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## Some Limits on the Judicial Power to Restrict Dissemination of Discovery

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# SOME LIMITS ON THE JUDICIAL POWER TO RESTRICT DISSEMINATION OF DISCOVERY

## INTRODUCTION

The pretrial process of discovery governed by Federal and Maine Rule of Civil Procedure 26 enables plaintiffs in product liability actions to delve where few people have delved before—into a corporation's internal memoranda, competitive practices, and secret product or design information as well as other less sensitive information in a company's possession. Discovery, in this context as in others, is a powerful tool determined by the courts to be necessary for the just litigation of claims.

As a balance to the leeway given parties to compel production of information in discovery,<sup>1</sup> federal and Maine courts have the authority under Federal and Maine Rule 26(c) to protect parties and witnesses from the harm that can result from a disclosure of confidential information.<sup>2</sup> The court may enter a protective order, sometimes

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1. See, e.g., *Colony Cadillac & Oldsmobile, Inc. v. Yerdon*, 558 A.2d 364, 366 (Me. 1989) (stating that a party refusing to produce information requested in discovery on the basis that it was improper should have moved for a Rule 26(c) protective order).

2. Federal and Maine Rule 26(c) are substantially the same with the exception of an admonition in the Maine Rule to exercise the rule "with liberality." ME R. CIV P 26(c) reads:

**Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, any justice or judge of the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including without limitation one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by 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; (9) that the party taking the deposition pay the traveling expenses of the opposite party and of his attorney for attending the taking of the deposition; (10) that a witness under the control of the party taking the deposition be required to be brought within the state for his deposition. The power of the court under this rule shall be exercised with liberality toward the accomplishment of its purpose to protect parties and witnesses.

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

called a confidentiality order, restricting a party receiving the information from disseminating it or from making any use of the information other than for purposes of the specific litigation.<sup>3</sup> In addition, public access to information after its use in the litigation often is barred by such orders.

Irrespective of the legal interests of the parties involved in the case, however, the public outside the legal community may have an interest in the information, and the receiving party may wish to disclose it. This point is brought into focus by the occasional case in which confidential information raises dramatic health issues, such as the recent reports of potential health risks from silicone breast implants.<sup>4</sup>

Judicial use of Rule 26(c) to restrict dissemination of discovered information predictably has invited First Amendment claims of free speech.<sup>5</sup> In 1984 the Supreme Court held in the landmark case of *Seattle Times Co. v. Rhinehart*<sup>6</sup> that courts could restrict parties' or witnesses' dissemination of discovered information for good cause without infringing on First Amendment rights. Despite the *Seattle Times* decision, however, courts have continued to struggle with the extent to which protective orders implicate the First Amendment.<sup>7</sup>

Indeed, the disparity among courts regarding the appropriate use of protective orders goes beyond variations in addressing the First Amendment issue. The differences include variations not only in the specific showing required to justify a protective order, but also in the materials covered by orders and in the scope of restrictions imposed on the litigants.

This disparity in courts' approaches to protective orders has persisted despite the frequent use of protective orders in product liability and commercial litigation.<sup>8</sup> While any explanation for this persis-

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person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

3. *Id.*

4. See Philip J. Hilts, *F.D.A. Seeks Halt in Breast Implants Made of Silicone*, N.Y. TIMES, Jan. 7, 1992, at A1, C5 (reporting that memoranda entered as sealed evidence in cases indicated that Dow Corning Co. may have known that its breast implants may leak or rupture).

5. As the First Circuit Court of Appeals observed: "There is the potential for an infringement of the first amendment whenever the government prohibits or restrains free speech or publication." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 5 (1st Cir. 1986).

6. 467 U.S. 20 (1984).

7. See *infra* notes 91-104 and accompanying text.

8. See, e.g., *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 129 F.R.D. 483, 485 n.4 (D.N.J. 1990) (noting a trend toward seeking protective orders in that court); *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985) (reporting that federal district courts are "being bombarded by an ever increasing number of requests for protective orders"). See also Anne Cohen, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813, 1844 (1984) (noting the "tendency of courts to grant inartful protective orders with little 'cause' shown").

tence may be speculative, it likely results from a combination of factors. Protective orders are interlocutory orders arising out of the discovery process,<sup>9</sup> are issued by trial courts given broad discretion,<sup>10</sup> are reviewable only for abuse of that discretion or for clear error of law,<sup>11</sup> and sometimes are not vigorously opposed by plaintiff's counsel because of the more readily apparent interest in moving forward with discovery.<sup>12</sup>

Maine courts are empowered and exhorted by Maine Rule 26(c) to issue protective orders. Unlike the Federal Rule, Maine Rule 26(c) includes an admonition for the courts to exercise their powers to grant a protective order and other controls over discovery "with liberality . . . to protect parties and witnesses."<sup>13</sup> Whether conscious of the admonition or not, state courts in product liability cases have issued broadly constructed protective orders restricting plaintiffs, their attorneys and their witnesses from revealing information.<sup>14</sup>

The risk for all trial courts, confronted with the potential magnitude of discovery problems<sup>15</sup> and hesitant to spend their limited time on this one procedural issue,<sup>16</sup> is that the power to grant protective orders will degenerate into a perfunctory granting of most or even all such requests. The decision to grant such an order becomes perfunctory when the court does so without an appropriate "good cause" determination and without a careful fashioning of the order to minimize its impact on the affected parties. In Maine's courts, despite the admonition to use the protective-order power liberally, the same considerations apply as fully as in federal courts to a determination of whether a protective order is justified.

This Comment examines these considerations and concludes that trial courts must guard against exercising too freely their power to

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9. FRANCIS H HARE, JR., JAMES L. GILBERT, AND WILLIAM H. REMINE, CONFIDENTIALITY ORDERS § 2.2, at 10 [hereinafter HARE].

10. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36.

11. Protective orders are appealable under a collateral order exception to the final judgment rule. See *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1307-08 (7th Cir. 1984). Some courts also may issue a writ of mandamus when the trial court has committed a clear error of law and the party has no alternative means of obtaining relief. HARE, *supra* note 9, § 6.15, at 159.

12. "All too often, the plaintiff's attorney is unaware of the strategic significance of the motion [for a protective order]." HARE, *supra* note 9, § 1.1, at 2.

13. ME. R. CIV. P. 26(c).

14. See, e.g., *Bailey & Bailey v. Sears, Roebuck & Co. and Emerson Elec. Co.*, No. CV-88-187 (Me. Super. Ct., Sag. Cty., Apr. 17, 1990). "All documents produced or information disclosed and designated or marked as 'confidential' by the Defendant shall be revealed, except as provided below, only to counsel to this case. Such information shall include confidential, proprietary and/or trade secret information supplied by the Defendant in response to the Plaintiffs' demands or requests." *Id.* at 1.

15. See *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36 n.23.

16. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 428, 456 (1991).

issue protective orders. Such an overly broad exercise of the power relieves movants of their burden to articulate with some specificity the potential harm constituting good cause for restricting parties' and witnesses' First Amendment interests. An understanding of the implications of protective orders should encourage courts to fashion such orders in a way that minimizes the effect on the parties and witnesses without sacrificing the protective purpose of the order. Part I of this Comment provides a background on protective orders. Part II revisits *Seattle Times* and explores how courts have interpreted it to recognize a limited First Amendment consideration. Part III discusses the standard of good cause to issue a protective order. Part IV explores the court's responsibilities in fashioning a protective order, taking into consideration the disadvantages the court's choices present to the plaintiff and the defendant. Part V examines public access to information gathered in discovery, both at the pretrial stage and after the information has been used in a judicial proceeding or as a basis for a judgment. Finally, Part VI assesses the effects of protective orders on litigants and witnesses after trial, a timely subject given the current appeal of a protective order from the United States District Court for the District of Maine to the United States Court of Appeals for the First Circuit.<sup>17</sup>

## I. BACKGROUND

With the growth of compelled discovery in civil cases during this century,<sup>18</sup> protective orders have become a frequently used tool to limit the dissemination of discovered material.<sup>19</sup> Protective orders ostensibly protect parties and witnesses from injury by the publication of their trade secrets or of otherwise confidential information.<sup>20</sup>

Federal Rule of Civil Procedure 26(c) and its counterpart in the Maine Rules of Civil Procedure authorize the court in which an action is pending to issue an order protecting a party or person from

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17. *Poliquin v. Garden Way, Inc.*, No. 90-0245 P (D. Me. Jan. 17, 1992).

18. FED. R. CIV. P. 26(b)(1) and ME. R. CIV. P. 26(b)(1) are identical and provide for an extremely wide scope of discovery. Both rules read, in part:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

See generally 8 CHARLES A. WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2007 (1970) [hereinafter WRIGHT & MILLER].

19. See *supra* note 8.

20. Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 9 (1983).

"annoyance, embarrassment, oppression, or undue burden or expense . . . ." <sup>21</sup> The order must be made "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown . . . ." <sup>22</sup>

The federal Rule derives from Rule 30(b),<sup>23</sup> which was adopted in 1938. The original provisions of Rule 30(b) allowed for protective orders only with regard to depositions.<sup>24</sup> However, Rules 33 and 34 were amended in 1948 to provide for the use of Rule 30(b) orders for written interrogatories and requests for admission.<sup>25</sup> A reorganization of the discovery rules in 1970 resulted in the current Rule 26(c), with an added provision for protecting trade secrets and confidential commercial information to reflect the prevailing practices in the courts.<sup>26</sup>

The federal Rule was adopted to protect parties and witnesses in light of "the almost unlimited right of discovery" provided by Rule 26(b).<sup>27</sup> To that end, the court is given far-ranging discretion to fashion orders protecting against abuse or misuse of the discovery process.

The background and purposes of Maine Rule 26(c) are parallel to those of the federal Rule. Maine Rule 26(c) originated in Maine Rule 30(b).<sup>28</sup> The rule providing for protective orders was viewed by influential commentators on Maine law as "the chief bulwark of the rules against abuse of the deposition machinery. The court is charged with a heavy responsibility in making such order as justice requires . . . . If the court fails to be vigilant, the potential abuses may outweigh the benefits of the discovery procedure."<sup>29</sup>

21. FED. R. CIV. P. 26(c); ME. R. CIV. P. 26(c).

22. *Id.*

23. 8 WRIGHT & MILLER, *supra* note 18, § 2035, at 260.

24. *Id.*

25. *Id.* at 260-61.

26. *Id.*; FED. R. CIV. P. 26(c), Notes of Advisory Committee on Rules, Subdivision (c)—Protective Orders. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 890 n.41 (E.D. Pa. 1981).

27. 8 WRIGHT & MILLER, *supra* note 18, § 2036, at 267.

28. CHARLES A. HARVEY, JR., RAYMOND G. MCGUIRE, & L. KINVIN WROTH, MAINE CIVIL PRACTICE 207 (Supp. 1981) [hereinafter MAINE CIVIL PRACTICE, SUPP.].

29. 1 RICHARD H. FIELD, VINCENT L. MCKUSICK, & L. KINVIN WROTH, MAINE CIVIL PRACTICE § 30.2, at 490 (1970) [hereinafter MAINE CIVIL PRACTICE].

Indeed, Maine Rule of Civil Procedure 37(d) requires that the court not excuse failure to attend a deposition, serve answers to interrogatories, or respond to a request for inspection on the basis of the discovery's being objectionable unless a protective order has been sought. "The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c)." ME. R. CIV. P. 37(d). See *Colony Cadillac & Oldsmobile, Inc. v. Yerdon*, 558 A.2d 364, 366-67 (Me. 1989) (because no protective order was sought, court was within its discretion to default defendant for failure to comply with discovery orders); *Ireland v. Galen*, 401 A.2d 1002, 1005 (Me. 1979) (because no protective order was sought before failure

The Maine Supreme Judicial Court's concern for potential abuse of discovery was evident in a statement in Maine Rule 30(b) directing the courts to make liberal use of protective orders "toward the accomplishment of [the Rule's] purpose to protect parties and witnesses."<sup>30</sup> The Advisory Committee noted somewhat redundantly in its tentative draft that the purpose of the admonition was "to emphasize that the rule should be administered . . . to afford adequate protection to parties and witnesses, particularly in cases involving small sums."<sup>31</sup> The statement on liberality was retained in the reorganization of the provisions into Maine Rule 26(c).<sup>32</sup> Other commentators have explained that the language "re-emphasises the intended breadth of application."<sup>33</sup>

Rule 26(c) in both the federal and Maine rules requires a showing of "good cause" before the court issues a protective order. The rule puts the burden of persuasion on the party who seeks the order.<sup>34</sup> The movant must show good cause through "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements."<sup>35</sup>

The good cause standard suggests three issues for analysis: the nature of the interest to be protected, the sufficiency of the harm that

to comply with discovery order, defense that discovery request was not served on a party could not be asserted).

30. 1 MAINE CIVIL PRACTICE, *supra* note 29, at 481.

31. ADVISORY COMMITTEE OF THE RULES OF COURT PROCEDURE, TENTATIVE DRAFT, MAINE RULES OF CIVIL PROCEDURE, III-12 (Aug. 1, 1958).

32. MAINE CIVIL PRACTICE. SUPP., *supra* note 28, at 207.

33. *Id.* at 239.

34. 8 WRIGHT & MILLER, *supra* note 18, § 2035, at 264-65; *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974).

35. 8 WRIGHT & MILLER, *supra* note 18, § 2035, at 264-65; *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986).

"Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986).

A business may have a greater difficulty showing the need for a protective order when the issue is embarrassment than when the issue is a trade secret, other proprietary information, or competitive harm.

[B]ecause release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground.

*Id.* A showing of harm to competitive and financial position may be required. *See Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (distinguishing the harm from disseminating information about past mismanagement from that which results from disseminating information which is proprietary).

is threatened by dissemination, and any countervailing interests militating against the issuance of the order or the dimensions of the order.<sup>36</sup> Countervailing interests may include the effectiveness of the order in preventing the harm, alternative and less restrictive means to prevent the harm, the interests of the party opposing the motion (and those of other litigants in related cases), the administration of justice itself, and interests of third parties.<sup>37</sup>

Federal and Maine Rule 26(c) are explicit on the uses of the protective order "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Rule 26(c)(7), in both federal and Maine form, specifically empowers the court to fashion the order to protect "trade secret or other confidential research, development, or commercial information . . . ."<sup>38</sup>

Requests for protective orders in the context of discovery commonly occur in product liability cases.<sup>39</sup> The defendant business typically asserts that the material sought by discovery involves a trade secret or other proprietary information and asks the court to restrict the plaintiff from disclosing the material to anyone outside the case.<sup>40</sup> In other instances, the defendant seeks a protective order as protection from embarrassment or damage to reputation.<sup>41</sup> Protective orders are also used in commercial litigation, and are sometimes requested by groups or individuals in a variety of actions as a means to protect personal privacy interests. Indeed, *Seattle Times* involved a request by a religious group that sought to keep its membership lists from being made public.<sup>42</sup>

Protective orders typically are requested early in the litigation process at a time when the court, in the interest of efficiency, may not want to weigh each item of discovery on the merits of the movant's claim of a trade secret, confidentiality, or embarrassment.<sup>43</sup> The examination of documents and the hearing process consume judicial time, slow the pace of discovery, and may further delay resolution of the case.<sup>44</sup> The plaintiff's attorney has interests similar to the court's in wanting to conserve time, smooth the discovery process,

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36. HARE, *supra* note 9, § 1.1.

37. *Id.* § 6.1, at 115.

38. Maine and Federal Rule 26(c) are substantially the same with the exception of the Maine Rule's admonition to use the rule with liberality.

39. HARE, *supra* note 9, § 1.1.

40. *Id.* The protective order does not restrict the party from disseminating the identical information if it is gained through some means unconnected with the court's processes. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 34.

41. See, e.g., *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1985), *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1985).

42. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 24.

43. Nonetheless, an orderly and smooth discovery process is fostered by attention to the issue of protective orders before substantial discovery begins. *MANUAL FOR COMPLEX LITIGATION. SECOND*, § 21.43 (1985).

44. See Marcus, *supra* note 20, at 24 n.98 (1983).



and with deliberate speed reach a settlement or go to trial. However, the plaintiff's attorney at this early point also may be unaware of the strategic significance of a protective order.<sup>45</sup>

Trial courts are given wide discretion to weigh the appropriateness and draw the contours of protective orders.<sup>46</sup> The individual circumstances of each case preclude any exact prescription or detailed instruction on the propriety and scope of such orders.<sup>47</sup> The orders are interlocutory and are subject to review only for clear error or for abuse of discretion.<sup>48</sup>

Courts analyze three issues when fashioning the protective order. The court must decide (1) to whom the order applies, (2) what information the order covers and what kinds of communications are prohibited, and (3) to whom disclosures shall not be made.<sup>49</sup> As to the first issue, courts usually are inclusive and restrict parties, expert and lay witnesses, consultants, and plaintiff's attorneys and staff from disclosure.<sup>50</sup> Regarding the second issue—what information the order covers and the kinds of communications to be prohibited—the restriction may apply to distributing the physical documents themselves (or summaries of documents or lists of documents), to forbidding any discussion of documents, or simply to informing counsel in similar litigation that documents or information undiscovered by that counsel exist.<sup>51</sup> In considering the third issue—people to whom disclosures shall not be made—restrictions range from the defendant's competitors (the least restrictive); to competitors and the me-

45. HARE, *supra* note 9, § 2.4, at 14.

46. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36.

47. Both the Federal and Maine Rule 26(c) authorize the court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." FED. R. CIV. P. 26(c); ME. R. CIV. P. 26(c).

It is impossible to set out in a rule all of the circumstances that may require limitations on discovery or the kinds of limitations that may be needed. The rules, instead, permit the broadest scope of discovery and leave it to the enlightened discretion of the district court to decide what restrictions may be necessary in a particular case.

8 WRIGHT & MILLER, *supra* note 18, § 2036, at 268.

"Only in the context of particular discovery material and a particular trial setting can a court determine whether the threat to substantial public interests is sufficiently direct and certain." *In re Halkin*, 598 F.2d 176, 195 (D.C. Cir. 1979).

"[H]ard and fast rules in this area are inappropriate. Frequently the injury that would flow from disclosure is patent, either from consideration of the documents alone or against the court's understanding of the background facts. The court's common sense is a helpful guide." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981).

48. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1120 (3d Cir. 1986); *In re Coordinated Pretrial Proceedings, Etc.*, 669 F.2d 620, 623 (10th Cir. 1982).

49. HARE, *supra* note 9, § 4.2.

50. *Id.*

51. *Id.*

dia; to competitors, the media, and other plaintiffs' lawyers involved in similar litigation (the most restrictive).<sup>52</sup>

A perception has grown among plaintiffs' attorneys and some sectors of the public that protective orders have been overused at the expense of plaintiffs and the public interest. The perception has prompted a movement to limit the use of such orders, either by legislation or by a change in rules. Currently, two states have passed laws and one state has amended its rules of procedure to place more restrictions on the use of protective orders.<sup>53</sup>

For very practical reasons,<sup>54</sup> many litigants stipulate to protective orders to facilitate the discovery process. In the absence of a rule or law to restrict the use of protective orders by stipulation, there often is no advocate to oppose the issuance of a protective order unless an intervenor enters.<sup>55</sup>

Although protective orders prohibiting dissemination of discovered information prevent abuse of the litigants' power of almost unlimited discovery, courts are restricted in their use of such orders by the requirement that they find good cause. When a court finds good cause, the court has latitude to fashion the application and the scope of the order to achieve its purpose. *Seattle Times Co. v. Rhinehart* arose as a contest of this exercise of the Rule 26(c) power against a newspaper defendant's First Amendment right to publish.

## II. SEATTLE TIMES CO. v. RHINEHART AND THE FIRST AMENDMENT

Implicit in Maine and Federal Rule 26(c) is that the party receiving discovery information may disseminate it at will in the absence of a protective order.<sup>56</sup> Otherwise, the court would not need to issue

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52. *Id.* In reality, the most restrictive order would be to restrict counsel from disclosing information to her own client. Such a restriction was held to be invalid in *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981), on First Amendment grounds without any countervailing interest. However, the decision preceded *Seattle Times*, and a countervailing interest might be found in a case in which the client was a competitor of the party producing the information in discovery.

53. See *infra* notes 214-21 and accompanying text.

54. Practical reasons include the time, expense, and the court's good will at stake in challenging cause for a protective order. The plaintiff typically is focused on facilitating discovery toward resolving the litigated issue, not on asserting a right to disseminate information gained through discovery. HARE, *supra* note 9, § 1.1, at 2.

Particularly in complex cases, "[t]he parties agree to such orders in order to commence discovery without the expense and delay involved in debating the scope of protective provisions." Marcus, *supra* note 20, at 9.

55. "The parties are often overzealous in designating materials confidential." Marcus, *supra* note 20, at 11.

56. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 35 (implying that discovery gives litigants the opportunity to obtain information and release it publicly at the risk of damage to reputation or privacy of other litigants); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988) (interpreting *Seattle Times* as recognizing "general first amendment freedoms with regard to information gained through discovery and that, absent a valid court order to the contrary, [litigants] are entitled to

a protective order to restrict dissemination. However, prohibiting the dissemination of information obtained through discovery implicates the First Amendment right of parties and witnesses<sup>57</sup> because protective orders inherently resemble prior restraints on speech.<sup>58</sup>

Prior restraint describes a restriction on speech intended to prevent the speech from reaching an audience, as distinguished from punishment subsequent to the speech. The distinction between prior restraint and subsequent punishment is sometimes blurred. A statute that discourages the publication of speech by the threat of subsequent punishment is not a prior restraint. However, a Minnesota statute prohibiting defamatory speech was interpreted by the Supreme Court in *Near v. Minnesota*<sup>59</sup> to be a prior restraint because "[t]he object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical."<sup>60</sup> The nature of prior restraint is that it involves a pervasive government intrusion and can accomplish that intrusion "by a single stroke of the pen,"<sup>61</sup> whereas subsequent punishment typically involves a more substantial expense of time and resources.<sup>62</sup> The Supreme Court in *Nebraska Press Ass'n v. Stuart*<sup>63</sup> characterized prior restraint as the "most serious and least tolerable infringement on First Amendment rights,"<sup>64</sup> partly because the prior restraint constitutes "an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time."<sup>65</sup>

At a time when federal courts were in disagreement over the First Amendment interest implicated in protective orders,<sup>66</sup> the United

disseminate the information as they see fit"); *In re Halkin*, 598 F.2d 176, 189 (D.C. Cir. 1979) (recognizing that "the presumption under the discovery rules is that a party may do anything it wants with discovery material, absent a protective order").

57. "There is the potential for an infringement of the first amendment whenever the government prohibits or restrains free speech or publication." *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 5 (1st Cir. 1986).

58. See, e.g., *In re Halkin*, 598 F.2d at 183.

59. 283 U.S. 697, 702-03 (1931).

60. *Id.* at 711.

61. Thomas I. Emerson, *The Doctrine of Prior Restraint*, 20 LAW & CONTEMP. PROBS., 648, 655-57 (1955).

62. *Id.* at 656-57. For a short discussion of the identification of prior restraints, see JEROME A. BARRON AND C. THOMAS DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS, §§ 2.1-2.4 (1979).

63. 427 U.S. 539 (1976).

64. *Id.* at 559.

65. *Id.*

66. *Compare International Products Corp. v. Koons*, 325 F.2d 403, 407-08 (2d Cir. 1963) (holding that First Amendment rights are not implicated in restricting dissemination of discovery information) with *In Re Halkin*, 598 F.2d at 188 (finding that First Amendment rights are not waived as a condition to the privilege to discovery materials but that First Amendment rights may be limited in narrow circumstances) and *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981) (finding that a "height-

States Supreme Court decided *Seattle Times Co. v. Rhinehart*.<sup>67</sup> *Seattle Times* began when the leader (Rhinehart) and some members of a small religious group called the Aquarian Foundation sued the *Seattle Times* and the *Walla Walla Union-Bulletin* in Washington Superior Court for libel. The suit alleged that the religious group had suffered a loss of donations from the membership and public as a result of a series of newspaper articles detailing various incidents of Rhinehart's behavior, his vacated conviction, and the religious group's beliefs.<sup>68</sup>

In preparing a defense, the newspapers sought extensive discovery, including financial information, the identity of donors during the prior ten years, and a list of the members during that time.<sup>69</sup> The newspapers clearly stated their intentions to publicize the information gained in discovery.<sup>70</sup> The plaintiffs opposed the discovery request and moved for a protective order preventing dissemination of any information gained through discovery.<sup>71</sup>

The trial court granted partial discovery but issued a protective order<sup>72</sup> prohibiting public dissemination of "the financial affairs of the various plaintiffs, the names and addresses of Aquarian Foundation members, contributors, or clients, and the names and addresses of those who have been contributors, clients or donors to any of the various plaintiffs."<sup>73</sup> The court prohibited the newspaper defendants from any use of the information except where "necessary . . . to prepare and try the case."<sup>74</sup>

On appeal by both sides, the Washington Supreme Court affirmed both the discovery order and the protective order. The Washington court decided that the plaintiffs had "a recognizable privacy interest; and the giving of publicity to these matters would allegedly and understandably result in annoyance, embarrassment and even oppression."<sup>75</sup>

The United States Supreme Court affirmed the Washington

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ened sensitivity" to First Amendment rights is required in weighing protective orders).

67. 467 U.S. 20 (1984).

68. *Id.* at 22-23.

69. *Id.* at 24.

70. *Id.* at 25.

71. *Id.*

72. The trial court issued the protective order under Washington Rule of Civil Procedure 26(c) on the religious group's renewal of its motion for an order. The trial court denied the motion when first made because the assertions by the movants were "too conclusory to warrant a finding of 'good cause,'" a point that should not be lost considering some courts' indiscriminate granting of protective orders today. *Id.* at 25-27.

73. *Id.* at 27 (quoting Appendix at 65a, *Seattle Times* (No. 82-1721)).

74. *Id.* at 27 n.8.

75. *Rhinehart v. Seattle Times Co.*, 654 P.2d 673, 690 (Wash. 1982) quoted in *Seattle Times Co. v. Rhinehart*, 467 U.S. at 28.

court's decision. The Supreme Court held that where "a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment."<sup>76</sup> The Court enumerated three principles. First, the right to discovery is by legislative grace and not by First Amendment, so "continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other situations."<sup>77</sup> Second, "pretrial depositions and interrogatories are not public components of a civil trial,"<sup>78</sup> either historically at common law or by conduct in modern practice. Consequently, restraints placed on "not yet admitted" information "are not a restriction on a traditionally public source of information."<sup>79</sup> Third, the restraint is not "the kind of classic prior restraint that requires exacting First Amendment scrutiny"<sup>80</sup> in that only information obtained through discovery is controlled. Identical information obtained by independent means may be disseminated.<sup>81</sup> Thus, the First Amendment rights are implicated "to a far lesser extent" than similar restraints in a different context, and protective orders occupy a "unique position" in relation to the First Amendment.<sup>82</sup>

*Seattle Times* seemed to be a departure from a modern history of placing First Amendment rights above other interests the state believes to be compelling. The Supreme Court has on other occasions rejected attempts to infringe on the First Amendment in favor of the state's interest in preserving the anonymity of juvenile offenders,<sup>83</sup> in protecting a criminal defendant's Sixth Amendment right to a fair trial,<sup>84</sup> and in preserving the integrity of public office.<sup>85</sup> Indeed, in *New York Times Co. v. United States*<sup>86</sup> the Court rejected a prior restraint on documents stolen from the government that involved a national security interest. After *Seattle Times*, conceivably, a party could not be restrained from disseminating national secrets stolen from the government but could be restrained from disseminating confidential information obtained legally—by court

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76. *Id.* at 37.

77. *Id.* at 32 (citing *In re Halkin*, 598 F.2d 176, 206-07 (D.C. Cir. 1979) (Wilkey, J., dissenting)).

78. *Id.* at 33.

79. *Id.*

80. *Id.*

81. *Id.* at 33-34 (citing *Gannett Co. v. DePasquale*, 443 U.S. 368, 399 (1979) (Powell, J., concurring)).

82. *Id.* at 34.

83. *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

84. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

85. *Near v. Minnesota*, 283 U.S. 697 (1931).

86. 403 U.S. 713 (1971).

order—from a litigant in the discovery process, without any “compelling interest” or “least restrictive means” requirement. Truly, as the *Seattle Times* Court said, Rule 26(c) protective orders occupy a “unique position . . . in relation to the First Amendment.”<sup>87</sup>

Several factors existed in *Seattle Times* that could have encouraged the Court in its decision. First, the newspapers’ attempted use of the discovery process as a means of news gathering<sup>88</sup> created the specter of procedural abuse. The Court noted the trial court’s reasoning that the protective order would “avoid the ‘chilling effect’ that dissemination would have on ‘a party’s willingness to bring his case to court.’”<sup>89</sup> Second, the movants of the protective order had First Amendment rights to privacy, freedom of religion, and freedom of association at stake<sup>90</sup>—interests of considerable potency. Third, the newspapers’ intended publication of the information was somewhat commercial in that they were undeniably in the business of disseminating information. In short, *Seattle Times* was an unsympathetic case from the standpoint of vacating the protective order.

Unfortunately, *Seattle Times* did not completely remove the First Amendment confusion about protective orders. The decision has been interpreted in conflicting ways by the federal courts. In *Cipollone v. Liggett Group, Inc.*,<sup>91</sup> the Third Circuit Court of Appeals interpreted *Seattle Times* as leaving “no room for lower courts to consider first amendment factors in fashioning or reviewing Rule 26(c) orders.”<sup>92</sup> The *Cipollone* court said that the Supreme Court’s opinion was “consistent with the position that the first amendment is simply irrelevant to protective orders in civil discovery,” the result being that protective orders are not subject to a “less restrictive means test.”<sup>93</sup>

However, in *Anderson v. Cryovac, Inc.*<sup>94</sup> the United States Court of Appeals for the First Circuit disputed the *Cipollone* court’s interpretation, concluding instead that the *Seattle Times* Court ruled simply that protective orders implicated First Amendment rights “to a far lesser extent than would restraints on dissemination of information in a different context.”<sup>95</sup> The *Anderson* court ruled that

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87. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 34.

88. *Id.* at 25.

89. *Id.* at 27 (quoting Record at 63, *Seattle Times*, (No. 82-1721)).

90. *Id.* at 25.

91. 785 F.2d 1108 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987).

92. *Cipollone v. Liggett Group, Inc.*, 785 F.2d at 1119.

93. *Id.*

94. 805 F.2d 1 (1st Cir. 1986).

95. *Id.* at 7 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. at 34) (emphasis added). See *H.S. Gere & Sons, Inc. v. Frey*, 509 N.E.2d 271, 274 (Mass. 1987) (quoting *Seattle Times* language implicating the First Amendment in the issuance of protective orders).

“first amendment considerations cannot be ignored” in protective orders, but “scrutiny must be made within the framework of Rule 26(c)’s requirement of good cause.”<sup>96</sup> While the First Circuit found that *Seattle Times* “foreclosed any claim of an absolute public right of access to discovery materials,” it said that *Seattle Times* “did not hold that a discovery protective order could never offend the first amendment.”<sup>97</sup> The *Anderson* court’s observation that First Amendment interests were implicated to a “far lesser extent” is consistent with *Tavoulaareas v. Washington Post Co.*,<sup>98</sup> an earlier case in which the United States Court of Appeals for the District of Columbia Circuit remanded to the lower court for a redetermination of good cause in light of *Seattle Times*. The *Tavoulaareas* court said *Seattle Times* “does not require a court to apply especially close scrutiny in deciding whether to give parties to a civil litigation, including newspapers, a right to disseminate information gained through the discovery process.”<sup>99</sup> That *Seattle Times* qualified, instead of repudiated, a role for the First Amendment in the consideration of a Rule 26(c) order is also evident from the Court’s analytical approach. The Court invoked the test of *Proconier v. Martinez*,<sup>100</sup> which asks whether “the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.”<sup>101</sup> To quote the *Anderson* court, the *Seattle Times* Court applied “the heightened scrutiny test of *Proconier* to the practice of restraining a litigant’s right to disseminate discovery information, not to any particular application of Rule 26(c).”<sup>102</sup> Having resolved the constitutional validity of the Rule, the *Seattle Times* Court then observed that the trial court must have broad discretion “to weigh fairly the competing needs and interests of parties” and “substantial latitude to fashion the protective orders”<sup>103</sup> without engaging in “heightened First Amend-

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96. *Anderson v. Cryovac, Inc.*, 805 F.2d at 7.

97. *Id.* at 6-7. Indeed, the First Circuit subsequently struck down two protective orders on First Amendment grounds as “too vague and too broad” in *In re Perry*, 859 F.2d 1043, 1050 (1st Cir. 1988). The *Perry* court said the protective orders, issued by an administrative law judge, were an attempt to regulate the content of union campaign literature. *Id.* at 1049.

98. 737 F.2d 1170, 1172 (D.C. Cir. 1984) (remanding an order to the lower court for a redetermination of good cause in light of *Seattle Times v. Rhinehart*).

99. *Tavoulaareas v. Washington Post Co.*, 737 F.2d at 1172.

100. 416 U.S. 396 (1974).

101. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 32 (quoting *Proconier v. Martinez*, 416 U.S. at 413).

102. 805 F.2d at 7 n.2. The United States Court of Appeals for the Sixth Circuit interpreted *Seattle Times* a third way in *The Courier Journal v. Marshall*, 828 F.2d 361 (6th Cir. 1987). In a decision denying a writ of mandamus to a newspaper seeking public access to discovery information, the *Courier Journal* court indicated that the *Proconier* test should be applied to the specific protective order request. *Id.* at 364.

103. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36.

ment scrutiny of each request."<sup>104</sup> The Court thereupon deferred to the Washington Supreme Court, which held that the trial court did not abuse its discretion.<sup>105</sup> The Court noted that it was "apparent that substantial government interests were implicated" given the movants' rights of privacy and religious association at stake.<sup>106</sup>

In summary, *Seattle Times* found Washington Rule 26(c) constitutionally valid. In its application, a limited First Amendment scrutiny is incorporated within the trial court's examination of good cause. If good cause is shown to warrant a limitation on a party's First Amendment rights, the court has broad latitude to fashion an order restricting dissemination of information as far as necessary to avoid injury to the party at risk.<sup>107</sup> Absent a showing of good cause, the parties or witnesses receiving the discovery information retain a First Amendment right to disseminate the information.<sup>108</sup>

A protective order granted without the requisite showing of good cause, in addition to encroaching on the First Amendment rights of parties or witnesses, would also exceed the court's authority under Rule 26(c).<sup>109</sup> By the logic of Rule 26(c) itself, the trial court's broad discretion in this area, recognized by the *Seattle Times* Court, is not an unlimited discretion. Similarly, although Maine Rule 26(c) includes an admonition to apply the Rule with liberality to protect the parties and witnesses, the Rule nevertheless requires that a good cause threshold be met.<sup>110</sup>

To fathom this limitation requires looking only as far as *Gulf Oil Co. v. Bernard*,<sup>111</sup> a 1981 class action in which the Supreme Court affirmed the vacating of a Rule 23 order barring counsel from communicating with potential class members. The issue in *Gulf Oil* was whether the lower court had abused its discretion by failing to engage in a "careful weighing of competing factors."<sup>112</sup> The *Gulf Oil*

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104. *Id.* at 36 n.23.

105. *Id.* at 36.

106. *Id.* at 37 n.24.

107. This approach may not be as strict as that taken in *United States v. O'Brien*, 391 U.S. 367 (1968), in which the Court said that an incidental restriction on speech must be "no greater than is essential to the furtherance of [the government's] interest." *Id.* at 377.

108. Concurring with the majority in a separate opinion, Justice Brennan, joined by Justice Marshall, viewed the Court's holding as recognizing a First Amendment consideration in formulating protective orders. "The Court today recognizes that pre-trial protective orders . . . are subject to scrutiny under the First Amendment," Brennan wrote. *Seattle Times v. Rhinehart*, 467 U.S. at 37 (Brennan, J., concurring).

109. "There can be no doubt that *Seattle Times* left that prerequisite [good cause] to a protective order wholly intact." *Tavoulares v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984). See also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 892 (E.D. Pa. 1981).

110. FED. R. Civ. P. 26(c); ME. R. Civ. P. 26(c).

111. 452 U.S. 89 (1981).

112. *Id.* at 102.



Court, referring to the "good cause" analysis of Rule 26(c) for comparison,<sup>113</sup> said that the trial court had abused its discretion by not appropriately identifying and balancing "the potential abuses" against "the rights of the parties under the circumstances."<sup>114</sup> The Court said that although the trial court had "both the duty and the broad authority" to enter orders governing the conduct of counsel and parties in class action cases so as to manage the case, "this discretion is not unlimited, and indeed is bounded by the relevant provisions of the Federal Rules."<sup>115</sup> Interestingly, the *Gulf Oil* Court did not believe itself compelled to resolve which First Amendment standards were implicated in the decision to issue the order<sup>116</sup> but observed only that the order involved "serious restraints on expression."<sup>117</sup> The significance of the Court's balancing approach is that absent a proper determination of good cause any First Amendment interest may be sufficient to make the trial court's order an abuse of discretion.

Courts therefore must make a determination of good cause because they are required to do so by Rule 26(c), and they must consider First Amendment interests. Since First Amendment considerations are merged into the "good cause" determination of Rule 26(c), the limitations that Rule 26(c) allows on the First Amendment rights of parties or witnesses can be delineated only by examining "good cause." Yet ascertaining a "good cause" threshold that applies across cases is problematic because a determination of good cause is necessarily fact-specific. That alone is justification for granting trial courts broad—but not unlimited—discretion in this area.

### III. GOOD CAUSE

Good cause is a legal term of art. One federal court has described good cause as meaning that "a sound basis or legitimate need"<sup>118</sup> exists to justify its order. The *Seattle Times* Court did not provide a definition. Nonetheless, determining good cause for a protective order should involve the court in a deliberate, logical analysis.

The movant for the order has the burden of production and persuasion.<sup>119</sup> The movant first must identify and articulate for the court the harm that might result from dissemination. Maine and Federal Rule 26(c) define the harms from which parties or witnesses

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113. *Id.* at 102 n.16.

114. *Id.* at 102-03.

115. *Id.* at 100.

116. *Id.* at 103-04.

117. *Id.* at 104.

118. *In re Alexander Grant & Co. Litigation*, 820 F.2d 352, 356 (11th Cir. 1987).

119. *See, e.g., Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 129 F.R.D. 483, 485 n.4 (D.N.J. 1990).

should be protected to include "annoyance, embarrassment, oppression, or undue burden or expense." Courts have construed Federal Rule 26(c)(7) and its predecessor, Rule 30(b), to protect "a wide variety of business information"<sup>120</sup> so long as the likelihood of harm is shown. The *Seattle Times* Court noted that "[a]lthough the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule."<sup>121</sup> Consistent with this approach, courts have recognized competitive disadvantage as a basis for a Rule 26(c) order, although they have not designated the specific type of harm in Rule 26(c) under which it would be categorized.<sup>122</sup>

The movant must show that the harm would be significant,<sup>123</sup> and has a reasonable likelihood of occurring.<sup>124</sup> The movant's assertions must be substantiated "by specific examples or articulated reasoning"<sup>125</sup> as opposed to "stereotyped or conclusory statements."<sup>126</sup>

To determine if good cause has been shown, the court must balance the harm to the movants if the discovery information is disseminated (as well as the court's corresponding interest in managing the discovery process<sup>127</sup>) against the countervailing interests subor-

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120. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 890 (E.D. Pa. 1981) (construing FED. R. Civ. P. 26(c)(7)).

121. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 35 n.21.

122. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. at 890 (construing FED. R. Civ. P. 26(c)(7)).

123. *Cipollone v. Liggett Group, Inc.*, 785 F.2d at 1121.

124. See *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986); *In re San Juan Star Co.*, 662 F.2d 108, 117 (1st Cir. 1981). For a pre-*Seattle Times* summation of the two approaches toward the probability of harm, viz., "reasonable likelihood" and "serious and imminent threat," see *In re Halkin*, 598 F.2d 176, 193 n.42 (D.C. Cir. 1979). In light of the *Seattle Times* decision, reasonable likelihood would seem to be the proper standard.

125. *Cipollone v. Liggett Group, Inc.*, 785 F.2d at 1121 (citing *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978)); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); 8 WRIGHT & MILLER, *supra* note 17, § 2035. See also *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (citing *In re Halkin*, 598 F.2d 176, 193 (D.C. Cir. 1979), for the standard of showing required for good cause); *Anderson v. Cryovac, Inc.*, 805 F.2d at 7.

126. *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973), cert. denied, 414 U.S. 1162 (1974); 8 WRIGHT & MILLER, *supra* note 18, § 2035.

127. The court has an interest in overseeing the discovery process to prevent its abuse. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 35. "Abuse" has been said by Harvard law professor Arthur Miller to include "all forms of activity, whatever the motivation, that represent a use of the system that does not serve a legitimate discovery function." Miller, *supra* note 16, at 446 n.93. Abuse in the present context might be to use the discovery process to obtain information irrelevant to the litigation in order to threaten the opposing party with embarrassment or to maliciously harm the opposing party. See also *infra* note 155 and accompanying text. In other contexts, abuse includes the use of discovery to delay the litigation process, or to frustrate or to

dinated by a protective order. These countervailing interests may include the limited First Amendment interests of parties or witnesses recognized in *Seattle Times*,<sup>128</sup> the general interest of the courts in "just, speedy and inexpensive" determinations of actions<sup>129</sup> that might be assisted by the sharing of information with other plaintiffs in similar litigation,<sup>130</sup> and the interests of third parties.<sup>131</sup> The balancing test is essential to determine whether good cause exists, despite the fact that under the *Seattle Times* standard the First Amendment interests of parties and witnesses will fall victim, at least in some degree, to a reasonable likelihood of substantial harm. This weighing of the interests is the *sine qua non* of the justification for the trial court's broad discretion.<sup>132</sup>

*Seattle Times* itself illustrates the kind of showing that may be required of the movant. The Washington trial court first denied (without prejudice) Rhinehart and his religious organization a Rule 26(c) protective order restricting dissemination of the list of donors, which the court was requiring Rhinehart and the organization to provide the *Seattle Times* in discovery. Filing a motion for reconsideration, Rhinehart and his organization submitted affidavits of several members detailing letters and telephone calls defaming the organization and in some cases threatening physical injury to members. Actual attacks were also described. The affidavits asserted that public disclosure of donor lists would affect membership and donations and would result in harassment and reprisals.<sup>133</sup> The trial court thereupon entered a protective order restricting dissemination.

In *Nestle Foods Corp. v. Aetna Casualty and Surety Co.*<sup>134</sup> a federal district court refused to issue a protective order because the movant failed to satisfy a similar standard. The defendant insurance company had moved for a protective order to restrict dissemination of its claim files, underwriting files, engineering files, and claim and underwriting manuals on the ground that disclosure to competitors would reduce Aetna's competitive advantage.<sup>135</sup> Aetna did not support its assertions with affidavits providing a factual basis but relied only upon conclusory arguments.<sup>136</sup> In refusing to enter a protective order, the *Nestle Foods* court characterized Aetna's submission as

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impose burdensome expenses on the opposing party. HARE, *supra* note 9, § 5.6.

128. See *supra* note 108 and accompanying text.

129. FED. R. CIV. P. 1.

130. See *infra* note 201 and accompanying text.

131. See *infra* notes 211-13 & 222-27 and accompanying text.

132. "The trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery." *Seattle Times v. Rhinehart*, 467 U.S. at 36 (footnote omitted).

133. *Id.* at 25-27.

134. 129 F.R.D. 483 (D.N.J. 1990).

135. *Id.* at 485 n.5.

136. *Id.* at 485.

"only general and vague references to harm"<sup>137</sup> and "broad and conclusory allegations."<sup>138</sup>

What constitutes a sufficient showing in practical terms is not easily definable. In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,<sup>139</sup> an antitrust case involving massive amounts of documents, the United States District Court for the Eastern District of Pennsylvania qualified its discussion of the requisite showing for a protective order by observing that "[f]requently the injury that would flow from disclosure is patent, either from consideration of the documents alone or against the court's understanding of the background facts. The court's common sense is a helpful guide."<sup>140</sup> In denying Aetna a protective order, the *Nestle Foods* court also relied on its "common sense" to conclude that a real fear of competitive harm would have dissuaded Aetna from having cooperated previously with other insurers in sharing information of the type at issue.<sup>141</sup>

The characterization of the information can be significant. The type of information for which courts are asked to restrict dissemination varies greatly and may include, for example, internal memoranda, marketing research, design specifications, minutes of safety committees, and records of other claims by injured people or of consumer complaints.

The movant for a protective order may try to characterize the material as trade secrets, a category which is explicitly included in Rule 26(c)(7) for protection by a court order. This characterization, if convincing, can persuade a court that good cause exists for a protective order, particularly since legislation has afforded protection to trade secrets. For example, the Uniform Trade Secrets Act, as adopted by Maine, instructs courts to guard trade secrets during litigation.<sup>142</sup>

However, the definition of a trade secret is ambiguous and may be overly elastic.<sup>143</sup> Maine's Uniform Trade Secrets Act defines a trade secret as information that "[d]erives independent economic value, actual or potential, from not being generally known to and not being readily ascertainable by proper means by other persons who can obtain economic value from its disclosure or use" and concerning which the owner has made "reasonable" efforts "to maintain its se-

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137. *Id.*

138. *Id.* at 486.

139. 529 F. Supp. 866 (E.D. Pa. 1981).

140. *Id.* at 891.

141. *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 129 F.R.D. 483, 484 (D.N.J. 1990).

142. ME. REV. STAT. ANN. tit. 10, §§ 1541-1548 (West Supp. 1991-1992).

143. See Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 490.

crecy."<sup>144</sup> In addition, the magnitude of the harm from dissemination may vary greatly even among the types of information that may be characterized as trade secrets.<sup>145</sup>

Some courts, consequently, have applied standards to determine whether information is a true trade secret worthy of protection from dissemination. These standards include (1) the extent to which the information already is known by outsiders, (2) the extent to which the information is known by employees and others in the business, (3) the measures taken by the movant to guard the information's secrecy, (4) the value of the information to the movant and its competitors, (5) the amount spent by the movant in developing the information, and (6) the ease with which others could properly acquire or duplicate the information.<sup>146</sup>

Information need not qualify as a trade secret in order to be protected by the courts from dissemination. Rule 26(c)(7) makes clear that disclosure of "other confidential research, development, or commercial information" may be restricted. Sensitive commercial information may not qualify as a trade secret but may nevertheless cause injury to the movant if disseminated. Information on relationships among licensees, customers, and suppliers could fall into this category, for example, if some of them were to make unfavorable comparisons of their negotiated terms with others' terms.<sup>147</sup>

Rule 26(c) also empowers a court to enter an order restricting the dissemination of confidential information that may only embarrass a party or person. The *Seattle Times* Court observed that the power to enter a protective order to protect from "annoyance, embarrassment, [and] oppression" implicitly recognizes the value of protecting privacy in the discovery process.<sup>148</sup> Protecting privacy thus can be

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144. ME. REV. STAT. ANN. tit. 10, § 1542 (West Supp. 1991-1992).

145. See generally Marcus, *supra* note 143, at 488-93. Marcus notes that the extreme of a "true trade secret" is the formula for Coca-Cola, which only two people in the Coca-Cola Co. were said to know. The two people were forbidden to fly on the same plane, and the formula was kept in an Atlanta bank vault that could be opened only upon resolution of the company's board of directors. *Id.* at 489 & n.183 (citing Coca-Cola Bottling Co. v. Coca-Cola Co., 107 F.R.D. 288 (D. Del. 1985)).

146. See *United States v. International Business Machines Corp.*, 67 F.R.D. 40, 46-47 (S.D.N.Y. 1975); *Farnum v. G.D. Searle & Co.*, 339 N.W.2d 384, 389 (Iowa 1983). See also Thomas M. Fleming, Annotation, *Propriety and Extent of State Court Protective Order Restricting Party's Right to Disclose Discovered Information to Others Engaged in Similar Litigation*, 83 A.L.R. 4TH 987, 991 (1991). For example, the United States Court of Appeals for the Third Circuit decided in *Smith v. BIC Corp.*, 869 F.2d 194 (3d Cir. 1989), that design information that appeared in a patent or that could be obtained by reverse engineering did not qualify as a trade secret, whereas specifications and tolerances that could not be so discerned were trade secrets. The result in *Smith* was reached without explicitly using these criteria. *Id.* at 199-201.

147. See, e.g., *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 880-81 n.21 (E.D. Pa. 1981).

148. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 35 n.21.

distinguished from protecting a trade secret or the direct commercial value of information.<sup>149</sup> The Court noted that “[a]lthough the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule.”<sup>150</sup>

However, courts have shown a reluctance to recognize the non-monetary privacy interests of a business partly on the rationale that embarrassment can be so easily and commonly claimed. Consequently, a business applicant for a protective order “whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious.”<sup>151</sup> Furthermore, “[a]s embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground.”<sup>152</sup> *Seattle Times*, in contrast, involved a religious group—rather than a business group—and its leader in litigation with a newspaper.

Consistent with *Cipollone*, the Third Circuit in *Smith v. BIC Corp.*<sup>153</sup> held that BIC Corp.’s claim that publicly disclosing other accidents from its product would embarrass the company, creating bad publicity that would push its stock price down, did not constitute good cause to limit dissemination of that particular information.<sup>154</sup> The court was explicit that a showing of direct economic harm from the release of confidential information would have been more influential than a showing of harm from bad publicity.<sup>155</sup>

After the proffering of facts by the movant, the court must balance the assertions of harm against countervailing interests, an inherently fuzzy proposition given that incompatible rights and interests must be weighed. Nevertheless, as cases following *Seattle Times* demonstrate, the countervailing limited First Amendment interest should outweigh (a) conclusory assertions of harm, (b) assertions of

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149. See Marcus, *supra* note 143, at 491-92.

150. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 35 n.21.

151. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986).

152. *Id.*

153. 869 F.2d 194 (3d Cir. 1989).

154. *Id.* at 201.

155. *Id.* The motivation of the party intending to disseminate discovered information could be relevant if it contributes to the movant’s showing of a reasonable likelihood of serious or substantial harm or if it constitutes an abuse of the court’s processes. See *Seattle Times Co. v. Rhinehart*, 467 U.S. at 35. For example, a showing that a party obtained confidential information irrelevant to the litigation for the purpose of profiting from its sale presumably would constitute such an abuse. Consequently, the Rule 26(c) power to restrict speech means that a trial court may become entangled in determining the party’s motivation for exercising its limited First Amendment right. Courts must ensure, however, that a naked allegation of the litigant’s motivations not excuse the movant for a protective order from making a particularized showing of a reasonable likelihood of serious or substantial harm.

confidentiality or trade secret status when disclosure already has been made elsewhere, and (c) harms that extend only to corporate embarrassment or bad publicity.

It is only the particular showing of a reasonable likelihood of serious or substantial harm that meets the threshold of good cause for a protective order limiting dissemination. Even when that threshold is crossed, the United States Court of Appeals for the Second Circuit has said that the court fully retains its discretion whether to issue a protective order.<sup>156</sup> Even when good cause is shown, the court that decides to enter a protective order has the responsibility to fashion the order to account for the interests of the opposing parties, of witnesses, and of third parties.

#### IV. FASHIONING THE PROTECTIVE ORDER

Upon the particular demonstration of fact, the court has the discretion to issue an order to protect the parties or witnesses while weighing the interests of the other litigants or of third parties. Rule 26(c) vests authority in the court to make the determination of good cause, to decide after balancing the interests whether to issue the protective order, and to fashion the order as the court deems necessary to protect the interests shown.

In this context, Federal and Maine Rule of Civil Procedure 65(d), governing the use of injunctions, provide a useful analogy to Rule 26(c) in that they involve a similarly remedial, as opposed to punitive, power of the court.<sup>157</sup> Both versions of Rule 65(d) require that the restraining order or injunction state the reasons for the order and be specific in its terms. By analogy to Rule 65(d), the court should state reasons for the issuance of the Rule 26(c) protective order and be specific within the order so it may be easily obeyed and enforceable and not be oppressive.<sup>158</sup>

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156. "Even when good cause for the issuance of a protective order is shown, the decision to grant such an order lies in the discretion of the court." *In re Agent Orange Product Liability Litigation*, 104 F.R.D. 559, 572 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir. 1987).

157. FED R. CIV. P. 65(d) reads:

Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

ME. R. CIV. P. 65(d) is substantially the same.

158. 11 WRIGHT & MILLER, *supra* note 18, § 2955, at 540-43. An example of lack of specificity in a protective order occurred in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987), an action brought by United Steelworkers of America members alleging violations of the Employment Retirement Income Security Act. (This action was one of three brought on the issue by United

The court faces three principal issues in fashioning such a protective order. It must resolve to whom the order applies, to what information the order applies, and to whom the information may be given. The easiest issue is to whom the order applies. The issue is only theoretical and not problematic since the nature of secrecy demands that it apply, first, to the parties' counsel initially receiving the information in the discovery process, and second, to anyone else authorized by the order to receive the information from the counsel.<sup>159</sup> Typically, potential or actual witnesses are required to acknowledge the terms of the protective order or sign an agreement to comply, for purposes of application of the order, before they may receive the information.<sup>160</sup>

#### A. *To What Information Does the Order Apply?*

In deciding which information should be restricted from dissemination, the court is not entirely bound by the good cause showing of the movants. Although one might suppose that the information subject to the restriction must be exactly that information which the court explicitly determines would cause the injury if disseminated, in complex litigation courts frequently issue blanket protective orders, commonly called umbrella orders.<sup>161</sup> Such orders restrict dis-

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Steelworkers members.) The court entered a protective order prohibiting dissemination of "documents." Plaintiffs' counsel and Continental Can's counsel interpreted the order differently. Continental Can argued unsuccessfully that "documents" included depositions taken during discovery. Telephone Interview with Daniel McIntyre, plaintiffs' counsel (Apr. 21, 1992).

159. See HARE, *supra* note 9, at 42 & n.6. See, e.g., *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 127-28 (D. Mass. 1990) (allowing disclosure to counsel; to partners, associates, secretaries, paralegal assistants and employees to the extent required for services; to persons with prior knowledge of the documents or information; to parties or their representatives assisting counsel; to court officials; and, upon signing of a confidentiality agreement and submission of it to opposing counsel, to outside consultants or witnesses); *Poliquin v. Garden Way, Inc.*, No. 90-0245 P (D. Me. Jan. 17, 1992) (protective order) (allowing disclosure to counsel; to expert witnesses after provision of a resume to opposing counsel and execution by the witness of an acknowledgment of the protective order's terms; and to any prospective or actual witness after execution of an acknowledgment).

160. See HARE, *supra* note 9, § 4.3; see also *Poliquin v. Garden Way, Inc.*, No. 90-0245 P at 3-4 (D. Me. Jan. 17, 1992) (protective order); *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123, 127-28 (D. Mass. 1990).

161. See HARE, *supra* note 9, § 4.10. See also *In re Alexander Grant & Co. Litigation*, 820 F.2d 352 (11th Cir. 1987):

Busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document. The order issued in this case, as in others, is designed to encourage and simplify the exchanging of large numbers of documents, volumes of records and extensive files without concern of improper disclosure.

*Id.* at 356. See also *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1123 (3d Cir. 1986) (recommending that district courts in the circuit use umbrella orders in complex cases).



semination of any information gathered in discovery upon a designation of confidentiality of that information by the movant for the order. Typically, the application of the protective order to any particular article of discovery is lifted only after successful application by the affected party to the court.<sup>162</sup>

Such umbrella orders are theoretically problematic given that *Seattle Times* recognizes a limited First Amendment right incorporated in the good cause determination. It is difficult to justify a court order restricting an individual's First Amendment right to disclose any particular fact on the basis that there is good reason to gag that person concerning other, but as yet unspecified, facts.<sup>163</sup> Two principles overcome this difficulty.

First, the language of *Seattle Times* indicates that the court issuing a protective order need not be overly concerned about overbreadth of its order. The *Seattle Times* Court explicitly gave the trial courts "substantial latitude to fashion protective orders."<sup>164</sup> The Court in fact rejected the "least restrictive means" test employed by the First Circuit in *In re San Juan Star Co.*,<sup>165</sup> a case preceding *Seattle Times*.

Second, the simple practicalities of litigation in massive cases demand that courts not engage in a document-by-document approach to fashioning such protective orders. The *Manual for Complex Litigation, Second*, developed to assist the judiciary in the management of complex cases,<sup>166</sup> endorses the use of umbrella orders, for example.<sup>167</sup> Clearly, it was the potentially enormous consumption of judicial resources that pushed the *Seattle Times* Court toward rejecting a "least restrictive means" test. As the *Seattle Times* Court noted, "heightened First Amendment scrutiny of each request for a protective order would necessitate burdensome evidentiary findings and could lead to time-consuming interlocutory appeals . . . ."<sup>168</sup>

*Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,<sup>169</sup> an international antitrust case lasting nearly a decade, is a legendary

162. HARE, *supra* note 9, § 4.10. See *Cipollone v. Liggett Group, Inc.*, 785 F.2d at 1122.

163. From an absolutist first amendment position . . . it is difficult to see how umbrella orders could pass muster because, at the time the order is presented to the court, the identity of the documents to be designated confidential is not known. *Seattle Times* rejected that absolutist view, however, and left it for lower courts to make good cause determinations in issuing protective orders.

Marcus, *supra* note 143, at 500.

164. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36.

165. 662 F.2d 108, 116 (1st Cir. 1981).

166. See Miller, *supra* note 16, at 449.

167. MANUAL FOR COMPLEX LITIGATION, SECOND, § 21.431, at 53 (1985).

168. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36 n.23.

169. 529 F. Supp. 866 (E.D. Pa. 1981).

example<sup>170</sup> of the implications of massive litigation for management of discovery in the context of protective orders. The *Zenith Radio* court was asked to decide the confidentiality status of 3,500 docket filings, 17,000 pages with cross-references to 250,000 documents in plaintiffs' final pretrial statement, and millions of documents produced in discovery and marked confidential.<sup>171</sup> The court denied a motion to remove a pre-trial umbrella protective order that would have meant a wholesale post-trial declassification of the confidential status of documents produced in discovery.<sup>172</sup>

Two other related considerations influence the courts' tendencies to use umbrella protective orders. One is the goal of speedy administration of justice,<sup>173</sup> and the other is the interest of the litigants, including the parties whose speech is restricted, to move the discovery smoothly along as an aid to resolving the real issues being litigated.<sup>174</sup>

Given the legitimacy accorded umbrella orders, once a trial court has found good cause to enter a protective order restricting dissemination, the protective order is not invalid even if it is somewhat overbroad. To the consternation of strict First Amendment adherents, the good cause test must be viewed conceptually as more of a threshold for entering the protective order than an exacting determination of what information can be restricted from dissemination.<sup>175</sup>

In this context, the admonition in Maine Rule 26(c) for the court to exercise its powers over discovery, including the power to enter protective orders, "with liberality toward the accomplishment of its [the Rule's] purpose to protect parties and witnesses" appears more meaningful. Given that *Seattle Times* evidently legitimizes the power to enter an umbrella order restricting all discovered information designated by the movant as confidential, a Maine court genu-

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170. Indeed, *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.* was cited by the *Seattle Times* Court as an example of what the Court hoped to avoid by its recognition of broad discretion in the trial court. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36 n.23.

171. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. at 873.

172. *Id.* at 915.

173. FED. R. CIV. P. 1; ME. R. CIV. P. 1. Both Rules include the sentence: "They [these Rules] shall be construed to secure the just, speedy and inexpensive determination of every action."

174. See HARE, *supra* note 9, § 2.4, at 14: "Expense and delay are more than [sic] a mere residue of the litigation. If left unabated, they threaten the ability of the system to deliver justice in as real a sense as artificial limitations on discovery would do."

175. See *Nestle Foods Corp. v. Aetna Casualty & Sur. Co.*, 129 F.R.D. 483, 486 (D.N.J. 1990) ("While this Court recognizes that umbrella-type protective orders, such as submitted by defendants here, are valid, nonetheless, the movant still is required to make a threshold showing of good cause."); See also HARE, *supra* note 9, § 4.10, at 54.

inely can take the admonition to heart.

However, regardless of the legitimacy of entering umbrella protective orders, the reality is that such orders often prejudice the judicial mechanics against the party whose speech is restricted. By allowing the movant for the protective order to designate the documents which shall be confidential, courts delegate a power that only in the rarest circumstances they would grant in other areas of the litigation process. Giving the movant such power to determine which information shall not be disseminated naturally invites over-designation and potentially lowers the good cause test governing any particular item to a standard of whether such a classification can be argued with any justification.<sup>176</sup>

Another possible impact is more subtle. In umbrella orders, the court's review typically is enlisted only if the affected parties object to the designation. Recognizing that the court used the umbrella order precisely to avoid protracted disputes on the designation of confidentiality, the affected parties understandably may be reluctant to risk aggravating the court by contesting the movant's branding of discovery.<sup>177</sup> When the affected party overcomes its reluctance, its request for the court's intervention puts it in a position of seeking a change in the status quo, potentially creating a disguised shift in the burden of persuasion from the original movant for the order to the affected party.<sup>178</sup>

Finally, protective orders are rarely appealed by parties and are still more rarely overturned because of their status as interlocutory orders, the desire of litigants to address the central litigation, and the strong disposition of reviewing courts to give the trial court broad latitude in fashioning the orders.<sup>179</sup> Therefore, umbrella or-

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176. The tendency of counsel to overdesignate discovery information as confidential is widely recognized.

The problems of preserving protection for documents produced under confidentiality orders are aggravated by the understandable tendency of counsel to err on the side of caution by designating any possibly sensitive documents as confidential under the order. . . . Although the judge, in the interest of reducing the time and expense of the discovery process, should be somewhat tolerant of this practice, counsel should not mark documents as protected under the order unless they are at least arguably subject to protection. The designation of a document as confidential may be viewed as equivalent to a motion for protective order and subject to the sanctions of Fed. R. Civ. P. 26(g).

MANUAL FOR COMPLEX LITIGATION, SECOND, § 21.431, at 53 n.60 (1985).

177. HARE, *supra* note 9, § 4.10, at 56.

178. *Id.* § 1.1, at 2.

179. See *id.* § 6.15, at 158 (interlocutory orders are not normally appealable); Susan M. Angelo, Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1659 n.91 (1980) (appellate courts are reluctant to overturn a decision granting or denying a protective order); *Seattle Times Co. v. Rhinehart*, 467 U.S. at 36 (stating that "[t]he trial court is in the best position to weigh fairly the competing needs and interests of parties affected by discovery").

ders frequently can significantly exceed the scope of justifiable restriction on a party's First Amendment interests and yet persist.<sup>180</sup>

Courts can, however, take steps to lessen (although not eliminate) these problems. To minimize the potential for abusing the confidentiality designation of information by the movant, the court can expend enough judicial resources to limit the order to particular categories of discovery by subject and age of the information.<sup>181</sup> In addition, the court might explicitly put the movant on notice in its order that the movant will bear the burden of establishing the appropriateness of its designation of discovery information as confidential if the issue reaches the court.<sup>182</sup> Finally, any shifting in burden can be minimized or eliminated by providing that the party whose speech is restricted inform the movant of the basis for an objection to the confidentiality designation of particular information and by providing, if the parties do not resolve the dispute, that the movant retain the burden of establishing appropriateness.

A 1992 amendment to Maine Rule of Civil Procedure 26, which is designated Rule 26(g), adds the step of requiring the opposing parties to meet "in a good faith effort to resolve by agreement" any disputes about a motion for a protective order.<sup>183</sup> The Rule requires the movant for the order to certify "that such a conference has

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180. Cf. HARE, *supra* note 9, § 4.10, at 56.

181. HARE, *supra* note 9, § 4.11.

182. In *Baker v. Liggett Group, Inc.*, 132 F.R.D. 123 (D. Mass. 1990), a case involving a cigarette manufacturer's liability, the court issued an umbrella order with the following provision:

If plaintiffs seek to establish that certain documents or information (or categories of documents or information) designated as confidential, previously or in the future, are not entitled to such status and protection, they shall inform counsel for Liggett and Reynolds [the movants of the order] of the basis for their objection. Within twenty days thereafter, if the parties cannot resolve the dispute, Liggett or Reynolds shall, pursuant to the Local Rules of the United States District Court for the District of Massachusetts, bring the matter to the Court for resolution, and bear the burden of establishing that a protective order concerning such documents or information is appropriate.

*Id.* at 127.

183. ME. R. CIV. P. 26(g) reads:

**Discovery Motions: Conference Required.** Before filing a motion for a physical examination pursuant to Rule 35, a motion to determine sufficiency of answers or objections to requests for admission pursuant to Rule 36(a), a motion to compel discovery pursuant to Rule 37(a)(2), or a motion for a protective order pursuant to Rule 26(c), counsel for the moving party shall confer with counsel for the opposing party in a good faith effort to resolve by agreement the issues in dispute. Any such motion when filed shall be accompanied by the certificate of the moving party, subject to the provisions of Rule 11, that such a conference has taken place, or that specified reasonable efforts have been made to hold such a conference, and that counsel have been unable to resolve the dispute.

Rule 26(g) became effective on Feb. 15, 1992. 599 A.2d CV.

taken place, or that specified reasonable efforts have been made to hold such a conference, and that counsel have been unable to resolve the dispute."<sup>184</sup> The Rule, prompted by the frustration felt by judges in resolving time-consuming discovery disputes<sup>185</sup> and adapted from Local Rule 16(e) of the United States District Court for the District of Maine,<sup>186</sup> could exert pressure on all sides not to overreach and could stem overuse of protective orders. Clarifying the Rule's scope to require litigants to make a good faith effort to resolve challenges to confidential designations after an umbrella protective order is entered could also be worthwhile.

### B. To Whom May the Information Be Given?

The third issue the court must address in fashioning a protective order is to whom disclosure of information is prohibited. The least restrictive order might be to prohibit dissemination to competitors of the movant. A more restrictive order would prohibit dissemination to competitors and the media, and the most restrictive order would prohibit dissemination by counsel to all entities and individuals except to co-counsel and support staff.<sup>187</sup>

Witnesses needing to be informed of discovered information for the litigation, typically experts, are usually permitted to receive the information provided that they acknowledge the terms of the order and agree to abide by its terms. However, protective orders often condition dissemination to witnesses on providing notice to the movant and, in some orders, providing the witness's resume.<sup>188</sup> This condition can offer a strategic advantage to opposing parties because they can discern early an opposing party's potential expert

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184. *Id.*

185. Telephone Interview with Peter Mills, member and former chairman of the Discovery Subcommittee, Maine Advisory Committee on Rules of Civil Procedure (Mar. 17, 1992). The Advisory Committee explained that the amendment's "purpose is to reduce the number of contested discovery motions . . ." ME. R. CIV. P. 26(g) advisory committee's note (forthcoming).

186. ME. R. CIV. P. 26(g) advisory committee's note. An amendment to Federal Rule 26(c) requiring a good faith meeting similar to that of the current District of Maine Local Rule has been proposed. The proposed language would add the requirement that a movant for a protective order accompany with the motion "a certificate that the movant in good faith has conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES. PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE AND THE FEDERAL RULES OF EVIDENCE (Aug. 1991).

187. HARE, *supra* note 9, § 4.2. According to Hare, the least restrictive order is common in cases in which a competitor is a party. *Id.*

188. See, e.g., *Poliquin v. Garden Way, Inc.*, No. 90-0245 P (D. Me. Jan. 17, 1992) (protective order); *Bailey & Bailey v. Sears, Roebuck & Co. and Emerson Elec. Co.*, No. CV-88-187 (Me. Sup. Ct., Sag. Cty., Apr. 17, 1990).

witnesses.<sup>189</sup>

A more practical problem with protective orders surfaces in the ability of expert witnesses to comply with such orders. Expert witnesses bound by protective orders have the problematic duty to mentally separate and ignore confidential information they learn in one case when supporting their expert opinion in another case.<sup>190</sup>

A still more difficult problem is the potential incidental disclosure of information by lawyers to witnesses when the lawyers are counsel in similar litigation. For example, Continental Can Co. alleged in *Gavalik v. Continental Can Co.*<sup>191</sup> that a plaintiffs' lawyer was in contempt of a protective order by using confidential, discovered materials from that case to draft a complaint in another case.<sup>192</sup> Judge Alan N. Bloch of the United States District Court for the Western District of Pennsylvania, noting the difficulty that the lawyer preparing a complaint or taking a deposition would have in distinguishing between information known from sources covered by a protective order and information known through other sources, found no contempt. Judge Bloch instead criticized his own protective order as overreaching when it threatened to become a justification "to search the minds of lawyers to see where they got the information to file a complaint somewhere else or to do something somewhere else."<sup>193</sup>

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189. See HARE, *supra* note 9, § 4.8, at 53 (asserting that identifying potential expert witnesses exceeds the scope of Fed. R. Civ. P. 26(b)(4), thus insulating the identity of consulting experts from discovery); *id.* § 4.9, at 55-56 (maintaining that attempts to modify an order reveal strategy to the opposing party).

190. *Id.* § 4.16.

191. 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987).

192. Transcript of Hearing at 1, *Gavalik* (Nos. 81-1519, 82-1995) (W.D. Penn. Sept. 13, 1989).

193. *Id.* at 130. Judge Bloch's more extensive comments were:

These people who have testified today have indicated that certainly they looked at documents, they read depositions. It appears to me certainly some of those, if not all of them, came before the protective order or came from other sources than the Gavalik case discovery.

As any attorney does in preparing a complaint or in taking a deposition, naturally you make yourself familiar as you can with the facts of the situation. You don't necessarily think about where you got knowledge of those facts.

And that's why I said a few minutes ago I'm going to be much more restrictive in the use of this type of protective order in the future, and I mean that.

The purpose of my protective order was not to eliminate other suits in other jurisdictions. That was never the case. You came to me, as many lawyers do in many cases, and said, "These people in their discovery are seeking very confidential information," and I said, and I have said, as I say, in most situations like that, "Well, there's a way we can protect that. We can see to it that they only use this confidential information as they might need it to prosecute this particular case." I didn't mean in that to limit other cases anywhere else. I meant to satisfy you about your worry about confi-

A group often excluded from receiving confidential information is other lawyers involved in similar litigation. This exclusion probably generates the greatest discomfort and disadvantage for the parties in the litigation who are restricted by the order. Plaintiffs' counsel in product liability actions involving the same or similar products are typically prevented by such protective orders from discussing the strategic significance of discovered information or interpreting for others the meaning of discovered information.<sup>194</sup> In addition, counsel in similar litigation are handicapped in their effort to determine that their discovery request was comprehensive and cannot ensure that their opponent has responded completely, consistently,<sup>195</sup> and candidly<sup>196</sup> to discovery requests. Particularly in product liability actions—cases that are often technically demanding—the counsel for the defendant company frequently collaborate in preparing their defenses to similar claims whereas the plaintiffs' counsel can be barred from meaningful collaboration.<sup>197</sup>

These factors might not outweigh a significant public interest or some other good cause against sharing of discovery information should such public interest or good cause be shown. However, no meaningful public interest is served in most cases by restricting the sharing of confidential information among litigants in similar

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dential information.

This case has taught me something, and I've never had a problem—I've issued a lot of these orders in the past, and I've never had a problem like this before, but this case has taught me a lesson, and I'm going to be a lot more restrictive in issuing those kind of orders and I'm going to say to parties who come in with that argument, "That's too bad. You give them the discovery, because the discovery is relevant, and we're not going to give you a protective order."

Because we're not going to get involved in situations like this, where we're trying to search the minds of lawyers to see where they got the information to file a complaint somewhere else or to do something somewhere else. The Courts have enough problems and enough work without getting into those kinds of situations.

And so you will have to suffer the consequences of confidential information getting out because you are involved in a lawsuit, and that's part of what you have to put up with when you have a judicial system such as ours in this country, which provides for the discovery of relevant materials.

*Id.* at 129-30.

194. HARE, *supra* note 9, § 4.15.

195. *Garcia v. Peebles*, 734 S.W.2d 343, 347 (Tex. 1987).

196. Problems with candor in discovery have been noted in complicated litigation. *See, e.g., id.* (citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1341 (5th Cir. 1978); *Seboldt v. Pennsylvania R.R. Co.*, 290 F.2d 296, 299 (3d Cir. 1961); *Gammon v. Clark Equip. Co.*, 686 P.2d 1102, 1107 (Wash. Ct. App. 1984), *aff'd* 707 P.2d 685 (Wash. 1985); *Buehler v. Whalen*, 374 N.E.2d 460, 467 (Ill. 1977); *Rock Island Bank & Trust Co. v. Ford Motor Co.*, 220 N.W.2d 799, 801 (Mich. Ct. App. 1974); and *Bollard v. Volkswagen of America, Inc.*, 56 F.R.D. 569, 583 n.4 (W.D. Mo. 1971)).

197. *Marcus*, *supra* note 143, at 495. *Cf. HARE*, *supra* note 9, § 2.5, at 17.

cases,<sup>198</sup> and many courts have ruled that the risk of sharing discovery information does not constitute by itself good cause for a protective order prohibiting dissemination.<sup>199</sup> Moreover, adherence to the *Seattle Times* decision does not require a restriction on the sharing of information among litigants.<sup>200</sup>

Indeed, the sharing of discovery among litigants in different cases may serve the public interest. It may foster speed and minimize discovery costs in litigation, both of which fall within the goals of procedure embodied in both Maine and Federal Rule of Civil Procedure 1. One federal district court denying a protective order observed that such sharing even reduced the cost of the discovery process to the party from whom the discovery was obtained, namely, the movant for the order.<sup>201</sup> Arthur Miller of Harvard University suggests that the "central inquiry" of a court analyzing the issue of sharing discovery with other litigants should be whether the sharing "will actually promote litigation efficiency and fairness."<sup>202</sup> However, Miller may be contemplating this inquiry in the context of a motion to modify a protective order, not in the fashioning of the original order. Fashioning the original order with adequate notice provisions similar to those governing the dissemination of information to witnesses would better accommodate the restricted litigant and conserve judicial resources without creating an injustice to the party from whom discovery was obtained.

The *Manual for Complex Litigation, Second* recommends sharing such discovery material,<sup>203</sup> concluding that "substantial savings in time and expense may often be achieved."<sup>204</sup> The *Manual* even raises the possibility that counsel in some cases "may be required to seek access to such materials before undertaking new discovery" because Federal Rule 26(b)(1)(i) empowers the court to limit discovery when the information is obtainable from a "more convenient, less burdensome, or less expensive" source.<sup>205</sup> When a protective order in another case limits such disclosure, the *Manual* suggests that the judges in the two cases consult toward accommodating a

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198. See Marcus, *supra* note 143, at 496.

199. See *Wauchop v. Domino's Pizza, Inc.*, 138 F.R.D. 539, 546 (N.D. Ind. 1991).

200. See Marcus, *supra* note 143, at 495.

201. *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982).

202. Miller, *supra* note 16, at 497.

203. *MANUAL FOR COMPLEX LITIGATION, SECOND*, § 21.431, at 53 and n.61 (1985).

204. *Id.* § 21.431, at 53.

205. *Id.* The exact text of FED. R. CIV. P. 26(b)(1)(i) reads:

The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from another source that is more convenient, less burdensome, or less expensive . . . .



disclosure.<sup>206</sup>

A potential concern for the court in the sharing of discovery is the party who wants to profit commercially from the sale of the discovered information to other litigants. Miller suggests that a court should be "particularly hesitant" about commercialization of discovered information, but he acknowledges that the recovery by the party of its cost of obtaining the discovered information may be appropriate through such sale of the information.<sup>207</sup> So long as the potential sale of the discovered information is not the purpose for engaging in the discovery, the court's concern about commercialization does not invalidate the legitimacy of "sharing" discovery expenses. Resolution of these two issues may lie in a court's allowing a party a "controlled recovery" of some discovery costs.<sup>208</sup>

#### V. THE PUBLIC INTEREST IN DISCOVERED INFORMATION

The issue of public access to information during pretrial discovery is not as difficult as the issue of a right of a party or counsel in the litigation to disseminate it. In *Seattle Times* the Court said that the public's interest in discovered information is not a constitutional or a common law restriction on the court's power to enter a pretrial protective order.<sup>209</sup> As the Court noted, "[P]retrial depositions and interrogatories are not public components of a civil trial. . . . [R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."<sup>210</sup>

Clearly, under *Seattle Times*, the public does not have a pretrial right of access to most types of information during discovery. However, the hypothetical situation in which particular information produced in discovery could be "so significant to the process of self-governance" that the court would violate the First Amendment if it imposed secrecy has not been discarded by commentators.<sup>211</sup> The potential remains that some right of public access to narrow types of discovery material might be recognized, but that hypothetical remains untested.

Frequently, litigants agree to confidentiality of discovered information and settlement amounts in pretrial settlement agreements.

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206. MANUAL FOR COMPLEX LITIGATION. SECOND, § 21.432, at 53-54.

207. Miller, *supra* note 16, at 497-98 & n.342.

208. Marcus, *supra* note 143, at 499.

209. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 33.

210. *Id.* (citations omitted). The First Circuit noted the *Seattle Times* finding in *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), in which it said: "Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants." *Id.* at 780.

211. Anne E. Cohen, Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813, 1833 (1984). Cohen's hypothetical was recently recognized by Arthur Miller as conceivable. Miller, *supra* note 16, at 441.

Considering the absence of a recognized public right of access to such information, the confidentiality provided by settlement agreements between private parties usually does not invoke constitutional or common law claims.<sup>212</sup> However, greater concerns about the public interest arise in cases in which the parties involve governmental entities or individuals, in which the agreement is by a court-approved class settlement, or in which the court held trial-like proceedings to promote or design the settlement.<sup>213</sup>

The widespread use of protective orders when issues of significant interest to the public are involved—and a general lack of success in contesting protective orders—has recently prompted legislation or rule changes in Virginia, Florida, and Texas.<sup>214</sup> To the chagrin of corporate counsel, plaintiffs' lawyers, with the support of the media, have campaigned in these states against practices involving secrecy in the management of discovery materials.<sup>215</sup> Their successes are a product of public concern about the judicial system's protection of parties' commercial interests at the expense of public health and safety and of a general predilection against secrecy in governmental functions, irrespective of their judicial context.<sup>216</sup>

Virginia has restricted the use of protective orders that prevent the sharing of information among litigants in similar actions. Protective orders preventing dissemination of discovery information in personal injury actions or actions for wrongful death cannot prohibit an attorney from "sharing such material or information with an attorney involved in a similar or related matter . . ." Notice and an opportunity for a hearing must be given to affected parties, and the receiving attorney must agree in writing to be bound by the protective order.<sup>217</sup>

Florida has imposed broader limitations on protective orders. The Florida Sunshine in Litigation Act prohibits courts from restricting

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212. See Marcus, *supra* note 143, at 502-05; see also Miller, *supra* note 16, at 484-87.

213. See Marcus, *supra* note 143, at 505 n.285; see also Miller, *supra* note 16, at 486-87.

214. Nicholas Wittner and Richard Campbell, *Protective Orders Under Attack*, AM. CORP. COUNS. 15 (Winter 1990).

215. Miller, *supra* note 16, at 442-45. See, e.g., *ATLA Challenges Secrecy Order for Defective Heart Valves*, ATLA ADVOC., May 1990, at 1; SOCIETY OF PROFESSIONAL JOURNALISTS AND ASSOCIATION OF TRIAL LAWYERS OF AMERICA, KEEPING SECRETS JUSTICE ON TRIAL 9, 15-16 (1990).

216. See *ATLA Challenges Secrecy Order for Defective Heart Valves*, ATLA ADVOC., May 1990, at 1; Nicholas Wittner and Richard Campbell, *Protective Orders Under Attack*, AM. CORP. COUNS. 15 (Winter 1990). For a critical discussion of the movement to restrict the use of protective orders, see Miller, *supra* note 16, at 441-45.

217. VA. CODE ANN. § 8.01-420.01 (Michie Supp. 1990). For a short discussion of the Virginia law, see Alan Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure; Where Does the Balance Lie?*, 24 U RICH L. REV 109, 122-23 (1989).

disclosure of information or materials "concerning a public hazard" or "useful to members of the public in protecting themselves from injury which may result from the public hazard . . . ." In addition, the Act gives standing to "any substantially affected person, including but not limited to representatives of the news media" to contest an order or agreement restricting dissemination.<sup>218</sup>

Texas moved in the same direction by changing its Rules of Civil Procedure. The Supreme Court of Texas amended its rules to recognize a presumption of public access to court records—defined in the rules to include unfiled discovery materials and settlement agreements—"concerning matters that have a probable adverse effect upon the general public health or safety . . . ." <sup>219</sup> Rule 76a also requires a showing of "a specific, serious and substantial interest"—outweighing the public interest—to seal such court records and, significantly, a finding that there is "no less restrictive means" to protect the private interest.<sup>220</sup> The Rule gives third parties the right to intervene in determining the confidentiality of records.<sup>221</sup>

A number of courts have recognized a common law right of public access to records filed with the court,<sup>222</sup> but in *Anderson v. Cryovac, Inc.*<sup>223</sup> the First Circuit declined to extend that right to discovery information filed with the court.<sup>224</sup> This interpretation is compatible with the Supreme Court's view in *Nixon v. Warner Communications, Inc.*<sup>225</sup> The Supreme Court in *Nixon* acknowledged "a general right to inspect and copy public records and documents, including judicial records and documents,"<sup>226</sup> but the Court noted that the right was not absolute and could be subordinated to other concerns at the discretion of the trial court.<sup>227</sup>

However, a statutory presumption of public access to discovered information filed with the court has been discerned under the Federal Rules of Civil Procedure. Rule 5(d) requires the filing of all papers after the complaint but allows the court on its own motion not to require filing.<sup>228</sup> The Advisory Committee's Notes to Rule 5(d)

218. FLA STAT. ANN. § 69.081(6) (West Supp. 1991).

219. TEX. R. CIV. P. 76a(2)(c).

220. TEX. R. CIV. P. 76a(1).

221. TEX. R. CIV. P. 76a(4).

222. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 & nn.7 & 8 (1978), provides a summary of courts that have recognized this common law right.

223. 805 F.2d 1 (1st Cir. 1986).

224. *Id.* at 13.

225. 435 U.S. 589 (1978).

226. *Id.* at 597.

227. *Id.* at 598-99.

228. FED. R. CIV. P. 5(d) reads:

All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination and interrogatories, requests for

observe that the Committee "first proposed that discovery materials not be filed unless on order of the court or for use in the proceedings. But such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally."<sup>229</sup> In *In re Agent Orange Product Liability Litigation*<sup>230</sup> the Second Circuit interpreted Rule 5(d), paired with Rule 26(c), to "provide a statutory right of access" by class action litigants and the general public to discovery materials filed with the court. In *Hawley v. Hall*<sup>231</sup> the United States District Court for the District of Nevada similarly interpreted Rule 5(d) to allow a presumption of public access to pretrial documents filed with the court unless a protective order is issued. The *Hawley* court consequently adopted a policy of requiring the filing of discovery documents on request of a non-party in the absence of a protective order restricting access.<sup>232</sup>

Rule 5(d) is not, however, a good indicator of federal district courts' operations. Many district courts have adopted local rules dispensing with the filing requirements except when needed in connection with motions.<sup>233</sup> Even when filing is made, the court can seal the records<sup>234</sup> at its discretion, which is a lesser standard than the good cause standard for restricting the right to dissemination.<sup>235</sup>

The policy of filing discovery unless otherwise ordered and the Notes explaining that policy in Federal Rule 5(d) are absent from the Maine Rules of Civil Procedure. Maine Rule 5(d) refers to Rule 26(f), which says that discovery "shall not be filed with the court" unless "otherwise ordered."<sup>236</sup> Maine Rules 5(d) and 26(f), taken together, do not suggest a statutory presumption of public access to pretrial discovery that is filed. However, those rare instances in which discovery is filed in Maine may coincide with some use of the discovered information in a court proceeding or as the basis for a ruling, possibly creating a right of public access.

documents, requests for admission, and answers and responses thereto not be filed unless on order of the court or for use in the proceeding.

229. FED. R. CIV. P. 5, advisory committee's note, 1980 Amendment, Subdivision (d).

230. 821 F.2d 139, 146 (2d Cir. 1987).

231. 131 F.R.D. 578 (D. Nev. 1990).

232. *Id.* at 583.

233. See Marcus, *supra* note 20, at 13-14 & nn.61-62 (1983).

234. See *id.*; *Seattle Times Co. v. Rhinehart*, 467 U.S. at 33 n.19; *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978), *aff'g* *United States v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976).

235. *Nixon v. Warner Communications, Inc.*, 435 U.S. at 598.

236. The text of ME. R. CIV. P. 26(f)(1) begins: "Unless otherwise ordered by the court, or necessary for use in the proceeding, notices, written questions and transcripts of depositions, interrogatories, requests pursuant to Rules 34 and 36, and answers, objections and responses thereto shall be served upon other parties but shall not be filed with the court."

The use of discovered information as the basis for a court decision or in a court proceeding, other than a ruling on a discovery motion<sup>237</sup> creates a common law presumption of public access. For instance, in *Joy v. North*<sup>238</sup> the Second Circuit characterized a document produced through discovery which was submitted to support a motion for summary judgment as "no longer a private document. . . . [but] part of a court record. Since it is the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny."<sup>239</sup> The Seventh Circuit reached the same conclusion in *In re Continental Illinois Securities Litigation*.<sup>240</sup>

Whether the presumption of public access to civil trials rises to a First Amendment right has not been decided by the Supreme Court. In *Globe Newspaper Co. v. Superior Court*<sup>241</sup> the Supreme Court recognized a constitutional right of public access to criminal proceedings that can be denied only on a showing of a compelling government interest and by narrowly tailoring the denial to serve that interest.<sup>242</sup> Several circuits have relied upon many of the same reasons cited by the Court in *Globe Newspaper* to discern a right of public access, perhaps even a First Amendment right, to civil trials<sup>243</sup>—insuring quality, honesty, and respect for the legal system, and adhering to a tradition of public access.<sup>244</sup> Consequently, federal appeals courts have imposed a *Globe*-like test on requests to limit the public's access to discovered information admitted into evidence.<sup>245</sup> Public access to a trial should be understood to include the right to inspect and copy the judicial record, including the tran-

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237. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11-12 (1st Cir. 1987). The First Circuit said that discovered information submitted to the court for a ruling on a discovery motion does not create a right of public access. The court was explicit that "there is no right of public access to documents considered in civil discovery motions" because of a traditional lack of openness of the discovery process to the public and a "fundamental" difference between proceedings on discovery motions and other "proceedings to which the courts have recognized a public right of access." *Id.*

238. 692 F.2d 880 (2d Cir. 1982).

239. *Id.* at 894.

240. 732 F.2d at 1302, 1312-13 (7th Cir. 1984).

241. 457 U.S. 596 (1982).

242. *Id.* at 606-07.

243. See *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1178-79 (6th Cir. 1983).

244. See *supra* note 243.

245. *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071, 1073 (3d Cir. 1984); *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1313 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983); *In re San Juan Star Co.*, 662 F.2d 108, 116 (1st Cir. 1981). See also *Kehm v. Proctor & Gamble Mfg. Co.*, 580 F. Supp. 913, 916-17 n.4 (N.D. Iowa 1983), *aff'd*, 724 F.2d 630 (8th Cir. 1984) (finding a substantial interest and the lack of less restrictive alternatives to the protective order).

script, as well as the ability to attend open court proceedings.<sup>246</sup>

Admission of discovered information as evidence, absent an attempt to condition admission on confidentiality, has been construed to constitute a publication of the information and a waiver of confidentiality interests preserved by a pretrial protective order unless the pre-trial order specifically applies.<sup>247</sup> A party wishing to preserve the confidentiality of discovered information, therefore, should move to condition any use or admission of confidential information on its being sealed. Should the court be unwilling to seal those parts of the record, the party might attempt to preserve the confidentiality of the documents themselves—even those going to a jury—without sealing the information actually read into the record in a hearing or trial.<sup>248</sup>

The standard to deny public access is a higher one than good cause for a pretrial protective order<sup>249</sup> and, therefore, should require an analysis distinct from that required to enter the pretrial order.<sup>250</sup> A major justification for pretrial protective orders, the litigant's ability in discovery to obtain information from a party that will not be made public in a trial,<sup>251</sup> is lacking in the consideration of orders limiting public access to information that has been submitted as evidence. A trade secret still should qualify under this post-trial test for protection from dissemination.<sup>252</sup> However, a mere private interest in secrecy may be overcome if that "secret" has been published in an open court,<sup>253</sup> although that fact may not be conclusive. Information that merely causes a corporation embarrassment or bad public relations, both of which have been held to be insufficient justification for a pretrial protective order, clearly should not warrant a

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246. See, e.g., *Littlejohn v. BIC Corp.*, 851 F.2d 673, 678 (3d Cir. 1988).

247. *Id.* at 680; *National Polymer Prods. v. Borg-Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981). The Third Circuit acknowledged a common law and First Amendment right of public access to civil trials in *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984).

248. See, e.g., *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1326-27 (D.C. Cir. 1985).

249. See *supra* notes 76-82 and accompanying text.

250. The court in *Kehm v. Proctor & Gamble Mfg. Co.*, 580 F. Supp. 913 (N.D. Iowa 1983), evidently engaged in such a re-analysis. *Id.* at 916 n.4.

251. *National Polymer Prods. v. Borg-Warner Corp.*, 641 F.2d at 424.

252. *Publiker Indus., Inc. v. Cohen*, 733 F.2d at 1071. Maine Rule of Evidence 507 grants a privilege for a witness or party possessing a trade secret and instructs the court to take "protective measures" to preserve that privilege when disclosure to the court is required. ME. R. EVID 507.

253. "A serious question exists as to whether sealing transcripts of proceedings held in open court or exhibits displayed in open court is ever justifiable. . . . It suffices to note that once an exhibit is publicly displayed, the interest in subsequently denying access to it necessarily will be diminished." *United States v. Mitchell*, 551 F.2d 1252, 1260-61 (D.C. Cir. 1976), *aff'd sub. nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978). See *Littlejohn v. BIC Corp.*, 851 F.2d 673, 685 (3d Cir. 1988).

post-trial protective order.

## VI. THE POST-TRIAL RIGHTS OF PARTICIPANTS

Following the admission of discovered information in evidence in open court, the First Amendment right of litigants and witnesses to disseminate the information usually remains subject to the pretrial protective order. Yet, by publication in open court, the judiciary has lost some degree of control over the information. Reimposing control over the published information raises a "specter of government censorship" that the Supreme Court did not find in *Seattle Times* because of uninterrupted judicial control over the discovered information in that case.<sup>254</sup> After publication in open court, imposing a prior restraint on the speech of the participants in the litigation restricts their First Amendment right to disseminate beyond that of non-participants. However, as officers of the court, counsel may be constrained to comply with a pretrial protective order that requires the return of all copies of discovered information.<sup>255</sup> Other participants in the litigation, such as expert witnesses, seemingly also would be bound by an order to which they had agreed as a condition of receiving the information.

The Third Circuit case of *Littlejohn v. BIC Corp.*<sup>256</sup> supports an interpretation that the court's continued restriction on information published at trial imposes a greater burden on the First Amendment interest of the participants than does restriction on dissemination of pretrial information. In *Littlejohn* the plaintiff's counsel was held not in contempt of a pretrial protective order for retaining and disseminating discovered information after its publication in trial despite the order's terms that the information be returned to the defendant company without dissemination.<sup>257</sup> "If the public had a right of access to the deposition testimony and exhibits admitted into evidence, then [the attorney] did no more than exercise this right in retaining copies of these documents."<sup>258</sup> The Third Circuit, although concerned about the counsel's violation as an officer of the court, noted that the protective order did not explicitly apply to deposition testimony read into the record and exhibits admitted into evidence.<sup>259</sup> The tone of the *Littlejohn* court, however, suggests

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254. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 32.

255. See *Littlejohn v. BIC Corp.*, 851 F.2d at 684 ("As an officer of the court, [Attorney] Kardos bound himself to conscientiously adhere to these terms [of the protective order].").

256. 851 F.2d 673 (3d Cir. 1988).

257. *Id.* at 686.

258. *Id.* at 684.

259. *Littlejohn v. BIC Corp.*, 851 F.2d at 686 (distinguishing the protective order at issue from that in *Kehm v. Proctor & Gamble Mfg. Co.*, 580 F. Supp. 913 (N.D. Iowa 1983), which had explicitly applied to material read into the record and admitted into evidence).

that an attorney would be unwise to act on his First Amendment right in the face of a standing pretrial protective order, irrespective of publication in open court.<sup>260</sup> Prudence demands a motion to modify the protective order.

The post-trial restriction also has a great potential to be misapplied to information obtained independently of the proceeding rather than solely applied to information obtained through the proceeding. In *Poliquin v. Garden Way, Inc.*,<sup>261</sup> a product liability suit involving a chipper/shredder,<sup>262</sup> the United States District Court for the District of Maine entered an umbrella protective order restricting dissemination of material designated as confidential by the defendant company and requiring the destruction of the documents within 90 days after the completion of the litigation.<sup>263</sup> The order, currently on appeal to the First Circuit, was granted on the basis that the information involved "trade secrets and other confidential information."<sup>264</sup> Included in the confidential designation were the identities of people who had claimed injuries from chipper/shredders. As a result, the plaintiffs' depositions of people who had claimed injuries were included within the documents to be destroyed after the trial.<sup>265</sup> The district court denied a request to modify the order and instead ordered that Garden Way's counsel could remove all discovery documentation in the court's file, and the court further sealed "all testimony and arguments made during the trial" dealing with material subject to the protective order.<sup>266</sup>

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260. "Scrupulous compliance with court discovery orders is particularly important because our system of discovery relies on the cooperation and integrity of attorneys operating within the guidelines provided by the Federal Rules of Civil Procedure and the provisions of any protective order." *Id.* at 684.

261. *Poliquin v. Garden Way, Inc.*, No. 90-0245 P (D. Me. Jan. 17, 1992) (protective order).

262. The Super Tomahawk chipper/shredder allegedly caused an injury requiring amputation of Mr. Poliquin's hand. Poliquin alleged improper design and failure to warn. Mem. of Att'y Maurice Libner in Supp. of Mot. for Relief from Protective Order, *Poliquin v. Garden Way, Inc.* (D. Me. Feb. 18, 1992) (No. 90-0245 P).

263. *Poliquin v. Garden Way, Inc.*, No. 90-0245 P (D. Me. Jan. 17, 1992) (protective order). The order identified some categories of documents specifically, but also allowed the defendant to designate future documents as confidential. *Id.* at 2.

264. *Id.* at 1. *Garden Way, Inc.*, the defendant company which manufactured the chipper/shredder alleged to have injured the plaintiffs, argued that dissemination of the information "could well be detrimental to its competitive edge" and that "[t]here does not appear to be any legitimate purpose for permitting this information to be used elsewhere outside the context of this litigation." Mem. of Law in Supp. of Mot. for Protective Order, *Poliquin v. Garden Way, Inc.* (D. Me. May 17, 1991) (No. 90-0245 P). A supporting affidavit from a *Garden Way* vice president was filed with the court but was confidential. Letter from Maurice A. Libner, plaintiff's attorney (Mar 18, 1992) (on file with the author).

265. Pls.' Mem. in Supp. of Mot. for Determination of Confidentiality, *Poliquin v. Garden Way, Inc.* (D. Me. Nov. 25, 1991) (No. 90-0245 P).

266. *Poliquin v. Garden Way, Inc.*, No. 90-0245 P (D. Me. Jan. 17, 1992) (protective order).



In *Seattle Times* the Supreme Court explicitly based its holding on the fact that the protective order was placed on information not obtained from sources "independent of the court's processes."<sup>267</sup> By contrast, the information in the *Poliquin* depositions was obtained by the plaintiffs' counsel from sources other than the company and without compulsion by the court. A parallel exists with the case of *Butterworth v. Smith*,<sup>268</sup> in which the Supreme Court prohibited Florida from silencing a grand jury witness who wanted to publish his testimony. The Court emphasized that the information was in his possession before he testified before the grand jury.<sup>269</sup> Similarly, in *International Products Corp. v. Koons*<sup>270</sup> the Second Circuit modified a protective order to allow a party to disseminate information he possessed before giving a deposition covered by the protective order. In instances in which the counsel for *Poliquin* knew, prior to discovery, the identities of the other persons claiming similar injuries, the depositions of those individuals clearly should have been outside the protective order. Neither *Butterworth* nor *Koons* is directly on point, however, with regard to those instances in which information in the depositions was the product of learning the identities of the third parties through discovery.

The more attenuated the relationship between the confidential information obtained from the defendant and the information developed independently by the restricted litigant, the greater the First Amendment interest that may be involved. Under these circumstances, the justifications for recognizing only a limited First Amendment interest may be diminished. First, the information at issue may not be proprietary and confidential to the defendant. Second, the protective order approaches a classic prior restraint if it restricts dissemination of information obtained less through the court process than "through means independent of the court process."<sup>271</sup> The question raised by *Poliquin* is whether gaining the identification of information sources through compelled discovery—the identification having been designated confidential—necessarily makes all subsequent information obtained through those sources equally confidential. Even if the answer is yes, practicality and efficiency should demand that litigants in similar litigation not be required to incur the expense and effort of redeveloping the identical information.

The result of the *Poliquin* order is that the third parties deposed in that litigation can expect requests to give basically the same dep-

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tive order).

267. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 34.

268. 494 U.S. 624 (1990).

269. *Id.* at 635.

270. 325 F.2d 403 (2d Cir. 1963).

271. *Seattle Times Co. v. Rhinehart*, 467 U.S. at 33-34.

osition to each future plaintiff in similar litigation on the company's chipper/shredders. Indeed, counsel for Poliquin reported that the taking of the depositions was costly to the plaintiff and that many of the people deposed gave their depositions reluctantly and with considerable personal difficulty.<sup>272</sup>

Significantly, the counsel for Poliquin became plaintiff's co-counsel in a very similar claim in New York State,<sup>273</sup> but the district court denied his motion for relief from the protective order.<sup>274</sup> Sharing of discovered information would avoid the expense and delay to the plaintiffs—and to some extent the defendant company—of repeating discovery. Imposing confidentiality puts the plaintiff's attorney in the bizarre position of knowing information that he cannot share or even discuss with co-counsel.<sup>275</sup> Imposing a repetition of costs and difficulties on future litigants and the third parties is contrary to the admonition of Federal Rule of Civil Procedure 1 to construe the rules to promote the "just, speedy, and inexpensive determination of every action."

## VII. CONCLUSION

The constitutional legitimacy of wide-ranging Rule 26(c) orders to protect against dissemination of trade secrets and other commercially valuable information of parties is beyond dispute after *Seattle Times*. However, the pressure on overtaxed judicial resources, the admonition in Maine Rule of Civil Procedure 26(c) to protect parties and witnesses from harm from the discovery process, and a tendency to enter umbrella orders create a very real potential for overuse of the court's authority. This potential should be taken seri-

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272. Pls.' Mem. in Supp. of Mot. for Determination of Confidentiality, *Poliquin v. Garden Way, Inc.* (D. Me. Nov. 25, 1991) (No. 90-0245 P).

273. Mem. of Att'y Maurice Libner in Supp. of Mot. for Relief from Protective Order, *Poliquin v. Garden Way, Inc.* (D. Me. Feb. 18, 1992) (No. 90-0245 P).

274. *Poliquin v. Garden Way, Inc.*, No. 90-0245 P (D. Me. Mar. 17, 1992) (order denying motion for relief from protective order).

275. Daniel McIntyre, counsel for members of the United Steelworkers of America in three suits against Continental Can Co., experienced a similar problem during litigation. The cases against Continental Can alleged that the company violated the Employee Retirement Income Security Act by laying off employees before they qualified for pensions. McIntyre obtained highly significant documents through discovery in *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). Because of a protective order issued by the federal court, McIntyre could not share the documents with his co-counsel in *Gavalik v. Continental Can Co.*, 812 F.2d 834 (3d Cir. 1987), *cert. denied*, 484 U.S. 979 (1987), a case involving the same issues. The documents provided substantial support for the plaintiffs' claim that the company was trying to control pension costs through layoffs and plant closing, according to McIntyre. His co-counsel eventually obtained the documents because they were filed with and released by the Los Angeles federal court's clerk as not sealed. Telephone Interview with Daniel McIntyre, plaintiff's counsel (Apr. 21, 1992). The third of the three actions against Continental Can Co. was *McLendon v. Continental Can Co.*, 908 F.2d 1171 (3d Cir. 1990).

ously, given that trial courts have been granted broad latitude to issue such orders and there is little likelihood of appellate review.

Although the limited First Amendment interests of parties and witnesses in this regard are difficult to measure against the commercial and privacy values of litigants, the criteria for issuing protective orders exist to require a balancing of interests. In particular, conscientiousness requires a specific showing of a reasonable likelihood of injury from dissemination and a determination not to allow conclusory statements to suffice. Once an adequate showing of good cause is made, the protective order can be fashioned to take into consideration the disadvantages of limitations on sharing of discovered information among other litigants in similar actions and the unconscious burden shifting that may occur in the fashioning of umbrella protective orders.

Therefore, the following issues should be considered in determining whether to grant a protective order:

(1) What categories of information are being claimed as confidential, and are they equally confidential?

(2) Has the movant supported its claims with particularized showings of a reasonable likelihood of serious or substantial injury?

(3) Has the information already been disclosed to others; has the movant made efforts to maintain the confidentiality of the information; and could the information be developed independently at little expense?

(4) Is there an alternative and less restrictive means to prevent the claimed harm?

(5) What are the interests of the parties opposing the protective order, the interests of the court system, and the interests of the public, and can they be accommodated by the fashioning of the protective order?

(6) Is the magnitude of the discovery so broad that the court may manage the issue of confidentiality only by an umbrella order?

(7) If an umbrella order is warranted, has the burden been maintained on the movant to justify future designations of confidentiality?

(8) Will the protective order restrict dissemination of the information itself, restrict comment on the information, or restrict even disclosure of the fact that such information exists?

(9) To whom will dissemination be prohibited: competitors, the public, other litigants, the client?

(10) What requirements will be imposed on witnesses before they may receive information?

(11) Is the protective order specific, so that it may be easily obeyed?

Finally, a constitutional right of public access to judicial proceedings requires that courts engage in a separate, heightened First

Amendment analysis before sealing court records from the public.<sup>276</sup> To overuse protective orders is to ignore valid public interests and spark attempts to limit by statute the authority of the courts to preserve confidentiality interests.

*Thomas C. Bradley*

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276. See *supra* text accompanying notes 241-51.

