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THE PROTECTIVE ORDER IN PRODUCTS LIABILITY LITIGATION: SAFEGUARD OR MISNOMER?^{†*}

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I. INTRODUCTION

The Advisory Committee that drafted the Rules of Civil Procedure during the 1930s could not have envisioned the explosion of complex products liability and mass tort litigation that has occurred in the federal courts over the past two to three decades.¹ Products liability as it now exists was not conceived until the mid-sixties, well after the Federal Rules of Civil Procedure effected a "revolution in litigation by broadening the availability of discovery."² It is not surprising, then, that application of the Rules of Civil Procedure to products liability litigation as we now know it often produces results that are wholly inconsistent with the paramount goal of the Federal Rules of Civil Procedure as articulated in Rule 1: "secur[ing] the just, speedy, and inexpensive determination of every action."³

Rule 26(c) of the Federal Rules empowers the courts to enter protective orders that limit the dissemination of proprietary information produced in discovery.⁴ These orders have proven to be an effective means of expediting the discovery process by reducing the need for time-consuming discovery disputes that are wholly collateral to the underlying issues of the case. Courts can enter protective orders in products liability cases on a motion by a party or by a person from whom discovery is sought. Where a protective order

¹ See Brazil, *Improving Judicial Controls over the Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. B. FOUND. RES. J. 875; Peckham, *The Federal Judge as a Case Manager: The New Role In Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770 (1981). In 1985 alone, individuals brought 160,660 civil lawsuits in the federal district courts. Of those, 29,152 cases were personal injury lawsuits based on diversity jurisdiction. WALT'S FEDERAL STATE COURT DIRECTORY 135 (1987). Between 1975 and 1985, the number of products liability suits pending in the federal district courts jumped from 2768 to 22,111. STATISTICAL ABSTRACT OF THE UNITED STATES (107th ed. 1986).

² Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 6 (1983).

³ FED. R. CIV. P. 1; see also *Foman v. Davis*, 371 U.S. 178, 181-82 (1962).

⁴ Protective orders typically limit disclosure of information covered in the order to the parties involved in the lawsuit and to their experts. They also frequently limit the use of the information to the same case, requiring its return or destruction at the conclusion of the litigation. For a more detailed discussion of "umbrella" protective orders of the type frequently used in complex products liability cases, see *infra* text accompanying notes 66-73. See also W. SCHWARZER, *MANAGING ANTITRUST & OTHER COMPLEX LITIGATION* 235-37, 311-15, 405-10 (1982) (reproducing protective orders entered in several recent cases).

has been entered pursuant to stipulation rather than on motion, as is most frequently the case in the products liability context, great strides are made toward securing the relatively speedy and inexpensive determination of lawsuits.

In addition to furthering Rule 1 interests, protective orders protect anyone who must respond to a discovery request, including plaintiffs, defendants and non-parties, from invasion of their privacy by other would-be plaintiffs, the public and the press. Under the rule, the "good cause" requirement for entry of a protective order is satisfied where the movant is able to show that the material sought to be protected contains "trade secrets," "confidential research" or "commercial information." The movant who seeks a protective order must set forth specific examples of the competitive harm that will be suffered without the order. Defendants in cases involving mass-marketed consumer goods, in particular, face situations in which the harm they seek to avoid through a protective order does not, standing alone, rise to the level of "good cause" within the meaning of Rule 26(c),⁵ but nonetheless brings the threat of legitimate business losses. For example, the dissemination of information about older products may not only spread trade secrets, but also may damage the reputation of an entire product line. This occurs regardless of the lack of similarity between new and old products, particularly through proliferation of the information in the hands of the organized plaintiffs' bar. With increasing frequency, such defendants find themselves pitted against syndicates of contingency fee lawyers who have joined together to exchange information in proceedings then pending or later initiated,⁶ self-proclaimed public interest organizations,⁷ private industry lobby groups,⁸ and the investigative press.⁹

The number and variety of potential adversaries may make the ramifications of unfettered dissemination of discovery information

⁵ For the text of Rule 26(c), see *infra* text accompanying note 27.

⁶ *E.g.*, Association of Trial Lawyers of America, which provides members with research assistance in handling plaintiffs' medical malpractice and products liability cases.

⁷ *E.g.*, Trial Lawyers for Public Justice, Public Citizen Litigation Group, and the Center for Auto Safety.

⁸ *E.g.*, Insurance Institute for Highway Safety.

⁹ *E.g.*, *Sixty Minutes*, *Prime Time Live*, etc. The Association of Trial Lawyers of America has urged legislative modification of the protective order provisions now contained in federal and state rules of civil procedure. Legislation that limits the effectiveness of protective orders was passed in Virginia. VA. CODE ANN. § 8.01-420.01 (1989). Similar legislation was narrowly defeated in Maryland and Florida and has been discussed on the federal level. The Texas Supreme Court, pursuant to its rule making authority, enacted a rule limiting protective orders in April, 1990.

overwhelming. A single lawsuit can place enormous amounts of wholly proprietary information in the hands of a lawyer whose primary mission in the litigation may be to use that information for purposes entirely unrelated to preparing the case at hand for trial. That lawyer may reap tremendous financial and other benefits, such as referral networks or leads to other information, by enlisting others in review and republication of proprietary information. To the extent that such information makes its way into the hands of adversaries, the producing party will invariably be exposed to adverse publicity that will taint juries in future cases involving the same or other products.

The uncontrolled dissemination of discovery information among an ill-defined and untraceable amalgam of adversaries may also disperse trade secrets and other confidential information. As a result, the party's privacy interest in that information will forever be lost. Competitors will then have ready access to the company's internal decision-making procedures and to other highly sensitive information. In extraordinary cases, the viability of a product, a company, or an entire industry may well be jeopardized.¹⁰

Although the interests of products liability defendants in protecting proprietary information are indisputably valid, they recently have been vigorously attacked by members of the plaintiffs' bar seeking the unrestricted sale of discovery information at a profit.¹¹ A series of recent decisions, based variously on constitutional, common law, and statutory theories, perpetuate the false assumption that somehow there exists a general public "right" of access to obtain, or a plaintiff's "right" to disseminate, discovery materials produced in litigation and subject to a valid protective order. Commentators and practitioners once thought that the United States Supreme Court's decision in *Seattle Times v. Rhinehart* debunked this myth.¹² Despite *Seattle Times*, however, the trend is to recognize the right of access and the right to disseminate. This trend, combined with the procedural impediments to obtaining and enforcing protective orders, has subverted and left open to considerable doubt the practical value of the protective order as a meaningful form of protection for products liability defendants. Although many com-

¹⁰ As, for example, with the football helmet, the intrauterine device (IUD), and the all-terrain vehicle.

¹¹ Legislation introduced in several states would alter the rules through which protective orders are issued. *Court Approved Protective Orders, Why They Are Needed*, 57 DEF. COUNS. J. 89, 92 (1990).

¹² 467 U.S. 20 (1984).

mentators seem to have welcomed the trend,¹³ this article argues against it on the basis that it lacks support in the law, accords insufficient weight to the legitimate privacy interests of corporate defendants, and is at odds with the overriding directive of Rule 1.

II. THE APPLICABLE FEDERAL RULES¹⁴

Although most discussions of protective orders begin with Rule 26(c), which sets forth the standards for the issuance of such orders,¹⁵ the more appropriate starting point for analysis is actually Rule 1, because Rule 1 sets the tone by which all other pertinent Rules are to be interpreted.¹⁶ As previously noted, Rule 1 instructs that the Rules shall be construed "to secure the just, speedy, and inexpensive determination of every action." Also important is Rule 11, which, significantly, was amended in 1983 as part of a major revision to the Rules expressly designed to curb expensive litigation and expand the role of the federal courts in managing discovery.¹⁷ Rule 11, as amended, applies to all "papers," including formal discovery responses.¹⁸ It imposes on the lawyer signing those papers

¹³ See, e.g., Note, *Protective Orders and the Use of Discovery Materials Following Seattle Times*, 71 MINN. L. REV. 171 (1986) [hereinafter Note, *Use of Discovery Materials*]; Comment, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order*, 60 N.Y.U. L. REV. 1137 (1985) [hereinafter Comment, *Mass Products Liability Litigation*]; Note, *Seattle Times v. Rhinehart: Making "Good Cause" a Good Standard for Limits on Dissemination of Discovered Information*, 47 U. PITT. L. REV. 547 (1986) [hereinafter Note, "Good Cause"]; Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 WIS. L. REV. 1055 (1985) [hereinafter Note, *Effect on Discovery Sharing*]. But see Marcus, *supra* note 2 (pre-*Seattle Times* article arguing against recognition of broad right of access or dissemination).

¹⁴ Because the Federal Rules of Civil Procedure only apply in federal court and many products liability claims are brought in state court, the Federal Rules may not always be applicable. The analysis in both cases is similar, however, as most states have adopted discovery provisions similar to those in the Federal Rules. See F. JAMES & G. HAZARD, *CIVIL PROCEDURE* § 5.2, at 230 (1985).

¹⁵ See, e.g., Note, *Nonparty Access to Discovery Materials in Federal Courts*, 94 HARV. L. REV. 1085 (1981); Note, *First Amendment Interests in Trade Secrets, Private Materials, and Confidential Information: The Use of Protective Orders in Defamation Litigation*, 69 IOWA L. REV. 1011 (1984). For the text of Rule 26(c), see *infra* text accompanying note 27.

¹⁶ See FED. R. CIV. P. 1. The Supreme Court has clearly stated that the discovery rules are "subject to the injunction of Rule 1." *Herbert v. Lando*, 441 U.S. 153, 177 (1979).

¹⁷ See *Federal Rules of Civil Procedure*, 97 F.R.D. 165 (1983). Also as a result of the 1983 amendments, Rule 26(b)(1) now authorizes courts to limit discovery when the party seeking discovery has had adequate opportunity to complete discovery, when more convenient means of discovery are available, or when the discovery sought is unduly burdensome or expensive. *Id.* at 172. In addition, Rule 16, after the 1983 amendments, requires courts to enter an order within 120 days of the filing of the complaint limiting the time in which the parties must complete discovery. *Id.* at 168-69.

¹⁸ FED. R. CIV. P. 11.

the duty to make "reasonable inquiry" into the facts and law and certify that such responses are "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation."¹⁹ Together, Rules 1 and 11 have significant bearing on applications for protective orders, and, it is submitted, on applications for their modification—whether by plaintiffs seeking to disseminate or by non-parties claiming a public right of access.

Rule 26(b) is also fundamental to an understanding of protective orders because it governs the overall scope of discovery. Rule 26(b) permits a party to obtain discovery regarding "any matter, not privileged, which is relevant to the subject matter involved in the pending action."²⁰ The Rule also allows discovery of information that will be inadmissible at trial, so long as "the information sought appears reasonably calculated to lead to the discovery of admissible evidence."²¹

The Supreme Court has emphasized that full disclosure lies at the heart of the discovery rules, and that the parties should be able "to obtain the fullest possible knowledge of the issues and facts before trial."²² Rule 26(b) provides a products liability plaintiff, therefore, with considerable leeway in searching out information in a corporate defendant's possession for use in proving his or her claim, opposing any defenses raised, and impeaching any witnesses.²³ Because the Rule provides that objections regarding admissibility are not a proper basis for refusing discovery,²⁴ the defendant's discovery responses customarily combine in an undifferentiated fashion both admissible and inadmissible information. It is precisely because of this wide scope of discovery authorized by Rule 26(b) that Rule 26(c) provides a mechanism for the issuance of protective orders.²⁵ Indeed, the issue involved with

¹⁹ *Id.*; see also FED. R. CIV. P. 26(g) (signing of discovery requests, responses, and objections).

²⁰ FED. R. CIV. P. 26(b).

²¹ *Id.*

²² *Hickman v. Taylor*, 329 U.S. 495, 501 (1947); see also *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958).

²³ It has been stated that the pretrial discovery procedures under the Rules sought to put an end to the "sporting theory of justice," whereby the result of a trial depended on luck and on counsel's skill and strategy. C. WRIGHT & A. MILLER, *FEDERAL PROCEDURE* 18-19 (1970).

²⁴ FED. R. CIV. P. 26(b).

²⁵ The very broad statement as to the scope of discovery in Rule 26(b) is preceded by the phrase "[U]nless otherwise limited by order of the court in accordance with these rules" FED. R. CIV. P. 26(b).

most motions for protective orders "is not whether the [c]ourt is going to allow a party to embark upon a fishing expedition but whether the [c]ourt may make the voyage more pleasant for those who are required to become passengers by the Rules of Civil Procedure."²⁶

Rule 26(c) provides, in pertinent part:

Upon motion by a party . . . , and for good cause shown, the court . . . may make any order which justice requires to protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by 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 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.²⁷

The express language of Rule 26(c) thus allows substantial restriction or even prohibition of a plaintiff's discovery rights when "justice" requires. Literally, the Rule permits the court to prohibit or terminate discovery even where the party from whom discovery is sought will suffer mere "annoyance" or "embarrassment."

Under Rule 26(c), then, a trial judge has broad discretion to manage the discovery process in a way that will accommodate both

²⁶ *Twin City Fed. Sav. & Loan Ass'n v. American Title Ins. Co.*, 31 F.R.D. 526, 527 (W.D. Mo. 1962); see also Marcus, *supra* note 2, at 7 (protective orders have removed some of the "harsh edges of liberal discovery").

²⁷ An analogue to Rule 26(c) is Rule 30(d), which authorizes certain limitations on depositions. See FED. R. CIV. P. 30(d). Rule 26(c) was adopted in 1970 to protect parties and witnesses from potential abuse of the discovery process. 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2036, at 267 (1970). Under the initial Rules, protective orders only applied to depositions under Rule 30(b). In 1948, Rules 33 and 34 were amended to allow courts to issue protective orders for interrogatories and requests for admissions. The 1970 amendments, however, established general provisions applicable to all means of discovery. *Id.* § 2035, at 260.

the plaintiff's need for full disclosure and the defendant's need to protect its legitimate right to privacy from harmful and unnecessary intrusions. The Supreme Court has recognized the extraordinary potential for abuse inherent in a liberal discovery process,²⁸ and has urged the lower courts to exercise their discretion under Rule 26(c) to protect the parties from harmful side effects.²⁹ The Washington Supreme Court stated in *Rhinehart v. Seattle Times*, an opinion squarely affirmed by the United States Supreme Court:

Implicit in [the] language [of Rule 26(c)] is a recognition that by requiring a party to submit to the searching inquiries of discovery, the courts have required him to give information about himself which he would otherwise have no obligation to disclose. A realm of privacy which courts had previously left undisturbed was now opened.

. . . [T]he effective administration of justice does not require dissemination beyond that which is needed for litigation of the case. It was the needs of litigation and only those needs for which courts adopted this rule and demanded of the litigant a duty which would not otherwise be his. For this reason, it is proper that the courts be slow to subject a civil litigant to any exposure which he deems offensive, beyond that which serves the purpose of the rule.³⁰

Courts and litigants have also come to rely on the federal courts' power to issue protective orders under Rule 26(c), especially in complex products liability litigation, to accomplish the purposes embodied in Rule 1—to speed up discovery and minimize discovery disputes.³¹

Rule 26(c)(7), which explicitly sanctions the entry of a protective order to limit or control disclosure of either a "trade secret" or

²⁸ See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (referring to some discovery tactics as a social cost rather than a benefit).

²⁹ See *Herbert v. Lando*, 441 U.S. 153, 177 (1979) (district courts should freely exercise their power to control and restrict discovery where necessary to protect a party from abuse). See generally J. FRIEDENTHAL, M. KANE & A. MILLER, *CIVIL PROCEDURE* § 7.15, at 413 (1985) (noting broad discretion given to trial courts to balance danger of harassment against need for information under Rule 26(c)).

³⁰ *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 236, 654 P.2d 673, 679 (1982), *aff'd*, 467 U.S. 20 (1984).

³¹ See generally *infra* text accompanying notes 65–72. Rule 26(c) motions for protective orders are often brought in response to a Rule 37 motion by the plaintiff to compel discovery. Rule 37(a) allows the court to enter a protective order upon the denial of a motion to compel even if the objecting party does not move for a protective order. See *FED. R. CIV. P.* 37(a).

"other confidential research, development, or commercial information," is the section of Rule 26(c) invoked most frequently in the products liability context. As discussed below, however, the courts have rigidly construed their working definitions of both "trade secrets" and "confidential information," making it extremely difficult for corporate defendants in products liability suits to satisfy the "good cause" requirement for the initial issuance of a protective order.

A. "Trade Secrets" Under Rule 26(c)(7)

Before a court will issue a protective order to protect an alleged "trade secret" under Rule 26(c)(7), it first must independently verify that the information sought to be protected actually fits the term's legal definition. Under the definition set forth in section 757 of the *Restatement of Torts*, which has been adopted by a number of courts,³² a trade secret is "any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it."³³ Comment (b) to section 757 suggests that courts may consider the following six factors in determining the existence of a trade secret: the extent to which those outside the business know the alleged "trade secret;" the number and positions of employees with knowledge of the "trade secret;" the defendant's rules and procedures designed to protect the secret; the value of the "trade secret" to the defendant or his competitors; the effort and cost of developing the "trade secret;" and the ease or difficulty with which others could acquire or duplicate the "trade secret."³⁴

³² See, e.g., *Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988); *DeFord v. Schmid Prods. Co.*, 120 F.R.D. 648, 653 (D. Md. 1987); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 28 (E.D. Mich. 1981); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977); *United States v. International Business Machs. Corp.*, 67 F.R.D. 40, 46-47 (S.D.N.Y. 1975).

³³ *RESTATEMENT OF TORTS* § 757 (1939). Section 757 was omitted from the Second *Restatement of Torts* because liability for harm caused by unfair and deceptive trade practices was considered to be more properly the subject of unfair competition and trade regulation. See 4 *RESTATEMENT (SECOND) OF TORTS* 1-2 (1977). The section 757 factors, however, continue to be cited and applied by the courts. See also *UNIF. TRADE SECRETS ACT* § 1(4), which contains an expansive definition of the term.

³⁴ *RESTATEMENT OF TORTS* § 757 comment B (1939). Other factors courts may consider include: whether the information has been released in other cases not subject to the protective order; whether the information is current; whether the information has been filed with a governmental agency; and whether disclosure will place the company at a great competitive disadvantage. See *In re Upjohn Antibiotic Cleocin Prod. Liab. Litig.*, 81 F.R.D. 482, 483 (E.D. Mich. 1979), *aff'd*, 664 F.2d 114 (6th Cir. 1981).

Obtaining a trade secret designation that warrants the issuance of a protective order poses particular difficulties for the products liability defendant because the information sought in such cases rarely falls within this narrowly defined category. *Waelde v. Merck, Sharp & Dohme*,³⁵ a case in which the court declined to issue a requested order, exemplifies this difficulty. In *Waelde*, the plaintiff sought discovery of the Federal Drug Administration "new drug application" file on the prescription drug Clinoral. The file contained post-marketing reports of adverse reactions, pre-marketing studies, animal tests, and correspondence on the drug's effects. The defendant argued that the files contained trade secrets, and that their disclosure without a protective order would allow competitors to obtain the file from the FDA and use it to obtain approval of similar drugs, thus nullifying the trade secret status. In declining to issue the requested order, the court noted that the case before it was not one where a *competitor* was the party seeking the information, such as in an antitrust action where there would be a strong likelihood of actual competitive injury.³⁶

Courts generally have presumed that disclosure to a direct competitor (such as might occur in an antitrust or patent infringement context) is more harmful than disclosure to a noncompetitor.³⁷ Although information is not handed over directly to a competitor in the products liability context, this presumption ignores the reality that sensitive information, once disclosed, may make its way over time into the hands of any number of direct or indirect competitors and result in similar harm. Making it even more difficult for a defendant to obtain a "trade secret" designation in a products liability case, some courts have held that once a product incorporating the alleged trade secret enters the marketplace, the trade secret is, *a fortiori*, made public and consequently lost.³⁸ Again, the difficulty faced by the products liability defendant in arguing for "trade secret" protection under Rule 26(c)(7) is readily apparent.

B. "Confidential Information" Under Rule 26(c)(7)

Information that does not rise to the level of a "trade secret," but that is nonetheless "confidential," also may be entitled to pro-

³⁵ 94 F.R.D. 27 (E.D. Mich. 1981).

³⁶ *Id.* at 29-30; see also *DeFord*, 120 F.R.D. at 653 (products liability action against manufacturer of intrauterine device (IUD)).

³⁷ See, e.g., *American Standard, Inc. v. Pfizer, Inc.*, 828 F.2d 734, 739-41 (Fed. Cir. 1987) (holding burden of proof of establishing trade secrets met in patent infringement suit).

³⁸ See, e.g., *Midland Ross Corp. v. Sunbeam Equip. Corp.*, 316 F. Supp. 171, 177 (W.D. Pa.), *aff'd*, 435 F.2d 159 (3d Cir. 1970).

tection under Rule 26(c)(7). Confidential information has been defined as information which, if disclosed, will cause a "clearly defined, serious injury" to the defendant's business.³⁹ The following five criteria, derived from *Parsons v. General Motors*,⁴⁰ are generally cited as the standard for determining "confidentiality": how many employees had knowledge of the information or worked on a confidential project; how the defendant maintained the secrecy of the information; how the defendant controlled or limited the reproduction and circulation of the information; the age of the information; and whether any of the information was required to be reported to the government.⁴¹ In *Parsons*, the court held that previously conducted rear-end impact crash tests and other information relating to the design and manufacture of the fuel system of a car manufactured by General Motors did not contain confidential information exempt from discovery.⁴² The court so held even though General Motors had submitted affidavits stating that the information had always been limited to the technical and engineering staffs within the company, with initial distribution of the reports limited to only a few selected employees. The court instead focused on the fact that the information at issue was ten years old.⁴³

The defendant in the typical products liability case often finds itself in the same position as General Motors in *Parsons*. The predicament lies in trying to protect the confidentiality of information and data pertaining to a product prepared years before the product was finally assembled, years more before the product allegedly harmed the plaintiff, and even more years than that before the issue is presented to the court for resolution. Thus, it is not unusual for a defendant to advocate the confidentiality of design drawings, design safety meeting minutes and marketing data generated during the design and manufacturing process ten years before the suit was filed, seven years before the occurrence of the injury, and three or four years before the product was even assembled.

While staleness of the information sought to be protected as "confidential" is not an absolute bar to the issuance of a protective order,⁴⁴ it is a factor that must be overcome by a specific showing

³⁹ *United States v. International Business Machs. Corp.*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975); *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202-03 (S.D.N.Y. 1977).

⁴⁰ 85 F.R.D. 724 (N.D. Ga. 1980).

⁴¹ *Id.* at 726.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *See, e.g., Hecht v. Pro-Football, Inc.*, 46 F.R.D. 605, 606-07 (D.D.C. 1969) (three-year-old financial information protected).

of present harm.⁴⁵ The courts have emphasized that "speculative" allegations of injury from the disclosure of dated information are not sufficient to warrant the issuance of a protective order.⁴⁶ Thus, just as the defendant in the typical products liability case finds it difficult to obtain a "trade secret" designation for its proprietary information, it also faces impediments to protecting that information as merely "confidential."

C. *The Burden of Proof and the Balancing Test Under Rule 26(c)*

As should be clear from the foregoing discussion,⁴⁷ courts interpreting Rule 26(c)(7) place the burden squarely on the party seeking confidentiality to show not only that the information sought to be protected qualifies either as a trade secret or as confidential information, but also that "good cause" exists for the entry of a protective order.⁴⁸ Once the moving party has met these requirements, the burden shifts to the other party to establish that discovery of the information is relevant and necessary to the action.⁴⁹

The initial burden of proof on the defendant, however, is a heavy one.⁵⁰ The Third Circuit Court of Appeals recently has rei-

⁴⁵ *DeFord v. Schmid Prods. Co.*, 120 F.R.D. 648, 654 (D. Md. 1987). Compare *United States v. American Optical*, 39 F.R.D. 580 (N.D. Cal. 1966) (holding outdated information not deserving of protection) with *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981) (recognizing that even "old business data may be extrapolated and interpreted to reveal a business's current strategy, strengths and weaknesses" and may be worthy of protection).

⁴⁶ *DeFord*, 120 F.R.D. at 654; see also *United States v. International Business Machs. Corp.*, 67 F.R.D. at 40, 49 (S.D.N.Y. 1975) (sales and profits data 3-15 years old not protected).

⁴⁷ See *supra* text accompanying notes 31-45 for a discussion of Rule 26(c)(7).

⁴⁸ See *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 202 (S.D.N.Y. 1977); see also *Turick v. Yamaha Motor Corp.*, 121 F.R.D. 32, 35 (S.D.N.Y. 1988) (mere conclusory allegations in attorney's affidavit that disclosure in products liability case of materials relevant to defendant's design processes, sales records, marketing plans, and test protocols and results would hurt its competitive position in the all-terrain vehicle market held insufficient to establish "good cause"); *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288, 292 (D. Del. 1985).

⁴⁹ *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 326 (S.D. Fla. 1985).

⁵⁰ See, e.g., *Smith v. BIC Corp.*, 121 F.R.D. 235, 241, 242 (E.D. Pa. 1988), where the court held that BIC, the manufacturer of disposable, nonrefillable butane lighters, was not entitled to a protective order to prevent the discovery of design and safety test information or information regarding other complaints or accidents involving the same product. On appeal, the Third Circuit Court of Appeals held that the records concerning the design and safety tests were entitled to protection, but it upheld the portion of the order providing that the information on prior accidents and complaints could be turned over without limitation. See *Smith v. BIC Corp.*, 869 F.2d 194 (3d Cir. 1989); see also *Twin City Fire Ins. Co. v. Employers Ins.*, 124 F.R.D. 652, 653 (D. Nev. 1989); *John Doe I-VI v. Yogi*, 110 F.R.D. 629 (D.D.C. 1986); *Culligan v. Yamaha Motor Corp.*, 110 F.R.D. 122, 125 (S.D.N.Y. 1986) (en-

terated, "broad allegations of harm unsubstantiated by specific examples or articulated reasoning are insufficient to support the entry of a protective order."⁵¹ The defendant who seeks a protective order must therefore set forth specific examples of the harm that will occur in the absence of the order.⁵² Adding further difficulty, courts have held that the affidavit of an attorney alone is hardly ever sufficient to establish good cause.⁵³

Even where "good cause" for the entry of a protective order has been shown, the entry of the order is always within the trial court's discretion.⁵⁴ Courts customarily apply a "balancing test" by comparing the burden that will be imposed on the moving party if the order is *not* granted with the burden imposed on the party who requested the discovery if the order *is* granted.⁵⁵ Courts recognize that "[i]t is not the duty of federal courts to accommodate the public relations interests of the litigants."⁵⁶ Thus, in deciding whether

tering only limited protective order relating to post-manufacture testing in all-terrain vehicle products liability case); *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 219 (D. Mont. 1986); *Howard v. Galesi*, 107 F.R.D. 348, 350 (S.D.N.Y. 1985).

⁵¹ *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

⁵² *See, e.g., Cuno, Inc. v. Pall Corp.*, 117 F.R.D. 506, 508 (E.D.N.Y. 1987) (mere allegation in defendant's motion that documents had at all times been maintained as internal proprietary documents and that they contained valuable confidential technical information generated by corporate scientists held insufficient to establish good cause).

⁵³ *See, e.g., In re Iowa Freedom of Information Council*, 724 F.2d 658, 663 (8th Cir. 1983); *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21, 23 (S.D.N.Y. 1971). *But see Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 203 (S.D.N.Y. 1977) (court considered hearsay allegations of attorney's affidavits in connection with motion for protective order under Rule 26(c)(7), recognizing that in time the plaintiff could produce nonhearsay affidavits to same effect).

⁵⁴ A motion for protective order has been described as a "disfavored motion." *Kiblen v. Retail Credit Co.*, 76 F.R.D. 402, 404 (E.D. Wash. 1977).

⁵⁵ *See, e.g., In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 669 F.2d 620, 623 (10th Cir. 1982); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 911-12 (E.D. Pa. 1981). An interesting and unusual application of this balancing test by a court exercising its discretion in deciding whether to issue a protective order is *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir. 1985), a products liability action against a tampon manufacturer seeking recovery for injuries suffered from toxic shock syndrome (TSS). The protective order was sought by the Centers for Disease Control, a nonparty that had been served with a subpoena by a tampon manufacturer seeking to discover the names and addresses of women who had participated in research on TSS. The Court of Appeals for the Eleventh Circuit upheld the trial court's exercise of its discretion in holding that the CDC's interest in keeping its participant's names confidential outweighed the discovery interests of the defendant. *See also Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556 (7th Cir. 1984).

⁵⁶ *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 40 (C.D. Cal. 1984). In *Petroleum Products*, the plaintiffs alleged a conspiracy among some of the world's largest enterprises to raise and stabilize the retail prices of gasoline, affecting

information is deserving of protection, courts generally place greater weight on the possibility of tangible monetary damage than on perceived injury to the reputation or public standing of a corporation.⁵⁷ Far from recognizing the heightened potential for harm from public intrusion into a defendant's privacy in "high profile" cases, courts sometimes have tended to deny motions for protective orders precisely because the general subject matter of the litigation is of "general public interest."⁵⁸

Of particular importance in the products liability context is that a defendant's contention that a plaintiff desires to share the "fruits" of discovery with other plaintiffs in related or unrelated cases generally has *not* been held to constitute the requisite "good cause" for the initial issuance of a protective order.⁵⁹ A seminal case in this area is *Patterson v. Ford Motor Co.*,⁶⁰ where the court rejected Ford's assertion that a protective order was justified. Ford based its request on the fact that the plaintiff's counsel were members of various associations that collected and distributed information regarding motor vehicle manufacturers and would use the information only to foment additional litigation. Although one state court recently has noted that *Patterson* may now be of doubtful precedential value in the wake of *Seattle Times*,⁶¹ most courts have continued to subscribe to the view expressed in *Patterson*. Courts and commentators alike have generally tended to approve the practice of information sharing, especially in products liability cases, as coming within the aim of the Rules to secure a just, speedy, and inexpensive determination of every action.⁶² Whether or not the practice of infor-

the lives of all Americans. Similar claims of potential embarrassment also have routinely been rejected in products liability cases brought against cigarette companies. *See, e.g., Brown & Williamson Tobacco Co. v. FTC*, 710 F.2d 1165 (6th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573 (D.N.J. 1985), *rev'd on other grounds*, 785 F.2d 1108 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

⁵⁷ *See, e.g., Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (E.D. Ark. 1986) (declining to issue protective order covering other consumer complaints and litigation against automobile manufacturer involving alleged "park and reverse" occurrences where defendant merely claimed it would suffer embarrassment and harm to reputation); *see also Litton Indus., Inc. v. Lehman Bros.*, 122 F.R.D. 433, 436 (S.D.N.Y. 1988).

⁵⁸ *See, e.g., In re Texaco, Inc.*, 84 Bankr. 14, 17-18 (S.D.N.Y. 1988) (no good cause shown for issuance of protective order in widely-publicized Pennzoil-Texaco shareholders derivative suit); *see also United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421 (W.D.N.Y. 1981) ("Love Canal" toxic waste case).

⁵⁹ The Manual for Complex Litigation endorses discovery sharing in certain circumstances to avoid duplicative efforts. MANUAL FOR COMPLEX LITIGATION § 3.11, (5th ed. 1982).

⁶⁰ 85 F.R.D. 152 (W.D. Tex. 1980).

⁶¹ *See Mampe v. Ayerst Labs.*, 548 A.2d 798, 805 n.13 (D.C. 1988).

⁶² *Patterson*, 85 F.R.D. at 154; *see also DeFord v. Schmid Prods. Co.*, 120 F.R.D. 648, 654

mation selling among the plaintiff's bar is acceptable, most courts exhibit a reluctance to protect products liability defendants from the use in future lawsuits of information produced in discovery by defendants.⁶³ As a result, these unshielded defendants are often at a grave disadvantage in trying to make the requisite showing in the context of a contested motion for a protective order.⁶⁴

III. THE "UMBRELLA" PROTECTIVE ORDER

In most complex products liability cases, both confidential and nonconfidential documents responsive to a plaintiff's discovery re-

(D. Md. 1987); *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 220 (D. Mont. 1986); *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982); *In re Upjohn Antibiotic Cleocin Prod. Liab. Litig.*, 81 F.R.D. 482 (E.D. Mich. 1979), *aff'd*, 664 F.2d 14 (6th Cir. 1981). *But see* *Scott v. Monsanto Co.*, 868 F.2d 786 (5th Cir. 1989) (entry of protective order restricting plaintiff's use of materials to present litigation not an abuse of discretion despite inability to share and compare information with plaintiffs in other products liability cases); *Allen v. G.D. Searle & Co.*, 122 F.R.D. 580, 582-83 (D. Or. 1988) (manufacturer of CU-67 contraceptive not entitled to protective order prohibiting plaintiff from disclosing or disseminating title pages of depositions in other CU-67 lawsuits against manufacturer that covered issues directly related to plaintiff's case). *See generally* Mason & Hare, *The Use of FRCP 26(c)(7) to Prevent or Limit the Dissemination of "Internal Documents,"* 7 J. PROD. LIAB. 1 (1984); Rheingold, *The Development of Litigation Groups*, 6 AM. J. TRIAL ADVOC. 1 (1982); Note, *Anti-Dissemination Orders in Product Liability Suits*, 5 AM. J. TRIAL ADVOC. 507 (1982).

⁶³ *See e.g.*, *Ward v. Ford Motor Co.*, 93 F.R.D. 579 (D. Colo. 1982); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27 (E.D. Mich. 1981); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152 (W.D. Tex. 1980); *Parsons v. General Motors Corp.*, 85 F.R.D. 724 (N.D. Ga. 1980). *See generally* Hoenig, *Protective Confidentiality Orders*, N.Y.L.J., Mar. 5, 1990, at 3, 12 n.52. For a discussion of information sharing and selling among plaintiffs, see *infra* text accompanying notes 241-53.

⁶⁴ If the court denies a motion for a protective order, or grants it but in a form unsatisfactory to the defendant, the defendant cannot appeal it unless it involves exceptional circumstances that warrant *mandamus* review, *see, e.g.*, *New York v. United States Metals Ref. Co.*, 771 F.2d 796, 801 (3d Cir. 1985) (allowing *mandamus* review where no other path of appellate review available), or unless it meets the criteria for interlocutory review under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Under the *Cohen* test, a decision granting or denying a protective order may be appealed only if the protective order involves: an issue unrelated to the merits of the main dispute; a complete resolution of that issue; a right incapable of vindication on appeal from the final judgment; and an important and unsettled question of controlling law, not merely a question of the proper exercise of discretion. *See In re San Juan Star Co.*, 662 F.2d 108, 112-13 (1st Cir. 1981); *see also* *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1116-17 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

A protective order is not an appealable interlocutory injunction under 28 U.S.C. § 1292(a)(1) unless it grants or denies all or some of the substantive relief sought by the parties. Because protective orders resolve discovery issues, this will rarely be the case. *See United States Metals Ref. Co.*, 771 F.2d at 801. In addition, appellate review of protective order decisions is limited to the question of whether the issuing court abused its discretion. *Gallela v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973).

quest are intermingled in the defendant's files. Moreover, in many cases, a particular responsive document may contain both confidential and non-confidential information. To sift through all of the information and prepare a detailed explanation of the confidential nature of each document the defendant seeks to protect would, in such cases, require a vast work effort for many weeks. To undertake such a task prior to producing the documents would needlessly delay the document production process.⁶⁵ In an effort to adhere to Rule 1 and to avoid immersing themselves in such a document-by-document review, courts in complex products liability cases involving massive document productions frequently enter "blanket" or "umbrella" protective orders.⁶⁶ More often than not, the parties stipulate to these orders.⁶⁷

An "umbrella" or "blanket" protective order typically permits the defendant to designate as "confidential" a large volume or entire class of discovery material. The plaintiff is permitted to challenge the confidentiality designation, and the burden of showing that the designated materials are, in fact, confidential rests at all times with the defendant.⁶⁸ Because courts frequently enter umbrella orders to cover large document productions, the plaintiff who challenges their confidentiality will be required to identify the specific documents that do not qualify for protection.⁶⁹ Umbrella protective orders thus prevent unnecessary delays in discovery that otherwise would be caused if the parties were required to segregate and explain the proprietary nature of each and every document alleged

⁶⁵ See *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356-57 (11th Cir. 1987); *Tavoulareas v. Piro*, 93 F.R.D. 24, 29 (D.D.C. 1981).

⁶⁶ It has been observed that complex cases in which protective orders are the norm already occupy a disproportionate share of the courts' time. See Pollack, *Discovery—Its Abuse and Correction*, 80 F.R.D. 219 (1978). One trial judge has observed that careful scrutiny of every document in a complex case would make the judge "a veritable hostage" consigned to "years of adjudication of the confidentiality of individual documents." *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 878-79 n.18 (E.D. Pa. 1981).

⁶⁷ In apparent recognition of the general confidentiality of discovery, negotiations relating to stipulated protective orders normally focus on *which* protective devices the parties will use (e.g., limitations on access, separate storage, the designation of persons eligible for access) rather than on *whether* there should be an order limiting dissemination. See Marcus, *supra* note 2, at 9.

⁶⁸ See generally *Litton Indus., Inc. v. Lehman Bros.*, 122 F.R.D. 433, 435-36 (S.D.N.Y. 1988); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988); see also *Alexander Grant*, 820 F.2d at 356; *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987).

⁶⁹ For a more extended discussion of the practical operation of stipulated umbrella orders and challenges to confidentiality designations in such orders, see Marcus, *supra* note 2, at 18-20.

to be confidential. They also save the courts from becoming bogged down in the tedium of endless collateral disputes over discovery, and enable the parties to proceed expeditiously with preparation for trial.

The use of umbrella orders in complex litigation has become commonplace. As at least one court has observed:

[T]he propriety and desirability of protective orders securing the confidentiality of documents containing sensitive commercial information that are the subject of discovery in complex cases is too well established to belabor here. We are unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court.⁷⁰

The *Manual for Complex Litigation* encourages the use of umbrella protective orders and even recommends a specific form of order.⁷¹ Thus, every day, in countless courts throughout the nation, millions of documents are being produced in reliance on the binding force of stipulated umbrella protective orders. Yet, despite their widespread use, especially in complex products liability cases, it is becoming increasingly unclear whether defendants can continue to rely upon their sustained validity.

As discussed more fully below, the defendant in a products liability suit who, along with its lawyer, has complied with a plaintiff's discovery request under the protection of a protective order, may be called upon to duplicate its efforts many times *in the future*. This duplication may occur if and when the plaintiff, the plaintiff's attorney, the plaintiff's expert witnesses, other plaintiff's attorneys, or any of a number of others, such as the press, seek disclosure of the same materials and information, for reasons entirely of their own.

Until recently, it had been widely assumed that the very rationale underlying the provision for the issuance of protective orders under Rule 26(c) is that the only use of discovery materials sanctioned by the federal rules is for trial preparation in the pending

⁷⁰ *Zenith Radio Corp.*, 529 F. Supp. at 889. *But see* *Waelde v. Marck, Sharpe & Dohme*, 94 F.R.D. 27 (E.D. Mich. 1981) (holding blanket protective orders overbroad and not permitted by Rule 26(c)). *See also* *Ramada Inns, Inc. v. Drinkhall*, 490 A.2d 593 (Del. 1985) (umbrella order not justified where volume of material sought to be protected not overly voluminous).

⁷¹ *See* *MANUAL FOR COMPLEX LITIGATION*, § 21.43 (1982), *reprinted in* 1 J. MOORE, W. TAGGART & J. WICKER, *MOORE'S FEDERAL PRACTICE* § 21.43, at 48-50 (1986).

case.⁷² Protective orders clearly are of little value if the parties cannot rely on them. Yet, recent cases recognizing a public right of access and plaintiff's right to disseminate discovery information subject to protective orders—particularly stipulated umbrella orders—may portend the very demise of such orders.

As discussed more fully below, the trend in these recent cases threatens to clog the courts with costly and time-consuming discovery disputes. The trend also will likely increase the risk that information that should be disclosed instead will be the subject of debate, and at the same time impede settlement. This trend might subvert the underlying purpose of the Rules themselves: to "secure the just, speedy, and inexpensive determination of every action."⁷³

IV. THE PUBLIC "RIGHT" OF ACCESS

A. *The Historically Private Nature of Discovery*

Prior to the enactment of the Rules, little, if any, discovery preceded civil trials. Although both English law and American federal law afforded parties some ability to obtain documents and depositions, these mechanisms were extremely narrow in scope. In the federal courts, the Judiciary Act of 1789 provided for the taking of depositions, but only in cases where a deposition was necessary to preserve testimony—such as where the deponent was more than 200 miles from the court, about to leave the country, old, or sick.⁷⁴ State court procedures were scarcely more expansive, at least until the appearance of the Field Code in 1848.⁷⁵ Thus, discovery issues historically occupied a far less significant role in civil trials than they recently have assumed. Ambush and surprise were the marching orders of the day, much as burial by paper avalanche governs modern trial practice.

The Judiciary Act made no particular provisions regarding rights of access to discovery. Although the Act provided for depositions to be sealed prior to trial, that provision was not intended to

⁷² See generally 8 C. WRIGHT & A. MILLER, *supra* note 27, § 2040, at 291–92 (discussing the court's concern that discovery may be used merely as a "device" to obtain information). See also Marcus, *supra* note 2, at 7–8, where the author reiterates the general assumption that any use of discovery materials except to prepare for trial is inappropriate, and states that one reason this assumption is difficult to prove is that it is so pervasive.

⁷³ FED. R. CIV. P. 1.

⁷⁴ C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2002 (1970).

⁷⁵ See generally 4 J. MOORE, J. LUCAS & G. GROTH, *MOORE'S FEDERAL PRACTICE* § 26.03 (2d ed. 1986); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 946–51 (1961).

protect confidentiality, but rather to insure that the transcript would not be altered before trial.⁷⁶ The only federal statute directly to address the question of public access to discovery materials prior to the adoption of the Rules was the Publicity in Taking Evidence Act of 1913.⁷⁷ This Act specifically provided for public access to depositions in antitrust actions. The very fact that such a statute was required to make depositions public in such cases underscores the traditionally private nature of discovery.⁷⁸

What little discovery *did* exist prior to the enactment of the Rules was, by custom, not open to the public. Even without the benefit of a procedural device comparable to a Rule 26(c) protective order, a court sitting in equity could prevent public access to discovery through its equity powers. In fact, in 1912, a Massachusetts court sitting in equity barred the press and other members of the public from attending a deposition on the grounds that the deposition was not part of the formal trial and that the testimony contained therein might not be admissible in evidence.⁷⁹

The adoption of the Rules in 1938 did nothing to alter this traditionally private nature of discovery. Because discovery usually takes place in law offices or on other private property, as a practical matter the public generally is unable to determine when or where discovery proceedings will take place and has no certain right to attend them even if they are aware of the time and place.⁸⁰ Initially, the Rules required that the parties file with the court all interrogatory answers, responses to requests for admissions, and deposition transcripts. The 1980 amendments to Rule 5(d) permit courts to order that such materials *not* be filed.⁸¹ As a result of these amendments, designed to ease the paper avalanche that still plagues the courts,⁸² many district courts have adopted local rules eliminating the filing requirement for some or all of these discovery materials.⁸³

⁷⁶ *Louis Werner Stave Co. v. Marden, Orth & Hastings Co.*, 280 F. 601, 604 (2d Cir. 1922).

⁷⁷ Act of March 3, 1913, ch. 114, 37 Stat. 731 (codified at 15 U.S.C. § 30 (1982)); see Marcus, *supra* note 2, at 38-40.

⁷⁸ Marcus, *supra* note 2, at 40.

⁷⁹ *United States v. United Shoe Mach. Co.*, 198 F. 870, 874-76 (D. Mass. 1912).

⁸⁰ See Marcus, *supra* note 2, at 12-13.

⁸¹ See FED. R. Civ. P. 5(d). For a more detailed discussion of Rule 5(d), see *infra* text accompanying notes 192-230.

⁸² See *Amendments to the Federal Rules of Civil Procedure*, 85 F.R.D. 521, 540-41 (1980) (Report of Advisory Committee on Civil Rules).

⁸³ See, e.g., Local Rules, Central District of California, Rule 6(d) (all discovery); Local Rules, Middle District of Florida, Rule 3.03(c) (interrogatories), 3.03(d) (depositions).

Thus, nothing in the Rules themselves suggests that discovery is in any way a public process.

Since the adoption of the Rules, the Supreme Court has recognized a right based on the common law, rather than on any constitutional provision, to inspect judicial records and documents.⁸⁴ The Court, however, has never indicated that this right would extend to purely pretrial discovery materials. Interestingly, one year after recognizing the common law public right of access to court records, the Court *refused* to recognize a sixth amendment right on the part of the press and the public to attend a criminal pretrial suppression hearing.⁸⁵ Nonetheless, the Court ultimately did recognize a public right of access to attend a criminal courtroom trial based on the first amendment.⁸⁶ The recognition of a first amendment right in this context has subsequently been extended to encompass a public right of access to attend both preliminary hearings⁸⁷ and voir dire examinations of jurors⁸⁸ in criminal proceedings.

The Supreme Court has never recognized a first amendment right to attend civil trials, although at least three circuit courts of appeals have done so to date.⁸⁹ In addition, some commentators have suggested that this may be the next logical step in extending the public right of access.⁹⁰ More importantly, however, the Supreme Court has *never* held that pretrial documents produced in either civil or criminal cases are subject to either a constitutional, common law, or statutory public right of access. In fact, the only

⁸⁴ *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

⁸⁵ *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

⁸⁶ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (plurality opinion); see also *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (striking down a mandatory closure rule applicable to trials for sexual offenses involving victims under age 18). The *Globe* Court stated, however, that the presumption of access was not absolute. *Id.* at 606.

⁸⁷ See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986).

⁸⁸ See *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

⁸⁹ *Wilson v. American Motors Corp.*, 759 F.2d 1568 (11th Cir. 1985); *Publicker Indus., Inc. v. Cohen, Inc.*, 733 F.2d 1059 (3d Cir. 1984); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983); see also *Westmoreland v. Columbia Broadcasting Sys.*, 752 F.2d 16, 23 (2d Cir. 1984) (dicta); cf. *In re Iowa Freedom of Information Council*, 724 F.2d 658, 661 (8th Cir. 1984) (recognizing right of access to contempt proceedings, characterized as a "hybrid containing both civil and criminal characteristics"). But see *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985) (no public right of access to civil trials).

⁹⁰ See, e.g., Note, *Publicker Industries v. Cohen: Public Access to Civil Proceedings and A Corporation's Right to Privacy*, 80 Nw. U.L. REV. 1319, 1336-40 (1987); Comment, *The First Amendment Right of Access to Civil Trials After Globe Newspaper Co. v. Superior Court*, 51 U. CHI. L. REV. 286, 294-98 (1984).

Supreme Court case even to *address* the impact of the first amendment on civil discovery prior to *Seattle Times v. Rhinehart*, far from requiring access, held that a court could not constitutionally require the disclosure of NAACP membership lists. The Court reasoned that such disclosure would have a negative impact on the members' first amendment freedom of association.⁹¹

The source of a constitutional public right of access, if indeed one exists, must be found in the first amendment's protection of communication about the functioning of government, which empowers everyone to be a "judicial watchdog."⁹² The "right" must be seen as an adjunct to the right to engage in speech and commentary about the efficiency and fairness of the court system. While not articulated in the words of the first amendment,⁹³ courts that have discerned the "right" have found it by implication, on the theory that it is necessary in order to enjoy the other, articulated first amendment rights.⁹⁴ Even if public access exists as a means of heightening respect for the judicial process and permitting scrutiny of judicial performance, the concept simply has no application in the pretrial discovery process. As another commentator has stated:

[T]he evolving constitutional and common law doctrines of right of access to certain judicial proceedings simply do not and should not apply to pretrial discovery in civil cases There is no reason for perpetuating the myth that pretrial discovery is public. To the extent that any decision concerning the availability of a protective order depends upon that myth, it is flawed.⁹⁵

Indeed, the history against which *any* claims of public access to discovery materials must be assessed is, as discussed above, one of confidentiality.

B. *Conflict in the Circuits Before Seattle Times*

Prior to the Supreme Court decision in *Seattle Times*, lower courts were divided on the question of whether a public right of

⁹¹ NAACP v. Alabama, 357 U.S. 449, 456 (1958).

⁹² See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 605-06 (1982).

⁹³ The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or of the right of the people to peaceably assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

⁹⁴ Cf. *Globe Newspaper Co.*, 457 U.S. at 604.

⁹⁵ Marcus, *supra* note 2, at 40-41.

access to pretrial discovery documents in civil cases existed at all, and if it did exist, whether it was rooted in the Constitution or in the common law. In *International Products Corp. v. Koons*,⁹⁶ which for a time stood as one of the few authorities in this area, Judge Friendly, writing for a unanimous Second Circuit Court of Appeals, flatly rejected the recognition of any first amendment right. In *Koons*, the district court sealed the deposition testimony of the plaintiff corporation. The court of appeals upheld the district court's power to limit the defendants' use of the deposition testimony. Judge Friendly concluded that the court could "entertain no doubt about the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes."⁹⁷

In *In re Halkin*,⁹⁸ a divided District of Columbia Circuit Court of Appeals, taking a divergent approach, suggested that a protective order could be analogized to a "prior restraint" and thus subject to strict scrutiny under the first amendment.⁹⁹ The plaintiffs in *Halkin* alleged that the CIA and National Security Agency conducted unlawful surveillance of them because they opposed the Vietnam war. The plaintiffs gave written notice that they intended to release to the press documents obtained during discovery that related to Operation CHAOS, the code name for the CIA's surveillance of anti-war activists. Prior to production, those documents had been purged of all information that related to national security. Although they

⁹⁶ 325 F.2d 403 (2d Cir. 1963). *Koons* involved a motion by the president of a corporation to limit his deposition testimony under the predecessor to Rule 26(c), Rule 30(b), authorizing the sealing of depositions. The deposition at issue contained facts indicating that officers of the corporation had made improper payments to officials of a foreign government. The government intervened and moved for an order limiting dissemination of this information on the basis that its disclosure could be inimical to private American business interests and to United States foreign policy.

⁹⁷ *Id.* at 407.

⁹⁸ 598 F.2d 176 (D.C. Cir. 1979). *Halkin* involved an action by opponents of the Vietnam War who contended that the government had engaged in a program of unlawful surveillance against them. The plaintiffs obtained numerous documents in discovery that purportedly substantiated their claims, and declared their intention to release the documents to the media. The defendants moved for and the court issued a protective order under Rule 26(c). *Id.* at 179-81. The District of Columbia Circuit Court reversed on a petition for a writ of mandamus. *Id.* at 182. For a more detailed discussion of *Halkin*, see Note, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645 (1980) [hereinafter Note, *Rule 26(c) Protective Orders*] (proposing an extension of the *Halkin* test); see also Comment, *Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause*, 1980 DUKE L.J. 766 (analyzing *Halkin* and proposing a balancing test).

⁹⁹ *Halkin*, 598 F.2d at 183, 186.

had not done so at the time of production, the defendants responded to the notice of the plaintiffs' intended press release with a motion for a protective order.

The *Halkin* court set out a three-part test for measuring the first amendment propriety of a protective order that limits the dissemination of discovery materials: whether the harm posed by dissemination was substantial and serious; whether the restraining order was narrowly drawn and precise; and whether there was an alternative means of protecting the public interest that intruded less directly on expression.¹⁰⁰ Applying this test, the *Halkin* court concluded that the order before it violated the first amendment because the defendants had offered no evidence to support their contention that dissemination was likely to result in "substantial and serious harm" to their right to a fair trial. In addition, the defendants made no attempt to show that they could not have averted the anticipated harm by some less intrusive means.¹⁰¹

Judge Wilkey, in a compelling dissent that presaged the Supreme Court's subsequent decision in *Seattle Times*, emphasized the anomaly of the majority's position. The majority acknowledged a court's authority under Rule 26(c) to permit the *more* intrusive remedy of denying discovery altogether based solely on a showing of "good cause," but limited the court's power to order the *less* intrusive remedy of prescribing how the discovery information could be used.¹⁰² In opining that the "good cause" standard enunciated in Rule 26(c) was, in itself, adequate to protect the first amendment rights of litigants, Judge Wilkey emphasized that litigants wishing to disseminate discovery materials have gained access to such materials only through a system of federal rules that expressly reserves to the courts the power to attach restrictions on their use. "Thus, when litigants receive discovery materials, they receive them already *subject to* the court's exercise of this discretionary power."¹⁰³

¹⁰⁰ *Id.* at 191.

¹⁰¹ *Id.* at 197. The *Halkin* approach, requiring strict scrutiny of protective orders under the first amendment, was adopted by several other courts prior to the Supreme Court's decision in *Seattle Times*. See, e.g., *In re Upjohn Antibiotic Cleocin Prods. Liab. Litig.*, 664 F.2d 114 (6th Cir. 1981); *National Polymer Products v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981).

¹⁰² *Halkin*, 598 F.2d at 208-09 (Wilkey, J., dissenting).

¹⁰³ *Id.* at 206 (Wilkey, J., dissenting) (emphasis in original). See also Comment, *The First Amendment Right to Disseminate Discovery Materials: In re Halkin*, 92 HARV. L. REV. 1550 (1979).

In the third leading pre-*Seattle Times* case, *In re San Juan Star Co.*,¹⁰⁴ the First Circuit Court of Appeals declined to adopt the approach of either *Koons* or *Halkin* and instead announced a new, four-part test, characterized as "good cause" with "heightened sensitivity to the first amendment concerns at stake,"¹⁰⁵ to determine the constitutionality of protective orders limiting dissemination. In *San Juan Star*, the *San Juan Star* newspaper sought to intervene in a federal civil rights action brought by the relatives of two members of a radical Puerto Rican political group who had been slain by police officers. The newspaper challenged a district court order that prohibited the disclosure of deposition evidence to the public or the press. The First Circuit Court of Appeals fashioned a new test to determine whether the protective order violated the first amendment.

Under the *San Juan Star* test, the factors to be considered included: the magnitude and imminence of the threatened harm; the effectiveness of the protective order in preventing the harm; the availability of less restrictive means of preventing the harm; and the narrowness of the order.¹⁰⁶ Employing this test, the *San Juan Star* court sustained the protective order at issue insofar as it related to restraints on disclosure to the press or to any third party.¹⁰⁷ The court explained:

Unlike evidence at trial, [discovery information] has not passed the strict threshold tests of relevance and admissibility, yet it has been compelled by dint of legal process. The information revealed may be irrelevant, prejudicial, or pose an undue invasion of an individual's privacy.

Such undigested matter, forced from the mouth of an unwilling deponent, is hardly material encompassed within a broad public "right to know." Its disclosure would

¹⁰⁴ 662 F.2d 108 (1st Cir. 1981). *San Juan Star* originated as a civil rights action against several agents of the Puerto Rican government. The case was brought by relatives of two suspected terrorists killed by the police on the eve of a closely contested electoral campaign. The district court had issued a protective order prohibiting the attorneys from disclosing discovery information to the litigants, the press, or any third party. For a more detailed discussion of *San Juan Star*, see Comment, *In re San Juan Star: Discovery and the First Amendment*, 34 BAYLOR L. REV. 229 (1982).

¹⁰⁵ *San Juan Star*, 662 F.2d at 116.

¹⁰⁶ *Id.* Compare *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 912 (E.D. Pa. 1981) (antitrust action where court formulated a similar balancing test).

¹⁰⁷ *San Juan Star*, 662 F.2d at 116-17. The court struck down that part of the order purporting to restrict dissemination to the litigants themselves on the basis that it would impermissibly interfere with the attorney-client relationship. *Id.* at 118.

not advance the informed civic and political discussion that the first amendment is intended to protect.¹⁰⁸

It presumably was in order to resolve the conflict among the circuits on the question of the appropriate standard of review for protective orders that the Supreme Court granted *certiorari* in *Seattle Times v. Rhinehart*.¹⁰⁹

C. *Seattle Times v. Rhinehart*

Seattle Times v. Rhinehart began as a state court action against the *Seattle Times* newspaper for defamation and invasion of privacy. The *Seattle Times* had published a series of unfavorable articles concerning the plaintiff, Rhinehart, and an obscure religious foundation of which Rhinehart was the spiritual leader.¹¹⁰

During discovery, the *Seattle Times* had requested the production of documents, including documents relating to the financial affairs of Rhinehart and his organization. Rhinehart produced some documents, but declined to disclose his current residence and the names of the foundation's members and donors. When the *Seattle Times* moved for an order to compel, Rhinehart sought a protective order to limit further dissemination of the information by the newspaper.

The trial court granted the protective order, which prohibited the *Seattle Times* from publishing any information about the church's membership and donors except to the extent necessary to prepare for and try the case. The Washington Supreme Court affirmed the trial court's exercise of its discretion in granting the order. The court held that the order, which was intended to preserve the plaintiff's privacy rights, satisfied the "good cause" standard of Wash-

¹⁰⁸ *Id.* at 115.

¹⁰⁹ 467 U.S. 20 (1984). The Supreme Court characterized the decision of the Washington Supreme Court in *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 654 P.2d 673 (1982), as consistent with the then-unambiguous position of the Second Circuit Court of Appeals enunciated in *International Products Corp. v. Koons*, 325 F.2d 403 (2d Cir. 1963). *But see In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987) (post-*Seattle Times* Second Circuit case recognizing a public right of access). The Supreme Court's decision also appeared to be consistent with Judge Wilkey's dissent in *In re Halkin*, 598 F.2d 176, 200 (D.C. Cir. 1979) (Wilkey, J., dissenting). See Note, "Good Cause," *supra* note 13, at 555 n.55 (1986); Note, *Clear Standards for Discovery Protective Orders: A Missed Opportunity in Rhinehart v. Seattle Times Co.*, 8 U. PUGET SOUND L. REV. 123 (1984).

¹¹⁰ The articles described, among other things, seances conducted by Rhinehart, his sale of magical "stones" that had been expelled from his body, and a six-hour extravaganza at the Walla Walla State Penitentiary involving cash prizes and a chorus line of bikini-clad women. *Seattle Times v. Rhinehart*, 467 U.S. 20, 22-23 (1984).

ington's analogue to Rule 26(c),¹¹¹ and accordingly, did not violate the first amendment.

The United States Supreme Court affirmed unanimously, holding squarely that a protective order does not offend the first amendment where it is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial discovery, and does not restrict dissemination of information gained from other sources.¹¹² In so holding, the Court specifically stated that "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."¹¹³ The Court also emphasized that a litigant's power to compel another party to a lawsuit to produce discovery is a product of legislative grace, not the Constitution, and can be limited or even denied altogether without impinging on the first amendment.¹¹⁴

The Court observed that the right to gather information through discovery is found not in the Constitution, but only in legislation like the Federal Rules of Civil Procedure or analogous state counterparts. Thus, the Court rejected *both* the asserted first amendment right of the party opponent to disseminate freely otherwise private information gathered in discovery *and* any supposed first amendment right of the press or the public to obtain access to such information. The Court in *Seattle Times* framed the issue before it as "whether a litigant's freedom comprehends the right to disseminate information that he has obtained pursuant to a court order that both granted him access to that information and placed restraints on the way in which the information might be used."¹¹⁵ Because the *Seattle Times* was a media defendant, however, the decision necessarily also resolved, or should have resolved, the conflict over any purported right of access by the public or the press. If the parties have no right to disseminate the materials to the public, then it follows that the public can have no separate right of access.¹¹⁶

¹¹¹ The protective order was issued pursuant to Washington state discovery provisions modeled after the Federal Rules. Compare FED. R. CIV. P. 26-37 with WASH. SUPER. CT. CIV. R. 26-37. Rhinehart had presented to the court affidavits detailing anonymous threats of harassment and physical harm to individuals affiliated with the foundation if the information was released.

¹¹² 467 U.S. at 34.

¹¹³ *Id.* at 33.

¹¹⁴ *Id.* at 32.

¹¹⁵ *Id.*

¹¹⁶ See Pownell, *The First Amendment and Pretrial Discovery Hearings: When Should the Public and Press Have Access?*, 36 UCLA L. REV. 609 (1989) (*Seattle Times* addressed both dissemination and public access issues).

D. *The Aftermath of Seattle Times*

1. The Constitutional Right of Access

Despite the seeming clarity of the *Seattle Times* opinion, courts have continued to struggle with the question of whether a first amendment public right of access to pretrial discovery materials exists.¹¹⁷ The courts' concern over this issue probably reflects a strong belief that anything remotely connected with the administration of the judicial system should be open to public scrutiny. The concern seems to be particularly acute in cases involving the safety of mass-marketed consumer products and significant newsworthy events.

A handful of courts have plainly taken the position that the Supreme Court "meant what it said" in its explicit *Seattle Times* holding, and that protective orders do not implicate first amendment concerns in any way.¹¹⁸ Perhaps the leading case adopting this "strict" interpretation is *Cipollone v. Liggett Group, Inc.*,¹¹⁹ a well-publicized "failure to warn" action brought against several large cigarette companies. In order to streamline the litigation, the magistrate supervising discovery in that case had issued an umbrella protective order covering documentation of the industry's knowledge of the health risks associated with smoking.¹²⁰ The district court subsequently modified the order, characterizing *Seattle Times* as "imprecise" as to whether such orders were subject to strict constitutional scrutiny and the application of first amendment standards.¹²¹ The Third Circuit Court of Appeals granted a writ of *mandamus* and ordered the district court to reconsider its ruling. The appeals court explained that there is simply "no room for lower

¹¹⁷ *Seattle Times* has been characterized as a triumph of judicial administrative control over the discovery process. Note, *Access to Pretrial Documents Under the First Amendment*, 84 COLUM. L. REV. 1813, 1837 (1984) [hereinafter Note, *Access to Pretrial Documents*].

¹¹⁸ See, e.g., *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1119-20 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987); *New York v. United States Metals Ref. Co.*, 771 F.2d 796, 802-03 (3d Cir. 1985); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172 (D.C. Cir. 1984); *In re Korean Air Lines Disaster*, 597 F. Supp. 621, 623 (D.D.C. 1984); see also *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988), cert. denied, 109 S. Ct. 838 (1989) (recognizing that any first amendment right of access claim independent of Rule 26(c) is "largely foreclosed" by *Seattle Times*); *DeFord v. Schmid Prods. Co.*, 120 F.R.D. 648, 654 n.5 (D. Md. 1987) (a general first amendment public right of access is "precluded" by *Seattle Times*); *In re Consumers' Power Co. Sec. Litig.*, 109 F.R.D. 45 (E.D. Mich. 1985).

¹¹⁹ 785 F.2d 1108 (3d Cir. 1986).

¹²⁰ For the text of the magistrate's protective order, see *Cipollone*, 785 F.2d at 1112 n.4.

¹²¹ *Cipollone v. Liggett Group, Inc.*, 106 F.R.D. 573, 582 (D.N.J. 1985).

courts to consider first amendment factors in fashioning or reviewing Rule 26(c) orders . . . [T]he first amendment is simply irrelevant to protective orders in civil discovery."¹²²

Other courts, however, have shown a hesitancy to interpret the Supreme Court's words literally. *Anderson v. Cryovac, Inc.*¹²³ perhaps best exemplifies this hesitancy. In *Anderson*, the First Circuit Court of Appeals read *Seattle Times* as foreclosing "any claim of an absolute public right to access to discovery materials,"¹²⁴ but nonetheless characterized the extent of the public's right of access to judicial proceedings as "still in the process of being defined."¹²⁵ *Anderson* was a highly-publicized toxic waste case in which the court was confronted with a number of issues, among them the constitutionality of a protective order that selectively granted media access to pretrial discovery information.¹²⁶ One of the media intervenors in the case specifically requested access to documents considered by the court with respect to certain discovery proceedings. The *Anderson* court read *Seattle Times* as holding only that protective orders implicate the first amendment "to a far lesser extent" than restraints in other contexts.¹²⁷ It thus concluded that, while such orders are not subject to strict or heightened scrutiny, the first amendment must still retain a "presence" in the review process within the "good cause" framework of Rule 26(c).¹²⁸

¹²² *Cipollone*, 785 F.2d at 1119. On remand, the district court determined that the magistrate had not sufficiently articulated good cause for the order and issued a new, more limited protective order. *Cipollone*, 113 F.R.D. at 89. The defendants again sought a writ of *mandamus* vacating the district court's modification of the magistrate's order, but the Court of Appeals for the Third Circuit this time denied the writ, stating that the district courts' consideration of the "public interest" in the good cause analysis was permissible inasmuch as the "public interest" had not itself been evaluated under a first amendment standard. *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335, 341 (3d Cir. 1987).

¹²³ 805 F.2d 1 (1st Cir. 1986).

¹²⁴ *Id.* at 6.

¹²⁵ *Id.* at 10.

¹²⁶ The plaintiffs in *Anderson* alleged that the defendant had contaminated their town's drinking water supply by discharging toxic chemicals into the ground, causing serious illnesses and death. After more than three years of discovery, the interest of the news media was aroused, and the district court issued a protective order prohibiting the parties from revealing information obtained through discovery except to governmental authorities. An amended order contained an exception allowing the parties' experts to reveal the information to the academic community, but forbade all press releases for general distribution. Later, the court also excepted one television station from the scope of the order. Thereafter, another news organization, the *Boston Globe*, was allowed to intervene, but it was denied access to the protected discovery information.

¹²⁷ *Id.* at 7 (citing *Seattle Times v. Rhinehart*, 467 U.S. 20, 34 (1984)).

¹²⁸ *Id.*; see also *United States v. Kentucky Utils. Co.*, 124 F.R.D. 146, 152 n.5 (E.D. Ky.

Although the *Anderson* court explicitly structured its analysis within the "good cause" framework of Rule 26(c), it actually applied a standard of review more closely resembling the heightened scrutiny that the First Circuit Court of Appeals had followed prior to *Seattle Times*.¹²⁹ The *Anderson* court specifically inquired into the magnitude of the harm posed by the dissemination, the ability of the order to protect against that harm, the scope of the order, and the existence of less restrictive means.¹³⁰ The court ultimately concluded that, based on the fundamental difference between discovery proceedings and other judicial proceedings, there exists no public right of access to pretrial discovery materials, including documents submitted to the court in connection with a discovery motion.¹³¹ Thus, the decision again leaves unclear what once appeared to have been resolved by *Seattle Times*: the precise relationship between Rule 26(c)'s good cause requirement and the first amendment. As another commentator has observed, the unfortunate result of this defect in clarity "may be to broaden the 'good cause' requirement unduly, defeat the reliability and flexibility of a Rule 26(c) order and relegate the applicable standard back to the conflict characteristic of pre-*Seattle Times* decisions."¹³²

Similar confusion is evident in the well-publicized *In re "Agent Orange" Product Liability Litigation*,¹³³ a multi-district class action. In *Agent Orange*, the magistrate's opinion set aside an umbrella protective order, including an agreement to return to the defendants all discovery materials after the parties had reached a settlement. The magistrate in *Agent Orange* initially acknowledged that, in light of *Seattle Times*, there could be "no question" that the first amendment

1989) (antitrust case adopting *Anderson* court's position that first amendment concerns are not totally irrelevant after *Seattle Times*).

¹²⁹ See *In re San Juan Star*, 662 F.2d 108, 115 (1st Cir. 1981).

¹³⁰ *Anderson*, 805 F.2d at 7-9.

¹³¹ *Id.* at 13; see also *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987) (drawing distinction between private documents collected during discovery and judicial records); *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985). The *Anderson* court held, however, that access to pretrial discovery could not be afforded selectively to some members of the general public but not to others.

¹³² Note, *Rule 26(c) Protective Orders, First Amendment Scrutiny and the Good Cause Standard*, 21 SUFFOLK U.L. REV. 909, 915 (1987) (arguing that the First Circuit Court of Appeals should have more carefully distinguished the litigants' desire to disseminate information at issue in *Seattle Times* from the requests of media sources—non-parties to the litigation—for access to the discovery materials involved in *Anderson*).

¹³³ 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd*, 821 F.2d 139 (2d Cir.), *cert. denied*, 108 S. Ct. 344 (1987).

does not require open access to discovery materials.¹³⁴ Inexplicably, however, later in the same opinion, the magistrate stated:

The Court in *Seattle Times* approved a limitation on First Amendment rights upon a showing of good cause. In the absence of such a showing, continued protection would violate the First Amendment, particularly in this case, which is of great interest to the public and the media.¹³⁵

The magistrate's opinion in *Agent Orange* was adopted by the district court, and approved by the Second Circuit Court of Appeals.¹³⁶ It is noteworthy, however, that the appeals court, in affirming, avoided any discussion of a purported constitutional right of access, basing its decision instead on a "statutory" right of access arising in part, it concluded, by implication from Rule 26(c)'s "good cause" requirement and from the filing requirement under Rule 5(d).¹³⁷ Yet, inasmuch as the Second Circuit Court of Appeals did not *explicitly* reject the magistrate's confused first amendment analysis, its decision seems only to have further contributed to the uncertainty surrounding a constitutional right of public access which, one would have thought, *Seattle Times* had plainly put to rest.

Even some courts that previously found no first amendment right of access to discovery materials have recently suggested that such a right may attach at some later stage of the litigation, when the public interest in open court proceedings supposedly outweighs the need for an efficient judicial process.¹³⁸ In addition, several courts have suggested that there may exist a first amendment public right of access to documents considered by a court in ruling on pretrial motions that are dispositive of the litigants' substantive rights.¹³⁹ The Court of Appeals for the First Circuit, however, has characterized this position as being "at the farthest reaches of the

¹³⁴ *Id.* at 566.

¹³⁵ *Id.* at 570.

¹³⁶ *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir. 1987).

¹³⁷ See *infra* text accompanying notes 192-230 for a discussion of the right to access under Rule 5(d).

¹³⁸ See, e.g., *In re Consumers Power Co. Sec. Litig.*, 109 F.R.D. 45, 55 (E.D. Mich. 1985) (emphasizing in denying press access to pretrial discovery materials that a much stricter test would apply for exclusion of the public at later stages of the litigation).

¹³⁹ See, e.g., *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308-10 (7th Cir. 1984); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982); see also *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165 (6th Cir. 1983) (recognizing first amendment public right of access to record of administrative proceedings, including discovery documents, under review by court).

first amendment right to attend judicial proceedings."¹⁴⁰ The District of Columbia Circuit Court of Appeals has flatly rejected it as being inconsistent with *Seattle Times's* reference to the admission of evidence as the "touchstone" of any first amendment right of access.¹⁴¹

The equivocal opinions of some courts in the wake of *Seattle Times*, suggesting that there may yet exist a first amendment public right of access to pretrial discovery materials, cannot be squared with either the explicit holding of *Seattle Times* or with the realities of modern-day discovery practice. Civil litigation is, by definition, a process of dispute resolution between *private parties* and, in fact, the overwhelming number of disputes are resolved without the intervention of the courts. The mere existence of court rules and processes for assisting the parties in resolving their differences cannot reasonably be construed to give rise to any constitutional right on the part of strangers to the dispute or to any undefinable "public right to know." The parties to a private lawsuit should be allowed to maintain their right to privacy, as well as their right to a fair trial in the event that settlement is not achieved, irrespective of the curiosity or business concerns of non-parties.

Commentators have argued that some information may be "so significant to the preservation of the process of self governance . . . that it would violate the [first] amendment to keep the press and public from that knowledge."¹⁴² This suggestion, taken to its logical extreme, would make every piece of discovery open to judicial scrutiny, if for no other reason than the need to determine whether the information achieves the level of significance required to implicate self-government. The parties' legitimate interest in the privacy of their documents and information would then be subject to the whim of individual judges in deciding what is important for our "self-governance," a task, it is submitted, that judges are ill-suited to perform. While it is true that in some situations the "public interest" in obtaining access to information may appear strong, as, for example, in *Miami Herald Publishing Co. v. Gridley*, where the petitioning newspapers sought discovery materials that were rele-

¹⁴⁰ *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 8 (1st Cir. 1986); cf. *Federal Trade Comm'n v. Standard Fin. Management Corp.*, 830 F.2d 404 (1st Cir. 1987).

¹⁴¹ *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985).

¹⁴² Note, *Access to Pretrial Documents*, *supra* note 117, at 1833; see also Note, *Rule 26(c) Protective Orders*, *supra* note 98, at 1656 (arguing that there is a substantial public interest in the actions of large enterprises similar to the interest in the actions of government).

vant to the physical condition and fitness for office of a United States Senator who was seeking re-election,¹⁴³ the function of the judicial system is to resolve private disputes—not to generate information for public consumption.¹⁴⁴

2. The Common Law Right of Access

Just as a broad purported public right of access to pretrial discovery materials finds no support in the Constitution, it also finds no foundation in the common law.¹⁴⁵ Although a public right of access to actual court documents based on the common law may well exist, this right does not apply to pretrial discovery proceedings. As previously indicated, the Supreme Court, along with a number of lower courts, has recognized a common law right to inspect and copy judicial records and documents based on a "citizen's desire to keep a watchful eye on the workings of public agencies."¹⁴⁶ The right of access to judicial records is considered "fundamental to a democratic state,"¹⁴⁷ and is based on the principle that "what transpires in the court room is public property."¹⁴⁸ Inspection, it has

¹⁴³ 510 So. 2d 884 (Fla. 1987).

¹⁴⁴ See Marcus, *supra* note 2, at 52.

¹⁴⁵ The common law right is said to pre-date the Constitution, while the first amendment right is of more recent vintage. The latter, however, is generally thought to be based on tradition. See Marcus, *supra* note 2, at 29 n.118. This ambiguity has sometimes caused the two terms to be used interchangeably. See *id.* The major difference between viewing the public right of access as a common law—rather than a constitutional—guarantee, is that a common law right apparently can be more easily overcome by reasons favoring secrecy. See *In re Washington Post Co.*, 807 F.2d 383, 390 (4th Cir. 1986); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986). But see *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570–71 (11th Cir. 1985) (incorporating constitutional standard into common law analysis).

In addition, the appellate standard of review under the common law is an abuse-of-discretion test, while the constitutional standard is generally more stringent. *Anderson*, 805 F.2d at 13; *Washington Post Co.*, 807 F.2d at 390; see also *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 473 (6th Cir. 1983); *In re Application of NBC, Inc.*, 653 F.2d 609, 613 (D.C. Cir. 1981). Beyond this, the distinction between the constitutional and common law rights is somewhat ambiguous.

¹⁴⁶ *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); see also *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866 (E.D. Pa. 1981). See generally Note, *The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera*, 16 Ga. L. Rev. 659, 666–72 (1982).

¹⁴⁷ *United States v. Mitchell*, 551 F.2d 1252, 1258 (D.C. Cir. 1976), *rev'd on other grounds sub nom. Nixon v. Warner Communications*, 435 U.S. 589 (1978).

¹⁴⁸ *Craig v. Harney*, 331 U.S. 367 (1947).

been said, "serves to produce 'an informed and enlightened public opinion.'"¹⁴⁹

In refining the precise contours of this presumptive common law right, some courts have recognized a presumptive right of access to the transcripts of hearings on pretrial motions,¹⁵⁰ to the record of administrative proceedings under review,¹⁵¹ to documents submitted in support of certain motions (such as motions for summary judgment) filed with the court,¹⁵² and to settlement agreements submitted to the court for approval.¹⁵³ Where information produced in discovery has actually been admitted into evidence at an open trial, a presumptive common law right of public access may attach.¹⁵⁴ Even then, however, the right is not absolute. The Supreme Court has stated that "every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."¹⁵⁵

More importantly, there is general agreement, that while a common law public right of access may attach to materials forming

¹⁴⁹ *Mitchell*, 551 F.2d at 1258 (quoting *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)).

¹⁵⁰ *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066-71 (3d Cir. 1984).

¹⁵¹ *Brown & Williamson Tobacco Corp. v. Federal Trade Comm'n*, 710 F.2d 1165, 1179-80 (6th Cir. 1983).

¹⁵² *In re Continental Ill. Sec. Litig.*, 732 F.2d 1302, 1308-09 (7th Cir. 1984); *Joy v. North*, 692 F.2d 880, 893-94 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983); *see also In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34, 41-43 (C.D. Cal. 1984) (affirming existence of common law right of access to pretrial briefs and statements, summary judgment motions, and supporting affidavits and exhibits).

¹⁵³ *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986). In *Hotel Rittenhouse*, the Court of Appeals for the Third Circuit held that a trial court may permit settlement and enforcement proceedings to be or remain sealed only where the party seeking to retain confidentiality can make a specific showing that the need to preserve confidentiality outweighs the general presumption in favor of public access to judicial filings. *Id.* at 344. The court acknowledged that the terms of the settlement would remain confidential had the parties merely filed a stipulation of dismissal and refrained from filing the actual settlement agreement with the court or seeking enforcement of the agreement. By holding that a settling party can have either confidentiality or court enforcement of a settlement, but not both, however, the court may have created a disincentive for settlement. *Cf. Minneapolis Star & Tribune v. Schumacher*, 392 N.W.2d 197 (Minn. 1986) (media have no common law right of access to settlement records on file with the court).

¹⁵⁴ *See, e.g., In re CBS, Inc.*, 828 F.2d 958, 959 (2d Cir. 1987) (affirming common law right of access to evidence presented in open court session); *see also Wilson v. American Motors Corp.*, 759 F.2d 1568, 1570 (11th Cir. 1985) (affirming common law right of access to civil trial records).

¹⁵⁵ *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *see also Times Herald Printing Co. v. Jones, M.D.*, 717 S.W.2d 933, 936 (Tex. Ct. App. 1986) (recognizing that common law right of access to records is not absolute and "must bow to the discretion of the trial judge in making a decision based upon the facts of a particular case").

the basis for a decision on the merits, it does *not* extend to purely pretrial discovery materials.¹⁵⁶ Indeed, no court of record appears ever to have extended the common law public right of access to materials that have not been introduced as evidence at trial or at least as documentation in support of trial papers or motions to the court.¹⁵⁷ And, to the extent that the law in this area may once arguably have been uncertain, the Supreme Court substantially precluded the common law claim in its *Seattle Times* decision.¹⁵⁸ The Court of Appeals for the First Circuit has recently refused to recognize a presumptive common law public right of access to documents submitted to a trial court for its ruling on a pretrial discovery motion, noting that discovery is "fundamentally different" from those other proceedings for which a public right of access has been realized.¹⁵⁹ The court stated: "There is no tradition of public access to discovery, and requiring a trial court to scrutinize carefully public claims of access would be incongruous with the goals of the discovery process."¹⁶⁰

¹⁵⁶ See, e.g., *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355 (11th Cir. 1987); *Federal Trade Comm'n v. Standard Fin. Management Corp.*, 830 F.2d 404, 408 (1st Cir. 1987); *Anderson v. Cryovac*, 805 F.2d 1, 13 (1st Cir. 1986); *Simon v. G.D. Searle & Co.*, 119 F.R.D. 683, 684 (D. Minn. 1987); *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582, 584 (E.D.N.Y. 1983); see also *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1340, 1342 n.3 (D.C. Cir. 1985) (both majority and dissenting opinions agreeing that the common law presumption does not go beyond evidentiary materials used in determining the litigants' substantive rights); *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010 (D.C. Cir. 1984); cf. *Cincinnati Gas & Elec. Co. v. General Elec. Co.*, 854 F.2d 900 (6th Cir. 1988) (no public right of access to summary jury trial). See generally Pownell, *supra* note 116 (distinguishing between access to pretrial adjudicatory proceedings and access to discovery materials).

¹⁵⁷ Even in the context of a motion for summary judgment, there may be good reasons for denying access to the underlying materials—at least where the motion is denied—because such a decision is not dispositive but rather is most properly characterized as a *refusal* to decide the merits of the case. Given the frequency and ease with which parties move for summary judgment, sometimes as a pretext for public dissemination of discovery materials, the recognition of a common law right of access in this context is troublesome. See Marcus, *supra* note 2, at 49. A rule that a party must disclose to the public all materials submitted in conjunction with a motion for summary judgment that is ultimately denied could preclude later settlements premised on confidentiality.

¹⁵⁸ *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 788 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989). In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), the Supreme Court entered a protective order prohibiting the *Times* from using discovery information "in any way except as necessary to prepare and try its case." Further, the Court "rejected the suggestion that review of a protective order requires any heightened scrutiny under the first amendment." 858 F.2d at 788. See also *Anderson*, 805 F.2d at 13.

¹⁵⁹ *Anderson*, 805 F.2d at 13.

¹⁶⁰ *Id.*

Nevertheless, other courts have invoked the common law presumption of public access in recent cases involving documents subject to protective orders in ways that bode poorly for defendants who seek to rely on such orders to safeguard proprietary information. For example, in *Littlejohn v. BIC Corp.*,¹⁶¹ the Third Circuit Court of Appeals recognized a common law public right of access to documents that were discovered under the aegis of a protective order but that were erroneously admitted into evidence at trial. The underlying case was a products liability action in which the plaintiff claimed that she had been injured by a defectively designed BIC disposable lighter. The trial was bifurcated into liability and damages phases, and following a verdict for the plaintiff in the liability phase, the case was settled. Following settlement, BIC moved to have the record sealed; the court denied this motion and dismissed the case. Thereafter, in accordance with the terms of a stipulated protective order, all exhibits designated "confidential" were returned to the lawyers for BIC.¹⁶²

Subsequently, the *Philadelphia Inquirer* (PNI), researching a story on the BIC lighter litigation, attempted to intervene to secure access to the trial exhibits, including confidential documents covered by the protective order whose admission into evidence had not been contested. PNI based its application for intervention on an asserted common law public right of access. The Third Circuit Court of Appeals declined to review the intervention order because BIC had never challenged the propriety of the intervention in the court below.¹⁶³ The correctness of that order, however, because it was based solely on the common law right of access claimed by BIC, is itself questionable. It is highly doubtful whether, under the Rules, a third party seeking access to a record after termination of an action should be allowed to proceed without filing a separate complaint or an order to show cause.¹⁶⁴

¹⁶¹ 851 F.2d 673 (3d Cir. 1988).

¹⁶² *Id.* at 684-85.

¹⁶³ *Id.* at 677 n.7.

¹⁶⁴ See *Black v. Central Motors Line, Inc.*, 500 F.2d 407, 408 (4th Cir. 1974) ("Intervention is ancillary and subordinate to a main cause and whenever an action is terminated, for whatever reason, there no longer remains an action in which there can be an intervention."); see also *Fuller v. Volk*, 351 F.2d 323, 328 (3d Cir. 1965). But see *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 341-42 n.2 (3d Cir. 1986) (presuming intervention to be proper method for seeking access to record even though underlying case had been settled); *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 788 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989) (intervention allowed pursuant to Local Rule 16(g)). See *infra* text accompanying notes 184-90 for a discussion of *Public Citizen*.

Questions about the propriety of the intervention aside, the *Littlejohn* court also agreed with PNI that PNI had a common law right of access to the confidential exhibits. This was true even though the exhibits had been admitted into evidence improperly and the case had been settled. The court observed that "the public's exercise of its common law access right in civil cases promotes public confidence in the judicial system by enhancing the testimonial trustworthiness and the quality of justice dispensed by the court."¹⁶⁵ The *Littlejohn* court reasoned that the defendant's failure to object to the admission into evidence of the documents at trial constituted a waiver of any of its potential confidentiality interests under the protective order.¹⁶⁶

Ultimately, PNI was denied access to certain of the requested documents based on the court's further finding that any public access right to those documents evaporated when the court, pursuant to administrative practice, returned them to the attorneys following the settlement. *Littlejohn*, therefore, may stand only for the proposition that a common law right of access may attach to those documents which, though covered by a protective order, are admitted into evidence, even if erroneously, and that remain part of the judicial record. Examples of this would be deposition testimony read into evidence at trial or exhibits transcribed and made a part of the official court transcript. Nevertheless, because of the *Littlejohn* court's apparent willingness to allow the original intervention order, based as it was solely on PNI's common law access claim asserted well after trial and settlement, the decision raises serious concerns about whether defendants in products liability cases may continue to rely on the confidentiality of information covered by a protective order.

3. The Statutory Right of Access

Recently, some courts, unable to discern a public right of access to discovery materials based either squarely on the Constitution or on the common law, have purported to discern a *statutory* right of

¹⁶⁵ *Littlejohn*, 851 F.2d at 678; see also *Hotel Rittenhouse*, 800 F.2d at 345; *United States v. Criden*, 648 F.2d 814, 819 (3d Cir. 1981).

¹⁶⁶ 851 F.2d at 680. The court explained that the release of the information in open court constituted a "publication," thus restricting the defendant's ability later unilaterally to restrict its future use. *Id.*; see also *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418, 421 (6th Cir. 1981).

access, based on Rules 26(c) and 5(d).¹⁶⁷ The Court of Appeals for the Second Circuit spearheaded this alarming trend in *Agent Orange*.¹⁶⁸ As discussed below, however, neither of these Rules can reasonably be construed as providing the basis for recognizing a general public right of access. The court's reliance on a statutory right to justify the modification of previously entered protective orders, at the behest of the press or of other third parties, can only be characterized as patently capricious and a form of judicial tyranny.

a. *The Statutory "Right" Under Rule 26(c)*

Agent Orange is the leading case supporting the existence of a public right of access to discovery materials generated in the course of a private products liability lawsuit based purportedly, at least in part, on the language of Rule 26(c) itself.¹⁶⁹ In *Agent Orange*, some 15,000 Vietnam veterans sought to recover for physical injuries they allegedly suffered as a result of their exposure to various herbicides manufactured by a number of chemical companies and supplied to the government for use in defoliating the Southeast Asian jungles.¹⁷⁰

After the case was settled¹⁷¹ and during a Rule 23(e) fairness hearing, a public interest group, the Vietnam Veterans of America, along with several non-representative class members and one of the plaintiff's attorneys, sought access to massive amounts of discovery produced by the Dow Chemical Company and certain other of the corporate defendants.¹⁷² The district court had previously entered an umbrella protective order during the early stages of the litigation.¹⁷³ The *Agent Orange* special master found the order necessary

¹⁶⁷ See *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir.), cert. denied, 484 U.S. 953 (1987); see also *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775 (1st Cir. 1988), cert. denied, 109 S. Ct. 838 (1989).

¹⁶⁸ 821 F.2d 139.

¹⁶⁹ A second basis for the *Agent Orange* court's recognition of a public right of access was Rule 5(d). See *infra* text accompanying notes 192-230 for a complete discussion of Rule 5(d).

¹⁷⁰ The extensive procedural history and general background of the *Agent Orange* litigation is summarized in *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145 (2d Cir. 1987). See also *Discovery Documents Are Public*, NEWS MEDIA & THE LAW, Summer 1987, at 13-14.

¹⁷¹ See *In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740 (E.D.N.Y. 1984) (settlement opinion).

¹⁷² *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985). For the text of Rule 23(e), see FED. R. CIV. P. 23(e).

¹⁷³ See *In re "Agent Orange" Prod. Liab. Litig.*, 96 F.R.D. 582 (E.D.N.Y. 1983). The full text of the protective order is reprinted in the Appendix to the opinion. *Id.* at 585-87.

due to the "complexity of [the] litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the [trial date]." ¹⁷⁴

After concluding that neither the Constitution nor the common law provided the applicants with a sufficient basis for obtaining access to the discovery materials,¹⁷⁵ the magistrate, in an opinion later adopted by the district court,¹⁷⁶ relied in part on the Rule 26(c) requirement that a party seeking a protective order prove that "good cause" exists to limit access to discovery material.¹⁷⁷ The magistrate's reasoning was apparently that the procedural burden on the party seeking confidentiality indicated a congressional intent that materials and information generated by discovery under *normal* circumstances be open for public review and dissemination:

Fed. R. Civ. P. 26(c) presumes that discovery materials are open to the public. The Rule's requirement that the proponent of non-disclosure prove that good cause exists to limit public access to discovery material demonstrates that, in the absence of such proof, the discovery is open to the public.¹⁷⁸

The magistrate essentially "explained away" *Seattle Times*, stating only that the Supreme Court had "tacitly affirmed the validity of the statutory presumption" when it approved the trial court's exercise of its discretion in finding that good cause in that case had been shown.¹⁷⁹ Nowhere in *Seattle Times*, however, did the Court make any mention of any statutory presumption of public access. The Court was concerned only with the legitimacy of controls over extrajudicial use of the discovery information by the defendant, who in that case happened to be a media entity. Moreover, the Court addressed that issue only after it had *already* held that that

¹⁷⁴ *Id.* at 583.

¹⁷⁵ 104 F.R.D. at 566. The magistrate appeared at least tentatively to reject the intervenors' first amendment argument based on a strict reading of *Seattle Times*, concluding that the first amendment does not affect the trial court's right to restrain dissemination of pretrial discovery material. *Id.* As to the common law right of access claim, the magistrate cited to the rule that the common law right of access is limited only to those documents actually relied on by a court in reaching its decision. *Id.* at 567. The magistrate also appeared to be influenced by the fact that the principal movants were either non-parties or non-representative class members. *Id.* at 567 n.5.

¹⁷⁶ *Id.* at 562.

¹⁷⁷ *Id.* at 567.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

same party had no constitutional right of access. The Rule 26(c) issues addressed in *Seattle Times* thus pertained to a party to the litigation, who already had access to the confidential material at issue, and not to the general public. Because of this, the magistrate's reliance on *Seattle Times* as a source of support for his opinion that Rule 26(c) creates a statutory right of access for members of the general public was, quite simply, misplaced. Disturbingly, however, this strained construction of *Seattle Times* and of Rule 26(c) was affirmed by the Second Circuit Court of Appeals.¹⁸⁰

The district court's and appeals court's approval of the magistrate's suggestion in *Agent Orange* that Rule 26(c), independent of the Constitution or the common law, provides a statutory basis for a public right of access to discovery materials is simply unworkable in light of the realities of day-to-day trial practice. This is particularly true in the products liability context. It is also at odds with Rule 1's admonition that the Rules should be interpreted "to secure the just, speedy, and inexpensive determination of every action."¹⁸¹ Under the *Agent Orange* courts' reading of Rule 26(c), the general public would presumably have the right to attend any deposition, participate in product inspections and testing, and compel the production of documents, often numbering in the thousands. Under the *Agent Orange* analysis, because it is a statutory "right," non-party access may be reasonably assured against applications for protective orders even though the end result inevitably will be additional cost, delay, frustration, and, perhaps, the intimidation of witnesses and attorneys. Few corporate employees would be willing to appear as deponents for their employers under Rule 30(b)(6)¹⁸² if the local or national investigative press were expected to be present at the deposition.¹⁸³

At the time of the Second Circuit Court of Appeals' decision in *Agent Orange*, it might have been thought that this novel recognition of a "statutory" public right of access under Rule 26(c) would turn out to be an anomaly. As a highly-publicized multidistrict class action lawsuit of almost unprecedented proportions, in which the United States government also was extensively involved, the case might have been seen as unique and difficult to analogize to other

¹⁸⁰ *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145-46 (2d Cir.), cert. denied, 484 U.S. 953 (1987).

¹⁸¹ FED. R. CIV. P. 1.

¹⁸² See FED. R. CIV. P. 30(b)(6).

¹⁸³ See, e.g., *Avirgan v. Hull*, 118 F.R.D. 252 (D.D.C. 1987) (allowing press to attend deposition over objection of deponent).

products liability cases. Moreover, due to the procedural posture of the case at the time the requests for access to the discovery materials were made, reasonable arguments for access could conceivably have been made. These arguments could have been based on the need of the court and veteran class members to consider the protected material in evaluating the adequacy of the proposed settlement.¹⁸⁴

The impact of *Agent Orange*, however, coming as it did from one of the most respected of the federal circuits, has already been felt in other complex litigation. Subsequent to *Agent Orange*, in a case involving few of those unique characteristics, except perhaps, for having a relatively high public profile, the First Circuit Court of Appeals evidenced its willingness to discern a similar Rule 26(c) "statutory" right of public access. In *Public Citizen v. Liggett Group, Inc.*,¹⁸⁵ the court concluded that Public Citizen, a "public interest" group, had standing to intervene to request modification of a protective order, notwithstanding its failure to secure Rule 24 intervenor status. The court based its conclusion in part on the idea that a public right of access subsists in Rule 26(c)'s good cause requirement. In that case, the district court was faced with a motion to lift a protective order to allow access to the discovery documents produced by the defendant tobacco company. The underlying case, in which the plaintiffs alleged that cigarettes manufactured by the defendant had caused their decedent's death, had previously been dismissed on federal preemption grounds,¹⁸⁶ and a final judgment of dismissal had been entered.

After the dismissal, Public Citizen was unable to secure formal intervenor status under Rule 24 and sought to intervene informally, asserting a general public right of access. The *Public Citizen* court stated that intervention was justified "to relieve the plaintiff of the burden" of the previously-entered protective order that prevented it from making the discovery in its possession public.¹⁸⁷ In thus using Rule 26(c) itself as at least a partial independent basis for allowing intervention by a member of the public, the First Circuit Court of Appeals actually carried the flawed statutory analysis of

¹⁸⁴ See *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 572-74 (E.D.N.Y. 1985).

¹⁸⁵ 858 F.2d 775 (1988), *cert. denied*, 109 S. Ct. 838 (1989); see also *United States v. Kentucky Utils. Co.*, 124 F.R.D. 146 (E.D. Ky. 1989) (following *Agent Orange* approach in antitrust case and permitting disclosure of documents sealed as part of settlement agreement).

¹⁸⁶ See *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).

¹⁸⁷ *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 784-87 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989).

Agent Orange one step further.¹⁸⁸ At best, Rule 26(c) may implicitly permit a party-opponent to disseminate information obtained through discovery in the absence of a protective order. Even this right, however, may be subject to other Rules and limitations, such as Rule 11 sanctions if the information was obtained for improper purposes unconnected to the litigation, or, perhaps, money damages for its improper, tortious use.

No language in Rule 26(c), however, permits a *non-party* to engage in discovery. Indeed, the foundational discovery Rule, Rule 26(a), specifically limits its applicability to "parties."¹⁸⁹ Under the Rules, a person otherwise unconnected to a case¹⁹⁰ ordinarily has no discovery rights whatsoever unless he becomes a party, and at least until recently, generally has been permitted to do so, if at all, only under the strictures of Rule 24.¹⁹¹ The use of Rule 26(c) by the *Agent Orange* court, and more recently, by the court in *Public Citizen*, to divine a statutory "right" of access, simply cannot be squared with the other Rules. In their zeal to find grounds for setting aside umbrella protective orders and allowing broad public access to discovery materials, these courts, by resorting to Rule 26(c), have fashioned a rule of procedure that makes no sense and that will inevitably impose unwarranted costs and hardships on both the parties and the judicial system.

b. *The Statutory "Right" Under Rule 5(d)*

The second, and seemingly even less substantial, ground on which some courts recently have predicated a statutory public right of access to discovery materials is Rule 5(d). As previously discussed,¹⁹² Rule 5(d) codifies the normal presumption that all "papers" after the complaint "required to be served" upon a party will be filed with the court, but it further states that the court may, "on

¹⁸⁸ The *Public Citizen* court also held that Public Citizen's right to intervene could be predicated on Rule 5(d). See *infra* text accompanying notes 192-230 for a discussion of Rule 5(d).

¹⁸⁹ See FED. R. CIV. P. 26(a).

¹⁹⁰ See FED. R. CIV. P. 27.

¹⁹¹ See FED. R. CIV. P. 24. But see *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988) where the Third Circuit Court of Appeals left undisturbed the district court's allowance of intervention pursuant to an asserted common law presumptive right of access. See *supra* text accompanying notes 161-62 for a discussion of *Littlejohn*.

¹⁹² See *supra* text accompanying notes 81-83, for a discussion of the 1980 amendments to Rule 5(d).

motion of a party or on its own initiative" order that such materials *not* be filed.¹⁹³

In the *Agent Orange* litigation, the magistrate, in addition to relying on Rule 26(c) in finding a public right of access, also cited to Rule 5(d).¹⁹⁴ The magistrate concluded that Rule 5(d) separately created a public right of access to the discovery materials in that case, including materials produced pursuant to Rule 34,¹⁹⁵ *even though the materials had not in fact been filed with the court* prior to the approval of the settlement. The nonfiling of the materials in *Agent Orange* was due partially to the lack of any Rule 34 filing requirement¹⁹⁶ and partially to the existence of a local rule, then in force, which reversed the general presumption of Rule 5(d) and mandated that discovery materials ordinarily *not* be filed.¹⁹⁷ The *Agent Orange* magistrate found support for his position only in the concluding phrase of the governing local rule, which left open the possibility that a court could, in individual cases, order the filing of discovery responses.¹⁹⁸ On appeal, the Second Circuit Court of Appeals approved this novel reading of Rule 5(d), relying essentially on the Advisory Committee note accompanying the Rule, which states that discovery 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."¹⁹⁹

The *Agent Orange* analysis makes little sense, either as a reasonable interpretation of Rule 5(d), or as a statement of the actual practice of law in the federal courts. Significantly, prior to the decision in *Agent Orange*, at least one commentator had labeled the 1983 amendment to Rule 5(d), which reversed the traditional filing requirement, "misguided" precisely because it was thought that the amendment would impair public access to discovery materials.²⁰⁰ The Second Circuit Court of Appeals' endorsement of Rule 5(d) as the basis for a statutory public right of access is also impossible to

¹⁹³ See FED. R. CIV. P. 5(d).

¹⁹⁴ *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 567-68 (E.D.N.Y. 1985).

¹⁹⁵ See FED. R. CIV. P. 34.

¹⁹⁶ See *id.* Rule 34 requires only that discovery materials be made available for inspection and copying.

¹⁹⁷ S.D.N.Y., E.D.N.Y. Civ. R. 18(a) (1983). 104 F.R.D. at 567-68.

¹⁹⁸ *Agent Orange*, 104 F.R.D. at 568.

¹⁹⁹ *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 146-47 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987); see FED. R. CIV. P. 5(d) advisory committee's note.

²⁰⁰ See Note, *Non-Party Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085, 1095 n.51 (1981).

reconcile with the fact that documents produced for discovery and inspection pursuant to Rule 34 document requests cannot properly be termed "papers" which are "required to be served" within the meaning of Rule 5(d).²⁰¹ As noted above, Rule 34, unlike other Rules governing discovery, does not provide that responsive discovery material be filed with the court and made part of the public record.

That discovery documents are not "papers" is further evidenced by Rule 11's requirement that every "paper of a party represented by an attorney be signed by at least one attorney of record."²⁰² The fact that the Rule's drafters never suggested that documents produced in discovery must be signed under Rule 11 reinforces the conclusion that such documents are not Rule 5(d) "papers." Indeed, if all discovery materials were to be deemed "papers" under Rule 5(d), then, pursuant to Rule 7(b)(2),²⁰³ all such materials not only would have to be signed, but also would have to be formally captioned and served upon the other party in court. The fact that none of these procedures is actually followed again demonstrates the fallacy inherent in equating documents produced pursuant to Rule 34 with "papers" under Rule 5(d).

The Second Circuit Court of Appeals in *Agent Orange* acknowledged that discovery documents "technically may not fall within the terms of Rule 5(d)."²⁰⁴ But the court also noted that the distinction between materials filed with a court, and thus presumably public, and those not filed, and thus presumably private, is much more than a mere "technicality."²⁰⁵ The *Agent Orange* court's use of its Rule 5(d) supervisory power solely to grant the public at large access to private information to which it would not otherwise have been entitled²⁰⁶ thus seems utterly capricious. It represents a clear departure from the purpose and intent of Rule 5(d), and improperly casts the court in an investigative—rather than its normal adjudicative—function.

²⁰¹ FED. R. CIV. P. 5(d).

²⁰² FED. R. CIV. P. 11.

²⁰³ See FED. R. CIV. P. 7(b)(2).

²⁰⁴ *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 147 (2d Cir.), cert. denied, 484 U.S. 953 (1987).

²⁰⁵ *Id.*

²⁰⁶ As noted above, the district court declined to accept the applicants' first amendment and common law right of access arguments. See *supra* note 175 for a discussion of this point. The Second Circuit Court of Appeals did not address either of these arguments, instead focusing solely on upholding the statutory right of access. *Agent Orange*, 821 F.2d at 145.

Several recent state court cases have declined to follow the lead of *Agent Orange*, and have refused to interpret their own rules of procedure regarding filing requirements and protective orders as the basis for finding a statutory public right of access to discovery materials. The Florida Supreme Court, for example, has denied press requests under the state public records laws, or otherwise, to obtain copies of unfiled depositions in both criminal²⁰⁷ and civil²⁰⁸ proceedings. The Florida Supreme Court has recognized that "[t]ransforming the discovery rules into a major vehicle for obtaining information to be published by the press even though the information might be inadmissible, irrelevant, defamatory or prejudicial would subvert the purpose of discovery and result in the tail wagging the dog."²⁰⁹ Similarly, the Vermont Supreme Court has declined to recognize a statutory public right of access to unfiled discovery materials under its state counterpart to Rule 5(d).²¹⁰

On the other hand, the Second Circuit Court of Appeals' recognition of a statutory presumption of broad public access to information produced during discovery is having an impact on other complex federal litigation across the country, particularly in the products liability context. A particularly striking example is *Graham v. Wyeth Laboratories*,²¹¹ a products liability case brought against the manufacturer of a DTP vaccine. Following the entry of a verdict for the plaintiff in *Wyeth*, the court lifted the protective order previously entered in favor of the defendant, and then went a step farther, ordering the creation of a so-called "Wyeth Laboratories DTP Vaccine Litigation Library."²¹² This "library" was to contain the trial transcript, exhibits, pleadings, depositions, and other discovery documents produced in the case (including documents that

²⁰⁷ See *Palm Beach Newspapers, Inc. v. Burk*, 504 So. 2d 378 (Fla. 1987).

²⁰⁸ See *Miami Herald Publishing Co. v. Gridley*, 510 So. 2d 884 (Fla. 1987).

²⁰⁹ *Palm Beach*, 504 So. 2d at 384. The *Palm Beach* court also rejected a parallel statutory argument that the Florida equivalent to Rule 26(c)—Rule 1.280(c)—created a presumptive public right of access. *Id.* at 383–84.

²¹⁰ See *Herald Ass'n, Inc. v. Judicial Conduct Bd.*, 149 Vt. 233, 544 A.2d 596 (1988). In *Herald Association*, the subject discovery materials had been sent to the state's Judicial Conduct Board at the time the request for access was made, but the Board had not yet ruled as to whether it would accept them. The court reasoned that the Board could direct that such discovery information, though already in its possession, be returned to the parties, rendering it undiscoverable.

²¹¹ 118 F.R.D. 511 (D. Kan. 1988).

²¹² *Id.* at 513–14. The court noted that the defendant no longer produced the vaccine and reasoned that it was, for that reason, "in no jeopardy insofar as competitors are concerned." *Id.* at 512. On this basis the court concluded that "[f]or all purposes, there are no secrets." *Id.*

had previously been the subject of the protective order)—all for the benefit of other DTP plaintiffs, as well as for “researchers, academics, institutions, consumer groups, members of the medical profession or associations, private or governmental, legal associations such as the ATLA and/or Defense Research Institute, and even law students.”²¹³ The court envisioned an expansion of the “library,” in the future, by way of additional materials supplied by others following the trials of successive DTP cases.²¹⁴

The court justified its action in creating this wholly unprecedented “library,” which was presumably to be maintained on premises through the use of public employees and public funds, on the basis that the *Wyeth* case “ha[d] it all” regarding the vaccine.²¹⁵ The court wanted to ensure that future litigants and other interested parties would not be required to “re-invent the wheel.”²¹⁶ Although the portion of the district court’s order mandating the creation of the “library” was subsequently vacated by the Tenth Circuit Court of Appeals on a petition for a writ of mandamus,²¹⁷ the district court’s opinion is notable because it represents perhaps the latest and most extreme example of judicial overreaching in the wake of *Agent Orange*. Although neither *Agent Orange* nor Rule 5(d) was actually mentioned by the district court in *Wyeth*, the idea of the “library” seems implicitly to follow from the recognition of the “statutory” right of access, based on Rule 5(d), which formed the basis for the Second Circuit Court of Appeals’ analysis in *Agent Orange*. But, as the appeals court in *Wyeth* observed in vacating the creation of the library, a court’s interest in avoiding unnecessary repetition and expense and in judicial expediency, while perhaps laudable in the abstract, is improper where it exceeds the bounds of its judicial authority.²¹⁸

Following *Agent Orange*, at least one other district court has resorted to local filing rules as a basis for discerning a statutory public right of access to discovery materials in a products liability

²¹³ *Id.* at 514.

²¹⁴ *Id.*

²¹⁵ *Id.* at 513.

²¹⁶ *Id.*

²¹⁷ *Wyeth Labs. v. United States Dist. Court*, 851 F.2d 321 (10th Cir. 1988). The Tenth Circuit Court of Appeals upheld the portion of the order vacating the protective order, however, noting that the defendant retained the right to challenge the disclosure of any material on an individual basis and upon a particularized showing of need.

²¹⁸ *Id.* at 324. The court of appeals specifically questioned whether public funds could be expended for the contemplated library absent an appropriation by Congress.

case. In the later case, however, *Public Citizen v. Liggett Group*,²¹⁹ the district court's particularly strained interpretation of Rule 5(d) was disapproved, at least in part, on appeal. In *Public Citizen*, Public Citizen invoked both Rule 26(c) and a local rule as a basis for informal intervention.²²⁰ Like the local rule involved in *Agent Orange*, this rule reversed in part the filing presumption of Rule 5(d) by requiring that discovery materials ordinarily should *not* be filed unless the court so orders.²²¹ Public Citizen also based its access claim in part on Rule 5(d), arguing that that Rule creates a presumption that all discovery materials are available to the public if filed in court. Because the court had already dismissed the case and good cause for the protective order under Rule 26(c) no longer existed, Public Citizen argued, the order should be modified and Rule 5(d) filing required. The district court accepted this argument and ordered that the documents be filed in court and made available to the public, despite the fact that the litigation had already been concluded.

On appeal, the First Circuit Court of Appeals upheld Public Citizen's right to intervene based on Rule 5(d) but vacated the part of the order actually imposing the Rule 5(d) filing requirement. The court held that while the district court may have had the power under Rule 5(d) to order the filing of discovery materials *during the pendency of the litigation*, its jurisdiction did not extend to post-judgment action.²²² Because the district court, previous to ordering the filing, had entered a final judgment of dismissal on the merits, no substantive issue was left to be resolved, and the court simply lacked the power to impose any new affirmative requirements on the parties relating to discovery. As the appeals court noted, the purpose of discovery is to enable parties to obtain material "relevant to the subject matter in the pending action"—a purpose that can obviously no longer be served once a case has been dismissed.²²³ Indeed, once a case has been dismissed and rights to appeal have lapsed, parties are ordinarily under no obligation even to preserve the discovery materials they have obtained.²²⁴ The First Circuit Court of Appeals'

²¹⁹ 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989).

²²⁰ See *supra* text accompanying notes 187-91 for a discussion of Rule 26(c).

²²¹ See Local Rule 16(g), U.S. Dist. Ct., D. Mass. Public Citizen also invoked Rule 26(c) in support of its attempt to intervene.

²²² *Public Citizen*, 858 F.2d at 781. The district court had reasoned that the outstanding protective order presented a live controversy extending past the dismissal of the underlying claims. See *id.* at 780.

²²³ *Id.* at 781.

²²⁴ In *Public Citizen*, for example, the First Circuit Court of Appeals pointed out that any

decision in *Public Citizen* thus correctly recognizes the inherent limitations on the power of a court to order Rule 5(d) filing as a predicate for the recognition of a statutory public right of access. Nevertheless, the fact that the *Public Citizen* court even went so far as to interpret its local filing rule as according a statutory basis for intervention by Public Citizen, notwithstanding the latter's failure to secure formal Rule 24 intervenor status, represents a troubling extension of Rule 5(d).

The Third Circuit Court of Appeals in *Littlejohn v. BIC Corp.*²²⁵ seems to have rejected—if only implicitly—the *Agent Orange* approach of using court filing procedures as a justification for discerning a public right of access to materials covered by a protective order. As previously discussed,²²⁶ the *Littlejohn* court did recognize the existence of a public right of access based on the common law, at least with respect to confidential documents actually admitted, although erroneously, into evidence at trial. The court further held, however, that because the petition for intervention by the Philadelphia Inquirer (PNI) came some five months *after* the case had been settled and dismissed, with no appeal pending, and after the confidential exhibits had already been returned to the parties, the documents could no longer be considered “judicial records” to which a right of access could attach. In recognizing that both historically and as a matter of common sense the content of a judicial record has both temporal and substantive limits,²²⁷ the *Littlejohn* court impliedly recognized that it is not the business of courts to serve as permanent repositories of information available for members of the public and the press to access at their convenience. The court stated:

In this era of “the paper chase,” hundreds of thousands of exhibits may be subpoenaed and entered into evidence

of the parties were free to destroy all of the documents in their possession long before Public Citizen filed its motion and that, had they done so, any Rule 5(d) filing order would obviously have been meaningless and unavailing. *Id.*

²²⁵ 851 F.2d 673 (3d Cir. 1988).

²²⁶ See *supra* text accompanying notes 161–64 for a discussion of the *Littlejohn* case.

²²⁷ *Littlejohn*, 851 F.2d at 682. The court observed that under 28 U.S.C. § 457, obsolete papers may be disposed of with approval of court. Of further significance to the *Littlejohn* court was the existence of a local rule that provided that the district court has custody over all exhibits received into evidence but also stated that these exhibits are considered only “auxiliary case records,” to be taken from the clerk’s custody at the conclusion of the case. Local Rule 39(e), U.S. Dist. Ct., E.D. Pa. (1986). The court reasoned that if the exhibits had not been so returned by the time of the intervention, they already would have been destroyed by the district court clerk, and could no longer be a part of the judicial record subject to presumptive public access. *Id.*

in bulk in a single case . . . (citations omitted). Must a court be forever burdened with the responsibility of maintaining, supervising the possession of, or adjudicating access rights of such documentary exhibits? We believe not. This is an unreasonable burden to inflict upon courts, particularly at a time when litigation continues to grow more complex and voluminous.²²⁸

The Third Circuit Court of Appeals also pointed out in *Littlejohn* that the purposes of public access, while perhaps served during the trial period and while a case is pending in court, are no longer served once the litigation has been completely concluded.²²⁹ The *Littlejohn* court never explicitly rejected or even considered the statutory right of access approach under Rule 5(d) that was first recognized in *Agent Orange*. The *Littlejohn* determination that confidential materials—including even trial exhibits returned to their owner after a case has been terminated by settlement—do not retain their status as “judicial records” to which a presumptive public right of access may attach, does appear at odds with the *Agent Orange* approach. The *Littlejohn* approach, however, represents a far more sensible accommodation of the needs of both the parties and the system.²³⁰

²²⁸ *Id.* at 682–83; see also *Simon v. G.D. Searle & Co.*, 119 F.R.D. 683, 684 (D. Minn. 1987) (noting that the court had never sanctioned the wholesale filing of discovery materials, depositions or exhibits, and declining to recognize a public right of access to documents never admitted into evidence or ruled on by the court); cf. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 899 n.63 (E.D. Pa. 1981) (“We have serious doubts that a member of the public could acquire access under the common law rule to materials already restored to their owner.”).

²²⁹ *Littlejohn*, 851 F.2d at 682. The court noted that public access serves “to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the system.” *Id.* PNI had also argued in *Littlejohn* that, notwithstanding the termination of the underlying suit, the district court still had supervisory power over the documents because copies had been resubmitted to the court under seal in connection with ancillary contempt proceedings against the plaintiff’s attorney. The court rejected this argument, observing that PNI had not intervened to secure access to the record of the contempt proceedings. Rather, PNI had sought access only to the records in the underlying case. *Id.* at 683 n.24.

²³⁰ *Id.* at 683. The Third Circuit Court of Appeals left untouched the district court’s determination that PNI was entitled to obtain items that properly remained a part of the judicial record, such as deposition testimony read into evidence at trial or exhibits actually made a part of the official court transcript. *Id.*; see also *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1025 (D.C. Cir. 1984) (presumption of openness created by Rule 5(d) is qualified by Rule 26(c)(7)’s protection of confidential information and by litigant’s constitutionally protected interest in avoiding public disclosure of sensitive commercial information not used at trial).

V. THE PLAINTIFF'S "RIGHT" TO DISSEMINATE

Although courts sometimes confuse or combine the two ideas, a plaintiff's purported right to disseminate discovery materials must be analyzed separately from the public's purported right of access to them. Protective orders that put limitations on how a person may share discovered information raise more obvious first amendment issues than do limitations on access; a judicial limitation on a person's ability to disseminate information obtained through discovery is, at least ostensibly, a restraint on speech. As the Supreme Court stated in *Seattle Times*, however, because the discovery process itself is a matter of legislative "grace," it is *not* the type of "classic" prior restraint that requires exacting first amendment scrutiny.²³¹

As discussed above, the scope of a party's first amendment rights must be determined by reference to the statutory scheme of the Rules. Because the one circumscribed purpose of discovery under the Rules is to facilitate trial preparation, a party's interest in disseminating information obtained through discovery must be constrained by this single purpose. Instead of using a strict scrutiny test, the *Seattle Times* court formulated a special test to determine whether protective orders that limit dissemination by plaintiffs pass constitutional muster. Under *Seattle Times*, a "litigant has no first amendment right of access to information made available only for purposes of trying his suit."²³² Thus, a protective order will not offend the first amendment so long as it is entered within the requirements conferred by Rule 26(c); is limited to the context of pretrial discovery; and does not restrict the dissemination of information obtained outside the discovery process.²³³

Seattle Times holds that a protective order that fulfills the "good cause" requirement of Rule 26(c) will, by virtue of its compliance

²³¹ See *Seattle Times v. Rhinehart*, 467 U.S. 20, 32-34 (1984). Under the "strict scrutiny" test, a prior restraint on speech will not offend the first amendment if: the harm posed by the restrained speech is substantial and serious; the restraint is narrowly drawn and precise; and there is no alternative means of protecting the public interest that intrudes less directly on expression. See generally *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-63 (1976).

²³² *Seattle Times*, 467 U.S. at 32.

²³³ See *id.* at 34-35. See *supra* notes 110-16 and accompanying text for a discussion of *Seattle Times*. Under the third prong of the *Seattle Times* test, it is clear that the dissemination of information received *independently* of the discovery process cannot be prohibited. See, e.g., *In re Rafferty*, 864 F.2d 151 (D.C. Cir. 1988) (magistrate exceeded scope of authority by placing under protective order materials obtained *prior* to discovery); see also *Kirshner v. Uniden Corp. of Am.*, 842 F.2d 1074, 1080-81 (9th Cir. 1988) (district court abused discretion in issuing a protective order purporting to restrict use of documents obtained by plaintiff's attorney in separate action earlier filed against same defendant on behalf of another client).

with that Rule, be constitutional. Unfortunately, despite the clarity of its stated holding, *Seattle Times* has done little to resolve the confusion about how the first amendment impacts on a plaintiff's right to share discovery information.²³⁴ The main reason for this confusion is probably the Court's reluctance to disregard completely the first amendment in its analysis. While it refused to subject the protective order under review *itself* to strict scrutiny, it analyzed the rule pursuant to which it was entered—Rule 26(c)—using a classic strict scrutiny analysis.²³⁵ Thus, although the *Seattle Times* Court clearly held that protective orders that limit information-sharing by plaintiffs are *not* classic prior restraints, the use of classic strict scrutiny in analyzing Rule 26(c)—the type of scrutiny used to analyze prior restraints—has created some troublesome ambiguity.²³⁶

As a result of this ambiguity, lower courts that have tried to follow *Seattle Times* disagree on the extent to which an anti-dissemination protective order must be viewed as a prior restraint on

²³⁴ See, e.g., Comment, *Mass Products Liability Litigation*, *supra* note 13; Note, "Good Cause", *supra* note 13; Note, *Effect on Discovery Sharing*, *supra* note 13.

²³⁵ The Court acknowledged that pretrial discovery creates "significant potential for abuse," in the form of delay, expense and potential violations of privacy, and that the government has a substantial interest in preventing abuse of the judicial process. *Seattle Times*, 467 U.S. at 34. The Court thus reasoned that Congress was justified when it empowered trial courts, through Rule 26(c), to enter anti-dissemination protective orders; because the government's interest in preventing abuses of the judicial process is unrelated to the suppression of expression, Rule 26(c) does not offend the first amendment. See also *id.* at 37-38 ("[I]t is necessary to consider . . . whether 'the limitation of First Amendment freedoms [is] no greater than is necessary or essential to the protection of the particular governmental interest involved.'" (quoting *Procunier v. Martinez*, 416 U.S. 396, 413 (1974))).

²³⁶ Another possible reason for the ambiguity generated by *Seattle Times* may be that disclosure in the case could have abridged the first amendment religious and associational freedoms of the plaintiffs, a point specifically emphasized by Justice Brennan in his concurring opinion: "[R]espondent's interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the First Amendment." *Id.* at 38 (Brennan, J., concurring). This has led some commentators to conclude that trial courts may accord greater deference to the first amendment claims of a party seeking to disseminate where the opposing party has not asserted a competing constitutional claim. See, e.g., Note, *Use of Discovery Materials*, *supra* note 13, at 180-83, 194-96. The majority opinion by Justice Powell, however, only briefly acknowledged the conflict between the defendant's first amendment interests and the plaintiff's privacy and religious freedom interests. See *Seattle Times*, 467 U.S. at 37 n.24. Further, nothing in the opinion indicates that the Court viewed the existence of such a competing constitutional claim as fundamental to its determination that the defendant had no right to disseminate.

Another commentator has suggested that *Seattle Times* should be viewed as tightening the rules only for dissemination to the general public, but not for information-sharing among litigants *per se*, because the party against whom the protective order was sought in that case was a newspaper that already had revealed its intention to publish the information for general circulation. See Note, *Effect on Discovery Sharing*, *supra* note 13, at 1069. This interpretation, however, is difficult to square with the Court's own explicit articulation of its holding.

protected speech. As previously noted, the Third Circuit Court of Appeals applies a simple, less stringent "good cause" test to protective orders, and reads *Seattle Times* to prohibit a court issuing or reviewing a protective order from considering the first amendment at all.²³⁷ But the First Circuit Court of Appeals has held that *Seattle Times* does not permit, let alone mandate, a court issuing a protective order to ignore the first amendment, and continues to require that courts apply a "heightened scrutiny" within Rule 26(c)'s requirement of good cause.²³⁸

Clearly, any asserted first amendment interest of a plaintiff who wishes to disseminate discovery information in order to influence the outcome of the *pending litigation* is entitled to no weight, because there can be scant first amendment interest in promoting a trial through the media. As the Supreme Court has stated, "trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."²³⁹ Indeed, when dissemination of the fruits of discovery by a plaintiff during the original action impinges on the defendant's ability to obtain an impartial jury or a fair trial, serious questions of professional responsibility may be raised.²⁴⁰ As previously discussed, however, most courts have held that a plaintiff's stated desire to share information with plaintiffs in *related* lawsuits, standing alone, does not give rise to "good cause"

²³⁷ See, e.g., *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1119 (3d Cir. 1986), *cert. denied*, 479 U.S. 1043 (1987); *New York v. United States Metals Ref. Co.*, 771 F.2d 796, 802 (3d Cir. 1985); see also *Oklahoma Hosp. Ass'n v. Oklahoma Publishing Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984); *Worrell Newspapers, Inc. v. Westhafer*, 739 F.2d 1219, 1223-24 n.4 (7th Cir. 1984); *Tavoulareas v. Washington Post Co.*, 737 F.2d 1170, 1172-73 (D.C. Cir. 1984). For a criticism of the approach of the Third Circuit Court of Appeals in *Cipollone*, see Note, *Protective Orders Prohibiting Publication of Information Obtained Through Discovery*, 32 VILL. L. REV. 813, 833 (1987) [hereinafter Note, *Information Obtained Through Discovery*] (arguing that the case "achieves a resolution of the ambiguity in *Seattle Times* by a kind of judicial fiat and not by a resolution, in theory, of the conflicting principles that generated it").

²³⁸ *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986). Although the First Circuit Court of Appeals stated in *Anderson* that the *Seattle Times* test is not as stringent as the one the First Circuit had previously adopted in *In re San Juan Star Co.*, 662 F.2d 108, 115-16 (1st Cir. 1981), which had called for "heightened scrutiny" of an order restraining communication, see *Anderson*, 805 F.2d at 5-6, as a practical matter it is difficult to discern the difference between the tests used in *Anderson* and *San Juan Star*. See also *Michelson v. Daly*, 590 F. Supp. 261, 266 (N.D.N.Y. 1984) (*Seattle Times* requires separate inquiry into whether restriction is no greater than necessary to protect public interest).

²³⁹ *Bridges v. California*, 314 U.S. 252, 271 (1941).

²⁴⁰ Disciplinary Rule 7-107(G) of the A.B.A. Code of Professional Responsibility strictly prohibits communicating certain information about civil litigation if the information is likely to be disseminated by means of public communication.

under Rule 26(c).²⁴¹ Due to the growing trend of selling information, often at a profit, among members of the plaintiff's bar,²⁴² information marketing among plaintiffs' attorneys has become big business.²⁴³ As a result, constitutional challenges to protective orders by plaintiffs' experts or by the attorneys themselves may no longer be too far-fetched.²⁴⁴ But, to the extent that a protective order that

²⁴¹ See *supra* note 58 and accompanying text for a discussion of litigation that is of public interest.

²⁴² See, e.g., *In re Upjohn Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482 (E.D. Mich. 1979), *aff'd*, 664 F.2d 14 (6th Cir. 1981) (approving sale of discovery information to other plaintiffs under court supervision). *But see* *Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 630 (8th Cir. 1984) (plaintiff's attorney held in contempt for selling discovery information to plaintiffs in other toxic shock syndrome case while initial case was on appeal).

²⁴³ Most commonly, individual litigants learn of similar suits elsewhere and contact involved parties seeking information that those parties may have obtained through discovery. Sometimes, parties or their lawyers form strategy groups to devise a coordinated discovery plan that includes provisions for sharing discovery fruits between all group members. See, e.g., Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 122 (1968) (describing meeting of plaintiffs' lawyers at the American Trial Lawyers Association (ATLA) meeting to discuss coordinated strategy in products liability cases involving prescription drug MER/29). Another method of information sharing is through established information exchanges, such as the ATLA Exchange, which are centralized data banks where discovered information is collected and made available to members. Litigants almost always must pay for the information, and the price is sometimes set at a level that ensures a profit for the discovering party's attorney. See generally Note, *Effect on Discovery Sharing*, *supra* note 13, at 1057-58.

The Trial Lawyers for Public Justice (TLPJ), a law firm established by ATLA members for the purpose of filing amicus briefs and creating an information sharing network, maintains various clearinghouses through which it sells discovery information. For example, the "Airbag Clearinghouse" sells discovery materials to plaintiffs' attorneys in cases that allege that a motor vehicle has a design defect if it does not contain an airbag. TLPJ charges \$1200, plus five percent of the contingency fee, plus the cost of producing any updated material. 1984 ANN. REP. OF THE TRIAL LAWYERS FOR PUB. JUSTICE. Information sharing is neither forbidden nor authorized by the Federal Rules of Civil Procedure.

Selling discovery material in exchange for a portion of the contingency fee is unethical in states that prohibit referral fees. *How the Plaintiff's Bar Shares Its Information*, NAT'L L.J., July 23, 1984. Moreover, the outright sale of discovery materials may be ethically dubious for other reasons. Canon 5 of the ABA Model Code of Professional Responsibility requires a lawyer to exercise independent judgment on behalf of a client. A lawyer who will benefit financially from the sale of discovery material is unlikely to exercise the proper judgment required by Canon 5 with regard to whether he should agree to a protective order prohibiting its dissemination. On the other hand, some commentators believe that the sale of such information, if agreed to by the selling lawyer's client, will be ethically sound. *Id.*

²⁴⁴ Retained experts are generally required to sign affidavits acknowledging that they have read the protective order and agree to be bound by it before they are shown the material covered by the order, and a violation of the order may result in a finding of contempt. See, e.g., *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 974 (3d Cir. 1982) (upholding contempt finding against expert who disclosed material under protective order to counsel who retained him to assist in preparation of another case against same defendant); see also *American Motors Corp. v. Huffstutler*, No. WD-89-54 (Ohio Ct. App. Mar. 9, 1990), where the expert, an engineer who had also worked as in-house counsel for American Motors Corporation,

limits dissemination implicates a plaintiff's first amendment interests, those rights are frequently counterbalanced by the defendant's right to a fair trial—a trial free from massive, emotionally-charged publicity²⁴⁵—and by legitimate interests in corporate privacy.²⁴⁶

Limitations on a plaintiff's first amendment right to disseminate may also frequently be warranted to ensure the smooth operation of the discovery system by avoiding the glut of protective order litigation that would otherwise inundate the courts. While courts have tended to endorse information-sharing among plaintiffs

left the company and later attempted to use information learned in the course of his review of cases for the defendant as a retained expert for plaintiffs.

An expert might argue that he cannot be precluded from using confidential information in testifying because he has a fundamental right to pursue his profession and a corresponding professional duty to reveal to his clients what he knows and cannot cleave from his memory. Cf. *In re Upjohn Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482, 483-84 (E.D. Mich. 1979) (suggesting that it could result in a violation of medical ethics for an expert who knows the hazards of a drug to conceal that knowledge from others), *aff'd*, 664 F.2d 114 (6th Cir. 1981). At least one court has noted, however, that the idea that an expert witness is automatically entitled to act as a "self-appointed savior" carries with it the "seed of abuse." *Baim & Blank, Inc. v. Bruno-New York, Inc.*, 17 F.R.D. 346, 348 (S.D.N.Y. 1955); see Marcus, *supra* note 2, at 67-68.

A plaintiff's attorney subject to a protective order in one case might find himself with a similarly situated plaintiff in a subsequent case and argue that the protective order deprives him, without due process, of his ability adequately to represent the subsequent plaintiff. *But see* *Leis v. Flynt*, 439 U.S. 438, 438-39, 441 (1979) (out-of-state counsel's right to appear *pro hac vice* on behalf of client is not among those interests protected by the fourteenth amendment's due process clause, nor is such privilege a constitutionally protected property right); *Northern Pa. Legal Servs., Inc. v. County of Lackawanna*, 513 F. Supp. 678 (M.D. Penn. 1981) (an attorney has no property interest in representing a particular client absent an express or implied contract with a governmental entity). To date, no court appears to have been called upon to decide any due process claim of this type.

One possible line of defense against such claims, which conceivably may represent the wave of the future in products liability cases (particularly where plaintiffs seek to modify existing protective orders) involves the federal copyright laws. One federal court already has judicially approved the extension of copyright protection to documents found to be trade secrets under state law. *Honda Research & Dev. Co., Ltd. v. Loveall*, 687 F. Supp. 355 (E.D. Tenn. 1985, 1987); see *Loveall v. American Honda Motor Inc.*, 694 S.W.2d 937 (Tenn. 1985) (state case finding defendant entitled to protective order limiting dissemination of competitively sensitive information regarding developmental procedures, specifications and testing of all-terrain cycle). As a result of this federal court's decision, the Tennessee state court prohibited the plaintiff's lawyer from disclosing to any third parties copyrighted trade secret testing documents that were obtained in the course of discovery. Presumably, once such documents became copyrighted, the plaintiff's attorney also could be enjoined from distributing the protected documents to lawyers for other (or potential) parties litigating claims against the same copyright holder.

²⁴⁵ See, e.g., *CBS, Inc. v. United States Dist. Court*, 729 F.2d 1174, 1179 (9th Cir. 1983).

²⁴⁶ See, e.g., *Krause v. Rhodes*, 671 F.2d 212, 217 (6th Cir.), *cert. denied*, 459 U.S. 823 (1982); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 480-81 (S.D.N.Y. 1982); see also Comment, *The Constitutional Right to Withhold Private Information*, 77 Nw. U.L. Rev. 536 (1982).

as economical and efficient,²⁴⁷ in the long run information sharing may actually *waste* judicial time and resources. Defendants faced with the prospect that documents produced in one case will generate similar claims throughout the country will more aggressively resist disclosure. In addition, a protective order that conclusively determines that a particular set of documents is confidential in the initial case will presumably make the issue of confidentiality *res judicata* in any subsequent case. By contrast, an order that is open to modification so as to allow information sharing is subject to repeated challenges to confidentiality in subsequent litigation.²⁴⁸

Sharing information, on the representation that those with whom the information is shared agree to be bound by the terms of the protective order entered in the initial case, may also, as a practical matter, raise serious problems of policing and enforcement. Even some proponents of discovery sharing acknowledge this difficulty.²⁴⁹ First, the likelihood of violation, inadvertent or otherwise, will increase in direct proportion to the number of disclosures.²⁵⁰ Once the information has been transferred beyond the limits of the jurisdiction where it was originally discovered, the court's contempt power will no longer reach those in its possession. Moreover, organized information exchange among the plaintiff's bar enables plaintiffs in lawsuits across the country to use the same experts for similar types of suits. The corporate defendant in a products liability

²⁴⁷ See MANUAL FOR COMPLEX LITIGATION § 3.11 (5th ed. 1982); see also *Burlington City Bd. of Educ. v. United States Mineral Prods. Co.*, 115 F.R.D. 188, 191 (M.D.N.C. 1987) (permitting exchange of videotaped depositions among plaintiffs' attorneys). But see *Forest Oil Corp. v. Tenneco, Inc.*, 109 F.R.D. 321, 323 (S.D. Miss. 1985) (modification denied where plaintiffs in collateral cases sought access to discovery documents after they had already obtained discovery in other cases).

²⁴⁸ See Sherman & Kinnard, *Federal Court Discovery in the 80's, Making the Rules Work*, 95 F.R.D. 245 (1982). Discovery sharing may also burden the system by creating "canned" evidence that may be inappropriate in another lawsuit or which may even be of questionable authenticity. Cf. *Cedars-Sinai Medical Center v. Revlon, Inc.*, 113 F.R.D. 632 (D. Del. 1987). In *Cedars-Sinai*, the plaintiff, at the conclusion of a case, sought an amendment to a protective order to require the defendant's counsel to retain confidential materials that had been produced by it in discovery and had already been returned by the plaintiff. The plaintiff wanted the documents retained and centrally located in the event that it needed them for future lawsuits. The court noted that the plaintiff failed to show that the documents had bearing or would bear on any other proceeding. The court denied the plaintiff's motion, stating that it would not grant a discovery request for documents that had no relevance to any case presently before it "simply because the documents may one day prove to be relevant in another action, possibly in another court." *Id.* at 633.

²⁴⁹ See, e.g., Comment, *Mass Products Liability Litigation*, *supra* note 13, at 1149-50.

²⁵⁰ See Anderson, *How to Use Protective Orders to Safeguard Confidential Information*, 32 PRAC. LAW. 23, 26 (1986).

action who produces confidential information in one case, in one state, may have produced that information in every case nationwide, because information that an expert learns may become a permanent part of his memory.²⁵¹ Finally, the plaintiff who seeks to share discovery information for use in other cases may further frustrate attempts to limit dissemination by persuading the court in the subsequent case to enjoin the defendant from enforcing the protective order issued in the previous case.²⁵²

Although the Constitution requires states to give full faith and credit to the "judicial proceedings" of sister states,²⁵³ the Supreme Court's interpretation of the full faith and credit clause has spoken in terms of the credit due to final judgments.²⁵⁴ The success of a full faith and credit argument to enforce a protective order from another jurisdiction may therefore depend on whether or not the issuing state classifies the order as a judgment. Even where there is no final judgment, however, principles of comity will weigh in favor of enforcing a protective order issued by a foreign court.²⁵⁵

At the very least, a litigant who consents to the entry of a protective order and later seeks its modification should be held to have waived any first amendment interests in disclosure. As a leading commentator has noted, such negotiated protective orders are, in fact, "archetypal waivers:"

They are intelligent because they result from consultations between client and lawyer and voluntary because the party seeking discovery has no duty to consent to them. Protective orders save the litigant seeking production of confidential information the time and money that discovery disputes would entail and ensure that he will receive information that a court might otherwise decline to order produced.²⁵⁶

²⁵¹ See *supra* note 244 for a discussion of expert witnesses.

²⁵² See, e.g., *Garcia v. Peeples*, 734 S.W.2d 343 (Tex. 1987). In *Garcia* the survivor of an automobile accident instituted a state court products liability action, based on a design defect in the car's fuel system, against the automobile manufacturer. The court permitted wholesale distribution of voluminous discovery documents relating to fuel system integrity even though the information was protected by protective orders in other cases in other jurisdictions.

²⁵³ U.S. CONST. art. IV, § 1. A similar rule is imposed on the federal courts with regard to state court judgments by the statute implementing the full faith and credit clause, 28 U.S.C. § 1738 (1988).

²⁵⁴ *Thomas v. Washington Gas Light Co.*, 448 U.S. 261, 271 (1980).

²⁵⁵ See, e.g., *Dart Indus. v. Liquid Nitrogen Processing Corp.*, 50 F.R.D. 286 (D. Del. 1970).

²⁵⁶ *Marcus*, *supra* note 2, at 69; see also *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1006 (3d Cir. 1976) (suggesting in dicta that parties and counsel who take advantage

Thus, where the proposed modification affects a protective order to which the parties have stipulated, the shared and explicit assumption that discovery was for the purposes of that case alone ought to go a long way toward denying a plaintiff's request for modification.²⁵⁷ Courts should refuse to endorse the tactic of some plaintiffs "of inducing broad disclosure under a set of ground rules and of then avoiding any limitations on itself by asking the court to come in and change those rules."²⁵⁸ As a leading commentator has noted, "[i]t is astonishing in this era of litigation boom and discovery crisis to suggest that information-gathering is a legitimate purpose for litigation."²⁵⁹

The Supreme Court has plainly indicated that when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery should be altogether denied.²⁶⁰ The outright sale of discovery materials may be ethically dubious at best.²⁶¹ The practice may even set the stage for certain judicial abuses, such as barratry. Nonetheless, in a growing number of cases, particularly in the products liability context, it appears that plaintiffs may be initiating litigation and discovery *primarily* to obtain information, to find a wrong and report on it, and only *secondarily* to obtain judicial relief.²⁶² Because of this, it is becoming increasingly important for courts to be sensitive to the interests of defendants in the reliability of anti-dissemination protective orders.

of the discovery process implicitly waive their first amendment rights to freely disseminate information thereby obtained). The traditional definition of waiver in the constitutional context requires the intentional relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). See generally Rubin, *Toward a General Theory of Waiver*, 28 UCLA L. REV. 478 (1981).

²⁵⁷ See, e.g., *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393, 395 (W.D. Va. 1987) (modification denied in antitrust case); see also *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 267 (M.D.N.C. 1988).

²⁵⁸ *Omega Homes*, 656 F. Supp. at 404.

²⁵⁹ Marcus, *supra* note 2, at 53.

²⁶⁰ *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352-53 n.17 (1978); see also *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1300 (7th Cir. 1980).

²⁶¹ See *supra* note 243. Although the A.B.A. Code of Professional Responsibility does not directly address the sale of discovery materials, the sale of such materials may raise doubts about a lawyer's ability to exercise independent professional judgment as is required under Canon 5. See Note, *Use of Discovery Materials*, *supra* note 13, at 201. But see Comment, *Mass Products Liability Litigation*, *supra* note 13, at 1155-56 (arguing that any divergence of interests between attorney and client in such cases is likely to be no greater than that inherent in any contingency fee arrangement).

²⁶² See Levitt, *Keeping Secrets Secret*, 13 LITIGATION 10 (Fall 1986).

As previously discussed, uncontrolled dissemination of proprietary information presents unacceptable hazards to the rights of defendants. Particularly in products liability cases, plaintiffs often routinely move to modify protective orders at the close of litigation, and courts sometimes seem to lose sight of the fact that information-sharing, while perhaps generally consistent with the directive of Rule 1, at least when shared with other plaintiffs, is not *specifically* authorized by the Rules. Free dissemination of discovery materials, whether to other plaintiffs, to the press, or to other members of the public, threatens to taint the fairness of the civil justice process.²⁶³ As one commentator has noted "[T]he speculative possibility that in some cases the public would benefit from dissemination of information garnered through discovery hardly warrants the conversion of the process into an investigatory tool for inquisitive litigants."²⁶⁴

Where the parties have not stipulated to the protective order, this waiver analysis is less than fully applicable.²⁶⁵ Even then, however, the Rule 1 and privacy interest protected by the entry of the protective order may be entitled to considerable weight when balanced against the relatively weak interests of the vast majority of plaintiffs in dissemination. Moreover, adopting a waiver approach to the plaintiff's right to disseminate discovery information covered by a protective order does not require that courts *automatically* deny plaintiffs the right to disseminate. It only precludes them from claiming that they have an absolute first amendment right to do so, thus permitting courts to give adequate consideration to the interests of defendants and the interests of Rule 1.²⁶⁶

VI. THE BURDEN OF PERSUASION AND STANDARDS FOR MODIFICATION

As should already be apparent from the foregoing discussion, the first amendment issues that arise when dissemination of discovered information is restricted before trial change as the litigation advances. Confidential information that is used at trial goes into the public domain unless it is submitted under seal or reviewed *in camera*

²⁶³ Marcus, *supra* note 2, at 57.

²⁶⁴ *Id.*

²⁶⁵ See *id.* at 69-72; Note, *Information Obtained Through Discovery*, *supra* note 237, at 843.

²⁶⁶ See Marcus, *supra* note 2, at 72; see also, Note, *Information Obtained Through Discovery*, *supra* note 237, at 843-53 (proposing a "forfeiture analysis" to evaluate a plaintiff's first amendment right to disseminate in the context of a non-stipulated protective order).

by the court, or unless the protective order is clearly reasserted at trial and drafted to include prohibitions against further dissemination after trial.²⁶⁷

Even information that has not been disclosed before the conclusion of the litigation may be subject to less protection after a judgment has been entered because several of the typical grounds for "good cause," such as the need to ensure a fair trial, will by then have been eliminated. In *Littlejohn v. BIC Corp.*,²⁶⁸ the Third Circuit Court of Appeals upheld the denial of a petition for contempt filed against a plaintiff's attorney for failing to return copies of confidential documents covered by a protective order after the settlement and dismissal of the case. The court, noting that neither of the parties seemed to have treated the protective order as dispositive of the confidentiality of the documents admitted at trial, held that the presumptive public right of access to the deposition testimony and exhibits admitted into evidence outweighed any interests of the defendant in continued secrecy.²⁶⁹

But while courts undoubtedly do have inherent power to modify protective orders, it is far less clear which party bears the burden of persuasion as to modification, and what the appropriate standards for modification are. The confusing split of authority in this area has generated substantial uncertainty, and has made it increasingly difficult for defendants, especially in the products liability context, to rely on the continued validity of their protective orders.

The courts' inability to agree on the burden of persuasion is evident even in some of the early cases. In *Essex Wire Corp. v. Eastern Electric Sales Co.*,²⁷⁰ for example, the plaintiff sought to abrogate a confidentiality agreement composed of an agreement by the parties and a ruling by the court pursuant to the forerunner to Rule 26(c), which also required a showing of good cause. The court held that it was incumbent on the defendants—the beneficiaries of the pro-

²⁶⁷ See *National Polymer Prods., Inc. v. Borg-Warner Corp.*, 641 F.2d 418 (6th Cir. 1981); see also *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988). On the other hand, some courts have held that a protective order that specifies that the protected documents can be used "only in the present lawsuit" protects the documents even after they are used at trial. *Harris v. Amoco Prod. Co.*, 768 F.2d 669 (5th Cir. 1985).

²⁶⁸ 851 F.2d 673 (3d Cir. 1988).

²⁶⁹ *Id.* at 686. On remand, the district court also held that the attorney's reasonable and good faith, though erroneous, belief that a particular document had been admitted into evidence did not warrant a finding of contempt for retaining a copy of that document in violation of the protective order. *Littlejohn v. BIC Corp.*, 697 F. Supp. 192, 194 (E.D. Pa. 1988).

²⁷⁰ 48 F.R.D. 308 (E.D. Pa. 1969).

protective order—to show “good cause” why the information should not be made public.²⁷¹ By contrast, in *American Telephone & Telegraph Co. v. Grady*,²⁷² the Seventh Circuit Court of Appeals held that “exceptional considerations” warranted the alteration of a stipulated protective order, thus signifying that it is the party seeking modification who bears the burden of persuasion, and that the burden is a heavy one.²⁷³ More recently, some lower courts appear to have adopted a “balancing test,” considering such factors as the nature and purpose of the original protective order, the degree of reliance on the order by the protected party, the purpose and status of the party requesting modification, and the role, if any, of the government in the dispute.²⁷⁴ To date, however, none of the circuit courts of appeals have explicitly adopted any such framework, and some recent decisions suggest that the burden may increasingly be falling on defendants to justify, on a document-by-document basis, their continued need for protection.

Once again, this trend seems largely to have been spearheaded by the decision of the magistrate in *Agent Orange*, adopted by the district court and implicitly endorsed by the Second Circuit Court of Appeals.²⁷⁵ In *Agent Orange*, the magistrate held squarely that it is the protected party who must bear the burden of showing that “good cause” continues so as to warrant the maintenance of the protective order.²⁷⁶ This represented a clear break from prior precedent in the Second Circuit, which had required the party seeking to modify a protective order to show a “compelling need” or “extraordinary circumstances” warranting the modification.²⁷⁷ Although the Court of Appeals for the Second Circuit, in affirming *Agent Orange*, did not directly reach the issue whether the magistrate below had applied the correct standard of proof, the opinion clearly

²⁷¹ *Id.*

²⁷² 594 F.2d 594, 597 (7th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979).

²⁷³ See also *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949 (8th Cir.), *cert. denied*, 441 U.S. 907 (1979). The Seventh Circuit Court of Appeals, however, later repudiated the “exceptional circumstances” approach of *Grady* in *Wilk v. American Medical Ass’n*, 635 F.2d 1295, 1300 (7th Cir. 1980).

²⁷⁴ See, e.g., *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 106 F.R.D. 551, 554 (S.D.N.Y. 1985); see also *Marine Power & Equip. Co. v. Department of Transp.*, 107 Wash. 2d 872, 734 P.2d 480 (1987).

²⁷⁵ *In re “Agent Orange” Prods. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff’d*, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987).

²⁷⁶ See *id.* at 568–70.

²⁷⁷ See, e.g., *Federal Deposit Ins. Corp. v. Ernst & Ernst*, 677 F.2d 230 (2d Cir. 1982); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979).

leaves open the possibility that the standard adopted by the magistrate may be found acceptable in future cases.²⁷⁸ Not surprisingly, that lesser standard has subsequently been employed by at least one other district court in the Second Circuit.²⁷⁹

The First Circuit Court of Appeals, relying heavily on *Agent Orange*, has also suggested a willingness to abandon the "extraordinary circumstances" standard for modifying protective orders in favor of a far less restrictive standard. In *Public Citizen v. Liggett Group*,²⁸⁰ while noting that it "need not decide the matter definitively," the court strongly suggested that more lenient standards for modification may be appropriate in cases other than those in which the government, which already has at its disposal special investigatory powers not available to private litigants, is the party seeking access.²⁸¹ The court suggested that in a products liability suit involving only private parties, modification could be ordered so long as "the reasons underlying the initial promulgation of the order in respect to the particular document no longer exist," and additionally, so long as the district court is able to make a "reasoned determination that public interest considerations favored allowing counsel to make those particular documents public."²⁸² The *Public Citizen* court held that because the case had been dismissed on the merits, thereby eliminating the possibility of trial, there was a "significant

²⁷⁸ See *Agent Orange*, 821 F.2d at 146-47. The court assumed without deciding that the traditional Second Circuit standard, imposing on the party seeking modification the burden of showing extraordinary circumstances, applied, and stated that that burden had been satisfied. *Id.*

²⁷⁹ See *Litton Indus., Inc. v. Lehman Bros.*, 122 F.R.D. 433 (S.D.N.Y. 1988) (allowing challenges to deposition confidentiality designations where no good cause was shown in first instance). But see *Minpeco S.A. v. Conticommodity Servs., Inc.*, 832 F.2d 739 (2d Cir. 1987) (post-*Agent Orange* non-products liability case where Second Circuit Court of Appeals employed traditional "extraordinary circumstances" standard).

²⁸⁰ 858 F.2d 775 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 838 (1989).

²⁸¹ *Id.* at 791. The Court of Appeals for the First Circuit distinguished *Martindell*, 594 F.2d 291, and *Palmieri v. New York*, 779 F.2d 861 (2d Cir. 1985), two previous cases that had applied the extraordinary circumstances test, as cases involving governmental intervention. See *Public Citizen*, 858 F.2d at 791. *Martindell* involved an attempt by the United States government as prosecutor to shortcut its normal investigatory procedures by obtaining sealed depositions in a shareholder derivative suit to which it was not a party, after witnesses had testified pursuant to a protective order without first invoking their privilege against self-incrimination. See *Martindell*, 594 F.2d 291. *Palmieri* involved a request by New York State to intervene in a private antitrust action to access sealed settlement documents. See *Palmieri*, 779 F.2d 861; see also *H.L. Hayden Co. v. Siemens Medical Sys., Inc.*, 106 F.R.D. 551 (S.D.N.Y. 1985); cf. *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1300 (7th Cir. 1980) (granting State of New York access to sensitive discovery materials on the basis that it did not have the same "awesome" discovery tools as the federal government).

²⁸² *Public Citizen*, 858 F.2d at 791-92.

change in circumstances calling into question the necessity of the protective order."²⁸³ The point of the protective order, the court reasoned, "was to promote a fair trial, not to guarantee [the defendant] perpetual secrecy."²⁸⁴

Both the Second Circuit Court of Appeals in *Agent Orange* and the First Circuit Court of Appeals in *Public Citizen* further justified their approach to modification on the fact that the defendants in those cases had never been required to demonstrate good cause in the first instance for the issuance of the umbrella protective orders. Both courts acknowledged that umbrella orders, by extending broad protection to all documents produced, serve to expedite discovery.²⁸⁵ But the courts still seemed to take the position that such orders "are by nature overinclusive and are, therefore, peculiarly subject to later modification."²⁸⁶

The new approach to modification exhibited by the Courts of Appeals for the First and Second Circuits, and apparently now being followed by a number of other courts,²⁸⁷ is problematic because of the nearly insurmountable burden it imposes on products liability defendants. These defendants, having once produced voluminous discovery materials in response to a plaintiff's request, may apparently now be called upon *at any time* to justify their continuing need for protection from the public and the press. This burden is particularly onerous given that the court is required to consider, among other issues, the extent to which the materials and information may have become stale in the interim.²⁸⁸ It seems un-

²⁸³ *Id.* at 790.

²⁸⁴ *Id.*; cf. *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 147 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987), where the court justified modification in part on the fact that the protective order, by its terms, was applicable solely to the pretrial stages of the litigation.

²⁸⁵ *Public Citizen*, 858 F.2d at 790; *Agent Orange*, 821 F.2d at 148.

²⁸⁶ *Public Citizen*, 858 F.2d at 790; *Agent Orange*, 821 F.2d at 148 ("[H]ad the district court not lifted the orders, we would be compelled to find that the orders had been improvidently granted because the district court never required appellants to make the requisite good cause showing.").

²⁸⁷ See, e.g., *Littlejohn v. BIC Corp.*, 851 F.2d 673 (3d Cir. 1988); *Cipollone v. Liggett Group, Inc.*, 822 F.2d 335 (3d Cir. 1987) (allowing modification where magistrate failed to make specific written findings as to good cause); *United States v. Kentucky Utils. Co.*, 124 F.R.D. 146 (E.D. Ky. 1989); *Litton Indus., Inc. v. Lehman Bros.*, 122 F.R.D. 433 (S.D.N.Y. 1988); *Sharjah Inv. Co. (UK) Ltd. v. P.C. Telemart, Inc.*, 107 F.R.D. 81 (S.D.N.Y. 1985); *Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.*, 101 F.R.D. 34 (C.D. Cal. 1984).

²⁸⁸ See *supra* notes 42-45 and accompanying text for a discussion of the dilemma of trying to protect outdated information. One commentator has observed that the logic behind the courts' "dated matter" approach to protective orders would seem to undermine almost all protective orders entered into as part of a settlement package because a party could almost

likely that corporate documents and information about the design, manufacture, and distribution of products placed in the stream of commerce many years before the discovery process began will often be able to withstand a non-party's challenge on staleness grounds made months or years after the litigation has been terminated.²⁸⁹ Yet, as previously discussed, a corporate defendant may have perfectly legitimate reasons for wishing the information to remain private, and interests in the continued validity, finality and reliability of protective orders.

Under the approach apparently now sanctioned by a number of courts, if the requirements of Rule 26(c) and Rule 11 are applied literally, the corporate defendant, as the protected party, must, at the conclusion of the case, wade through all the discovery produced, document-by-document. The defendant must then show good cause why each individual document still warrants protection. Given the strictures of Rule 11 and the requirement of reasonable inquiry,²⁹⁰ such a document-by-document investigation could impose substantial costs and hours or even weeks of labor on the defendant, followed by considerable effort by the court, extending many years after the litigation is resolved.

The United States District Court for the District of Columbia has taken a far more practical approach to post-trial applications to set aside protective orders. In *Tavoulareas v. Washington Post Co.*,²⁹¹ the court was confronted with an application by the *Washington Post* and a non-party (the Reporters Committee for Freedom of the Press) for access to some 3800 pages of deposition testimony and 425 pages of accompanying exhibits generated during a libel action brought against the *Post* by the president of Mobil Corporation and his son. The documents in question involved Mobil's dealings in Saudi Arabia and its marine transport business, and were all subject to an umbrella protective order entered some five years earlier.²⁹²

always assert that the passage of time had obviated the need for continuing protection. Thus, a good argument can be made that courts should apply this approach only to the *initial* determination of whether to enter a protective order. Marcus, *supra* note 2, at 28 n.117.

²⁸⁹ In the *Agent Orange* case, for example, the magistrate referred to the dated nature of the discovery materials at issue (20 to 30 years old) as an "important factor in determining whether disclosure will cause competitive harm." *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 575 (E.D.N.Y. 1985), *aff'd* 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987). See also *Graham v. Wyeth Labs.*, 118 F.R.D. 511 (D. Kan.), *vacated on other grounds*, 851 F.2d 321 (10th Cir. 1988).

²⁹⁰ See *supra* notes 17-19 and accompanying text for a discussion of Rule 11.

²⁹¹ 111 F.R.D. 653 (D.D.C. 1986), *on remand from* 737 F.2d 1170 (D.C. Cir.), *vacating* 724 F.2d 1010 (D.C. Cir. 1984) for reconsideration in light of *Seattle Times*.

²⁹² *Id.* at 654.

In light of the post-trial application to set aside the protective order, Mobil conducted a generalized renewed evaluation of the materials and submitted an affidavit of counsel in support of its position that the order was still needed so as not to affect adversely its position with Saudi Arabia. The *Post*, however, asserted that a document-by-document and line-by-line inspection of the materials and testimony was necessary to meet the burden imposed on Mobil by Rule 26(c). The *Post* also argued that the information was substantially in the public domain, and that because it involved commercial events more than ten years old, it was stale.²⁹³

The court agreed that the burden remained on Mobil to make a "present determination" of good cause, but flatly rejected its claim that intense scrutiny of the materials was needed in a matter already tried to a conclusion.²⁹⁴ Instructing that Rule 26(c) should be construed so as to secure the just, speedy, and inexpensive determination of every action, the court declined to "undertake that which it ha[d] already stated it had no intention of undertaking: a time-consuming review of the [voluminous discovery documents]."²⁹⁵ Because the *Post* had already obtained the full benefit of the discovery materials for trial preparation, and the material was no longer needed for trial, the court concluded that "such an undertaking would be a waste of the parties' and the Court's resources."²⁹⁶ The court further specifically ruled that the lawyer's affidavit, though it did not meet the standard of particularity that would have been required to justify the initial entry of an umbrella protective order on a contested motion, satisfied its burden of showing good cause for maintaining the umbrella order that had been in place for several years.²⁹⁷

The standards for modification of umbrella protective orders should not be lessened. Further, Rule 26(c) should not be interpreted so as to impose on parties and the system itself a never-ending responsibility to monitor discovery records and proceedings as if the materials and information were comparable to presidential papers or state secrets with significant historic value to our democ-

²⁹³ See *id.* at 655-57.

²⁹⁴ *Id.* at 659.

²⁹⁵ *Id.*

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 659-60; see also *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 121 F.R.D. 264, 268 (M.D.N.C. 1988) ("To the extent that a party has relied on [a] protective order for a significant period of time, [a] [c]ourt may require a reduced showing of good cause in order to continue with a protective order.").

racy. Placing such an onerous burden on the products liability defendant—particularly in complex products liability cases—not only fails “to secure the just, speedy and inexpensive determination” of every action required by Rule 1, but also runs afoul of the everpressing need, in an age of shrinking budgets, to manage the courts’ dockets in a way that will produce reasonable access to the judicial system for *all* members of society.

VII. CONCLUSION

Protective orders are, at least ostensibly, intended to protect parties subject to the extremely liberal rules of discovery in civil litigation from the irreparable harm that can accompany the publication of proprietary, confidential business information and trade secrets. Increasingly, however, this protection is being eroded by courts that, succumbing to pressures from the public and the press, have allowed private dispute resolution to be turned into a media event, and by a plaintiff’s bar that has made a business out of selling information obtained in discovery to other potential adversaries. These courts, rather than concerning themselves with the efficient resolution of the private dispute before them, seem to assume that litigation has a legislative function and that lawsuits are akin to freedom of information requests. Despite Supreme Court decisions that plainly confirm that there is no right of access—constitutional or otherwise—to confidential pretrial discovery information, defendants, particularly those in products liability cases, continue to face successful challenges to protective orders from many fronts.²⁹⁸

Recent lower court cases recognizing a presumptive public right of access to discovery materials, and imposing on defendants a never-ending obligation to show “good cause” for maintaining confidentiality through a document-by-document review of the information produced, may preclude future use of stipulated protective orders. Those who seek protection are left with a motion for a protective order as their only recourse. Because the burden of establishing a record sufficient for entry of a protective order on

²⁹⁸ Legislation has been discussed at both the state and federal level that would modify Rule 26(c) and similar state rules to restrict the use of protective orders. For example, one bill considered by some federal legislators would bar courts from issuing orders that preclude disclosure to a federal agency of information relating to product safety. The danger of such legislation, if enacted, should be clear from the foregoing discussion. Such an amendment to Rule 26(c), in addition, would undoubtedly spawn “satellite hearings” regarding a determination of the “public interest” and offer plaintiffs the chance to obtain confidential documents from a prior similar case that may not even be discoverable in a current action.

motion is difficult, information that previously would have been quickly disclosed will now be disclosed only after lengthy and hotly contested evidentiary hearings at which confidentiality is disputed.²⁹⁹ Moreover, parties subject to discovery requests will try to persuade courts to deny discovery altogether, because once information is produced, no order can adequately protect its confidentiality.³⁰⁰ Eliminating the blanket protective order assures ever more aggressive and frequent arguments over discovery requests, undermining the goals of Rule 1.³⁰¹

The trend toward restricting the use of protective orders, evident in so many recent cases and some state legislation, is likely to impede settlements at the same time that the facilitation of settlements is increasingly being recognized as "a legitimate and desirable goal for courts to pursue."³⁰² At least one court has noted, "that the need for trial frequently disappears once both sides have a full and complete understanding of the facts"³⁰³ When parties can no longer rely upon protective orders as a tool to facilitate full and complete disclosure of relevant confidential information, the settlement of cases will be delayed or prevented simply because the parties will be delayed in assembling the factual basis for intelligent settlement discussion. Moreover, any trial attorney knows that confidentiality orders, whether with respect to the terms of the settlement itself or with respect to information disclosed during the litigation, often form part of the consideration for the settlement. It is not only defendants who look for that type of consideration; plaintiffs often look for it as well, whether to avoid embarrassment

²⁹⁹ See generally, Marcus, *supra* note 2, at 21-22.

³⁰⁰ *Id.* at 21; see, e.g., *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 482 n.22 (S.D.N.Y. 1982) (declining to enter protective order restraining plaintiff's disclosure of matters already obtained in discovery but stating that "the penchant of the plaintiff to try her case in the media may become a consideration in determining the scope of discovery to be afforded her"); see also *In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) ("If the trial judge were required to allow virtually full publicity of utterances forced from the mouth of an unwilling deponent . . . he might well refuse to allow the discovery to proceed at all . . .").

³⁰¹ See, e.g., *Rhinehart v. Seattle Times Co.*, 98 Wash. 2d 226, 254, 654 P.2d 673, 689 (1982) (noting that parties who are not assured that the information they give will be used only for litigation may be "tempted to withhold information and even to shade the truth, where otherwise they would not do so"); see also *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), *cert. denied*, 379 U.S. 900 (1964).

³⁰² Marcus, *supra* note 2, at 27. See generally Marcus, *supra* note 2, at 27-28. The 1983 amendment to Rule 16 explicitly directs that the pretrial hearing should include a discussion of "the possibility of settlement." See Federal Rules of Civil Procedure 97 F.R.D. 165, 170 (1983).

³⁰³ *Krause v. Rhodes*, 671 F.2d 212, 214 (6th Cir.), *cert. denied*, 459 U.S. 823 (1982).

or harassment over the terms of the settlement or to prevent disclosure of embarrassing personal information that came out over the course of the litigation. If parties cannot assume with confidence that their protective orders are reasonably secure from collateral attack, settlement will be made more difficult for the simple reason that the parties will have been denied flexibility in what they can ask for or give by way of consideration. With fewer cases settling and more cases going to trial, the strain on already overcrowded court dockets will be further increased, and the goals of the Rules will be further undermined.³⁰⁴

The recent trend towards restricting the use of protective orders is already changing the face of complex litigation. The umbrella protective order, a standard in multidistrict and complex products liability litigation, once provided a guarantee of protection with relative ease of administration. Now, defendants in such cases must increasingly confront the document-specific protective order. This is a costly and time consuming mechanism for safeguarding defendants' information and one that may now be reviewable by motion of any member of the public, at any time. Such a protective order not only undermines the spirit of Rule 1, but also offers the producing party no real protection at all. Far from functioning as a safeguard, the term "protective order" may rapidly be becoming a misnomer.

³⁰⁴ See Marcus, *supra* note 2, at 28. Courts, however, generally have not been willing to recognize this problem. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 953 (1987) (rejecting defendant's argument that unsealing order improperly altered a term of the settlement agreement, stating that the existence of the protective order was not integral to the settlement in that case); see also *Bank of Am. Nat'l Trust v. Hotel Rittenhouse Assocs.*, 800 F.2d 339 (3d Cir. 1986) (discussed at *supra* note 144); *United States v. Kentucky Utils. Co.*, 124 F.R.D. 146, 153 (E.D. Ky. 1989).