NOTE

Clear Standards for Discovery Protective Orders: A Missed Opportunity in *Rhinehart v. Seattle Times Co.*

I. INTRODUCTION

The Washington State Supreme Court faced the conflict in values between liberal discovery rules and the first amendment for the first time in *Rhinehart v. Seattle Times Co.*[1] The appeal by the Seattle Times raised the issue of whether protective orders restricting the dissemination of discovery materials violate free speech interests and constitutional guarantees of public access to judicial proceedings.[2] The Washington Supreme Court's response failed to create meaningful policy guidelines for future cases. The majority, concurring, and dissenting opinions each suggested a different way to analyze protective orders. The majority refused to recognize first amendment interests in pretrial discovery orders, but phrased its refusal so ambiguously that the status of first amendment interests in protective orders was left uncertain.

The United States Supreme Court partially resolved the confusion when it considered the validity of the *Rhinehart* protective order on appeal. The Court affirmed the state supreme court, but disagreed with the state court's rationale in one important respect. The Court did find limited first amendment interests affected by the protective order request.[3] Despite its acknowledgment of first amendment interests, the Supreme Court joined the Washington court in declining to formulate a clearly defined balancing test for trial courts to use in issuing protective orders,[4] and thus failed to ensure that limitations on first amendment freedoms would be no greater than necessary to

1. 98 Wash. 2d 226, 654 P.2d 673 (1982), *aff'd*, 104 S. Ct. 2199 (1984).
2. *Id.* at 229, 654 P.2d at 676.
3. Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2208 (1984).
4. *Id.* at 2206.

prevent abuses of pretrial discovery.

This Comment examines the *Rhinehart* litigation and suggests balancing guidelines that the courts, in particular the Washington Supreme Court,[5] could have proposed as standards. Several federal circuit courts have developed clear balancing criteria for trial courts to use in issuing protective orders.[6] Washington courts had not considered the scope of first amendment interests in discovery before *Rhinehart*, but they had issued balancing standards for protecting such interests in the context of other judicial proceedings.[7] The *Rhinehart* court could have produced clearer guidelines for evaluating protective orders by carefully considering the relevant federal cases as well as the free speech[8] and open judicial proceedings[9] provisions of the Washington State Constitution, and the state's Public Disclosure Act.[10]

Both state and federal cases are relevant to the *Rhinehart* decision because discovery proceedings in Washington are governed by Superior Court Civil Rule 26 (CR 26), which is based on rule 26 of the Federal Rules of Civil Procedure.[11] CR 26 contains the central provisions governing the scope of discovery.[12] CR 26(c) authorizes superior courts to restrict a litigant's broad rights to information during discovery.[13] The rule also provides

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5. References to the *Rhinehart* court and the *Rhinehart* decision, unless otherwise noted, are to the Washington State Supreme Court and to the state court's decision.

6. *See, e.g.*, San Juan Star Co. v. Barcelo, 662 F.2d 108, 116 (1st Cir. 1981); *In re* Halkin, 598 F.2d 176, 191 (D.C. Cir. 1979).

7. *See infra* note 138.

8. WASH. CONST. art. I, § 5: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right."

9. WASH. CONST. art. I, § 10: "Justice in all cases shall be administered openly, and without unnecessary delay."

10. WASH. REV. CODE ch. 42.17 (1983). Chapter 42.17 governs disclosure of campaign financing, lobbyist reporting, and public records. This Comment examines only public records disclosure as governed by WASH. REV. CODE §§ 42.17.250 -.340 (1983).

11. *Rhinehart*, 98 Wash. 2d at 231, 654 P.2d at 676.

12. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE, CIVIL § 2001, at 15 (1970) [hereinafter cited as WRIGHT & MILLER].

13. WASH. SUPER. CT. C.R. 26(c) is identical in substance to the text of FED. R. CIV. P. 26(c) and reads as follows:

> (c) **Protective Orders.** 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 or alternatively, on matters relating to a deposition, the court in the county where the deposition is to be taken 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

that upon "good cause shown," a court may make "any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense."[14] However, protective orders, originally intended as remedies for abuse, may be abuses in their own right. Some commentators claim that the good cause standard is too easily met, and that it allows unnecessary restrictions on the dissemination of discovery information.[15]

The Seattle Times challenged the good cause standard in *Rhinehart*. The Times charged that CR 26(c) unconstitutionally infringed on its first amendment rights by permitting a court, upon a mere showing of good cause, to limit the use to which the press could put pretrial discovery information.[16] The Washington Supreme Court did not wholeheartedly endorse the good cause standard, but it did reject the Times' first amendment arguments. The *Rhinehart* majority concluded that interests in privacy and judicial administration override competing constitutional concerns when a protective order is at issue.[17]

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on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a 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.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

WASH. SUPER. CT. C.R. 26(c).

14. *Id.*

15. A typical criticism is found in Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1666 (1980) (good cause standard should be replaced by a balancing test because "good cause" does not adequately protect the first amendment interests in disseminating discovery information). Some courts have read specific considerations into the good cause standard. *See, e.g.*, San Juan Star Co. v. Barcelo, 662 F.2d 108, 116 (1st Cir. 1981) (good cause standard should incorporate heightened sensitivity to first amendment concerns); *In re* Halkin, 598 F.2d 176, 193 (D.C. Cir. 1979) (in determining whether good cause exists, trial court must also require a specific showing that dissemination of discovery information would pose a concrete threat to an important countervailing interest).

16. 98 Wash. 2d at 229, 654 P.2d at 676.

17. The majority thus proposed a limited balancing test whereby the trial court would weigh the interests of both parties. *Id.* at 256, 654 P.2d at 690. The court added, however, that the judge's major concern should be the facilitation of the discovery pro-

The Washington State Supreme Court has previously balanced the interests of privacy and effective judicial administration against those of free speech and public access in the context of judicial proceedings,[18] and the court missed a significant opportunity to expand and apply this balancing test in *Rhinehart*. The United States Supreme Court similarly declined to create a balancing test to ensure the full protection of first amendment interests during pretrial discovery. A need remains for a general standard to ensure that first amendment interests in disseminating discovery information are identified and protected when a protective order is requested.

II. *Rhinehart v. Seattle Times Co.*: An Overview

Rhinehart v. Seattle Times Co. developed from charges of defamation and invasion of privacy filed by Keith Rhinehart against the Seattle Times and the Walla Walla Union-Bulletin.[19] Both newspapers had published several articles about Rhinehart and the Aquarian Foundation, a religious sect founded and led by Rhinehart. After Rhinehart sued on behalf of himself and the foundation, the defendants conducted discovery regarding the plaintiffs' financial affairs, membership, and donors. The plaintiffs supplied some financial materials, but refused to divulge other information in an attempt to forestall unwanted publicity.[20]

The defendants sought and were granted an order compelling discovery, and the plaintiffs obtained a protective order restricting the use of the acquired information.[21] The protective order stated that "information gained by a defendant through the discovery process may not be published by any of the defendants or made available to any news media for publication or dissemination."[22] The newspapers attacked the protective order on the ground that it denied them freedom of the press and freedom of speech guaranteed by the first amendment of the United States Constitution and by article I, section 5 of the Washington Constitution. The trial court's memorandum opinion stated that the plaintiffs had reasonable grounds for requesting and receiv-

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cess, which involves a consideration of the privacy interests of the parties. *Id.*

18. *See, e.g., infra* notes 141-48 and accompanying text.

19. 98 Wash. 2d at 227, 654 P.2d at 675.

20. *Id.* at 228, 654 P.2d at 675.

21. *Id.*

22. *Id.*

ing a protective order.[23] The trial court feared a "chilling" effect on a party's willingness to sue if such orders could not be issued.[24] The judge found access to the courts to be as important as freedom of the press "because it is through the courts that our fundamental freedoms are protected and enforced."[25]

A majority of the supreme court upheld the protective order and concluded, contrary to the trend in the federal circuits, that the good cause standard provided a sufficient framework within which to evaluate a CR 26(c) protective order.[26] Most of Justice Rosellini's opinion, however, was devoted to demonstrating that the order could meet the heavy burden of justification required of a prior restraint.[27] The majority never expressly concluded that meeting the good cause standard alone was sufficient to validate a protective order. Justice Dolliver's concurrence addressed the majority's uncertainty, declaring that the court "should state categorically that discovery under the standards of CR 26(c) and the protective orders of the court in this case do not require a First Amendment analysis."[28] Such a categorical statement would enable the court to avoid "the morass of rather tendentious First Amendment commentary" afflicting federal court decisions regarding 26(c) orders.[29]

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23. *Id.* at 228-29, 654 P.2d at 675.

24. *Id.*

25. *Id.*

26. *Id.* at 256, 654 P.2d at 690. Justices Stafford, Williams, and Dore concurred with Justice Rosellini's majority opinion. *Id.* at 258, 654 P.2d at 691. Chief Justice Brachtenbach concurred with the majority and with Justice Dolliver's concurring opinion. *Id.* at 258, 261, 654 P.2d at 691, 692. Justice Dimmick concurred with Justice Dolliver's concurrence. *Id.* at 261, 654 P.2d at 692. Justice Pearson joined Justice Utter's dissent. *Id.* at 275, 654 P.2d at 700. *See supra* note 6 for cases that have expanded the traditional scope of good cause.

27. 98 Wash. 2d at 256, 654 P.2d at 690. A prior restraint is any type of predetermined prohibition to restrain certain specified information. Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976). The Supreme Court has held that prior restraints on speech and publication are the most serious and least tolerable infringement of first amendment freedoms. *Id.* at 559. A few courts have stated that protective orders limiting the dissemination of discovery materials are prior restraints. *See, e.g.*, Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 204 (S.D.N.Y. 1977) ("Defendants contend correctly that if this Court grants the protective order sought by plaintiff, it would, in effect, be ordering a 'prior restraint' of the freedom of the press. . . ."); Georgia Gazette Publishing Co. v. Ramsey, 248 Ga. 528, 530, 284 S.E.2d 386, 387 (1981) ("[W]e find the restraining order . . . to be an unwarranted restraint upon the newspaper's liberty of speech and of the press."). A prior restraint may be constitutional, but the party seeking it "carries a heavy burden of showing justification for the imposition of such a restraint." Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971).

28. 98 Wash. 2d at 258, 654 P.2d at 691 (Dolliver, J., concurring).

29. *Id.*

The dissenting opinion suggested clarification of *Rhinehart* in the opposite direction, faulting the majority for exempting discovery from first amendment scrutiny.[30] Though courts were split regarding the proper balancing standard to apply,[31] Justice Utter stated that competing concerns could be evaluated if several factors were weighed: the extent of the first amendment interest enjoined by the order; the harm threatened by failing to issue a protective order; the status of the parties seeking an order and against whom the order is sought; and the court's specific concerns in issuing protective orders.[32]

Justice Utter criticized the *Rhinehart* order because the order was issued without consideration of first amendment interests and because it was overly broad.[33] According to Justice Utter, the trial court's concern about a hypothetical chilling effect meant that the rationale for the order lacked important specifics.[34] The trial court also failed to state what discovery information was restrained or for how long the restraint would last.[35] The dissent did not conclude that issuance of the order was in error, but urged a remand so that the trial judge could undertake a balancing test. "A specific harm has not been identified by the trial court, First Amendment interests are given no recognition, and the order does not reflect the narrowness which derives from a concern for such interests."[36] Justice Utter therefore attempted to fill the void he saw created by the majority opinion:

> By failing to apply in earnest the traditionally stringent standards of prior restraint, the majority both dilutes the future

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30. *Id.* at 261, 654 P.2d at 692 (Utter, J., dissenting) ("While purporting to apply the doctrine of prior restraint to this case, the majority's ruling for all practical purposes makes discovery a category exempt from First Amendment scrutiny.").

31. Justice Utter cited many cases and law review articles that are helpful in setting forth the protective order controversy. *Id.* at 264, 654 P.2d at 694. *See also* Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process*, 14 N. ENG. L. REV. 1 (1978); Comment, *In Re San Juan Star: Discovery and the First Amendment*, 34 BAYLOR L. REV. 229 (1982).

32. 98 Wash. 2d at 270-71, 654 P.2d at 697.

33. *Id.* at 274-75, 654 P.2d at 699.

34. *Id.* at 273, 654 P.2d at 698.

35. *Id.* at 274-75, 654 P.2d at 699. The second paragraph of the protective order prevented the dissemination of financial and membership information, but the next paragraph broadened the scope of the protective order to include all information uncovered through the discovery process. *Id.*

36. *Id.* at 275, 654 P.2d at 699-700.

> value of the doctrine in a proper context and neglects the primary duty of the court in this case: establishing the appropriate standard by which trial courts may issue protective orders without violating the requirements of the constitution.[37]

That primary duty also was left unfulfilled by the United States Supreme Court. The Court identified first amendment interests in discovery when it affirmed the *Rhinehart* majority opinion, but failed to issue the standard needed to protect those interests. The uncertainty created by the Washington court's opinion thus increased following the United States Supreme Court's decision.

III. First Amendment Interests in Pretrial Discovery: Recognition Without Protection

A. *The Scope of First Amendment Interests in Discovery Orders*

1. *The Federal View Before* Rhinehart

When the Washington Supreme Court considered *Rhinehart*, it looked solely to the federal courts for guidance, a source that was somewhat ambiguous. The traditional stance had been that first amendment rights either are waived or are of no concern during discovery.[38] Recent reexaminations of discovery orders had led several courts and commentators to conclude, however, that protective orders have a limited impact on a litigant's first amendment freedoms.[39]

Although some categories of speech are exempted from first amendment protection because they are without informative or social value,[40] discovery materials do not automatically fall

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37. *Id.* at 261, 654 P.2d at 692-93.

38. Dore, *supra* note 31, at 10. *See, e.g.*, Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976) (parties and counsel, by taking advantage of discovery processes, may implicitly waive their first amendment rights to disclose or disseminate information obtained through those processes); International Prods. Corp. v. Koons, 325 F.2d 403, 407 (2d Cir. 1963) (no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes).

39. *See Rhinehart*, 98 Wash. 2d at 264, 654 P.2d at 694 (Utter, J., dissenting) and cases cited therein.

40. *In re* Halkin, 598 F.2d 176, 188 (D.C. Cir. 1979) (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)). Categories of speech exempted from first amendment protection include: libelous falsehoods, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); obscenities, Miller v. California, 413 U.S. 15, 23 (1973); and "fighting words," Chaplinsky v. New Hampshire, 315 U.S. at 572.

within one of those categories.[41] Not all discovery information warrants public dissemination and full-fledged first amendment protection.[42] A tension exists between the need to protect privacy and public interests in discovery materials,[43] and that tension led to a recognition of limited first amendment interests in *In re Halkin*[44] and in *San Juan Star Co. v. Barcelo.*[45]

The *Halkin* court decided that first amendment rights are present once discovery information is obtained, but added that the strength of those rights depends on the nature of the information.[46] An order limiting publication of political speech or court records evokes different interests than an order restraining

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41. Koster v. Chase Manhattan Bank, 93 F.R.D. 471, 476 (S.D.N.Y. 1982). The Supreme Court agreed in Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984), that it is "clear that information obtained through civil discovery authorized by modern rules of civil procedure would rarely, if ever, fall within the classes of unprotected speech identified by decisions of this Court." *Id.* at 2206.

42. *See* WASH. SUPER. CT. C.R. 26(c), *supra* note 13.

43. One commentator described the tension as follows:

> [T]he courts have on various occasions upheld a right of access to information of great public concern, especially when the government is involved. Furthermore, civil litigation often involves important social issues that seldom or never arise in criminal proceedings. In some instances, civil actions are brought solely for the purpose of gaining information for the public or to expose a need for governmental action or correction. The public has a strong interest in observing such proceedings. Because of the perishable quality of such information, even a temporary suppression can result in irreparable harm.

Comment, *supra* note 31, at 242 (footnotes omitted). Another court saw less need to justify public access to discovery materials. "As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings." American Tel. & Tel. Co. v. Grady, 594 F.2d 594, 596 (9th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979). Aside from the public's interest, litigants may have an interest in publicizing discovery information. Note, *supra* note 15, at 1655. A litigant has a first amendment right to discuss a lawsuit publicly, and public disclosure of discovered information may be essential to effective litigation. *Id.* The litigant may choose to publicize the case in order to solicit funds, and disclosure of discovered information may be necessary to show the suit is grounded in fact rather than allegation. *Id.* at 1655-56.

But see Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2207-08. The Court did not say that discovery proceedings may never be made public, but found that "in general, they are conducted in private as a matter of modern practice." The Court added that restraints on discovered information are not a restriction on a traditionally public source of information. *Id.* at 2208. The Court made no mention of situations in which discovered information should be made public, as noted above.

44. 598 F.2d 176 (D.C. Cir. 1979). *See infra* note 50 for the facts in *Halkin.*

45. 662 F.2d 108 (1st Cir. 1981). Appellants in *San Juan Star* challenged an order prohibiting the attorneys in a civil rights suit from disclosing any deposition evidence to the press, the litigants, or to any third party. The suit arose from the killings of two suspected terrorists by Puerto Rican police.

46. 598 F.2d at 191.

commercial information,[47] and an order "protecting" highly newsworthy information raises concerns different from a temporary restraint of materials having "constant but rarely topical interest."[48] The *Halkin* court directed courts to determine first whether a requested protective order would restrain information and what the nature of that restraint would be.[49] If the discovery information was newsworthy or of public interest, the trial court was to review the order with a test that balanced first amendment interests against competing concerns.[50]

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47. *Id.*

48. *Id.* These statements appear to show the acceptance of content-based regulations of speech that the Supreme Court has directed courts to avoid. *See* Erznoznik v. Jacksonville, 422 U.S. 205 (1975). In *Erznoznik*, the Court concluded that a state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content. "But when the government, acting as censor, undertakes selectively to shield the public from some kinds of speech on the ground that they are more offensive than others, the First Amendment strictly limits its power." *Id.* at 209. The Court cited Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972), as support for its stance against content-based regulations. *Erznoznik*, 422 U.S. at 209. In the passage referred to, the Court said, "[a]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Mosley*, 408 U.S. at 95.

The Court's disapproval of the government as censor was extended to the courts in Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976). The Court refused to uphold a gag order prohibiting publication of an accused's confessions in a highly publicized murder trial. Justice Brennan commented that "the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges." *Id.* at 613 (Brennan, J., concurring).

The *Halkin* court apparently accepted an editorial role for judges because pretrial discovery information is obtained solely through the court's processes and because all discovery information will not eventually be destined for public consumption. Such was the court's position in *San Juan Star*. *See infra* notes 52-56 and accompanying text. The *Rhinehart* dissent also accepted the principle that first amendment interests will vary according to the type of expression subject to the protective order. 98 Wash. 2d at 270, 654 P.2d at 697 (Utter, J., dissenting).

What all three opinions described, therefore, was not a radical departure from the discretionary good cause standard. The opinions simply suggested the adoption of a more carefully defined set of guidelines so that first amendment interests would receive adequate attention where appropriate. The *Rhinehart* dissent criticized the majority opinion because "it has not provided an analytical framework by which we as a reviewing court will be able to differentiate this case from one in which the First Amendment interest is more substantial." *Id.*

49. 598 F.2d at 191.

50. *Id.* The *Halkin* order did implicate first amendment interests. The plaintiffs in *Halkin* sued the United States government for conducting unlawful surveillance programs against their anti-Vietnam War activities. When the United States sought a protective order to prevent disclosure of certain discovery materials, the *Halkin* court held that the newsworthiness of the information mandated its disclosure. 598 F.2d at 197. The

The *San Juan Star* court also determined that significant but limited first amendment concerns are affected by pretrial discovery protective orders.[51] According to the court, first amendment interests and the severity of a court's scrutiny of restraints on dissemination differ in cases involving civil discovery rather than public proceedings.[52] Discovery information has not passed the strict tests of relevance and admissibility that are applied to trial evidence. The material revealed may be irrelevant or prejudicial, or may pose an undue invasion of an individual's privacy.[53] "Such undigested matter, forced from the mouth of an unwilling deponent, is hardly material encompassed within a broad public 'right to know.' "[54] The first amendment still must be considered in weighing a protective order request, however, because of the order's impact on the individual interest in self-expression and the concern that government not lightly engage in restraints on communication.[55] Some discovery information will be relevant at trial, newsworthy, and therefore subject to greater attention under the first amendment.[56]

Because first amendment interests are viewed as limited in discovery proceedings, most federal courts have stopped short of analyzing protective orders as prior restraints.[57] Since the order in *San Juan Star* touched on first amendment interests, the court applied a standard of review similar to the prior restraints standard, but less stringent because of the more limited first

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government materials had been purged of sensitive and confidential information before being given to the plaintiffs. 598 F.2d at 180.

51. 662 F.2d at 114. The *Rhinehart* dissent similarly assumed the presence of limited first amendment interests in discovery materials. 98 Wash. 2d at 266, 654 P.2d at 695 (Utter, J., dissenting). "[O]ne's interest in disseminating discovery materials is restricted because it is obtained solely by virtue of the court's processes." *Id.* at 265, 654 P.2d at 694 (quoting *Halkin*, 598 F.2d at 206).

52. *San Juan Star*, 662 F.2d at 114.

53. *Id.* at 115.

54. *Id.* Similar reasoning was used to restrict the dissemination of trade secrets and other confidential information in Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866 (E.D. Pa. 1981). The *Zenith* court noted that it was beyond dispute that judicial proceedings and records are open to the public, but added that it was difficult to determine what types of materials comprise judicial records. *Id.* at 895. The raw fruits of discovery do not constitute judicial records because they are not in the court's possession until introduced as evidence. The public has no common law right to inspect materials produced in discovery but not placed in the custody of the court. *Id.* at 898 (citing Wilk v. American Medical Ass'n, 635 F.2d 1295, 1299 n.7 (7th Cir. 1980)).

55. *San Juan Star*, 662 F.2d at 115.

56. *Id.*

57. *Cf. supra* note 27.

amendment interests at stake.[58] Similarly, the *Halkin* court did not view first amendment interests as sufficiently strong to warrant analysis of a protective order as a prior restraint.[59]

2. *The* Rhinehart *Approach*

The Washington Supreme Court did not adopt the reasoning of the *Halkin* and *San Juan Star* courts because it did not regard their recognition of first amendment interests as mandated by previous United States Supreme Court decisions.[60] However, the means of analysis with which the Washington court examined the *Rhinehart* order contradicted the court's reluctance to identify first amendment interests in pretrial discovery.

The *Rhinehart* opinion began with a fundamental point: the press is afforded no greater constitutional protection than is the general public.[61] The *Rhinehart* court thus established at the outset that the Seattle Times would receive no special consideration because of its position as both litigant and press representative.[62] The clarity of that point faded, however, as the court more closely examined the degree of constitutional protection that the Times deserved in the *Rhinehart* litigation. The Times claimed that the protective order acted as a prior restraint in limiting the use to which the newspaper could put discovery information.[63] The majority did not believe the prior restraint doctrine applicable, and added that it would not reach the prior restraint issue because "even under the prior restraint doctrine protective orders can be justified."[64] Thus began the court's lengthy analysis of the *Rhinehart* protective order as a prior restraint.[65] The majority never expressly declared that first

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58. *San Juan Star*, 662 F.2d at 116.

59. *Halkin*, 598 F.2d at 186.

60. *Rhinehart*, 98 Wash. 2d at 248, 654 P.2d at 685.

61. 98 Wash. 2d at 229-30, 654 P.2d at 676. *See also* Pell v. Procunier, 417 U.S. 817, 833 (1974); Zemel v. Rusk, 381 U.S. 1, 13 (1965).

62. The majority criticized a case in which defendants were given greater rights than normal litigants because they were members of the press. 98 Wash. 2d at 245, 654 P.2d at 684 (criticizing Reliance Ins. Co. v. Barron's, 428 F. Supp. 200 (S.D.N.Y. 1977)). Because the defendants represented the press, the *Reliance* court analyzed the protective order as a prior restraint. 428 F. Supp. at 204. One commentator found the *Reliance* court "incorrect in its apparent belief that the press was entitled to special first amendment considerations." Dore, *supra* note 31, at 11.

63. *Rhinehart*, 98 Wash. 2d at 230, 654 P.2d at 676.

64. *Id.* at 231, 654 P.2d at 676.

65. *See Rhinehart*, 98 Wash. 2d at 261, 654 P.2d at 692 (Utter, J., dissenting).

amendment interests are affected when a protective order is issued, but by analyzing the *Rhinehart* order as a prior restraint, the court implicitly recognized strong first amendment interests in CR 26(c) protective orders.

The court began its justification of the *Rhinehart* order by reviewing the purposes of discovery rules and protective orders.[66] CR 26(c) was designed to ameliorate problems caused by unlimited discovery proceedings.[67] The majority found no indication in the discovery rules or anywhere else that the purposes of discovery include the dissemination of information to the public.[68] The majority overlooked the fact that unless a protective order is issued, materials obtained in discovery may be used by a party for any purpose, including dissemination to the

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"While voicing adherence to the prior restraint doctrine, the majority's analysis [of a protective order as a prior restraint] reflects more its initial skepticism as to the doctrine's application." *Id.* Justice Utter considered the prior restraint analysis inappropriate, since only limited first amendment interests attach to the dissemination of discovery materials. *Id.* at 263, 654 P.2d at 694.

66. 98 Wash. 2d at 231, 654 P.2d at 676-77. The pretrial discovery procedures in the 1938 Federal Rules of Civil Procedure sought to put an end to the "sporting theory of justice," whereby the result of a trial depended on luck and on counsel's skill and strategy. WRIGHT & MILLER, *supra* note 12, at 18-19. "Under the [common law] philosophy that a judicial proceeding was a battle of wits rather than a search for the truth, each side was protected to a large extent against disclosure in his case." *Id.* at 14. The 1938 rules and subsequent revisions revealed a different philosophy: every party to a civil action is entitled to pretrial disclosure of all relevant information in the possession of any person, unless that information is privileged. *Id.* at 15. This broad disclosure has three purposes. One is to narrow the issues in a trial, another is to obtain evidence for use at trial, and the third is to reveal the existence of evidence that might be used at trial. *Id.*

67. Protective orders are directed mainly at the use, rather than the acquisition, of the information discovered. WRIGHT & MILLER, *supra* note 12, § 2001, at 15. In limiting the use of discovery materials, Rule 26(c) protective orders serve a dual function: "[s]uch orders are meant to protect the health and integrity of the discovery process, as much as to protect the parties who participate in it." *Rhinehart*, 98 Wash. 2d at 231, 654 P.2d at 677.

68. 98 Wash. 2d at 235, 654 P.2d at 679. The court cited Chief Justice Burger's concurrence in Gannett Co. v. DePasquale, 443 U.S. 368 (1979), in support of that statement. In *Gannett*, the Court upheld a trial court's closure of a pretrial suppression hearing. *Id.* at 394. The *Gannett* Court's emphasis on fair trial concerns makes the case of limited relevance to *Rhinehart*. In most civil cases, the possibility that publicity will result in an unfair trial is not at issue. *See* Note, *supra* note 15, at 1661. "Very few civil cases achieve the notoriety that attaches to sensational criminal trials." *Id.* Another commentator adds that "[i]n effect, society tolerates greater imprecision in the protection of rights in the civil context, and thus instances of prejudice that might cause concern in criminal trials may be deemed insignificant in civil trials." Note, *Trial Secrecy and the First Amendment Right of Public Access to Judicial Proceedings*, 91 HARV. L. REV. 1899, 1922 (1978).

public.[69] The majority also overlooked the following observation:

> The fact that information is received through discovery renders it 'of public interest.' Discovery is part of a judicial proceeding; and public knowledge of the workings of the discovery system and of the types of information subject to discovery adds to an understanding of the judicial system. Moreover, public scrutiny is thought to benefit the proceeding itself: fairness is ensured, and efficiency and competency are improved.[70]

The majority concluded that the United States Supreme Court protects legitimate publicity interests with first amendment freedoms.[71] In *Near v. Minnesota ex rel. Olson*[72] and *Organization for a Better Austin v. Keefe*,[73] the Supreme Court abated publication restrictions because, according to the *Rhinehart* court, each case concerned "the rights of advocacy, and the dissemination of ideas, which lie at the core of First Amendment protection."[74] Since *Rhinehart* did not involve advocacy or abstract discussion, but "only the reporting of supposed facts elicited in discovery," the court decided that the information did not warrant first amendment protection.[75] This supposed distinction between reporting facts and advocating ideas does not withstand scrutiny. In both *Near* and *Austin*, as in most instances where opinions are publicized, factual evidence supported the positions advocated. Neither the newspaper in *Near* nor the citizens in *Austin* advocated ideas without reporting facts.[76]

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69. *In re* Halkin, 598 F.2d 176, 188 (D.C. Cir. 1979).

70. Note, *supra* note 15, at 1655. *See also* Comment, *supra* note 31, at 242.

71. *Rhinehart*, 98 Wash. 2d at 248, 654 P.2d at 686.

72. 283 U.S. 697 (1931). A Minnesota law authorized abatement, as a public nuisance, of a malicious or scandalous newspaper. *Id.* at 701-02. When a local prosecutor successfully brought an abatement action against a newspaper for criticizing law enforcement officials, the Supreme Court set aside the state injunction as a prior restraint. *Id.* at 723.

73. 402 U.S. 415 (1971).

74. 98 Wash. 2d at 248-49, 654 P.2d at 686.

75. *Id.*

76. The majority's use of *Austin* is especially puzzling. In *Austin*, a real estate broker attempted to enjoin a community's distribution of pamphlets that criticized the broker's allegedly "block-busting" and "panic peddling" activities. 402 U.S. at 416. The Supreme Court reversed the state court injunction, stating that "[d]esignating the conduct as an invasion of privacy . . . is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record." *Id.* at 419-20. The Supreme Court nowhere referred to the pamphlets, as did the *Rhinehart* majority, as "racist in their content." 98 Wash. 2d at 248, 654 P.2d at 686. The pamphlets contained facts, as would a Times article on Kevin Rhinehart. An addi-

The *Rhinehart* court acknowledged that when matters of public interest are of concern and privacy interests are not, there may be good reason to deny a protective order and permit discovery information to be publicized.[77] A protective order should not issue, however, if the information to be published is merely newsworthy.[78] "It does not seem likely that, where a matter is considered newsworthy, the media will be without its own means of examining the facts."[79] Even assuming that newsworthiness is severable from public interest, the conclusion that first amendment interests subside as newsworthiness increases is questionable.[80]

The uncertainty with which the Washington court addressed first amendment interests may have been one reason for the pointed introduction to Justice Brennan's concurrence in *Seattle Times Co. v. Rhinehart*.[81] The Justice began his opinion with this statement: "The Court today recognizes that pretrial protective orders . . . are subject to scrutiny under the First

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tional point made in *Austin* further weakens its holding as support for the majority's position in *Rhinehart*. Respondent's claim of an invasion of privacy was unwarranted because he was "not attempting to stop the flow of information into his own household, but to the public." *Austin*, 402 U.S. at 420. The same observation could be made in *Rhinehart*.

77. 98 Wash. 2d at 254, 654 P.2d at 689.

78. *Id.* at 254-55, 654 P.2d at 689. The court was skeptical as to the newsworthiness of the material on the Aquarian Foundation. "We are not told what interest of the public is served by the newspaper's further exposure of this allegedly religious sect, unorthodox though it undoubtedly is, but we assume that publishers could rightly find it newsworthy." *Id.* at 255, 654 P.2d at 689. The United States Supreme Court was less skeptical: "In this case, as petitioners argue, there certainly is a public interest in knowing more about respondents." Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2206 (1984).

79. *Rhinehart*, 98 Wash. 2d at 254-55, 654 P.2d at 689. The Supreme Court adopted the same line of reasoning, and held that the protective order was not a prior restraint because the Times could use outside means to uncover the desired information. Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2208 (1984). Two problems arise with this reasoning. The first focuses on how a court is to determine, when a subsequent article includes the protected information, whether that information was produced through legitimate investigation or by violating the protective order. A newspaper may be forced to restrict its discussion of the litigation to avoid being charged with violating a protective order. The second problem arises when a party is not a member of the press. How else will that party get information than through the discovery process? In a case such as *Rhinehart*, the restriction of information may be more beneficial than harmful. In a case such as *Halkin*, however, private citizens could be unfairly restrained from releasing information of legitimate public interest.

80. The *Halkin* court and the *San Juan Star* court both specified that newsworthy information deserved first amendment protection. *Halkin*, 598 F.2d at 191; *San Juan Star*, 662 F.2d at 115.

81. 104 S. Ct. 2199 (1984).

Amendment."[82]

3. *Resolution by the Supreme Court*

The United States Supreme Court granted certiorari to resolve the conflict presented by *Rhinehart*, *Halkin*, and *San Juan Star*.[83] Though the Court affirmed the *Rhinehart* court's holding, it did not affirm the rationale for that holding. In recognizing the presence of limited first amendment interests in disseminating discovery information,[84] the Court followed more closely the analysis used by the federal circuits.

In words reminiscent of *Halkin* and *San Juan Star*, the Court stated that judicial limitations on a litigant's ability to disseminate discovery information compromise the first amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context.[85] Petitioners gain the information they wish to disseminate only by virtue of the trial court's discovery processes.[86] Since discovery is not a traditionally public component of a civil trial, restraints placed on discovered but unadmitted information are not restraints of traditionally public information.[87] Furthermore, since the limitations imposed by a protective order pertain only to information produced via pretrial discovery, a protective order is not the kind of classic prior restraint that requires exacting first amendment scrutiny.[88] A party is free to distribute the same information covered by a protective order if that information is derived independently of the court's processes.[89] The Supreme Court concluded that protective orders occupy a unique position in relation to the first amendment:[90] a determination that discovery information is not a totally unprotected category of speech[91] does not mean that a litigant has an unrestrained right to distribute discovery information.[92]

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82. *Id.* at 2210 (Brennan, J., concurring).
83. Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2205 (1984).
84. *Id.* at 2207.
85. *Id.*
86. *Id.*
87. *Id.* at 2207-08.
88. *Id.* at 2208.
89. *Id.*
90. *Id.*
91. *Id.* at 2206-07.
92. *Id.* at 2207.

The Supreme Court thus identified the presence of limited first amendment interests in disseminating discovery information in much the same manner as had the *Halkin* and *San Juan Star* courts.[93] The Court echoed the circuit courts' refusal to characterize a protective order as a traditional prior restraint because of the limited first amendment interests involved.[94] Unfortunately, however, the Supreme Court stopped short of adopting the standards set forth by *Halkin* and *San Juan Star* for protecting first amendment interests during pretrial discovery. As the following discussion shows, the Supreme Court broke ranks with the circuit courts and more closely aligned itself with the Washington Supreme Court in discussing the standard of review that a trial court should use in evaluating a protective order request. The Court failed to adopt the more definitive standards proposed by the federal circuit courts.

B. The Standard of Review

1. The Federal Balancing Test

In conjunction with their recognition of first amendment interests in discovery proceedings, the federal circuit courts applied a standard of review that is more closely defined than the discretionary good cause standard contained in rule 26(c).[95] Most of these courts did not condemn the good cause standard but took care to outline the specific considerations that the standard should contain. Under the good cause standard as traditionally applied, a trial court employs only its discretion in deciding whether to consider first amendment interests in evaluating a protective order request.[96] The trial court's discretion is more limited when a balancing test is used, and thus first amendment interests are given greater protection.[97]

The *Halkin* court developed a three-part balancing test for evaluating a protective order request: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alter-

93. *See supra* notes 44-59 and accompanying text.

94. *See supra* notes 57-59 and accompanying text.

95. An exception is the decision in Koster v. Chase Manhatten Bank, 93 F.R.D. 471 (S.D.N.Y. 1982), in which the court carefully outlined the various balancing tests but refused to select one because the order involved did not meet the requirements of good cause. *Id.* at 479-80.

96. *Id.* at 479.

97. *Id.* at 480.

native means of protecting the public interest that intrudes less directly on expression.[98] The court acknowledged that a smoothly operating system of discovery is in the interest of litigants and society as a whole, since discovery contributes to the full airing of material facts in controversy.[99] Protecting the fairness of the judicial system also is an important interest, though a defendant's right to a fair trial receives more protection in criminal than in civil proceedings.[100] The balancing test undermines neither interest, but requires a court to demand "a particular and specific demonstration of fact," rather than "stereotyped and conclusory statements."[101] An order restraining speech cannot be based on a record that merely speculates that the right to a fair trial might be jeopardized.[102]

Although the *San Juan Star* court agreed that competing interests must be clearly articulated, it suggested a more relaxed standard for examining protective orders.[103] The *San Juan Star* decision advised courts to evaluate the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if one were deemed necessary.[104] The court proposed a good cause standard incorporating a heightened sensitivity to the first amendment interests at stake.[105]

The balancing tests proposed by the federal circuits vary in wording, but each compels a trial court to define carefully the competing interests involved and to give special attention to first amendment interests before issuing a protective order. The first amendment interest implicated by a protective order request varies according to the type of information discovered, so no simple rule applies in all cases.[106] These balancing guidelines, therefore, do not remove a trial court's discretionary authority in issuing protective orders. Instead, they seek to retain that authority while ensuring that a litigant's first amendment interests are recognized and protected.

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98. 598 F.2d at 191.
99. *Id.* at 192.
100. *Id.* at 192-93. *See also supra* note 68.
101. *Id.* at 193 (quoting WRIGHT & MILLER, *supra* note 12, § 2035, at 265).
102. 598 F.2d at 193.
103. 662 F.2d 108, 116 (1st Cir. 1981).
104. *Id.*
105. *Id.*
106. *Rhinehart*, 98 Wash. 2d at 271-72, 654 P.2d at 698 (Utter, J., dissenting).

2. *The State Supreme Court's Standard of Review*

The *Rhinehart* majority stated that rule 26(c) "has generally been given effect according to the import of its words."[107] "The issuance of protective orders is within the discretion of the trial court, to be granted where, in its judgment, good cause exists. . . ."[108] While the court acknowledged that some federal courts had not adopted a literal interpretation of the good cause standard, it dismissed the balancing tests proposed as "unduly complex and onerous."[109] By adopting the prior restraint standard of review, however, the *Rhinehart* majority adopted a far more onerous standard than any balancing test.[110]

The majority sought to justify the protective order as a prior restraint by showing the need to protect privacy interests and to ensure effective judicial administration. The court cited tort law, state statutes, and Supreme Court cases to illustrate the increasing awareness that privacy rights must be protected.[111] The court's discussion of privacy interests ended in a dire prediction. If protective orders could not be issued to protect such interests, the result would be a "serious undermining of the morale of the people as well as the integrity of the government."[112] The majority thus viewed *Rhinehart* in disjunctive terms: either privacy rights were supreme or protective orders were useless. Few supporters of the first amendment balancing test have denigrated privacy interests. Rather, they have shown that other rights, including those protected by the first amendment, may be as important as, or more important than, the pri-

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107. *Id.* at 234, 654 P.2d at 678.

108. *Id.* at 234-35, 654 P.2d at 678.

109. *Id.* at 248, 654 P.2d at 685. Another commentator viewed the *Halkin* criteria quite differently, stating that the proposed balancing test clarified the previously uncertain good cause standard. "In the past, courts have been unable to develop a workable standard of good cause for issuing protective orders prohibiting dissemination. . . . The *Halkin* test is an excellent formulation of the good cause standard that properly accounts for the constitutional right to disseminate discovery information." Note, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 DUKE L.J. 766, 799 (1980).

110. Justice Utter stated:

> The inconsistency of the majority's approach is made evident by its treatment of *Halkin* and *San Juan Star*. The majority states the standards articulated by those courts are not mandated by the constitution. . . . Yet the standards developed in both cases are less stringent than the heavy presumption against validity, which the majority purports to apply in dispensing with this case.

98 Wash. 2d at 267 n.13, 654 P.2d at 695 n.4 (Utter, J., dissenting).

111. *Id.* at 236-42, 654 P.2d at 680-83.

112. *Id.* at 238, 654 P.2d at 680.

vacy interests in a case.[113]

The other justification offered for the protective order as prior restraint was the need for effective judicial administration. The *Rhinehart* majority criticized the balancing tests offered by the federal circuits, finding that they "tend to undermine the objectives of pretrial discovery, which is designed to expedite rather than hinder the process of litigation."[114] Few of the balancing tests offered have overlooked the needs of judicial administration.[115] The *Rhinehart* dissent recognized that "the court has legitimate concerns in administering the discovery process, which may affect the extent to which First Amendment expression remains unimpaired."[116] The need that overrides all others, however, is the need to identify the interests implicated by a protective order request. Those interests will include, not exclude, administrative needs. In some cases such needs will override the first amendment interests at stake, and in some they will not. The balancing guidelines guarantee that all interests are considered rather than undermined.

The *Rhinehart* majority's discussion of cases dealing with first amendment rights in judicial proceedings[117] continued to circle the issue that the balancing tests confront. The majority concluded that "the [United States Supreme] Court's concern for the protection of First Amendment rights, at least insofar as access to governmental processes is concerned, increases in proportion to the intensity of the legitimate interest which the public has in learning about those processes."[118] The real issue in *Rhinehart*, however, was just how the legitimacy of that public interest should be determined. A trial court should not be

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113. *See Rhinehart*, 98 Wash. 2d at 271, 654 P.2d at 697 (Utter, J., dissenting); San Juan Star Co. v. Barcelo, 662 F.2d 108, 115 (1st Cir. 1981); *In re* Halkin, 598 F.2d 176, 190-91 (D.C. Cir. 1979); Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 204-05 (S.D.N.Y. 1977); Note, *supra* note 15, at 1656-57, 1662-63; Dore, *supra* note 31, at 15-17; Comment, *supra* note 31, at 243-45; Note, *supra* note 109, at 791-94.

114. 98 Wash. 2d at 248, 654 P.2d at 685.

115. Both *In re* Halkin, 598 F.2d 176 (D.C. Cir. 1979) and San Juan Star Co. v. Barcelo, 662 F.2d 108 (1st Cir. 1981) recognized the need for smoothly functioning discovery proceedings, and neither saw a balancing test as an interruption of such processes. *Halkin*, 598 F.2d at 192; *San Juan Star*, 662 F.2d at 116.

116. 98 Wash. 2d at 268, 654 P.2d at 696 (Utter, J., dissenting).

117. *Id.* at 250, 654 P.2d at 686-87 (discussing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)); 98 Wash. 2d at 249, 251, 654 P.2d at 686-87 (discussing Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978)); 98 Wash. 2d at 249, 654 P.2d at 686 (discussing Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)).

118. 98 Wash. 2d at 250, 654 P.2d at 687.

directed simply to use its discretion in deciding whether the public interest in access is legitimate. A balancing test with specific guidelines for administration ensures a more complete consideration and protection of each interest involved in a protective order decision. Even if the *Rhinehart* information was not deserving of strong first amendment protection, the Washington Supreme Court should have proposed guidelines for trial courts to use in cases where the first amendment concerns were more substantial.

The *Rhinehart* court held that the good cause standard required a limited balancing test in which a trial court weighs the interests of the parties to determine whether a protective order is needed or appropriate. The *Rhinehart* court insisted, however, that the trial court's major concern is the "facilitation of the discovery process and the protection of the integrity of that process," which involves considering the parties' privacy interests and does not condone publicity.[119] Even assuming that a protective order is a prior restraint of free expression, the *Rhinehart* majority concluded that the interest of the judiciary in the integrity of the discovery processes met the "heavy burden" of justifying a prior restraint.[120]

In avoiding any real consideration of the tests described as onerous and complex, the *Rhinehart* majority offered a substitute that is logically weak and without clear-cut guidelines. When the Times appealed the state court's decision, the United States Supreme Court only partially clarified the considerations to be weighed in reviewing a protective order request.

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119. *Id.* at 256, 654 P.2d at 690.

120. *Id.* The *Rhinehart* court's treatment of the prior restraint doctrine is difficult to explain. The United States Supreme Court views prior restraints with special disfavor, and has, so far, placed constitutional barriers against such restraints that are almost impossible to overcome. *See* G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1505, 1517 (10th ed. 1980). The chief purpose of the guarantee of a free press is to prevent prior restraints on publication. Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713 (1931). "[L]iberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints, or censorship." *Id.* at 716.

In Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199 (1984), the Supreme Court was careful to note that a protective order is not the type of classic prior restraint that requires exacting first amendment scrutiny. *Id.* at 2208. Since a protective order only restrains a litigant from using information obtained through pretrial discovery, such orders implicate the first amendment rights of the restricted party to a far lesser extent than would restraints on dissemination in a different context. *Id.*

3. The United States Supreme Court's Standard

Even though the Supreme Court recognized first amendment interests in pretrial discovery, it declined to use the *Rhinehart* case as an opportunity to outline balancing criteria that would protect such interests.[121] The Court did employ a limited balancing test, however, to determine the scope of a litigant's first amendment rights to disseminate discovery information.[122] In making that determination, the Court found it necessary to consider whether the "practice in question [furthers] an important or substantial government interest unrelated to the suppression of expression" and whether "the limitation of First Amendment freedoms is no greater than is necessary or essential to the protection of the government interests involved."[123]

The Supreme Court found that CR 26(c) furthers the substantial government interest of assisting litigants in acquiring information helpful to their case,[124] but also found that the rule makes it possible for a litigant to obtain information that could be damaging to the opposing party's reputation and privacy if released.[125] The Court stated that "the government clearly has a substantial interest in preventing this sort of abuse of its processes"[126] and concluded that prevention of such abuse was sufficient justification for the authorization of protective orders.[127]

The Court reached this conclusion without an express reference to the second half of its balancing test: whether the limitation of first amendment interests is no greater than necessary.[128] This is just the oversight that the balancing tests proposed by *Halkin* and *San Juan Star*—and by the *Rhinehart* dissent—sought to cure. Well-defined balancing guidelines would ensure a limitation of first amendment freedoms no greater than necessary to protect the discovery process.

The Supreme Court recognized that CR 26(c) confers broad discretion on the trial court to decide when a protective order is

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121. Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2206 (1984).
122. *Id.* at 2207.
123. *Id.* (quoting Procunier v. Martinez, 416 U.S. 396, 413 (1974)).
124. 104 S. Ct. at 2208.
125. *Id.* at 2209.
126. *Id.*
127. *Id.*
128. *Id.*

appropriate, but concluded that such discretion was proper.[129] "The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery."[130] The Court concluded that Rhinehart's rights to privacy and religious freedom outweighed the Times' first amendment interests in publicizing the protected information.[131] The United States Supreme Court basically followed the reasoning of *Halkin* and *San Juan Star* until the question of a well-defined balancing test arose. At that point, the Court unfortunately adopted the conclusion reached, if not the rationale employed, by the state supreme court in *Rhinehart*.

IV. Washington Guidelines for Evaluating CR 26(c) Protective Orders

The Washington Supreme Court has held several times that the state constitution's free speech guarantees must be balanced against interests in privacy and effective judicial administration.[132] The court also has balanced such interests against the constitution's protection of open judicial proceedings.[133] Several cases dealing with access to governmental records similarly have balanced rights of free speech against privacy interests.[134] While none of these cases deal with discovery proceedings or protective orders, they show an ability and a willingness to balance constitutional rights that should have been applied in *Rhinehart*.

A. Article I, Sections 5 and 10: A Balancing Mandate

Article I, section 5 of the Washington Constitution provides that "[e]very person may freely speak, write and publish on all

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129. *Id.*

130. *Id.*

131. *Id.* at 2209-10 (Brennan, J., concurring).

132. *See infra* note 138.

133. *See infra* note 138.

134. *See* Seattle Times Co. v. County of Benton, 99 Wash. 2d 251, 661 P.2d 964 (1983) (reporter's right of access to confidential juvenile court files must be weighed against family's interest in anonymity); Cowles Publishing Co. v. Murphy, 96 Wash. 2d 584, 637 P.2d 966 (1981) (public interest in certain court records must be weighed against interests in effective law enforcement and individual privacy and safety); Cohen v. Everett City Council, 85 Wash. 2d 385, 535 P.2d 801 (1975) (reporter's interest in trial transcript must be weighed against court's reasons for secret adjudication); *In re* Sage, 21 Wash. App. 803, 586 P.2d 1201 (1978) (adoptee's interest in learning identity of natural parents must be weighed against policy in favor of keeping adoption records sealed).

subjects, being responsible for the abuse of that right."[135] This section has been interpreted in conjunction with article I, section 10, which provides that "[j]ustice in all cases shall be administered openly and without unnecessary delay."[136] Rarely has either provision been given its "plain meaning"[137] when the interests they protect conflict with other rights.[138] Washington

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135. WASH. CONST. art. I, § 5.

136. WASH. CONST. art. I, § 10. Cases interpreting both sections 5 and 10 include Federated Publications, Inc. v. Kurtz, 94 Wash. 2d 51, 615 P.2d 440 (1980) (right of press to attend and publish information revealed in pretrial suppression hearing balanced against defendant's right to fair trial) and State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608 (right of press to publish information learned in court proceeding balanced against court's interests in ensuring fair trial), *cert. denied*, 404 U.S. 939 (1971), *modified*, State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984).

137. The Georgia Supreme Court gave a state constitutional provision its plain meaning in Georgia Gazette Publishing Co. v. Ramsey, 248 Ga. 528, 284 S.E.2d 386 (1981). The court held that the "free press" provision mandated the rejection of a protective order and that application of a balancing test was unnecessary. *Id.* at 529-30, 284 S.E.2d at 387. The protective order was an unwarranted restraint upon the defendant newspaper's liberties of speech and press. *Id.*

Such state constitutional provisions rarely are interpreted literally. Justice Frankfurter stated in a concurrence to Pennekamp v. Florida, 328 U.S. 331 (1946), that "[t]he State constitutions make it clear that the freedom of speech and press they guarantee is not absolute." *Id.* at 356 n.5. Most of the constitutions "explicitly provide in practically identical language for the right to speak, write and publish freely, every one, however, 'being responsible for the abuse of that right.'" *Id.* The Georgia constitution contains such a provision. *Id.*

But see State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984): "[Wash.] Const. art. I, § 5 guarantees an absolute right to publish and broadcast accurate, lawfully obtained information that is a matter of public record by virtue of having been admitted into evidence and presented in open court." *Id.* at 378, 679 P.2d at 361.

138. Article I, section 5 cases include Federated Publications, Inc. v. Kurtz, 94 Wash. 2d 51, 615 P.2d 440 (1980); State v. Conifer Enters., Inc., 82 Wash. 2d 94, 508 P.2d 149 (1973) (only compelling state interest in regulation of subject within state's constitutional power to regulate can justify limiting free expression); City of Seattle v. Bittner, 81 Wash. 2d 747, 505 P.2d 126 (1973) (not all prior restraint of free expression is forbidden; narrow restraint with procedural safeguards would be permissible); State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971), *modified*, State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984); Fine Arts Guild, Inc. v. City of Seattle, 74 Wash. 2d 503, 445 P.2d 602 (1968) (right of free speech balanced against city's right to regulate movies); Markham Advertising Co. v. State, 73 Wash. 2d 405, 439 P.2d 248 (1968) (public's right to enjoy highways free of billboards outweighs free speech interest claimed by advertising company), *appeal dismissed*, 393 U.S. 316 (1969); Johnston v. Beneficial Management Corp. of America, 26 Wash. App. 671, 614 P.2d 661 (1980) (free speech right of counsel to communicate with potential class members balanced against parties' right to fair trial), *rev'd on other grounds*, 96 Wash. 2d 708, 638 P.2d 1201 (1982).

Article I, section 10 cases include Seattle Times Co. v. Ishikawa, 97 Wash. 2d 30, 640 P.2d 716 (1982) (right of press to publish information contained in court record weighed against need to protect defendant's interests); Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 633 P.2d 74 (1981) (right of press to attend pretrial hearings balanced

courts often have balanced article I guarantees against a defendant's right to a fair trial and the interest in effective judicial administration.[139]

Even though the cases interpreting the Washington Constitution do not concern discovery proceedings or protective orders, they are relevant to the issues in *Rhinehart*. The needs of public access and free speech may be less significant in civil discovery than in other judicial proceedings, but this does not mean that such needs are of no consequence when a protective order is requested. The *Rhinehart* majority stated that such orders may be unwarranted when privacy interests are absent.[140] Use of a balancing test requires a court to examine the presence and importance of various interests in a case. Even if interests in public access are outweighed by privacy interests, articulation of those interests helps to ensure that protective orders are issued only when appropriate.

In *Federated Publications, Inc. v. Kurtz*, the Washington Supreme Court relied on article I, sections 5 and 10 to establish standards for closing a pretrial suppression hearing.[141] The court

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against defendant's right to fair trial), *cert. denied*, 456 U.S. 984 (1982); Cohen v. Everett City Council, 85 Wash. 2d 385, 535 P.2d 801 (1975) (reporter's interest in trial transcript must be weighed against court's reasons for secret adjudication); State *ex rel.* Lewis v. Superior Court, 51 Wash. 2d 193, 316 P.2d 907 (1957) (right to open proceedings weighed against juvenile defendant's right to anonymity); State v. Collins, 50 Wash. 2d 740, 314 P.2d 660 (1957) (right to public trial weighed against court's right to limit disturbances of trial proceedings); State v. Malone, 20 Wash. App. 712, 582 P.2d 883 (1978) (defendant's right to public trial balanced against court's right to regulate conduct of parties at trial).

139. *See supra* note 138. The court also has balanced article I, section 5 rights against other interests in contexts other than judicial proceedings. In Fine Arts Guild, Inc. v. City of Seattle, 74 Wash. 2d 503, 445 P.2d 602 (1968), the court balanced the right of free speech against a city's right to regulate movies. The court upheld the constitutionality of the regulating ordinance. *Id.* at 513, 445 P.2d at 608. Although "any restraint imposed upon a constitutionally protected medium of expression comes into court bearing a heavy presumption *against* its constitutionality," *id.* at 506, 445 P.2d at 604 (emphasis supplied by court), prior restraints are not forbidden by article I, section 5. *Id.* at 512, 445 P.2d at 608. The freedoms of speech and press are not absolute in Washington; the presence of those rights requires courts to engage in a first amendment balancing test. *Id.* at 513, 445 P.2d at 608.

140. 98 Wash. 2d at 254, 654 P.2d at 689.

141. 94 Wash. 2d 51, 615 P.2d 440 (1980), *cert. denied*, 456 U.S. 984 (1982). In *Kurtz*, a newspaper sought relief from an order barring the press and public from a pretrial suppression hearing. The court preferred to resolve *Kurtz* under the Washington State Constitution because of significant textual differences between the Washington and United States constitutions regarding open judicial proceedings. *Id.* at 56, 615 P.2d at 443. "Since the Washington Constitution provides more specific guidance on the matter of open proceedings it simplifies our task." *Id.* at 57, 615 P.2d at 443. The court

held that a "substantial difference" exists between the right to publish already acquired information and the right to attend a proceeding for the purpose of news gathering.[142] Article I, section 5 protects the former but confers no right to the latter.[143] The *Rhinehart* court did not apply this rule when it decided that free speech guarantees did not affect the order prohibiting the Seattle Times from publishing already acquired information.

The *Kurtz* court also found that article I, section 10 is not limited to trials "but includes all judicial proceedings."[144] The public's right to attend open proceedings is not absolute; standards must guide courts in deciding when exceptional circumstances mandate closure.[145] "[T]he court needs workable standards that allow it to strike a balance between the public's right of access and the accused's rights to a fair trial. . . ."[146] To justify closure the accused must show, and the court must balance, the following factors: The likelihood of jeopardy to the accused's constitutional rights from an open judicial proceeding; the opportunity for anyone present to object to the closure; and the lack of practical alternatives to closure that would protect the accused's rights.[147] The court generally should weigh the competing interests of the defendant and the public and make a closure order no broader in application or duration than necessary.[148]

The Washington court thus applied in *Kurtz* a test resembling the balancing tests it shunned in *Rhinehart*. Like the *Halkin* and the *San Juan Star* guidelines, the *Kurtz* test weighed the harm caused by disclosure against the rights of the press and public.[149] The *Kurtz* court also looked to alternatives

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added a note absent in *Rhinehart*: "[S]tate courts are the ultimate arbiters of state law, unless a state court's interpretation restricts the liberties guaranteed the entire citizenry under the federal constitution." *Id.* at 57, 615 P.2d at 443-44.

While *Kurtz* dealt with pretrial hearings, the decision supports the conclusion that free speech interests are important in *Rhinehart*. In *Kurtz*, the press was not a party to the litigation and had no special rights of access. A protective order appears much closer to a restraint on free speech than does an order closing a pretrial hearing to third parties. If the court saw free speech concerns implicated in *Kurtz*, it should have seen them involved in Rhinehart's request for a protective order.

142. *Kurtz*, 94 Wash. 2d at 58, 615 P.2d at 444.

143. *Id.*

144. *Id.* at 59-60, 615 P.2d at 445.

145. *Id.* at 61, 615 P.2d at 445.

146. *Id.*

147. *Id.* at 62-63, 615 P.2d at 446.

148. *Id.* at 64-65, 615 P.2d at 447.

149. *Id.* at 64, 615 P.2d at 447.

to a restriction on expression.[150] When none were found, the court emphasized that the restrictive order had to be narrowly drawn.[151] Similar rules were stated in *Halkin*[152] and in *San Juan Star*.[153] Rather than leave the competing interests of public access and fair trial solely to a trial court's discretion, *Kurtz* suggested guidelines for courts to use in exercising their discretionary authority.[154] *Kurtz* added that the interests of free speech and public access are even stronger when a party is forbidden to disclose information already obtained through judicial proceedings.[155] The *Rhinehart* majority could have acknowledged that holding and modified the *Kurtz* test into guidelines applicable to discovery orders.

The state supreme court extended the article I "open judicial proceedings" provision to civil proceedings in *Cohen v. Everett City Council*.[156] The *Cohen* court expressly disagreed with the contention that a right to a public trial exists only in criminal proceedings.[157] "This argument overlooks article 1, section 10 of our state constitution which mandates that 'Justice in

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150. *Id.* at 63, 615 P.2d at 446.

151. "The order must be no broader in its application or duration than necessary to serve its purpose, which in this case was to protect the accused's right to a fair trial while preserving the public's right to open proceedings." *Id.* at 64-65, 615 P.2d at 447.

152. 598 F.2d at 191.

153. 662 F.2d at 116. The *Halkin* and *San Juan Star* guidelines also were anticipated in State *ex rel.* Superior Court v. Sperry, 79 Wash. 2d 69, 483 P.2d 608, *cert. denied*, 404 U.S. 939 (1971), *modified*, State v. Coe, 101 Wash. 2d 364, 679 P.2d 353 (1984). In *Sperry*, the supreme court refused to uphold a trial court order forbidding the reporting of any court proceedings except those conducted in open court. *Id.* at 78, 483 P.2d at 613. When the jury was removed, the press reported on testimony made in the jury's absence. *Id.* at 71, 483 P.2d at 609. The trial court held the press in contempt, but the supreme court vacated that judgment. The *Sperry* court weighed the constitutional rights of the press and public against those of the defendant, and concluded that the trial court's effort to secure a fair trial wrongfully deprived the press of its constitutional right to report what happened in open trial. *Id.* at 78, 483 P.2d at 613. "If restraints upon the exercise of First Amendment rights are necessary to preserve the integrity of the judicial process, then those restraints must be narrowly drawn." *Id.*

The *Coe* decision modified *Sperry* to provide even stronger support for article I, section 5 interests. The *Coe* court stated that once information is admitted into evidence and presented in open court, the right of the press to use it is absolute. 101 Wash. 2d at 378, 679 P.2d at 361. "To the extent that any of the language in *Sperry* suggests that this right is not absolute, it is modified to conform with this opinion." *Id.* If free speech rights are absolute when information is presented in open court, the need for a clearly defined balancing test to protect such rights before trial appears even greater following the *Coe* decision.

154. 94 Wash. 2d at 62-65, 615 P.2d at 446-47.

155. *Id.* at 58, 615 P.2d at 444.

156. 85 Wash. 2d 385, 535 P.2d 801 (1975).

157. *Id.* at 388, 535 P.2d at 803.

all cases shall be administered openly. . . .' This separate, clear and specific provision entitles the public [and the press] to openly administered justice."[158]

The *Cohen* decision is relevant to *Rhinehart* despite its emphasis on trial proceedings. The Washington Supreme Court has held that criminal pretrial proceedings are subject to the open judicial proceedings guarantee.[159] Given these precedents, the next logical step would be to include civil pretrial proceedings within that scope of constitutional protection. Interests in privacy may be greater than rights of access at the discovery stage, but even the *Rhinehart* court acknowledged that the public may have rights of access to certain kinds of information

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158. *Id.* The supreme court in *Cohen* vacated an order sealing a court record following a decision on the merits. *Id.* at 390, 535 P.2d at 804. The *Cohen* court recognized that exceptional circumstances sometimes justify limitations on open proceedings, and pointed to adoption and juvenile court proceedings as two such circumstances, *id.* at 388, 535 P.2d at 803, but held that the trial court's reasons for secret adjudication were not of sufficient public importance to justify an exception to the requirement of article I, section 10. *Id.* at 389, 535 P.2d at 803-04. The *Cohen* court was wary of having its findings applied to different factual situations. The court carefully noted that "the issue before us does not involve the power of the court to keep confidential its records prior to considering a matter on the merits." *Id.* at 387, 535 P.2d at 802-03. The trial court action must have reached a stage where justice is being administered before the open proceedings mandate applies. *Id.* at 388-89, 535 P.2d at 803. While the *Rhinehart* court might argue that justice is not being administered in a discovery proceeding, the majority's constant claims that disclosure of the discovery information would impair judicial administration undermines any such argument.

159. The court applied article I, section 10 to pretrial proceedings in Federated Publications, Inc. v. Swedberg, 96 Wash. 2d 13, 633 P.2d 74 (1981), *cert. denied*, 456 U.S. 984 (1982), when it examined a trial court order requiring members of the press to sign the Bench-Bar-Press Guidelines before attending pretrial hearings in a highly publicized criminal trial. The Bench-Bar-Press Guidelines are a set of principles that guide the courts, lawyers, and court personnel, as well as the media, in protecting the rights of litigants while preserving the freedoms of speech and press. They honor the right of the news media to report what occurs in the course of criminal court proceedings. These guidelines suggest the exercise of caution in reporting matters that may be damaging to the right of an accused to a fair trial during pretrial proceedings, when the risk of violating the defendant's rights is greatest. *Id.* at 20-21, 633 P.2d at 77-78. The trial court's order was upheld only after the *Swedberg* court considered many competing interests. The Bench-Bar-Press Guidelines balanced the rights of the press against those of the litigants. *Id.* at 20, 633 P.2d at 77. The trial court balanced the public's right to know against the defendant's right to a fair trial. *Id.* at 21, 633 P.2d at 78. The supreme court balanced the trial court's authority to control judicial proceedings against the needs of public access and free press. *Id.* at 22, 633 P.2d at 78. Neither court assumed that introduction of constitutional concerns produced an onerous set of guidelines. Invocation of such concerns simply required a balancing of competing interests.

Another case considering pretrial proceedings in light of article I, section 10, is Seattle Times Co. v. Ishikawa, 97 Wash. 2d 30, 640 P.2d 716 (1982). *See infra* notes 163-72 and accompanying text.

revealed during discovery.[160] It is through clearly framed balancing tests that the appropriate interests are properly identified and weighed against one another. Applying the *Cohen* guidelines,[161] a trial court should be required to show that specific circumstances warrant the issuance of a protective order as an exception to the open proceedings requirement.[162]

When pretrial proceedings were closed without a clear rationale in *Seattle Times Co. v. Ishikawa*,[163] the supreme court's concerns anticipated those raised in the *Rhinehart* dissent. The trial court closed a criminal pretrial hearing, sealed the record of that proceeding, and refused to open the record to the public.[164] When the Times challenged that action, the court turned to *Kurtz* to decide whether pretrial publicity would violate a defendant's fair trial rights.[165] Since the trial court closed the record to protect additional interests, the supreme court broadened the *Kurtz* framework.[166] The supreme court demanded a greater showing of need when a party requested closure to protect interests other than fair trial rights.[167] Instead of only a "likelihood of jeopardy," the supreme court required a "serious and imminent threat to some other important inter-

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160. 98 Wash. 2d at 254, 654 P.2d at 689.

161. *See supra* note 158.

162. "As a general proposition, pretrial discovery is public unless compelling reasons exist for denying the public access to the proceedings." *Rhinehart*, 98 Wash. 2d at 264, 654 P.2d at 694 (Utter, J., dissenting). *Cf.* Seattle Times Co. v. Rhinehart, 104 S. Ct. 2199, 2207-08 (1984): "[P]retrial depositions and interrogatories are not public components of a civil trial." The Court added a footnote to this statement and acknowledged that some jurisdictions, including Washington, require the filing of discovery materials as public information. *Id.* at 2207 n.19. Since a trial court may order that discovery materials not be filed or filed under seal, the court may control access to this source of public information. *Id.*

163. 97 Wash. 2d 30, 640 P.2d 716 (1982).

164. *Id.* at 32, 640 P.2d at 717.

165. *Id.* at 37-39, 640 P.2d at 720-21.

166. In going beyond *Kurtz*, the *Ishikawa* court stated:

> Closure and sealing in the present case was premised in part on the protection of the defendant's fair trial rights, as in *Kurtz*. However, Judge Ishikawa restricted public access to protect other interests here, too. Because we believe that closure to protect the defendant's right to a fair trial should be treated somewhat differently from closure based entirely on the protection of other interests, we will expand upon the framework adopted in *Kurtz* to cover such motions.

Id. at 36-37, 640 P.2d at 720.

167. *Id.* at 37-39, 640 P.2d at 720-21. "[S]ince important constitutional interests would be threatened by restricting public access . . . a higher threshold will be required before court proceedings will be closed to protect other interests." *Id.* at 37, 640 P.2d at 720.

est."[168] "Because courts are presumptively open, the burden of justification should rest on the parties seeking to infringe the public's right."[169]

That burden was not met in *Ishikawa* since the judge initially gave no reason for issuing the closure order.[170] The supreme court found that it was "unclear to what extent the [trial] court weighed the competing interests and the alternative methods."[171] Furthermore, since the order was worded very broadly and was to last indefinitely, "[t]he judge erred in failing to narrowly tailor the protective restriction on access to suit the specific needs of this case."[172]

In *Ishikawa*, the supreme court offered another set of guidelines to help trial courts resolve a conflict between constitutional interests.[173] The *Ishikawa* case dealt with a pretrial hearing, but its guidelines appear applicable to pretrial discovery orders, particularly since the failings of the *Ishikawa* order were reflected in *Rhinehart*. The *Rhinehart* order concerned interests other than fair trial rights, but the plaintiff's showing of "serious and imminent threat" was never demonstrated clearly. The trial court judge in *Rhinehart* offered a rationale for the order, but that rationale does not appear to be grounded in specifics any more than was Judge Ishikawa's. Keith Rhinehart never said that he would withdraw his suit; the trial court feared only a hypothetical chilling effect on a litigant's right to sue.[174] The *Rhinehart* order also failed to meet the "narrowly tailored" requirement set forth once again in *Ishikawa*.[175]

The *Rhinehart* disavowal of free speech concerns is not con-

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168. *Id.* at 37, 640 P.2d at 720.

169. *Id.* at 37-38, 640 P.2d at 720.

170. *Id.* at 39, 640 P.2d at 721. The judge did not inform petitioners of the interests being protected until compelled to do so by the supreme court four months after closure had been ordered. *Id.* at 40, 640 P.2d at 721.

171. *Id.* The trial court stated only that this was "an exceptional case under exceptional circumstances" and that none of the *Kurtz* alternatives applied. *Id.* at 40, 640 P.2d at 722. The supreme court concluded that these legal findings lacked factual support. *Id.* at 41, 640 P.2d at 722.

172. *Id.* at 42, 640 P.2d at 723. This need of a narrowly tailored restriction was referred to in *Kurtz*, *Halkin*, and *San Juan Star*. *See supra* note 149 and accompanying text. *Sperry* also made such a demand. *See supra* note 153. The supreme court ordered a remand of the *Ishikawa* case because the absence of "critical factual findings" prevented any meaningful review of Judge Ishikawa's order. *Ishikawa*, 97 Wash. 2d at 45, 640 P.2d at 724.

173. *See supra* notes 166-69.

174. *Rhinehart*, 98 Wash. 2d at 273-74, 654 P.2d at 699 (Utter, J., dissenting).

175. *See supra* note 172.

vincing given the Washington Supreme Court's recognition of such interests in other realms of the judicial process. Moreover, the federal circuits have recognized the interests of access, free speech, and free press in FRCP 26(c) orders to the same degree that the Washington Supreme Court has recognized those interests in other judicial proceedings. When the *Rhinehart* court ignored state case law, it missed an opportunity to build upon clear and relevant precedents in developing CR 26(c) standards. A trial court faced with a protective order request should be required to balance the rights of free speech and open judicial proceedings against those of individual privacy and effective judicial administration. If an order is issued, it must be supported by factual findings and be narrowly drawn.

The *Cohen* court mentioned another area of state law that supports the wisdom of a balancing test. The next section analyzes common law and statutory provisions dealing with public access to government records. These provisions offer additional guidance for establishing standards to use in issuing and reviewing CR 26(c) orders.

B. Open Judicial Records: The Common Law and the Public Disclosure Act

The Public Disclosure Act[176] requires state agencies to make their records available for public inspection and copying.[177] The role of court records within the Act is uncertain, in part because the Washington Supreme Court has not yet addressed whether a trial court is a state agency.[178] The justices avoided the issue in *Cohen* because the statute was not cited to the court.[179] The question was evaded a second time in *Cowles Publishing Co. v. Murphy*[180] because the common law solved the question of access to judicial records.[181]

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176. *See supra* note 10.

177. WASH. REV. CODE § 42.17.250 (1983).

178. *See infra* notes 179-80.

179. 85 Wash. 2d at 390, 535 P.2d at 804 ("The city does not address the threshold question of whether a trial court is a state agency within the statute. However, we do not reach that issue because, even if RCW 42.17.330 were applicable, it was not cited to the court. . . .").

180. 96 Wash. 2d 584, 637 P.2d 966 (1981).

181. The *Cowles* court cited its refusal in *Cohen* to determine whether the judicial branch was a state agency under WASH. REV. CODE §§ 42.17.250-.340.

> We again reserve the question since it is not necessary under our rationale. Since we find that under the common law we have the inherent authority to

The common law presumption of open judicial records is grounded in the belief that maximum public access to governmental information gives the public the knowledge needed to understand how government works and to evaluate government officials.[182] The "informed public concept" usually is associated with the legislative and executive branches of government, but applies equally to the judicial branch.[183] Access to certain records gives the public a chance to see how the judicial process is conducted. Indiscriminate disclosure of all records, however, could hamper or destroy the effectiveness of judicial processes.[184] Aware of the need to weigh conflicting factors, the *Cowles* court suggested a set of procedures for handling search warrants[185] and concluded that "[t]he magistrate or judge must weigh the competing interests involved with making the documents a matter of public record, and determine whether a substantial threat exists to the interests of effective law enforcement, or individual privacy and safety."[186]

Once again, the state supreme court established a balancing test for evaluating public access to judicial records. As in *Kurtz*

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control access to records such as these, we decline respondent's invitation to apply the rationale of RCW 42.17 or constitutional law in resolving this issue.

Cowles, 96 Wash. 2d at 588, 637 P.2d at 969.

The issue in *Cowles* was whether search warrants, affidavits of probable cause, and inventory lists pertaining thereto should be filed as a matter of record for public inspection. *Id.* at 585, 637 P.2d at 967. The documents were not public just because public officials handled them. *Id.* at 587, 637 P.2d at 968. The *Cowles* court suggested three criteria for determining the accessibility of such records. First: Does some substantive legal provision grant the right of access? Second: Will public access benefit the legal system? Third: Will access jeopardize any other interest? *Id.* at 587-88, 637 P.2d at 968. The "substantive legal provision" that could grant access might come from statutory, constitutional, or common law. *Id.* at 588, 637 P.2d at 968. Although the respondent suggested application of the Public Disclosure Act, the *Cowles* court turned to common law principles. *Id.* at 588, 637 P.2d at 969. The common law presumes the openness of judicial records, though the public right of access may be limited by a judge's discretion. *Id.* The court again recognized that trial judges need standards with which to guide their use of discretion. *Id.* at 589, 637 P.2d at 969. Since case law was of little help, the *Cowles* court turned to an examination of the public right of access. "In this way, we can determine how to strike the balance between the right of the public and the need for effective law enforcement and individual privacy." *Id.*

182. *Id.*

183. *Id.*

184. *Id.* at 590, 637 P.2d at 969.

185. *Id.* at 590, 637 P.2d at 970. If no objection is made, an executed search warrant and the records pertaining thereto should be filed. Interested parties may request that a warrant not be filed. The objector to the filing must demonstrate that filing of the documents presents a substantial threat to a significant interest. *Id.*

186. *Id.*

and *Ishikawa*, the supreme court saw a need to assist lower courts in using their discretionary powers. The right of public access was of sufficient importance to be weighed against the rights of privacy and judicial administration.

Not all judicial records are regarded in the same light as the *Cowles* search warrants. An appellate court held in *In re Sage*[187] that adoption records must remain sealed, even to an adult adoptee, unless good cause is shown.[188] Full disclosure of adoption records is not mandated by the Public Disclosure Act.[189] Juvenile records are also excluded from the mandate of the Public Disclosure Act. Despite the need to protect juvenile defendants, however, limited access to juvenile records is allowed by section 13.50.010(8) of the Revised Code of Washington, which permits access for legitimate research purposes.[190] A newspaper reporter's research is legitimate under the statute.[191]

Washington courts therefore have balanced competing legislative and constitutional policies to determine the accessibility of court records. Even though state statutes sanctioned confidentiality in *Sage*, the court balanced competing interests and offered a rationale for denying public access.[192] The *Rhinehart* majority equated the "prior restraint" of a CR 26(c) order with the exemptions in the Public Disclosure Act,[193] but the restrictions on dissemination are not wholly comparable. The juvenile[194] and adoption[195] acts have lengthy legislative histories

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187. 21 Wash. App. 803, 586 P.2d 1201 (1978).

188. *Id.* at 809, 586 P.2d at 1205. *See supra* note 158.

189. *Sage*, 21 Wash. App. at 811, 586 P.2d at 1206. The Public Disclosure Act, WASH. REV. CODE ch. 42.17, yielded to the Washington State Adoption Act, WASH. REV. CODE ch. 26.32, which embodies a policy of confidentiality rather than disclosure. *Sage*, 21 Wash. App. at 808-09, 586 P.2d at 1204-05. The *Sage* trial court attempted to accommodate the various conflicting interests but concluded that the plaintiff's desire to discover his natural parents' identity did not satisfy the "good cause" needed for disclosure. *Id.* at 811, 586 P.2d at 1206. "The potential disruption and emotional distress which could result from indiscrimihate disclosure outweigh Mr. Sage's request for information regarding his 'roots.' " *Id.*

190. Seattle Times Co. v. County of Benton, 99 Wash. 2d 251, 253, 661 P.2d 964, 965 (1983).

191. *Id.* Since most criminal proceedings are public and open to the media, the court may not deny access for legitimate research purposes if the anonymity of the parties is preserved. *Id.* at 259, 661 P.2d at 968.

192. 21 Wash. App. at 811, 586 P.2d at 1206.

193. 98 Wash. 2d at 238, 654 P.2d at 680.

194. WASH. REV. CODE ch. 13.50 (1983) deals with the keeping and release of records by juvenile justice or care agencies.

195. WASH. REV. CODE ch. 26.32 (1983) is the Adoption Act. Section 26.32.150 governs disclosure of adoption records.

detailing the need to protect the privacy interests of easily identified and narrowly defined groups of people. Protective orders have a much broader applicability. First amendment and public access concerns are implicated to a far greater degree in discovery than in adoption and juvenile proceedings, since civil discovery information will more often be of legitimate public interest than information from adoption or juvenile proceedings. The court has balanced free speech and open access rights against privacy concerns when considering adoption and juvenile records, and it should certainly do so in considering discovery materials.

Discovery materials fall between adoption records and search warrants in the open access continuum. Some discovery information clearly should not be publicized, but even the *Rhinehart* court admitted that some should.[196] Standards applicable to situations beyond *Rhinehart* are needed so that courts may determine logically which records should be disclosed and which kept confidential. The balancing tests applied to other judicial records should be modified and applied to discovery materials. Given the absence of statutory guidelines and the lesser need for fair trial concerns in civil proceedings, the *Rhinehart* court's willingness to limit access to pretrial discovery information appears misplaced.[197]

V. Conclusion: A Workable Standard for CR 26(c) Protective Orders

The United States Supreme Court identified the role of first amendment interests in pretrial discovery, but it did not clarify the standards needed to protect such interests. Both the Washington and United States Supreme Courts should have offered clear-cut balancing tests for courts to use in issuing pretrial discovery protective orders. The Washington Supreme Court might have done so had it turned to state rather than federal case law.

The Washington Supreme Court has balanced constitutional rights against other interests in the past, and it should not

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196. 98 Wash. 2d at 254, 654 P.2d at 689.

197. The Public Disclosure Act includes an exception to disclosure that could strengthen that conclusion. Wash. Rev. Code § 42.17.310(1)(j) (1983) exempts from disclosure any records that would not be available to another party under the rules of pretrial discovery. This exemption could be interpreted to mean that pretrial materials made available to another party should fall under the directives of the Public Disclosure Act.

have avoided doing so in *Rhinehart*. The court's refusal to recognize free speech interests in restraining access to civil discovery information is puzzling in light of its previous sensitivity toward any infringement of free speech rights. The questions posed by Justice Utter to determine the need for a protective order are comparable to guidelines formerly established by the Washington court. While these guidelines arose in different contexts, they were still applicable to the underlying issues in *Rhinehart*: the state constitutional requirement of open judicial proceedings, the state and federal provisions protecting the freedom of speech and press, and the common and statutory law presumptions of public access to judicial records.

Clear articulation of a balancing test would have better served *Rhinehart* and future cases involving CR 26(c) orders. Such a balancing test need not imply that first amendment freedoms override all other rights. Protective orders are essential for the smooth functioning of discovery, and the right to privacy is an important consideration. A typical test for CR 26(c) orders might weigh first amendment interests, the harm to be prevented by a protective order, any harm that an order might cause, and the interests of the court in issuing a protective order.

The Washington Supreme Court has balanced multiple concerns before without finding them onerous or complex. Had the *Rhinehart* court turned to its own precedents, it could have succeeded in shaping clear criteria for issuing and evaluating CR 26(c) protective orders.

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