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Third-Party Modification of Protective Orders Under Rule 26(c)

Patrick S. Kim

INTRODUCTION

In early 1983, the Coca-Cola Company was sued by several of its bottling companies for breach of contract in the United States District Court for Delaware.¹

The bottling companies claimed that, in order to prevail on their claims, they needed to discover several types of information. Among these discovery requests was an order seeking discovery of the secret formula to the ingredient that gives Coca-Cola its distinctive taste: "Merchandise 7X." The Coca-Cola Company so valued the confidentiality of the secret formula that only two employees in the entire corporation actually knew the formula, and they were prohibited from traveling on the same airline flights together.² Only one written copy of the formula existed, kept in a security vault at the Trust Company Bank in Atlanta, Georgia which could be opened only upon a resolution from the Company's Board of Directors.³ Coca-Cola eventually settled the suit rather than risk potential disclosure of the formula, even though the discovery would have been placed under seal.

In modern complex litigation, the scope of discovery is broad and may yield thousands of documents, many of which can contain sensitive or private information. To protect the interests of litigants who must produce discovered materials of a confidential nature, Rule 26(c) of the Federal Rules of Civil Procedure allows courts to issue protective orders that prohibit the parties from divulging information gained through discovery.⁴ Parties commonly request

1. See *Coca-Cola Bottling Co. v. Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985). In this case, the potential consequences of disclosure of the discovery material were so grave that Coca-Cola settled the case *despite the fact* that the court had issued a protective order prohibiting dissemination.

2. See 107 F.R.D. at 289-90.

3. See 107 F.R.D. at 290.

4. Rule 26(c) provides that "[u]pon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . ." FED. R. CIV. P. 26(c). Although this rule technically requires a motion, in practice many protective orders are stipulated to by both parties to the litigation. See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427 (1991). In these cases, "good cause" still must be shown. See, e.g., *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994). Therefore, for the purposes of this Note, both situations are identical.

protective orders under Rule 26(c) that forbid the parties from disseminating materials obtained through discovery.⁵

Rule 26(c) protective orders are “flexible devices” and are open to modification by the issuing court.⁶ Often, parties other than the two parties involved in the original suit where the protective order was issued challenge such orders.⁷ These third-party challenges come from both third-party litigants and third-party nonlitigants.

One type of third party who might seek protected discovery is litigants who are “similarly situated” to the litigants in the original case. Similarly situated parties are those who could obtain the protected information through independent discovery, such as plaintiffs suing the same defendants or defendants facing suit from the same plaintiffs. They seek to avoid duplicative discovery efforts by gaining access to discovered materials already retrieved by the original parties.

Third-party nonlitigants, such as newspapers⁸ or public interest groups,⁹ challenge the orders on the basis that certain information under protective order involves “matters of public concern” and therefore should not be kept confidential.¹⁰ For example, information about the conduct of government officials or the existence of dangerous products in the marketplace might be a matter of public concern meriting wider publicity.¹¹

5. See *Zenith Radio Corp. v. Matsushita Elec. Indus. Corp.*, 529 F. Supp. 866, 889 (E.D. Pa. 1981) (stating that the judge was “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”).

6. See 8 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 2044.1 (2d ed. 1994).

7. See 8 *id.* (“Although requests for modification do frequently come from the litigants themselves, it is often true that they come from, or are made on behalf of, other persons.”). The common manner by which nonlitigants seek access to discovery materials under a protective order is to move for intervention under Rule 24(b). See 8 *id.* (“There is a considerable body of law affirming the propriety of such limited intervention.”).

8. See, e.g., *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984) (prohibiting a newspaper from disseminating protected material discovered in a suit in which it was a defendant).

9. See *Public Citizen v. Liggett Group*, 858 F.2d 775, 787-88 (1st Cir. 1988) (prohibiting a public interest group from gaining access to protected discovered material from litigation in which it was not a party).

10. These parties argue for a “public law” model of adjudication, where the judge is “the creator and manager of complex forms of ongoing relief, which have widespread effects on persons not before the court.” Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284 (1976); see also Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) (“Adjudication is the social process by which judges give meaning to our public values.”). Under this view, the court system seeks to resolve issues of social policy (i.e. the “public interest”) as well as promote the impartial adjudication of private disputes between private parties.

11. See COMMITTEE ON RULES OF PRACTICE AND PROCEDURE, JUDICIAL CONFERENCE OF U.S., *PROPOSED RULES 56 (OCT. 1993)* [HEREINAFTER PROPOSED RULES], reprinted at 150 F.R.D. 323, 388 (1993) (“Information about the conduct of government officials is frequently used to illustrate an area of public concern. The most commonly offered example focuses on information about dangerous products or situations that have caused injury and may con-

Courts are uncertain about how they should weigh the interests of third parties when considering modification of a protective order to allow access to discovered materials.¹² The Second Circuit has stated that protective orders should not be modified unless the intervening party can show some "extraordinary circumstance or compelling need."¹³ Most other courts, however, disapprove of the Second Circuit's narrow standard. For instance, the Third Circuit advocates applying the same balancing test used for determining whether to grant a protective order in the first place.¹⁴ If good cause for secrecy still can be shown after the intervening party has presented its reasons for gaining access, then the protective order should not be modified.¹⁵ The Seventh, Ninth, and Tenth Circuits also reject the "extraordinary circumstances" test and advocate disclosure of discovered materials to meet the needs of parties in other pending litigation.¹⁶ These courts allow parties involved in other

tinue to cause injury until the information is widely disseminated."). See generally Brad N. Friedman, Note, *Mass Products Liability Litigation: A Proposal for Dissemination of Discovered Material Covered by a Protective Order*, 60 N.Y.U. L. REV. 1137 (1985) (pointing out that keeping discovery materials secret might result in future injuries from defective products).

12. See 8 WRIGHT ET AL., *supra* note 6, § 2044.1 ("[O]ne court has decried 'the chaos that now characterizes this area of the law.'" (quoting H.L. Hayden Co. v. Siemens Medical Sys., Inc., 106 F.R.D. 551 (S.D.N.Y. 1985))). Compare *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) ("[A]bsent a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need . . . a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government . . .") with *In re Grand Jury Subpoena*, 836 F.2d 1468, 1477 (4th Cir. 1988) (rejecting the Second Circuit standard in *Martindell* by refusing to quash a grand jury subpoena despite the existence of a valid protective order).

13. *Martindell*, 594 F.2d at 297. The Eighth Circuit has a similar test that allows modification only when "intervening circumstances" make modification appropriate. See *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 954 (8th Cir. 1979).

14. See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994). The court described the appropriate balancing process as follows:

If access to protected [material] can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected material is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted.

23 F.3d at 790 (quoting Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 HARV. L. REV. 1085, 1092 (1981)).

15. See *Pansy*, 23 F.3d at 790.

16. See *Wilk v. American Medical Assn.*, 635 F.2d 1295, 1299 (7th Cir. 1980); *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 475 (9th Cir. 1992); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990). The Sixth Circuit has held that a protective order can be modified to accommodate the reasonable requirements of parties in other litigation and has also recognized a public interest in certain court records needed to enforce antitrust and other similar laws. See *Meyer Goldberg, Inc. v. Fisher Foods, Inc.*, 823 F.2d 159, 163-64 (6th Cir. 1987). The First Circuit has also rejected the "extraordinary circumstances" test as too stringent but has not articulated a specific, alternative test. See *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 791 (1st Cir. 1988) ("While we need not decide the matter definitively, we reject the 'extraordinary circumstances' standard.").

pending litigation access to protected discovery, noting that secrecy interests can be protected by placing the intervening party under the same confidentiality order as the original parties. Thus, the Seventh, Ninth, and Tenth Circuits do not require a new showing of good cause, as the Third Circuit requires; rather, they assume good cause is present where parties involved in other pending litigation present a need to gain access.

This Note argues that similarly situated litigants always should be given access to protected discovered materials, while non-litigants should gain access to protected materials only in exceptional circumstances. This approach effectively balances the privacy and property interests of the original parties and the intervening parties with the interests of adjudicative efficiency. Part I establishes that there is no general public right of access to civil discovery and that courts should disregard such purported rights when considering whether to modify a protective order. Part II identifies three interests that courts should weigh when considering whether to modify a protective order: the privacy interests of the litigants, the property interests of the litigants, and efficiency considerations. Absent a showing of unusual public need, these are the only interests relevant to the decision to modify a protective order. Part III argues that courts always should modify protective orders for third parties similarly situated to litigants in the original dispute and that protective orders only should be modified for third party non-litigants in extraordinary circumstances.

I. GENERAL RIGHTS OF PUBLIC ACCESS TO DISCOVERED MATERIAL

There are no general rights of public access to discovered materials in the federal courts. Third parties have argued that they have a right to such materials under three different theories. First, some argue that the First Amendment affords a right of public access. Second, others argue that a common law right exists based on the desire for public trials. A third group argues that the federal rules themselves imply a right of public access. This Part considers and rejects each of these arguments in turn.

A. *First Amendment Interests in Pretrial Discovery*

At first blush, the First Amendment appears to support public access to discovered materials in two ways: by guaranteeing a right to disseminate information or by guaranteeing a right of access to information. The Supreme Court's decision in *Seattle Times v. Rhinehart*, however, makes clear that First Amendment principles do not support the rights of third parties to disseminate or gain access to protected discovered materials.

1. Dissemination

A trial participant might claim a right to free speech in disseminating discovered material.¹⁷ For example, a litigant who has gained certain information about a defective product through discovery might claim that barring publication of such information abridges her right to free speech.

The Supreme Court limited a litigant's First Amendment right to disseminate discovered materials in *Seattle Times v. Rhinehart*.¹⁸ In *Seattle Times*, Rhinehart brought several suits for defamation and invasion of privacy against the *Seattle Times*, which had published several articles about Rhinehart and his religious organization, the Aquarian Foundation. In the course of the pretrial discovery, the *Seattle Times* sought information about the identity of the Aquarian Foundation's donors and members. When the Foundation refused to produce the information, the Washington state court issued an order requiring production, while also issuing a protective order — identical to those allowed under Federal Rule 26(c)¹⁹ — prohibiting the *Seattle Times* from “publishing, disseminating, or using the information in any way except where necessary to prepare for and try the case.”²⁰ The *Seattle Times* subsequently appealed the court's decision on the protective order, arguing that civil discovery is no different from any other source of information and that the discovery therefore was “protected speech” under the First Amendment.²¹

The Supreme Court rejected this argument, holding that where a trial court issues a protective order on a showing of good cause under Rule 26(c), the First Amendment is not infringed.²² The Court applied a two-pronged test to determine whether a litigant has a First Amendment right to disseminate materials discovered under a protective order.²³ First, the protective order must further “an important or substantial governmental interest unrelated to the suppression of expression.”²⁴ Second, a restriction on First Amendment freedoms must be “no greater than is necessary or essential to the protection of the particular governmental interest

17. See U.S. CONST. amend. I; see also Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 53-55 (1983).

18. 467 U.S. 20 (1984).

19. The state of Washington adopted discovery rules modeled after Rules 26-37 of the Federal Rules of Civil Procedure, and the Supreme Court used commentary on the Federal Rules as an aid in its analysis in *Seattle Times*. See 467 U.S. at 29.

20. 467 U.S. at 27.

21. See 467 U.S. at 30-31.

22. See 467 U.S. at 37.

23. See 467 U.S. at 32.

24. 467 U.S. at 32 (quoting *Proconier v. Martinez*, 416 U.S. 396, 413 (1974)).

involved.’”²⁵ The Court found that protective orders prevent potential damage to a litigant’s reputation and privacy. Thus, a Rule 26(c) protective order serves substantial government interests unrelated to the suppression of expression.²⁶ The Court also held that a protective order limited First Amendment freedoms no more than was necessary to protect government interests because good cause is required by Rule 26(c).²⁷ Since protective orders satisfy both prongs of the Court’s test, a party has no First Amendment right to disseminate discovered material. Although the *Seattle Times* was an actual litigant in the *Seattle Times* case, the Court’s reasoning barring a First Amendment right to dissemination is equally applicable to third parties seeking access to discovered materials; there is no First Amendment right to disseminate discovered materials.

The Court also relied on the policies that underlie expansive discovery in barring a First Amendment right to the dissemination of discovered materials. The Court pointed out that, because information in discovery is gained only “by virtue of the trial court’s discovery processes,”²⁸ greater court control over the dissemination of such information is justified. These policies are even more pressing when courts consider modification of protective orders for third parties because such third parties have not been involved in the discovery process.

2. Access

The First Amendment also theoretically encompasses a general right of public access to materials relating to trials. The public’s interest in open discussion of government affairs always has been protected under the First Amendment.²⁹ Public access to materials relating to trials enables members of the public to understand and

25. 467 U.S. at 32 (quoting *Procurier*, 416 U.S. at 413).

26. See 467 U.S. at 34-36.

27. See 467 U.S. at 32-34. It may be argued that stipulated protective orders do not necessarily meet the second prong because good cause formally has not been shown. However, because the relevant interests to such a showing are the privacy and property interests of both parties, stipulation by both parties to the protective order is functionally equivalent. By stipulating to a protective order, both parties have admitted that their privacy and property interests are strong enough to warrant such an order.

It is conceivable that an order might be so broad as to be unjustified, perhaps if it prohibited dissemination of material at any time in the future. However, protective orders normally may be modified at the discretion of the court and so it is unlikely that any would violate the second prong of the First Amendment test.

28. 467 U.S. at 32.

29. See *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (“Underlying the First Amendment right of access to criminal trials is the common understanding that ‘a major purpose of that Amendment was to protect the free discussion of governmental affairs.’” (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966))).

criticize court proceedings. Parties also might seek to extend this right to gain access to protected discovery.³⁰

The logic of *Seattle Times*, however, dictates that no such public right of access exists. Presumably, a media defendant, such as the *Seattle Times*, would have the strongest "public access" claim under the First Amendment. As a part of the media, the *Seattle Times* informs the public about governmental proceedings such as trials, a vital part of a self-governing democracy.³¹ Certainly, as an actual party to the litigation, the *Seattle Times* would have a stronger right to disseminate discovered materials than a mere outside party. Accordingly, it seems counterintuitive to suggest that the public ought to have a separate right of access to discovered materials when the Court has held that there is no right for a newspaper which already has the information to disseminate such materials to the public.³²

No third-party right of access to discovered materials exists under the general constitutional right of access to materials used at trial. The Supreme Court has established two alternative conditions for deciding if the public has a right of access to trial materials: access is permitted if historically the materials have been open to the press and the general public or if public access is necessary for the public to understand the workings of the judicial process.³³

With respect to the first alternative, pretrial discovery proceedings were not open to the public at common law and are conducted in private in modern practice.³⁴ Further, the Supreme Court explicitly held that discovered materials failed this route to a public right of access in *Seattle Times*: "[P]retrial depositions and interrogatories are not public components of a civil trial. . . . [R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information."³⁵ Moreover, public access to discovered materials is not necessary to enable the public to understand the workings of the judicial process. In the case of protected discovered materials, unadmitted discov-

30. This argument is especially potent because sealed proceedings very well may represent the most controversial of court cases.

31. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1975).

32. See Katherine Wiesepape Pownell, Comment, *The First Amendment and Pretrial Discovery Hearings: When Should the Public and Press Have Access?*, 36 UCLA L. REV. 609, 622 (1989); see also Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 796 (1990) (citing Pownell, *supra*); Miller, *supra* note 4, at 439 (citing Pownell, *supra*). In extraordinary circumstances, however, this Note argues that third-party-nonlitigant access may be justified.

33. See *Globe Newspaper Co.*, 457 U.S. at 605-06.

34. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984).

35. 467 U.S. at 33.

ered material is not used by the court in reaching any decision.³⁶ The First Amendment protects the right to disseminate information that the public can use to evaluate decisions made by a court, but, because unadmitted discovered materials themselves are not the basis of any decisions, they cannot serve the function of facilitating public scrutiny of judicial decisionmaking.³⁷ Therefore, under either prong of the Court's public access analysis, there is no First Amendment right to discovered materials.

B. *Common Law Presumption of Public Access*

Litigants have attempted to extend the common law right of access to inspect public records and documents to pretrial discovered materials.³⁸ As with First Amendment rights, the common law right of access to trial materials does not extend to pretrial discovered materials. There is a long-standing common law presumption that the public may inspect judicial records.³⁹ The Supreme Court affirmed this common law doctrine, stating that it helps produce an informed public opinion.⁴⁰ This right of access has been held to include such things as transcripts of hearings on pretrial motions, settlement agreements submitted to the court for approval, and discovered material that actually has been admitted into the court record as evidence at trial.⁴¹

Given that most discovered materials are not used by courts in reaching decisions, the common law right does not extend to all discovered materials.⁴² The common law right of access to trial materials promotes public confidence in the adjudicative process⁴³ and therefore extends only to documents filed with the court in connection with motions for court action.

In contrast, when discovered materials are filed in conjunction with a motion, they become part of the public record, and access to the materials is mandated by the common law right. For instance,

36. See Miller, *supra* note 4, at 440; cf. Pownell, *supra* note 32, at 615-20 (extending the constitutional right of public access to trial materials to pretrial discovery hearing materials but not all discovered materials).

37. See Anderson v. Cryovac, Inc., 805 F.2d 1, 11-13 (1st Cir. 1986) (rejecting a First Amendment right of public access to pretrial discovery materials under the two-pronged test); Miller, *supra* note 4, at 440 (same analysis).

38. See, e.g., Anderson, 805 F.2d at 13.

39. See 805 F.2d at 13 (citing Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978)).

40. See Grosjean v. American Press Co., 297 U.S. 233, 247-50 (1936).

41. See Campbell, *supra* note 32, at 803.

42. See *id.* at 804.

43. See Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 160-61 (3d Cir. 1993). The *Leucadia* court declined to consider whether documents on file with the court that were not connected to a motion for court action also were presumptively open to the public scrutiny.

in *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*,⁴⁴ the Third Circuit allowed a third party access to certain sealed discovered documents *that were filed with the court in conjunction with a motion*.⁴⁵ Because the discovered documents in this case happened to be filed with the court in connection to a motion upon which the court had ruled, the common law right of public access applied. But most discovered documents do not form the basis of a decision by a court, and thus the common law right does not extend to pretrial discovered materials.⁴⁶ The *Leucadia* court explicitly acknowledged this limitation on the common law right.⁴⁷ Hence, there is neither a common law nor First Amendment right of public access to pretrial discovery not filed with the court in conjunction with a motion.⁴⁸

C. Statutory Rights of Access to Discovery

The Federal Rules of Civil Procedure do not create a statutory right of public access to protected discovered materials. One court has suggested that Rule 5 requires all discovery to be filed with the court and that the public right of access to materials filed with the court attaches to all discovery.⁴⁹ This section argues that this argument is erroneous.

Rule 5(a) and Rule 5(d) appear to require that all discovery materials be filed with the court.⁵⁰ The Advisory Committee's com-

44. 998 F.2d 157 (3d Cir. 1993). In *Leucadia*, a producer sued a competitor for misappropriation of trade secrets. The discovery in the case was under a protective order to prevent dissemination of the important trade secrets that were involved. Both parties filed pretrial motions under seal before settling the suit. A stockholder of the defendant company later filed suit against the defendant, charging that it had violated federal securities laws by making false and misleading statements regarding the corporation's business prospects, including the failure to disclose adequately the consequences of the *Leucadia* settlement.

45. See 998 F.2d at 160.

46. See Campbell, *supra* note 32, at 804.

47. See *Leucadia*, 998 F.2d at 162 ("[B]ecause Burstein seeks only access to documents that are on file, this case does not implicate the standards . . . resolved in *Seattle Times v. Rhinehart*.").

48. See *Grove Fresh Distrib., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897-98 (7th Cir. 1994) ("[M]aterial uncovered during pretrial discovery is ordinarily not within the scope of press access."); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) ("The common law presumption that the public may inspect judicial records . . . does not encompass discovery materials."); see also Campbell, *supra* note 32, at 804-05.

49. See *In re Agent Orange Prod. Liability Litig.*, 821 F.2d 139, 145 (2d Cir. 1987).

50. The *Agent Orange* court argued that Rule 5 requires that all discovered materials be filed with the court and that the public right of access to such materials attaches to all discovery. See 821 F.2d at 146-47. Rule 5(a) states that "every paper relating to discovery required to be served upon a party . . . shall be served upon each of the parties." FED. R. CIV. P. 5(a). This language was inserted into the Rule in a 1970 amendment. The Advisory Committee's comments to the amendment make clear that discovered materials should be filed with the court. See FED. R. CIV. P. 5(a) advisory committee's note ("This amendment makes clear that all papers relating to discovery which are required to be served on any party must be served on all parties, unless the court orders otherwise."). The Committee observed that

ments to the enactment of the current version of Rule 5(d) state that discovered material is required to be filed because “such materials are sometimes of interest to those who may have no access to them except by a requirement of filing, such as members of a class, litigants similarly situated, or the public generally.”⁵¹

There are several problems with this reasoning. First, the filing requirement of Rule 5(d) should not apply to discovered materials under a Rule 26(c) protective order because that would result in protected discovery being part of the *public* record. Therefore, even if Rule 5(a) and 5(d) do create a public right of access to unprotected discovery, this right should not apply to protected discovery. But conceivably a protective order could be issued that did not waive the Rule 5 requirements, resulting in protected documents that were part of the public record. Second, even if Rule 5(d) is interpreted to require the filing of all discovered documents with the court, Rule 5 “seeks to insure a full exchange of the written communications among the *litigants*,”⁵² not to create a public access file for the general public.

Moreover, not all discovery is required to be filed with the court. Rule 34, which concerns the production of documents, does not require that documents discovered under it be filed with the court.⁵³ This is because discovered documents produced under Rule 34 are not “papers required to be served” within the meaning of Rule 5.⁵⁴ If they were controlled by Rule 5, then they also would have to be signed by an attorney under Rule 11 and formally captioned and served upon the other party in court under Rule 7(b)(2).⁵⁵ Because none of these procedures is usually performed

although the unamended rule explicitly required that notices and demands be filed, it was not clear that answers and responses also were to be filed; the amendment resolved this ambiguity. See FED. R. CIV. P. 5(a) advisory committee’s note. An even stronger inference that all discovery materials are to be filed with the court can be drawn from Rule 5(d), which provides that the court may grant an order that “depositions upon oral examination and interrogatories, requests for documents, requests for admission, and *answers and responses thereto* not be filed.” FED. R. CIV. P. 5(d) (emphasis added). The Advisory Committee’s comments regarding this language allowing a court to waive the filing requirement for discovery supports consideration of third-party interests in discovery. See FED. R. CIV. P. 5(d) advisory committee’s note.

51. FED. R. CIV. P. 5(d) advisory committee’s note. The Second Circuit quoted this language in concluding that Rule 5(d) provides a statutory right of public access to unprotected discovery materials. See *Agent Orange*, 821 F.2d at 146.

52. 4A CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1141 (1987) (emphasis added).

53. See FED. R. CIV. P. 34.

54. See Campbell, *supra* note 32, at 813 (“Rule 34, unlike other rules governing discovery, does not provide that responsive discovery material be filed with the court and be made part of the public record.”).

55. See *id.* at 813.

for discovered material,⁵⁶ it is unlikely that documents produced under Rule 34 should be considered "papers" under Rule 5.⁵⁷

Finally, the Supreme Court itself limited the public's interest in discovered documents filed under Rule 5(d) in *Seattle Times*. "Discovery rarely takes place in public. . . . Thus, to the extent that courthouse records could serve as a source of public information, access to that source customarily is subject to the control of the trial court."⁵⁸ Rule 5(d) serves as the source for a presumption of public access to discovered material only through the discretion of the trial judge, not as a presumptive right of the public.

In sum, third parties who seek access to pretrial discovered materials under a protective order of confidentiality cannot claim a First Amendment, common law, or statutory right to such materials. Hence, courts should not take such supposed rights into account when modifying protective orders or even when initially issuing them.

II. INTERESTS IMPLICATED IN MODIFICATION OF A PROTECTIVE ORDER

Courts should consider three interests when deciding whether to modify protective orders for the benefit of third parties: privacy, property, and efficiency.⁵⁹ Section II.A discusses the privacy and property interests of litigants that are protected by Rule 26. Section II.B argues that concerns about efficiency in litigation always should be considered by courts deciding whether to modify a protective order. Section II.C argues that other circumstances should affect a court's decision to modify a protective order only if a third party can demonstrate a compelling public interest in the modification.

A. *Privacy and Property Interests in Discovery*

The privacy and property interests of parties to a litigation should be weighed in every decision regarding a protective order. Litigants have a right to expect that discovered information will not be disseminated to third parties. Without this expectation, the discovery process would be chilled by the concern that open discovery might bring about embarrassment or economic harm.⁶⁰

56. Occasionally, these procedures would be performed where discovered material is attached to a motion or petition to the court.

57. See Campbell, *supra* note 32, at 813.

58. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 n.19 (1984).

59. See Miller, *supra* note 4, at 464-77.

60. See *id.* at 483.

The language of Rule 26 that discusses the interests the court should consider when granting a protective order recognizes litigants' interest in privacy: "[T]he court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"⁶¹ Although the phrase "privacy interest" does not appear in the rule, the words *annoyance*, *embarrassment*, and *oppression* signal that the privacy of information that would be annoying, embarrassing, or oppressive if released to the public should be a concern when granting a protective order. Litigants have strong privacy interests in pretrial discovered materials.⁶²

The language of Rule 26 also emphasizes property interests in discovered materials. Rule 26(c)(7) allows a court to ensure "that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."⁶³ Courts often grant protective orders on the ground that some economic or competitive harm may result from the disclosure of particular information.⁶⁴ The value of information in the commercial world often gives it the status of property,⁶⁵ a view that the Supreme Court has affirmed.⁶⁶ Indeed, trade secrets can be so valuable that litigants sometimes prefer to settle out of court rather than risk disclosure.⁶⁷

B. Efficiency Interests in Discovery

Efficiency concerns also should play a role in every decision concerning discovery. The demands of modern litigation strain the resources of courts and litigants alike. Increasingly, courts have

61. FED. R. CIV. P. 26(c).

62. See Miller, *supra* note 4, at 464 ("Privacy can be a matter of concern to the plaintiff, the defendant, and nonparties in a wide array of lawsuits."). The *Manual for Complex Litigation*, a text looked to by many courts to guide the management of cases, cites individual privacy as a basis on which discovery might be protected. See MANUAL FOR COMPLEX LITIGATION § 21.43 & n.132 (1995). In particular, the potential release of financial and medical information arouses privacy concerns. See, e.g., *Seattle Times*, 467 U.S. at 35 (recognizing a "substantial interest" in preventing damage to privacy resulting from the release of discovery materials); *Coleman v. American Red Cross*, 23 F.3d 1091, 1096 (6th Cir. 1994) (The privacy interest of a blood donor in records of a Red Cross Blood drive is "substantial."); *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 487-88 (4th Cir. 1992) (recognizing that medical records of AIDS victims should receive "scrupulously confidential treatment").

63. FED. R. CIV. P. 26(c)(7).

64. See, e.g., *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 694-95 & n.1 (9th Cir. 1993) (recognizing a potential financial loss or disadvantage if discovery materials are publicly disclosed); *In re Remingtons Arms Co.*, 952 F.2d 1029, 1032 (8th Cir. 1991) ("Confidential business information has long been recognized as property." (quoting *Carpenter v. United States*, 484 U.S. 19, 26 (1987))).

65. See Miller, *supra* note 4, at 468.

66. See *Carpenter*, 484 U.S. at 19; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) (affirming that confidential information is recognized as property).

67. See *supra* text accompanying notes 1-4.

bowed to efficiency concerns when deciding issues related to discovery.⁶⁸ For example, courts are increasingly consolidating actions and using complex litigation strategies to conserve court resources and limit duplicative discovery. Courts in such cases are forced to take on a highly managerial role and occasionally to fashion remedies that resemble the actions of administrative agencies more than traditional individual judgments.⁶⁹ The need for increased efficiency is evidenced by the creation of devices designed to streamline the procedure in complex cases, such as the class action and consolidated multidistrict discovery.⁷⁰

Efficiency concerns imply that duplicative discovery efforts should be avoided wherever possible. Courts should allow a plaintiff to "share" discovery with a third-party litigant who brings suit against the original defendant under the same claim. The efficiency of this type of discovery sharing is attributable to the fact that a group of litigants has the same interest in certain discovered materials. The third party is saved the time and expense of "reinventing the wheel" through duplicative discovery efforts.⁷¹

68. Liberal joinder of parties and class action suits exemplify ways in which modern civil procedure supports efficiency concerns. See Chayes, *supra* note 10, at 1289-91. Modern causes of action can involve thousands of plaintiffs, and such cases have given rise to the Judicial Panel on Multidistrict Litigation. See Miller, *supra* note 4, at 448-49 (describing the electrical-equipment cases of the early 1960s, which spawned more than 1800 separate lawsuits by customers defrauded by a conspiracy of electrical-equipment manufacturers).

69. The recent settlement of the breast implant cases are a case in point; there, Judge Sam Pointer of the Northern District of Alabama supervised an agreement providing for the distribution of over \$1 billion to present and potential injured plaintiffs through a complex administrative mechanism. See *Individual Lawsuits on Silicone Implants are Allowed in Ruling*, WALL ST. J., Oct. 10, 1995, at B10.

70. Special problems arise when the interests of large groups are represented in the traditional, private law system. See Chayes, *supra* note 10, at 1291 ("[T]he class action responds to the proliferation of more or less well-organized groups in our society and the tendency to perceive interests as group interests . . ."); see also MANUAL FOR COMPLEX LITIGATION, *supra* note 62, § 20.21 ("[S]uch litigation places greater demands on counsel in their dual roles as advocates and officers of the court."). The *Manual for Complex Litigation* encourages this type of discovery sharing to bolster the efficiency aims of Rule 1. See *id.* § 21.423. Commentators such as Arthur Miller also advocate discovery sharing in order to increase the efficiency of the litigative process. See Miller, *supra* note 4, at 497-98 ("Barring [discovery] sharing smacks too much of requiring each litigant to reinvent the wheel . . . 'there is no reason to erect gratuitous roadblocks in the path of a litigant who finds a trail blazed by another.'" (quoting *Wilk v. American Medical Assn.*, 635 F.2d 1295, 1301 (7th Cir. 1980))); see also Marcus, *supra* note 17, at 41 ("By far the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation. . . . Under these circumstances, modification furthers, rather than undermines, the policies underlying rule 1."). The general trend toward accommodating group interests in litigation supports this emphasis on efficiency. For instance, where a product defect results in thousands of potential plaintiffs, adjudicating each case individually would be wasteful. Thus, measures aimed at efficiency are often designed to help judges assess and accommodate group interests.

71. However, efficiency concerns also support the privacy and property interests of those who originally requested the protective order. If these concerns are not addressed adequately by a protective order, the party producing discovery may be discouraged from being fully cooperative in the discovery process. See *Beckman Indus., Inc. v. International Ins. Co.*,

Most courts recognize the interest in efficiency by their reluctance to force third-party litigants to engage in duplicative discovery efforts.⁷² Especially when the court extends the protective order to include the third party seeking modification, the privacy and property interests of the opposing party are weak in light of the increased efficiency that results from allowing discovery to be shared among similarly situated litigants.⁷³

C. Unusual Public Need

The Advisory Committee's emphasis on the discretion of the trial court leaves open the possibility of allowing discovery due to unusual public need.⁷⁴ Most courts, for instance, allow a grand jury subpoena to overcome a protective order.⁷⁵ This bypass of a protective order would not necessarily occur under this Part's previ-

966 F.2d 470, 475 (9th Cir. 1992) (“[A]llowing modification may slow down the initial litigation, because parties are discouraged from disclosing for fear of forced disclosure in a later action.”); *In re Grand Jury Subpoena*, 836 F.2d 1468, 1472 (4th Cir. 1988) (“Absent [protective] orders, witnesses would be deterred from providing essential testimony in civil litigation, thus undermining the adversary process.”); *Minpeco S.A. v. Conticommodity Servs., Inc.*, 832 F.2d 739, 742 (2d Cir. 1987) (reducing the reliability of protective orders would hinder the interest of “just, speedy and inexpensive” litigation because it would deter parties from providing full disclosure of all evidence that might be relevant). Because most protective orders are stipulated to by both parties, courts are saved the time and expense of litigating such matters. See *Marcus*, *supra* note 17, at 2. Protective orders also encourage parties to comply willingly with discovery requests, making the discovery process more efficient. See *Miller*, *supra* note 4, at 446 (“Issuance of a protective order . . . can promote orderly compliance with discovery requests and minimize the amount of procedural maneuvering.”).

72. See *Beckman*, 966 F.2d at 475 (“Ninth Circuit precedent strongly favors disclosure [of discovery] to meet the needs of parties in pending litigation.”); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (favoring modification to prevent duplicative discovery); *Wilk*, 635 F.2d at 1299 (“[W]e . . . are impressed with the wastefulness of requiring the State of New York to duplicate discovery already made.”).

73. See *Beckman*, 966 F.2d at 476 (affirming the modification of a protective order for a similarly situated third party); *United Nuclear*, 905 F.2d at 1426 (affirming access to discovery where the third party would be bound by the original protective order).

74. The Advisory Committee's note provides that, when deciding whether to modify a protective order, “public and private interests in disclosure must be weighed against the private interests that may defeat any discovery or sharply limit the use of discovery materials. These factors are not expressed in more precise terms because of the need to balance infinite degrees of the interests that weigh for or against discovery.” PROPOSED RULES, *supra* note 11, at 57, reprinted at 150 F.R.D. 323, 389 (1993).

75. Even where a protective order was granted specifically to prevent government access, courts should comply with grand jury subpoenas. In *Martindell v. International Telephone & Telegraph Corp.*, 594 F.2d 291 (2d Cir. 1979), the Second Circuit applied its “compelling need” standard and quashed a grand jury subpoena of discovery documents in a parallel civil suit. The court reasoned that “a witness should be entitled to rely upon the enforceability of a protective order against any third parties, including the Government, and that such an order should not be vacated or modified merely to accommodate the Government's desire to inspect protected testimony for possible use in a criminal investigation,” 594 F.2d at 296, and thus the protective order should be upheld. However, the plaintiffs did not disclose any information; the government sought it independently. Thus, the Second Circuit's approach proves too rigid. As recently recognized by the Eleventh Circuit, a court cannot give a party effective immunity from prosecution. See *In re Grand Jury Proceedings*, 995 F.2d 1013 (11th Cir. 1993).

ously stated balancing test. The government when using a grand jury subpoena is not a member of a group that includes the original litigants. The governmental interest in having access to discovered materials differs substantially from the interests of the original litigants. Unlike a similarly situated third-party litigant, the nature of the government's claim differs from that of the original plaintiff. A grand jury subpoena seeks to gather evidence on criminal charges, often undefined in contrast to the civil claims of the original plaintiff.⁷⁶ Thus, allowing the government to overcome a protective order with a grand jury subpoena would not increase the efficiency of litigation in general and could harm the privacy and property rights of the original litigants.

On the other hand, a grand jury legitimately represents the interests of the general public. "Since the founding of the United States, grand juries have been accorded wide latitude to gather all relevant material because 'the public . . . has a right to every man's evidence.' . . . [T]he grand jury exercises this right for the public."⁷⁷ Courts have considered such special circumstances when deciding whether to modify a protective order.

Such special consideration for bodies that represent the public interest is supported by the Advisory Committee on Civil Rules. The proposed rule explicitly requires courts to consider public as well as private interests when deciding whether to modify a protective order.⁷⁸ Courts give due weight to the public interest in protected discovery by modifying protective orders for governmental bodies that specifically are designated to protect the public interest.

Aside from the grand jury subpoena, there may be other exceptional circumstances that justify modification of protective orders

The [Second Circuit] rationale . . . fails to recognize that federal courts lack the power to provide witnesses with the broad protection that witnesses seek. In asking a court to shield potentially incriminating material . . . a civil witness seeks to avoid indictment and, ultimately, punishment based on the information revealed.

Federal courts, however, have no authority to grant witnesses . . . such use immunity. 995 F.2d at 1017.

76. The scope of civil discovery, although broad, is limited to the material relevant to a predetermined cause of action. A grand jury, by contrast, is charged with determining whether an actionable crime has been committed at all. *See, e.g., Branzburg v. Hayes*, 408 U.S. 665, 701 (1972) (stating that a grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed" (quoting *United States v. Stone*, 429 F.2d 138, 140 (2d Cir. 1970))).

77. *Grand Jury Proceedings*, 995 F.2d at 1015-16 (11th Cir. 1993) (quoting *Branzburg*, 408 U.S. at 686-87).

78. The Judicial Conference has proposed an amendment to Rule 26(c) that gives explicit factors for courts to consider when ruling on a motion to modify a protective order. Proposed subsection 3 requires courts to consider "(A) the extent of reliance on the order; (B) the public and private interests affected by the order; and (C) the burden that the order imposes on persons seeking information relevant to other litigation." PROPOSED RULES, *supra* note 11, at 54-55, reprinted at 150 F.R.D. 323, 386-87 (1993).

for third parties. For instance, courts might allow government regulatory agencies access to discovered materials under protective order. Allowing regulatory agencies access to discovered materials would prevent future harms, while protecting potential defendants from invasive or harassing discovery from nonlitigant third parties, such as overzealous media. Protective orders may hinder regulatory agencies from gathering information about dangerous products.⁷⁹ Regulatory agencies are similar to grand juries in that they are governmental bodies charged with protecting the public interest. As governmental agencies, they are far better suited to maintaining the confidentiality of discovered material than newspapers or public interest groups. The exigencies of future fact situations are impossible to predict, but it is safe to say that the interests of third parties are likely to outweigh the privacy and property interests of litigants on rare occasions. The important point is that judges always have the discretion to consider the exceptional circumstances of third parties, whether litigants or not, when deciding whether to modify protective orders.

III. BALANCING THE THREE FACTORS: A PER SE RULE

This Part argues that courts should adopt a per se rule granting access to protected discovery to similarly situated third-party litigants because the balance of privacy, property, and efficiency interests always favors granting access. Conversely, non-similarly situated third parties should not have access to protected discovery unless “extraordinary circumstances” are shown.

Courts should adopt a per se rule allowing modification of protective orders for third parties who demonstrate that they are similarly situated to litigants in the case. Forcing a party that is similarly situated to make parallel discovery efforts by denying its request to modify the protective order would conflict with the goal of making litigation more efficient. In this situation, the opposing party’s privacy or property interests are not harmed because the third party would gain access eventually to the material in question through other means. Any possible privacy or property interests in the discovered material can be protected by extending the confidentiality order to the party seeking access.⁸⁰ Thus, the low interest in confi-

79. See Dorothy J. Clarke, *Court Secrecy and the Food and Drug Administration*, 49 *FOOD & DRUG L.J.* 109, 110-11 (1994) (suggesting that the Federal Food, Drug and Cosmetic Act be amended to require “drug and device manufacturers to submit information to the FDA regarding product liability litigation and settlements”).

80. See *Beckman Indus. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (extending a protective order to a third party); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (same); see also Miller, *supra* note 4, at 498-99 (arguing that protective orders should be extended to third parties if the court allows discovery sharing).

dentiality should be outweighed by considerations of efficiency in this case, and the protective order should be modified.⁸¹

A per se rule also would eliminate unnecessary legal wrangling over access to protected discovery. Similarly situated parties need only prove that they are similarly situated, and so transaction costs would be minimized for courts considering modification of a protective order. Parties subject to discovery also would be on notice that similarly situated parties would have access to such material. A per se rule would replace lengthy determinations of rights to information with a simple procedure.

The proposed rule for similarly situated third parties contradicts the Second Circuit's "extraordinary circumstances" test.⁸² The Second Circuit standard requires a similarly situated third party to show compelling need or extraordinary circumstances. The "extraordinary circumstances" test, however, is more appropriate in cases where the third party seeking modification of the protective order is not similarly situated. In such a case, the opposing party's privacy and property interests are high. Indeed, the very purpose of the protective order may well have been to prevent third-party nonlitigants, such as newspapers, from gaining access to the material. The interests of the nonlitigant third party are irrelevant to the balancing test unless they constitute an unusual public need. In light of the strong privacy and property interests of the opposing party, courts almost always should deny requests for modification by such parties.

CONCLUSION

In modern complex litigation, preserving the efficiency of the adjudicative process is essential to protecting the interests of both individual litigants, potential litigants, and ultimately, the public in-

81. This interest balancing is valid both for protective orders that were issued on a showing of good cause and those issued merely on the stipulation of both original parties. The privacy and property interests of the parties and the efficiency interests of the court system itself are just as valid even when good cause is not shown upon the initial issuance of the protective order. As argued above in section I.C, the showing of good cause goes to whether the *original litigants* are able to disseminate discovery materials; it is irrelevant to *third parties* seeking to gain access to the discovery.

In other words, section I.C argued that there is not a presumption of public access to discovery. There is a presumption that parties to the litigation themselves can disseminate discovery materials as they wish, unless "good cause" for a protective order is shown. Thus, where there has been no showing of good cause, the interests that must be balanced when determining third-party claims seeking access are not affected. Lack of a showing of good cause might affect the right of an original litigant seeking to disseminate discovery, but this is not within the scope of this Note.

82. See *In re Grand Jury Subpoena Duces Tecum*, 945 F.2d 1221, 1226 (2d Cir. 1991) (holding that a protective order may be modified only if the party seeking modification can show "improvidence in the original grant of the protective order or compelling need or extraordinary circumstances").

terest as well. This requires both protecting the privacy and property interests that litigants may have in discovered materials and preventing wasteful duplicative discovery that raises the cost of litigation for similarly situated litigants. A per se rule granting similarly situated litigants access to protected discovery upholds the public interest, as well as privacy, property, and efficiency interests. These same interests demand that third-party nonlitigants be granted access to discovered materials in only the most compelling circumstances. Otherwise, litigants would be discouraged from participating in the discovery process and would be forced to settle rather than risk public dissemination of valuable, private information.