orders reduce the parties' mutual fears by facilitating the exchange of large numbers of documents while guaranteeing that information will not be disclosed or will be disclosed only in a certain manner or

114. See Marcus, *Myth and Reality*, *supra* note 1, at 9.

115. See, e.g., *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355-56 (11th Cir. 1987) (umbrella order had been justified upon assertions that adverse publicity, intimidation or other outside forces could hinder free flow of information); *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988) (court recognized that absent the stipulated umbrella order, dissemination of commercial information to competitor would thwart the discovery process); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582, 583 (E.D.N.Y. 1983) (court recognized that absent stipulated umbrella order, release of information that was admittedly not confidential, but which might fuel "the emotionalism surrounding the issues," would thwart the discovery process); *Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co.*, No. 83-3347, 1988 U.S. Dist. LEXIS 16961, at *12 (D.D.C. Mar. 2, 1988) (umbrella order had been justified upon assertions by both parties of the need to protect work-product and attorney-client information); Note, *Dissemination of Discovered Material*, *supra* note 1, at 1145 (noting that defendants frequently stipulate to protective orders to protect, privacy interests, avoid adverse publicity and avoid competitive disadvantage).

116. See Marcus, *Myth and Reality*, *supra* note 1, at 2; J. Friedenthal, M. Kane & A. Miller, *Civil Procedure*, § 7.15 (1985); *Manual for Complex Litigation*, Second, § 21.431, at 52 (1985).

In Zenith Radio Corp. v. Matsushita Elec. Indus. Corp., 529 F. Supp. 866, 889, n.40 (E.D. Pa. 1981), Judge Becker went so far as to say that "[w]e are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court." This proposition, however, may overstate the case because many complex litigation protective orders are entered through motion practice. See *supra* notes 17-113 and accompanying text.

117. See, e.g., *Alexander Grant & Co.*, 820 F.2d at 354 (40,000 documents produced during discovery); *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230, 231 (2d Cir. 1982) (millions of documents produced during discovery); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1296 (7th Cir. 1980) (100,000 documents produced during discovery); *Zenith Radio Corp.*, 529 F. Supp. at 873 (hundreds of thousands of documents produced during discovery); *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 130 (S.D.N.Y. 1976) (over 400,000 documents produced). The boom in discovery owes a great deal to technological developments. The photocopier has increased the amount of paper contained in files by most governmental and business organizations, not to mention enabling attorneys to make copies of opposing party's files. The computer has also made it easier to cope with the voluminous amount of paper generated by discovery.

to certain persons.¹¹⁸

In this way, consent orders reduce motion practice¹¹⁹ and litigation costs. Reduced motion practice conserves untold hours of judicial time¹²⁰ and allows courts to lend their attention to more pressing, substantive matters. With more time to spend on other matters, presumably justice is better served. Therefore, because stipulated protective orders appear to serve Rule 1 interests,¹²¹ most courts sign the order without

118. See Manual for Complex Litigation, Second, § 21.431, at 52 (1985). An umbrella or blanket protective order, therefore, eliminates the need for the court to engage in a document-by-document review of all discovered material to determine what is truly confidential. See *Alexander Grant & Co.*, 820 F.2d at 356. Typically, umbrella or blanket protective orders specify that information claimed to be *confidential* will be provided to opposing counsel on the condition that information will not be disclosed without a court order, except to certain persons for particular purposes. See Manual for Complex Litigation, Second, § 21.431, at 52 (1985); see, e.g., *Littlejohn v. BIC Corp.*, 851 F.2d 673, 676 (3d Cir. 1988) (stipulated protective order prohibited dissemination of any confidential material to nonparties); *Alexander Grant & Co.*, 820 F.2d at 356 (same); *In re Film Recovery Sys., Inc.*, 804 F.2d 386, 388 (7th Cir. 1986) (same); *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc.*, 121 F.R.D. 264, 266 (M.D.N.C. 1988) (deposition by nonparty given wholesale classification as confidential); *Zenith Radio Corp.*, 529 F. Supp. at 875 (stipulated order prohibited dissemination of confidential information to persons other than "qualified persons").

Some umbrella orders, however, are even broader, shielding both *non-confidential* and *confidential* material. See, e.g., *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 595 (7th Cir. 1978) (stipulated protective order governed subsequent use of *all* documents and other materials produced through discovery), *cert. denied*, 440 U.S. 971 (1979); *In re Apex Oil Co.*, 101 Bankr. 92, 95 (Bankr. E.D. Mo. 1989) (consent order acknowledged that all documents produced for discovery will be designated confidential); *United States v. Kentucky Util. Co.*, 124 F.R.D. 146, 148 (E.D. Ky. 1989) (stipulated protective order authorized wholesale destruction of all documents produced during discovery), *rev'd on other grounds*, 927 F.2d 252 (6th Cir. 1991).

Ultimately, the distinction makes little difference because the parties will define what constitutes confidential or non-confidential material to ensure that information they wish to shield will fall within the purview of the order.

119. A motion is an application for an order. It is usually made within the framework of an existing action or proceeding and is ordinarily made on notice, but some motions may be made without notice Orders are the devices whereby the courts manage litigation and resolve various disputes between the parties, and motions are the expedients for securing the orders. Most motions concern only incidents, i.e., they seek orders processing some housekeeping phase of the case, such as the pleadings or the disclosure devices. . . . [A]ny order the court can make, an interested party may move for."

D. Siegel, *New York Practice*, § 243, at 363 (2d ed. 1991). While of obvious necessity, many litigants abuse the process by inundating the court with motions which increases costs for the litigants and strains judicial resources. Cf. *In re Activision Sec. Litig.*, 723 F. Supp. 1373, 1374 (N.D. Cal. 1989) (court criticized the predictable path of large securities cases including lugubrious pleadings and massive discovery).

120. See Marcus, *Myth and Reality*, *supra* note 1, at 2. Nevertheless, because blanket protective orders are so over inclusive, see Manual for Complex Litigation Second, § 21.431, at 53 n.60 (1985), they are particularly susceptible to judicial modification. Therefore, courts may find themselves ultimately faced with the same discovery issues the protective order supposedly eliminated. See *infra* Part III.

121. See Marcus, *Myth and Reality*, *supra* note 1, at 2; see, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (stipulated blanket protective orders promote the "overriding goal of the Federal Rules of Civil Procedure, to 'secure the just, speedy, and inexpensive determination of every action.'" (citations omitted),

engaging in a good cause analysis and without requiring the parties to demonstrate good cause.¹²² Good cause for the stipulated order is assumed to lie in the fact that Rule 1 interests are furthered.

There is, however, growing concern that these stipulated protective orders may streamline the discovery process at the expense of justice.¹²³ Because so many cases are settled during or after discovery is completed, a continuing protective order denies potential plaintiffs and the public-at-large the opportunity to determine if the claims had any merit.¹²⁴ Fur-

cert. denied, 111 S. Ct. 799 (1991); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582, 583 (E.D.N.Y. 1983) (the number of documents to be reviewed and desire to meet trial date deadline were sufficient to determine that good cause existed for original order); *Apex Oil Co.*, 101 Bankr. at 101 ("judicial economy is an appropriate consideration in drafting protective orders"). As one court explained:

[I]n complex litigation where document-by-document review of discovery materials would be unpracticable, and when the parties consent to an umbrella order . . . to encourage maximum participation in the discovery process, conserve judicial resources and prevent [] abuses, . . . a district court may find good cause and issue a protective order pursuant to Rule 26(c).

In re Alexander Grant & Co. Litig., 820 F.2d 352, 357 (11th Cir. 1987); *accord Apex Oil Co.*, 101 Bankr. at 101.

122. *See, e.g.*, *Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 n.15 (3d Cir. 1988) (judge signed stipulated order without an independent determination of good cause); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1311 (7th Cir. 1984) (protective order contains no finding of good cause); *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 595 (7th Cir. 1978) (no discussion of how court determined that good cause existed), *cert. denied*, 440 U.S. 971 (1979); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 403-04 (W.D. Va. 1987) (same); *In re Korean Airlines Disaster of Sept. 1, 1983*, 597 F. Supp. 621, 622 (D.D.C. 1984) (challenge to consensual protective order does not discuss good cause for initial entry of protective order); *Chambers Dev. Co. v. Browning-Ferris Indus.*, 104 F.R.D. 133, 134 (W.D. Pa. 1985) (opinion outlining protective order states merely that defendants established good cause without discussing how they did so); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 38 (C.D. Cal. 1984) (on motion to modify a stipulated order, court determined that it was impossible to tell what showing was made when order was originally entered). *But see s.a.r.l. Orliac v. Berthe*, 765 F.2d 30, 31 (2d Cir. 1985) (court was "loathe" to sign parties' broad protective order that would "keep information . . . hidden from the public eye" and "determine the fate of the information after the appeal" was concluded without a proper showing of good cause); *Sharjah Inv. Co. (U.K.) Ltd. v. P.C. Telemart, Inc.*, 107 F.R.D. 81, 83 (S.D.N.Y. 1985) (court determined that neither party demonstrated good cause for the entry of blanket protective order); *Broan Mfg. Co. v. Westinghouse Elec. Corp.*, 101 F.R.D. 773, 774 (E.D. Wis. 1984) (court determined that neither party demonstrated good cause for issuing stipulated protective order and denied entry).

Although courts apply a less rigorous good cause standard to consent orders, some have observed that it is doubtful that any judge would approve such an order if the parties could not make a prima facie demonstration of good cause. *See United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 889 n.40 (E.D. Pa. 1981). This assertion, however, is not entirely supported by case law, as many stipulated protective orders are vacated or modified because, when put to the test, the proponents were unable to demonstrate good cause. *See infra* text accompanying notes 128-161.

123. *See Arthurs, Defendants Fight Back, supra* note 10, at 5, col. 1.

124. This concern was expressed in Judge Clarke's dissenting opinion in *In re Alexander Grant & Co. Litig.*, 820 F.2d 352 (11th Cir. 1987). Judge Clark argued that because the case involved government entities suing a securities brokerage firm for damages, the public's interest in having access to discovery materials at the very least should have been

thermore, shielding the bulk of documents exchanged through discovery may not, in fact, streamline the discovery or litigation processes.¹²⁵ By guaranteeing confidentiality now, future litigants are forced to go into court and persuade the judge to modify the stipulated order to engage in discovery with one of the parties.¹²⁶ Thus, motion practice and litigation

considered. *See id.* at 357. In *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989), the court upheld the lower court's determination that the Federal Rules of Civil Procedure created a right of public access to discovery materials. *See id.* at 788-89. This right was particularly strong in *Public Citizen* because, as one of the tobacco industry products liability cases, the lower court recognized, and the court of appeals did not dispute, that "important public health concerns surround[ed] the documents in question." *Id.* at 780.

Notably, none of the judges in the above stated cases argued that the public had a right of access independent of the Federal Rules of Civil Procedure. All acknowledged that the Supreme Court had eliminated this avenue in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984). *See supra* note 39 and accompanying text. Rather, these judges based their analysis on the presumption of public access that Rule 26(c) creates absent a showing of good cause. *See Public Citizen*, 858 F.2d at 787-89; *Alexander Grant & Co.*, 820 F.2d at 357. Thus, if a stipulated protective order is not suitably grounded in good cause, the public is denied the proper opportunity to examine the fruits of discovery.

125. *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 36 (C.D. Cal. 1984) (court implied that many of the present problems in the instant complex litigation stemmed from umbrella orders); *Does I-VI v. Yogi*, 110 F.R.D. 629, 632 (D.D.C. 1986) ("Blanket orders only postpone, rather than prevent, the need for the Court to closely scrutinize discovery materials to see if the seal was justified."); Note, *Nonparty Access*, *supra* note 10, at 1089-90 ("[s]tipulated orders presumably satisfy the immediate parties at the time of stipulation, but they may improperly prejudice the future uses of discovery fruits").

126. The difficulties in doing this are highlighted in *In re Upjohn Co. Antibiotic Cleocin Prod. Liab. Litig.*, 664 F.2d 114 (6th Cir. 1981). In this case, products liability actions were consolidated by the Judicial Panel of Multidistrict Litigation and transferred to the Eastern District of Michigan. *See id.* at 116. Shortly thereafter, one of the plaintiffs moved to vacate a protective order which had been entered by the original trial judge. Judge Kennedy, who was handling the pretrial proceedings, vacated the order, but specifically provided that the defendant could seek protective orders in the parallel actions in state courts. Moreover, the plaintiffs had to inform the court of the terms upon which any information would be disseminated to those litigants outside the multidistrict litigation. *See id.* at 116-17.

On appeal, the defendants framed the issue as follows: "[D]id the District Court, as a transferee court in multidistrict litigation, err in totally vacating a transferor court's order enjoining extra-multidistrict use and disclosure of confidential documents?" *Id.* at 117. As framed, the issue raised questions concerning comity, the authority of transferor courts once divested of a case and the "law of the case" doctrine, which states essentially that "when an issue is once litigated and decided, that should be the end of the matter." *Id.* at 119 (quoting *Philadelphia Hous. Auth. v. American Radiator & Standard Sanitary Corp.*, 323 F. Supp. 381, 383 (E.D. Pa. 1970)).

The Sixth Circuit decided that under 28 U.S.C. § 1407 (1988), transfer of district court proceedings did divest the transferor court of any further authority, at least with respect to discovery matters. *See id.* at 118. Furthermore, transferor courts would not be offended by a transferee court's decision to "harmonize the activities relating to discovery" as it saw fit, even if the transferee court went about it differently, as long as the transferee court "ponder[ed] the reasons which may have prompted the earlier action." *Id.* at 118-19. Finally, because the transferee court was not acting upon dispositive legal issues, the "law of the case" doctrine was not offended. Indeed, Judge Kennedy was acting on issues that were being addressed for the first time. *See id.* at 119-20.

What this case points out is that protective orders can raise tangential complex legal

costs are not ultimately diminished.¹²⁷

Therefore, although stipulated orders continue to exist, they are hardly the catch-all solution for unbridled discovery. In fact, if protective orders ultimately do quell discovery, but only by placing obstacles in front of likely future plaintiffs, Rule 1's goals are subverted

III. MODIFICATION OF BLANKET PROTECTIVE ORDERS

Because disseminating sensitive or confidential information can be so damaging, stipulated umbrella orders are "by nature over-inclusive."¹²⁸ They are, therefore, particularly susceptible to subsequent modification.¹²⁹ Rule 26(c), however, does not address, authorize, or provide guidelines for modifying or lifting a protective order.¹³⁰ Nonetheless, there is a consensus among courts that a protective order can be modified or lifted¹³¹ even if entered into by consent.¹³² Because of the lack of statutory guidance, however, conflict exists as to what burden of persuasion is necessary to modify an order, and upon whom this burden falls.¹³³ The legal issues become all the more complex because most motions to lift or modify a protective order are made by movants who were not parties to the action in which the protective order was entered.

issues with farreaching consequences. Therefore, in complex cases, broad protective orders may not minimize the discovery disputes at all.

127. See *infra* Part III.

128. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989).

129. See *Manual for Complex Litigation*, Second, § 21.431, at 53 n.60 (1985); *Public Citizen*, 858 F.2d at 790; *Petroleum Prods. Antitrust Litig.*, 101 F.R.D. at 40-44.

130. See Fed. R. Civ. P. 26(c).

131. See *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991); *Public Citizen*, 858 F.2d at 782; *H.L. Hayden Co. v. Siemens Medical Sys.*, 106 F.R.D. 551, 552 (S.D.N.Y. 1985); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *Manual for Complex Litigation*, Second, § 21.431, at 53 n.60 (1985).

One court analogized a protective order to an injunction because the protective order specifically extended forty-five (45) days after the final adjudication or settlement of the plaintiff's claims. See *Public Citizen*, 858 F.2d at 782. Therefore, according to the Supreme Court's decision in *United States v. Swift*, 286 U.S. 106 (1932), without question, it was subject to modification because the "power to modify the decree . . . [was there] by force of principles inherent in the jurisdiction of the chancery." *Id.* at 114.

132. See *In re Film Recovery Sys., Inc.*, 804 F.2d 386, 387-88 (7th Cir. 1986); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1310-11 (7th Cir. 1984); *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 595 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 403 (W.D. Va. 1987); *Parkway Gallery Furniture Inc. v. Kittinger/Pa. House Group, Inc.*, 121 F.R.D. 264, 267 (M.D.N.C. 1988); *In re Apex Oil Co.*, 101 Bankr. 92, 95 (Bankr. E.D. Mo. 1989); *Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co.*, No. 83-3347, 1988 U.S. Dist. LEXIS 16961, at *11 (D.D.C. Mar. 2, 1988); *New Eng. Sav. Bank v. First Commercial Corp.*, No. 88-2570, 1989 U.S. Dist. LEXIS 9296, at *5 (D.N.J. Aug. 9, 1989).

133. See *United Nuclear Corp.*, 905 F.2d at 1428; *H.L. Hayden Co.*, 106 F.R.D. at 552; *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 568-69 (E.D.N.Y. 1985); Note, *Nonparty Access*, *supra* note 10, at 1091.

A. Heightened Standard for Modification of Protective Orders

Frequently, persons interested in the litigation may wish to modify an existing protective order. The movant—a party or nonparty—may wish to disseminate the information to the public because of the tremendous public interest the matter has received.¹³⁴ Alternatively, a nonparty may seek access to discovery materials to prepare for anticipated or ongoing litigation, contending that duplicative discovery is wasteful or impossible.¹³⁵ Indeed, a party to the original order may seek modification in order to share information with another who is preparing to litigate with the nonmovant.¹³⁶

Some courts, however, believe that without the continuing guarantee of confidentiality, meaningful discovery will be considerably more difficult, and maybe impossible, to conduct.¹³⁷ Therefore, in response to modification motions by parties or nonparties, courts place the burden of persuasion squarely on the movant.¹³⁸ Some courts require the movant

134. See, e.g., *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988) (nonparty movant sought to disclose information exchanged by international tobacco manufacturer because of the tremendous health implications), *cert. denied*, 488 U.S. 1030 (1989); *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230, 231 (2d Cir. 1982) (nonprofit consumer organization sought access to terms of settlement agreement between the FDIC and accountants of large insolvent national banking institution); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 884-85 (E.D. Pa. 1981) (party sought wholesale disclosure of documents produced in decade long litigation because of the "widespread publicity" generated in legal and financial circles and because the case was of great public importance); *Apex Oil Co.*, 101 Bankr. at 97 (nonparty newspaper sought to disclose information contained in report because it contained matters affecting the public); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 38-39 (C.D. Cal. 1984) (party and nonparties sought to disclose information exchanged by defendants because the allegations of conspiracy in oil pricing resulted in a strong public interest in the case).

135. See, e.g., *American Tel. & Tel. Co.*, 594 F.2d at 595 (government filed its own suit against plaintiff but successfully argued that access to discovery materials in this related case would save time and money); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 293 (2d Cir. 1979) (Justice Department sought to gain access to sealed deposition testimony because it was relevant to its investigations and they feared that witnesses would claim their Fifth Amendment rights in any investigation by the government).

136. See *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987).

137. See, e.g., *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985) (court acknowledged that information the nonparty movant seeks would not have existed without the protective orders); *Martindell*, 594 F.2d at 295 (court acknowledged that without confidentiality, deposed witnesses would refuse to testify pursuant to their Fifth Amendment rights, thus subverting the procedural system); *Ropfogel v. Wise*, No. 83 Civ. 2837 (MP), 1991 WL 167207, at *2 (S.D.N.Y. Aug. 22, 1991) ("confidentiality is an integral part of the civil litigation process and plays an essential role in fostering the resolution of disputes from start to finish").

138. See *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989); *In re Film Recovery Sys., Inc.*, 804 F.2d 386, 389 (7th Cir. 1986); *Omega Homes, Inc.*, 656 F. Supp. at 404; *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 893 (E.D. Pa. 1981); *H.L. Hayden Co. v. Siemens Medical Sys.*, 106 F.R.D. 551, 556 (S.D.N.Y. 1985); *Ropfogel*, No. 83 Civ. 2837, 1991 WL 167207, at *2 (S.D.N.Y. Aug. 22, 1991).

to demonstrate that "extraordinary circumstance or compelling need" exists before a protective order will be modified or lifted.¹³⁹ Others take a less onerous approach and look at the totality of the circumstances and examine the movant's reasons for wanting to modify or lift the order.

Regardless of the standard, however, once the burden is placed on the movant, the modification battle is uphill and is frequently unsuccessful.¹⁴⁰ This is true for a number of reasons. First, because many of these orders are consent orders, courts place great significance on the fact that

139. *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979); *accord Minpeco S.A. v. Conticommodity Serv., Inc.*, 832 F.2d 739, 742 (2d Cir. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 147 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987); *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *In re Apex Oil Co.*, 101 Bankr. 92, 103 (Bankr. E.D. Mo. 1989); *see also Public Citizen*, 858 F.2d at 790 (although court of appeals did not think the "extraordinary circumstances" test applied, a dismissal on the merits was a significant change in circumstances warranting modification of the protective order).

Often, the movants in cases that applied the heightened standard have been governmental units seeking to use the fruits of discovery from one case in its own litigation or investigation. *See, e.g., Minpeco*, 832 F.2d at 740-41 (nonparty, the Commodities Futures Trading Commission, sought to obtain modification of protective order to gain access to sealed information for its own administrative enforcement action); *Palmieri*, 779 F.2d at 864-65 (nonparty, New York Attorney General, moved for modification of protective order for use in parallel state criminal investigation); *American Tel. & Tel. Co.*, 594 F.2d at 597 (nonparty, United States government, moved for modification of protective order for use in antitrust litigation); *Martindell*, 594 F.2d at 293 (nonparty, United States government, informally moved for modification of protective order to assist in criminal investigations). Because of the government's awesome investigatory powers, *see GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976), typically, the government is required to prove that "extraordinary circumstances" or "compelling need" exists. *Martindell*, 594 F.2d at 296. Under these circumstances, the government is denied access if the primary purpose of the modification requested is merely to compare the fruits of discovery with the results of its own investigation, or to determine if there are grounds to bring criminal charges. *See, e.g., Minpeco*, 832 F.2d at 743 (the CFTC had already completed much of its own discovery and was seeking modification simply to compare its analysis); *Palmieri*, 779 F.2d at 865-66 (lower court properly denied New York Attorney General's request to unseal deposition taken in collateral case because exceptional circumstances did not exist and the very papers requested would not have existed but for the protective order); *American Tel. & Tel. Co.*, 594 F.2d at 597 (court granted government's motion to modify protective order because exceptional circumstances existed and there was no sign that government was exploiting discovery); *Martindell*, 594 F.2d at 296 (court denied government's motion to modify protective order because exceptional circumstances did not exist and government was using information for investigatory purposes only).

140. *See e.g., Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230, 231 (2d Cir. 1982) (court denied nonparty's motion to modify protective order); *Zenith Radio Corp.*, 529 F. Supp. at 894 (court denied party's motion to modify protective order); *H.L. Hayden Co.*, 106 F.R.D. at 556-57 (same); *Doskocil Cos. v. C&F Packing Co.*, No. 89 C 0600, 1989 U.S. Dist. LEXIS 14071, at *3 (E.D. Ill. Nov. 17, 1989) (same).

Understandably, therefore, courts may not accept the discovery sharing argument of a party who originally consented to the protective order as compelling enough to warrant modifying an agreement relied upon by the other party. *See, e.g., Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987) (court denied plaintiff's request to modify protective order to which plaintiff had voluntarily stipulated, because court would not "rewrite" the terms of stipulated order that had been relied on by opponent and apply them retroactively).

the opposing party relied on continuing confidentiality to expedite discovery and eliminate disputes.¹⁴¹ Furthermore, the court's inevitable document-by-document review of information to establish what is properly entitled to protection may also militate against modification.¹⁴²

The moving party must thus convince the court that the need for public dissemination or discovery sharing outweighs a non-movant opponent's reliance.¹⁴³ The court clearly forces the moving party to "justify the investment of judicial and private resources" that would be involved in trying to declassify the guarded information by measuring any showing made by the movant against the unfairness to the non-movant opponent.¹⁴⁴ This is particularly true if the movant is a party who, up to the present motion, operated and benefitted under the existing protective order.¹⁴⁵ As one court stated, "having made their bed, [the movants] must sleep in it."¹⁴⁶

Despite the weight given by these courts to a non-movant opponent's reliance, some movants are able to demonstrate that modification is nonetheless warranted. Not surprisingly, those most successful are able to establish that the opponent's reliance on the permanence of the order is unreasonable.¹⁴⁷ In addition, modification has been granted when a movant demonstrated that it was not seeking to exploit the present litiga-

141. See, e.g., *Ernst & Ernst*, 677 F.2d at 232 (if a protective order has been entered and relied upon, it can only be modified if an 'extraordinary circumstance' or 'compelling need' sanctions the requested modification); *Martindell*, 594 F.2d at 296-97 (same); *Zenith Radio Corp.*, 529 F. Supp. at 893-94 (parties had relied upon the protective orders for nearly a decade and plaintiff's motion for "wholesale declassification would undermine their justified expectations"); *H.L. Hayden Co.*, 106 F.R.D. at 556 (defendants had relied upon the protective order and this was a factor counseling against modification); *Ropfogel v. Wise*, No. 83 Civ. 2837, 1991 WL 167207, at *3 (S.D.N.Y. Aug. 22, 1991) (both parties had relied on order and had benefitted under it, therefore, absent consent, there was no right to disclosure).

In *Martindell*, the court stated that "absent a showing of improvidence in the grant of a . . . protective order or some extraordinary circumstance or compelling need, . . . a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government." *Martindell*, 594 F.2d at 296 (emphasis added).

142. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 893, 894 (E.D. Pa. 1981).

143. See *Palmieri v. New York*, 779 F.2d 861, 864-65 (2d Cir. 1985); *Zenith Radio Corp.*, 529 F. Supp. at 893, 894; *H.L. Hayden Co. v. Siemens Medical Sys.*, 106 F.R.D. 551, 555 (S.D.N.Y. 1985).

144. *Zenith Radio Corp.*, 529 F. Supp. at 894.

145. See *Zenith Radio Corp.*, 529 F. Supp. at 894; *Omega Homes, Inc.*, 656 F. Supp. at 404; *H.L. Hayden Co.*, 106 F.R.D. at 552; *New Eng. Sav. Bank v. First Commercial Corp.*, No. 88-2570, 1989 U.S. Dist. LEXIS 9296, at *2 (D.N.J. Aug. 9, 1989); *Doskocil Cos. v. C&F Packing Co.*, No. 89 C 0600, 1989 U.S. Dist. LEXIS 14071, at *2 (N.D. Ill. Nov. 17, 1989).

146. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 894 (E.D. Pa. 1981).

147. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 147 (2d Cir. 1987) (reliance was unreasonable because stipulated protective orders related to pretrial discovery only and the orders were probably improvidently granted because there was never any showing of good cause); *Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir.

tion for a fishing expedition, and that duplicating discovery would result in great waste.¹⁴⁸ Still another modification was obtained when the court was convinced that the movant, who was a stipulating party to the original order, would suffer competitive harm without a modification.¹⁴⁹ The court in this latter case was particularly impressed that the movant became aware of the potential harm after the first agreement was signed.¹⁵⁰ Otherwise, courts appear reluctant to allow a party to the order to "gain by motion what it has specifically bargained away by consent order."¹⁵¹

B. *Good Cause Standard for Modification of Protective Order*

Other courts reject the "extraordinary circumstances or compelling need" approach, and instead opt to place the burden on the party opposing the modification to establish why the protective order should remain.¹⁵² Most courts conclude that to sustain the status quo, the opposing party must demonstrate that "good cause" for the protective order exists.¹⁵³ Their reasoning for this approach is that Rule 26(c)

1985) (if movant could show that protective orders were improvidently granted, reliance would not sustain the protective order).

In *Martindell*, the court prohibited modification of a protective order that sealed the transcript of deponent witnesses because the witnesses relied on the order. See *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979). The court added, however, that reliance upon an order protecting "pre-existing documents from disclosure to the government would normally be more difficult to justify than that of a witness who would, absent the protective order, have invoked his privilege and given no testimony at all." *Id.* at 297 n.8.

148. See *American Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979). Interestingly, the Seventh Circuit has since rejected the "exceptional circumstances" or "compelling need" test, calling the test an "unfortunate choice of words" because the "two considerations . . . weighed in *Grady* were thoroughly unexceptional." *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1300 (7th Cir. 1980). The Seventh Circuit now looks to see if modification would "tangibly prejudice substantial rights of the party opposing modification." *Id.* at 1299.

149. See *New Eng. Sav. Bank v. First Commercial Corp.*, No. 88-2570, 1988 U.S. Dist. LEXIS 9296, at *7 (D.N.J. Aug. 9, 1989).

150. See *id.* at *5.

151. *Id.*; see, e.g., *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 404 (W.D. Va. 1987) (party's wish to modify protective order so as to share the fruits of discovery with other litigants was not persuasive because party had consented to, and benefitted under, the order as it was and changing it at this late stage was unfair); *Parkway Gallery Furniture, Inc. v. Kittinger/Pa. House Group, Inc.* 121 F.R.D. 264, 267 (M.D.N.C. 1988) ("[w]hen a party willingly accedes to the entry of a stipulated protective order, the Court will be hesitant to relieve that party of its obligations").

152. See *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991); *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 658 (D.D.C. 1986); *In re Film Recovery Sys., Inc.*, 804 F.2d 386, 389 (7th Cir. 1986); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1311 (7th Cir. 1984); *Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co.*, No. 83-3347, 1988 U.S. Dist. LEXIS 16961, at *12 (D.D.C. Mar. 2, 1988).

153. See *Continental Ill.*, 732 F.2d at 1311; *Grundberg v. Upjohn Co.*, 137 F.R.D. 372, 389 (D. Utah 1991); *Tavoulareas*, 111 F.R.D. at 658; *Independent Petrochem. Corp.*, No. 83-3347, 1988 U.S. Dist. LEXIS 16961, at *12 (D.D.C. Mar. 2, 1988). The Seventh and Tenth Circuits have adopted a similar approach by requiring the opposing party to

presumes access unless good cause is shown.¹⁵⁴ Therefore, if one is interested in gaining access to material exchanged through discovery, the party opposing modification must be able to demonstrate why access should not be granted.¹⁵⁵

When pressed to justify the maintenance of a stipulated protective order, most parties opposing modification argue that they were more forthcoming in response to discovery requests because they relied on the confidentiality of the order. Consequently, they may have turned over documents containing privileged or confidential information which if revealed will work serious harm to those involved.¹⁵⁶ Nevertheless, this argument is often unavailing because courts frequently find that the party's past reliance on impermeable confidentiality was misplaced. Indeed, if there is any inkling that the party ignored signs that disclosure might result, courts reject the reliance argument.¹⁵⁷ The reliance argument is not completely hopeless, however, particularly if the court is adamant that the court's inevitable document-by-document review subverts the goals of Rule 1.¹⁵⁸

Fear that modification will result in discovery sharing, or that it will unfairly assist another litigant in preparing for litigation, is also a generally ineffective argument to sustain a protective order in the face of a

demonstrate if its rights would be "substantially prejudiced." See *United Nuclear Corp.*, 905 F.2d at 1428; *Film Recovery Sys., Inc.*, 804 F.2d at 389; *Wilk*, 635 F.2d at 1299.

154. See *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 570 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987). In "*Agent Orange*", Magistrate Scheindlin determined that the "extraordinary circumstances" or "compelling need test," which placed the burden on the movant, and which controlled in the Second Circuit, was not applicable to the instant case because the government was not the movant and the protective order were not permanent. See *id.* at 570. Under those circumstances, the Magistrate felt, the burden should be placed on the parties seeking continuance of the protective orders. On appeal, the Second Circuit skirted the issue of whether the "extraordinary circumstances" test still controlled and held that the movants had met the test regardless. See 821 F.2d at 147.

155. See *supra* note 154.

156. See, e.g., *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1304 (7th Cir. 1984) (party opposing the motion argued that protected information revealed attorney-client information); *Tavoulaareas v. Washington Post Co.*, 111 F.R.D. 653, 656 (D.D.C. 1986) (party opposing the motion argued that protected information revealed confidential and proprietary information); *Independent Petrochem. Corp.*, No. 83-3347, 1988 U.S. Dist. LEXIS 16961, at *12 (D.D.C. Mar. 2, 1988) (party opposing the motion argued that protected information revealed attorney-client and work product information).

157. See, e.g., *Littlejohn v. BIC Corp.*, 851 F.2d 673, 680 (3d Cir. 1988) (party's reliance on protective order was unreasonable because they failed to raise the confidentiality issue when plaintiff discussed and used confidential documents as trial exhibits); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1311 (7th Cir. 1984) (protective order by its terms was not intended to protect discovered information from public disclosure if the information was entered into evidence); *Independent Petrochem. Corp. v. Aetna Casualty & Sur. Co.*, No. 83-3347, 1988 U.S. Dist. LEXIS 16961, at *12 (D.D.C. Mar. 2, 1988) (the protective order was so broad that allegations of reliance were not sufficiently compelling to warrant their continuation).

158. See *Tavoulaareas*, 111 F.R.D. at 659.

motion to lift or modify it.¹⁵⁹ This is true, unless, of course, the party can demonstrate serious harm. Still, because most courts subscribe to the belief that discovery sharing streamlines unavoidable discovery,¹⁶⁰ harm is difficult to demonstrate and modifications generally are granted.¹⁶¹

CONCLUSION

While there is no question that Rule 26(c) protective orders can ease the otherwise tedious and expensive discovery process, it is equally clear that these orders can be as exploitative as the process they attempt to streamline.

In some settings, courts will demand that the movant articulate with specificity the reasons why discovery should commence or continue behind a veil of secrecy. Usually, this occurs when defendants move unilaterally to prevent information from reaching other potential plaintiffs, the public, or competitors. In requiring this heightened demonstration of harm, courts focus on more than just the impact a protective order will have on the present parties and the court. Instead, the court focuses on Rule 1's central goal of "securing the just, speedy, and inexpensive" determination of the action. By allowing the release of this information, courts are clearly demonstrating that allowing the public and potential litigants to review the merits of the case and the value of the information actually comports with Rule 1, outweighing defendants' arguments that disclosure thwarts Rule 1's purpose. In fact, absent some demonstration that revelation of the information truly denies the movant a competitive advantage and poses serious financial harm if obtained by competitors, a unilateral motion for a protective order is difficult to obtain.

On the other hand, if both parties stipulate to a protective order, courts rarely question the propriety of the order. At first glance, stipulated protective orders pose the least problems for the courts and the litigation process as a whole. Because the parties usually draft the order to encompass most, if not all, of the material subject to discovery, presumably judicial resources are saved and discovery proceeds smoothly.

A closer look, however, reveals that this over-inclusiveness tends to

159. See *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 799 (1991); *In re Film Recovery Sys., Inc.*, 804 F.2d 386, 389 (7th Cir. 1986); *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1300 (7th Cir. 1981).

160. See *supra* notes 38-43 and accompanying text.

161. See, e.g., *United Nuclear Corp.*, 905 F.2d at 1428 ("Defendants' desire to make it more burdensome for Intervenor to pursue their collateral litigation is not legitimate prejudice."); *Wilk*, 635 F.2d at 1300-01 (because the charges in the collateral case were almost identical to those in the ongoing action, duplicate discovery would be wasteful and discovery sharing did not tangibly prejudice the opponent's rights); *Film Recovery Sys., Inc.*, 804 F.2d at 389 (because the collateral litigant would be allowed to obtain the same discovered information in a similar case, there was no demonstration of tangible prejudice).

make these orders particularly susceptible to later modification. Consequently, the discovery disputes avoided in the original dispute arise in the subsequent litigation and still require the expenditure of judicial resources and the parties' money. In fact, because Rule 26(c) does not provide any authority or guidance for lifting or modifying protective orders, greater resources are spent litigating the proper burden for modification and identifying on whom the burden falls.

Some courts determine that the nonparty movant must demonstrate "extraordinary or compelling need" to warrant modifying or lifting a stipulated order. The glaring problem with this heightened standard is that it applies to situations where the court might not have engaged in a good cause analysis in the original issuance.

Other courts reject the "extraordinary and compelling need" test, requiring instead that the party advocating the status quo demonstrate good cause why the protective order should remain. Under this analysis, if the party reasonably relied on the protective order, the order will remain. If, however, the party can only argue that the protective order facilitated discovery, then once discovery is over, the order will be lifted.

Ultimately, there are no hard and fast rules to establish good cause. With the exception of stipulated orders, courts appear ready and willing to look at all factors—even those that go beyond a particular court's role in the litigation—to determine exactly what "justice requires."