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Rule 26(c)(7) Protective Orders: Just What Are You Hiding Under There, Anyway?

BY ROSS T. TURNER*

INTRODUCTION

*Judicious division of labor between a large number of defense counsel can tax the limits of plaintiff's counsel's ability and decrease the quality of the plaintiff's counsel's product.*¹

A consumer is seriously injured by an allegedly defective product. One month later, another consumer is killed in a similar accident involving the same product. Separate products liability actions are filed against the manufacturer alleging the same product defect. During discovery, the manufacturer provides inconsistent responses to identical discovery requests from the respective attorneys for the injured consumers, but the injured parties, their attorneys, and the court will never know of the conflicting answers. The plaintiffs' attorneys must refrain from sharing or comparing what their individual discovery has revealed. Should the cases settle prior to trial, the public will never know of the allegedly defective product. Why? Because the manufacturer successfully moved for, or the attorneys for the injured consumers agreed to, the entry of protective orders or confidentiality agreements.²

* J.D. expected 2000, University of Kentucky. The author wishes to thank his father, Thomas E. Turner, J.D. 1970, University of Kentucky, for his guidance, his wisdom, and, most importantly, his patience.

¹ Albert H. Parnell, *The Coordinated Group Defense*, FOR THE DEFENSE, Nov. 1980, at 16, 19. The author of this seemingly obvious statement was the former lead counsel for Johns-Manville Corp. before asbestos litigation forced the company into bankruptcy. See Joseph F. Rice & Nancy Worth Davis, *Judicial Innovation in Asbestos Mass Tort Litigation*, 33 TORT & INS. L.J. 127, 136 n.52 (1997).

² The terms "protective order" and "confidentiality agreement" are often used interchangeably. While both typically limit the use or dissemination of information,

I. SCOPE

The defense bar has recognized that plaintiffs have “demonstrated a propensity for finding ways to streamline the expenditure of time, effort, and expense necessary to litigate against a particular defendant and product, [and] defense counsel can expect an increase in plaintiff’s counsel’s sharing of discovery materials.”³ In response to this perceived threat, plaintiffs can expect a similar increase in the defense’s attempted use of protective orders as provided for in Federal Rule of Civil Procedure 26(c)(7)⁴ and its analogous state counterparts.⁵ As part of an overall strategy of attrition waged by manufacturers against individual plaintiffs, the use, and often the misuse, of protective orders to shield or limit the use of documents produced in response to discovery requests is becoming the rule rather than the exception.⁶ This is due in part to the perception that the typical defendant’s strategy in a products liability case is to

[m]ake this litigation so difficult and so expensive that most plaintiffs’ attorneys will be overwhelmed, abandon the claim, and never try this kind of litigation again; make the discovery process extremely time-consuming for the parties and the court; [and] encourage the courts to deny discovery requests by suggesting that this will “move the case along.”⁷

This Note will explore the circumstances under which protective orders limiting the use and/or dissemination of “trade secret[s] or other confiden-

a “confidentiality agreement” usually refers to an agreement by the parties, while a “protective order” refers to one entered by the court pursuant to FED. R. CIV. P. 26(c). For a discussion of the provisions of this rule, see *infra* Part III.B.

³ Kerry A. Kearney & Tracey G. Benson, *Preventing Non-Party Access to Discovery Materials in Products Liability Actions: A Defendant’s Primer*, in 4 CURRENT ISSUES IN L. & MED. 36, 43-44 (Defense Research Inst. Series No. 4, 1987).

⁴ FED. R. CIV. P. 26(c)(7).

⁵ See, e.g., KY. R. CIV. P. 26.03(1)(g) (West 1998). The federal and Kentucky rules governing civil discovery protective orders are for all practical purposes identical. See *infra* note 69.

⁶ See Teresa M. Hendricks & Joseph W. Moch, *Protective Orders: The Industry’s Silencer on the Smoking Gun*, 73 MICH. B.J. 424, 424 (1994).

⁷ Dianne Jay Weaver, *Foreword* to FRANCIS H. HARE, JR. ET AL., FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES at xxvii (1994) [hereinafter HARE, JR. ET AL., FULL DISCLOSURE].

tial . . . information”⁸ are appropriate in products liability actions brought by individual plaintiffs against corporate manufacturer defendants. It focuses on a common problem: the entry of protective orders, whether by court order or by agreement of the parties, covering documents that are not entitled to such protection under the rules of civil procedure. The circumstances of a given case may also raise questions regarding the ethical and legal propriety of such requests. A manufacturer, like any commercial litigant, clearly has an interest in preventing the disclosure of true trade secrets to its competitors.⁹ That same manufacturer is not, however, entitled to misuse the rules in an attempt to force an individual plaintiff to try her case in a vacuum.¹⁰

Part II examines the legal and ethical obligations of the manufacturer’s counsel—to the client, to the plaintiff, and to the court—when considering whether to seek either an agreed-upon or a court-entered protective order. It focuses on the considerations that must be addressed by the manufacturer’s counsel under the Federal Rules of Civil Procedure (“Federal Rules”)¹¹ and

⁸ FED. R. CIV. P. 26(c)(7). Although this Note is concerned primarily with the rights and obligations of individual parties to products liability actions, the battle over the use of protective orders is being waged on several fronts. The public’s right to access of discovered documents, particularly where an allegedly defective product is involved, is hotly debated. Compare Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 428 (1991) (arguing against reform that would “creat[e] a presumption of public access” to information obtained during discovery), with Jacqueline S. Guénégo, Note, *Trends in Protective Orders under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score*, 60 FORDHAM L. REV. 541, 549 (1991) (conceding “the presumption of public access created by Rule 26(c)”). A side issue to that debate is the effect of the United States Supreme Court’s ruling in the First Amendment case of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984), that when a protective order is entered on a showing of good cause, is limited to discovery, and does not cover evidence obtained from other sources, it does not violate the First Amendment. See, e.g., WILLIAM H. FORTUNE ET AL., MODERN LITIGATION AND PROFESSIONAL RESPONSIBILITY HANDBOOK § 7.2.4 (1996) (“The federal appellate courts have interpreted *Seattle Times* as requiring, at most, a nod in the direction of the first amendment before issuing a protective order.”). These questions are beyond the scope of this Note.

⁹ See *infra* notes 142-44 and accompanying text.

¹⁰ See Francis H. Hare, Jr. & James L. Gilbert, *Resisting Confidentiality Orders*, TRIAL, Oct. 1990, at 50, 50 [hereinafter Hare, Jr. & Gilbert, *Resisting Confidentiality Orders*].

¹¹ See *infra* Part II.A, notes 21-33.

the Model Rules of Professional Conduct.¹² Part III covers the statutory authority for civil discovery protective orders. It includes an overview of the modern discovery system, the issues giving rise to the need for protective orders, and the primary rule governing their use in products liability actions.¹³ This section sets forth the minimum requirements which must be satisfied for the entry of a protective order, cautions against a plaintiff's unquestioning agreement to such an order, and further cautions against a court's granting these requests as a matter of course.¹⁴ It also discusses the emergence of "umbrella" or "blanket" protective orders, which may be used as a means of shielding documents not otherwise entitled to protection under the rules and of effectively shifting the burden of proof as to the appropriateness of an order from the manufacturer to the individual plaintiff.¹⁵

Part IV addresses a relatively new concept that many believe is the primary reason for the misuse of protective orders: information sharing by similarly situated plaintiffs. This section explains that information sharing can help alleviate the disparities in resources between plaintiffs and defendants in products liability cases and discusses the rise of information exchange groups. Finally, Part V reaches the conclusion that where the statutory elements of Rule 26(c)(7) have been satisfied by a corporate manufacturer defendant, protective orders are properly entered; that where these elements are lacking, legal and ethical rules prohibit their use; and that it will rarely if ever be beneficial in the long run for a plaintiff to agree to such orders where those elements have not been satisfied.

Whether used as a sword or a shield,¹⁶ both the federal and Kentucky rules provide for the entry of protective orders when certain requirements are met.¹⁷ This Note will explore the factors, both legal and ethical, that must be addressed by the parties and the court before a protective order is sought or entered.¹⁸ A long line of federal district and circuit court opinions, as well as a growing number of analogous state court decisions, attest that parties to products liability litigation continue to disagree over the use of protective orders with considerable frequency.¹⁹

¹² See *infra* Part II.B, notes 34-56.

¹³ See *infra* Part III.A, notes 57-77.

¹⁴ See *infra* Part III.B, notes 78-124.

¹⁵ See *infra* Part III.C, notes 125-44.

¹⁶ See generally Glen Mark Thompson, Note, *Protective Orders: Sword and Shield in the War of Discovery*, 12 AM. J. TRIAL ADVOC. 483 (1989).

¹⁷ See *infra* note 78 and accompanying text.

¹⁸ See *infra* Part II.

¹⁹ Befitting an issue of concern to products liability plaintiffs, who are often thrust into the role of David in their struggle against a corporate Goliath, the body

It has been noted that the discovery process “concededly may work to the disadvantage as well as to the advantage of individual plaintiffs. Discovery, in other words, is not a one-way proposition.”²⁰ This Note maintains that both plaintiffs and manufacturers in products liability actions should be subject to the same construction and application of the discovery rules.

II. THE MANUFACTURER’S COUNSEL’S LEGAL AND ETHICAL OBLIGATIONS

A. Rule 1: The Overriding Consideration

Federal Rule of Civil Procedure 1 provides that all federal procedural rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”²¹ Rule 1 was amended in 1993, adding the words “and administered” in recognition of “the affirmative duty of the court . . . to ensure that civil litigation is resolved not only fairly, but also without undue cost or delay. As officers of the court, attorneys share this responsibility with the judge to whom the case is assigned.”²² Ironically, Rule 1 is often cited, by courts and commentators, by opponents and proponents alike, as the primary factor in questions involving the use of protective orders.²³ The plaintiff often contends that it

of work extolling the virtues of protective orders from a defendant’s perspective is voluminous. *See, e.g.*, Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C.L. REV. 771 (1990); Paul S. Doherty III, *Public Policy Favors the Liberal Use of Protective Orders in Products Liability Litigation*, 4 PRODUCTS LIABILITY L.J. 143 (1993); James R. Jarrow, *Industrial Espionage? Discovery Within the Rules of Civil Procedure and the Battle for Protective Orders Governing Trade Secrets and Confidential Information*, 32 WASHBURN L.J. 318 (1993).

²⁰ *Hickman v. Taylor*, 329 U.S. 495, 507 (1947).

²¹ FED. R. CIV. P. 1.

²² *Id.* 1 advisory committee’s note.

²³ *Compare* *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 91 (D.N.J. 1986) (stating “requests to limit the use of discovery to the litigation in which it is initially obtained” is “counter to a fundamental purpose of discovery under the Federal Rules” and “the admonition of Rule 1”), *and* Guénégo, *supra* note 8, at 571 (arguing that allowing the release of discovered evidence to other litigants “comports with Rule 1, outweighing defendants’ arguments that disclosure thwarts Rule 1’s purpose”), *with* *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 892 (E.D. Pa. 1981) (grouping cumbersome data into manageable categories to support a Rule 26(c) order “is desirable from the standpoint of case

is less expensive for present and future litigants to share the fruits of discovery with one another. Meanwhile, the manufacturer asserts that it will be less expensive and speedier if sharing among plaintiffs is restricted by claiming that all discovered information is confidential, without the time- and labor-intensive process of selecting each particular document which may actually contain confidential information.²⁴

Manufacturers routinely request protective orders, either by court order or by agreement, when faced with a number of cases involving the same alleged product defect.²⁵ The manufacturer's counsel will agree to produce the requested documents, but only under an agreement of confidentiality.²⁶ Often "plaintiff's counsel will voluntarily execute the protective order out of a sense of relief that the sought-after documents will finally be produced."²⁷ Seldom in these circumstances is the manufacturer required by the court to make any showing that the requirements of Rule 26(c) have been met.²⁸

management and is consistent with the instruction of Rule 1"), and Campbell, *supra* note 19, at 772 (asserting that "application of the Rules of Civil Procedure to products liability litigation . . . often produces results that are wholly inconsistent with the paramount goal of the Federal Rules of Civil Procedure as articulated in Rule 1").

²⁴ See *infra* notes 126-36 and accompanying text. Manufacturers commonly argue that the interests of speed and financial economy are best served by the entry of a protective order prohibiting dissemination of *any* material exchanged through discovery. See, e.g., *Cipollone*, 113 F.R.D. at 93. Due to the massive amounts of documents involved in most products liability actions, and to reduce supervision by the court, some courts have accepted this contention even when the plaintiff has objected. See *Tavoulareas v. Piro*, 93 F.R.D. 24, 29-30 (D.D.C. 1981) (stating that whether the protective order would serve the interests of the court was a proper factor to consider). Note, however, that manufacturers rarely discuss the "just" element of Rule 1. See *infra* note 33.

²⁵ See Hare, Jr. & Gilbert, *Resisting Confidentiality Orders*, *supra* note 10, at 50.

²⁶ A manufacturer's request for a protective order is often the result of the plaintiff's motion to compel discovery, filed after receiving inadequate responses to discovery requests. When faced with the court's discovery order, the claim that the information should be protected suddenly arises. See Peter Perlman, *Protective Orders: Public Safety at the Mercy of Private Justice 1* (unpublished manuscript from presentation to St. Ives Journal Club (Apr. 25, 1989)) (on file with author). Mr. Perlman, noted products liability attorney and veteran of many protective order disputes, offered invaluable insight into many of the ideas presented in this Note.

²⁷ *Id.* at 2.

²⁸ See *id.*

The benefits to the manufacturer resulting from entry of the protective order are numerous. Individual plaintiffs with similar actions and discovery needs are forced into duplicitous and time-consuming discovery, increasing the litigation costs in both time and dollars for each plaintiff.²⁹ In addition, counsel for the injured consumer is prevented from discussing or comparing the documents received to those received by others with similar cases. By restricting the ability to discuss the documents, the manufacturer severely limits meaningful consultation between plaintiffs' counsel. If the manufacturer's responses to multiple plaintiffs are inconsistent, the differences will necessarily go undetected.³⁰

In return, the plaintiff receives nothing. An agreed protective order is, in effect, an agreement whereby the plaintiff relinquishes her rights to use and compare the discovered information and, in return, receives from the defendant exactly what she is otherwise entitled to under the discovery rules. The "carrot" is that the defendant will produce the documents without protracted discovery disputes.³¹

Due to the nature of the legal system and the current discovery rules, "there are many opportunities, if not incentives, for attorneys to engage in discovery that, although authorized by the broad, permissive terms of the rules, nevertheless results in delay."³² Products liability actions, and particularly unqualified requests for protective orders, often provide ample opportunities for such delays and not the "just, speedy, and inexpensive determination" mandated by Rule 1.³³

²⁹ *See id.* at 7.

³⁰ *See id.*

³¹ Some even suggest that, without a protective order, the chances of settlement are diminished. *See Campbell, supra* note 19, at 835 (stating that where a defendant "can no longer rely upon protective orders as a tool to facilitate full and complete disclosure of relevant confidential information, the settlement of cases will be delayed or prevented").

³² FED. R. CIV. P. 26 advisory committee's note.

³³ FED. R. CIV. P. 1. The operative word in Rule 1 is "and." The rule does not call for the just, speedy *or* inexpensive determination of every action. Not surprisingly, the "just" requirement of Rule 1 receives little or no attention from most protective order proponents. *See, e.g., Campbell, supra* note 19, at 772-73 (asserting that agreed protective orders make "great strides . . . toward securing the relatively speedy and inexpensive determination of lawsuits"); *Doherty, supra* note 19, at 154 (stating that umbrella protective orders "are especially effective tools to expedite discovery"); *Jarrow, supra* note 19, at 325 (noting that liberal use of protective orders would "truly expedite the process").

The "just" requirement has been noted by courts in other contexts. In a products liability action involving the infamous "killer" multi-piece truck rims, the trial

B. The Model Rules of Professional Conduct: Expedition and Access

The problems associated with the speedy determination requirement of Rule 1 affect all aspects of a products liability action, but perhaps nowhere are they more acute, and the abuse more widespread, than during discovery. The Model Rules of Professional Conduct ("Model Rules") offer some guidance, if no clear answers. Several provisions are applicable to requests for protective orders by manufacturers in products liability actions. Model Rule 3.2 states that "[a] lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client."³⁴ Model Rule 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence."³⁵ In addition, Model Rule 3.4(d)'s prohibition against the making of frivolous discovery requests is implicated in some cases.³⁶

The comment to Model Rule 3.2 serves as a starting point for an analysis of whether a manufacturer's request for a protective order is proper. The drafters began by stating, "Dilatory practices bring the administration of justice into disrepute."³⁷ In an age marked by skepticism on the part of the general public toward the practice of law, this comment should guide the parties' discovery decision-making and conduct.³⁸ The comment to Rule 3.1 also makes clear that the "duty to use legal procedure for the fullest benefit of the client's cause"³⁹ is no defense to the improper use of protective orders, noting that "[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client."⁴⁰ Finally, the comment to Rule 3.2 states:

court automatically excluded from evidence all of the defendant's documents that were dated after the date of manufacture of the product at issue. *Jackson v. Firestone Tire & Rubber Co.*, 788 F.2d 1070, 1084 (5th Cir. 1986). The appellate court stated, "While this approach certainly promotes the cause of efficiency, we think that the overriding goal of justice demands a more sensitive analysis." *Id.*

³⁴ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1998).

³⁵ *Id.* Rule 3.4(a).

³⁶ *See id.* Rule 3.4(d).

³⁷ *Id.* Rule 3.2 cmt.

³⁸ *See, e.g.,* Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805 (1998).

³⁹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.1 cmt.

⁴⁰ *Id.* Rule 3.2 cmt. Umbrella protective orders may be used to restrict more information than is properly entitled to protection, and agreed protective orders can remove the manufacturer's burden of proving entitlement to protection altogether. *See infra* Part III.C.

Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.⁴¹

Thus many of the justifications put forth by manufacturers in support of such protection are specifically rejected by the drafters of the Model Rules. First, manufacturers often contend that *all* discovered documents should be covered, regardless of whether they are confidential or otherwise entitled to protection, because to require strict adherence to the provision of Rule 26(c) is time-consuming and labor-intensive.⁴² Second, improper protective order requests clearly can be used to frustrate a products liability plaintiff's attempt to obtain information critical to her claim and often lead only to delay.⁴³ Finally, the current tolerance of unjustified protective orders is perhaps best evidenced by the lack—thus far—of ethical and legal opinions directed at such misuse.⁴⁴ It cannot be maintained, however, that a particular course of action is necessarily “ethical” by virtue of not being specifically covered by an ethical rule or because there are no published opinions explaining a clearly applicable rule.

Under Model Rule 3.4(a), a lawyer must not unlawfully⁴⁵ obstruct access to evidence.⁴⁶ The comments state that “the adversary system

⁴¹ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 cmt.

⁴² See the discussion of umbrella protective orders *infra* Part III.C.

⁴³ See *infra* Part IV.

⁴⁴ No opinions were found that directly address the primary question posed here: whether a lawyer for a manufacturer in a products liability action violates an ethical duty by seeking or requesting a protective order for discovered information not entitled to protection under Rule 26(c) or otherwise.

⁴⁵ The wording of Model Rule 3.4(a) does not specifically address the question of whether an improper request for a protective order is “unlawful.” While this question is beyond the spirit and scope of this Note, it has been recognized that the rule “piggybacks on law external to the rule without identifying specifically the external law on which the meaning of the rule depends.” *Fairness to Opposing Party: Destroying Evidence*, [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 61:705 (Sept. 17, 1997). Some legal scholars have argued that the term “unlawfully” in Rule 3.4(a) refers not only to criminal law but also to conduct that violates the discovery rules. *Id.* at 61:705-06.

⁴⁶ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a). Likewise, the Model Code directs a lawyer not to suppress evidence that the client has a legal obligation to reveal or produce. See MODEL CODE OF PROFESSIONAL RESPON-

contemplates that the evidence in a case is to be marshalled competitively by the contending parties.⁴⁷ The drafters specifically point out that “[f]air competition in the adversary system is secured by prohibitions against . . . obstructive tactics in discovery procedure.”⁴⁸ Finally, echoing a sentiment that has particular significance in products liability actions, the drafters note that “[d]ocuments and other items of evidence are often essential to establish a claim or defense.”⁴⁹

When protective orders are sought in cases where their use is unwarranted but there has been no clearly “unlawful” conduct, Rule 3.4(a) may be difficult to apply. This is due in part to the general rule that litigants have no general duty to reveal damaging information to their adversaries.⁵⁰ Although courts frequently invoke this rule in cases where lawyers have allegedly “improperly withheld or concealed information,”⁵¹ the correlation between the general rule and the ethical propriety of such conduct should not be viewed as dispositive.

Less apparent, though perhaps much more threatening, is the notion that in attempting to force each individual plaintiff to try her case in a vacuum, a manufacturer’s request for a protective order drags the entire judicial system into the vacuum with her.⁵² In a never-ending parroting of the idea that the protective order will simplify discovery in *this* case, the effect on later litigants is brushed aside. Nonetheless, the court will undoubtedly see the same manufacturer, in similar cases, making this argument again and again. The “[j]udicious division of labor between a

SIBILITY DR 7-109(A) (1983). According to the *Restatement of the Law Governing Lawyers*, a lawyer may not obstruct access to evidence “when doing so would violate a court order or a criminal statute dealing with obstruction of justice or a similar offense.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 178(2) (Tentative Draft No. 8, 1997); see *Fairness to Opposing Party*, *supra* note 45, at 61:705.

⁴⁷ MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(a) cmt.

⁴⁸ *Id.*

⁴⁹ *Id.* This is especially true for plaintiffs in products liability cases. See discussion *infra* notes 196-98 and accompanying text.

⁵⁰ See *Fairness to Opposing Party: Concealing, Obstructing Access to Evidence*, [Manual] Laws. Man. on Prof. Conduct (ABA/BNA) 61:709 (Sept. 17, 1997).

⁵¹ *Id.* at 61:709 (citing *In re Enstar Corp.*, 593 A.2d 543 (Del. Ch. Ct. 1991), *rev'd on other grounds*, 604 A.2d 404 (Del. 1992)). This idea that a lawyer has no duty to reveal damaging information is further seen in ethics opinions stating that “generally there is no professional duty to disclose information that would be helpful to the opposing party.” *Id.* at 61:709.

⁵² See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(d).

large number of defense counsel can tax the limits of plaintiff's counsel[]"⁵³ In doing so, it also taxes the limits of an already overburdened court system.

The Model Rules raise no fewer than three critical questions that must be addressed by the manufacturer's counsel when deciding to seek a protective order: Is the order sought merely for the convenience of the defendant or its counsel?⁵⁴ Is the purpose of the order to frustrate the plaintiff's attempts "to obtain rightful redress or repose"?⁵⁵ Would "a competent lawyer acting in good faith . . . regard the [order] as having [no] substantial purpose other than delay"?⁵⁶ If the answer to any of these questions is yes, then counsel should refrain from making the request. If the manufacturer is unable or unwilling to answer these questions, then it is incumbent on the plaintiff's counsel, and the court, to demand that they respond.

III. AUTHORITY FOR DISCOVERY PROTECTIVE ORDERS

A. *The Modern Discovery System*

Discovery is a relatively new concept in the litigation process. Prior to the adoption of the Federal Rules in 1938, the "pre-trial functions of notice-giving, issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings."⁵⁷ Adverse parties would plead back and forth until a legal or factual issue arose.⁵⁸ Where necessary information could not be gleaned from the pleadings, the "parties were forced to obtain [it] . . . by whatever means of private investigation they could afford."⁵⁹ Trials were essentially "carried on in the dark," with surprise being

⁵³ Parnell, *supra* note 1, at 19. For a discussion of misuse of the discovery process with delay tactics and other ethical considerations facing litigators during discovery, see FORTUNE ET AL., *supra* note 8, § 6, at 241.

⁵⁴ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 cmt.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Hickman v. Taylor*, 329 U.S. 495, 500 (1947) (footnote omitted).

⁵⁸ See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 916 (1987).

⁵⁹ Thompson, *supra* note 16, at 484 (footnote omitted) (citing *Hickman*, 329 U.S. at 500); see also *Tiedman v. American Pigment Corp.*, 253 F.2d 803, 808 (4th Cir. 1958).

a constant and uncertain factor facing every litigator.⁶⁰ The parties could never be sure that they even knew all of the issues or facts until trial, when they would be elicited, often for the first time, from the witness stand.⁶¹

The drafters of the Federal Rules noted that “[t]he purpose of discovery is to provide a mechanism for making relevant information available to the litigants.”⁶² It is now taken for granted that “[m]utual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”⁶³ In place of common law pleading, the Federal Rules provide for broad pre-trial discovery.⁶⁴ The discovery rules were intended in part to end the days of trial by surprise.⁶⁵ Their primary function is to allow “the parties to obtain the fullest possible knowledge of the issues and facts before trial,”⁶⁶ and they have consistently been interpreted broadly.⁶⁷ It is well established that anything needed as evidence in a party’s case that is not otherwise protected should be available through the discovery process.⁶⁸ The Federal Rules, and those rules subsequently enacted by many states,⁶⁹ sought to make the trial process “less a game of blindman’s [bluff] and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.”⁷⁰ An unforeseen byproduct of the liberal construction of the discovery rules, however, was that discovery requests could be abusive, oppressive, and burdensome in some cases.

⁶⁰ *Hickman*, 329 U.S. at 501.

⁶¹ Although the discovery rules are relatively new, the ideas that spawned them are not. *Ex parte Uppercu*, 239 U.S. 435 (1915), decided long before the adoption of the Federal Rules, illustrates the need to make all information available to the litigants. In *Uppercu*, a party in a subsequent action petitioned the court to modify a sealing order to permit access to materials produced in an earlier action. *See id.* at 435. Ruling in favor of the petitioner, Justice Holmes recognized the basic premise underlying modern discovery: “So long as the object physically exists, anyone needing it as evidence at a trial has a right to call for it, unless some exception is shown to the general rule.” *Id.* at 440.

⁶² FED. R. CIV. P. 26 advisory committee’s note.

⁶³ *Hickman*, 329 U.S. at 507.

⁶⁴ *See Doherty*, *supra* note 19, at 144.

⁶⁵ *See Hickman*, 329 U.S. at 507.

⁶⁶ *Id.* at 501.

⁶⁷ *See id.* at 507; *Proctor & Gamble Distrib. Co. v. Vasseur*, 275 S.W.2d 941, 944 (Ky. 1955).

⁶⁸ *See Hickman*, 329 U.S. at 515 (Jackson, J., concurring).

⁶⁹ The Kentucky civil rules are in many respects identical to the federal rules and “actually are cut from the federal cloth.” *Newsome v. Lowe*, 699 S.W.2d 748, 749 (Ky. Ct. App. 1985).

⁷⁰ *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958).

In response, the Federal Rules were amended in 1970⁷¹ to strengthen the trial court's ability to control the discovery process.⁷²

[B]y centralizing the discovery principles in Rule 26 and making them applicable to all [discovery] devices, the amendments reflected . . . a view of pretrial [proceedings] as being an integrated process subject to overarching control by the trial court.

. . . .

The amendments transferred the governance of protective orders from Rule 30(b) to Rule 26(c) and made protective orders applicable to all forms of discovery. To "reflect[] existing law," the rulemakers also added a specific reference to "trade secret[s] or other confidential research, development, or commercial information." [Rule 26(c)] articulated the growing understanding that the Federal Rules provide for broad discovery and rely on the district court's discretion to decide whether protective restrictions are necessary in a particular case.⁷³

The chief opposition to modern discovery initially came from plaintiffs' attorneys as defense counsel learned that they could use the rules to force plaintiffs to disclose their cases in advance.⁷⁴ Today, some manufacturers have found a new use for the discovery rule. No matter what face is put on the use of protective orders, it seems that manufacturers in products liability actions realize that unfettered access to critical information tends to reduce the effects of their tremendous advantage in resources.⁷⁵ Protective orders are their sword in dealing with this challenge.

⁷¹ For a detailed review of the evolution of the federal discovery system, see Miller, *supra* note 8, at 447-63. Professor Miller examines the legal climate surrounding the adoption of the Rules in 1938 and the 1970, 1980, and 1983 amendments to the discovery rules, as well as policy and other considerations giving rise to these changes. *See id.* For an in-depth look at a recent proposal to further modify the rule governing protective orders, see Richard J. Vangelisti, *Proposed Amendment to Federal Rule of Civil Procedure 26(c) Concerning Protective Orders: A Critical Analysis of What It Means and How It Operates*, 48 BAYLOR L. REV. 163 (1996).

⁷² *See* Miller, *supra* note 8, at 450.

⁷³ *Id.* at 450-51 (footnotes omitted).

⁷⁴ *See* Hickman v. Taylor, 329 U.S. 495, 515 (1947) (Jackson, J., concurring).

⁷⁵ *See* Hendricks & Moch, *supra* note 6, at 424 ("[The] hidden agenda . . . is to divide and conquer plaintiffs by preventing them from sharing and coordinating discovery."); HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 159-62 ("[The] true motive . . . is to deny plaintiffs the benefit of coordinating their discovery efforts.").

Many of the issues underlying the advent of modern products liability are called into question when analyzing protective order problems. Most notably, the manufacturer has possession and control of virtually all the information needed by an injured plaintiff to prove her case⁷⁶ and the resources to shift enormous amounts of unnecessary expense to the plaintiff.⁷⁷

B. Rule 26(c)(7): The Minimum Requirements for Protection

Both the Federal Rules and Kentucky rules provide authority, upon a showing of good cause, for the entry of "any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."⁷⁸ If the party seeking the protective order successfully demonstrates that the information is entitled to protection and that good cause exists for entry of the order, "the burden shifts to the party seeking discovery" to demonstrate that the information at issue "is relevant and necessary."⁷⁹ The court must weigh the competing interests of the affected parties, and the court possesses substantial latitude to fashion an order that minimizes the negative impact of the disclosure.⁸⁰

1. The Information Must Be Entitled to Protection

The manufacturer in complex products liability actions must first show that the information requested by the plaintiff is entitled to protection.⁸¹ The reference to trade secrets and other confidential commercial information added in the 1970 amendments to the Federal Rules was intended to

⁷⁶ See *infra* notes 164-65 and accompanying text.

⁷⁷ See *infra* note 163 and accompanying text.

⁷⁸ KY. R. CIV. P. 26.03(1)(g) (West 1998). For all practical purposes, the federal and Kentucky rules governing protective orders are identical. The Kentucky rule substitutes "disclosed" for the federal rule's "revealed." Compare KY. R. CIV. P. 26.03(1)(g) (West 1998), with FED. R. CIV. P. 26(c)(7).

⁷⁹ *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987).

⁸⁰ See *Miller, supra* note 8, at 433-35; see also *infra* Part III.C.

⁸¹ See FED. R. CIV. P. 26(c)(7). No authorities were revealed for the proposition that any information other than "a trade secret or other confidential research, development, or commercial information," *id.*, is entitled to the protection of Rule 26(c)(7) nor does the rule so provide, see *id.*

reflect existing law: "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

Although manufacturers commonly argue that a protective order is justified because the information is a trade secret⁸³ entitled to protection under the Federal Rules, "information sought in such cases rarely falls within this narrowly defined category."⁸⁴ A number of jurisdictions have adopted the definition of a trade secret found in section 757 of the *Restatement of Torts*.⁸⁵ Under this definition, a trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."⁸⁶

⁸² *Id.* 26 advisory committee's note.

⁸³ In 1925, Kentucky's highest court defined a trade secret as "a plan or process, tool, mechanism, or compound, known only to its owner and those of his employees to whom it is necessary to confide it." *Progress Laundry Co. v. Hamilton*, 208 Ky. 348, 270 S.W. 834, 835 (Ky. 1925). The court elaborated on this definition in 1966, stating that a trade secret is "a novel and unique plan or process, tool, mechanism, or compound, known only to its owner and his employees, which has been perfected and appropriated by the exercise of individual ingenuity." *Mid-States Enter., Inc. v. House*, 403 S.W.2d 48, 50 (Ky. 1966).

⁸⁴ Campbell, *supra* note 19, at 780; see also Paula D. Osborn, *Protective Orders: The New Challenge*, FOR THE DEFENSE, Mar. 1991, at 2, 4 ("Trade secret status is generally reserved for information and documents specifically describing the manufacturer's product development, manufacturing and testing procedures, marketing and sales, and finances.").

⁸⁵ RESTATEMENT OF TORTS § 757 cmt. b (1939). Section 757 was omitted from the *Restatement (Second) of Torts* because the drafters felt that unfair competition and trade practices regulation, and not tort law, more properly covered liability from harm caused by unfair trade practices. See RESTATEMENT (SECOND) OF TORTS introductory note to division 9 (1977).

⁸⁶ RESTATEMENT OF TORTS § 757 cmt. b (1939). This comment suggests that courts may consider the following six factors in determining whether the information sought to be protected constitutes a trade secret: 1) the extent to which those outside the business know the alleged trade secret; 2) the number and positions of employees with knowledge of the trade secret; 3) the defendant's rules and procedures designed to protect the secret; 4) the value of the trade secret to the defendant or his competitors; 5) the effort and cost of developing the trade secret; and 6) the ease or difficulty with which others could acquire or duplicate the trade secret. See *id.*

Even where the elements of a trade secret are satisfied, the court may deny a manufacturer's request for a protective order. Courts have stated that, for the purposes of Rule 26(c), the following are not permissible trade secrets: information regarding the hazardous nature of the product and the manufacturer's knowledge of the risks;⁸⁷ information relating to other accidents, complaints, and trial evidence;⁸⁸ evidence of poor management or business practices;⁸⁹ matters affecting public health;⁹⁰ and broad allegations of embarrassment or the threat of injury to a corporation's reputation.⁹¹

In cases where the manufacturer is unable to show that the information qualifies as a trade secret, its next assertion is often that the challenged documents are nonetheless entitled to protection because they are confidential.⁹² Confidential information has been defined as information which, if disclosed, will cause a "clearly defined and very serious injury" to the defendant's business.⁹³ The often cited federal standard for determining confidentiality of corporate documents is set out in *Parsons v. General Motors Corp.*⁹⁴ In *Parsons*, the manufacturer claimed that crash tests and other information regarding the design and manufacture of the allegedly defective vehicle had always been restricted, even within the corporation, and were therefore entitled to protection.⁹⁵ The court considered the following factors: how many employees had knowledge of the information or worked on a confidential project; how the defendant maintained the secrecy of the information; how the defendant controlled or limited the

⁸⁷ See *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *In re Upjohn Co. Antibiotic Cleocin Prod. Liab. Litig.*, 81 F.R.D. 482, 483 (E.D. Mich. 1979).

⁸⁸ See *Smith v. BIC Corp.*, 869 F.2d 194, 201 (3d Cir. 1989); *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988); see also *Osborn*, *supra* note 84, at 4.

⁸⁹ See *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1074 (3d Cir. 1984); *Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982); *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987); see also *Osborn*, *supra* note 84, at 4.

⁹⁰ See *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983).

⁹¹ See *Joy*, 692 F.2d at 894; *Cipollone*, 785 F.2d at 1121.

⁹² See FED. R. CIV. P. 26(c)(7).

⁹³ *United States v. International Bus. Mach. Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975); see also *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202-04 (S.D.N.Y. 1977).

⁹⁴ *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980); see also *Campbell*, *supra* note 19, at 781.

⁹⁵ See *Parsons*, 85 F.R.D. at 725.

reproduction and circulation of the information; the age of the information; and whether any of the information was required by law to be reported to the government.⁹⁶ In denying the motion for a protective order, the *Parsons* court emphasized the age factor, noting that the information sought to be deemed confidential was ten years old.⁹⁷

Finally, where both trade secret and confidential information arguments have failed, the manufacturer may argue that the information should be entitled to protection to avoid “annoyance, embarrassment, oppression, or undue burden or expense.”⁹⁸ For this assertion to prevail, the manufacturer must prove that the release of the discovered information “would, by itself, have a direct impact on the company’s financial standing.”⁹⁹ It has been recognized that this “category of protection currently is of very little practical use except with regard to [a] narrow type of information which does not strictly compromise trade secret material.”¹⁰⁰

2. The “Good Cause” Balancing Test

It has often been said that, without more, pretrial discovery is not entitled to judicial protection.¹⁰¹ This presumption of access to discovery materials may be overcome by a showing of good cause under Rule 26(c).¹⁰² Through the use of umbrella protective orders, manufacturers commonly attempt to shift the burden to the plaintiff to show why the documents should not be protected.¹⁰³ A party seeking a protective order cannot rely on conclusory statements but must show the specific harm that will result from disclosure.¹⁰⁴ The courts place a heavy burden of proof on

⁹⁶ See *id.* at 726. Note that there is some overlap between *Parson’s* “confidential information” factors and the *Restatement’s* “trade secret” factors. See *supra* note 86.

⁹⁷ See *Parsons*, 85 F.R.D. at 726.

⁹⁸ FED. R. CIV. P. 26(c).

⁹⁹ *Osborn*, *supra* note 84, at 5 (interpreting *Smith v. BIC Corp.*, 869 F.2d 194, 201 (3d Cir. 1989), and *Cippolone v. Liggett Group, Inc.*, 113 F.R.D. 86, 90 (D.N.J. 1986)). The defendant is also faced with the difficult task of differentiating between the financial effect of publicity about the litigation in general and the specific effects of any publicity about information revealed in discovery. See *id.*

¹⁰⁰ *Id.*

¹⁰¹ See, e.g., *Avirgan v. Hull*, 118 F.R.D. 252 (D.D.C. 1987); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471 (S.D.N.Y. 1982).

¹⁰² See FED. R. CIV. P. 26(c).

¹⁰³ See *infra* notes 129-32 and accompanying text.

¹⁰⁴ See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986); *Reliance Ins. Co. v. Barron’s*, 428 F. Supp. 200, 204 (S.D.N.Y. 1977).

the party seeking a protective order in order to effectuate the goal of promoting discovery.¹⁰⁵ The movant must show not only that the information is entitled to protection, but also that good cause exists for the entry of the order.¹⁰⁶

In one of the most influential decisions applying the good cause requirement, *In re "Agent Orange" Products Liability Litigation*,¹⁰⁷ the special master granted a petition by similar plaintiffs to unseal court records.¹⁰⁸ The district court noted that if the movant for a protective order fails to establish good cause, then the information is "available to the public."¹⁰⁹ The court of appeals agreed, and held that "if good cause is not shown, the discovery materials in question should not receive judicial protection."¹¹⁰ The court of appeals further noted the Advisory Committee's assertion that one of the reasons for Federal Rule of Civil Procedure 5(d) is to provide access to "litigants similarly situated."¹¹¹

Because the good cause requirement is strictly construed, the movant must make a particularized factual showing that it would suffer harm should the court deny its motion for a protective order.¹¹² The good cause requirement demands that the movant show that it will suffer a specific, serious injury if disclosure occurs.¹¹³ The affidavit of an attorney, standing alone, will rarely be sufficient to establish good cause.¹¹⁴ Strict construction of the good cause element is illustrated in *Kamp Implement Co., Inc. v. J.*

¹⁰⁵ See Doherty, *supra* note 19, at 147.

¹⁰⁶ It has been suggested that the defendant must show good cause before the court may enter the order even where there is no opposition to the request, e.g., in a case involving an agreed confidentiality order. See Richard A. Rosen, *Confidentiality Agreements Become Increasingly Elusive*, NAT'L L.J., July 20, 1998, at B7.

¹⁰⁷ *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985), *order aff'd*, 821 F.2d 139 (2d Cir. 1987).

¹⁰⁸ See *id.* at 564.

¹⁰⁹ *Id.* at 567.

¹¹⁰ *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145 (2d Cir. 1987).

¹¹¹ *Id.* at 146. Rule 5(d) provides, in part, that the court may order that certain discovery documents "not be filed unless on order of the court or for use in the proceeding." FED. R. CIV. P. 5(d). For a discussion arguing against the use of Rule 5(d) as a factor influencing protective order decisions, see Campbell, *supra* note 19, at 811-18.

¹¹² See *supra* note 104 and accompanying text.

¹¹³ See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)).

¹¹⁴ See Campbell, *supra* note 19, at 783.

I. Case Co.,¹¹⁵ where the trial court found that “[t]he protective order proposed by [the] defendants . . . [was] not supported in its entirety by good cause.”¹¹⁶ The court instead entered an order which specifically permitted the sharing of discovery materials with plaintiff’s counsel in similar cases.¹¹⁷ The court stated:

Defendants maintain that they are not trying to keep information from other litigants, but seek only to prevent confidential material from “freely flowing” to third parties without any safeguards. While this position has merit, the onus must be on the defendants to make a specific showing that they will be harmed by a particular disclosure.¹¹⁸

The burden of proving an assertion of privilege rests upon the party asserting such claim.¹¹⁹ Once the manufacturer has met its burden of showing good cause for the issuance of a protective order, most courts apply a balancing test, balancing the plaintiff’s need for the information sought against the injury to the defendant that will result if uncontrolled disclosure is compelled.¹²⁰ If the party seeking the protective order successfully convinces the court that the harm that would result from compelling disclosure is sufficient to warrant limiting the disclosure of the discovered material, then the court may issue the order.¹²¹ Many courts, however, have limited the types of potential harm to the party seeking protection that will be considered in this balancing. For example, damage to a corporation’s goodwill or reputation generally is not sufficient to establish a need for protection.¹²² In addition, several courts have held that the possibility that the plaintiff may share the fruits of discovery with other

¹¹⁵ *Kamp Implement Co. v. J. I. Case Co.*, 630 F. Supp. 218 (D. Mont. 1986).

¹¹⁶ *Id.* at 220.

¹¹⁷ *See id.* at 221; *see also infra* Part IV.

¹¹⁸ *Kamp*, 630 F. Supp. at 220.

¹¹⁹ *See McFadden v. Norton Co.*, 118 F.R.D. 625, 627 (D. Neb. 1988).

¹²⁰ *See, e.g., Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787 (3d Cir. 1994); *see also Miller, supra* note 8, at 433-34.

¹²¹ *See Miller, supra* note 8, at 432-33. The party seeking discovery can show the information sought is relevant and necessary in order to avoid the protective order after good cause has been shown by the party opposing discovery. *See id.*

¹²² *See, e.g., Smith v. BIC Corp.*, 121 F.R.D. 235, 242-43 (E.D. Pa. 1988), *order aff’d*, 869 F.2d 194 (3d Cir. 1989). The court found this argument especially unpersuasive in light of adverse publicity that had already occurred. *See id.* at 243.

plaintiffs in related or unrelated cases does not constitute good cause for the issuance of a protective order.¹²³ The idea is clear and simple:

[To force] each plaintiff in every similar action to run the same gauntlet over and over again serves no useful purpose other than to create barriers and discourage litigation against the defendants. Good cause as contemplated under Rule 26 was never intended to make other litigation more difficult, costly and less efficient.¹²⁴

C. "Umbrella" and "Agreed" Protective Orders

Rule 26(c) does not prescribe the precise scope of a protective order. If a defendant in a products liability action has successfully met the covered information and good cause elements, the court "may make any order which justice requires."¹²⁵ Products liability cases typically involve situations where the manufacturer possesses both confidential and non-confidential documents that are responsive to a plaintiff's discovery request, and even individual documents may contain both confidential and non-confidential information.¹²⁶ Manufacturers often argue that "[t]o sift through all of the information and prepare a detailed explanation of the confidential nature of each document the defendant seeks to protect would, in such cases, require a vast work effort for many weeks."¹²⁷ These defendants take the position that adherence to the requirements of Rule 26(c) would delay discovery, and so they seek the entry of blanket or umbrella protective orders.¹²⁸

¹²³ See, e.g., *Patterson v. Ford Motor Co.*, 85 F.R.D. 152 (W.D. Tex. 1980); see also *infra* Part IV.

¹²⁴ *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 87 (D.N.J. 1986).

¹²⁵ FED. R. CIV. P. 26(c). Of course, a protective order may cover only limited specific and identified information. See, e.g., *Pellegrino v. United States*, No. 89-CIV-8406, 1992 WL 84475, at *3 (S.D.N.Y. Apr. 15, 1992) (regarding protective order covering single, specified audiotape).

¹²⁶ See *Campbell*, *supra* note 19, at 785-86.

¹²⁷ *Id.* at 786.

¹²⁸ See *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356-57 (11th Cir. 1987); *Tavoulareas v. Piro*, 93 F.R.D. 24, 29 (D.D.C. 1981); see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866 (E.D. Pa. 1981). The *Zenith* court noted that careful scrutiny of every document in a complex case would make the judge "a veritable hostage" consigned to "years of adjudication of the confidentiality of individual documents." *Id.* at 878-79 n.18. It is true that requiring a defendant to meet the statutory requirements before a protective order is entered

An umbrella protective order typically permits the manufacturer to designate all documents produced during discovery as confidential and thus not subject to dissemination by the plaintiff.¹²⁹ These orders can effectively be used to shift the defendant's burden of showing confidentiality to the plaintiff to show that the information is not confidential.¹³⁰ The plaintiff who challenges the confidentiality of any documents covered by an umbrella protective order is required to identify the specific documents that do *not* qualify for protection.¹³¹ The manufacturer may use such an order not in furtherance of Rule 1, but rather to subvert the goals of the discovery process itself and shift the onus to the economically disadvantaged plaintiff.¹³²

In an effort to avoid meeting the strict requirements of Rule 26(c)(7), manufacturers may wish to have the plaintiff enter an agreement whereby all discovered documents are confidential and not subject to dissemination or comparison with discovery received by other plaintiffs. One commentator has suggested that plaintiffs' reluctance to agree to umbrella protective orders forced upon them by manufacturers "threatens to clog the courts with costly and time-consuming discovery disputes . . . and at the same time impede settlement."¹³³ However, this argument assumes a presumption in favor of protective orders. To the contrary, the rules clearly state that the burden is on the proponent, ordinarily the manufacturer, to show that good cause exists and that the information is entitled to protection.¹³⁴ The attempt to shift that burden is especially troublesome to an already disadvantaged plaintiff.¹³⁵

may increase, at least initially, the burden on the courts. This assertion, however, could be made with respect to virtually any rule.

¹²⁹ See Doherty, *supra* note 19, at 149.

¹³⁰ See *id.*

¹³¹ See Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 18-20 (1983).

¹³² See *supra* Part II.

¹³³ Campbell, *supra* note 19, at 788 (arguing that a plaintiff's refusal to agree to an umbrella protective order suggested by the defendant itself "might subvert the underlying purpose of" Rule 1). It is also suggested that umbrella protective orders "save the courts from becoming bogged down in the tedium of endless collateral disputes over discovery, and enable the parties to proceed expeditiously with preparation for trial." *Id.* at 787. The potential exists, of course, for the manufacturer to use this same reasoning when suggesting that the plaintiff enter an agreed protective order. In either case, the manufacturer receives the benefits, and the plaintiff receives nothing. See *supra* notes 29-31 and accompanying text.

¹³⁴ See *supra* Part III.B.

¹³⁵ See *infra* notes 181-83 and accompanying text.

Umbrella protective orders allow manufacturers to designate information as confidential without showing good cause, leaving the burden and expense of challenging the designation on the plaintiff. They are not granted as a matter of right but rather are "typically permitted only in cases of extremely complex litigation, *and then with much hesitation*."¹³⁶ Umbrella protective orders allow a manufacturer to designate "all discovery as protected, without any review or determination of 'good cause' by the parties or court."¹³⁷ Accordingly, umbrella protective orders are disfavored by most courts.¹³⁸ In *Cipollone v. Liggett Group, Inc.*,¹³⁹ the manufacturer moved for an umbrella protective order prohibiting the dissemination of both confidential and non-confidential material, asserting that the order would facilitate discovery by streamlining litigation.¹⁴⁰ The court, skeptical of the "wholesale designation of confidentiality by defendants," denied the motion.¹⁴¹

Some umbrella protective orders permit the manufacturer to designate as confidential any documents that they believe contain trade secrets or other confidential commercial information, but not necessarily all discovered documents.¹⁴² As with any protective order, however, these orders must be preceded by the manufacturer's showing of entitlement to protection and good cause. These types of "protective orders are routinely agreed to by the parties and approved by the courts in commercial litigation, especially in cases between direct competitors."¹⁴³ In these cases, the need to protect true trade secrets is most apparent. "Good cause"

¹³⁶ *Andrew Corp. v. Rossi*, 180 F.R.D. 338, 342 (N.D. Ill. 1998) (citing *John Does I-VI v. Yogi*, 110 F.R.D. 629, 632 (D.D.C. 1986)) (emphasis added).

¹³⁷ *Bayer AG & Miles, Inc. v. Barr Lab., Inc.*, 162 F.R.D. 456, 465 (S.D.N.Y. 1995).

¹³⁸ *See id.*

¹³⁹ *Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86 (D.N.J. 1986).

¹⁴⁰ *See id.* at 93.

¹⁴¹ *Id.* at 93-94. It has also been noted that "the once-reflexive willingness of judges to approve broadly framed protective orders has eroded. State and federal judges nationwide are more skeptical of the appropriateness of such orders and will often raise questions *sua sponte* about the scope or necessity." Rosen, *supra* note 106, at B7. The *Cipollone* court also rejected a public policy argument, noting that Rule 26(c) does not authorize courts to make such policy decisions. The relevant inquiry is into the harm the defendants would suffer without the order. *See Cipollone*, 113 F.R.D. at 93-94.

¹⁴² *See Guénégo*, *supra* note 8, at 561-62 & n.18.

¹⁴³ *Bayer AG & Miles, Inc. v. Barr Lab., Inc.*, 162 F.R.D. 456, 468 (S.D.N.Y. 1995).

generally exists for issuance of a blanket protective order permitting competitors to designate [as] ‘confidential’ certain commercial information,” although that presumption is not satisfied as easily in litigation brought by an injured consumer.¹⁴⁴

IV. THE PLAINTIFF’S NEW TOOL: DISCOVERY SHARING

In a typical products liability action against a corporate manufacturer, local attorneys in the jurisdiction where the case is filed are hired by the manufacturer to work under the supervision of either a national or in-house corporate counsel.¹⁴⁵ These local counsel benefit from being able to share information among themselves and with the national counsel.¹⁴⁶ Where lawsuits involving the same allegedly defective product are pending in multiple jurisdictions, the national counsel coordinates the management of discovery and trial tactics.¹⁴⁷ When a particular defense or strategy has been successful, all local counsel can be advised of this defense by the national counsel.¹⁴⁸ Plaintiffs, who often suffer from a disparity in financial resources, have a much greater need for such sharing of information. Discovery sharing is useful whenever individual plaintiffs must litigate against large, corporate defendants, as is often the case in products liability actions.¹⁴⁹ One court has noted that “[s]ome such plaintiffs may have organized support, but many others may not.”¹⁵⁰ Either way, the court stated that requiring each plaintiff to “go through a comparable, prolonged and expensive discovery process would be inappropriate.”¹⁵¹

The term “information sharing”¹⁵² generally refers to the sharing of materials received from the defendant during discovery between counsel

¹⁴⁴ *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 29 (E.D. Mich. 1981) (emphasis added). Courts may be more willing to grant protective orders where a competitor seeks the information because of the certainty that the information will be obtained by the competitor and the obvious likelihood of competitive injury. *See id.*

¹⁴⁵ *See HARE, JR. ET AL., FULL DISCLOSURE, supra* note 7, at 163.

¹⁴⁶ *See id.*

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

¹⁴⁹ *See Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 126 (D. Mass. 1990) (discussing information sharing in tobacco litigation) (citing *Cippollone v. Liggett Group, Inc.*, 113 F.R.D. 86, 91 (D.N.J. 1986)).

¹⁵⁰ *Id.* at 126.

¹⁵¹ *Id.*

¹⁵² This is also commonly referred to as “discovery sharing.”

representing plaintiffs in similar cases against that same defendant.¹⁵³ Information sharing mechanisms such as plaintiffs' information exchange groups have received strong support from courts and commentators alike.¹⁵⁴ In *Ward v. Ford Motor Co.*,¹⁵⁵ the trial court overruled the magistrate's order granting the manufacturer's motion for a restrictive protective order.¹⁵⁶ The plaintiff offered to agree to a protective order prohibiting disclosure to the defendant's competitors and the public, but refused to agree to nondisclosure to other similar plaintiffs.¹⁵⁷

The *Ward* court began by stating that "[t]he plaintiffs' attorneys' discovery information exchange group reduces the effort and expense inflicted on all parties, including Ford, by repetitive and unnecessary discovery. In this era of ever expanding litigation expense, any means of minimizing discovery costs improves the accessibility and economy of justice."¹⁵⁸ The court next noted that where it is claimed that "a single design defect is the cause of hundreds of injuries, then the evidentiary facts to prove it must be identical, or nearly so, in all the cases. Each plaintiff should not have to undertake to discovery [sic] anew the basic evidence that other plaintiffs have uncovered."¹⁵⁹ Requiring such repetitious discovery "would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel.

¹⁵³ See HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 164-65.

¹⁵⁴ See *id.* at 162. On the other hand, there are those who are skeptical of the beliefs of this majority. Plaintiffs' information exchange groups have been deemed "syndicates of contingency fee lawyers who have joined together to exchange information." Campbell, *supra* note 19, at 773. The defendant's national and local counsel presumably would constitute a similar "syndicate" of billable hour attorneys.

¹⁵⁵ *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982). Plaintiff's counsel in that case, James L. Gilbert, has written extensively on the use and misuse of protective orders. He is the co-author of many of the works cited herein, including HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7; Hare & Gilbert, *Resisting Confidentiality Orders*, *supra* note 10; Francis H. Hare, Jr. et al., *Confidentiality Orders in Products Liability Cases*, 13 AM. J. TRIAL ADVOC. 597 (1989) [hereinafter Hare, Jr. et al., *Confidentiality Orders in Products Liability Cases*]; and Francis H. Hare, Jr. & James L. Gilbert, *Discovery in Products Liability Cases: The Plaintiff's Plea for Judicial Understanding*, 12 AM. J. TRIAL ADVOC. 413 (1989) [hereinafter Hare, Jr. & Gilbert, *Discovery in Products Liability Cases*].

¹⁵⁶ See *Ward*, 93 F.R.D. at 580.

¹⁵⁷ See *id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

Efficient administration of justice requires that courts encourage, not hamstring, information exchanges such as that here involved."¹⁶⁰

Sharing of discovery by plaintiffs has been strongly resisted by the defense bar.¹⁶¹ As one products liability defense attorney has noted, "Unfortunately, courts generally view discovery sharing among plaintiffs with similar cases as an efficient way to conduct litigation."¹⁶² Discovery sharing, especially in products liability cases, alleviates some of the disparity in financial and legal resources between defendants and plaintiffs.¹⁶³ In addition, it counters the longstanding and enviable position of the manufacturer who possesses and controls most, if not all, of the evidence needed by the plaintiff to prove her case.¹⁶⁴ As one court noted, products liability actions "must rest basically on the records of the manufacturer and what information was known to him."¹⁶⁵ Despite the continuing protestations of manufacturers, most courts and commentators believe that discovery sharing is not only permissible but also appropriate in keeping with the mandates of Rule 1.¹⁶⁶ The just, speedy, and inexpensive determination of a particular case, as well as that of other similar cases pending against a particular manufacturer, is enhanced where information sharing is utilized. Manufacturers may attempt to use Rule 1 as the basis for the entry of a protective order. In many cases, however, the application of Rule 1, coupled with the plaintiff's legitimate need for information sharing, counsels for denial of the order. Nonetheless, many commentators still decry discovery sharing and put forth numerous arguments against its use.¹⁶⁷

¹⁶⁰ *Id.*

¹⁶¹ See Guénégo, *supra* note 8, at 545.

¹⁶² Osborn, *supra* note 84, at 6 (emphasis added) (citations omitted).

¹⁶³ See HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 164.

¹⁶⁴ See *infra* notes 195-98 and accompanying text.

¹⁶⁵ *Hess v. Pittsburgh Steel Foundry & Mach. Co.*, 49 F.R.D. 271, 273 (W.D. Pa. 1970).

¹⁶⁶ See Guénégo, *supra* note 8, at 558 ("[D]iscovery sharing [is] overwhelmingly deemed a valid Rule 1 interest."); see also Campbell, *supra* note 19, at 784 ("Courts and commentators alike have generally tended to approve the practice of information sharing, especially in products liability cases, as coming within the aim of [Rule 1]."); Doherty, *supra* note 19, at 145 ("[Courts are] increasingly unwilling to uphold broad protective orders forbidding discovery-sharing among plaintiffs' attorneys in products liability cases."); Miller, *supra* note 8, at 497 ("It is difficult, and indeed unwise, to have an absolute prohibition on discovery sharing.").

¹⁶⁷ These arguments include that discovery sharing forces defendants into quick settlements because of its injurious effect on other litigation against the defendant,

It is argued that defendants “should not be forced to incur repeated expense in responding to duplicitous discovery” where discovery sharing is being used.¹⁶⁸ This contention ignores the primary purpose of discovery sharing. Discovery sharing is not concerned with the relationship between the plaintiff and the defendant in a particular case. Rather, it focuses on the relationship between similarly situated plaintiffs, with the defendant being the only common thread between them.

Finally, opponents of discovery sharing assert that, even if it is not specifically improper, it is somehow illicit. A recent New Mexico decision is illustrative of most courts’ treatment of this type of claim. In *Krahling v. Executive Life Insurance Co.*,¹⁶⁹ the trial court entered a blanket protective order designating every document produced by the defendant in discovery as confidential without requiring a showing of good cause for such protection.¹⁷⁰ The defendant produced over 66,000 pages of documents, each of which was labeled confidential though no trade secret or other privilege was asserted.¹⁷¹ After summary judgment was entered in favor of the plaintiff, the plaintiff moved to lift the order of confidentiality for the purpose of sharing the information with other plaintiffs.¹⁷² The defendant contended that “sharing by the [plaintiff] with other [similar plaintiffs] that are in litigation with [the defendant] around the country would be a misuse of discovery for an ‘illicit’ purpose.”¹⁷³

encourages frivolous litigation because of cheap and readily available discovery, gives those plaintiffs who ride the coattails of false or deceptive claimants an unfair advantage, and allows irrelevant information to impact on the defendant’s rights of privacy. See Guénégo, *supra* note 8, at 545-46. Another commentator states that plaintiffs may be initiating litigation “to find a wrong and report on it, and only *secondarily* to obtain judicial relief.” Campbell, *supra* note 19, at 826 (footnote omitted).

These real or imagined injustices notwithstanding, no less an authority than Professor Arthur Miller recognizes that there “‘is no reason to erect gratuitous roadblocks in the path of a litigant who finds a trail blazed by another.’” Miller, *supra* note 8, at 497 (quoting *Wilk v. American Med. Ass’n*, 635 F.2d 1295, 1301 (7th Cir. 1980); see also Thompson, *supra* note 16, at 495 (precluding plaintiffs from information sharing “makes trial preparation more difficult and leads many plaintiffs to either settle cheaply or proceed to trial with potentially inadequate evidence”).

¹⁶⁸ Jarrow, *supra* note 19, at 323.

¹⁶⁹ *Krahling v. Executive Life Ins. Co.*, 959 P.2d 562 (N.M. Ct. App. 1998).

¹⁷⁰ See *id.* at 565.

¹⁷¹ See *id.*

¹⁷² See *id.* at 564.

¹⁷³ *Id.* at 568.

Reversing the trial court's denial of the motion to lift the order, the appellate court stated that "[t]he majority of courts that have considered assertions of this nature authorize the practice of discovery sharing among litigants," and that in the absence of "a bad faith purpose for the litigation on the part of the discovering party, most courts agree that discovery sharing serves Rule 1 interests and does not constitute good cause for entry of a protective order."¹⁷⁴ The court went on to restate the often cited presumption that

discovery should take place in public and that such presumption "should operate with all the more force when litigants seek to use discovery in aid of collateral litigation on similar issues, for in addition to the abstract virtues of sunlight as a disinfectant, access in such cases materially eases the tasks of courts and litigants and speeds up what may otherwise be a lengthy process."¹⁷⁵

Plaintiffs involved in complex product liability cases often form litigation support groups to pool resources and to coordinate their case preparation efforts.¹⁷⁶ The principal objective of these groups is to provide plaintiffs' counsel handling similar claims with the benefits of information sharing.¹⁷⁷ Plaintiffs routinely have access to all discovery materials in products liability cases that are subject to class action or mass consolidation procedures.¹⁷⁸ Local defense counsel in multi-jurisdictional products litigation have access to sophisticated information-sharing mechanisms implemented by their corporate client.¹⁷⁹ Until recently, the individual plaintiff was the only party to complex product liability litigation without any means of information sharing.¹⁸⁰

¹⁷⁴ *Id.* (citing Guénégo, *supra* note 8, at 548).

¹⁷⁵ *Id.* (quoting *Wilk v. American Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)).

¹⁷⁶ See HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 164.

¹⁷⁷ See *id.*

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* A corporate defendant has vast resources, exclusive control of relevant documents, and a system to coordinate legal and technical expertise. Their local counsel benefit from mutual access to computerized indexing of relevant documents and technical literature as well as summaries of expert opinions and testimony. See *Hendricks & Moch*, *supra* note 6, at 424-25. The numerous benefits to local defense counsel are discussed in detail in Hare, Jr. et al., *Confidentiality Orders in Products Liability Cases*, *supra* note 155, at 597.

¹⁸⁰ See HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 164.

Because products liability litigation is both technically and factually complex, an information sharing mechanism is critical to an attorney's ability to fairly and adequately prepare the client's case.¹⁸¹ This problem is most severe to solo practitioners and small firms, the largest portion of the plaintiffs' bar. Information sharing "helps counterbalance the effect uneven financial resources between parties might otherwise have on the discovery process, thereby protecting economically modest plaintiffs faced with financially well-off defendants and improving accessibility to justice."¹⁸² Most importantly, information sharing closely corresponds with "the just, speedy, and inexpensive determination of every action."¹⁸³

The 1970 amendments to the Federal Rules authorizing the entry of protective orders presented an opportunity for products liability defendants to attempt to hinder or prevent information sharing by plaintiffs. Shortly after the amendments took effect, manufacturers began testing their theory that information sharing is improper, using protective orders as their means of attack. An example is the 1973 case of *Johnson Foils, Inc. v. Huyck Corp.*,¹⁸⁴ where the manufacturer moved for an order preventing the plaintiff from using discovery material acquired from other similar cases.¹⁸⁵ The plaintiff offered to agree to an order prohibiting disclosure of the documents to the defendant's competitors and the public, but not other similar plaintiffs, while the defendant proposed an order preventing any and all disclosure.¹⁸⁶ The trial court, unmoved by the defendant's arguments, entered an order permitting information sharing among litigants with similar cases.¹⁸⁷ In balancing the needs and interests of both parties, the court stated that "[t]he fact that sensitive information is involved in litigation gives a party neither an absolute nor automatic right to have the discovery process hindered."¹⁸⁸

The court found that the manufacturer's proposed protective order placed unacceptable limits on the use of the discovered information in

¹⁸¹ See Hare, Jr. & Gilbert, *Discovery in Products Liability Cases*, *supra* note 155, at 413.

¹⁸² *Burlington City Bd. of Educ. v. United States Mineral Prod. Co.*, 115 F.R.D. 188, 190 (M.D.N.C. 1987).

¹⁸³ FED. R. CIV. P. 1.

¹⁸⁴ *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405 (N.D.N.Y. 1973).

¹⁸⁵ *See id.* at 409.

¹⁸⁶ *See id.* at 409-10.

¹⁸⁷ *See id.* at 410.

¹⁸⁸ *Id.* at 409 (citing *International Nickel Co. v. Ford Motor Co.*, 15 F.R.D. 392, 394 (S.D.N.Y. 1954)).

similar cases involving what were essentially the same litigants.¹⁸⁹ Perhaps more importantly, the court noted that such an order “also unduly restricts consultation by plaintiff of this case and others by providing for an overly detailed and cumbersome protection procedure.”¹⁹⁰ These themes are routinely restated by courts in denying inappropriate protective orders, but their continued use and misuse show little sign of abating.¹⁹¹

To counteract the work load and work quality problems faced by a single plaintiff’s attorney fighting a defense team,¹⁹² it is clear that the cooperative efforts of a number of plaintiffs’ attorneys in selecting, analyzing, and summarizing the information revealed in discovery will *increase* the quality of plaintiffs’ counsels’ work.¹⁹³ When the results of these combined efforts are shared by counsel representing plaintiffs with similar cases, they serve to raise the case preparation status of any individual plaintiff’s attorney to the level of the leading practitioners in the field.¹⁹⁴ Counsel for the manufacturer will likely have access to an enormous amount of shared information.¹⁹⁵ Information sharing among plaintiffs has become vital for their case preparation in order to adequately deal with the manufacturer’s wealth of resources.¹⁹⁶

The manufacturer has exclusive possession of most or all of the documentation regarding their product and their knowledge of its relative safety or danger.¹⁹⁷ The manufacturer’s internal documents, containing critical evidence of many of the issues in dispute, are often “the single most important source of information in a product liability case.”¹⁹⁸ Plaintiff’s

¹⁸⁹ *See id.* at 410.

¹⁹⁰ *Id.*

¹⁹¹ It is probably impossible to know precisely how often confidentiality agreements are entered in cases where the statutory elements have not been satisfied, but the plaintiff has nevertheless agreed to the terms just to get the documents produced. *See supra* notes 25-28 and accompanying text.

¹⁹² *See* Parnell, *supra* note 1; *see also supra* text accompanying note 1.

¹⁹³ *See* HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 165.

¹⁹⁴ *See id.*

¹⁹⁵ *See supra* note 179 and accompanying text.

¹⁹⁶ *See* HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 163.

¹⁹⁷ *See id.* at 74-76.

¹⁹⁸ *Id.* at 166. Internal documents may consist of the tests, studies, and other corporate reports that are created in the normal course of the defendant’s business in designing, testing, manufacturing and distributing the allegedly defective product. *See id.* at 74-75; *see also* Honda Motor Co. v. Salzman, 751 P.2d 489, 493 (Alaska 1988) (“[W]ithout the design defect documents . . . [a plaintiff] cannot be expected to prove *either* the existence of a defect *or* causation.”).

counsel must have full knowledge and understanding of these internal documents to adequately prepare their case.

Information sharing among plaintiffs may be the only way to achieve the full disclosure objective of the discovery rules.¹⁹⁹ By comparing the manufacturer's response to discovery in other similar cases, a plaintiff's counsel can verify the consistency of the responses in their individual case.²⁰⁰ Information sharing ensures "full and fair disclosure."²⁰¹ Manufacturers who are "subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses."²⁰²

The ability to exchange information with other lawyers who have already undertaken a particular litigation matter narrows the scope of the later discovery.²⁰³ Courts

have emphatically held that a protective order cannot be issued simply because it may be detrimental to the movant in other lawsuits. Using fruits of discovery from one lawsuit in another litigation, and even in collaboration among various plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure.²⁰⁴

It is never suggested that it is inappropriate for the manufacturer's national and local counsel to share information, discovery responses, and trial strategies in defending an allegedly defective product. It likewise must not be considered suspect when two plaintiffs, who have been injured by the same allegedly defective product, also share information. Sharing

¹⁹⁹ See HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 75. Discovery resulting from the cooperative efforts of two or more attorneys handling similar cases is also more likely to contain relevant information, and its relevance is more likely to be recognized, than discovery received by a lawyer handling a single case. *See id.* at 166.

²⁰⁰ *See id.*

²⁰¹ Garcia v. Peeples, 734 S.W.2d 343, 347 (Tex. 1987).

²⁰² *Id.* (citations omitted).

²⁰³ See HARE, JR. ET AL., FULL DISCLOSURE, *supra* note 7, at 165. The cost reducing effects on discovery resulting from information sharing among plaintiffs may include: narrower discovery requests; pooling of common documents, including deposition and trial transcripts, in a central depository; preparation of model briefs addressing common legal issues; and preparation of summaries of key internal documents. *See* Lawyers for Civil Justice Task Force, *Court-Approved Confidentiality Orders: Why They Are Needed*, 57 DEF. COUN. J. 89, 89-94 (1990).

²⁰⁴ Nestle Foods Corp. v. Aetna Cas. & Sur. Co., 129 F.R.D. 483, 486 (D.N.J. 1990) (citations omitted).

reduces litigation expenses for the party most in need of a “just, speedy, and inexpensive determination.”²⁰⁵

V. CONCLUSION

It should be self-evident that “the spirit of the rules is violated when advocates attempt to use discovery tools as tactical weapons rather than to expose the facts and illuminate the issues by overuse of discovery or unnecessary use of defensive weapons or evasive responses.”²⁰⁶ The unjustified use of Rule 26(c)(7) would constitute such a violation. Initially, it may in some cases create an additional burden on already overburdened court dockets to require a manufacturer to show that the documents sought to be protected meet the requirements of Rule 26(c)(7). There can be little doubt, at least as far as the manufacturer is concerned, that umbrella protective orders can simplify their discovery obligations.

This approach, however, is inappropriately and fatally short-sighted. Rule 1’s interest in a “just” determination of every action dictates that procedural ease on a court or a defendant must not be the dominant concern.²⁰⁷ Rule 1’s requirement of a “speedy” determination directs that all matters, especially those related to the often protracted stage of discovery, must not be artificially slowed by unwarranted procedural motions such as requests for protective orders where the elements of Rule 26(c)(7) cannot be met. Finally, the “inexpensive” mandate of Rule 1, so critical to the individual plaintiff in an action against a corporate manufacturer, is effectively satisfied by such mechanisms as discovery sharing, which help level the playing field. Manufacturers have, for some time and on numerous grounds, objected to these mechanisms, and the courts continue to reject overwhelmingly their claims.

A lawyer’s ethical obligations demand that protective orders must not be sought solely for the convenience of the manufacturer or its counsel. Nor is it permissible to use protective order requests in order to frustrate the plaintiff’s attempts to obtain rightful redress. In addition, the attorney’s duty as an officer of the court demands that the long-range effects of any protective order be given much consideration. Rather than focusing solely on the particular burdens and benefits in a given case, the attorney must accept the consequences of the order on parties to concurrent and

²⁰⁵ FED. R. CIV. P. 1; see Alan Lawrence, Comment, *The Value of Copyright Law as a Deterrent to Discovery Abuse*, 138 U. PA. L. REV. 549, 555 (1989).

²⁰⁶ FED. R. CIV. P. 26 advisory committee’s note.

²⁰⁷ See *supra* note 33.

subsequent litigation. Most importantly, the effect on the court system itself must be factored into the decision on whether to proceed with any such request.

It has now been over two decades since the Federal Rules were amended to add the protections of Rule 26(c)(7), presumably as a “shield” against improper discovery requests. The courts have repeatedly warned that its provisions not be used as a “sword,” as this would be in direct contravention of Rule 1. The line of authorities is now long enough that a manufacturer’s plea that it “didn’t know” must no longer be accepted. It is imperative that individual plaintiffs and the courts demand adherence to Rule 26(c)(7)’s terms, for neither the rule nor the law suggests that justice is subservient to convenience.