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## Proportionality, Pretrial Confidentiality, and Discovery Sharing

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# Proportionality, Pretrial Confidentiality, and Discovery Sharing

Dustin B. Benham\*

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### I. Introduction

Courts around the country enter pretrial confidentiality orders every day.<sup>1</sup> Commentators and courts have long debated the impact of court confidentiality on public safety.<sup>2</sup> This debate often centers on whether public harms flow from court orders that limit the audience for discovery information that those same courts order parties to produce.<sup>3</sup> But an underexplored aspect of pretrial confidentiality is the cost it imposes on the litigation system. Confidentiality orders that prevent litigants in similar cases from sharing information make litigation less efficient and less effective.<sup>4</sup> Courts are split on if, when, and how

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1. See FED. R. CIV. P. 26(c)(1)(g) (allowing protective orders to limit access to trade secrets and other proprietary information); see also, e.g., Laurie Kratky Dore, *Secrecy by Consent: The Use of Limits of Confidentiality in Pursuit of Settlement*, 74 NOTRE DAME L. REV. 283, 285 (1999) (noting the frequent use of confidentiality in civil litigation).

2. Compare Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 6–9 (1983) (chronicling the intrusive nature of civil discovery and observing that parties have legitimate reasons to keep discovery information private), and Richard P. Campbell, *The Protective Order in Products Liability Litigation: Safeguard or Misnomer?*, 31 B.C. L. REV. 771, 772–75 (1990) (contending that privacy interests should trump public and party interests broader dissemination of pretrial discovery), with Dore, *supra* note 1, at 296 (noting the view that courts are “publicly funded” and “accountable to and guardians of a broader public interest”), Richard Zitrin, *The Judicial Function: Justice Between the Parties, or a Broader Public Interest?*, 32 HOFSTRA L. REV. 1565, 1567 (2004) (contending that private dispute resolution is just one function of courts; they also have a significant public function), Joseph F. Anderson, Jr., *Secrecy in the Courts: At the Tipping Point?*, 53 VILL. L. REV. 811, 813 (2008) (noting that “[t]he debate over ‘court-ordered’ secrecy has festered for several decades” and concluding that more court transparency is needed), and *Sunshine in Litigation Act of 2009: Hearing on H.R. 1508 Before the Subcomm. on Commercial & Admin. Law Comm. on the Judiciary*, 111th Cong. 1 (2009) (testimony of Leslie A. Bailey, Staff Att’y, Public Justice) (“In short, through protective orders, secret settlements, and sealed court records, the public courts are being used by private parties to hide smoking-gun evidence of wrongdoing.”).

3. See, e.g., Anderson, *supra* note 2, at 811–12 (recounting a fatal accident stemming from allegedly faulty tires where information about the defect, potentially available from over two hundred related lawsuits, was kept from victims by confidentiality orders).

4. See, e.g., *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (determining that to deny sharing between litigants “would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel”).

these orders should allow litigants to share pretrial discovery information.<sup>5</sup>

This Article examines the systemic harms of confidentiality orders and contends that courts should exercise their discretion to allow information sharing between similar cases absent substantial evidence of countervailing factors. It is the first significant piece of legal scholarship to examine court confidentiality and discovery sharing in light of the recent and contentious proposed amendments to the Federal Rules of Civil Procedure, approved in May 2014 by the Federal Judicial Conference Standing Committee.<sup>6</sup>

The current General Motors defective-ignition crisis provides a contemporary example of the potential systemic impact of restrictive confidentiality orders. While many rightly focus on the potential impact of court confidentiality on public safety,<sup>7</sup> court orders also likely prevented some of the plaintiffs in virtually identical lawsuits from sharing discovery information with each other. By “silo-ing” discovery information in this way, G.M. (like many other litigants engaged in national-scale litigation) forced

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5. Compare *Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010) (denying request for sharing provision in protective order out of preference for later intervention and modification), and *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. Dist. Ct. App. 2011) (denying request for discovery-sharing provision based on conflict with state trade-secret statute), with *Garcia v. Peeples*, 734 S.W.2d 343, 346 (Tex. 1987) (mandating discovery-sharing provision in protective order absent showing of prejudice to producing party), and *Raymond Handling Concepts Corp. v. Super. Ct.*, 45 Cal. Rptr. 2d 885, 888 (Cal. Ct. App. 1995) (allowing trial court discretion to include discovery-sharing provision).

6. See ADVISORY COMM. ON CIVIL RULES, REPORT TO THE STANDING COMMITTEE 91–94 (May 2, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Standing/ST2014-05.pdf> [hereinafter COMMITTEE REPORT] (enumerating proposed amendments to the Federal Rules of Civil Procedure); Tera E. Brostoff, *Changes to E-Discovery Approved; “It Should Work,” Professor Predicts*, 82 U.S.L.W. 1918 (June 2, 2014) (discussing the rationale behind the amendments to Rule 37 and predicting the effectiveness of the new rule).

7. See, e.g., Bill Vlasic, *Inquiry by G.M. Is Said to Focus on Its Lawyers*, N.Y. TIMES, May 18, 2014, at A1 (“G.M.’s unwillingness to share information it had about defective switches with regulators most likely cost lives in accidents.”).

its opponents to wastefully reinvent the wheel when conducting discovery in each case.<sup>8</sup>

Indeed, plaintiffs with identical discovery requests in two virtually identical cases might be forced to litigate their entitlement to the same information anew in both cases. If courts in similar cases simply allowed parties to share discovery, the twin lawsuits would consume fewer court and party resources.<sup>9</sup> Multiplied over many cases and many document requests, court orders that prevent sharing create a significant drag on the system. Based on these efficiency concerns, most commentators that have considered the issue support some form of discovery sharing.<sup>10</sup>

Surprisingly, however, courts are still split on the propriety of protective-order provisions that allow information sharing between similar cases.<sup>11</sup> Some courts have mandated discovery sharing, holding that courts abuse their discretion by issuing orders that prevent the practice.<sup>12</sup> At the other end of the spectrum, some courts have recently held that discovery-sharing provisions are forbidden in many cases.<sup>13</sup> Indeed, federal and

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8. *Cf.*, e.g., *Garcia*, 734 S.W.2d at 346–48 (finding that nonsharing protective orders, in the products liability context, create inefficiency by forcing parties to conduct discovery without the benefit of information from previous cases).

9. *See*, e.g., *id.* at 347 (“In addition to making discovery more truthful, shared discovery makes the system itself more efficient.”).

10. *See*, e.g., Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457, 464–66, 466 n.61, 495–96 (cataloguing pro-sharing action by the legislatures and an ABA commission while endorsing discovery sharing); Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 498–99 (1991) (favoring discovery sharing when it actually promotes efficiency); Dore, *supra* note 1, at 363–65 (same).

11. *See*, e.g., cases cited *supra* note 5 (listing numerous cases in which courts have come to differing conclusions concerning protective orders).

12. *See Garcia v. Peebles*, 734 S.W.2d 343, 346–48 (Tex. 1987) (“The facts of this case do not justify the blanket protective order, and in rendering an overbroad order, the trial court abused its discretion.”).

13. *See Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. Dist. Ct. App. 2011) (denying a motion for a protective order on the grounds that it would allow dissemination of trade secrets in violation of a state statute); *cf. Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010) (finding that the presumption of public access “is trumped where the defendant establishes good cause to protect

state courts across the country, applying similar protective-order rules, are increasingly fractured on the issue.

The dispute about discovery sharing is particularly curious in the face of recent and ongoing procedural reform designed to make pretrial litigation more efficient. In late May 2014, the Federal Judicial Conference Standing Committee on the Rules of Practice and Procedure approved significant revisions to Federal Rule of Civil Procedure 26 to reduce the systemic burdens of pretrial discovery.<sup>14</sup> These proposed amendments are almost certain to become law in December 2015.

The centerpiece of the changes would highlight the concept of “proportionality” as the scope of discovery.<sup>15</sup> Proportionality is the notion that resources expended on discovery in a given case should correlate with the benefits of conducting the discovery.<sup>16</sup>

Notably, the proposed amendments are silent about discovery sharing.<sup>17</sup> But sharing works in tandem with proportionality by allowing parties to more accurately tailor discovery in cases where the parties are informed by shared information. Indeed, the crux of the amendments’ letter and spirit—minimizing the undue burdens of pretrial discovery<sup>18</sup>—

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discovery materials”).

14. See COMMITTEE REPORT, *supra* note 6, at 63–72 (detailing proposed amendments to the Federal Rules of Civil Procedure); Brostoff, *supra* note 6 (describing the rationale behind adopting certain amendments to the rules: “focusing on the goals of cooperation, proportionality and early case management”).

15. See COMMITTEE REPORT, *supra* note 6, at 65 (incorporating proportionality as Rule 26(b)(1) scope of discovery).

16. See FED. R. CIV. P. 26(b)(2)(C)(iii) (limiting discovery when “the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues”); see also 8A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2036 (3d ed. 2010) (discussing the rationale behind Rule 26(b)(2)(C)’s prohibition on “disproportionate discovery demands”); Richard Marcus, *Procedural Postcard from America*, 1 RUSS. L.J. 9, 19–20 (2013) (comparing American notions of proportional discovery with European norms).

17. COMMITTEE REPORT, *supra* note 6, at 80–86.

18. See *id.* at 82 (“The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.”).

stands in stark contrast to decisions that require parties to craft discovery requests in the dark and re-litigate the same discovery issues in virtually identical cases.

Beyond the extent to which discovery sharing complements recent procedural reform efforts, it also has many collateral benefits, including increased litigation integrity through transparency along with, in at least some cases, increased accountability for wrongdoing.<sup>19</sup>

Part II of this Article examines the court-confidentiality problem and its relationship to discovery sharing. Part III examines historical and contemporary trends in pretrial discovery and their relationship to court confidentiality and discovery sharing. Then, in Part IV, the Article proposes some baseline discovery-sharing principles and examines the potential interaction between these principles and the current proposed amendments to the civil rules.

## II. Court Confidentiality

Popular wisdom holds that courts are open to the public. As Atticus Finch presented his unforgettable closing argument in *To Kill a Mockingbird*, spectators watched from packed galleries.<sup>20</sup> Though unjustly divided by race between the lower gallery and the balcony, they observed both the presentation of evidence in the trial and the unjust conviction of Atticus's client.<sup>21</sup>

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19. See, e.g., *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987) (“Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses.”); Dore, *supra* note 1, at 363–65 (recognizing implicitly that shared disclosure may increase accountability by noting that “[t]he desire to shield oneself from other potential claims, however, does not alone justify” objection to discovery sharing).

20. See HARPER LEE, *TO KILL A MOCKINGBIRD* 186–87, 229–35 (Harper 2002) (describing the overflowing public courtroom, indicating that not even standing room remained to watch the case unfold); see also *TO KILL A MOCKINGBIRD* (Universal Studios 1962) (using the packed courtroom, open to the public, to demonstrate that the case had grasped the attention of the public).

21. LEE, *supra* note 20, at 240.

Popular notions of openness aside, the idea that courts and their processes are open to the public is only partially accurate. While a modern public would no doubt have a constitutional right of access to a criminal or civil trial, much of what takes place in litigation is not open to public view. In particular, civil discovery is often kept confidential through a procedural device known as a protective order.<sup>22</sup> And because many cases settle during discovery and before trial, the general public and other litigants involved in virtually identical cases have limited access to pretrial discovery information.<sup>23</sup>

Confidentiality in litigation, however, comes at a cost. According to pro-transparency advocates, keeping public health and safety hazards confidential costs lives.<sup>24</sup> Beyond the public safety issue, litigating individual cases in isolation has a systemic impact. Indeed, some have argued that the court system is made more expensive and less effective when those same pretrial confidentiality orders forbid litigants from sharing discovery in one case with litigants in other virtually identical cases.<sup>25</sup>

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22. See FED. R. CIV. P. 26(c)(1)(g) (permitting a court to issue a protective order to ensure that “a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way”); see also Judith Resnick, *The Privatization of Process: Requiem for and Celebration of the Federal Rules of Civil Procedure at 75*, 162 PENN. L. REV. 1793, 1814–17 (2014) (describing declining public access to once-public court functions, including pretrial discovery).

23. See, e.g., Andrew D. Goldstein, *Sealing and Revealing: Rethinking the Rules Governing Public Access to Information Generated Through Litigation*, 81 CHI.-KENT L. REV. 375, 401–02 (2006) (noting that much “litigant-centered” information, like discovery, generated through court processes is often kept from the public); see also Richard A. Zitrin, *The Laudable South Carolina Rules Must Be Broadened*, 55 S.C. L. REV. 883, 886–87 (2004) (describing the lack of judicial awareness of lawyer-driven secrecy through discovery and settlements occurring outside the view of the court).

24. See Zitrin, *supra* note 2, at 1565–66 (describing a particular case in which a plaintiff’s attorney, after agreeing to a “secretized” settlement, “[acknowledged] that others may have died later as a consequence” of the confidentiality).

25. Cf. Dore, *supra* note 1, at 363 (“Discovery sharing, while arguably undermining the efficiency of discovery in the immediate lawsuit, potentially avoids the wasteful duplication of discovery in collateral litigation, thereby ultimately advancing the efficient resolution of disputes.”).



As a prefatory matter, I choose the word “confidential” carefully here. Terminology in the confidentiality debate can carry a loaded meaning.<sup>26</sup> Proponents of more confidentiality, for instance, often refer to the issue as one of “privacy.”<sup>27</sup> Likewise, those who favor more public access to discovery materials typically refer to the issue in terms of “secrecy.”<sup>28</sup> In this Article, I refer to those in favor of less public access as “pro-confidentiality” and those in favor of more public access as “pro-transparency,” recognizing that neither term connotes those positions with perfect neutrality.<sup>29</sup>

The following subparts explore the basic protective-order framework in the American system and narrower, yet significant, problems stemming from the use of pretrial protective orders to stifle discovery sharing.

#### A. Pretrial Protective Orders

For more than three decades, courts, scholars, and legislators have debated the impact of court confidentiality. For the most part, the discussion has centered on public access and the tension between the idea that courts are public institutions that express public values and the notion that litigants do not sacrifice all privacy at the courthouse door.<sup>30</sup> And while it is difficult to calculate precisely which side has the momentum, it is undeniable that pretrial confidentiality is a feature of modern litigation.<sup>31</sup>

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26. Cf. Nancy S. Marder, *Introduction to Secrecy in Litigation*, 81 CHL.-KENT L. REV. 305, 305 (2006) (suggesting a court-confidentiality vocabulary).

27. See, e.g., Marcus, *supra* note 2, at 15 (observing the “privacy afforded pretrial proceedings” through protective orders). *But cf.* Marcus, *supra* note 10, at 457 (referring to the issue as “The Discovery Confidentiality Controversy”).

28. See, e.g., Zitrin, *supra* note 2, at 1572 (“In the last five years, secrecy in settlements has become an increasingly common subject of articles in the popular legal press and more scholarly forums.”).

29. See Marder, *supra* note 26, at 305 (describing the connotations associated with certain “loaded terms” often used when addressing the issue of confidentiality in discovery).

30. See sources cited *supra* note 2 (listing works of scholarship exemplifying the debate surrounding privacy in discovery).

31. See, e.g., Dore, *supra* note 1, at 285 (observing that secrecy is a part of

The confidentiality problem is typically framed as pitting the public's interest in knowing against the litigant's interest in confidentiality. In reality, this false binary oversimplifies the problem and ignores a third category affected by court confidentiality—litigants in separate but similar cases.<sup>32</sup> This group occupies a special position, with distinct interests in accessing discovery information but still regularly excluded from access by confidentiality orders.<sup>33</sup>

The trend of keeping pretrial litigation information confidential from both the public at large and other similar litigants pervades all aspects of the trial process. Before trial, courts and attorneys working on behalf of litigants liberally employ confidentiality orders to closet pretrial discovery from anyone outside of each particular case.<sup>34</sup>

Many of these cases settle, and settlement agreements often contain court-enforceable gag provisions that extend the original confidentiality orders indefinitely.<sup>35</sup> These agreements, like the orders that precede them, often include “return-or-destroy” provisions that require the parties to return or destroy all discovery information in the case within a few months of settlement.<sup>36</sup> These mechanisms make it more difficult for the

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every phase of civil litigation).

32. See, e.g., Marcus, *supra* note 10, at 493–94 (discussing “access for other litigants”).

33. Cf., e.g., *id.* (summarizing steps being taken to improve access to confidential material produced during discovery for similarly situated litigants).

34. See, e.g., Dore, *supra* note 1, at 332 (“To expedite discovery and avoid repeated motions for a protective order regarding every document believed to be confidential, parties will frequently agree to, and courts will regularly issue, umbrella protective orders.”).

35. See, e.g., *id.* at 290–92 (cataloguing the Civil Rules explicit bent toward settling cases); Anderson, *supra* note 2, at 813 (describing, from a federal judge’s perspective, the “take it or leave it” approach of some parties in getting courts to ratify secret settlements through court order).

36. See, e.g., Anderson, *supra* note 2, at 814 (describing requests from one or both of the parties to enter orders with “return or destroy” provisions). Even if relevant material is returned to the producing party, that party very well may have a duty to preserve it for future litigation. See, e.g., 8A WRIGHT ET AL., *supra* note 16, § 2284.1 n.4 (discussing the possible sources of an obligation to preserve information within control of a party). Compliance with that duty, however, is made more difficult to police when protective orders force the return or destruction of the material by opposing parties.

general public and litigants in similar cases to obtain the information. Even in cases that make it to trial, some courts have recently, and inexplicably, sealed trial testimony and exhibits from public view.<sup>37</sup>

Almost all facets of the broader court-confidentiality problem stem from a common root—protective orders. Confidential discovery, via protective orders, takes place in many cases that are ultimately settled.<sup>38</sup> If parties were unable to keep information exchanged in discovery secret in the first place, secret settlements would be largely ineffective.<sup>39</sup> As a result, it is not surprising that the early confidentiality controversy centered on appropriateness of protective orders.

The term “protective order” actually describes several related procedural devices that limit discovery.<sup>40</sup> But the type of protective order most relevant to the court-confidentiality debate allows courts to limit the persons to whom discovery information may be disclosed.<sup>41</sup> To guarantee the confidentiality of pretrial discovery materials, these orders are necessary because parties may freely disseminate anything they learn in discovery to the public at large, absent a contrary court order.

Described in Rule 26(c)(1)(g), these audience-limiting orders mandate that “a trade secret or other confidential research,

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37. See, e.g., *Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 U.S. Dist. LEXIS 77568, at \*4 (S.D. Tex. July 18, 2011) (permitting third-party intervenors to obtain documents produced by defendant in the current case, conditioned upon signing the parties’ confidentiality agreement, and denying access to exhibits produced by defendant in previous case under a different protective order).

38. See *Dore*, *supra* note 1, at 384–85 (describing the relationship between confidentiality and settlement).

39. See *id.* at 384 (“Secrecy undoubtedly facilitates the settlement process, and in some cases, compromise could not be reached without some assurance of its confidentiality.”).

40. See FED. R. CIV. P. 26(c)(1)(a)–(g) (enumerating various examples of “good cause” for a court to grant a protective order); see also 8A WRIGHT ET AL., *supra* note 16, § 2036 (stating that “a court is not limited to the eight specified types of orders” enumerated in Rule 26(c)).

41. See FED. R. CIV. P. 26(c)(1)(g) (allowing court use of a protective order to prevent sensitive commercial information from being disseminated to competitors); see also FED. R. CIV. P. 26(c)(1)(f) (allowing courts to seal depositions).

development, or commercial information not be revealed or be revealed only in a specified way.”<sup>42</sup> A particular order under this provision might limit disclosure of discovery materials to just those participating in the litigation—the parties, their attorneys, support staff, and experts.<sup>43</sup> A more onerous, and rare, version restricts access to only attorneys and consultants—precluding even parties from having access to particularly sensitive information.<sup>44</sup>

The defining feature of an audience-limiting protective order is that it allows discovery to go forward while simultaneously limiting the audience for the materials. In a way, this type of order might be viewed as a pragmatic middle ground.<sup>45</sup>

Implicit in the protective-order arrangement is the notion that the primary purpose of discovery is to prepare and resolve litigation.<sup>46</sup> Protective orders are often geared to steer discovery information to the appropriate audience for this purpose, even at the expense of other legitimate audiences.<sup>47</sup>

Nevertheless, under Rule 26, confidentiality is not automatic or an entitlement. Indeed, like other protective orders, Rule 26(c)(1)(g) confidentiality orders may be entered only on a showing of “good cause.”<sup>48</sup> Under the best formulations of good

42. FED. R. CIV. P. 26(c)(1)(g).

43. See Dore, *supra* note 1, at 327 (“Courts, for example, may restrict the disclosure of such discovery to designated persons or forbid its use for purposes unrelated to the preparation and settlement of the case at hand.”).

44. See, e.g., *Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1472 (9th Cir. 1992) (finding a protective order that denied access to party’s in-house counsel was not an abuse of discretion).

45. Cf. Marcus, *supra* note 10, at 484–85 (observing that a broad right of public access to discovery information would disrupt discovery).

46. Cf. Marcus, *supra* note 2, at 7 (contending that those involved in the litigation system operate under “the assumption that any use of discovery materials except to prepare for trial is inappropriate”). *But see* Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781, 1808 (2014) (acknowledging that the primary purpose of discovery is to prepare for trial but observing that “[e]ven in private litigation, parties openly use the system to obtain information” among other collateral purposes).

47. See Benham, *supra* note 46, at 1806–08 (arguing that the dissemination of discovery information is protected expression).

48. See, e.g., *Pia v. Supernova Media, Inc.*, 275 F.R.D. 559, 560 (D. Utah 2011) (“Under the rule, the party seeking protection has the burden to show

cause, a party seeking a protective order must make a particularized showing of both the confidential nature of the information and the harm that would flow from publicly disclosing it.<sup>49</sup> Conclusory allegations, unsupported by specific evidence, will not justify an order.<sup>50</sup>

Still, trial courts have inarguably broad discretion in finding good cause and fashioning protective orders, “frequently finding protection justified, and frequently denying protection.”<sup>51</sup> Even discretion, however, has its limits. Multiple courts have articulated good cause factors to provide at least a minimal structure.<sup>52</sup>

But in practice, the good cause standard has proven to be largely friendly to routine confidentiality requests, allowing many

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good cause for preventing dissemination of discovery materials.”).

49. See, e.g., *Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1034 (S.D.N.Y. 1993) (“With respect to [a] claim of confidential business information, [the good cause] standard demands that the company prove that disclosure will result in a clearly defined and very serious injury to its business.”); *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (finding the “good cause” requirement “to mean that the party seeking the protective order must demonstrate that the material sought to be protected is confidential and that disclosure will create a competitive disadvantage for the party”).

50. See, e.g., *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995) (“‘Good cause’ is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice.”); cf. 8A WRIGHT ET AL., *supra* note 16, § 2035 (“The courts have insisted on a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements, in order to establish good cause.”); Richard L. Marcus, *A Modest Proposal: Recognizing (at Last) that the Federal Rules Do Not Declare that Discovery Is Presumptively Public*, 81 CHI.-KENT L. REV. 331, 348 (2006) (noting that the standards for issuing protective orders are “somewhat exacting” but also contending that the substantial burden for obtaining a protective order does not imply public right of access in the absence of one).

51. 8A WRIGHT ET AL., *supra* note 16, § 2043.

52. See, e.g., *In re Roman Catholic Archbishop*, 661 F.3d 417, 424 (9th Cir. 2011) (balancing the factors enumerated in *Glenmede Trust Co.* to determine whether a party has shown “good cause”); *Glenmede Trust Co.*, 56 F.3d at 483 (enumerating several factors, “which are neither mandatory nor exhaustive, that may be considered in evaluating whether ‘good cause’ exists”); *Mosaid Techs., Inc. v. LSI Corp.*, 878 F. Supp. 2d 503, 508 (D. Del. 2012) (“Assessing whether good cause exists to seal a judicial transcript generally involves a balancing process, in which courts weigh the harm of disclosing information against the importance of disclosure to the public.”).

courts to enter protective orders as a matter of course in complex cases.<sup>53</sup> Other courts have recently gone as far as creating a standing protective-order form to which the parties may stipulate, standardizing the rubber-stamp process.<sup>54</sup>

### *B. Fault Lines in the Protective-Order Debate*

In response to a system that makes it easy to conceal discovery information, pro-transparency advocates have waged a multi-decade, multi-faceted campaign against protective orders. In large measure, these efforts have focused on public access questions,<sup>55</sup> largely ignoring the impact of court confidentiality on the litigation system. Up to this point, the fight has primarily revolved around three axes: a First Amendment challenge, a rule-based right of access argument, and transparency legislation.

One early line of attack against pretrial protective orders was founded in the First Amendment.<sup>56</sup> In the late 1970s, pro-transparency advocates urged a First Amendment basis for resisting protective orders: court orders restricting what litigants do with information that they obtained in discovery allegedly

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53. See, e.g., Joseph F. Anderson Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004) (contending, that to a federal district judge, “courts too often rubber-stamp confidentiality orders presented to them, sometimes altogether ignoring or merely giving lip service to the body of law and existing court rules that are supposed to apply when the parties request that discovery documents be filed under seal”); see also *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994) (observing the trend of some courts to enter protective orders as a matter of course “without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders”).

54. See *Model Protective Orders*, U.S. DIST. COURT N. DIST. CAL., <http://www.cand.uscourts.gov/model-protective-orders> (last visited Nov. 19, 2014) (providing “court-approved model forms” for protective orders) (on file with the Washington and Lee Law Review).

55. See, e.g., Zitrin, *supra* note 2, at 1567 (arguing in favor of transparency on the grounds that “[o]nce the disputants go to court, the public nature of the forum trumps the formerly private nature of the dispute”).

56. For a full analysis of the current relationship between the First Amendment and pretrial protective orders, see generally Benham, *supra* note 46, at 1785–86.

violated the Constitution's free-speech guarantee.<sup>57</sup> Early cases considering the argument suggested that confidentiality orders did not violate the First Amendment.<sup>58</sup>

But in 1979, the D.C. Circuit entered the fray and set off a firestorm by applying strict scrutiny to invalidate a protective order.<sup>59</sup> If this view prevailed, many protective orders would be doomed. The Supreme Court, in *Seattle Times v. Rhinehart*,<sup>60</sup> responded. Justice Lewis Powell, writing for a unanimous court, rejected the D.C. Circuit's strict-scrutiny approach and instead held that, although the First Amendment did protect those who disclose discovery information, the special context of civil litigation implicated free-speech concerns to a lesser extent than in other contexts.<sup>61</sup> While courts and commentators continue to debate the meaning of the case,<sup>62</sup> multiple courts have held that *Seattle Times* effectively removed the First Amendment from the protective-order analysis.<sup>63</sup>

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57. Cf., e.g., Michael Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process*, 14 N. ENG. L. REV. 1, 10–14 (1978) (examining the role of the First Amendment regarding protective orders).

58. See *Int'l Prods. Corp. v. Koons*, 325 F.2d 403, 407 (2d Cir. 1963) (“[W]e entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court’s process.”).

59. See *In re Halkin*, 598 F.2d 176, 183 (D.C. Cir. 1979) (“Even if the order is relatively narrow, however, it restrains the petitioner from communicating matters of public importance for an indefinite period of time. As such it constitutes direct governmental action limiting speech and must be carefully scrutinized in light of the first amendment.”).

60. 476 U.S. 20 (1984).

61. See *id.* at 37 (“[W]here . . . a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.”).

62. See, e.g., Benham, *supra* note 46, at 1804–14 (arguing that protective orders implicate significant First Amendment concerns).

63. See Marcus, *supra* note 10, at 462–63 (“[A]ll are agreed that the broad [First Amendment] prior restraint argument that captured attention in the early 1980s no longer has force.”). Compare *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1114 (3d Cir. 1986) (noting that “[d]espite the Supreme Court’s apparent endorsement in the above passage of a least restrictive means analysis, its holding requires only a good cause analysis”), with *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 n.2 (1st Cir. 1986) (interpreting *Seattle Times* to

Soon after the Court decided *Seattle Times*, a few commentators and courts cited the case to preclude discovery sharing between similar litigants.<sup>64</sup> That approach has been roundly rejected because the case simply did not address the propriety of sharing.<sup>65</sup> Indeed, if anything, courts allowing discovery sharing would impose a lesser speech restriction on litigants than that approved by the *Seattle Times* court.<sup>66</sup>

On another front in the court-confidentiality fight, transparency proponents have also contended that the Federal Rules of Civil Procedure create a right of third-party access to discovery materials.<sup>67</sup> Under a previous version of Rule 5(d), all discovery materials had to be filed with the court.<sup>68</sup> The reasoning went that the public had a common-law right to access the unsealed contents of a court file.<sup>69</sup> Because discovery was on

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apply “heightened” scrutiny to the practice of issuing protective orders and allowing some role for the First Amendment in the granting of particular protective orders). *But see* Benham, *supra* note 46, at 1804–14 (“The Supreme Court’s opinion in *Seattle Times*, recent Court statements, and an assessment of the nature of both protective orders and the speech that they restrict make clear that so-called intermediate scrutiny applies”).

64. *See, e.g.*, Rich Arthurs, *Defendants Fight Back on Data Sharing*, LEGAL TIMES, July 16, 1984, at 1 (describing Ford Motor Company’s attempt to use trade secret protection to prevent plaintiffs’ attorneys from sharing crash test data); Gary L. Wilson, Note, *Seattle Times: What Effect on Discovery Sharing?*, 1985 WIS. L. REV. 1055, 1056–57 (noting that the first court to apply *Seattle Times* “relied on the rationales enunciated by the Supreme Court and granted a protective order prohibiting the dissemination of discovered information to parties involved in similar litigation”).

65. *See, e.g.*, Marcus, *supra* note 10, at 495 (“[I]t is difficult to see how the [*Seattle Times*] Court’s reasoning should prompt other courts to curtail access for use in other litigation.”).

66. *See* Benham, *supra* note 46, at 1823 (explaining that courts utilize sharing protective orders to allow litigants to share discovery with litigants in similar cases).

67. *See* Seymour Moskowitz, *Discovering Discovery: Non-Party Access to Pretrial Information in the Federal Courts 1938–2006*, 78 U. COLO. L. REV. 817, 865–75 (2007) (arguing that a presumption of access to discovery material was “created by the combination of the Rule 5(d) filing requirement and the Rule 26 good cause provision”).

68. For a thorough history of changes to Rule 5(d) and the implications for access arguments, see *id.* at 833–53.

69. *See id.* at 861–64 (observing that a general right to inspect and copy both judicial and public records and documents existed).



file, or supposed to be, the public had a putative right to access depositions, interrogatory responses, and other discovery responses.<sup>70</sup>

A series of rules amendments, culminating in a 2000 amendment that forbids parties from filing discovery unless in connection with a proceeding or pursuant to a court order,<sup>71</sup> effectively ended the Rule 5-based argument for a right of access to unfiled discovery.<sup>72</sup>

Transparency, or “Sunshine,” legislation is yet another front in the fight against protective orders. For more than a decade, the Sunshine in Litigation Act has been filed, and re-filed, in both branches of Congress but has never become law.<sup>73</sup> Indeed, in May 2014, Senators Blumenthal and Graham reintroduced the legislation as the Sunshine in Litigation Act of 2014 (SILA 2014).<sup>74</sup>

The current act would require district courts to consider the health and safety implications of both protective orders (even agreed protective orders) and settlement agreements before approving them.<sup>75</sup> In particular, courts could not approve

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70. See, e.g., *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 596 (7th Cir. 1978) (“As a general proposition, pretrial discovery must take place in the public unless compelling reasons exist for denying the public access to the proceedings.”).

71. FED. R. CIV. P. 5(d) (2000).

72. See, e.g., Marcus, *supra* note 50, at 333 (“[A]mendments to the Rules that forbid the filing of most discovery in court . . . further support the proposal that the notion of the Rules themselves commanding public access should be laid to rest.”). *But see generally* Moskowitz, *supra* note 67 (indicating a presumption of access to discovery materials).

73. See Mary Elizabeth Keaney, Note, *Don’t Steal My Sunshine: Deconstructing the Flawed Presumption of Privacy for Unfiled Documents Exchanged During Discovery*, 62 HASTINGS L.J. 795, 798 (2011) (noting that the bill was originally introduced in 1993 by Senator Herbert Kohl, and it has been reintroduced annually ever since).

74. S. 2364, 113th Cong. (2014).

75. See *id.* § 2 (as introduced by Senate, May 20, 2014)

Amends the federal judicial code to prohibit a court, in any civil action in which the pleadings state facts relevant to protecting public health or safety, from entering an order restricting the disclosure of information obtained through discovery, approving a settlement agreement that would restrict such disclosure, or restricting access to court records, subject to exceptions, unless the court has first made

protective orders unless a “specific and substantial interest in maintaining the confidentiality of the records” outweighed the public interest in disclosure of “potential health or safety hazards.”<sup>76</sup>

Though primarily focused on giving the public access, SILA 2014 would also have implications for litigants seeking to share information between related cases. If the public has access to discovery materials so, presumably, would litigants in other similar cases as members of the public. And the Act’s nexus to public health and safety would often preclude protective orders in the very class of cases that benefit most from discovery sharing—products liability and tort actions involving products and injuries of national proportions.<sup>77</sup> As Congress considers SILA 2014, it should consider the negative impact on court efficiency stemming from protective orders along with the impact on public safety.

Additionally, some state legislatures have considered and passed transparency and sunshine legislation, including at least one statute that specifically addresses discovery sharing.<sup>78</sup> Still, the momentum for sunshine legislation in many states tapered off in the mid-1990s.<sup>79</sup>

With the constitutional front in the fight against protective orders largely dormant, the rule-based front effectively dead, and

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independent findings of fact that: (1) the order would not restrict the disclosure of information relevant to the protection of public health or safety or (2) the public interest in the disclosure of past, present, or potential health or safety hazards is outweighed by a specific and substantial interest in maintaining the confidentiality of the information and the requested protective order is no broader than necessary to protect the confidentiality interest asserted.

76. *Id.*

77. *See id.* (prohibiting protective orders in cases “in which the pleadings state facts that are relevant to the protection of public health or safety”).

78. *See* TEX. R. CIV. P. 76a (mandating a strict balancing test before courts may enter protective orders restricting access to unfiled discovery that implicates public health and safety); FLA. STAT. ANN. § 69.081 (West 2014) (forbidding court orders restricting disclosure of information concerning public hazards); VA. CODE ANN. § 8.01-420.01 (2014) (forbidding protective orders that stifle discovery sharing).

79. *But see* MONT. CODE ANN. § 2-6-112 (2014) (forbidding, by statute passed in 2005, certain court orders that have “the purpose or effect of concealing a public hazard”).

the legislative front pending, the discovery-sharing discussion often takes place in the context of trial court discretion.<sup>80</sup> The next subpart focuses on the relationship between protective-order discretion and discovery sharing.

### *C. Sharing Discovery in Similar Cases*

Litigants often seek to use discovery information obtained in one case to prepare and develop another related case.<sup>81</sup> The concept known as “discovery sharing” flows from a basic, uncontested proposition: Litigants may freely distribute discovery information unless a valid court order forbids them from doing so.<sup>82</sup> And even if a court order limits how parties use discovery information, judges have broad discretion to refuse dissemination

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80. See, e.g., Ashley A. Kutz, Note, *Rethinking The “Good Cause” Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P. 26(c)*, 42 VAL. U. L. REV. 291, 293 (2007) (describing approaches to determining good cause that range from “rubber-stamping” proposed protective orders to “hostility toward confidentiality,” analyzing various circuits’ approaches to “good cause,” and proposing an improved protective-order process under 26(c)).

81. See, e.g., *Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871, at \*3 (S.D. Tex. Feb. 17, 2011) (denying a protective order modification while acknowledging that the order allows for “sharing of discovered information with attorneys and other necessary persons representing parties with present or future cases pending against Defendant that arise out of the same or similar set of facts, transactions, or occurrences”); *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. Dist. Ct. App. 2011) (noting respondents’ request for a sharing provision to include collateral litigants); *Pincheira v. Allstate Ins. Co.*, 190 P.3d 322, 337 (N.M. 2008) (“The parties and amici recognize that this case is really about discovery sharing, both with other litigants and with the public at large.”); *Cowan v. Gen. Motors Corp.*, No. 06-1330-MLB, 2007 WL 1796198, at \*5 (D. Kan. June 19, 2007) (“The Court recognizes the public policy benefit of potentially sharing documents with attorneys involved in litigation of a similar product with similar issues.”).

82. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (holding that where “a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment”); see also Moskowitz, *supra* note 67, at 825 (“Absent a protective order, a plaintiff or defendant has the right to disseminate information obtained during discovery so long as the purpose for sharing is lawful.”).

to one group (e.g., the media) and allow dissemination to another (e.g., litigants in similar, but separate, litigation).<sup>83</sup>

Plaintiffs' attorneys typically contend that sharing information between similar cases allows them to avoid wastefully reinventing the wheel by repeatedly conducting virtually identical discovery.<sup>84</sup> Beyond these efficiency gains, sharing proponents contend that exchanging information allows isolated plaintiffs to prepare cases collaboratively, leveling the playing field with large law firms and national collaboration on the other side of the docket. Sharing also increases discovery accountability by allowing parties to compare discovery responses against responses in a similar case.<sup>85</sup>

Despite the apparent benefits, disputes about the propriety of sharing have persisted for decades.<sup>86</sup> Indeed, in the early 1990s, one leading pro-confidentiality commentator had already noted that the debate over so-called discovery sharing was "retrograde."<sup>87</sup> Some courts' continued reticence to allow it is curious, particularly considering the overwhelming consensus

83. See, e.g., *Raymond Handling Concepts Corp. v. Super. Ct.*, 45 Cal. Rptr. 2d 885, 890 (Cal. Ct. App. 1995) (noting that it is within trial courts' discretion to allow sharing with similar litigants while denying access to the general public).

84. See FRANCIS H. HARE, JR. ET AL., *CONFIDENTIALITY ORDERS* 69–70 (John Wiley & Sons, Inc. 1988) (contending that discovery, as a result of nonsharing protective orders, "must be repeated anew in every case," with the trial courts being forced to intervene in a repetition of the same discovery disputes); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (asserting that denying sharing between litigants "would be tantamount to holding that each litigant who wishes to ride a taxi to court must undertake the expense of inventing the wheel").

85. See, e.g., FRANCIS H. HARE, JR. ET AL., *FULL DISCLOSURE: COMBATING STONEWALLING AND OTHER DISCOVERY ABUSES* 166 (ATLA Press 1995) (arguing that "information sharing also provides plaintiffs the opportunity to verify the completeness and accuracy of a defendant manufacturer's response to discovery request"); cf. Marcus, *supra* note 10, at 495–96 ("In addition, in some cases access may prevent efforts to mislead the court in the second case.").

86. Compare Campbell, *supra* note 2, at 824 (opposing information sharing on the ground that it creates waste and threatens proprietary interests of parties), with Marcus, *supra* note 10, at 495–96 (observing that discovery sharing benefits the litigation system), and Rhiana Sharp, Comment, *Let in a Little Sunshine: Limiting Confidential Settlements in Missouri*, 69 MO. L. REV. 215, 229 (2004) ("Discovery sharing should be encouraged.").

87. Marcus, *supra* note 10, at 495.

among commentators and litigation experts that the practice is appropriate and does indeed increase court efficiency.<sup>88</sup>

At one time or another, the Federal Courts Study Committee, an American Bar Association commission, the Federal Judicial Center, state legislatures, and the authors of the discovery and protective order sections of the leading federal practice treatise have all endorsed some form of shared discovery.<sup>89</sup> Even those who have strenuously opposed widespread public disclosure of discovery information have conceded that an appropriate nonparty use of discovery is to prepare for related cases *distinct* from the case in which the discovery materials are first obtained.<sup>90</sup>

But despite broad support for the concept of discovery sharing and the regular recurrence of the issue in products-liability and other complex litigation, courts around the country are in disarray about if, when, and how to allow the practice.<sup>91</sup> In part, this fracture traces subtle disagreements among commentators on the proper method to share discovery information among cases.<sup>92</sup> First, both commentators and courts disagree about which procedural mechanism is most appropriate to enable sharing.<sup>93</sup> Courts typically employ one of two sharing

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88. See *id.* at 495 (noting that “courts continue to recognize that access for other plaintiffs should be allowed whether or not it is necessary to facilitate the preparation of the case before them because such sharing saves the courts and the litigants time and money”).

89. See sources cited *supra* note 10 (citing examples of commentators who endorse discovery sharing); MANUAL FOR COMPLEX LITIGATION (FOURTH) § 11.432 (2004) (endorsing sharing).

90. See, e.g., Miller, *supra* note 10, at 498–99 (“The judge should consider . . . the benefits of making the material available in other lawsuits and the economies achieved when lawyers collaborate in preparing their cases. . . . [T]he adjudicatory system will often be well-served by allowing the pooling of discovery materials . . .”).

91. See, e.g., cases cited *supra* note 5.

92. Compare Marcus, *supra* note 2, at 41–42 (mandating that collateral litigants establish entitlement to discovery information before sharing and thereby establishing intervention and modification as the preferred sharing mechanism), with David Timmins, Note, *Protective Orders in Products Liability Litigation: Striking the Proper Balance*, 48 WASH. & LEE L. REV. 1503, 1543 (1991) (preferring protective orders with sharing provisions).

93. Compare Long v. TRW Vehicle Safety Sys., Inc., No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010) (“[T]he court that entered

mechanisms: sharing provisions included in protective orders from the outset (“upfront” sharing provisions) or later protective-order modifications.

Second, courts and commentators disagree about the latitude trial courts have to grant or deny requests for sharing in either of the two common forms. In some jurisdictions, upfront sharing provisions are mandatory<sup>94</sup> absent countervailing factors, while other courts have discretion to grant or deny sharing requests.<sup>95</sup> And in at least one jurisdiction, entering a sharing protective order can be an abuse of discretion under certain circumstances.<sup>96</sup>

This subpart illuminates these fault lines by examining the two common sharing mechanisms in turn.

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the protective order must ‘satisfy itself that the protected discovery is sufficiently relevant to the collateral litigation that a substantial amount of duplicative discovery will be avoided by modifying the protective order.’”), and Marcus, *supra* note 2, at 41 (arguing that nonparty access may be justified “when litigants seek to obtain evidence relevant to other litigation”), with *Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987) (deciding that, due to “[t]he public policies favoring shared information,” the trial court erred in granting a protective order that prohibited the free exchange of discovered documents), and Timmins, *supra* note 92, at 1543 (advocating for sharing provisions in protective orders).

94. See *Garcia*, 734 S.W.2d at 346 (indicating that “balanced against concerns for confidentiality . . . are the public policies favoring the exchange of information” which “require that any protective order be carefully tailored . . . while allowing an exchange of discovered documents”).

95. See *Raymond Handling Concepts Corp. v. Super. Ct.*, 45 Cal. Rptr. 2d 885, 888 (Cal. Ct. App. 1995) (“To protect the privilege accorded to trade secrets in Evidence Code section 1060 . . . a trial court must balance the interests of both sides . . . a three-step process.”).

96. See *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. Dist. Ct. App. 2011) (“[T]o the extent a sharing provision is used, the provision must be narrowly tailored in scope and balanced with the need to protect the confidential nature of the documents sought to be discovered and the established need of the known collateral litigant to view the discovery.”); *Cordis Corp. v. O’Shea*, 988 So. 2d 1163, 1167 (Fla. Dist. Ct. App. 2008) (noting that a protective order permitting products-liability plaintiffs to release a manufacturer’s confidential information from discovery to attorneys not representing the parties or those in a collateral litigation was a departure from the essential requirements of law).

### 1. Upfront Sharing Provisions

Whether to include sharing provisions in protective orders from the outset comes up frequently in products-liability litigation. For instance, suppose that a party, WidgetCo, produces particularly dangerous widgets from 2010–2013. The widget injures Sally.

In turn, Sally sues WidgetCo on a products-liability theory and seeks discovery related to widget designs. WidgetCo objects, contending that the widget designs comprise competitively sensitive commercial information. The trial judge orders WidgetCo to produce the designs but simultaneously issues a protective order to keep the litigants from disclosing WidgetCo's proprietary information to the public and, more specifically, competitors. Before the judge issues the protective order, however, she has to decide whether to include an upfront discovery-sharing provision, or not.<sup>97</sup>

**The nonsharing scenario:** The protective order forbids anyone in the case from disclosing discovery information to anyone other than the parties, their attorneys, their attorneys' office staff, and experts.<sup>98</sup> Failure to abide by the order is punishable by contempt. The protective order also includes a "return-and-destroy" provision that requires Sally and her lawyers to return all discovery information to WidgetCo at the end of the litigation and destroy any information that is not returned.<sup>99</sup>

**The sharing scenario:** In contrast, imagine that the protective order forbids disseminating discovery information to anyone but the parties, attorneys, office staff, experts, *and* those

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97. One form or another of this hypothetical is a frequently repeated fact pattern in courts around the country. *See, e.g.*, *Williams v. Taser Int'l, Inc.*, No. 1:06-CV-0051-RWS, 2006 WL 1835437 (N.D. Ga. June 30, 2006) (illustrating a fact pattern akin to the aforementioned hypothetical).

98. *Cf., e.g.*, *Menendez ex rel. Menendez v. Wal-Mart Stores E. LP*, No. 1:10-CV-53, 2012 WL 90140, at \*3 (N.D. Ind. Jan. 11, 2012) (forbidding sharing upon finding that the nonsharing protective order was not too restrictive).

99. *Cf., e.g.*, *Hamm v. Matlack, Inc.*, No. 95-20-FR, 1995 WL 405250, at \*1 (D. Or. June 21, 1995) (requiring the return of protected documents at the conclusion of the litigation).

same categories of people in substantially similar litigation.<sup>100</sup> The sharing protective order further defines “substantially similar litigation” to include pending litigation involving allegedly defective widgets manufactured between 2010–2013 that allegedly injured a person.

The sharing order also specifically forbids dissemination of the information to WidgetCo’s competitors, even if they would otherwise be eligible to share in the information.<sup>101</sup> Like the nonsharing order, anyone who violates the sharing order is subject to contempt. Moreover, the order requires any person receiving WidgetCo’s discovery information to agree to be bound by the order’s terms, including its contempt provision.<sup>102</sup>

Various courts routinely issue both types of protective orders.<sup>103</sup> The practical implications of the courts’ choice are significant to both litigants and the broader system. The nonsharing order allows the litigants to use discovery information to prepare only the case at hand. This approach is consistent with the primary purpose of discovery—to prepare the case at hand for trial.

But it is simultaneously inconsistent, at least in part, with Rule 1’s command that the Civil Rules be “construed and administered” to secure the “speedy [] and inexpensive

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100. *Cf., e.g., Raymond Handling Concepts*, 45 Cal. Rptr. 2d at 888 (balancing the public interest in information sharing among litigants in similar cases and litigant confidentiality interests while upholding a sharing order).

101. *Cf., e.g., Garcia v. Peeples*, 734 S.W.2d 343, 348 (Tex. 1987) (holding that courts can require those wishing to share discovery material to certify that they will not release it to competitors).

102. *Cf., e.g., id.* at 346

Nothing herein shall prevent the exhibition of the documents and other materials covered by this protective order to experts who are assisting counsel in the preparation of this matter for trial, if such counsel has first obtained the written agreement of such persons to be bound by the terms of this Order.

103. *Compare Idar v. Cooper Tire & Rubber Co.*, No. C-10-217, 2011 WL 688871 (S.D. Tex. Feb. 17, 2011) (sharing order), *and Cowan v. Gen. Motors Corp.*, No. 06-1330-MLB, 2007 WL 1796198 (D. Kan. June 19, 2007) (sharing order), *with Williams v. Taser Int’l, Inc.*, No. 1:06-CV-0051-RWS, 2006 WL 1835437, at \*1–2 (N.D. Ga. June 30, 2006) (nonsharing order), *and Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 502–03 (S.D. Iowa 1992) (nonsharing order).



determination of *every* action and proceeding.”<sup>104</sup> While the nonsharing order may allow parties in the primary case to prepare for trial, it simultaneously stops other litigants from efficiently preparing other similar cases.<sup>105</sup>

Likewise, imagine an attorney with two separate, but similar, cases in two courts. Further imagine a strict nonsharing protective order in one case that specifically provided that discovery should only be used “for purposes of this litigation.” The order would force the attorney to repeat the same discovery in the other case even though the attorney would already have the discovery materials sitting in her office.

The sharing protective order, on the other hand, allows Sally to disseminate the information not only within the *Sally v. WidgetCo* case but also to other related litigation—obviating the need for repetitive discovery.<sup>106</sup> And it does so without undermining the WidgetCo interests that the court sought to protect. The value of WidgetCo’s information stems from the fact that WidgetCo’s competitors do not have access to it, and the protective order specifically forbids Sally, or anyone else receiving the discovery information, from providing it to a competitor.<sup>107</sup>

Of course, protective orders can be violated and, as a matter of simple probability, each additional person who receives the information under the sharing order makes it marginally more likely that the information makes its way to a competitor.<sup>108</sup> But decades of experience with sharing protective orders shows that

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104. FED. R. CIV. P. 1 (emphasis added).

105. *See, e.g.*, *Kamp Implement Co., Inc. v. J.I. Case Co.*, 630 F. Supp. 218, 220 (D. Mont. 1986) (stating that a nonsharing order “would result in duplication of time and effort [by the court] in each instance where discovery is sought”).

106. *See, e.g.*, *Garcia*, 734 S.W.2d at 346–47 (recognizing that allowing information exchanges between similarly situated litigants would enhance full disclosure and efficiency in the trial system).

107. *See, e.g.*, *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984) (noting, in the takings context, that the value of trade secret potentially is diminished only in circumstances where the government orders disclosure of “trade secret to others who are under no obligation to protect the confidentiality of the information”).

108. *See, e.g.*, *Campbell*, *supra* note 2, at 824 (positing that the likelihood of protective-order violations increases with each disclosure of discovery information).

violations are relatively rare and violations involving a leak to a competitor are virtually nonexistent.<sup>109</sup> And nonsharing orders, like sharing orders, can be violated. Considering the size of some in-house litigation staffs and the large numbers of outside counsel who staff complex lawsuits, it is feasible that a even nonsharing order could provide access to dozens, if not hundreds, of people. Thus, arguments about increased potential harm from sharing orders ignore those same risks in nonsharing orders.

The sharing protective order also seems to create efficiencies for WidgetCo—the order would seem to reduce WidgetCo’s own discovery expenses in future cases.<sup>110</sup> This benefit is particularly important in repeating-case contexts, like products liability. Mass-produced products that face defect allegations tend to injure more than one person.<sup>111</sup> In theory, the basic factual premise—that the product is defective and causes injury—is the same in each case, so discovery from one to another substantially overlaps.<sup>112</sup> Thus, under the sharing order, WidgetCo could simply provide discovery from the primary case to subsequent cases to expedite the process.

At least one antisharing commentator has contended sharing provisions in protective orders will encourage defendants not to cooperate in discovery, increasing systemic costs.<sup>113</sup> This argument (like many on the prosharing side) has neither been

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109. *But see, e.g.*, *McDonald v. Cooper Tire & Rubber Co.*, 186 F. App’x 930, 932 (11th Cir. 2006) (upholding sanctions imposed for providing protected discovery materials to unauthorized persons involved in collateral litigation).

110. *See Comes v. Microsoft Corp.*, 775 N.W.2d 302, 309–10 (Iowa 2009) (marveling at Microsoft’s expenditures to respond to a single discovery order—over \$5.5 million—and viewing any ruling that required repetition of that feat with incredulity).

111. *See, e.g., In re Bridgestone/Firestone Inc.*, 198 F.R.D. 654, 655 (S.D. Ind. 2001) (“The [Firestone] tires have been linked to the deaths of 148 Americans, and 6.5 million tires were recalled on August 9, 2000.”).

112. Of course, in practice, litigants often dispute whether the defect that injured one plaintiff is the same as the defect that injured another. But in a significant number of cases (e.g., the same allegedly faulty airbag sensor in a particular make, model, and year of car) the issues and discovery largely overlap.

113. *See Campbell, supra* note 2, at 824 (“Defendants faced with the prospect that documents produced in one case will generate similar claims throughout the country will more aggressively resist disclosure.”).

confirmed nor refuted by empirical evidence, leaving courts to grapple with the potential benefits and costs of sharing.

With experience and common sense, at least, supporting the notion that avoiding repetitive discovery saves resources, why would a defendant, like WidgetCo, ever insist on a nonsharing order? In many cases, the putative reason for requesting a nonsharing order—to protect competitive information—may be pretextual. Perhaps one reason a defendant, like WidgetCo, would seek a nonsharing order might be to gain a long-term advantage in repeating litigation.<sup>114</sup>

By limiting the information to the case at hand, nonsharing orders increase the time and expense of bringing claims against the defendant.<sup>115</sup> And the orders also isolate litigants in similar cases from one another, stifling collaboration among, and decreasing the efficacy of, plaintiffs' counsel.<sup>116</sup>

Using the WidgetCo hypothetical, imagine that the widget injures another plaintiff, John. John files suit against WidgetCo. With a nonsharing order in place in Sally's case, Sally's lawyers cannot reveal to John's lawyers what they learned about the widget or WidgetCo's conduct through discovery. John's lawyers do not have the benefit of WidgetCo's previous responses and must invest time and resources to conduct the discovery treasure hunt all over again.

Meanwhile, WidgetCo's attorneys would presumably have the benefit of a national network of outside counsel to weigh a coordinated response.<sup>117</sup> Those lawyers, unlike John's, would have the benefit of collective knowledge of the impact of particular discovery information on later discovery disputes, merits rulings, and settlement negotiations.

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114. Antisharing commentators have admitted as much. See Campbell, *supra* note 2, at 824.

115. See, e.g., *Comes*, 775 N.W.2d at 311 (describing “staggering” costs of repeating discovery in a second case involving similar issues).

116. See *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 153–54 (W.D. Tex. 1980) (reasoning that collaboration between plaintiffs' counsel furthers Rule 1 interests); Marcus, *supra* note 10, at 495 (noting the common plaintiffs' complaint about protective orders stifling collaboration).

117. See HARE, JR. ET AL., *supra* note 84, at 21 (“Corporate defendants have achieved efficiency by using economies of scale, regional or national coordination, and cost spreading among related cases.”).

Forcing each plaintiff to conduct discovery from this isolated position has two immediate benefits for WidgetCo. First, it raises the cost and effort required to bring suits against WidgetCo.<sup>118</sup> Requiring each plaintiff to expend resources litigating discovery disputes anew makes cases less economically desirable. Theoretically, this barrier to entry reduces the number of lawsuits against the company.

Second, not all plaintiffs' counsel are created equal, and some are undoubtedly more proficient at conducting discovery than others. By requiring each plaintiff's attorney to stand on her own, WidgetCo gains a net advantage against weaker litigators when compared with a system that allowed those same lawyers to collaborate with more-skilled lawyers. Moreover, allowing parties to compare current discovery responses with previously produced material may allow detection of discovery misconduct, like perjury in a deposition or omitted documents in response to a request for production.

Faced with these competing concerns, courts have considered whether efficiency and plaintiffs' interest in collaboration outweigh defendants' interest in protecting competitively sensitive information and the potential systemic costs of allegedly disruptive sharing provisions.<sup>119</sup>

At one end of the spectrum, an early and seminal discovery-sharing case found a court abused its discretion by denying a request for a discovery-sharing provision.<sup>120</sup> Noting that truth seeking in litigation is often hampered by the "adversarial approach to discovery," the court held that "shared discovery is an effective means to insure full and fair disclosure."<sup>121</sup> It went on

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118. See, e.g., *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 310–11 (Iowa 2009) ("When we add to the mix the time, money, and effort expended by counsel and support staff for the Iowa plaintiffs in organizing and analyzing the information after Microsoft produced it, the staggering cost of repeating the process in the Canadian litigation comes even more sharply into focus.")

119. See *Wolhar v. Gen. Motors Corp.*, 712 A.2d 464, 469 (Del. Super. Ct. 1997) (weighing proprietary interests against the interest in efficient litigation).

120. See *Garcia v. Peebles*, 734 S.W.2d 343, 348 (Tex. 1987) (finding that the trial court abused its discretion by denying discovery sharing).

121. *Id.* at 347. *Garcia* was decided under a state rule of civil procedure that differed somewhat from Rule 26(c), but the court implied that the opinion's reasoning was also applicable to a revised rule that more closely mirrored Fed.

to note that the efficiency sharing generates was among the “public policies” favoring upfront sharing orders.<sup>122</sup>

Other courts have endorsed sharing but have given trial courts discretion to include upfront sharing provisions or not. For example, in *Raymond Handling Concepts Corporation v. Superior Court*,<sup>123</sup> a California court refused to disturb a trial court’s protective order, finding that the court had properly exercised its discretion to allow discovery sharing.<sup>124</sup>

Still other courts, particularly in the federal system, have been hostile to upfront sharing provisions. For instance, in *Long v. TRW Vehicle Safety Systems, Inc.*,<sup>125</sup> both parties agreed that some type of protective order was appropriate but disputed the propriety of a sharing provision in the protective order.<sup>126</sup> Rejecting the provision, the court insisted that the proper procedure to share discovery required collateral litigants to intervene after the fact and seek to modify the nonsharing protective order.<sup>127</sup> According to the court, “a collateral litigant . . . should not be granted automatic access to a defendant’s confidential documents.”<sup>128</sup>

In recent years, the sharing–nonsharing protective-order rift has deepened. Florida appellate courts have twice reversed sharing protective orders as an abuse of trial-court discretion.<sup>129</sup>

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R. Civ. P. 26(c). *See id.* at 345 n.1 (reasoning that Texas’s recent amendments would change the state rule of civil procedure to more closely resemble the federal rule).

122. *See id.* at 346–47 (stating that the public policies supporting sharing “require that any protective order be carefully tailored to protect [the defendant’s] proprietary interests while allowing an exchange of discovered documents”).

123. 45 Cal. Rptr. 2d 885 (Cal. Ct. App. 1995).

124. *See id.* at 888.

125. No. CV-09-2209-PHX-DGC, 2010 WL 1740831 (D. Ariz. Apr. 29, 2010).

126. *See id.* at \*1 (describing disagreement between parties regarding whether a protective order should contain a sharing provision).

127. *See id.* (noting that a nonsharing protective order does not preclude sharing of discovery forever).

128. *Id.*

129. *See Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. Dist. Ct. App. 2011) (denying request for sharing order when proposed sharing provision conflicted with Florida trade-secret statute); *Cordis Corp. v. O’Shea*, 988 So. 2d 1163, 1167 (Fla. Dist. Ct. App. 2008) (denying sharing order in favor

In contrast to California and Texas, one Florida court forbade upfront sharing when the provisions potentially interfered with other courts' discovery rulings or state trade-secret law.<sup>130</sup> According to the court, discovery sharing could be better accomplished through later case-by-case protective-order modifications.<sup>131</sup>

Thus, there is currently a three-way split among jurisdictions on when and how to allow discovery sharing. While some courts favor later protective-order modifications to upfront sharing provisions, the modification landscape is itself fractured in a way that threatens the viability of sharing in some cases.

## 2. Modification

Courts have long been in split on the proper standard for modifying protective orders to allow discovery sharing.<sup>132</sup>

**Building on the WidgetCo hypothetical above:** Imagine that the court in the *WidgetCo v. Sally* products-liability case (the original case) enters a nonsharing protective order to protect WidgetCo's confidential information. The order restricts discovery access to the *WidgetCo v. Sally* parties, their attorneys, legal staff, and experts in the case. Later, John, a litigant in a similar case in another court, asks the *WidgetCo v. Sally* court to allow him and his attorneys access to the *WidgetCo v. Sally* discovery information for use in John's lawsuit. May the court modify the

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of later modification when protective order did not identify collateral litigants).

130. See *Wal-Mart*, 81 So. 3d at 490 (refusing to uphold a sharing order when it might violate Florida trade-secret law); *Cordis Corp.*, 988 So. 2d at 1167 (fearing that the sharing order might contradict other courts' discovery rulings).

131. See *Wal-Mart*, 81 So. 3d at 489 (favoring a protective-order modification over granting a sharing order); *Cordis Corp.*, 988 So. 2d at 1167 (preferring a case-by-case determination to modify protective orders instead of granting sharing orders).

132. Compare *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (requiring "extraordinary circumstance or compelling need" to modify protective order), with *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1301 (7th Cir. 1980) (concluding that collateral litigants in similar cases are "presumptively entitled to access" protected discovery), *superseded by rule as stated in* *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009).

protective order to permit John access and under what terms? It turns out that the answer varies across jurisdictions.

Most courts agree on the basic framework for protective-order modification. For starters, courts retain the power to modify their own protective orders, even after the litigation ends.<sup>133</sup> Similar to the broad discretion courts have to fashion protective orders in the first place, courts have substantial latitude to make changes to existing orders.

Both parties and nonparties to the order may move to modify.<sup>134</sup> And in the federal system, most courts agree that nonparties must seek permission to intervene pursuant to Rule 24(b) before, or at the same time, they request to modify the order.<sup>135</sup>

But permission to intervene establishes only that the third party gets to ask the court to modify the protective order; permission to intervene does not answer the more important question of whether the order should actually be modified.<sup>136</sup> Thus, disputes generally turn on the standard to modify, not the standard to intervene under Rule 24(b).<sup>137</sup>

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133. See, e.g., *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (finding that the district court had power to modify protective order in closed case). *But see* *Bond v. Utreras*, 585 F.3d 1061, 1079 (7th Cir. 2009) (foreclosing the possibility that the district court had inherent authority to revisit and rescind the protective order).

134. See, e.g., 8A WRIGHT ET AL., *supra* note 16, § 2044.1 (“[O]rdinarily requests to modify are directed to the district court’s discretion and subject to review only for abuse of discretion.”).

135. See, e.g., *EEOC v. Nat’l Children’s Ctr., Inc.*, 146 F.3d 1042, 1045 (D.C. Cir. 1998) (emphasizing that parties must abide by Rule 24(b) when attempting to modify an order).

136. See, e.g., *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 245 F.R.D. 632, 635 (D. Minn. 2007) (granting motion to intervene and then proceeding to questions related to confidentiality orders); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (upholding the district court’s decision to allow intervention to challenge a protective order before clarifying other issues); see also, e.g., 6 JAMES WM. MOORE ET AL., *MOORE’S FEDERAL PRACTICE* ¶ 26.106 (3d ed. 1997) (“The correct procedure for a nonparty to challenge a protective order is a motion to intervene in the action in which the protective order was issued.”); 8A WRIGHT ET AL., *supra* note 16, § 2044.1 (stating that “granting intervention does not imply that the protect order will be modified, but provides only that the intervenor may be heard on that subject”).

137. See 6 MOORE ET AL., *supra* note 136, ¶ 26.106 (outlining the standards and factors courts use to decide whether to modify an order).

The standards to modify protective orders are in apparent disarray, and even vary within the same jurisdiction, depending on the party who is seeking to modify and the circumstances under which the order was entered.<sup>138</sup> Courts modify stipulated umbrella orders more liberally than other protective orders because no particularized good cause showing is made when an umbrella order is entered.<sup>139</sup> Likewise, collateral litigants who seek to modify protective orders to gain access to discovery materials for use in their own cases often face a less onerous standard than third-party media or public interest litigants who seek access to disseminate discovery materials to the broader public.<sup>140</sup>

In addition, a circuit split persists even on the standard to allow access for collateral litigants.<sup>141</sup> The division among modifying courts stems from the competing Rule 1 concerns conjured by discovery sharing.<sup>142</sup>

On one hand, protective orders supposedly grease the wheels of litigation by ensuring secrecy—so long as parties can rely on protective orders being enforced over the long term.<sup>143</sup>

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138. *See id.* (discussing the multitude of standards that courts apply, depending on the situation, to determine whether to modify a protective order).

139. *See* San Jose Mercury News, Inc. v. U.S. Dist. Court, 187 F.3d 1096, 1103 (9th Cir. 1999) (“Such blanket orders are inherently subject to challenge and modification, as the party resisting disclosure generally has not made a particularized showing of good cause with respect to any individual document.”).

140. *Cf., e.g.,* 6 MOORE ET AL., *supra* note 136, ¶ 26.106 (generalizing that most courts favor avoiding duplicative discovery and allow a collateral litigant to access discovery protected by a protective order).

141. *See* 8A WRIGHT ET AL., *supra* note 16, § 2044.1 (comparing the Second Circuit’s “very restrictive attitude” regarding a modification with the Seventh Circuit’s functional approach to allowing access).

142. *See, e.g.,* Wilk v. Am. Med. Ass’n, 635 F.2d 1295, 1299 (7th Cir. 1980) (observing that Rule 1 efficiency concerns weigh in favor of modification for use of discovery in collateral litigation), *superseded by rule as stated in* Bond v. Utreras, 585 F.3d 1061 (7th Cir. 2009); *cf.* Comes v. Microsoft Corp., 775 N.W.2d 302, 311 (Iowa 2009) (weighing a party’s legitimate interest in confidentiality against systemic benefits of protective-order modification); *see also*, 8A WRIGHT ET AL., *supra* note 16, § 2044.1 (noting that courts confronted with protective orders have choices between concerns grounded in Rule 1).

143. *See* SEC v. TheStreet.Com, 273 F.3d 222, 230 (2d Cir. 2001) (“If protective orders were easily modified, moreover, parties would be less forthcoming in giving testimony and less willing to settle their disputes.”); *cf.*



On the other hand, refusing to modify nonsharing protective orders prevents similarly situated litigants from sharing already produced discovery, forcing each new case to engage in unnecessary re-discovery of the same information.<sup>144</sup> The current circuit split reflects this tension.

Valuing party reliance over the benefits of sharing, the Second Circuit often requires “extraordinary circumstances” to modify existing protective orders.<sup>145</sup> In *Martindell v. International Telephone*,<sup>146</sup> the district court denied a government request to modify a protective order, a request that would have given the government access to depositions from a civil case for use in a related criminal prosecution.<sup>147</sup> The Second Circuit affirmed, holding that courts should modify protective orders only on “a showing of improvidence in the grant of a Rule 26(c) protective order or some *extraordinary circumstance or compelling need*.”<sup>148</sup>

To be sure, *Martindell’s* holding should be construed more narrowly than it often is.<sup>149</sup> The actual discovery information at issue comprised depositions of witnesses who relied on the

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Marcus, *supra* note 10, at 485 (noting that lack of protective order creating “general public access would tend to disrupt the cooperative exchange of discovery”).

144. See *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003) (“Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery.”).

145. See *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (requiring “extraordinary circumstance or compelling need” to modify protective order); see also, e.g., *In re Sept. 11 Litig.*, 262 F.R.D. 274, 277 (S.D.N.Y. 2009) (“[P]laintiff seeking to modify a protective order [must] show improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need.” (internal quotations omitted)).

146. 594 F.2d 291 (2d Cir. 1979).

147. See *id.* at 293 (denying the government’s modification request because deposition testimony had been given in reliance on the protective order).

148. *Id.* at 296 (emphasis added).

149. See, e.g., *SEC v. TheStreet.Com*, 273 F.3d 222, 299 n.7 (2d Cir. 2001) (“Though *Martindell* did involve a Government request to modify a protective order, its logic is not restricted to Government requests, nor did our opinion in *Martindell* suggest otherwise.”).

protective order to *not* invoke their Fifth Amendment right against self-incrimination.<sup>150</sup>

An easy modification would have discouraged similarly situated witnesses from cooperating in discovery in the future—creating just the type of inefficiency Rule 1 will not brook. So the circuit court put its thumb on the side of protecting reliance interests, declining to find “extraordinary circumstances” and refusing to modify the order.

Most circuits have taken a more liberal approach to modifying protective orders. In an oft-cited case, *Wilk v. American Medical Ass’n*,<sup>151</sup> the Seventh Circuit declined to follow the extraordinary circumstances test.<sup>152</sup> Instead, the case announced a presumption in favor of modifications to allow discovery sharing.<sup>153</sup> But when parties opposed to discovery sharing can demonstrate prejudice flowing from the modification, according to *Wilk*, courts should employ a balancing test to weigh the benefits of discovery sharing against that prejudice.<sup>154</sup>

This approach reasonably addresses the Rule 1 tensions described. Parties’ actual reliance interests are considered and protected to ensure that protective orders maintain the teeth necessary to encourage full cooperation in discovery. At the same time, the test operates under a presumption in favor of the well-known benefits of discovery sharing.<sup>155</sup>

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150. See *Martindell*, 594 F.2d at 293 (denying the government’s modification request because deposition testimony had been given in reliance on the protective order, rendering the reliance on the Fifth Amendment unnecessary by the witnesses).

151. 635 F.2d 1295 (7th Cir. 1980), *superseded by rule as stated in* *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009).

152. See *id.* at 1299–1300 (forgoing the extraordinary circumstance standard in favor of the presumption that pretrial discovery must take place in public).

153. See *id.* (holding that when a modification of a protective order can place private litigants in a position they would otherwise reach only after repetitious discovery, courts should only deny the modification when it would prejudice substantial rights of the party opposing modification).

154. See *id.* at 1299 (instructing courts to determine whether the injury to the party opposing the modification outweighs the benefits of the modification).

155. See *id.* at 1299–1300 (describing the economic and efficiency benefits of discovery sharing).

### III. Trends in Discovery Reform

The court-confidentiality problem did not arise in a vacuum. Instead, the focus on confidentiality stems from a pretrial-discovery regime that some contend is uniquely intrusive and costly.<sup>156</sup> But the discovery status quo is soon to be affected by proposed rule amendments that are likely to become law.<sup>157</sup>

These amendments have the potential to weaken the core rationale justifying easily obtainable confidentiality orders by making discovery less intrusive in certain cases. And the amendments' focus on proportionality will work in tandem with discovery sharing to reduce discovery burdens on courts and litigants.

Before examining the current proposed changes, it would be helpful to understand some basic milestones in the development of the pretrial discovery system and how they relate to the development of protective-order law.

#### A. History

By all accounts, the late-1930s adoption of the Federal Rules of Civil Procedure transformed litigation.<sup>158</sup> The new rules introduced myriad pretrial discovery mechanisms to a system that traditionally relied on trial-by-surprise.<sup>159</sup> Indeed, before the

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156. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (explaining why pretrial discovery has become “one of the most divisive and nettlesome issues in civil litigation”).

157. See ADVISORY COMM. ON CIVIL RULES, REPORT TO THE STANDING COMMITTEE, app. B-31, 10–26 (June 14, 2014), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2014-add.pdf> (outlining the proposed changes to Rule 26 and including the Committee's notes explaining those changes).

158. See, e.g., Marcus, *supra* note 16, at 12–13 (observing that the civil rules transformed American litigation and laid the groundwork for a period of American procedural “exceptionalism”).

159. See *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (noting that the discovery rules make trial “less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practice”); *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (“[C]ivil trials in the federal courts no longer need be carried on in the dark. The way is now clear,

civil rules, parties had almost no opportunity for pretrial discovery, with a few limited exceptions.<sup>160</sup>

The hope behind these changes was that pretrial discovery would enhance the quality of fact-finding and increase efficiency at trial.<sup>161</sup> Because the new rules allowed the parties to unearth a wide range of information in advance, trial would be narrowed to only those facts and issues truly in dispute.<sup>162</sup> Likewise, trial would hopefully be less of a game of concealment and surprise (as it had traditionally been) and more of a search for the truth.<sup>163</sup>

The introduction of pretrial discovery also complemented the civil rules' notice pleading standards. Before the rules, pleading was onerous—parties were required to state claims and defenses in exacting factual detail.<sup>164</sup> The new pleading rules reduced this burden, requiring only that parties plead in a general form giving the opposing side notice of claims and defenses.<sup>165</sup> In the new notice pleading system, parties could no longer rely on the complaint or the answer to learn the factual basis of the other side's claim. Rather, parties would get notice of the claims via the pleadings and rely on discovery to uncover the facts.<sup>166</sup>

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consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial [through discovery].”).

160. See *Hickman*, 329 U.S. at 501 (noting the “cumbersome” and “narrowly confined” pre-rules discovery processes); see also 8 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2001 (3d ed. 2010) (describing the means by which parties conducted pretrial discovery prior to the rules as “very limited”).

161. See Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Discovery Rules*, 39 B.C. L. REV. 691, 725–26 (1998) (emphasizing that the changes to pretrial discovery would improve efficiency at trial and prevent surprises).

162. See, e.g., *Hickman*, 329 U.S. at 501 (proclaiming that the new rules enabled parties to “clarify the basic issues between [them]” before trial).

163. See, e.g., *Procter & Gamble*, 356 U.S. at 682 (noting that trial would become “more of a fair contest with the basic issues and facts disclosed to the fullest practicable extent”).

164. See *Hickman*, 329 U.S. at 500 (noting that before the civil rules, “the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings”).

165. See *id.* at 501 (interpreting the new rules to require the pleadings only to give notice to the opposing side).

166. See *id.* (stating that the “deposition-discovery process” now has “a vital role in the preparation for trial”). In recent years, the Supreme Court has revisited this notice pleading standard, requiring some degree of factual

The breadth of information parties could seek in discovery grew for decades.<sup>167</sup> Indeed, under the new regime parties were entitled to all relevant, nonprivileged information in the possession of any person.<sup>168</sup> This reversed a long-standing court aversion to pretrial “fishing expeditions.”<sup>169</sup>

This procedural expansion accompanied a substantive expansion, and some would say “litigation boom,” in American courts.<sup>170</sup> The advent of products liability litigation, the concurrent expansion of tort liability, and the explosion of civil rights litigation transformed the substantive legal landscape during the 1950s and 1960s.<sup>171</sup>

In 1970, amendments to the civil rules set the high water mark for broad discovery.<sup>172</sup> But during the ensuing decade, the tide in favor of liberal discovery procedure began to change.<sup>173</sup> By the late 1970s, commentators and courts began rumbling for

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specificity in pleading. *See* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (noting that the pleading standard in Rule 8 does not require detailed factual allegations but requires more than “an unadorned, the-defendant-unlawfully-harmed-me accusation”); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (reemphasizing that Rule 8(a)(2) requires only a short and plain statement that gives the defendant fair notice); *see also* Dustin B. Benham, *Twombly and Iqbal Should (Finally!) Put the Distinction Between Intrinsic and Extrinsic Fraud Out of Its Misery*, 64 SMU L. REV. 649, 678 (2011) (interpreting *Iqbal* and *Twombly* to require a party to plead specific factual allegations as to make a claim for relief plausible).

167. *See* 8 WRIGHT ET AL., *supra* note 160, § 2011 (noting the shift in perspective by the Supreme Court, deciding that discovery fishing expeditions are acceptable).

168. *See id.* (stating that “a party is not required to have the affirmative of the issue upon which he seeks discovery”).

169. *See* Subrin, *supra* note 161, at 743–45 (chronicling the Advisory Committee debates during the creation of the Federal Rules of Civil Procedure and observing that the rule drafters largely chose not to include restraints against fishing expeditions).

170. *See* Marcus, *supra* note 16, at 13 (referring to the mid-century transformation of American litigation as a product of both the procedural and substantive developments in American law).

171. *See id.* (listing the various growths in certain areas of law that contributed to the shifting legal landscape).

172. *See id.* (noting that the amendments to the rules benefited plaintiffs by making it easier to obtain proof and increase damages awards).

173. *See id.* at 14 (referencing the shift in the attitude regarding discovery as “a recoil”).

change.<sup>174</sup> At around the same time, the relationship between the breadth of discovery materials and the proper use of discovery materials (i.e., discovery confidentiality) became a battleground in the war against what many viewed as an out-of-control litigation system.<sup>175</sup>

It comes as no surprise that following the explosion of pretrial discovery and the substantive bases of recovery during the 50s and 60s, questions about the use of litigation information hit the forefront.<sup>176</sup> Parties increasingly sought to avoid responding to discovery altogether through a wave of suspect boilerplate objections.<sup>177</sup> At the same time, parties resisting discovery sought to limit dissemination of an increasingly broad swath of litigation information protective orders.<sup>178</sup> In response, other parties chafed under what they viewed as undue

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174. See, e.g., *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 741 (1975) (describing the discovery procedures as “liberal,” “extensive,” “a social cost rather than a benefit,” and “a threat”).

175. See 8 WRIGHT ET AL., *supra* note 160, § 2001 (reiterating the courts’ growing concern over the “abuse of discovery” by plaintiffs).

176. See, e.g., James P. Moon, *In re San Juan Star: Discovery and the First Amendment*, 34 BAYLOR L. REV. 229, 232–33 (1982) (discussing the balancing act between a plaintiff’s First Amendment right to free speech and a defendant’s right to a fair trial); Susan M. Angele, *Rule 26(c) Protective Orders and the First Amendment*, 80 COLUM. L. REV. 1645, 1654 (1980) (evaluating the competing interests in suppression and dissemination of discovered information during litigation); Michael Dore, *Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-trial Discovery Process*, 14 NEW ENG. L. REV. 1, 3 (1978) (acknowledging that “courts recognized the inherent danger that material disclosed during the course of litigation might be used for adverse collateral purposes”); see also Marcus, *supra* note 2, at 4 n.25 (recognizing the constitutional limitations on the power of courts to enter protective orders).

177. See Marcus, *supra* note 2, at 6 (stating that “the intrusiveness and burdensome nature of discovery is the most cited objection to the litigation boom”).

178. According to some pro-transparency advocates of the time, the confidentiality problem approached epidemic proportions. See HARE, JR. ET AL., *supra* note 84, at 1–6 (describing the “hidden agenda” of a motion for a protective order, which includes isolating the plaintiff’s attorney from consultation with other lawyers handling similar cases); cf. HARE, JR. ET AL., *supra* note 85, at 157–62 (indicating that protective orders frequently prevent plaintiffs from collaborating and result in stonewalling).

restrictions and aggressively litigated to obtain discovery and disseminate it widely.<sup>179</sup>

According to some commentators reflecting on that time, the American litigation system of the time had become uniquely “threatening” among the world’s systems.<sup>180</sup> But by the early 1980s, the tide turned against broad discovery, if not against stonewalling by parties to avoid producing responsive information. Reform has been incremental, many would contend too slow.<sup>181</sup> In 1980, amendments to the discovery rules were adopted, and three Justices dissented on the ground that the amendments did not go far enough to curb out-of-control discovery.<sup>182</sup>

Another package of discovery-reform amendments was adopted in 1983.<sup>183</sup> These amendments deleted a sentence in Rule 26 that seemed to permit unlimited discovery.<sup>184</sup> The changes also gave judges more tools to combat perceived excesses in discovery, including a provision that specifically allowed judges to consider whether discovery was proportional to the case.<sup>185</sup>

Simultaneously, the confidentiality fight raged on—*Seattle Times Co. v. Rhinehart*<sup>186</sup> was argued and decided in the spring of

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179. See Dore, *supra* note 176, at 3 (describing the manner in which litigants can, with very limited restraints, demand information during discovery).

180. See Marcus, *supra* note 16, at 13 (quoting a federal judge in saying, “[a] foreigner watching the discovery proceedings in a civil suit would never suspect that this country has a highly-prized tradition of privacy”).

181. See *id.* at 17 (“[I]t’s hard to deny that many argue that U.S. procedure is not functioning as one would want it to function.”).

182. See Amendments to the Federal Rules of Civil Procedure, 85 F.R.D. 521, 521 (1980) (“[T]he changes embodied in the amendments fall short of those needed to accomplish reforms in civil litigation that are long overdue.”).

183. See Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 171–72 (1983) [hereinafter 1983 Amendments] (updating Rule 26 to reflect changes in the general provisions governing discovery).

184. Former Rule 26(a) read, “Unless the court orders otherwise under subdivision (c) of this rule, the frequency of use of these methods is not limited.” *Id.*; see also 8 WRIGHT ET AL., *supra* note 160, § 2008.1 (outlining the changes made to Rule 26).

185. See FED. R. CIV. P. 26(b)(2)(C)(iii) (permitting the court to sua sponte limit discovery after conducting a cost–benefit analysis); 1983 Amendments, *supra* note 183, at 172 (discussing the scope of discovery).

186. 467 U.S. 20 (1984).

1984. Thus the Court tightened the discovery rules<sup>187</sup> and affirmed the role of pretrial-discovery confidentiality in less than one year.<sup>188</sup> According to the *Seattle Times* Court, discovery was still very broad and litigants still needed protection from broad dissemination of discovery materials, notwithstanding the amendments.<sup>189</sup>

The Court turned out to be prescient—within a few decades of the first discovery-reform amendments, many commentators concluded that the changes, particularly the proportionality amendment, had not been effective in substantially narrowing discovery.<sup>190</sup> And despite continued efforts at reform through the 1990s and early 2000s, at least some still contend that the costs of discovery, in terms of both privacy and money, are out of proportion with the benefits.<sup>191</sup>

### B. Current Proposal

In May 2010, the Advisory Committee on Civil Rules convened a two-day conference at Duke Law School to discuss potential solutions to various civil procedure problems.<sup>192</sup> Academics, judges, and attorneys from around the country gathered to exchange ideas, some of which were quite contentious.<sup>193</sup> Interestingly, protective orders were effectively a

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187. See 1983 Amendments, *supra* note 183, at 172 (limiting the scope of discovery).

188. See *Seattle Times*, 467 U.S. at 33 (noting that pretrial discovery should not be a “public component” of a civil trial).

189. See *id.* at 36 (“The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders.”); see also 1983 Amendments, *supra* note 183, at 172 (“Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved. . .”).

190. See Jordan M. Singer, *Proportionality’s Cultural Foundation*, 52 SANTA CLARA L. REV. 145, 148 (2012) (noting that the amendments had “virtually no impact” on the expansive nature of discovery).

191. See Marcus, *supra* note 16, at 17 (stating that “the notion that American litigation is too costly and time-consuming has gained much force”).

192. See *id.* (describing the conference at Duke Law that dealt with highly contentious subjects related to the Civil Rules).

193. See *id.* (detailing the participants that attended the conference and



non-issue at the conference, meriting only a passing mention among contributors.<sup>194</sup> Instead, the majority of attention focused on the rules governing pleading and discovery, with an emphasis on active judicial case management and party cooperation.<sup>195</sup>

Following the conference, the Advisory Committee spent three years considering the ideas and ultimately proposed several amendments to the civil rules in the fall of 2013.<sup>196</sup> Echoing concerns raised at the conference, the proposed amendments targeted discovery practices.

The original Advisory Committee Proposal would have amended rules to take some of the teeth out of the sanctions for failing to preserve evidence; lower the presumptive limits on the number of interrogatories, depositions, and requests for admission; require enhanced and accelerated case management; reaffirm proportionality's role in the scope of discovery; and encourage party cooperation through changes to Rule 1.<sup>197</sup>

After a public comment period during the spring of 2014, the Advisory Committee withdrew its changes to the presumptive numerical discovery limits.<sup>198</sup> It also substantially revised

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what they discussed).

194. See ADVISORY COMM. ON CIVIL RULES, REPORT TO THE CHIEF JUSTICE OF THE UNITED STATES ON THE 2010 CONFERENCE ON CIVIL LITIGATION 5 (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Report%20to%20the%20Chief%20Justice.pdf> [hereinafter REPORT TO THE CHIEF JUSTICE] (stating that “protective-order provisions of Rule 26(c) drew no comment or attention at all, other than suggestions for standardizing protective orders for categories of litigation”). But see Seymour Moskowitz, *What Federal Lawmakers Can Learn from State Procedural Innovations*, 2010 Conference on Civil Litig. (2010), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Duke%20Materials/Library/Seymour%20Moskowitz,%20What%20Federal%20Rulemakers%20Can%20Learn%20From%20State.pdf> (discussing litigation secrecy and secrecy reform).

195. See REPORT TO THE CHIEF JUSTICE, *supra* note 194, at 5 (“Pleading and discovery dominated Conference suggestions for rule amendments.”).

196. See Marcus, *supra* note 16, at 17 (describing the process that the Advisory Committee took to propose amendments to the civil rules).

197. See SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE 23 (2013), <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST09-2013.pdf> (describing the purposes of the changes to Rule 1).

198. See Tera E. Brostoff & Jeffrey D. Koelmay, *E-Discovery Rules Gets Late-Night Rewrite, Advisory Committee Approves Rules Package*, 82 U.S.L.W.

proposed language in Rule 37 that would have changed the threshold to sanction spoliation.<sup>199</sup> The comment period also resulted in tweaks to the language of the remaining proposed rule changes.<sup>200</sup>

On May 29, 2014, the Standing Committee on the Rules of Practice and Procedure approved the Advisory Committee's proposal.<sup>201</sup> The Judicial Conference voted on the Standing Committee's recommendation in the fall, putting the proposal before the Supreme Court.<sup>202</sup> If the Court adopts the Judicial Conference's recommendation, the amendments will become law in December 2015, absent unlikely Congressional action.

All of the amendments in the Duke Package aim to increase efficiency and reducing unnecessary, wasteful discovery and discovery litigation.<sup>203</sup> But changes to the discovery-scope provisions, in particular, merit discussion because of their close relationship to court confidentiality.

The proposed amendments would explicitly limit the scope of discovery in Rule 26(b)(1) to only that which is proportional to the case.<sup>204</sup> To determine what is "proportional," courts should

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1549 (Apr. 14, 2014) (indicating that public comments contributed to the Committee's decision to withdraw its changes to the numerical discovery limits).

199. *See id.* (describing the unpublished language of Rule 37 as "greatly simplified").

200. For instance, the Advisory Committee reordered the proportionality factors to make "the importance of the issues at stake" first in the list. *See* COMMITTEE REPORT, *supra* note 6, at 68 (describing the rearrangement of the factors). It also added "parties' relative access to relevant information" to the list of factors. *Id.*; *see also* Brostoff & Koelmay, *supra* note 198 (emphasizing the importance of the comment period on the Advisory Committee's final proposal).

201. Brostoff, *supra* note 6.

202. *Judicial Conference Receives Budget Update, Forwards Rules Package to Supreme Court*, THE THIRD BRANCH NEWS (Sept. 16, 2014), <http://news.uscourts.gov/judicial-conference-receives-budget-update-forwards-rules-package-supreme-court> (last visited Nov. 19, 2014) (on file with the Washington and Lee Law Review).

203. *See* SUMMARY OF THE REPORT OF THE JUDICIAL CONFERENCE COMM. ON RULES OF PRACTICE AND PROCEDURE, *supra* note 197, at 18 ("The proposed rules amendments are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 'to secure the just, speedy, and inexpensive determination of every action and proceeding.'").

204. *See* COMMITTEE REPORT, *supra* note 6, at 80 ("Parties may obtain

consider the importance of the issues at stake, the amount in controversy, the parties' relative access to sources of proof, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden of the discovery outweighs its likely benefit.<sup>205</sup> Thus, under the proposal, proportionality—first introduced in a less-prominent form in the 1983 amendments to Rule 26<sup>206</sup>—would take center stage in setting the scope of discovery.

In their current form, the Rules require courts to consider proportionality to limit discovery requests that are otherwise within the permissible scope of Rule 26(b)(1) but nevertheless impose a disproportionate burden.<sup>207</sup> Current Rule 26(b)(2)(C)(i)–(iii) allows courts to limit burdensome discovery, particularly when its costs outweigh potential benefits to the case.<sup>208</sup> For instance, courts may consider whether discovery is “cumulative” or “duplicative” or obtainable from a less-burdensome source.<sup>209</sup> Likewise, courts must consider the needs of the case and the importance of the issues when weighing the burdens imposed by discovery.<sup>210</sup>

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discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case.”).

205. *See id.* (stating these factors should be considered when determining the proportionality of the scope of discovery).

206. *See* 1983 Amendments, *supra* note 183, at 217 (incorporating proportionality into Rule 26, albeit not in the rule's primary scope provision).

207. *See* FED. R. CIV. P. 26(b)(1), (b)(2)(C)(iii) (mandating courts “limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit”).

208. *See* FED. R. CIV. P. 26(b)(2)(C)(i)–(iii) (“On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that . . . the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case . . .”).

209. *See* FED. R. CIV. P. 26(b)(2)(C)(i) (requiring courts to limit the extent of discovery if “the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive”).

210. *See* FED. R. CIV. P. 26(b)(2)(C)(iii) (listing the following factors to be considered by courts when deciding whether to limit discovery: “[T]he needs of the case, the amount in controversy, the parties' resources, the importance of

The proposed amendments to Rule 26 would promote the proportionality analysis to the primary scope provision of 26(b)(1).<sup>211</sup> Currently, attorneys are expected to exercise discretion to frame discovery requests within the scope allowed by Rule 26(b)(1),<sup>212</sup> and if they fail to do so, opposing counsel can request limitations, or protections, from the court.<sup>213</sup> Likewise, current rule 26(g) mandates that attorneys who sign discovery requests certify that the requests are, among other things, proportional.<sup>214</sup> If necessary, the court then exercises its discretion to refine discovery along those same lines.<sup>215</sup>

The amendments, however, would emphasize attorneys' obligation to consider what is proportional when they exercise their discretion to frame discovery requests in the first place.<sup>216</sup>

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the issues at stake in the action, and the importance of the discovery in resolving the issues”).

211. See COMMITTEE REPORT, *supra* note 6, at 80 (defining the “scope in general” as “any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case”).

212. Under the 2000 amendments, attorneys have discretion to frame requests relevant to any claim or defense of a party—a slightly narrower subset of information than information relevant to the “subject matter of the action” previously allowed. See FED. R. CIV. P. 26 advisory committee’s note (explaining the ramifications of allowing the prior broad scope of discovery, for instance, “parties seek to justify discovery requests that sweep far beyond the claims and defenses of the parties on the ground that they nevertheless have a bearing on the ‘subject matter’ involved in the action”). Now, courts are given the discretion to allow discovery relevant to the subject matter of the action. See FED. R. CIV. P. 26(b)(1) (permitting courts to widen the scope of discovery in this manner “for good cause”); see also Singer, *supra* note 190, at 176–80 (discussing the shift away from attorney discretion and toward judicial discretion in limiting pretrial discovery).

213. See FED. R. CIV. P. 26(b), (c) (setting forth limitations on discovery in subsection (b) and the protocol concerning motions for protective orders in subsection (c)).

214. See FED. R. CIV. P. 26(g) (requiring attorneys to affirm their requests are “neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action”).

215. See FED. R. CIV. P. 26(b)(2)(C)(iii) (allowing the court to limit the extent of discovery when it determines “the burden or expense of the proposed discovery outweighs its likely benefit”).

216. Cf. Singer, *supra* note 190, at 176–80 (noting the risks associated with placing undue emphasis on attorneys’ discretion in discovery).

The potential real-world impact of the proposed change is subject to fierce debate. Over 2,300 public comments were filed during the six-month comment period, some in favor of the proposal, some opposed, and some hoping the Committee would go further in limiting discovery.<sup>217</sup>

The Advisory Committee contends, contrary to many comments, that defining the scope of discovery around the proportionality concept merely reflects what is already in the rule.<sup>218</sup> According to the committee, the change “reinforces” attorneys’ proportionality obligations.<sup>219</sup> This reinforcement is apparently necessary because many courts and attorneys were not adhering to the proportionality concept when tailoring discovery.<sup>220</sup>

At a minimum, the changes could prompt a wave of discovery disputes based on allegations that discovery requests are not proportional to the case. Reacting to the re-crafted scope provision, litigants and courts will undoubtedly pay more heed to proportionality.<sup>221</sup>

Taken together, the amendments, combined with continued criticism of what some view as overbroad discovery, may create momentum in some courts to narrow the scope of discovery significantly, at least as a practical matter.<sup>222</sup> For some

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217. See Brostoff & Koelmay, *supra* note 198 (explaining, in response to this issue, “Rule 26(b)(1) was modified before the public comment period so that proportionality is now explicitly brought up early in the rule in the section addressing scope of discovery”).

218. See COMMITTEE REPORT, *supra* note 6, at 84 (asserting that “[r]estoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality”).

219. See *id.* (listing obligations such as considering proportionality “in making discovery requests, responses, or objections”).

220. See *id.* at 82–83 (noting that “district judges have been reluctant to limit the use of the discovery devices” as originally intended).

221. The proposed amendment would also delete the phrase, “[r]elevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence” from Rule 26’s scope provision. COMMITTEE REPORT, *supra* note 6, at 70. The impact of such a change is not clear, but some on the Advisory Committee contend that the phrase “was never intended to expand the scope of discovery.” Brostoff & Koelmay, *supra* note 198.

222. See, e.g., 8 WRIGHT ET AL., *supra* note 160, §§ 2008, 2008.1 (describing the modest impact of the discovery-scope amendments during the period from

commentators, the changes are a tepid step toward international litigation norms.<sup>223</sup> Some in practice describe the potential change as almost cataclysmic.<sup>224</sup> The truth is probably somewhere in the middle—the scope amendments will substantially narrow discovery in some cases but will not, as predicted by some, end pretrial litigation as we currently know it.<sup>225</sup>

Narrowing the scope of discovery may create efficiency in some cases. Avoiding wasteful re-discovery in similar cases would undoubtedly create efficiency in a wide swath of complex cases.<sup>226</sup> While the rule makers have chosen to focus on scope, courts should turn their attention toward a unified approach to sharing. Doing so would work in tandem with the proposed amendments. The next Part examines the relationship between sharing and proportionality and proposes some baseline sharing-protective-order principles.

#### IV. A Framework for Discovery Sharing

Courts and commentators are divided on the propriety of discovery sharing and how best to accomplish it.<sup>227</sup> The federal

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1980–2000).

223. See Marcus, *supra* note 16, at 23–24 (“From the perspective of the rest of the world, this package of changes is likely to seem very modest, perhaps minimal.”).

224. See, e.g., Letter from Paul W. Mollica, to the Comm. on Rules of Practice and Procedure, at 1 (Feb. 13, 2014)

[S]everal proposed amendments to the Federal Rules of Civil Procedure will deprive litigants of the promise of the American adversary process as the best means of ascertaining the truth and minimizing error. Rather, they will front-load federal civil cases with prefabricated conflicts that will disrupt orderly litigation and detract from truth-finding.

(internal quotations and citations omitted) (on file with the Washington and Lee Law Review).

225. See Singer, *supra* note 190, at 149 (outlining the important roles that attorney discretion and behavior play in achieving proportionality within the discovery process).

226. See discussion *supra* Part III(C)(i) (discussing the positive impact of sharing in products-liability cases).

227. See cases cited *supra* note 5 (demonstrating varying preferences among

civil rules are silent on sharing, forcing courts to implement ad hoc processes within the glow of Rule 26(c)'s "good cause" standard.<sup>228</sup> Courts, grasping in the dark for a framework, sometimes deny requests for perfectly acceptable upfront sharing provisions in protective orders.<sup>229</sup> In other instances, courts may deny a request to modify a nonsharing protective order to allow for sharing, following an out-of-touch modification standard that imposes an unnecessarily onerous burden.<sup>230</sup>

Hostility toward discovery sharing is contrary to both the spirit of the Duke Conference and the goals of the proposed civil amendments.<sup>231</sup> This Part proposes three basic discovery-sharing principles and considers their interaction with current law and the proposed amendments to Rule 26.

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courts concerning discovery-sharing provisions); *cf.* Marcus, *supra* note 2, at 43 (arguing that a third-party litigant seeking access to discovery in cases to which he is not a party should "demonstrate that he would have the right to obtain them," presumably in a modification proceeding); Campbell, *supra* note 2, at 824 ("[I]n the long run information sharing may actually *waste* judicial time and resources."); Timmins, *supra* note 92, at 1543 ("[I]nformation sharing avoids duplicitous discovery while maintaining the secrecy required for the defendant's competitive interests.").

228. See FED. R. CIV. P. 26(c)(1)(g) (outlining when courts may "for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense"); see also *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 n.1 (N.D. Ga. 1980) ("The federal rules do not foreclose collaboration among litigants."); Campbell, *supra* note 2, at 827 ("[I]nformation-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.").

229. See, e.g., *Williams v. Taser Int'l, Inc.*, No. 1:06-CV-0051-RWS, 2006 WL 1835437, at \*2 (N.D. Ga. June 30, 2006) (denying request for sharing provision in protective order).

230. *Knitting Fever, Inc. v. Coats Holdings Ltd.*, No. CV05-1065(DRH)(WDW), 2011 WL 3678823, at \*1-2 (E.D.N.Y. Aug. 22, 2011) (relying on *Martindell's* extraordinary circumstances test to deny a request to modify a protective order).

231. See COMMITTEE REPORT, *supra* note 6, at 65-66 ("A principal conclusion of the Duke conference was that discovery in civil litigation would more often achieve the goal of Rule 1—the just, speedy, and inexpensive determination of every action—through an increased emphasis on proportionality.").

*A. Upfront Sharing Provisions Versus Later Modification*

In most circumstances, upfront sharing provisions should be favored over later ad hoc intervention and modification requests. This principle has its root in Rule 26(c)'s good cause requirement and operates within trial courts' well-established zone of protective-order discretion.<sup>232</sup> In most cases implicating discovery-sharing concerns, evidence of good cause simply will not support a protective order that forbids sharing at the outset.<sup>233</sup> To establish good cause for a protective order, the party requesting the order must establish both that the information it seeks to protect is confidential and that failure to enter the order will result in substantial and serious harm.<sup>234</sup> The terms of the protective order should be no broader than necessary to protect the requesting party from such harm.<sup>235</sup>

The typical harm advanced by parties seeking protective orders is economic or proprietary injury flowing from dissemination of discovery information to competitors.<sup>236</sup> Protective orders that allow sharing prevent this harm in two

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232. See FED. R. CIV. P. 26(c) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."); Timmins, *supra* note 92, at 1507 ("After finding good cause, the court must then evaluate each of the countervailing concerns to determine whether the court should use the court's discretion to grant a protective order.").

233. See 8A WRIGHT ET AL., *supra* note 160, § 2035 (recognizing that specific evidence of harm must support entry of an audience-limiting protective order).

234. See, e.g., *In re Wilson*, 149 F.3d 249, 252 (4th Cir. 1998) ("To obtain a protective order under Rule 26(c), the party resisting discovery must establish that the information sought is covered by the rule and that it will be harmed by disclosure."); *Bank of N.Y. v. Meridien BIAO Bank Tanz. Ltd.*, 171 F.R.D. 135, 143 (S.D.N.Y. 1997) (noting that the party must show "clearly defined and very serious injury" to obtain protective order).

235. See *Small v. Ramsey*, 280 F.R.D. 264, 269 (N.D.W. Va. 2012) (stating that the moving party "must demonstrate that the discovery sought lacks relevance 'to the extent that the likelihood and severity of the harm or injury . . . outweighs any need for the information'").

236. See, e.g., *Petersen v. DaimlerChrysler Corp.*, No. 1:06 CV 00108 TC PMW, 2007 WL 914738, at \*1 (D. Utah Mar. 5, 2007) (stating that failure to enter protective order would result in "harmful disclosure of confidential and proprietary information").



ways. First, the orders typically include a provision that expressly forbids giving the information to the producing party's competitors, and violations are punishable by contempt.<sup>237</sup> Second, the sharing provision itself could be narrowly tailored to allow for sharing only with cases involving a strong factual similarity to the case in which the order is entered.<sup>238</sup> Excluding competitors from the sharing class obviates the most likely (and often only) cognizable source of harm flowing from the disclosure of discovery information.<sup>239</sup>

Many courts continue to enter nonsharing orders, even in the face of sharing requests.<sup>240</sup> The reasoning for doing so varies, but a common trend has been for courts, particularly federal courts, to deny upfront sharing provisions in favor of requiring litigants in similar cases to intervene and modify a nonsharing protective order.<sup>241</sup> Not only is this approach at

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237. *Cf., e.g.,* Pincheira v. Allstate Ins. Co., 190 P.3d 322, 337 (N.M. 2008) (“Ordinarily a protective order should permit discovery sharing among other litigants and witnesses, *who are not competitors of the defendant. . .*” (emphasis added)).

238. *Cf., e.g.,* Raymond Handling Concepts Corp. v. Super. Ct., 45 Cal. Rptr. 2d 885, 888 (Cal. Ct. App. 1995) (holding that, under the terms of a sharing protective order, “plaintiff’s attorney may share this discovery only with counsel in other similar cases, it must be assumed that the information is also discoverable in these other similar cases”).

239. *See* Campbell, *supra* note 2, at 774 (noting that the dissemination of discovery information means “[c]ompetitors will then have ready access to the company’s internal decision-making procedures and to other highly sensitive information”).

240. *See, e.g.,* Menendez *ex rel.* Menendez v. Wal-Mart Stores E. LP, No. 1:10-CV-53, 2012 WL 90140, at \*3 (N.D. Ind. Jan. 11, 2012) (denying request for sharing order and finding that “any purported gain in judicial efficiency achieved in other cases through ‘sharing orders’ is purely hypothetical” in case).

241. *See, e.g.,* Long v. TRW Vehicle Safety Sys., Inc., No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010) (holding that sharing provision would circumvent required modification procedure); Petersen v. DaimlerChrysler Corp., No. 1:06 CV 00108 TC PMW, 2007 WL 914738, at \*1 (D. Utah Mar. 5, 2007)

The court is not persuaded that the inclusion of [a sharing] provision is either appropriate or necessary. Such sharing requests can and should be considered on an ‘as-needed’ basis throughout the course of the litigation, rather than ‘opening the barn doors’ with a broad order at this stage, which is anything but “protective.”

odds with Rule 26(c)'s requirement that the breadth of a protective order be supported by evidence of good cause, but it also imposes burdens on the system with no correlative benefits.

Upfront sharing provisions are more efficient than later intervention and modification. First, upfront sharing provisions reduce litigation about discovery.<sup>242</sup> When properly crafted, discovery-sharing provisions avoid satellite discovery disputes by allowing parties to share discovery without any further court intervention.<sup>243</sup> In contrast, each litigant who seeks to share in already completed discovery in a case governed by a nonsharing order must intervene and file a motion to modify the order.<sup>244</sup> This process not only discourages litigants from utilizing shared discovery in the first place but also creates an unnecessary discovery dispute.<sup>245</sup>

These disputes often arise from a requirement in some courts that parties seeking to modify a protective order demonstrate that the information they seek through sharing

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242. See Singer, *supra* note 190, at 166–67 (describing a 2009 “study of closed civil cases by the Federal Judicial Center, 63.8% of plaintiffs’ attorneys and 61% of defense attorneys agreed that the parties in their cases ‘were able to reduce the cost and burden [of the named case] of discovery through cooperation.’”).

243. See, e.g., *Kamp Implement Co., v. J.I. Case Co.*, 630 F. Supp. 218, 220 (D. Mont. 1986) (“If defendants’ proposed [nonsharing] order were entered, the court would be faced with motions by litigants in other cases for modification of the order to allow the information to be released to them. This would result in duplication of time and effort in each instance where discovery is sought.”); *cf.*, e.g., *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (“Each plaintiff should not have to undertake to discover anew the basic evidence that other plaintiffs have uncovered.”).

244. See, e.g., *Long*, 2010 WL 1740831, at \*1 (stating that collateral litigants “should not be granted automatic access to a defendant’s confidential documents” and must “go through the appropriate steps to obtain that discovery”).

245. This effect proves counter to the scope and purpose of the Federal Rules of Civil Procedure. See FED. R. CIV. P. 1 (asserting the Rules “should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding”).

is discoverable in their own case.<sup>246</sup> The approach is rooted in comity concerns and concerns about forum shopping.<sup>247</sup>

Indeed, several courts have resisted sharing orders on the ground that sharing provisions have the potential to thwart the discovery limitations of the jurisdictions in which litigants receive shared information.<sup>248</sup> According to this line of reasoning, crafty litigants stuck in a jurisdiction with limited discovery could find a similar case with a sharing order in a jurisdiction with more liberal discovery standards. By doing so, the litigant might obtain information to which he or she would not otherwise be entitled. Accordingly, some courts deny sharing requests in favor of litigant-by-litigant modification.<sup>249</sup>

This process and the reasoning underlying it are flawed for several reasons. Even if an upfront sharing provision ignores discovery limitations in a collateral case, it does not harm the

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246. See, e.g., Marcus, *supra* note 2, at 43 (arguing that third-party litigant seeking to modify protective order should establish that “he would have the right to obtain” discovery in collateral action); 8A WRIGHT ET AL., *supra* note 16, § 2044.1 (“If the limitation on discovery in the collateral litigation would be substantially subverted by allowing access to discovery material under a protective order, the court should be inclined to deny modification.”); cf. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1132 (9th Cir. 2003) (“[T]he collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein. Requiring a showing of relevance prevents collateral litigants from gaining access to discovery materials merely to subvert limitations on discovery in another proceeding.”).

247. See, e.g., Foltz, 331 F.3d at 1133 (“Allowing the parties to the collateral litigation to raise specific relevance and privilege objections to the production of any otherwise properly protected materials in the collateral courts further serves to prevent the subversion of limitations on discovery in the collateral proceedings.”).

248. See, e.g., Bertetto v. Eon Labs, Inc., No. 06-1136 JCH/ACT, 2008 WL 2522571 (D.N.M. May 29, 2008) (stating that sharing provisions would “potentially usurp . . . a collateral court’s role in managing discovery in a collateral case”); see also Cordis Corp. v. O’Shea, 988 So. 2d 1163, 1167 (Fla. Dist. Ct. App. 2008) (“Allowing this degree of sharing of confidential information may provide a mechanism for attorneys in states with narrower discovery laws to evade their state law discovery limitations . . .”).

249. See, e.g., Cordis Corp., 988 So. 2d at 1167 (noting that “not every federal court decision has approved sharing confidential information even with collateral litigants or counsel”).

producing party in a way recognized by Rule 26(c). When previously produced information is shared, the producing party has presumably already expended resources to complete the discovery in the sharing jurisdiction. The collateral party receiving the shared information is responsible to pay to copy the documents.<sup>250</sup> Moreover, the party benefiting from sharing will almost always be required to agree to be bound by the terms of the protective order (e.g., use the documents only to prepare and try the collateral case).<sup>251</sup> If anything, the producing party has saved expense and time in the collateral case.<sup>252</sup> The system has undoubtedly benefited, particularly if the party receiving the shared information is able to exercise her discretion better in framing discovery requests in the collateral case or avoid some requests altogether.

Perhaps the producing party could complain that the collateral party received undue access to information that helped prove her case. But discovery limitations are meant only to balance the search for truth against the cost of that search, not to serve as a shield against liability.<sup>253</sup> Moreover, the scope of discovery is necessarily broader than the standard for admissibility.<sup>254</sup> If shared discovery yields relevant, admissible

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250. See FED. R. CIV. P. 26 advisory committee's note ("The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible.").

251. See *Raymond Handling Concepts Corp. v. Super. Ct.*, 45 Cal. Rptr. 2d 885, 886 (Cal. Ct. App. 1995) (describing a protective order with a typical sharing provision, tailored to ensure compliance by counsel receiving the shared documents).

252. See *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982) (observing that sharing protective orders save defendant expense in time that would otherwise be spent on duplicative discovery in similar cases).

253. Cf. *Hickman v. Taylor*, 329 U.S. 495, 507–08 (1947) (delineating circumstances in discovery which could cause "the rights of individual litigants [to be] drained of vitality and the lawsuit [to become] more of a battle of deception than a search for truth").

254. See FED. R. CIV. P. 26(b)(1) (allowing "[p]arties [to] obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense" even inadmissible information).

evidence, the receiving jurisdiction's trial process has been enhanced, not thwarted.<sup>255</sup>

Indeed, it is difficult to imagine what complaint the court in the receiving jurisdiction might have. If anything, the court in the receiving jurisdiction has had its interests furthered by the sharing protective order, particularly if the sharing jurisdiction has allowed broad discovery.<sup>256</sup> With more proof available, attorneys may be less likely to engage in discovery disputes in the receiving jurisdiction, saving resources for that court. And more information, rather than less, is almost always beneficial in seeking truth.<sup>257</sup> When that information comes to the collateral court essentially free of cost via a previously litigated case, it is hard to imagine the downside.

One legitimate concern, albeit unlikely to occur often, is that attorneys engaged in national-scale claims might seek out a jurisdiction with unusually liberal discovery standards and create a discovery mill for other claims around the country.<sup>258</sup> Presumably, the attorneys could file an action, obtain favorable discovery rulings, obtain a sharing protective order, and then use the jurisdiction to feed cases around the country, notwithstanding the merits of the collateral sharing case.

At the outset, there are almost no identified instances of this hypothetical occurring. In the event that a court had evidence of such a scheme, it would have ample discretion to deny a sharing

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255. See *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987) (“Shared discovery is an effective means to insure full and fair disclosure. Parties subject to a number of suits concerning the same subject matter are forced to be consistent in their responses by the knowledge that their opponents can compare those responses.”).

256. Cf. *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) (“The availability of the discovery information may reduce time and money which must be expended in similar proceedings, and may allow for effective, speedy, and efficient representation.”).

257. See *Garcia*, 734 S.W.2d at 347 (“[T]he ultimate purpose of discovery is to seek the truth, so that disputes may be decided by what the facts reveal, not by what facts are concealed.”).

258. See *Cordis Corp. v. O’Shea*, 988 So. 2d 1163, 1167 (Fla. Dist. Ct. App. 2008) (warning that permitting parties to share confidential information “may provide a mechanism for attorneys in states with narrower discovery laws to evade their state law discovery limitations by obtaining confidential information” from a more liberal jurisdiction).

provision in the first place or modify an existing protective order to shut the discovery mill down.<sup>259</sup> Utilizing a case primarily as a vehicle for obtaining information to overrun other jurisdiction's discovery limitations—rather than to work toward a resolution on the merits—would be inappropriate.<sup>260</sup> But the mere specter of such abuse does not constitute reason to abandon discovery sharing in favor of ad hoc modification, particularly when courts have ample tools to deal with any instances that do arise.<sup>261</sup>

Nevertheless, the discoverability requirement is a predicate to sharing in many jurisdictions.<sup>262</sup> As a result, parties forced to seek modification of protective orders may, in essence, litigate disputes about discoverability substantially similar to those they would face in their own cases. Upfront sharing provisions could avoid the problem altogether.

Beyond the direct efficiencies generated by sharing provisions, the provisions also provide some indirect, systemic benefits. Indeed, up-front sharing provisions encourage party cooperation and efficiency in the long run by avoiding reliance problems and properly setting party expectations at the inception of protective orders.<sup>263</sup> Later protective-order modifications often fall short in this regard.<sup>264</sup>

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259. See, e.g., *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980) (“Unless it can be shown that the discovering party is exploiting the instant litigation solely to assist litigation in a foreign forum, federal courts allow full use of the information in other forums.”).

260. See *id.* (highlighting the primary aim of the Federal Rules of Civil Procedure: to “secure the just, speedy, and inexpensive determination of every action”).

261. See FED. R. CIV. P. 37 (permitting courts to sanction parties for failing to comply with court orders); FED. R. CIV. P. 26(g)(3) (providing that a court may impose appropriate sanctions on a party or party's attorney for violating the certification standards for discovery requests and disclosures).

262. See, e.g., *Long v. TRW Vehicle Safety Sys., Inc.*, No. CV-09-2209-PHX-DGC, 2010 WL 1740831, at \*1 (D. Ariz. Apr. 29, 2010) (“[T]he collateral litigant must demonstrate the relevance of the protected discovery to the collateral proceedings and its general discoverability therein.”).

263. See, e.g., *Diversified Grp., Inc. v. Daugerdas*, 217 F.R.D. 152, 158 (S.D.N.Y. 2003) (noting one court's “restrictive attitude toward modification of protective orders” and arguing that “[i]f protective orders were easily modified, . . . parties would be less forthcoming in giving testimony and less willing to settle their disputes”).

264. See, e.g., *id.* (“Where there has been reasonable reliance by a party on a

Courts considering protective-order modification requests regularly struggle with questions about reliance.<sup>265</sup> Courts often hesitate to grant modifications to allow sharing after the parties have produced information to each other in reliance on a confidentiality order.<sup>266</sup> The basis for this hesitation is that the parties produced the information with the expectation that it would be used only for the case at hand.<sup>267</sup>

By defeating party expectations about confidentiality, so the logic goes, litigants will be less likely to produce information under protective orders in the future, causing inefficiency and other problems for the discovery system as a whole.<sup>268</sup> As discussed in Part IV.B, this reasoning may overstate the impact of defeated protective order expectations.

Whatever the true extent and impact of the reliance problem, sharing protective orders avoid questions about reliance altogether in most cases.<sup>269</sup> When a court enters a protective order with a well-crafted sharing provision, all parties to the order know, to a large extent, who may receive information under

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protective order, a district court should not modify the order ‘absent a showing of improvidence in the grant of [the] order or some extraordinary circumstance or compelling need.’”).

265. See *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir. 1964) (noting acts committed by the defendants “in reliance upon the entry and continuing effectiveness of the protective orders”), *cert. denied*, 379 U.S. 900 (1964).

266. See *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 293 (2d Cir. 1979) (rejecting the Government’s modification request due to the opposing party’s reliance on the prior order).

267. See *Campbell*, *supra* note 2, at 772–75 (explaining that “[t]he number and variety of potential adversaries may make the ramifications of unfettered dissemination of discovery information overwhelming”); *Marcus*, *supra* note 2, at 43–44 (arguing that “a court should ordinarily deny nonparty access if all the parties to litigation number one oppose it, even though it may increase the nonparty’s expenses”).

268. See *Campbell*, *supra* note 2, at 772–75 (addressing potential risks to litigants resulting from “[t]he uncontrolled dissemination of discovery information among an ill-defined and untraceable amalgam of adversaries” and why this would lead to lessened efficiency); *Marcus*, *supra* note 2, at 43–44 (noting that parties who foresee repeated claims may “fight discovery more vigorously”).

269. See *Timmins*, *supra* note 92, at 1520 (noting that “protective orders that allow information sharing can substantially reduce the burdens that the discovery process imposes on the plaintiff”).

that order. The increased certainty flowing from settled party expectations about litigant-to-litigant sharing may even, by itself, increase party willingness to provide forthright and complete discovery responses.<sup>270</sup>

In sum, in many cases, particularly products-liability and mass tort cases, later requests from collateral litigants to modify protective orders are perfectly foreseeable and avoidable.<sup>271</sup> Courts should set reasonable party expectations by entering sharing protective orders that account for this reality at the outset.<sup>272</sup>

For some courts, the practice of sharing privileged information across jurisdictions presents special difficulties. Privileges are often based on policy judgments meant to influence real-world behavior.<sup>273</sup> They represent particular jurisdictions' views on how to best maintain and further society, not simply run a court system.<sup>274</sup> These policy views manifest themselves in privileges by limiting litigant and court access to information.

In contrast, Rule 26(c)(1)(g) is aimed at limiting the audience for materials that have already been, or will be, found discoverable.<sup>275</sup> The focus of the protective order rules across jurisdictions (largely based on Rule 26(c)) is unquestionably

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270. See *Garcia v. Peeples*, 734 S.W.2d 343, 347–48 (Tex. 1987) (explaining that the goals of discovery are “often frustrated by the adversarial approach to discovery,” and that “[s]hared discovery is an effective means to insure full and fair disclosure”).

271. See *Campbell*, *supra* note 2, at 827 (“Particularly in products liability cases, plaintiffs often routinely move to modify protective orders at the close of litigation . . .”).

272. See *id.* at 831 (criticizing umbrella protective orders which do not account for this possibility).

273. See 2 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 5:2 (4th ed. 2013) (“Privilege rules occupy a unique place because they implement policies that are very different from those underlying other rules, and many privileges are broader in effect than other rules.”).

274. See *id.* (noting that privileges “are not designed to enhance the reliability of factfinding, and they exclude evidence that may be probative because other values are more important than finding truth in litigation”).

275. See FED. R. CIV. P. 26(c)(1)(G) (allowing courts to issue a protective order “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way”).



important but is simultaneously more value-neutral and more homogenous on value questions than the privilege rules.<sup>276</sup>

For instance, the spousal privilege reflects the judgment that marriage is a good that the government should promote.<sup>277</sup> The clerical privilege recognizes that candor between priest and parishioner, and the spiritual enlightenment that might follow, is good for society.<sup>278</sup>

As one might expect, the disagreements about the value judgments underlying privileges have produced substantial disparity in privilege law. Some jurisdictions recognize the physician–patient privilege while others do not.<sup>279</sup> Even when lawmakers in different jurisdictions agree about the existence of a privilege, the contours of its applicability may vary dramatically.<sup>280</sup> Adding to the complexity in the area, privileges are largely the province of state law in civil cases, even in federal courts.<sup>281</sup> The fifty states have come to widely varying conclusions on privilege questions, an unsurprising result that reflects the political and moral diversity of the country.

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276. See, e.g., Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 662 (stating that privileges “lie at the center of the contemporary debate about the foundations of liberal society” and that “[t]o privilege certain relationships is to declare certain values”).

277. See *Hawkins v. United States*, 358 U.S. 74, 77 (1958)

The basic reason the law has refused to pit wife against husband or husband against wife in a trial where life or liberty is at stake was a belief that such a policy was necessary to foster family peace, not only for the benefit of husband, wife and children, but for the benefit of the public as well.

278. See *Trammel v. United States*, 445 U.S. 40, 51 (1980) (“The priest-penitent privilege recognizes the human need to disclose to a spiritual counselor, in total and absolute confidence, what are believed to be flawed acts or thoughts and to receive priestly consolation and guidance in return.”).

279. Compare CAL. EVID. CODE § 994 (West 2008) (describing physician–patient privilege), with *United States v. Moore*, 970 F.2d 48, 50 (5th Cir. 1992) (“This Court has . . . concluded that there is no doctor-patient privilege under federal law.”).

280. Compare TEX. R. EVID. 509 (applying the physician–patient privilege in civil, not criminal, cases), with CAL. EVID. CODE § 300, 994 (applying the physician–patient privilege in criminal and civil cases).

281. See FED. R. EVID. 501 (“But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.”).

But these value judgments are not implicated by protective-order procedures. If a privilege applies and prevents disclosure in discovery, an audience-limiting protective order simply is not necessary. Indeed, if a privilege keeps information out of discovery, there is simply nothing to protect.

On the other hand, if one state's privilege law in a particular area (or lack thereof) allows disclosure of information that would be privileged in another state, and no court enters a protective order, the first state's privilege law may thwart the second's.<sup>282</sup> The same is true if a court in a state where information is not privileged allows discovery sharing with cases in states where privilege would limit disclosure. The information still would not reach the general public (because the collateral party presumably received the information by agreeing to the protective-order's restrictions against further disclosure); but it would be available for litigation purposes, contrary to the receiving jurisdiction's privilege law.<sup>283</sup>

One response to this might be simply that the states often thwart one another's policy judgments, an undeniable reality of a multi-sovereign republic. The disparity in privilege law, largely recognized as appropriately within the discretion of state lawmakers or courts, might be more the culprit here than the sharing order. Indeed, the court in the sharing jurisdiction was not obligated to enter a protective order at all.<sup>284</sup> And if it had refused to grant any confidentiality, its previous privilege ruling would have, in itself, thwarted the policy of the receiving jurisdiction by allowing would-be privileged information to flow in.

In this same way, Colorado's policy legalizing marijuana thwarts the criminal justice policy of its neighbor states when

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282. See 2 MUELLER & KIRKPATRICK, *supra* note 273, § 5.8 (delineating which state's privilege laws apply).

283. The party holding the privilege may, of course, still contest the admissibility of the information at trial. See, e.g., Marcus, *supra* note 10, at 496 ("[S]haring is consistent with a settled doctrine exempting exchange of information between litigants with a common litigation opponent from the risk that the exchange will be deemed a waiver of privileges.").

284. See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984) ("Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required.").

Colorado-grown pot flows across the border.<sup>285</sup> Rather than serving as a reason to limit discovery sharing, tension among states' privilege law may simply be an inevitable by-product of states' recognized ability to make their own policy choices.

Another version of the privilege problem comes up when sharing courts order parties to produce information pursuant to a qualified privilege.<sup>286</sup> The trade-secret privilege provides an apt example. Many states qualify the trade secret privilege to allow courts to compel production of otherwise privileged information where failing to do so would "conceal fraud" or otherwise create "an injustice."<sup>287</sup> The burden is often placed on the party seeking the privileged information to establish that injustice or concealment of a fraud would occur absent disclosure in the case.<sup>288</sup>

Some argue that when courts allow sharing in trade-secret cases without requiring such a showing, the protective-order ruling might actually conflict with the sharing jurisdiction's own privilege law.<sup>289</sup> Many states' privileges not only allow the party holding the privilege to refuse to provide the information absent a showing of injustice or fraud, but also to prevent others from doing so.<sup>290</sup> A sharing protective order in such a jurisdiction,

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285. See, e.g., Jack Healy, *After 5 Months of Sales, Colorado Sees the Downside of a Legal High*, N.Y. TIMES (May 31, 2014), <http://nyti.ms/1kjtWF8> (last visited Nov. 19, 2014) (highlighting that some law enforcement officials in neighboring states that have seen an increase in marijuana-related offenses) (on file with the Washington and Lee Law Review).

286. See *Wal-Mart Stores E., L.P. v. Endicott*, 81 So. 3d 486, 490 (Fla. Dist. Ct. App. 2011) (addressing the tension between sharing protective orders and state trade-secret privilege).

287. *Id.*

288. See, e.g., *id.* (stating that "sharing provisions, like the underlying one, which allow the dissemination of trade secrets without considering these factors codified" under Florida law "are per se unlawful").

289. See, e.g., FLA. STAT. ANN. § 90.506 (West 1995) (attempting to circumvent the conflict between disclosure and privilege by directing courts to "take protective measures that the interests of the holder of the privilege . . . require" when directing disclosure of such holder's trade secret).

290. See, e.g., FLA. STAT. ANN. § 90.506 ("A person has a privilege to refuse to disclose, and to prevent other persons from disclosing, a trade secret owned by that person if the allowance of the privilege will not conceal fraud or otherwise work injustice."); see also, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984) (holding that a protective order "entered on a showing of good cause as

according to some, could potentially undermine the privilege in all future cases within the sharing provision after the first case.<sup>291</sup>

But in the trade-secret-privilege context, these concerns conflate two separate issues and overstate the concern. First, the question of whether material is discoverable or not because of a privilege is distinct from concerns about limiting the proper audience for the material through protective orders.<sup>292</sup> If a court orders a party to produce otherwise privileged information because failing to do so would be “an injustice,” and does not enter a protective order, the information could be disseminated to the general public.

Of course, the inquiries inform one another. A court should consider the efficacy of protective measures when deciding to order production of trade secrets or other privileged information.<sup>293</sup> Whether to enter such an order, however, is a Rule 26(c) question, subject to the trial court’s broad discretion, not a privilege question. This distinction means that Rule 26(c)’s good cause standard, not privilege law, governs the size of the audience for trade-secret information a court has deemed discoverable.

Moreover, protective orders that account for similarity between the sharing case and receiving case adequately account for trade secret holders’ interests. Well-crafted sharing orders allow sharing only with factually similar litigation.<sup>294</sup> Thus, the

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required by Rule 26(c), . . . limited to the context of pretrial civil discovery, [that] does not restrict the dissemination of the information if gained from other sources” does not violate the First Amendment); Moskowitz, *supra* note 67, 824–25 (discussing the role of good cause in granting protective orders).

291. See *Wal-Mart Stores*, 81 So. 3d at 490 (“Sharing provisions, like the underlying one, which allow the dissemination of trade secrets without considering [the operation of the privilege] are per se unlawful.”).

292. Cf., e.g., *Chapa v. Garcia*, 848 S.W.2d 667, 673 n.8 (Tex. 1992) (Doggett, J., concurring) (“While discoverability by the parties is often confused with disclosability to the public, discoverability and disclosability issues must be resolved separately.”).

293. See *In re Cont’l Gen. Tire, Inc.*, 979 S.W.2d 609, 613 (Tex. 1998) (holding that courts should enter appropriate protective order *after* determining whether to order production of trade secret information).

294. See, e.g., *Raymond Handling Concepts Corp. v. Super. Ct.*, 45 Cal. Rptr. 2d 885, 886 (Cal Ct. App. 1995) (providing an example of a protective order that

shared information is likely necessary and relevant in the receiving case, satisfying the “injustice” prong of the trade-secret privilege.<sup>295</sup> If the discovery is relevant and necessary in one case involving a defective widget that injured a person it likely has a sufficient connection to another case involving the same widget that injured another person.

In essence, if the court compels disclosure of trade-secret information and simultaneously grants a protective order that allows sharing with similar cases, it has implicitly ruled that the information is necessary for the proper preparation of all cases within the sharing class.

To the extent the court has concerns about the relevance and necessity in cases receiving the information, it can address those concerns by narrowing the sharing class, not eliminating it entirely. An approach that allows appropriate sharing of trade-secret information, pursuant to a thoughtful and well-crafted sharing order, is consistent with the qualified trade-secret privilege.

Second, courts have long recognized that the trade-secret privilege is qualified rather than absolute.<sup>296</sup> Indeed, prominent commentators have recognized that protection for trade secrets is not a “true” privilege because trade secrets are “generally discoverable where they are relevant to the dispute.”<sup>297</sup> In many jurisdictions, the showings necessary to trigger compelled disclosure of trade secrets because of “injustice” boil down to something more than, but akin to, relevance.<sup>298</sup> Courts take this

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allowed sharing of information “in other pending similar litigation”).

295. See FLA. STAT. ANN. § 90.506 (stating that information may only fall within the trade-secret provision “if the allowance of the privilege will not . . . otherwise work an injustice”).

296. See, e.g., *Bleacher v. Bristol-Myers Co.*, 163 A.2d 526, 529 (Del. Super. Ct. 1960) (“Before a court will order a manufacturer to divulge information relating to a secret process or formula of his product, it must be clearly shown that the information required is relevant to the issue, not otherwise available and necessary in the proof of plaintiff’s case.”).

297. 2 MUELLER & KIRKPATRICK, *supra* note 274, § 5:49.

298. See, e.g., *Bleacher*, 163 A.2d at 529 (finding the plaintiff entitled to the trade secret information necessary to prove her case); see also 2 MUELLER & KIRKPATRICK, *supra* note 274, § 5:49 (“The term ‘privilege’ appears in this setting, but there is no ‘true’ privilege simply because trade secrets and competitive information are generally discoverable where they are relevant to

lenient approach because the trade-secret privilege works in tandem with protective orders to keep information from competitors.

The purpose of the privilege is to preserve the value of trade-secret information by forbidding its disclosure to the privilege holder's economic foes.<sup>299</sup> Almost all sharing orders forbid dissemination to the disclosing party's competitors. By doing so, the orders protect the value of the disclosing party's secrets. It is well established that compelling the disclosure of trade secrets in litigation subject to a protective order that prevents competitors from accessing the information is appropriate.<sup>300</sup>

### *B. Modification Standards*

To the extent courts use nonsharing protective orders, collateral litigants should be able to obtain easy access to discovery for use in related cases. Most courts to consider the issue take this liberal approach, championed by *Wilk v. American Medical Association*.<sup>301</sup> *Wilk's* presumption in favor of modifying

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the dispute.”). *But see In re Cont'l Gen. Tire, Inc.*, 979 S.W.2d at 613–14 (rejecting the argument that mere relevance is enough to overcome qualified trade secret privilege); *cf.* 26 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 5651 (1st ed. 2010) (stating that the concept of “injustice” in the qualified trade-secret context “expanded in the caselaw to any situation in which the facts cannot be ascertained without disclosure of the trade secrets” (internal quotation marks and citation omitted)).

299. *See, e.g., In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003) (“[A] trade secret is any formula, pattern, device or compilation of information which is used in one's business and presents an opportunity to obtain an advantage over competitors who do not know or use it.” (internal quotation marks and citation omitted)).

300. *See, e.g., Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill*, 443 U.S. 340, 362 n.24 (1979) (“Actually, orders forbidding any disclosure of trade secrets or confidential commercial information are rare. More commonly, the trial court will enter a protective order restricting disclosure to counsel. . .”).

301. 635 F.2d 1295, 1299 (7th Cir. 1980) (“[W]here an appropriate modification of a protective order can place private litigants in a position they would otherwise reach only after repetition of another's discovery, such modification can be denied only where it would tangibly prejudice substantial rights of the party opposing modification.”), *superseded by rule as stated in Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009); *see also, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131–32 (9th Cir. 2003) (citing *Wilk* with approval

protective orders to aid collateral litigation best supports Rule 1 interests, as highlighted at the Duke Conference and in the proposed civil rules amendments.<sup>302</sup>

Some courts, however, disagree and continue to impose an unduly high barrier to modifying protective orders.<sup>303</sup> The primary justification for doing so is the supposed harm to parties that have produced information in reliance on the order.<sup>304</sup> But reality belies this reasoning. First, many protective orders are stipulated umbrella orders, rubberstamped by a court.<sup>305</sup> By their very terms, these orders allow any party to the case to challenge the “confidentiality” of a document.<sup>306</sup> If a court sustains the challenge, the document is immediately stripped of protection. It is hard to envision how a party might view such an order as a guarantee of confidentiality and thereby rely on it.<sup>307</sup> Any party producing putatively confidential documents under an umbrella

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and requiring something less than *Martindell's* extraordinary circumstances test); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994) (rejecting extraordinary circumstances test as too strict); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1428 (10th Cir. 1990) (adopting the standard in *Wilk*); *Comes v. Microsoft Corp.*, 775 N.W.2d 302, 309–10 (Iowa 2009) (adopting the less stringent test from *Wilk*).

302. See COMMITTEE REPORT, *supra* note 6, at 77 (amending Rule 1 to emphasize that the parties, as well as the courts, have the responsibility to “secure the just, speedy, and inexpensive determination of every action”).

303. See *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (requiring “a showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need” to disclose information under the umbrella of a protective order).

304. See *id.* (rejecting a government attempt to modify a protective order where parties relied on the order in providing testimony that would otherwise be privileged under the 5th Amendment).

305. See Howard M. Erichson, *Court-Ordered Confidentiality in Discovery*, 81 CHI.-KENT L. REV. 357, 357 (2006) (“Disturbingly, some courts routinely sign orders which contain confidentiality clauses without considering the propriety of such orders, or the countervailing public interests which are sacrificed by the orders.” (citing *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 785 (3d Cir. 1994))).

306. See Marcus, *supra* note 10, at 500–02 (describing, with approval, the operation of umbrella protective orders).

307. See *id.* at 502 (“Admittedly, the court may find the fact that an umbrella order has been used bears on reasonable reliance issues if modification of the order is sought. . .”).

order is taking a leap of faith, not relying on a promise of future secrecy.

Second, it is well known that courts frequently modify protective orders to allow third parties to use discovery information in similar collateral litigation, particularly in products-liability litigation.<sup>308</sup> Indeed, many protective orders specifically indicate that the court retains jurisdiction to modify the order even after the primary litigation has ended. To the extent any party relies on an order expressly indicating it is subject to modification in a litigation system that frequently modifies orders for litigation-related use, such reliance is unreasonable.

Even if a party relies on a protective order for confidentiality, any harm flowing from a modification to allow information to be used in related litigation is minimal or nonexistent in most cases. Only two sources of harm typically flow from sharing-related modifications. Neither justifies an onerous modification standard. First, a party that produced inculpatory information in the sharing case may be held accountable in a receiving case for the real-world misconduct the shared information reveals. While this is undoubtedly undesirable for the producing party, courts should not resist modifying protective orders to aid parties in escaping liability in subsequent cases.<sup>309</sup> It is true that litigants sometimes escape liability as a by-product of the rules' goals (e.g., when a rule precludes disclosure of a damning fact for the sake of minimizing discovery's burdens or protecting another process), but minimizing liability for misconduct is not an appropriate use of the discovery rules.<sup>310</sup>

Many courts have lauded discovery sharing's capability to hold defendants accountable for varying discovery responses

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308. See *id.* at 498 (acknowledging courts' willingness to modify orders makes reliance less reasonable in many cases).

309. Cf. Dore, *supra* note 1, at 363 (arguing that protective orders should not be used to shield against liability).

310. See also *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (discussing the great need for grand jury transcripts to be kept confidential); cf. Dore, *supra* note 1, at 363 (arguing that protective orders should not be used as shield against liability).



across different cases.<sup>311</sup> Better holding defendants accountable for the real-world conduct that led to litigation seems to be an even more fundamental benefit of shared discovery. To the extent parties produce information in one case in reliance on a protective order to shield them from an inculpatory disclosure in a future case, their reliance is not detrimental in a sense that Rule 26 should recognize.<sup>312</sup>

A second harm Rule 26 might recognize is an increased risk of public disclosure, potentially undermining the competitive value of information.<sup>313</sup> When a protective order is modified, the audience of litigants and attorneys widens. Each additional person who receives the information makes it slightly more likely that someone violates the order's terms and disseminates the information to a broad, even public, audience.<sup>314</sup> The potential for mass dissemination may arguably be more acute in the Internet age, when one rogue recipient could disseminate an entire discovery production to a global audience.<sup>315</sup>

Nevertheless, experience has shown that the risk of such misconduct is minimal. During the more than forty years of the modern protective-order regime (including almost twenty years in

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311. See *In re Abbott Labs. Sec. Litig.*, No. 92 C 3869, 1993 WL 616693, at \*4 (N.D. Ill. Nov. 15, 1993) (stating that discovery sharing “allows plaintiffs’ counsel to verify that they, in their respective cases, have in fact received all of the documentation they are entitled to”).

312. *But see* *Martindell v. Int’l Tel. & Tel. Corp.*, 594 F.2d 291, 295–96 (2d Cir. 1979) (finding that the district court erred in allowing the Government to obtain protected testimony because “a witness should be entitled to rely upon the enforceability of a protective order against any third parties” otherwise such witnesses would be “inhibited from giving essential testimony in civil litigation”).

313. See *Campbell*, *supra* note 2, at 824 (discussing the potential for “serious problems of policing and enforcement” of protective orders and noting that “[o]nce 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”).

314. See *id.* (“[T]he likelihood of violation, inadvertent or otherwise, will increase in direct proportion to the number of disclosures.”).

315. See *Marder*, *supra* note 26, at 318 (observing that with the existence of the Internet “the reach of ‘public’ has expanded, and the consequences of any mistaken disclosure are far greater than when the ‘public’ meant an individual who went down to the courthouse . . . and then returned the document” after reading it).

the Internet age), notable protective order violations are relatively rare.<sup>316</sup> The relatively low number of serious violations likely stems from the serious consequences imposed on attorneys who violate orders. Contempt is one possible sanction.<sup>317</sup> A less recognized informal punishment, but one that may serve as a serious deterrent, is the likely use of an attorney's protective-order violation as evidence in other courts to prevent that same attorney, or expert, from obtaining access to discovery in future cases.<sup>318</sup> This informal sanction could undermine a protective-order violator's livelihood.

Moreover, harm flowing from reliance on an order modified to allow yet-to-occur future violations is speculative.<sup>319</sup> When courts assess the detriments of a modification, they should focus on actual or likely harm, not low-level possibilities.<sup>320</sup> Protective-order violations are rare, but unauthorized disclosure to a competitor of a producing party as the result of a protective-order modification is almost unheard of.

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316. Some violations have occurred over the years, but courts have displayed robust willingness to enforce their orders. Relative to the tens of thousands of protective orders issued during the Rule 26(c) era, the number of violations remains small. *But see* Smith & Fuller, P.A. v. Cooper Tire & Rubber Co., 685 F.3d 486, 490 (5th Cir. 2012) (upholding sanctions for inadvertent violation when attorneys had unintentionally disseminated materials via a CD provided to a plaintiffs' conference audience); McDonald v. Cooper Tire & Rubber Co., 186 F. App'x 930, 932 (11th Cir. 2006) (finding violation of protective order); Nevil v. Ford Motor Co., No. CV 294-015, 1999 WL 1338625, at \*4 (S.D. Ga. Dec. 23, 1999) (finding expert in contempt when expert disclosed information about protected documents in collateral litigation).

317. *See, e.g.*, Marcus, *supra* note 50, at 348 (noting that "contempt of court" is a potential punishment for violating a protective order).

318. Defendants are not shy about using past protective-order violations against the violator to urge courts not to grant access to information. *See* Defendant Cooper Tire & Rubber Co.'s Memorandum of Law in Opposition to Plaintiffs' Motion to Compel & in Support of Cooper's Motion for a Protective Order at 45, Richards v. Ford Motor Co., No. 310958/2011, 2013 WL 6096311 (N.Y. Sup. Ct. Dec. 9, 2011) (emphasizing that the "[p]laintiffs' retained tire expert, Dennis Carlson, has been sanctioned previously" for violating a protective order).

319. *See, e.g.*, Timmins, *supra* note 92, at 1523 (noting that courts have held that risk of harm through future disclosure is "entirely speculative").

320. *See, e.g.*, Parsons v. Gen. Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980).

Beyond the harm accruing to a particular litigant from relying on a later-modified protective order, some courts have considered negative impacts on the system that might flow from modifying an order. That was the scenario in *Martindell*, where the Second Circuit required extraordinary circumstances to modify an order to allow civil discovery to be used in a criminal prosecution.<sup>321</sup> Several witnesses relied on the protective order at issue when deciding not to exercise their Fifth Amendment right not to testify at a deposition.<sup>322</sup>

The court understandably worried that modifying the order would deter future litigants in the same situation from cooperating in civil discovery, particularly when criminal liability loomed in the background.<sup>323</sup> This reasoning doubtless has common sense appeal—knowing that a protective order might be modified to accommodate prosecutors would cause most people to refuse to testify by invoking the Fifth.

The gap in the court's reasoning, however, is twofold. First, it is less than clear that future witnesses would know about the previous protective order modification. Second, most cases do not involve discovery that has a dual-purpose use as both civil discovery and high-stakes criminal evidence, making the specter of widespread discovery resistance unlikely in regular circumstances.<sup>324</sup> In the absence of empirical evidence to the contrary, it seems unreasonable to assume that parties engaged in ordinary civil litigation will resist discovery to a greater extent than they would have anyway because of a possible protective-order modification.

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321. See *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979) (discussing the reasons the “information in question” was not found to be confidential).

322. See *id.* at 295–96.

323. See *id.* (“In short, witnesses might be expected frequently to refuse to testify pursuant to protective orders if their testimony were to be made available to the Government for criminal investigatory purposes in disregard of those orders.”).

324. Cf. *In re Agent Orange Prod. Liab. Litig.*, 821 F.2d 139, 147 (2d Cir. 1987) (finding that, in contrast to the deponents in *Martindell*, the proponents of continued protection in this case “could not have relied on the permanence of the protective order”), *superseded by statute as stated in Iridium India Telecom Ltd. v. Motorola, Inc.*, 165 F. App'x 878 (2d Cir. 2005).

The *Wilk* court appropriately created a presumption in favor of modifying protective orders to give collateral litigants access to discovery in the absence of substantial prejudice to the party opposed to the modification.<sup>325</sup> This modification-friendly approach considers the same interests as the *Martindell* court but accords them different importance.<sup>326</sup>

Instead of presuming the harm done to parties who allegedly rely on later-modified protective orders, the *Wilk* court requires a party resisting sharing via a modification to demonstrate actual harm from reliance or other prejudice.<sup>327</sup> At the same time, the *Wilk* test accords proper weight to the benefits of shared discovery by placing a thumb on that end of the scale. This proof-based approach to reliance reasonably balances the interests at stake.

A liberal modification regime also complements the current proposed amendments to the civil rules. When litigants in collateral cases modify a protective order and receive discovery under the modification, the discovery process is aided in collateral courts. Litigants receiving shared discovery information are in a better position to understand the benefits of potential discovery requests and to tailor them accordingly.<sup>328</sup> Like any

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325. See *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299–1300 (7th Cir. 1980) (explaining that the presumption for public access to pretrial discovery “should operate with all the more force when litigants . . . use discovery in aid of collateral litigation on similar issues” because “access in such cases materially eases the tasks of courts . . . and speeds up . . . a lengthy process”), *superseded by rule as stated in* *Bond v. Utreras*, 585 F.3d 1061 (7th Cir. 2009).

326. See *State ex rel. Ford Motor Co. v. Manners*, 239 S.W.3d 583, 587–88 (Mo. 2007). The *Manners* court has recognized a third strand, in addition to the *Martindell* and *Wilk* tests, in the modification standard fight. See *id.* (“Arguably, the standards recognize the same controlling criteria and differ only in the weight that should be given to the criteria in their balancing.”).

327. See *Wilk*, 635 F.2d at 1301 (concluding that due to the “close similarity” between the actions the “State is presumptively entitled to access to all of the *Wilk* discovery on the same terms as the *Wilk* plaintiff”).

328. See FED. R. CIV. P. 26(b)(2)(C)(iii) (“[T]he burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”); see also COMMITTEE REPORT, *supra* note 6, at 80 (showing committee’s suggested amendments to Fed. R. Civ. P. 26 regarding proportionality in discovery).

form of discovery sharing, sharing through protective-order modifications has the potential to reduce oft-repeating discovery litigation in repeating cases.

### *C. Proportionality and Sharing*

Although sharing does work in tandem with proportionality to streamline discovery, the relationship has its limits. For instance, shared discovery does not provide an independent ground for courts and litigants to employ the proportionality concept to limit discovery in most instances. At first glance, shared discovery from a previous or contemporaneous case might potentially be a “more convenient, less burdensome” source of information.<sup>329</sup> Moreover, shared discovery from another case might reduce the “importance of the discovery in resolving the issues.”<sup>330</sup> Shared discovery in the possession of a requesting party almost certainly does not preclude similar discovery in the party’s own case based on these provisions in their current or amended form.

Despite the intuitive appeal of the argument, no commentators and few courts have directly addressed the question. Courts have, however, regularly addressed the closely related question of whether litigants may request information from another party when the requestor already has the information in her possession.<sup>331</sup> And they have routinely allowed such discovery.<sup>332</sup>

For example, courts should seldom disallow the deposition of a witness in a case just because that witness has previously been deposed in another case, even though that deposition has been shared.<sup>333</sup> The re-deposition of the witness should be allowed

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329. FED. R. CIV. P. 26(b)(2)(C)(i).

330. FED. R. CIV. P. 26(b)(2)(C)(iii).

331. *See, e.g.*, *Wilson Land Corp. v. Smith Barney, Inc.*, 48 Fed. R. Serv. 3d 1297, 1302 (E.D.N.C. 2000) (“The mere fact that the matters regarding which discovery is sought happen to be within the knowledge of the moving party is not usually grounds for objection . . .”).

332. *Id.*; *Weiner v. Bache Halsey Stuart, Inc.*, 76 F.R.D. 624, 625 (S.D. Fla. 1977).

333. *Cf. Hoh Co. v. Travelers Indem. Co.*, No. 87-0274 RCL, 1991 WL

because, particularly with party witnesses, litigants in the current case are entitled to know that the party's contentions at deposition are based on current information for the current case.<sup>334</sup> Indeed, discovery is not limited to just an investigation of facts; another important purpose of discovery is to ascertain the parties' contentions about the facts, claims, and defenses.<sup>335</sup> Over time, parties can subtly shift their positions or give a different version of the facts. Memories change.

Different advocates advancing different claims ask different questions. Forcing litigants to rely on potentially outdated depositions to ascertain the current case's factual and legal posture would undermine the quality of fact finding at trial. Thus, there is substantial necessity for the deposition in the second case, and even though there is substantial subject-matter overlap, the deposition is not, in any way that is cognizable by Rule 26, "duplicative" or "cumulative" or even "available" from a less costly source.

The same logic should also apply when the form of discovery is dependent on written questions and a potentially variable party response.<sup>336</sup> Over time, circumstances, along with claims and defenses, change. Litigants should have the benefit of their own questions and the responses that flow from them. Requests for admissions provide an apt example. Asking someone to admit a fact or position presumes that the person asking has some previous knowledge on which to base the question.<sup>337</sup> Even if that

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229948, at \*3 (D.D.C. Oct. 25, 1991) (holding re-deposition allowed in light of changed legal circumstances after remand).

334. *See id.* (stating that the proposition that a court may not "prohibit the taking of a deposition altogether . . . absent extraordinary circumstances" applies "even when the party seeking discovery wishes to take a second deposition of the same individual").

335. *See* 8 WRIGHT ET AL., *supra* note 160, § 2014 (observing that the rule prohibiting discovery of matters within knowledge of requesting party "could hardly apply to discovery under the federal rules, since the purpose of the discovery rules is not only to elicit unknown facts, but also to narrow and define the issues").

336. *See, e.g.,* *United States v. 58.16 Acres of Land*, 66 F.R.D. 570, 573 (E.D. Ill. 1975) (holding that interrogatories are proper even when inquiring party already has knowledge).

337. *See* 8 WRIGHT ET AL., *supra* note 160, § 2014 ("[T]he very existence of a request-for-admission procedure, which often implies some knowledge on the

knowledge flows from shared discovery, courts should not preclude discovery as disproportionate.

Proportionality may, however, provide a mechanism to preclude re-discovery of information in some very limited circumstances. For instance, courts may decide that identical requests, including requests to which responses would not change from case to case, are “duplicative” or “cumulative” or simply not necessary in light of the burden of producing information that overlaps with already shared discovery.<sup>338</sup> But this is a principle of limited applicability.

Seldom will requests or responses be identical, or virtually so, even in similar cases. The facts of each case, and the parties’ contentions and shading of the facts in each case, will almost necessarily vary. The particular benefits of discovery for the current case must, in most cases, be weighed anew against the burdens of production despite the existence of shared responses from a previous case.<sup>339</sup> Thus, while sharing supports proportionality through the better exercise of attorney discretion, the practice is not an independent ground to limit discovery under the current or amended proportionality rules.

Instead of providing a basis to forbid discovery, sharing allows litigants to more carefully and thoughtfully employ proportional discovery requests. Instead of searching in the dark with unfocused discovery requests, attorneys can target particularly beneficial information based on their knowledge of other discovery productions in similar cases. This increased accuracy reduces both the volume of discovery requests and potential litigation about those requests stemming from well-founded or unfounded objections. In many instances, faced with

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part of the requesting party of the matters covered by the requests for admissions, shows that knowledge is no bar to use of the tools authorized by Rules 26 to 36.”).

338. 6 MOORE ET AL., *supra* note 136, ¶ 26.41[13] (“A court will nevertheless limit discovery of matters known to the discovering party when the discovery appears to serve no purpose . . .”).

339. See *Wiwa v. Shell Petrol. Dev. Co. of Nigeria Ltd.*, 335 F. App’x 81, 84 (2d Cir. 2009) (holding that the district court committed clear error by granting a Rule 26(b)(2)(C)(iii) request to limit discovery because of availability of discovery in related cases when previous discovery was inadequate to address issues in present case).

the choice between drafting requests for information already in their possession (and potentially litigating objections to those requests), litigants may well exercise their discretion to rely on shared information.

### *V. Conclusion*

Many courts have long recognized the benefits of discovery sharing, despite the fact that over thirty years of procedural reform aimed at improving discovery have ignored it. Partially as a result of this inattention, courts remain divided in their approach to the issue. Litigants and the court system suffer as a result. Preferring upfront sharing provisions and making later modifications easier would be steps consistent with the spirit and letter of current procedural reform. On balance, sharing makes courts more efficient, more transparent, and more effective at finding the truth. Courts operating within the discretion afforded by Rule 26(c), and similar state rules, should exercise their power to reap these benefits.