COURT-ORDERED CONFIDENTIALITY IN DISCOVERY

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INTRODUCTION

Some version of the following exchange happens regularly in state and federal courts around the United States. A party seeks discovery; the request includes a demand for documents or other information that the responding party considers sensitive. The responding party agrees to turn over the documents or other information only if given an assurance of confidentiality. The lawyers hammer out a confidentiality agreement that both sides find acceptable, and they present it to the judge as a stipulated protective order. The setup is so commonplace that it would be easy to miss the following question, which is not an easy one. Should the court grant the protective order based solely on the parties' stipulation, or should the court require some showing that confidentiality is warranted? If the latter, how strong a showing should the court demand? Some judges simply sign the stipulated order with no questions asked.[1] Others require a showing of good cause, the level of rigor of which may vary.[2] Some lawyers complain that courts have become increasingly hostile to stipulated protective orders.[3]

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1. *See* Estate of Frankl v. Goodyear Tire & Rubber Co., 853 A.2d 880, 882 (N.J. 2004) ("Without making any findings, a trial court signed the [stipulated] Protective Order."). *See also* Pansy v. Borough of Stroudsburg, 23 F.3d 772, 785 (3d Cir. 1994) ("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."); Advanced Modular Sputtering, Inc. v. Superior Court, 33 Cal. Rptr. 3d 901, 904 n.2 (Ct. App. 2005) (noting that "the parties stipulated to the entry of another protective order pursuant to which many of their documents are treated as confidential and filed under seal"); *In re* Shell E & P, Inc., No. 04-05-00345-CV, 2005 WL 2085337, at *1 (Tex. App. Aug. 31, 2005) (allowing a non-party standing to enforce "an 'Unopposed Protective Order Regarding Confidentiality' . . . which was signed by [the court in a prior lawsuit]"); Bd. of Trustees of Cal. State Univ. v. Superior Court, 34 Cal. Rptr. 3d 82, 90 (Ct. App. 2005) (suggesting that if parties wish to keep certain litigation documents confidential, "the parties could agree on a protective order as to such documents at the outset of the litigation").

2. *See* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003); Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995); Jepson, Inc. v. Makita Elec. Works, Ltd., 30 F.3d 854, 858 (7th Cir. 1994). *See also* Jordana Cooper, *Beyond Judicial Discretion: Toward a Rights-Based Theory of Civil Discovery and Protective Orders*, 36 RUTGERS L.J. 775, 782 (2005) ("Even in

The debate over discovery confidentiality has raged for over twenty years,[4] since before the Supreme Court's decision in *Seattle Times Co. v. Rhinehart*,[5] and it shows no sign of fading. If anything, issues of litigation confidentiality appear to have gained increased attention in recent years. The United States District Court for the District of South Carolina attracted nationwide attention in 2002 when it adopted a local rule severely restricting secret settlements and addressing other aspects of court-ordered confidentiality.[6] In 2004 the Federal Judicial Center completed an empirical study of sealed settlements.[7] It seems that each month of 2005 brought new attention to this set of issues. In January, the Civil Procedure Section of the Association of American Law Schools presented a program on "Secrecy in Litigation."[8] In February, the federal judges for the District of New Jersey adopted a local rule imposing restrictions on discovery protective orders as well as sealed settlements.[9] In March, the Supreme Court decided *Ballard v. Commissioner of Internal Revenue*,[10] involving the secrecy of Tax Court

cases where the parties stipulate to the terms of a protective order, it is of little moment without a true satisfaction of this rigorous 'good cause' standard because the Court is charged with independently testing the protective order under Rule 26(c).").

3. *See* Jack E. Pace III, *Testing the Security Blanket: An Analysis of Recent Challenges to Stipulated Blanket Protective Orders*, ANTITRUST, Summer 2005 at 46, 46.

> Even where both parties agree to limitations on the use of their opponent's confidential information—and there is no live dispute before the court concerning the use of that information—courts increasingly are rejecting SPOs [Stipulated Protective Orders]. These rejections usually occur in unpublished orders or during discovery status conferences and are not reported in published decisions. But a growing body of case law, commentary, and anecdotal evidence indicates a marked and growing trend in this direction.

Id. Pace, an antitrust lawyer, writes that in the past two years he was involved on three occasions in cases in which courts refused to sign stipulated protective orders. *Id.* at n.5.

4. *See, e.g.*, Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1 (1983).

5. 467 U.S. 20 (1984).

6. D.S.C. LOCAL R. 5.03. *See* 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, 719–26 (2004) (describing the adoption of the District of South Carolina local rule).

7. *See* R. TIMOTHY REAGAN ET AL., FED. JUDICIAL CTR., SEALED SETTLEMENT AGREEMENTS IN FEDERAL DISTRICT COURT 1 (2004), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/SealSet3.pdf/$file/SealSet3.pdf.

8. The words "secrecy" and "confidentiality" in this context are both loaded terms. Whereas secrecy tends to connote something dangerous or dirty, confidentiality, especially among lawyers, connotes an ethical duty. Those who favor greater openness in litigation tend to describe their opposition to "secrecy," while those who place less weight on openness describe their support of "confidentiality." *Compare, e.g.*, Anderson, *supra* note 6, at 711, *with* Richard L. Marcus, *The Discovery Confidentiality Controversy*, 1991 U. ILL. L. REV. 457 (1991). I moderated the 2005 AALS panel and chose the title "Secrecy in Litigation" because the panel was designed around the anti-secrecy arguments and responses to them. In this Article, however, I refer to the issue as one of confidentiality, consistent with the Article's central theme that, given the breadth of modern United States discovery, courts in most cases should grant confidentiality orders on a relatively light showing.

9. *See* D.N.J. LOCAL R. 5.3 (adopted Feb. 24, 2005).

10. 125 S. Ct. 1270 (2005).

trial judge findings. And in April, The Sedona Conference Working Group on Protective Orders, Confidentiality and Public Access published a draft set of guidelines ("Sedona Guidelines") on protective orders and litigation confidentiality.[11]

When parties present a court with a stipulated protective order, it is easy to understand why many judges would be quick to sign it. Such a protective order addressing discovery confidentiality lubricates the wheels of discovery. With a protective order in place, a responding party is more willing to turn over information rather than asserting and litigating every plausible relevance objection and privilege objection. After all, neither party objects to the order. On the other hand, litigation is a public process. Court-ordered confidentiality may prevent the public from gaining access to information that bears on public health and safety. Confidentiality may also decrease the efficiency of litigation by obstructing information-sharing among lawyers. Finally, there is a nagging sense that the imprimatur of the court ought not to be given without at least some showing of good cause.

This Article offers support for the argument that protective orders for discovery confidentiality should be granted upon a relatively light showing of good cause. The Article proceeds in two parts. Part I offers reasons why, in the vast majority of cases, courts should readily grant motions for protective orders with respect to discovery confidentiality as long as the movant can articulate some legitimate need for the information to be kept confidential. Looking at modern United States discovery from a comparative and historical perspective, broad and powerful party-controlled discovery can only be justified as a means of finding information for the resolution of the dispute, not as a public information tool. Part II explains why some showing of good cause nonetheless should be required, even if the parties themselves agree to the confidentiality protections.

I. A LIGHT STANDARD OF GOOD CAUSE FOR DISCOVERY CONFIDENTIALITY

Federal Rule of Civil Procedure 26(c) permits a court to grant a protective order "for good cause shown."[12] What constitutes good cause, however, necessarily depends on the extent to which courts have reason to

11. The Sedona Conference Working Group on Protective Orders, Confidentiality & Public Access, *The Sedona Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases*, 6 SEDONA CONF. J. 183 (2005) [hereinafter *Sedona Guidelines*], *available at* http://www.abanet.org/litigation/abaannual/papers/06b.pdf (April 2005 Revised Public Comment Draft Version).

12. FED. R. CIV. P. 26(c). *See also, e.g.*, N.J. R. CT. 4:10-3 (similarly permitting a court to grant a protective order "for good cause shown").

resist granting the requested order. Regarding protective orders forbidding certain discovery or otherwise limiting parties' access to information, courts appropriately require a showing that the information sought is not properly discoverable or that the discovery would cause an undue burden.[13] The question is whether protective orders that do not limit discovery of information, but rather restrict the disclosure of that information beyond the litigation, should require a similarly robust showing of good cause.

The recent draft Sedona Guidelines wisely recommend an easily satisfied threshold for obtaining confidentiality protective orders: "[T]he good cause standard generally should be considered to be satisfied as long as the parties can articulate a legitimate need for privacy or confidentiality, in those instances where the protective order will apply only to the disclosure of information exchanged during discovery."[14]

The Guidelines go on to emphasize that the good cause standard for a confidentiality protective order covering unfiled discovery does not require a detailed showing:

> Because of the limited scope and provisional nature of the protective order, the court need not conduct a detailed evidentiary inquiry into the nature of the information at issue, which courts are sometimes unwilling or often practically unable to do, where much or all of the information at issue may not ever be used in connection with the determination of the merits of the dispute.[15]

This approach makes sense. A light standard of good cause for discovery confidentiality reduces the burden on the court and facilitates the parties' information-gathering without impairing the public's ability to monitor the adjudicatory process.

Some courts require a more rigorous good cause showing before granting a protective order for discovery confidentiality. In the Third Circuit, such a protective order may not be granted unless the proponent shows that disclosure would cause a "clearly defined and serious injury,"[16] and

13. *Cf.* FED. R. CIV. P. 26(c).

14. *Sedona Guidelines*, *supra* note 11, at 201–02.

15. *Id.* at 202.

16. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994). The Third Circuit adheres to the following seven-factor test for deciding whether to grant a confidentiality protective order:

> 1) whether disclosure will violate any privacy interests;
> 2) whether the information is being sought for a legitimate purpose or for an improper purpose;
> 3) whether disclosure of the information will cause a party embarrassment;
> 4) whether confidentiality is being sought over information important to public health and safety;
> 5) whether the sharing of information among litigants will promote fairness and efficiency;
> 6) whether a party benefiting from the order of confidentiality is a public entity or official; and

the need for the protective order must be shown with specificity.[17] One practice guide on federal discovery proceedings advises attorneys that "[a] party seeking an order prohibiting disclosure of information obtained through discovery must show good cause. There must be evidence that disclosure would work a clearly defined and serious injury. The motion should be supported by facts, rather than conclusory statements, to demonstrate injury."[18]

Requiring evidence that disclosure would cause a "clearly defined and serious injury" imposes too great a burden on those seeking confidentiality protection. Such a strict requirement would make sense only if there were a strong presumption in favor of public access to discovery. Resistance to confidentiality orders comes from a sense that the machinery of justice should be accessible to the public. Litigation is a public process, the argument goes, and public monitoring of the justice system requires that nonparties have access to the information that drives adjudication. But discovery is not adjudication, and the presumption of public access that applies to the adjudicatory process should not apply equally to discovery.

It is important, in this regard, to distinguish between filed and unfiled discovery. A presumption of public access attaches to the adjudicatory process itself. Thus, for example, public access to the courtroom during trials should not be blocked except for very good reason.[19] Likewise, pleadings and dispositive motions are public records that should not be sealed except under compelling circumstances.[20] When materials obtained in discovery are introduced as evidence, either at trial or as attachments to a motion for summary judgment or other merits-related motion,[21] they become part of the adjudicatory process, and should be treated much like pleadings

7) whether the case involves issues important to the public.

Shingara v. Skiles, 420 F.3d 301, 306 (3d Cir. 2005) (citing Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995)).

17. *Pansy*, 23 F.3d at 786. *See also Shingara*, 420 F.3d at 306 ("In *Pansy* we explained that there is good cause when a party shows that disclosure will result in a clearly defined, specific and serious injury but that broad allegations of harm are not sufficient to establish good cause.").

18. 2 DISCOVERY PROCEEDINGS IN FEDERAL COURT § 20.13, at 24–25 (3d ed. 1995).

19. *See Sedona Guidelines*, *supra* note 11, at 25 ("Public access to trials on the merits, both jury and nonjury, reflects a long tradition in the United States. Trials have long been considered open to the public. Public access to trials is essential to the monitoring and oversight of the judicial process.").

20. *See, e.g.*, *In re* Cendant Corp., 260 F.3d 183, 192–93 (3d Cir. 2001); *see also* N.J. R. CT. 1:38 ("All records which are required by statute or rule to be made, maintained or kept on file by any court . . . shall be deemed a public record and shall be available for public inspection and copying [except for certain categories of confidential documents such as personnel records and probation reports].").

21. Materials filed as attachments to a discovery motion, however, ordinarily should be treated the same as unfiled discovery. *See, e.g.*, Hammock v. Hoffmann-LaRoche, Inc., 662 A.2d 546, 558 (N.J. 1995) ("[T]here is no presumptive right-of-public-access to discovery motions filed with the trial court.").

and courtroom proceedings, accessible to the public unless there is a compelling reason to the contrary.[22] The recent Sedona Guidelines state this point as a fundamental principle: "The public has a qualified right of access to pleadings, motions, and any other papers submitted to a court on matters that affect the merits of a controversy that can only be overcome in compelling circumstances."[23] Unfiled discovery,[24] on the other hand, does not give rise to a presumption of public access.[25] As the Sedona Guidelines put it, "[t]here is no presumed right of the public to participate in the discovery process or to have access to the fruits of discovery that are not submitted to the court."[26] Public monitoring of the judicial system does not require access to materials that are exchanged during discovery but not submitted for use in adjudication.

A. Modern United States Discovery in Comparative and Historical Perspective

From both a comparative and historical perspective, the breadth of modern United States discovery is staggering. Under the Federal Rules of Civil Procedure, as well as under state rules with comparable provisions, "[p]arties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party."[27] The Rule assumes that one piece of information may lead to another: "Relevant information need not

22. *See id.* at 558–59 (recognizing a strong presumption in favor of public access to documents filed as motion attachments).

23. *Sedona Guidelines*, *supra* note 11, at 188. The commentary explains:

> A qualified right or presumption of public access attaches to all documents filed with the court and material to the adjudication of all non-discovery matters. To overcome the presumption, the proponent of any motion to seal documents or court proceedings to which the presumption attaches must demonstrate that there are compelling reasons for denying public access and no reasonable alternative.

Id. (citation omitted).

24. Under the Federal Rules, parties must file pleadings, motions, and other papers, but do not file disclosures, depositions, interrogatories, document requests, or requests for admission unless they are used in the proceeding. *See* FED. R. CIV. P. 5(d); *see also* Estate of Frankl v. Goodyear Tire & Rubber Co., 853 A.2d 880, 886–87 (N.J. 2004) ("Furthermore, the 2000 Amendment to *Fed. R. Civ. P. 5(d)*, setting forth that discovery must *not* be filed unless it is 'used in the proceeding,' bolsters the distinction between filed and unfiled documents and supports the conclusion that unfiled discovery is not meant to be accessible to non-parties.").

25. *See, e.g.*, *In re* GlaxoSmithKline PLC, 699 N.W.2d 749, 755 (Minn. 2005) ("[D]ocuments produced as discovery are not presumed to be public."). Thus, in *Hammock*, while finding a presumption of public access to documents filed in connection with civil litigation, the New Jersey Supreme Court emphasized that "[t]he standard we establish today recognizes that there must continue to be confidentiality of materials submitted in the discovery process." 662 A.2d at 558.

26. *Sedona Guidelines*, *supra* note 11, at 200.

27. FED. R. CIV. P. 26(b). Even broader discovery is obtainable by court order upon a showing of good cause: "discovery of any matter relevant to the subject matter involved in the action." FED. R. CIV. P. 26(b).

be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[28] Although the scope of discovery under this Federal Rule was narrowed slightly by the 2000 amendments to Rule 26,[29] it remains extraordinarily broad. Not only do the Rules establish a broad scope of discoverable information, they provide a kit full of powerful tools for extracting that information: interrogatories,[30] written and oral depositions,[31] inspection of documents, things, and land,[32] physical and mental examinations,[33] and requests to admit.[34] Depositions and documents can be obtained from non-parties as well as parties.[35] Those who fail to comply with discovery requests may be ordered to do so,[36] and failure to comply with an order compelling discovery may subject the person to sanctions.[37] All in all, Federal Rules 26 through 37, and comparable rules in many states, give litigants extraordinary power to force others to turn over information against their will.

From a comparative perspective, United States discovery is unique. As Linda Mullenix puts it, "no other country in the world has any system of discovery approaching that provided for in the Federal Rules of Civil Procedure."[38] Neither civil law countries nor other common law countries give parties such power to demand information. The approach in most civil law countries is summarized by the American Law Institute and UNIDROIT[39] in the introduction to their proposed Principles and Rules of Transnational Civil Procedure:

> Under the civil law there is no discovery as such. However, a party has a right to request the court to interrogate a witness or to require the opposing party to produce a document. This arrangement is a corollary of the general principle in the civil-law system that the court rather than the parties is in charge of the development of evidence. In some civil-law systems a party cannot be compelled to produce a document that will es-

28. FED. R. CIV. P. 26(b).

29. Before 2000, Rule 26(b) permitted discovery of "any matter, not privileged, which is relevant to the subject matter involved in the pending action." STEPHEN C. YEAZELL, FEDERAL RULES OF CIVIL PROCEDURE 66, 69 (1999).

30. FED. R. CIV. P. 33.

31. FED. R. CIV. P. 30; FED. R. CIV. P. 31.

32. FED. R. CIV. P. 34.

33. FED. R. CIV. P. 35.

34. FED. R. CIV. P. 36.

35. FED. R. CIV. P. 30(a)(1); FED. R. CIV. P. 34(c).

36. FED. R. CIV. P. 37.

37. FED. R. CIV. P. 37.

38. Linda S. Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. 1, 6 (2001).

39. UNIDROIT is the International Institute for the Unification of Private Law, an organization with approximately fifty member countries.

> tablish its own liability—something like a civil equivalent of a privilege against self-incrimination. However, in many civil-law systems a party may be compelled to produce a document when the judge concludes that the document is the only evidence concerning the point on issue. . . . In any event, the standard for production under the civil law appears uniformly to be "relevance" in a fairly strict sense.[40]

Stephen Subrin, in his provocatively titled article, *Discovery in Comparative Perspective: Are We Nuts?*, emphasizes the difference in the amount of lawyer control: "Lawyers in civil law countries do not conduct pretrial depositions. There is also no pretrial document production conducted by the lawyers."[41]

Even in other common law countries, such as the United Kingdom and Canada, U.S.-style discovery is largely unknown:

> In most common-law jurisdictions, pretrial depositions are unusual and, in some countries, typically are employed only when the witness will be unavailable for trial. Documents are subject to discovery only when relevant to the proceeding. Relevance for this purpose is defined by reference to the pleadings in the case and . . . the rules of pleading require full specification of claims and defenses.[42]

In England, for example, parties may apply to the court for permission to take an oral deposition in limited situations, such as when a witness will be unavailable for trial.[43]

Professor Subrin acknowledges areas of convergence in light of the fact that England, Japan, the Netherlands, and other countries have adopted procedures that somewhat increase parties' ability to gather information,[44] but ultimately there is no denying the disparity between discovery in the United States and elsewhere:

> [T]he number of discovery mechanisms available to the American lawyer as a matter of right, the degree of party control over discovery, the extent to which liberal discovery in the United States has become what

40. AM. LAW INST., ALI/UNIDROIT PRINCIPLES AND RULES OF TRANSNATIONAL CIVIL PROCEDURE 12–13 (2004) (proposed final draft of March 9, 2004), *available at* http://www.unidroit.org/english/principles/civilprocedure/ali-unidroitprinciples-e.pdf.

41. Stephen N. Subrin, *Discovery in Global Perspective: Are We Nuts?*, 52 DEPAUL L. REV. 299, 302 (2002).

42. AM. LAW INST., *supra* note 40, at 11.

43. *See* Subrin, *supra* note 41, at 305. Canadian depositions ("examinations for discovery") are more limited than those in the United States. Parties have a right to examine only each individual party and one representative of each corporate party; there is no right to depose non-parties without leave of court. *Id.* at 306 n.34.

44. *See id.* at 302–03 (describing Japan's 1998 procedural reforms); *id.* at 303–04 (describing England's 1999 procedural reforms); *id.* at 306 & n.35 (describing the Netherlands' 1988 procedural reforms). *See also* Mullenix, *supra* note 38, at 24–26 (suggesting that there has been some convergence in discovery); *see generally* KUO-CHANG HUANG, INTRODUCING DISCOVERY INTO CIVIL LAW (2003) (advocating incorporation of more discovery procedures into civil law systems).

> almost looks like a constitutional right, and the massive use of discovery of all kinds in a substantial number of cases surely sets us apart.[45]

What is extraordinary about United States discovery from a comparative perspective is not only its breadth, but also the extent to which it is controlled by the parties rather than by the court. In spite of this, the court may become involved in discovery in several ways. Under the Federal Rules, certain aspects of discovery require the court's approval, such as physical and mental examinations.[46] Parties may solicit the court's involvement by moving to compel, seeking a protective order, or requesting sanctions.[47] In complex cases, courts sometimes appoint special masters to oversee discovery.[48] On the whole, however, the discovery Rules are designed to minimize the court's role and to enable the parties to control the process. By contrast, even in other common law countries where lawyers develop the evidence, the lawyers' power is significantly circumscribed by judicial control.[49] In civil law countries, the court possesses primary control over evidence-gathering.[50]

Looking at modern United States discovery from an historical perspective highlights the same two features: its breadth and the extent of party control. At common law, which depended on pleadings and trial to bring out the information relevant to adjudication, discovery played little role.[51] Rather, the antecedents of modern discovery devices may be found

45. Subrin, *supra* note 41, at 306–07.

46. *See* FED. R. CIV. P. 35. *See also* Fed. R. Civ. P. 26(b) (requiring court order for discovery of matters "relevant to the subject matter" but not "relevant to the claim or defense of any party").

47. *See* FED. R. CIV. P. 26; FED. R. CIV. P. 37.

48. MANUAL FOR COMPLEX LITIGATION (FOURTH), § 11.424 (2004).

49. *See* Subrin, *supra* note 41, at 305 (noting that in England, if the court gives permission to take an oral deposition, the court decides whether a judge, an examiner of the court, or a person appointed by the court will preside over the deposition).

50. *See* RUDOLF B. SCHLESINGER ET AL., COMPARATIVE LAW 469 (6th ed. 1998) (explaining the rule against taking depositions in many civil law countries in terms of "their fundamental notion that the taking of evidence in a lawsuit is not a private matter, but a function of the state, i.e., a function that may be performed only by judges or other officials deriving their authority from the local sovereign"); MANUAL FOR COMPLEX LITIGATION, *supra* note 48, at § 11.494.

> Discovery directed at witnesses, documents, or other evidence located outside the United States will often create problems, since many countries view American pretrial discovery as inconsistent with or contrary to their laws, customs, and national interests. For example, in civil-law jurisdictions where courts control the gathering and presentation of evidence, taking a deposition may be viewed as a judicial act performed by another sovereign.

Id.

51. Stephen Subrin explains the reasons for discovery's insignificance in both the early and later periods of common law:

> Historically, discovery had been extremely limited in both England and the United States. At early common law, the litigation process was looked at not as a rational quest for truth, but rather a method by which society could determine which side God took to be truthful or just. Discovery did not make sense in a world of ordeal, battle and oath-takers. Initially, the jurors themselves were people in the community who had knowledge of the facts. Nor was there much need for discovery at the later period of the common law when the pleadings assumed

in equity, where information could be obtained through interrogatories and depositions. These information-gathering devices, however, served a rather different function from modern discovery. As one treatise describes it, "Discovery in equity was not a truly *pretrial* device, as we use that term today, but a trial on the basis of documentary evidence."[52] Also, equitable discovery was subject to significant limitations.[53] Despite statutory procedures for interrogatories, document production, and depositions, discovery under code procedure was likewise quite limited.[54] The discovery provisions of the Federal Rules, enacted in 1938, represented a dramatic departure.[55]

B. Confidentiality and the Purpose of Discovery

When viewed in comparative and historical perspective, the breadth of modern United States discovery is extraordinary, as is the extent of party control over these powerful tools. Given the breadth of discovery and the power it places in the hands of the adversary parties, the argument for public access is weaker than it would be if discovery were narrower or less party-driven. The only sufficient justification for the modern United States version of discovery is to allow parties to gain access to information needed for the just resolution of disputes, not to make information accessible to the public. "Liberal discovery," the Supreme Court declared in *Seattle Times Co. v. Rhinehart*, "is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes."[56] The standard for obtaining an order protecting the confidentiality of unfiled

> such a critical role. The major purpose of single issue pleading was to reduce the case to a demurred issue that could be decided legally or to a limited question of fact.

Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 694–95 (1998) (footnotes omitted).

52. FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 284 (5th ed. 2001).

53. *See id.* at 285 (noting, among other limitations, that discovery could be had only against the adverse party, could reach only evidence that would be admissible at trial, and could obtain only information relevant to the case of the party seeking discovery (as opposed to information relevant to the adversary's case)); Subrin, *supra* note 51, at 698–99 (describing the limitations on equitable discovery and noting that before the Federal Rules of Civil Procedure "extremely limited discovery took place in both law and equity cases in the federal courts").

54. *See* JAMES ET AL., *supra* note 52, at 286. The Field Code permitted depositions of the opposing party, but the deposition took the place of calling the witness at trial, and it was conducted before a judge. *See* Subrin, *supra* note 51, at 696.

55. *See* Subrin, *supra* note 51, at 691 ("The Federal Rules discovery provisions dramatically increased the potential for discovery."). The broad discovery provisions went hand-in-hand with the notice pleading rule. Parties were not expected to know the detailed facts at the outset, but were permitted to discover them. Moreover, the pleadings could not serve as adequate disclosure mechanisms, so discovery devices were needed to permit parties to investigate the facts. *Id.* at 711 (quoting Charles Clark on the relationship between pleadings and discovery).

56. 467 U.S. 20, 34 (1984).

discovery therefore ought to be rather easy to satisfy in the ordinary run of cases.

In civil law systems, to a far greater extent than in the United States, the gathering of information coincides with its presentation to the court.[57] Similarly, under equity practice prior to the advent of the Federal Rules of Civil Procedure, information-gathering through interrogatories and depositions was for the purpose of presentation to the chancellor.[58] In modern United States discovery, by contrast, the primary information-gathering process does not coincide with the presentation of evidence to the court; indeed, much of the information never makes its way to the court.

Given the breadth of discovery and the extent of party control over it, the argument for public disclosure cannot overcome a legitimate need for confidentiality. Richard Marcus's words in 1991 ring even more true fifteen years later: "In an era of constantly diminished privacy it is important that we resist unnecessary efforts to curtail protections for confidential information. In an era when litigants have difficulty obtaining decisions of their cases, we should not rush to embrace a public information purpose for discovery."[59]

II. A NON-ZERO STANDARD OF GOOD CAUSE FOR DISCOVERY CONFIDENTIALITY

Although the standard of good cause for obtaining a discovery confidentiality order should be relatively light, it should be greater than zero. In other words, the court should not rubber-stamp a proposed protective order for discovery confidentiality, even if the parties have stipulated to it, without at least the minimal showing of the good cause suggested in Part I.

Questions about rubber-stamped stipulated protective orders arose in a case decided by the New Jersey Supreme Court in 2004. In *Estate of Frankl v. Goodyear Tire & Rubber Co.*,[60] the plaintiffs in a tire tread separation case agreed to confidentiality in order to obtain documents from the defendant. "In March 2000, plaintiffs and Goodyear, by consent, entered into a 'Proposed Stipulation and Protective Order Regarding Pre-Trial Documents to be Produced by Goodyear Tire & Rubber Co.' Without making any findings, a trial court signed the Protective Order in July 2000."[61]

57. *See supra* text accompanying notes 38–45.
58. *See supra* text accompanying note 52.
59. Marcus, *supra* note 8, at 506.
60. 853 A.2d 880, 882 (N.J. 2004).
61. *Id.*

Subsequently, when an intervenor sought access to the documents, a different judge of the trial court denied Goodyear's motion to enforce the protective order, explaining that courts should not "rubber-stamp Consent Orders containing blanket confidentiality provisions that are not accompanied by extrinsic support demonstrating good cause for their approval."[62] The New Jersey Supreme Court ultimately rejected the intervenor's effort to obtain access to the documents on the grounds that the rule on protective orders "is not an independent source of entitlement to public access to discovery documents, but only a procedural device by which documents, otherwise accessible, can be protected . . . ."[63] In answering whether the protective order rule provides "an independent source of entitlement" to information, the court lost sight of the question of whether a protective order should be granted or upheld without some showing of good cause. Even if the protective order rule itself does not provide a right of public access to information, parties may choose to disclose discovery materials to others unless prevented from doing so by an enforceable confidentiality agreement or by a valid protective order.[64] Thus, the lack of a public right to demand access to unfiled discovery materials does not render meaningless a non-party's challenge to a protective order's validity.

Three reasons counsel in favor of requiring at least a minimal showing of good cause before ordering confidentiality, notwithstanding the parties' agreement to the proposed order. First, some stipulated protective orders ought to be denied or modified because the public interest in access to the information outweighs the need for confidentiality. This is particularly true where public safety is at stake or where efficient handling of related cases requires that other lawyers have access to the information. Second, a finding of good cause gives parties at least a modest assurance that they can proceed with discovery in reliance on the protective order. Finally, the court's imprimatur should not be granted, and the power of contempt invoked, based on nothing more than the parties' private agreement.

A. Opportunity to Deny or Modify a Protective Order

Some confidentiality orders should be denied. In some cases, there may be no legitimate need for confidentiality. More importantly, if infor-

62. *Id.* at 883. *See also* Anderson, *supra* note 6, at 715 ("In my view, courts too often rubber-stamp confidentiality orders presented to them . . . .").

63. *Frankl*, 853 A.2d at 885–86.

64. *Sedona Guidelines*, *supra* note 11, at 201 ("A litigant has the right to disclose the fruits of discovery to non-parties, absent an agreement between the parties or an order based on a showing of good cause.") (citing Harris v. Amoco Prod. Co., 768 F.2d 669, 683–84 (5th Cir. 1985)).

mation bears on public health or safety, then a court should balance the need for confidentiality against the public interest in disclosure, and it should deny the protective order if the protective order is unjustified under the circumstances.[65] The requirement that a court grant a protective order only upon finding good cause creates an opportunity for the court to consider whether the information concerns risks to the public. The lack of adversarial presentation, in the case of a stipulated protective order, renders this opportunity less likely than in the case of an opposed protective order. Of course, it remains possible for a court familiar with the litigation to identify a public safety issue that warrants consideration before granting the order.

Even if a party has articulated a legitimate need for confidentiality, and the case involves no public interest that justifies outright denial of the protective order, a court may consider modifying the order rather than granting it in the form to which the parties stipulated. In particular, if the protective order prohibits the parties from sharing information with other lawyers handling related cases, the court should consider modifying the order to permit such sharing.[66] Coordination among counsel in related cases not only promotes litigation efficiency, but also enhances the quality of legal work and tends to level the field in asymmetrical multiparty litigation.[67] The requirement that a court grant a protective order only upon finding good cause creates an opportunity for the court to consider the worthiness of the proposed order, including consideration of whether the order would unduly constrain the sharing of information that would be useful in related cases.[68]

65. *See* Shingara v. Skiles, 420 F.3d 301, 307–08 (3d Cir. 2005) (vacating protective order based in part on "the fact that this case involves public officials and issues important to the public"); *Sedona Guidelines*, *supra* note 11, at 201 ("In determining whether good cause exists to issue or uphold a protective order under Fed. R. Civ. P. 26(c), a court is required to balance the parties' asserted interest in privacy or confidentiality against the public interest in disclosure of information of legitimate public concern.").

66. *Sedona Guidelines*, *supra* note 11, at 22. ("In many cases, any legitimate interest in continued secrecy can be accommodated by placing the collateral litigants under the use and non-disclosure restrictions of the original protective order. Modification merely removes the impediment of the protective order in the collateral litigation.").

67. *See* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 388–408 (2000) (describing coordination among counsel); *id.* at 458 (arguing that such coordination often promotes efficiency, quality, and fairness).

68. The stipulated protective order at issue in *Frankl* permitted the plaintiffs to "disseminate confidential materials to 'other attorneys with similar cases against Goodyear' provided that Goodyear received proper notice of such disclosure and the recipients of the information agreed to the terms of the Protective Order." 853 A.2d at 882.

B. Reliance on Protective Orders

When a court enters a protective order stating that certain information must be kept confidential, parties proceed with discovery in reliance on that order. Sophisticated parties understand that the order may be modified or vacated, but a certain amount of reliance is inevitable. Indeed, reliance on the order is exactly what the parties and the court intend, at least to some extent, because the point of the protective order is to facilitate the exchange of information by giving the responding party an assurance of confidentiality.

Protective orders remain subject to subsequent challenge, however.[69] Not only may protective orders be challenged by parties, but non-parties may intervene to seek modification or rescission of a protective order.[70] Even after the conclusion of an action, if a protective order remains in effect then it remains subject to challenge. The possibility of subsequent modification, according to one commentator, may be "the most significant vulnerability in current protective order practice."[71] One district court, in rejecting a stipulated protective order, explained that approval of the agreement "may furnish the parties with a false sense of protection that they might innocently, but wrongly, rely upon when releasing information."[72] To the extent that parties provide discovery in reliance on protective orders, such orders ought not to be granted if they have little chance of withstanding a subsequent challenge.

69. *See* Cooper, *supra* note 2, at 783 ("[T]he decision whether to modify a protective order, even long after trial or settlement, ultimately is a matter for the trial court's discretion. Thus, settled expectations may become unsettled at any point, even years after resolution of the case."). *See also, e.g.*, *Shingara*, 420 F.3d at 307–08 (permitting intervention by newspaper in public employee's action, and vacating protective order based on public importance of case and failure to show harm with sufficient specificity).

70. *Sedona Guidelines*, *supra* note 11, at 20. The Sedona Guidelines state:

> Most courts that have considered the question hold that the media, public interest groups, and other third-parties have standing to intervene in a civil case for the limited purposes of opposing or seeking modification or rescission of a protective order entered pursuant to Fed. Rule Civ. P. 26(c) when they assert that the public interest is served by disclosure.

Id.

71. Cooper, *supra* note 2, at 782.

72. USA Techs., Inc. v. Alphanet Hospitality Sys., Inc., No. CIV.A.98-3027, 1999 WL 391472, at *3 (E.D. Pa. May 26, 1999) (quoting Frupac Int'l Corp. v. MV "CHUCABUCO", No. CIV.A.92-2617, 1994 WL 269271, at *2 (E.D. Pa. June 15, 1994)).

C. The Court's Imprimatur and the Power of Contempt

Parties are free to enter into discovery confidentiality agreements,[73] and often do so. Such agreements generally may be enforced as a matter of contract law. Lawyers and litigants, however, often are unsatisfied with an agreement in the absence of a court order. The protective order adds two things to the parties' confidentiality agreement: the power of contempt, and whatever symbolic power the court's imprimatur carries. One who breaches a contract risks being sued in a breach of contract action. One who violates a court order, however, is subject to contempt. Greater government power is brought to bear on the latter because it is not merely about private agreement, but about the functioning of the judicial process or other public values. As long as the court has found some legitimate reason for confidentiality in discovery, a court order appropriately brings the public power into play. But it is difficult to see why the power of contempt should be invoked to enforce a mere agreement of the parties absent some judicial determination favoring enforcement of the agreement.

The court's imprimatur, in other words, should not be granted solely on the parties' say-so.[74] Parties should not have the power to turn their own contracts into court orders, enforceable by the power of contempt. As stated in Part I, orders protecting the confidentiality of unfiled discovery should be granted on a relatively light showing. Whether or not the parties stipulate to the agreement, courts generally should grant such protective orders as long as the proponent can show some legitimate need for confidentiality. But the parties' agreement, without any showing of a need for confidentiality, should not suffice to invoke the authority of the court and the contempt power. As Chief Judge Joseph Anderson puts it:

> It is one thing to say that the parties have the right, as they do, to agree upon secrecy *inter se*; it is quite another to suggest that there is some legal right to force a judge to sign an order requiring that the parties "hush up" on pain of contempt of court.[75]

Some lawyers and judges resist the idea that a court should require some showing of good cause for a protective order even if all parties have agreed to it. An assumption built into the adversary system is that if the

73. *See, e.g.*, D.N.J. LOCAL R. 5.3(b)(1) ("Notwithstanding this rule, parties may enter into written agreements to keep materials produced in discovery confidential and to return or destroy such materials as agreed by parties and as allowed by law.").

74. The trial judge in *Frankl* made this point nicely, emphasizing that litigants could bypass procedures for obtaining protective orders by "entering into a stipulation of confidentiality, *inter sese*, rather than seeking the Court's imprimatur of their arrangement." Estate of Frankl v. Goodyear Tire & Rubber Co., 853 A.2d 880, 883 (N.J. 2004) (quoting trial court).

75. Anderson, *supra* note 6, at 727.

adversary parties agree to something, then that issue no longer need be decided by the court.[76] Thus, one recent article on protective orders advances the argument that a "joint stipulation of good cause *is* a showing of good cause, and Rule 26 is satisfied."[77]

The argument that parties are entitled to work out protective orders by their own agreement may appear to be bolstered by Rule 26(c)'s conferral requirement, but this is not a necessary conclusion. Like Rule 37 on motions to compel,[78] Rule 26(c) requires that a motion for a protective order be "accompanied by a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."[79] The certification requirement demonstrates a preference for parties to work out their discovery disputes whenever possible without involving the court.[80] Most discovery disputes involve either discoverability issues, such as relevance, privilege, work product, and undue burden, or the adequacy of discovery responses. These disputes may reach the court either by the seeking party's motion to compel or by the responding party's motion for a protective order.[81] In this light, it makes sense that both Rule 37 and Rule 26(c) require parties to attempt to work out their differences before turning to the court to resolve their discovery dispute.

Orders concerning discovery confidentiality, however, present a different dynamic from disputes over discoverability or responsiveness. Discovery confidentiality does not primarily pit one party against the other, but rather pits the parties against a possible public interest in disclosure. The party responding to discovery wishes to keep its information confidential; the party seeking discovery wishes to obtain the information as readily as possible for use in the litigation.[82] In any event, the requirement that parties

76. Thus, for example, allegations in a complaint that are admitted in the answer are no longer contested issues in the action.

77. Pace, *supra* note 3, at 49.

78. FED. R. CIV. P. 37(a)(2)(B) ("The motion [to compel discovery responses] must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information without court action.").

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

80. *See supra* text accompanying notes 46–48 on the extent of party control, rather than judicial control, over discovery.

81. Rule 26(c) empowers courts to enter a wide variety of protective orders, including orders limiting the scope of discovery or forbidding certain discovery. *See* FED. R. CIV. P. 26(c)(1)–(8).

82. The judge, too, has an interest in ordering confidentiality to satisfy the parties, to facilitate the conclusion of the litigation, and to reduce the number of discovery disputes litigated by the parties. In his article defending the District of South Carolina's anti-secrecy rule, Chief Judge Anderson writes of "the human dynamic that comes into play when judges are presented with consent secrecy orders." Anderson, *supra* note 6, at 727. Writing mostly about secret settlements, but also about discovery, he

confer before seeking a protective order is not inconsistent with the court's obligation to reject a protective order—stipulated or not—absent a showing of good cause.[83]

CONCLUSION

Modern United States discovery, in both global and historical perspective, far exceeds the evidence-gathering power litigants have had in other places and times. Such broad power to extract information is justifiable as a means to gather information needed for adjudication, not as an all-purpose public information tool. The discovery rules do not purport to establish a broad information-gathering power divorced from particular litigated disputes.

Thus, the burden for obtaining an order protecting the confidentiality of unfiled discovery materials should be relatively light. Parties generally should be able to obtain such orders as long as the parties can articulate a legitimate need for confidentiality. The standard should not be so strict as to require, as some cases have held, both specificity and a showing of serious injury. Confidentiality orders should be rejected or modified if a risk to public safety, the need for information in related cases, or some other public interest outweighs the need for confidentiality. In many cases, however, protective orders for discovery confidentiality should be easily obtained.

The light standard for obtaining such orders, however, is nonetheless greater than zero. Thus, even for stipulated protective orders, courts should require a showing of good cause. The parties' say-so alone, without some showing of a need for confidentiality, does not constitute good cause for the granting of a protective order. Requiring a showing of good cause, beyond the parties' stipulation, accomplishes three things. First, it creates a stop-and-think opportunity for the lawyers to decide whether they really need the order, and for the court to consider whether any public interest is at stake that should be weighed against the need for confidentiality. Second, it offers at least some protection against unjustified reliance on protective orders that are subsequently challenged. Third, it prevents parties from

explains that "judges face incredible pressure to go along with court-ordered secrecy in the heat of battle." *Id.* at 729.

83. *See* 2 DISCOVERY PROCEEDINGS IN FEDERAL COURT, *supra* note 18, § 20.02, at 9–10.

> Although district courts are usually eager to ratify the parties' stipulated agreements, courts may refuse to ratify a stipulated protective order. . . . [T]he district court must make an independent determination that good cause for the protective order exists before it can agree to the stipulation and must reject a stipulated protective order if it finds that there is no good cause for the order.

Id. (citing Jepson v. Makita Elec. Works Ltd., 30 F.3d 854, 858 (7th Cir. 1994)).

obtaining the court's imprimatur solely by private agreement, in a context where the interests of the adversaries are pitted not primarily against each other, but against a possible public interest in disclosure.