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Rethinking the "Good Cause" Requirement: A New Federal Approach to Granting Protective Orders Under F.R.C.P.26(c)

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RETHINKING THE "GOOD CAUSE" REQUIREMENT: A NEW FEDERAL APPROACH TO GRANTING PROTECTIVE ORDERS UNDER F.R.C.P. 26(c)

I. INTRODUCTION

"Think Big Technologies" is the leading and only source of cameras for "AMAX" films.¹ "AMAX" films are surround-vision films which are shown in theaters and immerse the viewer in the experience depicted by the film. For example, one recent film titled "Glass Barrel Ride" depicted a plunge over the Niagara waterfalls in a glass barrel.

Think Big's cameras accomplish this effect by using a unique photographic method. Since 1963, Think Big has developed and sold equipment to display its films. It also operates theaters around the world. It has never, however, sold equipment to make the surround vision films, and no other competitor has entered the market.

Think Big contracted with Cokesi Company to supply caffeinated soda beverages for all of its theaters' snack-bars. Recently, a dispute arose regarding the scope of the contract. Cokesi believes that Think Big is bound to sell only Cokesi sodas, while Think Big asserts that the contract is not exclusive and that it is free to also contract with Pepsoke, Cokesi's soda competitor.

During discovery, Cokesi requested information about the surround-vision cameras and film methods that Think Big utilizes to produce the surround vision films. Think Big immediately requested a protective order under the *Federal Rules of Civil Procedure* ("F.R.C.P.") to keep discovery materials, particularly those involving its fundamental trade secret—the surround-vision filming process—confidential. Accordingly, Think Big enumerated a long list of "good cause" reasons to support the protective order request. Cokesi did not contest the protective order request, as it would also prefer to keep all discovery materials confidential for the sake of efficiency.

As the judge considered the request, many questions came to mind. She acknowledged that Think Big's business information might somehow be relevant to the litigation, but was that sufficient reason to deny the protective order? She reasoned that it may be possible for another company to get a business advantage by releasing Think Big's

¹ The facts in this introductory hypothetical are fictional.

camera technology, but was that sufficient reason to grant a protective order? She predicted that confidentiality may speed up the discovery process, because the litigation involved large companies, but was that sufficient reason to grant a protective order?

Looking to precedent, in her circuit and around other federal circuits, the judge found very little, often inconsistent, guidance. Even though some federal judges granted similar protective orders to protect trade secrets, other circuits definitively prioritized public access over confidentiality, making her unsure as to whether “good cause” existed in this instance. This judge did not know what process to follow, what information to consider, or what questions to ask.

As the preceding scenario demonstrates, the process by which protective orders are granted in federal court is unclear, complex, and, frankly, unpredictable. Think Big Technologies has an immense interest in keeping its film-making process confidential, while Cokesi is invested in getting as much information as possible about Think Big’s business practices. Despite the high stakes for both litigating parties, the judicial process for ascertaining “good cause” to grant protective orders under F.R.C.P. 26(c) is not clear.² On the federal level, the circuits have adopted a variety of approaches which differ in the scope and treatment of trade secrets.³ Some judges automatically grant uncontested protective orders, others require a particularized showing of fact in order to satisfy “good cause,” still others are adverse to confidentiality and refuse to grant protective orders.⁴ Because the F.R.C.P. itself does not provide guidelines for judges to consider when issuing protective orders, the approaches vary significantly. As a result, when requesting a protective order, the parties are not privy to what criteria each particular judge will consider or to what constitutes “good cause.” This uncertainty may inhibit attorneys from acting in accord with their fiduciary obligations, because even if a protective order is in the clients’ best interests, it is impossible to predict whether the litigation will yield the desired confidentiality.⁵

² See *infra* Part II.

³ *Id.*

⁴ See *infra* Part II.B.2.a.

⁵ See *infra* Part II.C.3. (discussing how the absence of a standard approach impedes attorneys’ ability to act in their clients’ best interest and, also, how legislation aimed at increasing public access divides attorneys’ fiduciary duty between their clients and the public at-large).

This Note explores the various federal circuit approaches for determining "good cause" and granting protective orders, analyzes shortcomings of the current, incomplete approaches, and proposes a process for federal judges to follow when ascertaining whether a protective order is proper. Part II of this Note explores and establishes the basic components of protective orders, outlines the courts' various methods of determining whether "good cause" exists, and specifically examines the Third Circuit's approach.⁶ Part III analyzes the courts' application of the Third Circuit's "good cause" balancing test and asserts that its narrow list of "good cause" balancing factors fails to account for the broad range of grounds for protective orders, including trade secrets.⁷ Part III, additionally, examines how the absence of a methodical approach to granting protective orders undermines attorneys' fiduciary duties to act in their clients' best interests.⁸ Finally, Part IV proposes the "Good Cause Doctrine," a procedural framework with distinct guidelines, comporting with attorneys' fiduciary duties, for federal judges to follow when considering whether "good cause" exists to grant a protective order under F.R.C.P. 26(c).⁹

II. BACKGROUND

Civil litigation is a system that involves secrecy.¹⁰ Protective orders, the method by which judges protect the confidentiality of discovery materials, create tension between individual litigants' confidentiality concerns and public access to the judicial system.¹¹ Tracing the distinct evolution of protective orders throughout American jurisprudence sheds light on their function in discovery, as well as their direct effect on individual privacy and public access to the judiciary.¹²

Part II examines the prevalence of confidentiality in discovery.¹³ By specifically focusing on the development of discovery and protective orders, Part II.A emphasizes that public access to the judiciary is not absolute.¹⁴ Next, Part II.B assesses the components of protective orders, identifies the F.R.C.P.'s "good cause" requirement, and outlines the courts' various methods of determining whether "good cause" exists to

⁶ See *infra* Part II.

⁷ See *infra* Part III.

⁸ See *infra* Part III.

⁹ See *infra* Part IV.

¹⁰ See *infra* Part II.A.

¹¹ See *infra* Part II.B.1.

¹² See *infra* Part II.A.

¹³ See *infra* Parts II.A-B.

¹⁴ See *infra* Part II.A.

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warrant a protective order.¹⁵ Finally, Part II of this Note concludes by categorizing state “sunshine in litigation” legislation that attempts to maximize public access by limiting judicial discretion to grant protective orders, and identifies how such a requirement interferes with attorneys’ fiduciary duty to serve their clients’ best interests.¹⁶

A. *The Prevalence of Confidentiality in Discovery*

[T]he most important office, and the one which all of us
can and should fill, is that of private citizen.¹⁷

1. The American Discovery Revolution: A Historical Perspective

Confidentiality saturates the history of the American judicial system.¹⁸ Based on concerns regarding intrusion into individuals’ private lives and confidential personal matters, Justices Louis D. Brandeis and Samuel D. Warren submitted an article to the Harvard Law Review at the end of the 19th century proposing that people are entitled

¹⁵ See *infra* Part II.B.

¹⁶ See *infra* Part II.C.

¹⁷ PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 66 (Schocken Books 2d ed. 1989) (quoting Louis D. Brandeis).

¹⁸ HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW 197 (Ams Pr. Inc. 1953). The United States has a highly-prized tradition of privacy. “The prevalence of concealment mechanisms, employed through judicially-sanctioned private-party agreements to obscure undesirable information from public scrutiny, is not a sudden development. Despite indicia of widespread secrecy throughout the judicial system, the emergence of secrecy in American litigation is more accurately depicted as a tortoise than a hare.” Albert Louis Chollet III, *Enabling the Gaze: Public Access and the Withdrawal of Tennessee’s Proposed Rule of Civil Procedure 1A*, 36 U. MEM. L. REV. 695, 700 (2006). It is undisputed that “secrecy has long been a part of the American legal system.” James V. Grimaldi, *Hearsay: The Lawyer’s Column; Recalls Spark Anti-Secrecy Bill*, WASH. POST, Sept. 18, 2000, at F35. At the turn of the 20th Century, William H. Moody, the U.S. Attorney General, recognized the acceptability and expectability of secrecy by noting that the records from the Department of Commerce and Labor “are executive documents acquired by the Government for the purpose of administering its own affairs... and must therefore be classed as privileged communications whose production can not be compelled by a court without the express authority of a law of the United States.” 25 Op. Atty Gen. 326 (1905). The prevalence of judicial secrecy continued throughout the mid-20th century as George G. Killenger wrote in 1950: “In the future... desired information will be supplied if, in our opinion, such information would be compatible with the welfare of society.” Letter from George G. Killenger, Chair of the U.S. Board of Parole (Oct. 27, 1950), *reprinted in* HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW 309 n.3 (Ams Pr. Inc. 1953). Historically, secrecy was clearly the norm in the judiciary. The reality was that “in the absence of a general or specific act of Congress creating a clear right to inspect—and such acts are not numerous—there is no enforceable legal right in public or press to inspect any federal non-judicial record.” HAROLD L. CROSS, THE PEOPLE’S RIGHT TO KNOW 197 (Ams Pr. Inc. 1953).

to a legal right of privacy.¹⁹ Public awareness and attention toward the prevalence of secrecy in judicial proceedings escalated a few decades later, soon after the establishment and adoption of the *Federal Rules of Civil Procedure* in 1938.²⁰

¹⁹ Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 196 (1890). The notion of privacy is well-established in American legal theory. This article provided, in part, that:

[p]olitical, social, and economic changes entail the recognition of new rights, and the common law, in its eternal youth, grows to meet the demands of society. . . [g]radually the scope of these legal rights broadened; and now the right to life has come to mean the right to enjoy life, — the right to be let alone.

Id. at 193. The avant garde progress of the late 19th century heightened the need for a right to personal privacy and "call[ed] attention to the next step which must be taken for the protection of the person, and for securing to the individual what Judge Cooley calls the right 'to be let alone.'" *Id.* at 195 (quoting THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888)). *But see* *United States v. Smith*, 776 F.2d 1104, 1114 (3d Cir. 1985) (the privacy interest is diminished if the litigant is a public figure generally subject to public scrutiny; "the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office.").

²⁰ Thomas S. Blanton, *U.S. Experience with Freedom of Information Law: Congressional Activism, News Media Leadership, & Bureaucratic Politics*, COMP. MEDIA L.J. 2 (2003). In the 1950's, the American Society of Newspaper Editors retained Harold Cross to review statutes restricting information access. *Id.* His findings "demonstrated that government at every level was systematically denying access to information" and questioned the distinction between government privacy and individual privacy. *Id.* Cross recognized the suppression of information regarding judicial proceedings and noted that:

Under the impact of expansion of governmental activities, the number and kinds of records withheld from public and press inspection have enormously increased. Statutes are high in number and infinite in variety; whenever legislators have convinced themselves . . . they have passed statutes which run the gamut from that which may perhaps be characterized as not "compatible with the public interest" to that which appears to have no basis except the belief that it is "none of the public's business." Some of these statutes impose mandatory secrecy. Others provide for such limited inspection that it is highly probable that courts would deny public or press inspection.

CROSS, *supra* note 18, at 84 (emphasis added). Cross calls for public recognition of judicial secrecy by noting that:

public business is the public's business. The people have a right to know. Freedom of information about public records and proceedings is their just heritage. Citizens must have the legal right to investigate and examine the conduct of their affairs. They must have simple, speedy means of enforcement.

Id. at 132 (emphasis added). Cross provides suggestions for what the press should do to address the secrecy that exists in the judicial system: "in light of favorable trends and the press record of successes, there seems to be no good reason why a newspaper should not put its rights to the test in respect of any record of legitimate interest to the public, unless a mandatory statute of clear import bars access." *Id.* at 32-33. Cross' position on the press' right to judicial access revolves around the First Amendment, a basis which the Supreme

2. Contemporary Access to Discovery: A Finite Right

First taking form in the mid-20th century, modern discovery provides litigants access to information held by the other parties, but does not compromise or eliminate individuals' confidentiality interests.²¹ Discovery—"an integral part of litigation"—is not limitless, but instead has definite boundaries.²² The United States Supreme Court clearly renounced the presumption that public access to judicial records is absolute in *Nixon v. Warner Communications, Inc.*²³ Six years later, the

Court subsequently invalidates. See *infra* notes 24-25, for a discussion of the Supreme Court's decision precluding the First Amendment as a means to circumvent protective orders.

²¹ James E. Rooks, Jr., *Let the Sun Shine In: 'Sunshine' Laws Do Not 'Chill' Settlements, Say Advocates of Open Courts*, 39 TRIAL 18 (June 2003). Professor Edson R. Sunderland is widely attributed with developing the then-innovative American discovery principles. Edson R. Sunderland, *Scope and Method of Discovery Before Trial*, 42 YALE L.J. 863, 865 (1933). Sunderland's ideas about discovery highlight the necessity of access to facilitate trial preparation:

Is there any way of bridging this gap between what is set up in the pleadings and what will come out in evidence? It is of course important to know in advance the nature and extent of your adversary's claims. This knowledge is given by the pleadings. But it is equally important, in preparing your proof, to know what proof your adversary will be able to present in support of his claims and in opposition to yours. This knowledge the pleadings does not give.

Id. His notions regarding expansive discovery were adopted by the Supreme Court in 1947:

No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.

Hickman v. Taylor, 329 U.S. 495, 507 (1947).

²² WILLIAM A. GLASER, PRETRIAL DISCOVERY AND THE ADVERSARY SYSTEM 33, 51 (1968). In *Hickman v. Taylor*, the U.S. Supreme Court ruled that access to information through discovery has definite boundaries. *Hickman*, 329 U.S. at 507. In this case, respondents (tug boat owners) employed counsel to defend them against potential suits resulting from the sinking of a tug in which crew members drowned. Respondents' attorney took statements from the survivors with an eye toward litigation. During discovery, the petitioner requested copies of written statements taken from the crew members, records, or other memoranda made regarding the tug boat incident. Respondents refused to provide the requested materials. On appeal, the Court found that petitioner's request, made without purported necessity or justification, fell outside of the arena of discovery. Discovery, "like all matters of procedure, has ultimate and necessary boundaries." *Id.* at 507. Under the auspices of Rule 26, "further limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege." *Id.* at 508.

²³ *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). During the criminal trial of several of the ex-President's former advisors on charges in connection with the Watergate investigation, portions of tape recordings were played in a public courtroom, and the reels

United States Supreme Court rejected the notion of a constitutional right to unlimited access to discovery in *Seattle Times v. Rhinehart*.²⁴ Instead, the Supreme Court specifically fettered public access to discovery, holding that discovery materials "are not public components of a civil trial."²⁵ Discovery was established to "avoid surprise at trial[.]" not to "enlarge the public's access to information."²⁶ Protective orders, one

of tapes were admitted into evidence. *Id.* at 589. Respondent reporters petitioned for permission to copy, broadcast, and sell portions of the tapes played during the trial. *Id.* The Court refused to grant access, holding that "the right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes." *Id.* at 598. It is "well-settled that any policy or presumption favoring openness in the judicial system is not absolute and may be limited when, in the discretion of the court, it is necessary, to ensure the integrity, efficiency, and fairness of the judicial process." Chollet, *supra* note 18, at 705. Similarly, in *Mercury News*, a newspaper sought to gain access to an investigation report commissioned by the City in connection with a sexual harassment suit. *San Jose Mercury News, Inc. v. U.S. Dist. Court- N.D. San Jose*, 187 F.3d 1096, 1098 (9th Cir. 1999). The court relied on the F.R.C.P. to find that the public had a presumptive access to prejudgment civil court records. *Id.* This presumption for openness, however, is easily overcome by the presence of "sufficiently important countervailing interests" for confidentiality and secrecy. *Id.* at 1102.

²⁴ *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984). In *Seattle Times*, the U.S. Supreme Court considered the issue of whether parties in civil litigation have a right to disseminate, prior to trial, information gained through pretrial discovery. The information in question concerned the size and nature of a religious foundation's membership, the names of its donors, and the amounts of their donations. The Court approved the imposition of a protective order and declared that a "litigant has no First Amendment right of access to information made available only for purposes of trying his suit." *Id.* at 32.

²⁵ *Id.* at 33. The Supreme Court held that the First Amendment does not preclude court control over discovery information, explaining that "pretrial depositions and interrogatories are *not public components* of a civil trial. Such proceedings were not open to the public at common law. . . and, in general, they are conducted in private as a matter of modern practice." *Id.* (emphasis added). The Supreme Court noted that "much of the information that surfaces during pretrial discovery may be unrelated, or only tangentially related, to the underlying cause of action. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." *Id.* at 33. Additionally, the Court overruled *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979), by concluding that an order prohibiting the dissemination of discovery materials before a trial is not the type of classic prior restraint requiring First Amendment scrutiny. *Id.* Based on *Seattle Times*, upon a showing of "good cause," public access to discovery may be limited. *Seattle Times*, 467 U.S. at 33.

²⁶ Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 447 (1991). The public's right of access to court proceedings has "never been extended beyond the confines of the courtroom and court documents." *Id.* at 429. *See, e.g., Gannett Co. v. DePasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring) ("During the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants."); *Seattle Times*, 467 U.S. at 34 (declaring that "[l]iberal discovery is provided for the *sole* purpose of assisting in the preparation and trial, or the settlement, of the litigated disputes.") (emphasis added).

method of preserving confidentiality, limit and shield sensitive discovery information.²⁷

B. *Protective Orders: Protecting Privacy in the Pursuit of Justice*

*I would rather be exposed to the inconveniences attending too much liberty than those attending too small a degree of it.*²⁸

1. Defining Protective Orders

Protective orders, as defined by F.R.C.P. 26(c), further courts' control over the discovery process and materials.²⁹ There are two different

²⁷ Alan B. Morrison, *Protective Orders, Plaintiffs, Defendants and the Public Interest in Disclosure; Where does the Balance Lie?*, 24 U. RICH. L. REV. 109, 111 (1989). Protective orders prohibit the dissemination of discovery, "except to a few narrow categories of people," which, depending on the particular circumstances, may include "other lawyers in the plaintiff's attorney's office, the plaintiff herself, expert witnesses, and perhaps a few others provided they sign a confidentiality agreement under which they would not divulge any of the information without permission from the court or the defendant." *Id.* But see *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (the "bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.").

²⁸ Letter from Thomas Jefferson, President of the United States, to Archibald Stuard, a Congressional Representative from Virginia (Dec. 23, 1791), reprinted in *THE PAPERS OF THOMAS JEFFERSON*, vol. 22 at 436 (Julian P. Boyd, et al. eds., 1950).

²⁹ *Seattle Times*, 467 U.S. at 35. The *Federal Rules of Civil Procedure* outline protective orders as follows:

c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, 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, and *for good cause shown*, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) that the disclosure or discovery not be had;
- (2) that the disclosure or discovery may be had only on specified terms and conditions, including a designation of the time or place;
- (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;
- (4) that certain matters not be inquired into, or that the scope of the disclosure or discovery be limited to certain matters;
- (5) that discovery be conducted with no one present except persons designated by the court;

approaches to protection for discovery materials: (1) particularized protective orders or (2) "umbrella" protective orders.³⁰

Particularized protective orders protect sensitive discovery materials individually, on a document-by-document basis.³¹ In these instances, the burden to prove "good cause" and justify confidentiality falls on the party seeking the particularized protective order.³²

On the other hand, umbrella protective orders designate all discovery documents as presumptively protected, unless a party challenges the confidentiality of a particular document.³³ This guarantee

(6) that a deposition, after being sealed, be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way; and

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or other person provide or permit discovery. . .

FED. R. CIV. P. 26(c) (2007) (emphasis added).

³⁰ MANUAL FOR COMPLEX LITIGATION (FOURTH) §11.432 (2004).

³¹ *Id.* Proponents of narrow, particularized protective orders assert that "[p]rotecting only material for which a clear and significant need for confidentiality has been shown will reduce the burdensomeness of the order and render it less vulnerable to later challenge." *Id.* See generally *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993).

³² *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986). Although what constitutes proper grounds is not uniform throughout the circuits, one commonality in granting particularized protective orders is that the party seeking the protective order carries the burden to justify confidentiality and establish the proper grounds to prove "good cause." *Id.*

³³ *United Nuclear Corp. v. Cranford Insur. Co.*, 905 F.2d 1424, 1427 (1990). Umbrella protective orders are defined as follows:

private-party agreements for unfettered access to all documents in an adversary's possession. Most commonly, the agreement conditions the unfettered access on the sealing of entire classes of discovery and the imposition of a gag order on the parties. These orders authorize each party producing information to designate the information they desire to keep confidential.

Chollet, *supra* note 18, at 702-03. The use of umbrella protective orders in discovery is widely accepted and is standard practice in complex cases. *United Nuclear Corp.*, 905 F.2d at 1427. See MANUAL FOR COMPLEX LITIGATION (SECOND) § 21.431 (1985). In complex litigation, where voluminous documents are sought *en masse*, the discovery process may endanger information that a litigant wants to keep confidential. *Id.* But see *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226-27 (6th Cir. 1996) (noting that protective orders that *automatically* authorize sealing records filed in litigation, without individual review, are not generally accepted. Additionally, this case demonstrates that documents

of confidentiality allows each party to make discovery disclosures without the delay and expense of adjudicating individual disputes over each sensitive document.³⁴ Additionally, umbrella protective orders align with the overriding goal of the F.R.C.P., “to secure the just, speedy, and inexpensive determination of every action.”³⁵ Once the court grants an umbrella protective order, the burden reverses—all discovery

under an umbrella protective order are subject to challenge to determine whether “good cause” exists to include any particular document under the protective order).

³⁴ *Citizens First Nat’l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 946 (7th Cir. 1999). Determinations of “good cause” do not need to be made on a document-by-document basis:

In a case with thousands of documents, such a requirement might impose an excessive burden on the district judge or magistrate judge.

There is no objection to an order that allows the parties to keep their trade secrets (or some other properly demarcated category of legitimately confidential information) out of the public record. . .

Id. See, e.g., *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987) (per curiam) (reasoning that “in complicated cases where document-by-document review of discovery materials would be unfeasible,” broad protective orders should be granted “to protect documents designated in good faith by the producing party as confidential”); *Chambers Dev. Co., Inc. v. Browning-Ferris Indus.*, 104 F.R.D. 133, 135 (W.D. Pa. 1985) (entering a protective order, providing in part that: “All documents produced in this litigation in response to a formal discovery request and all information contained in such documents shall be used solely for the prosecution and defense of the instant action and for no other purpose or publication, whether directly or indirectly, and shall not be disclosed. . .”); 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), available at <http://www.thesedonaconference.org/content/miscFiles/wg2may05draft2> (in cases with large quantities of discovery materials, “a threshold showing of ‘good cause’ over broad categories of material may be sufficient for the issuance of a protective order under F.R.C.P. 26(c). The purpose of the order would be to facilitate the cooperative exchange of voluminous discovery.”).

³⁵ FED. R. CIV. P. 1 (2006). A number of courts agree that umbrella protective orders that allow “each litigant to seal *all* documents that it produces in pretrial discovery, are unproblematic aids to the expeditious processing of complex commercial litigation.” *Citizens First Nat’l Bank of Princeton*, 178 F.3d at 945. There is no public right of access to discovery before the entry of a judgment. See generally *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1326 (D.C. Cir. 1985) (the lower court issued an umbrella protective order, based on the fact that “it would be undesirable to have Mobil specify, and the court rule on, objections to disclosure of particular documents, since that would slow discovery enormously and involve the court excessively in the discovery process.”); *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 425 (W.D.N.Y. 1981) (in complex cases, “[p]articularly those involving large corporate parties, the parties agree to the issuance of a broad protective order at the outset for their mutual protection, both from their competitors and waiting predatory third parties. . . in those cases it is generally conceded that either party could demonstrate the needed ‘good cause’ if put to the test.”). Umbrella protective orders are mutually beneficial: defendants are assured confidentiality, while plaintiffs get unfettered access. Chollet, *supra* note 18, at 702-03.

materials are assumed to be protected and the party wishing to access the information must prove the burden.³⁶

Granting protective orders to limit access to discovery is within the sound discretion of the court.³⁷ The protections and features of protective orders are well-established and standard during the discovery phase of litigation; however, the process by which protective orders are granted is unstructured and unclear.³⁸

2. Jumping Through Hoops: The Steps (or Lack Thereof) To Secure Protective Orders

It is common during litigation for parties to designate documents as confidential under the shield of a protective order, subject to court approval.³⁹ Protective orders can be granted on a motion from either party to the litigation, including both the requesting party and the party from whom the information is requested.⁴⁰ Procedurally, protective orders can be granted at any point during the litigation proceedings.⁴¹

³⁶ MANUAL FOR COMPLEX LITIGATION (FOURTH) §11.432 (2004).

³⁷ *Essex Wire Corp. v. E. Electric Sales Co.*, 48 F.R.D. 308, 310 (E.D. Pa. 1969). It is "beyond question that a court may issue orders prohibiting disclosure of documents or information." *F.D.I.C. v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982). Although the F.R.C.P. indicates that "the court may order discovery of any matter relevant to the subject matter involved in the action," the broad scope of discovery is subject to being restricted by the issuance of a protective order "for good cause shown." FED. R. CIV. P. 26(b)(1) (2006). "The granting of such [a protective] order is a matter within the sound discretion of the court." *Essex Wire Corp.*, 48 F.R.D. at 310. Protective orders may properly restrain public disclosure of pretrial discovery:

Once the judicial powers of government are engaged, the public has a legitimate interest in its appropriate exercise. When a court adopts a protective order, what might otherwise be a *private* accommodation among the parties becomes a *public* ordering. The court, through a protective order, lends its legitimating force to an agreement between the parties with respect to the pretrial disclosure of information. A court order is enforceable by its summary sanctioning powers, including the power to impose the sanction of contempt.

In re Consumer Power Co. Sec. Litig., 109 F.R.D. 45, 48 (1985). *See also Chem. & Indus. Corp. v. Druffel & Commercial Solvents Corp.*, 301 F.2d 126 (6th Cir. 1962). Restrictions on public access to discovery, through judicial issuance of a protective order, are appropriate upon a showing of "good cause." *See infra* Part II.B.2.a. for a discussion of F.R.C.P. 26(c)'s "good cause" requirement.

³⁸ *See infra* Part II.B.2.

³⁹ *Chollet*, *supra* note 18, at n.17. "By far, the protective order is the prevalent method of concealing information from public accessibility." *Id.* at 705.

⁴⁰ *Smith v. The City of Chi.*, No. 04 C 2710, 2005 U.S. Dist. LEXIS 26454, 5 (D. Ill. Oct. 31, 2005). Additionally, nonparties are permitted to intervene to contest or seek the issuance of a protective order. Courts recognize that "non-parties have valid privacy concerns

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a. *The "Good Cause" Requirement: One Requirement, Four Divergent Methods*

Once the party seeking a protective order makes a motion in the court where the action is pending, F.R.C.P. 26(c)'s "good cause" requirement comes into play.⁴² F.R.C.P. 26(c) stipulates that upon "motion by a party or by the person from whom discovery is sought" and "for good cause shown," the court may issue a protective order.⁴³ Neither F.R.C.P. 26(c) nor the U.S. Supreme Court has set forth a method or process by which federal judges are to determine whether or not "good cause" is satisfied.⁴⁴ As a result, determination of "good cause" is left to judicial discretion, the rigor of which may vary.⁴⁵

regarding public disclosure of their personnel information." *Id.* See also *Knoll v. Am. Tel. & Tel. Co.*, 176 F.3d 359, 365 (6th Cir. 1999) (holding that it "is clear that [the employer] defendants had a valid interest in the privacy of nonparty personnel files."); *Gehring v. Case Corp.*, 43 F.3d 340, 342 (7th Cir. 1994) (disclosure of a non-party's personnel files "would invade the privacy of the other employees."). The correct procedure by which a nonparty can challenge a protective order "is through intervention for that purpose." *United Nuclear Corp.*, 905 F.2d at 1427. See *infra* Part II.B.2.a. for a discussion on the various methods employed by the courts to determine if the F.R.C.P.'s "good cause" requirement is satisfied.

⁴¹ NY STATE TRIAL LAWYERS ASSOC., SECRETS KILL: WHY NEW YORK SHOULD ENACT THE SUNSHINE IN LITIGATION ACT (May 2004). In the pretrial phase:

A judge may be asked to issue a protective order which forbids the plaintiff from sharing information disclosed during the case with anyone, even government regulators. Corporate defendants sometimes require such an order before they will disclose sensitive information that could be publicly embarrassing or expose the company to further lawsuits.

Id. At the conclusion of litigation, "a defendant can request the plaintiff to agree to an order to seal all records in a case, including all exhibits and transcripts. Sealing orders can go so far as to remove all trace that the lawsuit even existed." *Id.* After a trial, defendants "can ask for a confidentiality agreement that prohibits" the other party from "revealing anything publicly about the case." *Id.*

⁴² FED. R. CIV. P. 26(c) (2006).

⁴³ *Id.* (emphasis added). It is firmly established "that a party wishing to obtain an order of protection over discovery material must demonstrate that 'good cause' exists for the order of protection." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994). See, e.g., *In re Agent Orange Prod. Liab. Litig.*, 104 F.R.D. 559 (E.D.N.Y. 1985), *aff'd by* 821 F.2d 139 (2d Cir.), *cert. denied*, 484 U.S. 926 (1987). "Good cause" is not satisfied and protective orders cannot be issued when based merely on complexity or "emotionalism[.]" *Id.* at 570. The court here held that the class members were entitled to disclosure of materials shielded by a protective order in absence of a "good cause" showing. *Id.*

⁴⁴ See *infra* Part IV (proposing a new approach and solution, the "Good Cause Doctrine").

⁴⁵ See *infra* Parts II.B.2.a.i-iv (discussing and outlining the various approaches that federal judges utilize in order to determine "good cause").

i. Rubber-Stamping Approach

One breed of judges simply, with no questions asked, rubber-stamps protective orders that are mutually-agreed upon and not contested by the litigating parties.⁴⁶ This method of granting protective orders forgoes judicial review when a protective order request is unopposed.⁴⁷ Opponents criticize rubber-stamping and argue that mere mutual agreement of the parties does not satisfy "good cause."⁴⁸

ii. Hostile Approach to Protective Orders: Resisting Confidentiality

Litigants, on the other hand, complain that some judges are increasingly hostile to confidentiality orders and often resist granting protective orders.⁴⁹ Judges in this arena criticize protective orders on

⁴⁶ *Pansy*, 23 F.3d at 785 (observing that "[d]isturbingly, 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[.]"). See also *Bd. of Trustees of Cal. State Univ. v. Sup. Ct.*, 34 Cal. Rptr. 3d 82, 90 (Ct. App. 2005) (advising litigants that in order to obtain confidentiality, "parties could agree on a protective order as to such documents at the outset"); 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) (noting that "courts too often rubber-stamp confidentiality orders").

⁴⁷ *Estate of Frankl v. Goodyear Tire & Rubber Co.*, 853 A.2d 880, 882 (N.J. 2004). At the trial court level, the parties agreed to a protective order for all pretrial documents produced by Goodyear Tire and, "without making any findings, a trial court signed the Protective Order." *Id.* at 882. "Under the terms of the protective order, Goodyear was permitted to earmark as confidential certain information it produced during discovery." *Id.* On appeal, the court refused to enforce the protective order. *Id.* at 884. The court further reprimanded the unreviewed manner in which it was issued by stating that trial courts should not "rubber-stamp" protective order requests if they "are not accompanied by extrinsic support demonstrating good cause for their approval." *Id.* at 883.

⁴⁸ *Bryan v. Eichenwald*, 191 F.R.D. 650, 652 (2000). Even if the motion for the protective order is unopposed, the "determination of good cause cannot be left to mere agreement of the parties." *Id.* Judges are "duty-bound" to "review any request to seal the record (or part of it)" and, therefore, "may not rubber stamp a stipulation to seal the record." *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (1999). On the other side of the argument, proponents of upholding mutual, uncontested agreements amongst the litigating parties to seal documents reason that:

if the parties are willing, for whatever reasons, to keep most information secret, we ought to be willing to allow them to do that. I say that not only because I believe that parties should be able to control their own lawsuits, but also because, if we had a rule which said that the judge must rule on claims of secrecy on a document-by-document basis, who would be there to police the judge?

Morrison, *supra* note 27, at 121.

⁴⁹ Jack E. Pace III, *Testing the Security Blanket: An Analysis of Recent Challenges to Stipulated Blanket Protective Orders*, 19 Antitrust ABA 46 (Summer 2005). Since their inception, protective orders have been hailed as "an efficient way to lay down ground rules and preemptively resolve discovery disputes." *Id.* More and more, however, courts refuse to

two grounds: confidentiality unduly limits public access and “good cause” is not proven.⁵⁰ The threshold for “good cause” among this group of judges is high and F.R.C.P. 26(c)’s protective order provision is essentially disregarded.⁵¹

iii. Detailed Approach: Requirement of Specificity

Other judges require a specific showing of “good cause” before granting a protective order.⁵² Judges subscribing to this approach argue that it is necessary to “make an independent determination of good cause prior to issuing a protective order, even if the parties submit an

grant protective orders: “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” protective orders that the parties stipulate. *Id.*

⁵⁰ Pace, *supra* note 49, at 46. See *Polo v. E.I. du Pont de Nemours & Co.*, No. 04-259-DRH (S.D. III. June 7, 2004) (order denying a joint motion for a protective order). *Polo* involved price-fixing claims against seed manufacturers. The parties proposed the protective order out of “concern that sensitive information could be misused” by the other manufacturer “in the absence of strict confidentiality protections.” Pace, *supra* note 49. The court, however, denied the protective order because of a lack of good cause. *Id.* The court further described the parties’ uncontested protective order as a “fudge” and invited the parties to submit a “tightly-drawn order which keeps secret only trade secrets or other narrowly defined categories of documents.” *Id.*

⁵¹ See *Beech-Nut Nutrition v. Gerber Prod. Co.*, No. CIV-S-01-1920 GEB PAN 1, 4 (E.D. Cal. Nov. 17, 2003) (order rejecting stipulated protective order). In this case between competitors in the baby food business, the court rejected a protective order that would have established “two tiers of ‘confidentiality’ and allowed both parties to protect” their commercially-sensitive materials “from falling into the hands of their opponent’s employees involved in competitive decision making.” Pace, *supra* note 49. While acknowledging that the “stipulated order [was] intended to facilitate the discovery process,” the court held that the “parties have not shown good cause why such information” – which both sides agreed was “highly sensitive” – required protection. *Id.*

⁵² *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 n.16 (1981) (the party seeking the protective order must submit “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements”). Broad allegations, unsubstantiated by specific and detailed examples of harm and possible injuries are insufficient and do not substantiate a “good cause” showing. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986), *cert. denied*, 484 U.S. 976 (1987). See, e.g., *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994) (holding that “broad allegations of harm are not specific to establish good cause” for a protective order); *Publiker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) (“Good cause is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure,” but the “injury must be shown with specificity”); *Hobley v. Burge*, 225 F.R.D. 221, 224 (2004) (which also utilizes the language “clearly defined and serious injury” in describing the method to establish whether good cause exists); *Bryan v. Eichenwald*, 191 F.R.D. 650, 652 (2000) (“In the absence of such showing, the court does not find good cause for filing documents under seal.”).

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agreed protective order."⁵³ Because courts are charged with independently concluding whether a particularized showing of fact warrants "good cause," the method and rigor that judges employ varies.⁵⁴

iv. The Sedona Approach⁵⁵

The 2005 draft Sedona Guidelines developed a readily satisfied threshold for obtaining protective orders, but its vague explanation did not develop a step-by-step method or provide additional clarity to the "good cause" requirement.⁵⁶ In short, "good cause" is satisfied under

⁵³ *Smith v. The City of Chi.*, No. 04 C 2710, 2005 U.S. Dist. LEXIS 26454 at 2. *See Citizens First Nat'l Bank of Princeton*, 178 F.3d at 945 ("The judge is the primary representative of the public interest in the judicial process" and has an independent duty to "review any request to seal the record (or part of it)"). The district court is best situated to determine relevant factors, and it should consider each case individually:

Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases. By focusing on the particular circumstances in the cases before them, courts are in the best position to prevent both the overtly broad use of [protective] orders and the unnecessary denial of confidentiality for information that deserves it. . .

Miller, *supra* note 26, at 492. Under this method, modifications of protective orders follow the same guidelines. *Id.* As long as a protective order remains in effect, the court that entered the order retains the power to modify it. *United Nuclear Corp. v. Cranford Insur. Co.*, 905 F.2d 1424, 1427 (1990). Modification of a protective order, "like its original entry, is left to the discretion of the district court." *Id.* *See Krause v. Rhodes*, 671 F.2d 212, 218 (6th Cir. 1982) (holding that the issue of whether a protective order, once issued, should be lifted or modified should be "left to the sound discretion of the trial court").

⁵⁴ *See Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994); *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995); *Foltz v. State Farm Mut. Auto Ins. Co.*, 331 F.3d 1122, 1130 (9th Cir. 2003).

⁵⁵ The Sedona Conference is a nonprofit law and policy think tank dedicated to the advanced study and development of complex civil litigation, as well as antitrust and intellectual property law. The Working Group Series brings together recognized lawyers and academics to discuss current issues that are either ripe for solution or in need of a "boost" to advance law and policy. 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), *available at* <http://www.thesedonaconference.org/content/miscFiles/wg2may05draft2>. Specifically, this Sedona Conference Working Group "was formed out of a desire to help bring some clarity and uniformity to practices involving protective orders in civil litigation and determinations affecting public access to documents filed or referred to in court." *Id.* The goal of this Working Group is to provide immediate guidance in an effort to reconcile public access and protective orders. *Id.*

⁵⁶ *Id.* In some cases, parties assert "legitimate reasons to limit the dissemination of certain information exchanged in the normal course of discovery." *Id.* Therefore, when discovery requires "disclosure of sensitive, confidential information involving matrimonial, financial, medical or family matters, or in commercial cases, trade secrets and other

the Sedona approach as long as one of the litigating parties is able to articulate a legitimate need for confidentiality.⁵⁷ At most, this recommendation emphasizes that F.R.C.P. 26(c)'s "good cause" standard does not require a detailed or particularized showing in order to be satisfied.⁵⁸

In response to the numerous, inconsistent "good cause" tests used by the courts and the failure of F.R.C.P. 26(c) to outline judicial criteria by which to grant protective orders, the Third Circuit adopted an innovative approach to guide judges and provide consistency among the circuits.⁵⁹

b. The Third Circuit's Approach to Resolving the "Good Cause" Dilemma

i. Pre-Pansy: Balancing Interests

Even before the Third Circuit in *Pansy v. Borough of Stroudsburg*⁶⁰ articulated and enumerated specific factors to consider in applying a balancing test for granting protective orders, federal circuits around the nation applied a similar balancing test, weighing the litigants' privacy interests against the importance of disclosure.⁶¹ A decade before the

confidential business information," protective orders are the way in which judges protect the legitimate need for confidentiality. *Id.*

⁵⁷ *Id.* The Working Group articulated that: "the good cause standard generally should be considered to be satisfied so 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." *Id.* The term "legitimate need" is not further defined. *Id.*

⁵⁸ *Id.* Further, the Working Group noted that: "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. . ." *Id.*

⁵⁹ See *infra* Part II.B.2.b (discussing the Third Circuit's "good cause" balancing test).

⁶⁰ *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994). See *infra* Part II.B.2.b.ii (discussing the *Pansy* test in detail).

⁶¹ See *infra* notes 61-64 (discussing the inception of the "good cause" balancing test). But see *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 911-12 (E.D. Pa. 1981). Plaintiffs in an antitrust case moved for vacatur of a pretrial protective order in its entirety. Although the District Court applied a balancing test to validate the protective order, it refused to develop a categorical process by which courts should evaluate "good cause" and emphasized that individual factors must be considered on a case-by-case basis. *Id.* This court noted that:

To apply a balancing test, of course, the particularized interests of the litigants for and against disclosure must be weighed. . . The court must evaluate the magnitude and imminence of the threatened harm from disclosure, including the particularized interests of the litigants against disclosure and the general government interests enumerated above,

Pansy decision, the Fourth Circuit articulated criteria to balance when determining "good cause."⁶² The Fourth Circuit's process balanced the reason public access is sought, the importance or necessity of public access to the documents, and whether the information furthers improper purposes.⁶³ In the same year, the Seventh Circuit, following in the footsteps of the Fourth and Tenth Circuits, employed a similar balancing test, weighing the interests of the party seeking disclosure against the importance of the litigants' privacy.⁶⁴ Similarly, the Eleventh Circuit

the narrowness of the proposed limiting order, and the availability of less restrictive alternatives. We cannot, of course, delineate precisely the application of the test except on a case-by-case basis.

Id. at 912. This balancing test ensures that litigants are guaranteed the necessary materials and, at the same time, "protect[s] from unwarranted harm parties whose rights may ultimately be vindicated at trial." *Id.*

⁶² *In re Knight Pub. Co.*, 743 F.2d 231 (4th Cir. 1984). See *infra* note 63 (discussing *In re Knight Pub. Co.*).

⁶³ *Id.* In *In re Knight Pub. Co.*, a newspaper reporter, who was denied access to a district courtroom, challenged the protective order sealing a state senator's trial. The Fourth Circuit applied a balancing test to determine if a protective order was appropriate:

factors to be weighed in the balancing test include whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records.

Id. at 235. Documents may accordingly be sealed "if the public's right of access is outweighed by competing interests." *Id.* Here, the district court erred in "giving too little weight to the presumption favoring access and making its decision to seal the documents without benefit of Knight's arguments for access." *Id.* The Fourth Circuit based its analysis on the criteria previously utilized by the Tenth Circuit, compelling the court to balance the aforementioned interests granting a protective order. *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 669 F.2d 620, 623 (10th Cir. 1982). On appeal, the Tenth Circuit affirmed the application of the balancing test for granting a protective order. *Id.* Specifically, the Tenth Circuit held that:

The relevance of the requested documents is not an issue in this case. Hence, the appropriate balancing test does not concern the relevance of the information sought vis-a-vis the burden imposed upon the responding party. Rather, we are concerned with the burden imposed upon the responding party if a protective order is not granted as compared with the burden imposed upon the requesting party if a protective order imposing conditions is granted.

Id. Florida argued that the amount of money involved, \$8,000, was insubstantial when compared to Kerr-McGee's total assets. *Id.* This argument failed because when balancing the interests, the monetary imposition constituted an undue burden and expense within F.R.C.P. 26(c), and on the other side of the balance, the burden placed on Florida by the protective order was not a harsh one. *Id.*

⁶⁴ *Deitchman v. E.R. Squibb & Sons, Inc.*, 740 F.2d 556, 559 (7th Cir. 1984). Plaintiffs brought pharmaceutical product liability actions against drug companies for injuries allegedly caused by exposure to a drug. *Id.* at 557. On appeal, the court held that the district court did not adequately weigh the competing hardships to determine the

balanced comparable factors in a products liability action when it upheld the court's issuance of a protective order that kept the names of participants in a research study confidential.⁶⁵

Although the criteria and methods used in each instance varied, the circuits began to solidify a balancing test trend to determine "good cause."⁶⁶ The Third Circuit utilized this groundwork in *Pansy* to develop a list of factors for judges to consider when determining whether F.R.C.P.'s "good cause" requirement is satisfied.⁶⁷

ii. The *Pansy* Balancing Test

Specifically, the Third Circuit operates under the guidelines that a protective order cannot be granted unless and until the proponent can indicate, with specificity, that disclosure would cause a "clearly defined and serious injury."⁶⁸ In *Pansy v. Borough of Stroudsburg*,⁶⁹ the court

appropriateness of discovery. *Id.* When protection is sought, the court must "apply a balancing test to determine whether the need of the party seeking disclosure outweighs the adverse effect such disclosure would have on the policies underlying the [claimed] privilege." *Id.* at 559 (internal quotations omitted). Specifically, "the court must compare the hardship to the party [or person] against whom discovery is sought, if discovery is allowed, with the hardship to the party seeking discovery, if discovery is denied." *Id.* (internal quotations omitted). Thus, this matter was remanded to review the nature and magnitude of the competing hardships. *Id.* at 566.

⁶⁵ *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545 (11th Cir.1985). In this products liability action against a tampon manufacturer seeking recovery for injuries suffered from toxic shock syndrome (TSS), the Center for Disease Control (a nonparty) sought a protective order to keep the identities of women that participated in the TSS research confidential. The court noted that "federal courts have superimposed a somewhat more demanding balancing of interests approach" to granting protective orders under F.R.C.P. 26(c). *Id.* at 1547. Under this standard, "the district court's duty was to balance P & G's interest in obtaining the names and addresses of the study participants against the Center's interest in keeping that information confidential." *Id.* The appellate court validated the protective order, holding that the district court "acted within its discretion in holding that the Center's interests in keeping its study participants' names confidential outweigh the discovery interests of P & G." *Id.*

⁶⁶ See *supra* notes 60-64.

⁶⁷ See *infra* Part II.B.2.b.ii (discussing the *Pansy* balancing test in detail).

⁶⁸ *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3rd Cir. 1994). See also *Shingara v. Skiles*, 420 F.3d 301, 306 (3d Cir. 2005) (noting that *Pansy* "explained that there is good cause when a party shows that disclosure will result in a clearly defined, specific and serious injury," and that "broad allegations of harm are not sufficient to establish good cause"). See *infra* Part III.A for an in-depth analysis of how subsequent courts have applied and modified *Pansy*.

⁶⁹ *Pansy*, 23 F.3d at 772. In *Pansy*, a former police chief filed a civil rights suit. *Id.* at 775. The parties obtained a protective order, but the press moved for the court to vacate the confidentiality agreement. *Id.* at 775. In denying the press' request, the court held that the judiciary possessed an "inherent power to grant orders of confidentiality over materials not

enunciated balancing test factors for courts to consider when determining "good cause."⁷⁰ Generally, according to the analysis set forth in *Pansy*, a court should balance the following factors prior to issuing a 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
- (7) whether the case involves issues important to the public.⁷¹

in the court file," most clearly, discovery. *Id.* at 785. The *Pansy* court laid groundwork and articulated criteria for a "good cause" balancing test. *Id.* at 786. A protective order cannot be issued without first weighing public and private interests to determine whether "good cause" exists:

All such orders are intended to offer litigants a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings. . . whether an order of confidentiality is granted at the discovery stage or any other stage of litigation, including settlement, good cause must be demonstrated to justify the order.

Id. Especially when the case involves "private litigants, and concerns matters of little legitimate public interest," the court should weigh in favor of granting a protective order to preserve confidentiality. *Id.* at 788. See *infra* Part II.B.2.a for an extended discussion and identification of the application of the "good cause" requirement.

⁷⁰ *Pansy*, 23 F.3d at 786-87. Courts should apply this balancing test when considering whether to grant a protective order at any stage of litigation. *Id.* But see *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 425 n.4 (W.D.N.Y. 1981) ("It does not appear that a mere balancing test would adequately ensure the broad and liberal treatment to be accorded the federal discovery rules.").

⁷¹ *Shingara*, 420 F.3d at 306 (citing *Glenmede Trust Co.*, 56 F.3d at 483; *Pansy*, 23 F.3d at 787-91). Interestingly, the relevancy of the information is not a consideration in determining whether to grant a protective order. See *Smith v. The City of Chi.*, No. 04 C 2710, 2005 U.S. Dist. LEXIS 26454 at 1-10. Here, the court broadened *Pansy* by considering the relevancy of information when considering a protective order request. In this case, the City sought to protect the confidentiality of the personnel and payroll records of city employees produced during discovery. *Id.* The court relied on Seventh Circuit precedent that makes it clear that "a trial judge must make an independent determination of good cause prior to issuing a protective order, even if the parties submit an agreed protective order." *Id.* at 2. Specifically, the judge has an independent duty to balance the public's interest against the "property and privacy interests of the litigants." *Id.* at 2. This analysis

This balancing test, which specifically addressed the confidentiality of a settlement agreement, requires the court to consider the requesting party's need for the information against the possible injury that may result from compelled disclosure.⁷²

When considering the possible harm to the litigants, this balancing process compels judges to grant protective orders in instances where confidentiality would outweigh the benefit of public access and prevent unnecessary injury to the litigating parties.⁷³ If the risk of harm to the

differs from *Pansy*, however, in that it prioritizes the relevancy of the information to the litigation—information important to the litigation is less likely to be subject to confidentiality restrictions. In this matter, “good cause” exists to enter a protective order prohibiting public disclosure of social security numbers, salaries, and home addresses of city employees, because such information is irrelevant and public disclosure may cause unnecessary annoyance or embarrassment and would unfairly invade the privacy of City employees. *Id.* at 6. See also *Empire of Carolina, Inc. v. Mackle*, 108 F.R.D. 323, 327 (S.D. Fla. 1985) (the court considered relevancy in denying a motion to compel production because the materials sought were “at best of limited relevance” and their disclosure presented “the spectre of catastrophic harm.”).

⁷² *Pansy*, 23 F.3d at 787. See *Shingara*, 420 F.3d at 301. The district court distinguished *Shingara* from *Pansy*, as *Shingara* involved a protective order over discovery materials, whereas *Pansy* addressed confidentiality of a settlement agreement. *Id.* Although the district court acknowledged *Pansy*, by recognizing that it must “balance the privacy interests of the parties against the public interest in access to the discovery information,” it ultimately rebutted the *Pansy* criteria and determined that the analysis should not be based on the fact that it involved a public official, the Pennsylvania Police, and the fact that it is an issue of public concern. *Id.* at 306. The Third Circuit determined that regardless of these factual differences, the same balancing process applies. *Id.* at 307. The case was remanded, noting that protection is available where “good cause” exists and that “a district court may determine that good cause exists only based on reasoning that is true to the direction, language and spirit of *Pansy*.” *Id.* at 308.

⁷³ *Pansy*, 23 F.3d at 787. “It is appropriate for courts to order confidentiality to prevent the infliction of unnecessary or serious pain on parties who the court reasonably finds are entitled to such protection. In this vein, a factor to consider is whether the information is being sought for a legitimate purpose or for an improper purpose.” *Id.* See *Glenmede Trust Co.*, 56 F.3d at 476. When considering a protective order, the Third Circuit applied *Pansy* and lifted a protective order because injury to the private litigants did not exceed the public's interest. In this case, *Glenmede* sought a protective order to keep documents confidential. *Id.* at 481. The district court denied *Glenmede* and *Pepper Hamilton*'s initial motion for a protective order, holding that it did not satisfy *Pansy*'s “good cause” requirement. *Id.* On appeal, the court held that “good cause” exists “when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury,” based on the seven factors that *Pansy* enumerates. *Id.* at 483. This analysis “should always reflect a balancing of private versus public interests,” considering and “focusing on the particular circumstances” of each case in order to prevent the “unnecessary denial of confidentiality for information that deserves it.” *Id.* Here, *Glenmede* and *Pepper Hamilton* asserted that general allegations of injury to reputation or embarrassment were not specifically articulated, as *Pansy* requires, and therefore insufficient and preclude protective order protection. *Id.* at 485. Because they failed to demonstrate a specific injury from public

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litigant seeking protection prevails over the public interest, then disclosure cannot be compelled.⁷⁴

The *Pansy* balancing factors provide Third Circuit judges with a framework for considering the F.R.C.P.'s "good cause" requirement. *Pansy* does not, however, address the issue of trade secrets, an interest that various courts, and F.R.C.P. 26(c) itself, recognize as "good cause" for confidentiality under protective orders.⁷⁵

3. The Trade Secret Dimension: Trade Secrets as "Good Cause" for Confidentiality

Trade secrets are secret by their very nature.⁷⁶ When trade secrets are involved in the discovery process, a Catch-22 dilemma emerges: litigants must disclose the requested trade secrets during the discovery process while simultaneously protecting those same trade secrets from further unlawful use.⁷⁷

access of the privileged documents, a protective order in this matter was not valid under the *Pansy* criteria. *Id.*

⁷⁴ *Pansy*, 23 F.3d at 786-87. The public interest component of the balancing test revolves around protecting public safety and health, promoting public respect for the judiciary, and assuring that judges perform their duties in an informed manner. The public's legitimate interests in this information must be balanced with the interest of the private litigant who seeks to conceal the discovery. Proponents of public access maintain that "pretrial access to information helps the public better understand judicial proceedings and public confidence in the judicial system as a whole can be enhanced." *In Re Consumer Power Co. Sec. Litig.*, 109 F.R.D. 45, 54 (1985). When the newspaper here challenged a protective order entered in a securities action, the court upheld the order as appropriate. When these "functional needs of society" are balanced against "the functional needs of the judicial system," the "scope of public access may need to be narrowed and its timing deferred." *Id.* at 54. *But see* *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993) (the court here did not recognize a public right of access to discovery materials).

⁷⁵ *See infra* Part II.B.3 (discussing trade secrets as satisfying "good cause" under F.R.C.P. 26(c)).

⁷⁶ *See* *CNF Packing Co. v. BP, Inc.*, 224 F.3d 1296, 1302 (Fed. Cir. 2000). "Absent any protective order, documents produced in litigation may be used for any purpose, including direct competition. Thus, protective orders are essential in trade secret litigation." Denise H. McClelland & Shannah J. Morris, *The 'Attorneys' Eyes Only' Designation and other Disclosure Restrictions in Trade Secrets Litigation*, 13 *Bus. Torts* 7 (2006). *See generally* *In re Alexander Grant & Co. Litig.*, 820 F.2d at 356-57.

⁷⁷ *McClelland & Morris, supra* note 76, at 7. Protection of trade secrets is sufficient "good cause" to satisfy the requirement of Rule 26(c) in granting protective orders:

One means of showing 'good cause,' and therefore a frequent subject of a Court directed protective order is the so-called trade secret or secret process. While Courts have generally allowed this information to be discovered, they have limited this right by issuing a protective

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Although *Pansy* does not enumerate trade secrets as a factor to consider when granting protective orders, courts in every federal circuit have held that restricting or denying access to discovery materials may be necessary to protect trade secrets.⁷⁸ When determining whether to issue a protective order in trade secret litigation, the stakes are high.⁷⁹

order which prohibits the disclosure of this information to anyone not directly connected with the preparation of the case.

Essex Wire Corp., 48 F.R.D. at 310. The logic applied by the court in granting this type of protective order is that "if this information were disclosed, the moving party would suffer great competitive disadvantage and irreparable harm," which outweighs the interest in public access. *Id.* See *Covey Oil Co. v. Cont'l Oil Co.*, 340 F.2d 993, 999 (10th Cir. 1965) (holding that discovery was to be made available "only to counsel and independent certified public accountants and only for the purposes of the case. The court forbade the use of the material 'for business or competitive purposes' . . . The right to further protective orders upon an appropriate showing was specifically recognized."); *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (holding 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"); *United States v. Lever Bros. Co.*, 193 F. Supp. 254, 257 (S.D.N.Y. 1961) (the court granted defendant corporation discovery of its competitor's sales data for the limited purpose of preparing a defense to the action. The "data requested in the instant case does not involve secret processes or customer lists, categories which have traditionally been considered to be entitled to greater protection"). The "good cause" requirement is satisfied and justified when the court issues protective orders to prevent the disclosure of trade secrets. Protective orders ensure that "confidential business information is not revealed to the public." *Essex Wire Corp.*, 48 F.R.D. at 310.

⁷⁸ See *Nixon*, 435 U.S. at 598 ("courts have refused to permit their files to serve . . . as sources of business information that might harm a litigant's competitive standing"). A sample of federal circuit decisions that restrict access to discovery to protect trade secrets is as follows: *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (in determining whether the district court properly sealed the motions in a state senator's trial, the Fourth Circuit determined that a factor to consider is whether not issuing a protective order will result in "unfairly gaining a business advantage"); *United States v. Amodeo*, 44 F.3d, 141, 147 (2d Cir. 1995) (in illustrating the limits to public access, the court noted that the public has in the past been excluded from court proceedings to protect trade secrets); *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 166 (3d Cir. 1993) (in the manufacturer's action against competitor alleging misappropriation of trade secrets, the district court entered a protective order for discovery documents containing confidential information. On appeal, the court held that when a district court determines whether sealed documents contained bona fide trade secrets, for good cause shown, it may grant a protective order requiring that "a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way."); *In re Knoxville News-Sentinel Co. Inc.*, 723 F.2d 470, 474 (6th Cir. 1983) (in considering a protective order, the court noted that there are exceptions which limit the public's right of access to judicial records. The right to inspect judicial records is not absolute and "access has been denied where" they include "sources of business information that might harm a litigant's competitive standing."); *Huntsman-Christensen Corp. v. Entrada Indus., Inc.*, 639 F. Supp. 733, 736 (C.D. Utah 1986) (plaintiffs initially obtained an order sealing the complaint to facilitate settlement negotiations. The parties, however, failed to resolve their differences.

As a result, three levels of restricted disclosure exist to protect discovery materials in trade secret litigation.⁸⁰ The lowest level of discovery protection, which simply restricts public access without

Defendants sought an extension of the court's order sealing the complaint. In making its decision, the court cited *Nixon*, indicating that "that the factors to be weighed in the balancing test include whether the records are sought for improper purposes, such as promoting a public scandal or unfairly gaining a business advantage."); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 662 (8th Cir. 1983) (the court here closed the hearing to avoid public disclosure of trade secrets and then redacted versions of the hearing transcripts, pleadings, and exhibits that were filed on public record. The court provided that if "it determines that secrets are involved, it should then return to the courtroom, announce this determination, and state that the remainder of the proceeding will be conducted *in camera*."); *Pratt & Whitney Can., Inc. v. United States*, 14 Cl. Ct. 268, 275 (Cl. Ct. 1998) (a common justification for limiting public access if trade secrets are contained therein. In this proceeding, the danger of publicly disclosing GE's trade secrets justified keeping certain portions of pleadings and hearing transcripts *in camera*—GE can file redacted versions of the transcripts and pleadings).

⁷⁹ *Adventist Health Sys./Sunbelt Health Care Corp. v. Trude*, 880 S.W.2d 539 (Ky. 1994). If a trade secret is released to the public, "one can never put the genie back in the bottle." Morrison, *supra* note 27, at 113. Once trade secret information is released, it cannot be recalled: "the injury suffered by petitioners, assuming their adversaries have no right to this disclosure under the Civil Rules, will be complete upon compliance with the order and such injury could not thereafter be rectified in subsequent proceedings in this case." *Adventist Health Sys./Sunbelt Health Care Corp.*, 880 S.W.2d at 541-42. *See also* Gen. Elec. Co. v. U.S. Nuclear Regulatory Comm'n, 750 F.2d 1394, 1401-02 (7th Cir. 1984) (noting that once trade secrets are disclosed, the potential harm cannot be remedied or protected against). Trade secrets warrant protection. Therefore, if the court is uncertain as to whether or not a trade secret will be adversely affected, the court should grant the protective order as the possibility of inadvertently releasing information through discovery is not to be taken lightly:

Inadvertence, like the thief-in-the-night, is no respecter of its victims. Inadvertent or accidental disclosure may or may not be predictable. To the extent that it may be predicted, and cannot be adequately forestalled in the design of a protective order, it may be a factor in the access decision.

AFP Advanced Food Prod. LLC v. Snyder's of Hanover Mfg., Inc., No. Civ.A. 05-3006, 2006 U.S. Dist. LEXIS 426, 2 (E.D. Pa. Jan. 6, 2006) (citing *U.S. Steel Corp. v. United States*, 730 F.2d 1465, 1468 (Fed. Cir. 1984) (deciding whether in-house patent attorneys should be given access to confidential information through discovery in patent infringement cases)). *But see* *Ventrassist Pty. Ltd. v. Heartware, Inc.*, 377 F. Supp. 2d 1278, 1289 (S.D. Fla. 2005) (rejecting the defendant's argument that *any* discovery would "damage" the defendant because the plaintiff and defendant were competitors in manufacturing medical devices and access would give the plaintiff a "competitive advantage." The court held that this concern was illusory because under the protective order the defendant could restrict dissemination of discovery materials under the confidential or attorneys' eyes only designations).

⁸⁰ *McClelland & Morris*, *supra* note 76, at 7. Formally, three levels of restricted disclosure have emerged to protect discovery materials in trade secret cases: "confidential," "attorneys and client representative(s)" protection, and "attorneys' eyes only." *Id.* These "levels of protection have been adopted to balance access to discovery" against the "misuse of documents and information containing trade secrets produced in discovery." *Id.*

affecting the litigants' access, is termed "confidential."⁸¹ The intermediate level of protection, which restricts the litigating parties' access, is known as "attorneys and client representative(s)" protection.⁸² "Attorneys' eyes only[.]" the most restrictive level of protection, provides that such information is only to be shared with the parties' legal counsel and, in certain cases, outside experts.⁸³ Courts have also provided that multiple levels of protection may be appropriate for different documents in a single case.⁸⁴

The approaches to ascertain "good cause" and grant protective orders on the federal level vary among and within the circuits.⁸⁵ A uniform federal process to determine what constitutes "good cause" is nonexistent. The Third Circuit's *Pansy* balancing test begins to set the

⁸¹ *Id.* Information designated as "Confidential" is not disseminated to the public, but instead can only be used in that particular litigation. However, these materials may be shared and/or reviewed by all of the parties to the suit, witnesses, experts, legal counsel, and anyone else directly involved in the litigation. *Id.* See *Star Scientific, Inc. v. Carter*, 204 F.R.D. 410, 416 (S.D. Ind. 2001) (although the trade secrets warranted protection, the court determined that the lowest level of protection, "confidential," was sufficient and would increase the level of protection afforded to the trade secrets to the "attorneys' eyes only" designation).

⁸² *McClelland & Morris*, *supra* note 76, at 7. This intermediate category allows counsel to have access "to all the opponent's trade secret information, but only one or a few client representatives, agreed to by the client and the litigation opponent, may receive access to such information." *Id.* See *Uniroyal Chem. Co. v. Syngenta Crop Prot.*, 24 F.R.D. 53, 58 (D. Conn. 2004) (the court imposed a less-restrictive middle level of protection – by restricting it to counsel, outside experts, and three designated employees of each company – demonstrating that the client's needs for certain highly confidential documents outweighed the opposing party's desire to keep them entirely confidential); *Zweidinger v. Toyota Motor Corp.*, C.A. No. 94C-06-008, 1995 Del. Super. LEXIS 327 (Del. 1995) (the court granted a protective order but refused to limit it to "attorneys' eyes only," and instead stipulated that outside counsel, legal staff, one employee of each party, and in-house counsel for each party could have access to the discovery).

⁸³ *McClelland & Morris*, *supra* note 76, at 7. See, e.g., *Grayzel v. St. Jude Med., Inc.*, 162 Fed. Appx. 954, 957 (Fed. Cir. 2005) (a protective order clearly stipulated who was privy to "Confidential" and "Attorneys' Eyes Only" materials, differentiating the two as different levels of protection. These provisions expressly prohibit persons who come into possession of any such information from disclosing it outside of the litigation, regardless of the use).

⁸⁴ *McClelland & Morris*, *supra* note 76, at 7. Clients seeking to protect trade secrets may use any combination of the three tier designations: confidentiality, attorney plus client representative(s), and attorneys' eyes only. See *Blanchard & Co. v. Barrick Gold Corp.*, 2004 U.S. Dist. LEXIS 5719 (E.D. La. 2004) (the court granted a two-tier protective order, including both "confidential" and "attorneys' eyes only" levels of protection, because of the parties' competitive relationship). Although each aforementioned level of disclosure "impedes the public's access to court records," the vulnerability of trade secrets renders this restriction within the court's discretion, as the litigants' specific interests outweighs the presumption of public access. *McClelland & Morris*, *supra* note 76, at 7.

⁸⁵ See *supra* Part II.B.2.

proper groundwork, but is inadequate overall because it only provides a narrow list of considerations.⁸⁶ At the state level, legislatures actively adopted legislation to govern protective orders, but continue to fall short of developing a methodical approach for judges to apply when granting protective orders.⁸⁷

C. *"Sunshine in Litigation" Statutes: Increasing Access at the Cost of Individual Confidentiality*

*Sunshine is said to be the best of disinfectants.*⁸⁸

Although *Seattle Times* allows limitations on the public's access to discovery materials, the debate regarding the amount of public access to all facets of discovery is unresolved.⁸⁹ Federal and state legislators who oppose protective orders attempt to circumvent the Supreme Court's holding in *Seattle Times* by enacting "sunshine" legislation aimed at stifling protective orders and, in effect, maximizing public access to discovery.⁹⁰

⁸⁶ See *supra* Part II.B.2.b.

⁸⁷ See *infra* Part II.C (outlining state statutes aimed at restricting confidentiality in litigation).

⁸⁸ LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914).

⁸⁹ See *supra* notes 24-25, for a discussion and analysis of *Seattle Times*. "At the rulemaking level, the Advisory Committee circulated a proposal to amend the protective order rule to address some of these concerns in 1993, but the Judicial Conference declined to adopt that proposed amendment. After considering the issue further, the Committee decided in March 1998, that it would not propose any further changes to the protective order rule and the matter remains in the legislative arena." *Id.* See also Richard L. Marcus, *Retooling American Discovery for the Twenty-First Century: Toward a New World Order?*, 7 TUL. J. INT'L & COMP. L. 153, 180 (1999).

⁹⁰ NY STATE TRIAL LAWYERS ASSOC., SECRETS KILL: WHY NEW YORK SHOULD ENACT THE SUNSHINE IN LITIGATION ACT (May 2004). The term "sunshine" derived from the oft-cited statement of Justice Louis D. Brandeis, "[s]unshine is said to be the best of disinfectants." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914). Proponents of these laws believe that "[f]ocusing sunlight on public hazards will make it possible to stop them from harming others and, with the benefit of public debate, to help lawmakers and government officials address any underlying statutory and regulatory deficiencies that allowed the hazards to occur in the first place." NY STATE TRIAL LAWYERS ASSOC., SECRETS KILL: WHY NEW YORK SHOULD ENACT THE SUNSHINE IN LITIGATION ACT (May 2004). The "sunshine" statutes and other limits on confidentiality "reflect the balance that courts and legislatures have attempted to strike between the need for confidential settlements" and "competing interests," such as public access. Blanca Fromm, *Bringing Settlement Out of the Shadows: Information About Settlement in an Age of Confidentiality*, 48 UCLA L. REV. 663, 679 (2001).

1. The Proposed Federal “Sunshine in Litigation” Legislation

At the federal level, there are currently no statutory provisions specifically enumerating the criteria for judges to consider when granting protective orders.⁹¹ Opponents of protective orders have introduced bills into Congress with the objective of enacting an official presumption of public access to all phases of litigation, including discovery, in order to protect public health and safety.⁹² The underlying purpose of the proposed federal legislation, titled the “Sunshine in Litigation Act,” is to curb judicial discretion to issue protective orders.⁹³ If adopted, the sunshine provision would restrict federal judges’

⁹¹ See *infra* Part II.B.2.b. Proponents of establishing a federal standard to determine “good cause” argue that federal judges have too much discretion, and that too much discretion can lead to abuse. 151 CONG. REC. S7831 (June 30, 2005) (statement of Sen. Kohl).

⁹² Grimaldi, *supra* note 18. Senator Kohl (D-WI) “first introduced the bill in 1990 after a Washington Post series uncovered a trend of manufacturers using court-imposed confidentiality orders to limit public debate about companies’ products.” *Id.* The Sunshine in Litigation Act would have established additional procedural requirements—including multiple hearings and specific findings—before a trial judge could close records or proceedings. Chollet, *supra* note 18, at 734-35. Additionally, the Act would have prohibited the issuance of a protective order anytime public health or safety is at issue. *Id.*

⁹³ 149 CONG. REC. S4963-S4964 (April 8, 2003) (statement of Sen. Kohl). When Senator Kohl reintroduced the Sunshine in Litigation Act in 2003 he emphasized that its purpose was to curb a judge’s discretion in granting protective orders:

Currently, judges have broad discretion in granting protective orders when ‘good cause’ is shown. But these protective orders are being misused. Tobacco companies, automobile manufacturers and pharmaceutical companies have settled with victims and used the legal system to hide information which, if it became public, could protect the American public but endanger their business or reputation. We can all agree that the only appropriate use for such orders is to protect trade secrets and other truly confidential company information and [this] legislation makes sure it is protected.

Id. at S4936. Senator Kohl also outlined his rationale for supporting the Sunshine in Litigation Act as being based on a precedent of discretionary judicial granting of protective orders:

The problem is a simple one and has been recurring for decades. An individual brings a cause of action against a manufacturer. . . The plaintiff, often reticent to continue the litigation process because of grief or lack of resources, settles the lawsuit quickly. In exchange, the defendant insists that the plaintiff agree to the inclusion of a confidentiality clause. This mechanism prevents either party from disclosing information revealed during the process of litigation. Both of the parties to the lawsuit believe that they have ‘won.’ the plaintiff won a satisfactory financial settlement, and the defendant won the right to conceal ‘smoking gun’ documents.

Id. In short, Kohl believes that “it is time to initiate a *federal* solution for this problem.” *Id.* (emphasis added).

discretion by requiring a particularized finding of fact prior to granting a protective order.⁹⁴

2. State Approaches to Limit Protective Orders

On the state level, a handful of states have adopted and enacted modified versions of the federally-proposed "Sunshine in Litigation Act," to limit the courts' power to issue protective orders and allow public access to discovery materials.⁹⁵ Among the jurisdictions that have enacted sunshine legislation, the approaches and processes implemented vary.⁹⁶ The majority of state statutes, although different in scope and content, focus on compelling the release of information if nondisclosure would potentially affect public health or safety.⁹⁷ The most effective way to examine and differentiate these statutes is to categorize states by those that include a trade secret exception and those that do not afford protection to trade secrets.⁹⁸

⁹⁴ *Id.* Senator Kohl outlined the process federal courts would follow if his 2005 proposal was adopted:

The Sunshine in Litigation Act is a modest proposal that would require Federal judges to perform a simple balancing test to ensure that the defendant's interest in secrecy truly outweighs the public interest in information related to public health and safety. Specifically, prior to making any portion of a case confidential or sealed, a judge would have to determine by making a particularized finding of fact—that doing so would not restrict the disclosure of information relevant to public health and safety.

151 CONG. REC. S7831 (June 30, 2005) (statement of Sen. Kohl). By requiring this finding of fact prior to allowing a protective order, Kohl argues that this "would not restrict the disclosure of information relevant to public health and safety." 149 CONG. REC. S4964 (April 8, 2003) (statement of Sen. Kohl).

⁹⁵ See *infra* Parts II.C.2.a-c (outlining the various state approaches). In pushing for federal legislation, Senator Kohl noted that "[s]ome states have been proactive" in developing sunshine legislation. 149 CONG. REC. S4964 (April 8, 2003) (statement of Sen. Kohl). The majority of the state-enacted measures stress "the possible utility of information obtained through discovery in revealing risks to public health." Marcus, *supra* note 88, at 180.

⁹⁶ Rooks, *supra* note 21, at 18. "Different jurisdictions have taken varied approaches, often depending on the particular secrecy mechanism addressed, but their thrust is usually to require greater judicial scrutiny rather than to ban secrecy altogether." *Id.* Some common examples include: declaring a presumption of openness for all court records in the jurisdiction; limiting circumstances in which protective orders may be entered; requiring a showing of good cause before approving secrecy, with the burden on the secrecy proponent; requiring public hearings before orders are granted; allowing intervention by interested nonparties; and specifying certain matters that may not be kept secret. *Id.*

⁹⁷ See *infra* Parts II.C.2.a-c.

⁹⁸ See *infra* Parts II.C.2.a-c. The states that afford protection to trade secrets are: Florida, Texas, Washington and Louisiana. Arkansas, on the other hand, does not protect trade secrets. Virginia's law provides a unique information-sharing framework.

a. *State Statutes that Require Public Hazard Disclosure, but Provide for a Trade Secret Exception: Florida, Texas, Washington, and Louisiana*

Florida's Sunshine in Litigation Act laid the groundwork and acted as a catalyst for state implementation of legislation inhibiting the judicial grant of protective orders.⁹⁹ Florida is considered to be innovative in enacting legislation that prohibits protective orders when doing so conceals public hazards.¹⁰⁰ Under its anti-secrecy legislation, Florida

⁹⁹ The Florida "Sunshine in Litigation Act" provides, in part:

(3) Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

(4) Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information concerning a public hazard, or any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard, is void, contrary to public policy, and may not be enforced.

(5) Trade secrets as defined in s. 688.002 which are not pertinent to public hazards shall be protected pursuant to chapter 688. . .

(7) Upon motion and good cause shown by a party attempting to prevent disclosure of information or materials which have not previously been disclosed, including but not limited to alleged trade secrets, the court shall examine the disputed information or materials in camera. If the court finds that the information or materials or portions thereof consist of information concerning a public hazard or information which may be useful to members of the public in protecting themselves from injury which may result from a public hazard, the court shall allow disclosure of the information or materials. If allowing disclosure, the court shall allow disclosure of only that portion of the information or materials necessary or useful to the public regarding the public hazard. . .

FLA. STAT. § 69.081 (2005). "Trade secrets" are separately defined as:

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process that: (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. at § 688.002. In December 2005, the Florida Court of Appeals affirmed the constitutionality of the Florida "Sunshine in Litigation" law, holding that it is "rationally related to a reasonable government objective." *Goodyear Tire & Rubber Co. v. Jones et al.*, 929 So. 2d 1081, 1086 (Fla. App. 2005).

¹⁰⁰ NICK SULLIVAN, AUTOMOTIVE LITIG. REPORTER, FLA. APPEALS COURT UPHOLDS 'SUNSHINE IN LITIGATION' LAW (2005), <http://news.findlaw.com/andrews/pl/aut/>

defines "public hazard" broadly, inhibiting protective orders if the litigants' confidentiality reduces public access to possible hazard information.¹⁰¹ If trade secrets are potentially at risk in a public hazard matter, the court provides a measure of confidentiality by disclosing only the portion relevant to public safety.¹⁰² Whereas Florida has attempted to protect public interest by prohibiting courts from entering protective orders in cases of public importance, Texas attempted to restrict confidentiality by establishing a rigorous balancing test.

In Texas, court records are presumed open and will only be sealed in instances where a protective order is the least restrictive means of adequately protecting the specific interest asserted.¹⁰³ The party seeking

20051222/20051222tires.html. Florida is cited as a model for state implementation of legislation that creates obstacles for the judicial issuance protective orders. *Id.* Senator Kohl cited the Florida statute during his proposed federal version, indicating that "Florida, for example, has in place a Sunshine in Litigation law that severely limits the ability of parties to conceal information that effects [*sic*] public health and safety." 149 CONG. REC. S4964 (April 8, 2003) (statement of Sen. Kohl).

¹⁰¹ FLA. STAT. § 69.081(2) (2005). Under the auspices of the Florida sunshine law, public hazards include any "instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, instrument, person, procedure, or product that has caused or is likely to cause injury." *Id.* By including such a broad list, the statute appears to extend to every possible matter. However, it is limited in one crucial way: in order to be a public hazard, it must have caused injury in the past and be likely to do so again. *Id.*

¹⁰² *Id.* at § 69.081(5). Florida's only explicit exception—trade secrets "which are not pertinent to public hazards"—essentially protects very little in practice, as relation to a public hazard is what triggers its application. *Id.* In Florida, *in camera* hearings balance whether the trade secrets are potentially at stake and warrant protection. *Id.* at § 69.081. Trade secrets include information that "derives independent economic value" from not be generally known by the public. *Id.* at § 688.002.

¹⁰³ Ashley Gauthier, *Secret Settlements: Hiding Defects, Hurting the Public*, 24 NEWS MEDIA & THE LAW 3 (FALL 2000). The Texas rule regarding sealing court records is, in part, as follows:

1. *Standard for Sealing Court Records.* Court records may not be removed from court files except as permitted by statute or rule. No court order or opinion issued in the adjudication of a case may be sealed. Other court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:
 - (a) a specific, serious and substantial interest which clearly outweighs:
 - (1) this presumption of openness;
 - (2) any probable adverse effect that sealing will have upon the general public health or safety;
 - (b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.
2. *Court Records.* For purposes of this rule, court record means . . .
 - (c) discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety, or the

confidentiality through a protective order has the burden of proving that a “specific, serious and substantial interest” clearly outweighs (1) the presumption of openness afforded by the Texas Rule of Civil Procedure 76a, as well as (2) any probable adverse effect that sealing would have on the general public health or safety.¹⁰⁴ Texas’s presumption of openness allows public access to un-filed settlements and discovery materials if a probable adverse effect on public health or safety exists.¹⁰⁵ Additionally, Texas Rule of Civil Procedure 76a allows third parties, including the media, to intervene and challenge sealing orders.¹⁰⁶ Texas courts, however, have limited public access through the implementation and

administration of public office, or the operation of government, except discovery in cases originally initiated to preserve bona fide trade secrets or other intangible property rights.

3. *Notice.* Court records may be sealed only upon a party’s written motion, which shall be open to public inspection. . .

4. *Hearing.* A hearing, open to the public, on a motion to seal court records shall be held in open court as soon as practicable, but not less than fourteen days after the motion is filed and notice is posted. Any party may participate in the hearing. Non-parties may intervene as a matter of right for the limited purpose of participating in the proceedings. . . The court may inspect records in camera when necessary. . .

6. *Order on Motion to Seal Court Records.* A motion relating to sealing or unsealing court records shall be decided by written order, open to the public, which shall state: the style and number of the case; the specific reasons for finding and concluding whether the showing required by paragraph 1 has been made; the specific portions of court records which are to be sealed; and the time period for which the sealed portions of the court records are to be sealed. . .

7. *Continuing Jurisdiction.* Any person may intervene as a matter of right at any time before or after judgment to seal or unseal court records. . . However, the burden of making the showing required by paragraph 1 shall always be on the party seeking to seal records. . .

TEX. R. CIV. P. 76a (Vernon 2005).

¹⁰⁴ BP Prods. N. Am., Inc. v. Houston Chronicle Publ’g Co., NO. 01-05-01032-CV, 2006 Tex. App. LEXIS 4286 (Tex. App. May 18, 2006). On appeal, BP contended that witness statements recounting the victims of an oil facility explosion are not court records and do not meet the test set forth in TEX. R. CIV. P. 76a. *Id.* After applying Rule 76a’s two-part test, the appellate court concluded that the trial court did not abuse its discretion by denying the corporation’s motion to seal the witness statements. *Id.*

¹⁰⁵ TEX. R. CIV. P. 76a(2)(c) (Vernon 2005). *See supra* notes 102-03. “In 1990, the Texas Supreme Court promulgated what is perhaps the most far-reaching court-written anti-secrecy regulation in the nation, Sec. 76a of the Texas Rules of Civil Procedure. This rule creates a ‘presumption of openness’ applying public access to all court records. Court records include pretrial discovery documents.” NY STATE TRIAL LAWYERS ASSOC., SECRETS KILL: WHY NEW YORK SHOULD ENACT THE SUNSHINE IN LITIGATION ACT (May 2004).

¹⁰⁶ TEX. R. CIV. P. 76a (Vernon 2005). Rule 76a even allows intervention after a final judgment, giving the media an opportunity to examine past records if new significance is discovered after-the-fact. *Id.*

application of Rule 76a.¹⁰⁷ One exception, trade secret information, is afforded confidentiality through protective orders.¹⁰⁸

Washington's Public Right to Know Bill establishes a strong presumption for public access to information in products liability and hazardous waste cases.¹⁰⁹ The Washington legislature, however, does

¹⁰⁷ *In re Bain*, 144 S.W.3d 236 (Tex. App. 2004). Texas courts clearly recognize limits to public access. *Id.* In a client's malpractice suit against her lawyer, the judge abused his discretion in ordering the disclosure of billing documents. *Id.* These documents were subject to a proper confidentiality order under TEX. R. CIV. P. 76a, the client was not authorized to receive the documents, and the client did not state how the information related to any element of her cause of action. *Id.* Additionally, Texas maintains that admissibility is, indeed, a prerequisite for unsealing documents. *Id.* See also *Abdelnour v. Mid Nat'l Holdings, Inc.*, 190 S.W.3d 237 (Tex. App. 2006). Documents may be tendered *in camera* for the purpose of obtaining a ruling on the admissibility of such documents. *Id.* Due to the fact that such documents are not 'court records,' the documents do not need to be given to the opposing party until the court rules on their admissibility. *Id.* Restraining public access, evident in each of these examples, is a byproduct of Texas' law regarding the sealing of court records.

¹⁰⁸ TEX. R. CIV. P. 76a(2)(c) (Vernon 2005) (preserving "bona fide trade secrets").

¹⁰⁹ Washington's version of the Sunshine in Litigation Act—the Public Right to Know Bill—follows, in part:

(1) (a) "Product liability/hazardous substance claim" means a claim for damages for personal injury, wrongful death, or property damage caused by a product or hazardous or toxic substances, that is an alleged hazard to the public and that presents an alleged risk of similar injury to other members of the public. (b) "Confidentiality provision" means any terms in a court order or a private agreement settling, concluding, or terminating a product liability/hazardous substance claim, that limit the possession, disclosure, or dissemination of information about an alleged hazard to the public, whether those terms are integrated in the order or private agreement or written separately. . .

(2) Except as provided in subsection (4) of this section, members of the public have a right to information necessary for a lay member of the public to understand the nature, source, and extent of the risk from alleged hazards to the public.

(3) Except as provided in subsection (4) of this section, members of the public have a right to the protection of trade secrets as defined in RCW 19.108.010, other confidential research, development, or commercial information concerning products or business methods.

(4) (a) Nothing in this chapter shall limit the issuance of any protective or discovery orders during the course of litigation pursuant to court rules. (b) Confidentiality provisions may be entered into or ordered or enforced by the court only if the court finds, based on the evidence, that the confidentiality provision is in the public interest. In determining the public interest, the court shall balance the right of the public to information regarding the alleged risk to the public from the product or substance as provided in subsection (2) of this section

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not limit protective orders, but instead only restricts private confidentiality agreements.¹¹⁰ Accordingly, before enforcing a confidentiality agreement, Washington requires the courts to weigh public safety risks against privacy interests.¹¹¹ Unlike Florida's provision, Washington's law is not limited to hazards that have actually caused injury, but instead applies to confidentiality agreements that limit disclosure "about an alleged hazard to the public."¹¹² As a matter of public policy in Washington, trade secrets and commercial information are protected and unnecessary disclosure is to be prevented.¹¹³

Like the Washington law, Louisiana's Sunshine in the Courtroom Bill attempts to balance the competing interests of public access and

against the right of the public to protect the confidentiality of information as provided in subsection (3) of this section.

(5) (a) Any confidentiality provisions that are not adopted consistent with the provisions of this section are voidable by the court. . .

WASH. REV. CODE ANN. § 4.24.611 (West 2005).

¹¹⁰ *Id.* at § 4.24.611(4)(a) ("Nothing in this chapter shall limit the issuance of any protective or discovery orders during the course of litigation pursuant to court rules.").

¹¹¹ *Id.* at § 4.24.611(4)(b).

¹¹² *Id.* at § 4.24.611(1)(b) (emphasis added). Confidentiality provisions, as defined by the statute, include court orders that "limit the possession, disclosure, or dissemination of information about an alleged hazard to the public, whether those terms are integrated in the order or private agreement or written separately. . ." *Id.* (emphasis added).

¹¹³ *Id.* at § 4.24.601. Washington's definition of "trade secrets" referred to in part (3) of the aforementioned statute is as follows:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process that:

(a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(b) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. at § 19.108.010. Specifically, the Code articulates that:

The legislature finds that public health and safety is promoted when the public has knowledge that enables members of the public to make informed choices about risks to their health and safety. Therefore, the legislature declares as a matter of public policy that the public has a right to information necessary to protect members of the public from harm caused by alleged hazards to the public. The legislature also recognizes that protection of trade secrets, other confidential research, development, or commercial information concerning products or business methods promotes business activity and prevents unfair competition. Therefore, the legislature declares it a matter of public policy that the confidentiality of such information be protected and its unnecessary disclosure be prevented.

Id. at § 4.24.601.

litigants' confidentiality in matters relating to public hazards.¹¹⁴ The Louisiana provision does provide exceptions to protect "trade secret" and "commercial information," terms which the statute itself does not define.¹¹⁵ As a result, in matters involving public hazards, trade secret information remains protected and, therefore, confidential under a protective order.¹¹⁶

¹¹⁴ LA. CODE CIV. PROC. ANN. art. 1426 (2005). In part, Louisiana's general provisions governing discovery indicate that:

A. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

- (1) That the discovery not be had.
- (2) That the discovery may be had only on specified terms. . .
- (3) That the discovery may be had only by a method of discovery other than that selected by the party seeking discovery.
- (4) That certain matters not be inquired into, or that the scope of the discovery be limited to certain matters.
- (5) That discovery be conducted with no one present except persons designated by the court.
- (6) That a deposition after being sealed be opened only by order of the court.
- (7) *That a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way. . .*

B. If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. . .

Id. (emphasis added).

¹¹⁵ *Id.* The Louisiana provision addresses "commercial information" as follows:

C. No provision of this Article authorizes a court to issue a protective order preventing or limiting discovery or ordering records sealed if the information or material sought to be protected relates to a public hazard. . . *unless such information or material sought to be protected is a trade secret or other confidential research, development, or commercial information.*

D. Any portion of an agreement or contract which has the purpose or effect of concealing a public hazard, any information relating to a public hazard. . . *is null and shall be void and unenforceable as contrary to public policy, unless such information is a trade secret or other confidential research, development, or commercial information.*

Id. (emphasis added).

¹¹⁶ *Save Our Selves, Inc. v. Louisiana Environmental Control Com.*, 430 So. 2d 1114 (La. App. 1983). In a hearing before the Louisiana Environmental Control Commission to determine whether permits for hazardous waste disposal and water discharge should be

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The aforementioned state statutes maximize public access, especially in matters involving public safety. By incorporating exceptions for trade secrets and commercially-sensitive information, and thereby preserving confidentiality in certain cases, however, they differ from the statute in Arkansas.¹¹⁷

b. *State Statute that Requires Public Hazard Disclosure, but Does Not Provide for a Trade Secret Exception: Arkansas*

Unlike the preceding state statutes, the Arkansas statute fails to protect trade secrets and reduces private litigants' right to privacy during discovery by prohibiting protective orders in matters regarding environmental hazards.¹¹⁸ Under this statute, public access is maximized as settlement agreements that conceal potential environmental or public health hazards are automatically treated as void by reason of Arkansas' public policy.¹¹⁹ Private contract provisions in Arkansas which restrict disclosure of environmental hazards, for trade secret reasons or otherwise, are void.

c. *Information-Sharing With Subsequent Litigants: Virginia*

Virginia's statute differs drastically from other states' sunshine legislation because it is based on the principle of information-sharing.¹²⁰

issued, certain trade secret information—unnecessary to the Commission's decision—was protected by Louisiana's trade secret exception to public access. *Id.*

¹¹⁷ See *infra* Part II.C.2.b (discussing Arkansas' confidentiality statute, which does not protect trade secrets).

¹¹⁸ ARK. CODE ANN. § 16-55-122 (Supp. 2005). The Arkansas statute titled "Contract provisions restricting disclosure of environmental hazards are void," indicates that:

(a) Any provision of a contract or agreement entered into to settle a lawsuit which purports to restrict any person's right to disclose the existence or harmfulness of an environmental hazard is declared to be against the public policy of the State of Arkansas and therefore void.

(b) For purposes of this section, the term "environmental hazard" means a substance or condition that may affect land, air, or water in a way that may cause harm to the property or person of someone other than the contracting parties to a lawsuit settlement contract. . .

Id.

¹¹⁹ *Id.* at § 16-55-122(a). See also Chollet, *supra* note 18, at n.225.

¹²⁰ Morrison, *supra* note 27, at 123. Virginia prohibits confidential settlements and gag rules in wrongful death and personal injury cases, effectively freeing attorneys to discuss relevant matters with future litigants. *Id.* Virginia law subscribes to the notion that there are no justifications for forbidding one attorney to share documents produced under a protective order with another attorney, as long as the second attorney abides by the original protective order provisions. *Id.* The Virginia legislature "stepped in and decided that certain kinds of disclosures are too important to be left to the lawyers and the

Virginia's protective order provision provides litigants with confidentiality by limiting public access, but simultaneously removes their ability to control future litigants' access.¹²¹ The Virginia legislature does not outline a process by which judges should grant protective orders, but instead governs their scope once issued.¹²² In Virginia, as a result of this law, attorneys can share information they receive under a protective order with other attorneys involved in similar litigation.¹²³

State statutory requirements regarding public access to discovery materials attempt to govern confidentiality, but fail to sufficiently establish a proper and thorough judicial approach to issue protective orders. Additionally, by restricting confidentiality in discovery, the sunshine in litigation statutes interfere with attorneys' fiduciary duty to act in their clients' best interests.¹²⁴

adversary process" and that "as long as the second lawyer is bound, the defendant gets all the protection to which it is entitled." *Id.*

¹²¹ VA. CODE ANN. § 8.01-420.01 (2006). In Virginia, attorneys are not permitted to release discovery information under a protective order to the public, but they are allowed to share information with subsequent litigants. The Virginia statute limiting further disclosure of discoverable materials is as follows:

A protective order issued to prevent disclosure of materials or information related to a personal injury action or action for wrongful death produced in discovery in any cause shall not prohibit an attorney from voluntarily sharing such materials or information with an attorney involved in a similar or related matter, with the permission of the court, after notice and an opportunity to be heard to any party or person protected by the protective order, and provided the attorney who receives the material or information agrees, in writing, to be bound by the terms of the protective order.

Id.

¹²² *Id.* Once a protective order is granted, this statute enables the judge to stretch or diminish its scope without any restrictions. *Id.*

¹²³ Morrison, *supra* note 27, at 123. Weaknesses exist in applying the Virginia information-sharing protective order statute. The Virginia statute does not:

state whether the other plaintiff's lawyer must have filed a lawsuit already. It is not clear whether the law applies to other lawyers who are either not members of the Virginia Bar or who have cases outside of Virginia. It fails to make clear which court will enforce the protective order against the second lawyer—the one issuing the protective order, or the one where the second case is pending.

Id. at 122.

¹²⁴ See *supra* Part II.C.2.

3. Interfering with Attorneys' Fiduciary Duty: Statutory Requirements for Public Access Are Not in Accord with Attorneys' Fiduciary Duty

*Good counselors lack no clients.*¹²⁵

Sunshine statutes divide attorneys' loyalty between their clients and the public, which may be inconsistent with the notion of a fiduciary duty. It is well-settled law that, regardless of jurisdiction, attorneys owe their clients a fiduciary duty.¹²⁶ The fiduciary duty binds attorneys to represent their clients' best interests.¹²⁷ Among the fiduciary duties are undivided loyalty, candor, and the ethical obligations of giving clients full and meaningful disclosure of conflicts of interest so that the client may decide if the representation is in his or her best interest.¹²⁸ The fiduciary duty that an attorney owes clients may not be dispensed with, modified, or taken lightly.¹²⁹ In some instances, protective orders may be in accord with clients' best interests. As a result, attorneys are bound to advocate for maximum confidentiality.¹³⁰ Statutes regulating

¹²⁵ WILLIAM SHAKESPEARE, MEASURE FOR MEASURE I, 2 (Signet 2005).

¹²⁶ Akron Bar Ass'n v. Williams, 819 N.E.2d 677, 680 (Ohio 2004). See also Huber v. Taylor, 469 F.3d 67 (3d Cir. 2006) (comparing various jurisdictions' approaches—including Pennsylvania, Indiana and Texas—to enforcing and regulating breaches of attorneys' fiduciary duty).

¹²⁷ MODEL RULES OF PROFESSIONAL CONDUCT (2004). See Akron Bar Ass'n, 819 N.E.2d at 680 ("The attorney stands in a fiduciary relationship with the client and should exercise professional judgment solely for the benefit of the client and free of compromising influences and loyalties") (internal quotation omitted); *In re Tsoutsouris*, 748 N.E.2d 856, 859 (Ind. 2001); Office of Disciplinary Counsel v. Monsour, 701 A.2d 556, 558 (Pa. 1997) ("This public trust that an attorney owes his client is in the nature of a fiduciary relationship involving the highest standards of professional conduct."); Arce v. Burrow, 958 S.W.2d 239, 246 (Tex. Ct. App. 1997), *rev'd on other grounds*, 997 S.W.2d 229 (Tex. 1997).

¹²⁸ Huber, 469 F.3d at 72. It is important to note, however, that the purpose of the fiduciary duty is two dimensional: it is not just to protect clients, but instead "is also designed to regulate the fiduciary and to ensure that the fiduciary performs his [or her] duties." *Id.* at 80. In fulfilling their fiduciary duties, attorneys must avoid conflicts of interest, and must also not "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." *Milgrub v. Cont'l Cas. Co.*, No. 03:05-332, 2007 U.S. Dist. LEXIS 80, 13 (D. Pa. Jan. 3, 2007). See also Willis v. Maverick, 760 S.W.2d 642, 645 (Tex. 1998).

¹²⁹ Huber, 469 F.3d at 72. See, e.g., *Milgrub*, 2007 U.S. Dist. LEXIS at 13 (clearly stating that the fiduciary duty that an attorney owes clients is "among the most stringent to be found"); *Capital Care Corp. v. Hunt*, 847 A.2d 75, 84 (Pa. Super. Ct. 2004) ("It is axiomatic that an attorney who undertakes representation of a client owes that client both a duty of competent representation and the highest duty of honesty, fidelity, and confidentiality."). As Judge Cardozo observed in *In the Matter of Rouss*, "[m]embership in the bar is a privilege burdened with conditions." *In the Matter of Rouss*, 116 N.E. 782, 783 (1917).

¹³⁰ See generally MODEL RULES OF PROFESSIONAL CONDUCT (2004). See *infra* Part III.B.2 (discussing the role of protective orders in discovery). As an advisor for her clients, a lawyer is required to provide advice using her professional judgment, considering not just the law, but also "moral, economic, social and political factors, that may be relevant to the

confidentiality diminish attorneys' ability to fully and effectively advocate for their clients.

State approaches to confidentiality provide a roadmap, but not a model, for a system of civil litigation that addresses privacy concerns and permits access to the judicial system. State statutes vary in scope, process, and on the issue of whether to protect trade secrets. Although the aforementioned states have enacted provisions guiding state courts' ability to provide confidentiality, the majority of states have not.¹³¹ Outlining the various approaches to which federal judges subscribe, and to which states adhere, reveals the fact that a consistent method for granting protective orders is non-existent.¹³²

An established and clear method by which judges on the federal level should grant protective orders remains undecided. Part III analyzes the shortcomings of the Third Circuit's balancing test, promotes the notion that a broad array of factors must be considered in effectively determining "good cause," and also highlights the fact that inhibiting protective orders circumvents attorneys' fiduciary duty.

client's situation." MODEL RULES OF PROFESSIONAL CONDUCT R. 2.1 (2004). Considering the most economically advantageous method of protecting discovery materials is consistent with an attorney's fiduciary duty. *Id.*

¹³¹ Tennessee, for example, refuses to enact legislation to establish standards for sealing court records. *See generally* Chollet, *supra* note 18. The Tennessee Supreme Court flatly rejected to Proposed Rule of Civil Procedure 1A which would have adopted procedural obstacles and a new standard for sealing court records. Opponents of the Rule "expressed concern over the Proposed Rule's expansive scope, citing numerous potentially detrimental effects of the proposed rule," including but not limited to "a chilling effect on settlements, unnecessary delay of litigation, and potential future disputes due to the vagueness in the Proposed Rule as drafted." *Id.* at 741-43. Due to the lack of "adequate procedural safeguards for refining the broad scope of the Proposed Rule" it likely "would have done more harm than good." *Id.* Even proponents of the Proposed Rule, who argue that "public notice is a social imperative" acknowledge that this "principle should be tempered to provide a reasonable balance of the many competing interests between private litigants and the public," which this restriction on protective orders failed to provide. *Id.* at 745. Because of the Tennessee Supreme Court's attention to the privacy infringements of the Proposed Rule, the trial court judge rightly maintains the discretion to issue protective orders. The full text of the proposed Rule can be found at the Tennessee Supreme Court's website: TENN. SUP. CT. (2006), <http://www.tsc.state.tn.us/opinions/tsc/rules/proposals/2005/2005amd.pdf>.

¹³² *See supra* Part II.B.2.a (discussing judges' approaches to granting protective orders); *supra* Part II.C.2 (discussing state statutes that regulate confidentiality in discovery).

III. ANALYSIS

*One of the things we cherish most about being Americans is
our . . . privacy.
If we lose that. . . we will have lost something irreplaceable.*¹³³

As Part II illustrates, the extent to which F.R.C.P. 26(c) permits judges to issue protective orders—and limit public access to discovery materials—is unclear.¹³⁴ While several federal courts and state legislatures have attempted to develop tests, no uniform set of rules yet exists for judges to consistently consult when determining “good cause” under F.R.C.P. 26(c).¹³⁵ Part III analyzes the tension that arises from allowing judicial discretion to govern the issuance of protective orders under F.R.C.P. 26(c), critiques the various judicially-created approaches to ascertaining “good cause,” and analyzes how protective orders comport with attorneys’ fiduciary duties.

Pansy chartered in new ground when it articulated specific criteria to consider when ascertaining whether discovery warrants a protective order.¹³⁶ Nevertheless, *Pansy*’s “good cause” balancing test is now archaic, undeveloped, and fails to account for the wide array of valid grounds for protective orders.¹³⁷ Clearly, *Pansy* laid important groundwork in isolating “good cause” considerations, but it is flawed in that it neither develops priorities for judges to consider nor accounts for matters in which trade secrets are at risk.¹³⁸ Additionally, *Pansy*’s unclear approach ushers in public policy shortcomings, such as undermining attorneys’ well-established fiduciary duty to serve their clients’ best interests.¹³⁹ Currently, on the federal level, there is not a clear, methodical process to ascertain “good cause,” a prerequisite of protective orders.¹⁴⁰

¹³³ Mark Hansen, *No Place to Hide*, 83 A.B.A. J. 44, 47 (Aug. 1997).

¹³⁴ See *supra* Part II.B (discussing the various approaches that federal judges currently follow to determine “good cause”).

¹³⁵ See *supra* Part II.B (discussing federal circuits’ approaches); *supra* Part II.C (discussing states’ efforts to define instances in which public access is necessary).

¹³⁶ See *supra* Part II.B.2.b.ii (discussing the *Pansy* test specifically); *supra* note 71 and accompanying text (discussing the seven narrow factors that *Pansy* outlines for judges to consider).

¹³⁷ See *infra* Part III.A.

¹³⁸ See *infra* Part III.B.1.

¹³⁹ See *infra* Part III.B.2 (discussing the effects of *Pansy* on attorneys’ fiduciary capabilities).

¹⁴⁰ See *supra* Part II.B.2.a (outlining the various approaches that federal judges currently apply when considering whether “good cause” exists).

A. *The Third Circuit's "Good Cause" Balancing Test: Subsequent Affirmation & Modification of Pansy v. Borough of Stroudsburg*

Following *Pansy*, federal courts began to apply, and in some cases modify, its specifically enunciated standards.¹⁴¹ For example, when considering the validity of a protective order, the Third Circuit directly applied *Pansy* and lifted a protective order because injury to the private litigants did not arise from or exceed the public's interest in access.¹⁴² Subsequent application of the "good cause" balancing test by the Third Circuit not only affirms *Pansy's* criteria, but also fundamentally broadens its applicability to include discovery materials at-large, not just confidential settlement agreements.¹⁴³ Later modifications of the *Pansy* standard also emphasize and prioritize the relevancy of the information in question to determine if "good cause" exists.¹⁴⁴

B. *Pansy v. Borough of Stroudsburg: Laying the Proper (But Not Complete) Groundwork for Satisfying the "Good Cause" Requirement*

Pansy enumerated criteria for judges to consider when determining "good cause" and, in effect, established the skeleton of a balancing test by holding that courts must weigh litigants' confidentiality interests against public access.¹⁴⁵ It is necessary to add flesh to the *Pansy* balancing test skeleton, because it lacks important and essential considerations, including whether public access to trade secrets provides unfair business advantages or disadvantages.¹⁴⁶ Moreover, in order to be in accord with the F.R.C.P. and attorneys' fiduciary duty to their clients,

¹⁴¹ See *supra* Part II.B.2.b.ii (discussing the *Pansy* balancing test, and noting subsequent implementation and modification of it).

¹⁴² See *supra* note 73 (discussing *Glenmede Trust Co. v. Thompson*, a case which applies the *Pansy* balancing test and clearly outlines each criteria in its consideration of a protective order).

¹⁴³ See *supra* note 72 (discussing *Shingara v. Skiles*, which clarifies and expands the *Pansy* test to apply to discovery materials, as well as confidential settlements).

¹⁴⁴ See *supra* note 71 (discussing *Smith v. City of Chicago*, which expands *Pansy's* balancing test to include consideration of the relevancy of the information that would be granted confidentiality under a protective order).

¹⁴⁵ See *supra* note 69 and accompanying text (discussing the court's holding and reasoning in *Pansy*); *infra* Part IV (explaining the proposed "Good Cause Doctrine," a new federal approach which would modify *Pansy's* balancing test and provide flesh to the bones of the Third Circuit's approach); see also *Shingara*, 420 F.3d at 301 (citing *Glenmede Trust Co.*, 56 F.3d at 483; *Pansy*, 23 F.3d at 787-91.).

¹⁴⁶ See *supra* Part II.B.3 (discussing trade secrets as valid "good cause" under F.R.C.P. 26(c) and providing a sample of the circuits' implementation of protective orders in trade secret matters).

additional considerations—particularly trade secrets—should be an essential step in establishing whether “good cause” exists.¹⁴⁷

1. *Pansy’s* Limited Set of Factors Improperly Fails to Account for Trade Secret Considerations When Determining “Good Cause”

The *Pansy* analysis is inadequate because it outlines incomplete criteria for judges to consider when granting protective orders and does not provide a process by which judges should prioritize or balance such criteria.¹⁴⁸ Trade secrets satisfy “good cause” to grant protective orders, pursuant to F.R.C.P. 26(c), because confidentiality in these instances preserves discovery information while shielding litigants from possible business injuries or disadvantages.¹⁴⁹

Trade secrets, a source of sufficient “good cause,” are overlooked in the *Pansy* balancing test.¹⁵⁰ When considering whether to grant a protective order, courts should carefully guard the confidentiality of trade secrets because imposing a business disadvantage on litigants as a result of forced disclosure of trade secrets is antithetical to the discovery process.¹⁵¹ A unique “genie in a bottle” dilemma arises when trade

¹⁴⁷ See *infra* notes 163-66 and accompanying text (discussing the impact of trade secrets on attorneys’ fiduciary duty); *infra* Part IV (proposing the “Good Cause Doctrine,” an approach that would prioritize trade secrets in determining whether discovery information warrants confidentiality).

¹⁴⁸ See *supra* note 71 and accompanying text (discussing the *Pansy* criteria, which are listed generally, without an accompanying method or process).

¹⁴⁹ See *supra* note 77 (discussing *Essex Wire Corp.*, which satisfied “good cause” by demonstrating that trade secrets were at risk. Although generally discoverable, this court held that trade secrets warrant protective orders in order to prohibit disclosure of confidential information).

¹⁵⁰ See *supra* note 75 and accompanying text (trade secrets are overtly absent from the *Pansy* “good cause” analysis); *supra* Part II.B.3 (discussing trade secrets as “good cause” for protective orders, and providing examples of trade secret protection from among the Circuits); *In re Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig.*, 101 F.R.D. 34 (C.D. Cal. 1984) (emphasizing that, pursuant to F.R.C.P. 26(c), a court may order that trade secrets, confidential research, or other commercial information produced during discovery be protected from public disclosure); see also *In re Papst Licensing*, No. MDL 1298, 2000 U.S. Dist. LEXIS 6374, 12 (E.D. La. May 4, 2000) (upholding a protective order which required counsel having access to confidential information to refrain from advice in patent prosecution for one year as “preparation and prosecution of patent applications . . . is an intensely competitive decision making activity”).

¹⁵¹ See *supra* Part II.B.3 (noting that the importance of preserving trade secrets’ confidentiality is sufficient “good cause” to grant a protective order); *supra* Part II.A (discussing the object and purpose of discovery); see also *Safe Flight Instrument Corp. v. Sundstrand Data Control, Inc.*, 682 F. Supp. 20, 22 (D. Del 1988) (“Courts dress technical information with a heavy cloak of judicial protection because of the threat of serious economic injury to the discloser” of the information).

secrets are at issue: once a judge allows trade secrets to be disclosed to the public, the judge cannot restore secrecy and propriety, or put the genie back into the bottle.¹⁵² If a court is uncertain as to whether or not trade secret information will be adversely affected, the court should grant a protective order as the possibility of inadvertently releasing information through discovery is a serious concern which F.R.C.P. 26(c) directly prohibits.¹⁵³

By aligning with the stipulations of F.R.C.P. 26(c), the "good cause" requirement is satisfied and justified when courts issue protective orders to prevent the disclosure of trade secrets.¹⁵⁴ A narrow construction of "good cause" factors is not in accord with F.R.C.P. 26(c) because it circumvents attorneys' fiduciary duty by restricting the methods by which attorneys can effectively advocate for their clients' best interests.¹⁵⁵

2. Public Policy & the Practical Shortcomings of *Pansy*: Considering a Narrow Set of Factors when Determining "Good Cause" Circumvents Attorneys' Fiduciary Duties

In order to comport with attorneys' fiduciary duties and serve as an effective guide for federal judges who are considering protective orders, *Pansy's* narrow list of factors must be broadened, clarified, and prioritized.¹⁵⁶ Protective orders that properly account for all "good cause" considerations are in accord with attorneys' fiduciary duties, as they enable attorneys to represent their clients' best interests and avoid the lengthy and expensive alternative of designating confidential documents throughout the discovery process.¹⁵⁷

¹⁵² See *supra* Part II.B.3 (discussing the unique and important confidentiality quality of trade secrets, which F.R.C.P. 26(c) instructs federal judges to protect through protective orders).

¹⁵³ See *AFP Advanced Food Prod. LLC*, *supra* note 79, at 2 (noting that "inadvertent or accidental disclosure may or may not be predictable," but that to the extent that it can be predicted, should be prevented through a protective order); see also *Commissariat A L'Energie Atomique v. Dell Computer Corp.*, No. 03-484-KAJ, 2004 U.S. Dist. LEXIS 12782, 6-11 (D. Del. May 25, 2004) (emphasizing that when there is an unacceptable risk of inadvertent disclosure or misuse of their highly confidential, a protective order should be granted).

¹⁵⁴ See *supra* Part II.B.3 (discussing the fact that F.R.C.P. 26(c) directly instructs courts to protect trade secrets and commercially-sensitive information).

¹⁵⁵ See *infra* Part III.B.2 (analyzing *Pansy's* effects on attorneys' fiduciary duties).

¹⁵⁶ See *infra* Part III (highlighting the shortcomings and problems with the Third Circuit's *Pansy* test); *supra* Part IV (proposing a solution—the "Good Cause Doctrine"—which accounts for trade secrets and comports with attorneys' fiduciary duties).

¹⁵⁷ See *infra* Part III.B.2 (noting how a narrow construction of "good cause" factors circumvents attorneys' fiduciary duty).

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It is necessary to establish a clear framework by which judges ascertain “good cause” so that attorneys are able to determine from the outset if a protective order is the most effective way to represent their clients’ best interests.¹⁵⁸ For practical reasons, limiting accessibility to discovery materials through a protective order may be in the clients’ best interests by yielding efficient proceedings, speedier resolutions, and often higher-dollar settlements.¹⁵⁹

To require an attorney to consider the interest of the public dilutes attorneys’ loyalty to their clients and creates a conflict of interest when none need exist.¹⁶⁰ Because of the absence of a federal approach to grant protective orders, some states undermine the F.R.C.P.’s protection of trade secrets by implementing sunshine statutes.¹⁶¹ State sunshine statutes diminish attorneys’ ability to act in their clients’ best interest by statutorily tying judges’ hands, hindering protective orders, and mandating public access without providing a judicial framework for confidentiality.¹⁶² Imposing a statutory requirement for full public access, particularly in complex litigation, would create an unnecessary burden on attorneys’ fiduciary duty to serve their clients’ best interests by increasing the cost and time frame of litigation.¹⁶³

In addition to the logistical benefits of efficiency and speed, the confidentiality that protective orders provide may be a necessary device for attorneys to preserve clients’ underlying interests.¹⁶⁴ For instance, one such important underlying interest includes the confidentiality of

¹⁵⁸ See *supra* Part IV (proposing the “Good Cause Doctrine,” a method by which attorneys may process their information and, as a result, serve their clients’ best interests by anticipating the viability of a protective order).

¹⁵⁹ See *supra* Part II.C.3 (discussing the importance of protective orders as a tool for attorneys to execute their fiduciary duty). See also *In re Alexander Grant & Co. Litig.*, 820 F.2d at 357 (emphasizing the benefits of protective orders based on the fact that “busy courts are simply unable to hold hearings every time someone wants to obtain judicial review concerning the nature of a particular document”).

¹⁶⁰ See *supra* Part II.C.3 (highlighting that attorneys represent their clients, not the public at-large, and are bound to serve their clients’ best interests).

¹⁶¹ See *supra* Part II.C.2 (identifying and categorizing state statutes that regulate confidentiality in discovery).

¹⁶² See *supra* Part II.C.2 (analyzing the effects of state “sunshine in litigation” statutes).

¹⁶³ See *supra* Part II.C.3 (discussing how statutory requirements for public access interfere with attorneys’ fiduciary duty); *supra* Part II.B.1 (discussing the overwhelming benefits of protective orders, specifically noting that of efficiency); see also *In re Reporters Comm. for Freedom of the Press*, 773 F.2d at 1326 (holding that protective orders are valid for the sake of efficiency, as a document-by-document review “would slow discovery enormously”).

¹⁶⁴ See *supra* Part II.B.3 (discussing trade secrets, an underlying interest of clients, as valid “good cause” for protective orders).

trade secret information.¹⁶⁵ Failure to account for a broad array of important "good cause" considerations skews attorneys' ability to protect their clients' confidential trade secret information.¹⁶⁶ Protective orders, and the confidentiality they provide, are key tools that attorneys rely on to fulfill their fiduciary duty.¹⁶⁷

Overall, the absence of a methodical process by which federal judges ascertain "good cause" inhibits attorneys' ability to determine the optimal course of action for their clients, as it is impossible for attorneys to predict whether a particular judge will view the discovery issue as constituting "good cause."¹⁶⁸ Protective orders comport with attorneys' fiduciary duty to their clients by enabling attorneys to represent their clients' best interests, increasing the efficiency of the litigation, and diminishing the expenses.¹⁶⁹ It is necessary, therefore, for federal judges to clearly and overtly adopt a methodical process in which to consider the broad range of criteria to ascertain "good cause" for granting protective orders.¹⁷⁰

IV. PROPOSING A NEW FEDERAL METHOD TO DETERMINE "GOOD CAUSE"

*Existing rules and principles can give us our present location,
our bearings, our latitude and longitude. The inn that shelters
for the night is not the journey's end. The law, like the
traveler,
must be ready for the morrow. It must have a principle of
growth.*¹⁷¹

Although each federal circuit's method to grant protective orders partially excels, each method fails to offer a clear and workable process for federal judges to approach "good cause."¹⁷² Consequently, this Part

¹⁶⁵ See *supra* Part II.B.3 (noting that F.R.C.P. 26(c) specifically protects trade secrets and instructs judges to grant protective orders when they are at risk).

¹⁶⁶ See *supra* note 129 and accompanying text (noting the breadth of attorneys' fiduciary duty).

¹⁶⁷ See *supra* Part II.C.3 (discussing how protective orders maximize efficiency and, often, settlement amounts).

¹⁶⁸ See *infra* Part IV (proposing a solution to the unclear and haphazard variety of federal approaches judges currently utilize to determine "good cause"); *supra* note 71 and accompanying text (discussing the *Pansy* criteria, which are not clear or prioritized).

¹⁶⁹ See *supra* Part II.C.3 (discussing how protective orders comport with attorneys' fiduciary duty).

¹⁷⁰ See *infra* Part IV (proposing a new approach to resolve *Pansy*'s shortcomings).

¹⁷¹ BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 19-20 (1924).

¹⁷² See *supra* Part II.B (discussing the various approaches the Circuits utilize to determine "good cause"); *supra* Part III.A (discussing how subsequent courts have modified and

fuses the best aspects of each approach and generates a solution and distinct guidelines for federal judges to follow when considering whether “good cause” exists to grant a protective order per the requirements of F.R.C.P. 26(c).¹⁷³

Problems and shortcomings exist with federal judges’ interpretation and application of F.R.C.P. 26(c)’s “good cause” requirement.¹⁷⁴ The absence of a consistent federal standard under which “good cause” is determined results in unbridled judicial discretion and inconsistent protective orders.¹⁷⁵ This Part modifies the Third Circuit’s balancing test by proposing significant additions to *Pansy*’s list of necessary considerations and establishes the “Good Cause Doctrine” (“GCD”).¹⁷⁶ The proposed GCD would effectively institute a new, methodical process by which federal judges should determine “good cause.”¹⁷⁷

The *Pansy* balancing test is inadequate.¹⁷⁸ Currently, the factors considered are too narrow, judicial discretion is unbridled, and the granting of protective orders across and within the circuits is inconsistent at best.¹⁷⁹ Although *Pansy* articulates seven factors for courts to balance when considering whether to grant a protective order, the Third Circuit’s approach is too narrow, ineffective, and unclear.¹⁸⁰

A. A Proper Fusion of the Current Tests: The Good Cause Doctrine

The proposed Good Cause Doctrine, which would apply to federal courts, widens the factors that federal judges consider when determining whether “good cause” is satisfied to warrant a protective order.¹⁸¹ This

expanded the *Pansy* criteria); *supra* Part III.B (highlighting *Pansy*’s failure to account for trade secrets as “good cause” and discussing how *Pansy*’s narrow list of factors circumvents attorneys’ fiduciary duty).

¹⁷³ See *infra* Part IV.A (proposing the “Good Cause Doctrine”).

¹⁷⁴ See *supra* Part III (analyzing the shortcomings with the current approach, or lack thereof).

¹⁷⁵ See *supra* Part II.B.2.a (noting the current variety of judicial approaches to granting protective orders).

¹⁷⁶ See *infra* Part IV.A. The name “Good Cause Doctrine” (“GCD”) and the factors of this test were created solely by the author.

¹⁷⁷ See *infra* Part IV.A (outlining a new, step-by-step method for judges to apply when considering “good cause”).

¹⁷⁸ See *supra* Part II.B.2.b (discussing the *Pansy* balancing test, the Third Circuit’s current approach to ascertaining “good cause”).

¹⁷⁹ See *supra* Part II.B (discussing the wide variety of current approaches to “good cause”).

¹⁸⁰ *Pansy*, 23 F.3d at 772. See *supra* Part II.B.2.b.ii (outlining the narrow list of *Pansy* balancing test criteria).

¹⁸¹ See *supra* Part III.B (analyzing *Pansy*’s incomplete groundwork).

new process, which merges the groundwork laid by *Pansy* with a broader set of factors and a distinct process by which the factors are considered, is in line with public policy and the overriding goals of the F.R.C.P.¹⁸² Unlike the Third Circuit's unclear balancing test, the proposed GCD is a step-by-step process that provides consistent factors for federal courts to consider, and instructs judges to methodically consider them when ascertaining "good cause."¹⁸³

The proposed GCD would require the party requesting a protective order to file a written motion with the adjudicating court. Additionally, a copy of the motion would be simultaneously submitted to a circuit-wide database that records confidentiality requests.¹⁸⁴ The federal judge would then consider the protective order motion by applying the proposed GCD.

Under the proposed Good Cause Doctrine, the federal court judge would first consider whether the information is being sought for a proper or improper purpose.¹⁸⁵ Improper purposes would include, but not be limited to, inappropriate access to trade secrets, embarrassment of the party, and idle gossip. If the information is sought for an improper purpose, then the process is over and the court shall grant a protective order.¹⁸⁶

Next, if the information is being sought for a proper purpose—including evaluating business history and dealings—the federal judge

¹⁸² See *supra* Part II.C.3 (noting how the absence of a consistent and method to determine "good cause" interferes with attorneys' fiduciary duties).

¹⁸³ See *supra* note 71 and accompanying text (discussing the Third Circuit's approach, the *Pansy* test).

¹⁸⁴ The purpose of the circuit-wide database is to record the frequency of confidentiality requests. Also, it ensures that the public is able to seek out and be aware of possible confidentiality. The discovery materials and information contained therein are not publicly released until the judge determines whether a protective order is proper.

¹⁸⁵ See *supra* note 71 and accompanying text. This portion of the proposed GCD directly adopts the second *Pansy* criteria.

¹⁸⁶ If a protective order is granted under any phase during the GCD analysis, the protective order is binding on the parties. No privilege of information-sharing, as the Virginia statute provides, exists under the GCD. See *supra* Part II.C.2 (discussing the Virginia information-sharing statute). Instead, each subsequent litigant must discover his own information and each request must individually undergo the GCD to determine whether confidentiality is proper.

would then consider whether trade secrets are at risk.¹⁸⁷ Under the proposed GCD, trade secrets would be defined as follows:

Commercially-sensitive information, including a formula, pattern, practice, design, instrument, compilation of information, program, device, method, technique, or process that:

- (a) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use;
- (b) Where this benefit must derive specifically from not being generally known, not just from the value of the information itself; and
- (c) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.¹⁸⁸

If trade secrets are at risk, the federal court shall grant a protective order to protect such information. The scope of protection may vary case-by-case, but protection of some form is clearly warranted.¹⁸⁹

If trade secrets are not at risk, the federal judge would then ask whether the case involves issues important to the public, such as public health or safety.¹⁹⁰ Under the framework of the proposed GCD, public health or safety concerns would include the following:

Any device, instrument, person, procedure, product, or condition of a device, instrument, person, procedure, or

¹⁸⁷ See *supra* note 29 (providing the text of F.R.C.P. 26, which allows for protective orders “upon good cause shown”); *supra* Part II.B.3 (discussing trade secrets as valid grounds for “good cause”).

¹⁸⁸ See *supra* note 99. The definition of trade secrets is based on the statutory language of FLA. STAT. § 688.002 (2005). The italicized text is the author’s contribution.

¹⁸⁹ See *supra* Part II.B.3 (discussing the three levels of trade secret confidentiality).

¹⁹⁰ See *supra* note 73 and accompanying text (discussing *Pansy*’s factors, which include both public health and safety concerns). This portion of the proposed GCD combines two of the *Pansy* factors into one succinct question.

product that has caused *and* is likely to cause injury to the public in the future.¹⁹¹

If the information is not important to the public, according to the aforementioned definition, then "good cause" is satisfied and a protective order shall be granted.

In cases where the information is important to the public, the federal court would proceed by asking whether sharing the information with the public would promote fairness and efficiency.¹⁹² Efficiency is considered in terms of both cost and time to the litigants. If public access would not promote fairness and efficiency, then a protective order should be granted. If sharing of information would promote fairness and efficiency, then the court should not grant a protective order, and the process is complete. By not requiring a particularized showing of "harm" prior to granting or denying a protective order, the proposed GCD would eliminate the vague and malleable "harm" component while streamlining judicial discretion.

The protective order hearing would be considered to be severed from the underlying case. It would, therefore, be immediately appealable, regardless of the judge's decision.¹⁹³ At this phase, any party or non-party witness who participated in the preceding hearing would be able to appeal.

B. Advantages of the Proposed Good Cause Doctrine

The Good Cause Doctrine provides for consistent and proper determination of "good cause" in federal court. By clarifying and

¹⁹¹ See *supra* note 101. The definition of public health or safety concerns is based on the statutory language of FLA. STAT. § 69.081(2) (2005). The italicized text is the author's contribution.

¹⁹² See *supra* Part II.B.2.b.ii (discussing the *Pansy* factors).

¹⁹³ The interlocutory appeal feature of the proposed GCD is analogous to the recently amended F.R.C.P. 23. See FED. R. CIV. P. 23(f) (2006) ("A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order."). F.R.C.P. 23 allows appellate review of district court decisions certifying or refusing to certify class actions. Although opponents of appellate review criticize it as inefficient, appellate control over district court discretion—in class action certification, as well as the issuance of protective orders—performs the important function of reigning in district court discretion and regularizing federal circuit decisions. See, e.g., *In re Lorazepam & Clorazepate Antitrust Litig.*, 289 F.3d 98, 102-06 (D.C. Cir. 2002); *Sumitomo Copper Litig. v. Credit Lyonnais Rouse, Ltd.*, 262 F.3d 134, 138-43 (2d Cir. 2001); *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 293-95 (1st Cir. 2000).

prioritizing the *Pansy* criteria, the proposed GCD delineates the type of discovery information that satisfies “good cause.” Its methodical process and principles override undirected judicial discretion, account for a variety of “good cause” forms, and also comport with public policy interests. The GCD outlines a clear standard by which protective orders may be granted and, as such, allows attorneys to argue proficiently for their clients’ interests in litigation where a protective order is at issue.¹⁹⁴ As a result, this clear process eliminates inconsistency in protective order issuance and allows attorneys to heighten efficiency and determine from the outset if a protective order is the most effective way of representing their clients’ best interests.

There are many problems with the current *Pansy* balancing test.¹⁹⁵ The proposed GCD model provides a mechanism that efficiently sorts out the discovery information that warrants confidentiality from the information that implicates public access. In the spirit of the F.R.C.P.’s goals, as well as attorneys’ fiduciary duties, the Good Cause Doctrine provides a clear and consistent process by which federal courts should determine whether “good cause” exists.

V. CONCLUSION

In sum, the absence of a method to determine “good cause” under F.R.C.P. 26(c) yields inconsistency and the disparate issuance of protective orders among the circuits, while undermining attorneys’ fiduciary duties. Because F.R.C.P. 26(c) does not provide a framework for judges to consult when granting protective orders, the approaches and standards applied among and within the circuits vary. The *Pansy* balancing test is undeveloped, fundamentally unstructured, and fails to account for a wide array of “good cause” considerations. The proposed Good Cause Doctrine is a new and unique method, which would resolve *Pansy*’s void by developing a thorough, step-by-step approach for judges to follow when determining “good cause.”

This framework is good news for Think Big Technologies from Part I, who under the proposed GCD would likely be successful in shielding their trade secrets under a protective order. The first step in securing a protective order would be for Think Big Technologies to file a motion for a protective order and to simultaneously submit a copy of the motion to

¹⁹⁴ The proposed GCD is in sync with attorneys’ fiduciary duty. It provides attorneys with a tangible process to consider and rely on when making decisions about the direction of their clients’ litigation.

¹⁹⁵ See *supra* Part II (analyzing the specific shortcomings of *Pansy*).

the circuit-wide data base. Assuming this procedural requirement is satisfied, the judge will proceed by applying the proposed GCD.

When applying the proposed GCD, the judge would first consider whether the information is being sought for proper or improper purposes. Here, Cokesi is seeking the information for the valid and proper purpose of evaluating Think Big's business history and dealings, not the improper purpose of usurping trade secrets or embarrassing the other party. Because the purpose is proper, the federal judge must continue by applying step two of the proposed Good Cause Doctrine.

Next, the judge must consider whether trade secrets or other commercially-sensitive information are at issue. Because Think Big's AMAX camera technology and film techniques are in fact trade secrets, the judge will grant a protective order and any discovery materials related to this information will remain confidential.¹⁹⁶ The proposed GCD concludes at this step, and a protective order is accordingly granted.

Protective orders function to limit and shield sensitive discovery information, "for good cause shown."¹⁹⁷ Currently, the process by which protective orders are granted is unstructured and unclear. The absence of a standard approach, which takes into account the broad range of "good cause" varieties, interferes with attorneys' fiduciary duty to serve their clients' best interests. Ultimately, the proposed Good Cause Doctrine, a new federal approach to granting protective orders under F.R.C.P. 26(c), strikes a balanced compromise and protects both competing interests: public access and private litigants' confidentiality.

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¹⁹⁶ At this phase, the judge will also consider the scope of the protective order. *See supra* Part II.B.3 (discussing the three possible levels of trade secret confidentiality: "confidential," "attorneys and client representative(s)" confidentiality, and "attorneys' eyes only").

¹⁹⁷ FED. R. CIV. P. 26(c) (2006).

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