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NOTE

Protective Orders and the Use of Discovery Materials Following *Seattle Times*

Rule 26(b) of the Federal Rules of Civil Procedure allows a party to a lawsuit to discover any relevant matter that is not privileged.\(^1\) Rule 26(c)\(^2\) limits this broad right to discovery,

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1. Rule 26(b) provides in relevant part:
   Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
   
   (1) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
   
   FED. R. CIV. P. 26(b).
   
   The liberal thrust of the rules is grounded in the judiciary's desire "to take the sporting element out of litigation, partly by affording each party full access to evidence in the control of his opponent." Martin v. Reynolds Metals Corp., 297 F.2d 49, 56 (9th Cir. 1961).
   

2. Rule 26(c) provides in relevant part:
   
   (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . 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 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
however, by authorizing a court, upon a showing of "good cause," to issue a protective order restricting either the scope

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

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

Rule 26(c) was adopted in 1970 to protect parties and witnesses from potential abuse of the discovery process. 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2036, at 287 (1970). See also United States v. CBS, Inc., 666 F.2d 364, 368-69 (9th Cir.) (finding that protective orders may be issued to safeguard parties and witnesses from the effects of broad discovery), cert. denied, 457 U.S. 1118 (1982).

Before 1970, protective orders were promulgated under selected Federal Rules, but the 1970 amendments finally couched protective orders in general terms applicable to all forms of discovery. 8 C. WRIGHT & A. MILLER, supra § 2035, at 260-61. Under the initial Federal Rules, protective orders only applied to depositions under Rule 30(b). In 1948, amendments to Rules 33 and 34 allowed courts to issue protective orders for interrogatories and requests for admissions. Id. The 1970 amendments, however, deleted all reference to protective orders from Rules 30, 33 and 34 and established general provisions applicable to all means of discovery. Id.

3. Rule 26(c) expressly requires that "good cause" be demonstrated by the party seeking the protective order. FED. R. CIV. P. 26(c). This requirement implies that "the information sought is within this provision of the rule,"—that it is confidential, for example—and that the producing party "might be harmed by its disclosure." 8 C. WRIGHT & A. MILLER, supra note 2, § 2043, at 300-01. See also Centurion Indus., Inc. v. Warren Steurer and Assoc., 665 F.2d 323, 325 (10th Cir. 1981) ("To resist discovery [by a Rule 26(c)(7) protective order], a person must . . . demonstrate that . . . disclosure [of the information sought] might be harmful."); Parsons v. General Motors Corp., 85 F.R.D. 724, 726 (N.D. Ga. 1980) (holding that good cause requires a showing of confidentiality and competitive disadvantage upon disclosure); Citicorp v. Interbank Card Assoc., 478 F. Supp. 756, 765 (S.D.N.Y. 1979) (requiring those opposing disclosure to prove that "disclosure will work a clearly defined and very serious injury" (quoting United States v. IBM Corp., 67 F.R.D. 40, 46 (S.D.N.Y. 1975))).

In addition, courts have demanded specific factual claims of harm and have refused to accept conclusory arguments. See, e.g., General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973) (requiring a "particular and specific demonstration of fact"), cert. denied, 414 U.S. 1162 (1974). An illustration of the strictness with which the good cause requirement is enforced is the judicial doctrine requiring that a party asserting that the information sought is secret establish that "measures were taken to guard the secrecy of the data in its own hands." Dore, Confidentiality Orders—The Proper Role of the Courts in Providing Confidential Treatment for Information Disclosed Through the Pre-Trial Discovery Process, 14 NEW ENG. L. REV. 1, 9 n.49 (1978). See also United States v. IBM Corp., 67 F.R.D. 40, 47 (S.D.N.Y. 1975) (party opposing disclosure must prove that information has been closely guarded by
of discovery or the use of discovered materials. Since the adoption of Rule 26(c) in 1970, protective orders have become commonplace, particularly in complex litigation. The rationale underlying the extensive issuance of protective orders is that the only appropriate use of discovery materials is for trial preparation in the pending case.

5. See supra note 2.

7. Parties involved in complex litigation often stipulate to protective orders to accelerate discovery and eliminate discovery disputes. J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 7.15, at 414 (1985). See also Marcus, supra note 1, at 1 (“Particularly in complex litigations, these [stipulated protective] orders have become an accepted part of the civil litigation landscape.”). One court, ruling on a detailed protective order, stated that it was “unaware of any case in the past half-dozen years of even a modicum of complexity where an umbrella protective order . . . has not been agreed to by the parties and approved by the court. Protective orders have been used so frequently that a degree of standardization is appearing.” Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 889 (E.D. Pa. 1981).

8. See Marcus, supra note 1, at 7-8 (“Emphasizing the rationale underlying discovery helps to explain a central psychological reality of discovery practice—the assumption that any use of discovery materials except to prepare for
Courts' willingness to issue protective orders as a matter of course has sparked vigorous criticism from lawyers and parties seeking unrestricted use of discovered materials. The critics argue that unrestricted use of discovered materials is desirable for a number of reasons. First, a litigant may use discovered information from one case to determine whether a party is withholding information or unscrupulously altering answers to particular questions in another case. In addition, a party may avoid costs associated with extensive "re-discovery." Finally, the unrestricted use of information obtained by discovery operates as an effective means of notifying nonparties of potential trial is inappropriate.

See also Rhinehart v. Seattle Times, 98 Wash. 2d 226, 239 n.4, 654 P.2d 673, 681 n.4 (1982) (stating that most attorneys are "surely aware" that discovery materials must be used only for pending litigation), aff'd, 467 U.S. 20, cert. denied on other issues, 467 U.S. 1230 (1984). See generally C. WRIGHT & A. MILLER, supra note 2, § 2040, at 291-92 (discussing the judiciary's fear that discovery may be used merely as a "device" to obtain information).

9. See infra notes 10-12.

10. The plaintiff's bar frequently opposes protective orders on this basis. See Wallace, Do Not Consent To That Concealment Order, 16 TRIAL 19, 19 (Oct. 1980). The author, Henry H. Wallace, a noted trial lawyer, stated:

Divide and conquer is the proven successful defense strategy. Defendants have been known to give contradictory answers to similar or identical interrogatories in different cases. Sometimes they produce in one case what they denied existed in another. Because of the [protective order], plaintiff's counsel is not in a position to compare notes with fellow victims similarly situated.

Id.

Two examples of questionable defense conduct help illustrate this problem. In Wilson v. Volkswagen of Am., Inc., 561 F.2d 494 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978), defendants answered interrogatories by stating that they had no list of previous lawsuits, although they later admitted in trial that they had an alphabetical card catalog of prior cases. 561 F.2d at 506, noted in Wallace, supra, at 19. In Rozier v. Ford Motor Co., 573 F.2d 1332 (5th Cir. 1978), a defendant denied that cost-benefit studies existed regarding an allegedly defective fuel tank which it manufactured. Id. at 1337, 1339-40. Less than a year after trial, however, plaintiff's counsel received the cost-benefit studies. The Fifth Circuit in Rozier overturned the verdict for defendants and ordered a new trial. Id. at 1349.

11. See Riley & Hoefer, Protective Orders: Machiavelli Would Be Pleased, 20 TRIAL 30, 32 (Nov. 1984) ("Making each claimant 'reinvent the wheel' serves the interest of the manufacturer—but not justice. Lawyers should resist any effort to use protective orders to prevent free exchange of information among victims of the same product defect."). The district court in Williams v. Johnson & Johnson, 50 F.R.D. 31 (S.D.N.Y. 1970), endorsed dissemination and receipt of recycled discovery information by counsel as economically advantageous: "[Counsel] thus reduce the time and money which must be expended to prepare for trial and are probably able to provide more effective, speedy and efficient representation to their clients. . . . If this approach leads to the consolidation of cases, it will save judicial time and effort as well." Id. at 32.
causes of action and publicizing other matters of interest to the public or the legal community.\textsuperscript{12}

Both attorneys and their clients have challenged protective orders which limit the use of discovered materials on first amendment grounds.\textsuperscript{13} Recently, in \textit{Seattle Times Co. v. Rhinehart},\textsuperscript{14} the United States Supreme Court considered whether civil litigants have a first amendment right to disseminate, in advance of trial, information gained through pretrial discovery. The Court held that a protective order does not violate the first amendment if it is granted upon a showing of good cause, is restricted to pretrial discovery, and does not limit the dissemination of information acquired from other sources.\textsuperscript{15}

Judicial application of the \textit{Seattle Times} standard has varied.\textsuperscript{16} Although the Court in \textit{Seattle Times} limited the first amendment rights of the media defendant, it did not address the rights of civil plaintiffs. In cases where civil plaintiffs have sought to disseminate information revealed in depositions regarding shooting of two suspected terrorists, the courts have generally upheld protective orders.\textsuperscript{17}

\textsuperscript{12} See, e.g., New York v. United States Metals Ref. Co., 771 F.2d 796 (3d Cir. 1985) (involving protective order that temporarily prohibited publication of expert report indicating that refining plant was emitting harmful quantities of pollutants into the air and affecting nearby Staten Island residents); Marcus, \textit{supra} note 1, at 52 (observing that a protective order following the 1974 Paris air crash, in which 350 people died, prevented public awareness of the airplane manufacturer's knowledge of the defect prior to airplane production).

\textsuperscript{13} Protective orders frequently include attorneys within the terms of their proscription against dissemination of discovery materials. See, e.g., \textit{In re San Juan Star Co.}, 662 F.2d 108, 117 (1st Cir. 1981) (protective order applies to both parties and counsel); \textit{In re Halkin}, 598 F.2d 176, 182 (D.C. Cir. 1979) (same). Attorneys have only recently opposed protective orders based on their own first amendment rights and often their claims are discussed only briefly. See, e.g., \textit{San Juan Star}, 662 F.2d at 118 (order prohibiting disclosure of discovery material by plaintiffs' counsel to clients violated first amendment). Cf. Cipollone v. Liggett Group Inc., 106 F.R.D. 573, 586 (D.N.J. 1985) (attorneys and their experts seeking to use discovery material in parallel litigation), \textit{rev'd and remanded}, 785 F.2d 1108 (3d Cir. 1986).

Litigants, on the other hand, frequently have asserted the first amendment argument. See, e.g., \textit{Seattle Times v. Rhinehart}, 467 U.S. 20, 30-31 (1984) (media defendant seeking to publish documents received through the discovery process); \textit{San Juan Star}, 662 F.2d at 116-18 (civil plaintiffs seeking to disseminate information revealed in depositions regarding shooting of two suspected terrorists); \textit{Halkin}, 598 F.2d at 182 (plaintiffs seeking to reveal discovery material regarding CIA surveillance of war protestors); International Prods. Corp. v. Koons, 325 F.2d 403, 404-05, 408 (2d Cir. 1963) (defendants seeking to publicize discovered information regarding plaintiffs' alleged payments to South American officials).

\textsuperscript{14} \textit{Seattle Times}, 467 U.S. at 37.

amendment right of litigants to disseminate discovered information, the Court failed to indicate whether some circumstances may exist in which there is a first amendment right to disseminate discovery materials.\(^7\) This Note examines the proper legal standard for determining whether a court should grant a protective order restricting the use of information gained through discovery.\(^8\) Part I discusses the *Seattle Times* decision. Part II then analyzes three approaches which courts have used in considering the first amendment implications of protective orders. Part III proposes an alternative approach that incorporates various competing interests into a balancing test. The Note concludes that courts should use the proposed balancing test to appropriately exercise the broad judicial discretion granted in *Seattle Times*.


17. See infra notes 37 & 51-57 and accompanying text. For example, *Seattle Times* does not address the first amendment claim of interested third parties seeking to disseminate discovery material. The media often has played the role of an interested third party. See, e.g., *In re Reporter's Comm. for Freedom of the Press*, 773 F.2d 1325, 1330-40 (D.C. Cir. 1985) (media group challenging protective order sealing documents in libel suit); *In re San Juan Star Co.*, 662 F.2d 108, 112-18 (1st Cir. 1981) (newspaper challenging protective order sealing deposition testimony in civil case arising out of shooting of two suspected terrorists); *Korean Air Lines Disaster*, 597 F. Supp. at 622 (newspaper seeking modification of protective order to allow publication of details of air crash), discussed infra note 50.

Litigants and their attorneys also have acted as interested third parties seeking discovery materials for use in parallel litigation. See, e.g., *Wilk v. American Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (attorney general seeking access to discovery documents and depositions from private litigation in another state); *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 265 (9th Cir. 1964) (party seeking access to documents and interrogatories filed by defendant in prior suit); *Cipollone*, 106 F.R.D. at 580-82 (attorneys and their experts seeking to use discovery materials from pending action in similar suits); *In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig.*, 81 F.R.D. 482, 483 (E.D. Mich. 1979) (multi-district litigation materials sought by party alleging similar cause of action in independent state case), aff'd, 694 F.2d 114 (6th Cir. 1983).

18. The scope of this Note is restricted to the dissemination of discovery materials by legal counsel and parties. This Note does not encompass issues arising when dissemination is sought by the general public or the media.
I. SEATTLE TIMES CO. V. RHINEHART

From 1973 through 1979, eleven articles appeared in the Seattle Times and another newspaper about the Aquarian Foundation and Keith M. Rhinehart. The Aquarian Foundation was a religious group which believed, among other things, in life after death and in communication with the dead through a medium. Rhinehart was the spiritual leader and primary medium of the group. The articles on the Foundation described seances conducted by Rhinehart, reported that Rhinehart claimed that magical “stones” had been “expelled” from his body, referred to Rhinehart’s past conviction for sodomy which was later vacated, and described an “extravaganza” which Rhinehart sponsored for prison inmates during which he gave away $35,000 to $50,000 in cash and prizes and at which a “cho- rus line of girls . . . shed their gowns and bikinis and sang . . . .” Rhinehart sued the Seattle Times for defamation and invasions of privacy.

In response to defendants’ discovery requests, plaintiffs refused to disclose certain financial information or to identify the Foundation’s members and donors of the previous ten years. The trial court granted defendants’ motion to compel discovery but subsequently issued a protective order prohibiting the defendants from publishing, disseminating, or using the information in any way except as necessary to prepare and try the case. The trial court’s order specifically did not apply to information.

20. Id.
21. Id.
22. Id. at 22-23.
23. Rhinehart also sued the Walla Walla Union-Bulletin, the authors of the articles, and their spouses. Id. at 23. Rhinehart brought the action on behalf of himself and the Foundation. Five Foundation members who had participated in the show at the penitentiary joined the suit as plaintiffs. Id.
24. Id. Rhinehart alleged that the articles discouraged contributions and caused a decline in membership. Id. The complaint also alleged that statements in the articles were “fictional and untrue,” that the defendants knew or should have known that the statements were false, that the statements “did and were calculated to hold [Rhinehart] up to public scorn, hatred and ridicule . . . .” and that the articles misrepresented the role of the Foundation’s “choir.” Id. The complaint requested $14,100,000 in damages. Id.
25. Id. at 24.
26. Id. at 24-27. The trial court initially refused to issue a protective order under the Washington state court equivalent of Federal Rule 26(c). Id. at 25. The court concluded that the facts that plaintiffs put forward in support of their claims that harm would result from dissemination of the information were “too conclusory” to merit a finding of good cause. Id. at 25-26. Affidavits submitted later by Rhinehart led the court to change its ruling. Affiants,
mation acquired outside of the discovery process.\textsuperscript{27}

On appeal, the Washington Supreme Court affirmed the protective order.\textsuperscript{28} The United States Supreme Court then granted certiorari\textsuperscript{29} to resolve a conflict between the circuits regarding the first amendment right to disseminate discovery materials.\textsuperscript{30} The Supreme Court affirmed, holding that,

members of the Foundation, described a series of letters and phone calls—several of which "threatened physical harm"—as well as attacks and assaults that occurred at the Aquarian headquarters. \textit{Id.} at 26. The affidavits persuaded the court that publication of the information might hurt Aquarian membership and income and might also lead to "additional harassment" of current members. \textit{Id.} at 26-27.

\textsuperscript{27} Id. at 27.


\textsuperscript{29} 464 U.S. 812 (1983).

\textsuperscript{30} Seattle Times Co. v. Rhinehart, 467 U.S. 20, 28-29 (1984). Earlier opinions by the First, Second and District of Columbia Circuits used widely disparate approaches to determine whether a first amendment right to disseminate discovery materials existed. The Second Circuit rejected recognition of any first amendment right, stating that "we entertain no doubt as to the constitutionality of a rule allowing a federal court to forbid the publicizing, in advance of trial, of information obtained by one party from another by use of the court's processes." \textit{International Prods. Corp. v. Koons}, 325 F.2d 403, 407 (2d Cir. 1963).

The D.C. Circuit, on the other hand, formulated a strict test to determine the constitutionality of a protective order which inhibits free speech. "The court must... evaluate such a restriction on three criteria: the harm posed by dissemination must be substantial and serious; the restraining order must be narrowly drawn and precise; and there must be no alternative means of protecting the public interest which intrudes less directly on expression." \textit{In re Halkin}, 598 F.2d 176, 191 (D.C. Cir. 1979) (footnotes omitted). \textit{See generally Note, Rule 26(c) Protective Orders and the First Amendment, 80 COLUM. L. REV. 1645 (1980) (proposing extension of Halkin test); Note, The First Amendment Right to Disseminate Discovery Materials, 92 HARV. L. REV. 1550 (1979) (criticizing Halkin's first amendment scrutiny as illogical in light of the greater intrusiveness of discovery); Note, Constitutional Standards Governing Issuance of Protective Orders Pursuant to Fed. R. Civ. P. 26(c) When Freedom of Speech is Restrained, 52 TEMPLE L.Q. 1197 (1979) (analyzing constraints of Halkin in contrast to broader entitlement theory); Comment, Protective Orders Prohibiting Dissemination of Discovery Information: The First Amendment and Good Cause, 1980 DUKE L.J. 766 (analyzing Halkin and proposing a balancing test).

The First Circuit used a four-pronged test that incorporated a "heightened sensitivity" to the first amendment: "We look to the magnitude and imminence of the threatened harm, the effectiveness of the protective order in preventing the harm, the availability of less restrictive means of doing so, and the narrowness of the order if it is deemed necessary." \textit{In re San Juan Star Co.}, 662 F.2d 108, 116 (1st Cir. 1981). \textit{See also Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 912 (E.D. Pa. 1981) (adopting a test modeled on San Juan Star). See generally Comment, In re San Juan Star: Discovery and the First Amendment, 34 BAYLOR L. REV. 229 (1982) (criticizing the San
although information obtained through discovery would "rarely" be classified as speech unprotected by constitutional guarantees,\textsuperscript{31} the protective order did not infringe upon the defendants' first amendment rights.\textsuperscript{32} According to the Court, protective orders implicated the first amendment rights of the restricted party "to a far lesser extent than would restraints on dissemination of information in a different context."\textsuperscript{33} In addition, the Court reasoned that a trial court must have authority to issue protective orders because such orders further a substantial government interest in preventing discovery abuse.\textsuperscript{34} The Court concluded that a protective order does not offend the first amendment if it is based upon a showing of good cause, is restricted to pretrial discovery, and does not limit the dissem-

\textsuperscript{31} Seattle Times, 467 U.S. at 31.
\textsuperscript{32} Id. at 37.
\textsuperscript{33} Id. at 34. The Court based its conclusion on three grounds. First, the Court noted that discovery is not a constitutional but a statutory right. Id. at 32 ("As in all civil litigation, petitioners gained the information they wish to disseminate only by virtue of the trial court's discovery processes. As the Rules authorizing discovery were adopted by the state legislature, the processes thereunder are a matter of legislative grace."). The Court noted that litigants do not "surrender their First Amendment rights at the courthouse door" but stated that those rights may be "subordinated to other interests." Id. at 32 n.18 (quoting In re Halkin, 598 F.2d at 186).

Second, the Court emphasized that pretrial discovery is not a public process. Id. at 33. The Court observed that most discovery takes place privately under arrangements mutually agreeable to counsel. Under the operative Rules, the court may only rarely become involved; local jurisdictions need not even require depositions or other discovery materials to be filed with the court. Id. at 33 n.19. Thus, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." Id. at 33 (emphasis added).

Finally, the Court held that protective orders do not apply to information acquired outside of the discovery process. Id. at 34.

\textsuperscript{34} Id. Discovery, the Court observed, is provided for the sole purpose of aiding the litigation process, whether the result is settlement or trial of a claim. Id. The liberal rules of discovery, however, allow for potential abuse in terms of delay and expense, and may seriously implicate the privacy interests of litigants or third parties. Rule 26(c) is designed to curb such abuse, the Court stated, and thus furthers a substantial government interest. Id. at 34-35. As an example of the substantial nature of this interest, the Court remarked that such abuse of the discovery process could effectively deny individuals access to the courts. "[R]ather than expose themselves to unwanted publicity, individuals may well forego the pursuit of their just claims. The judicial system will thus have made the utilization of its remedies so onerous that the people will be reluctant or unwilling to use it, resulting in frustration of a right as valuable as that of speech itself." Id. at 36 n.22 (citing Rhinehart v. Seattle Times Co., 98 Wash. 2d 226, 254, 654 P.2d 673, 689 (1982)).
ination of information acquired from other sources.\textsuperscript{35}

The Court in \textit{Seattle Times}, however, failed to explicitly set out a test for determining what constitutes good cause. \textit{Seattle Times} thus granted trial courts broad discretion to determine what constitutes “good cause” sufficient to warrant the issuance of a protective order.\textsuperscript{36} Moreover, the Court left unanswered the question whether some circumstances may exist in which the first amendment guarantees a right to disseminate discovery materials.\textsuperscript{37} In \textit{Seattle Times}, Rhinehart asserted that his constitutional rights to privacy and religious freedom would be

\begin{itemize}
\item \textsuperscript{35} \textit{Id.} at 37. The Court implied that another factor might be whether the protective order was the least burdensome alternative available to the trial court. \textit{Id.} at 32 (citing Procunier v. Martinez, 416 U.S. 396, 413 (1974)). However, the Court did not incorporate this component into either its analysis, \textit{id.} at 32-37, or its holding. \textit{Id.} at 37.
\item \textsuperscript{36} \textit{Seattle Times} has been characterized as a triumph of judicial administrative control over the discovery process. Note, \textit{Access to Pretrial Documents Under the First Amendment}, 84 COLUM. L. REV. 1813, 1837 (1984). Other commentators claim that the “utility” of Rule 26(c) was preserved by the Court’s deference to trial court discretion. C. WRIGHT \& A. MILLER supra note 2, \S 2043, at 140-141 (Supp. 1985).
\item \textsuperscript{37} Justice Powell, writing for the majority, noted that “[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit.” \textit{Seattle Times}, 467 U.S. at 32 (emphasis added). The information is obtained only by virtue of the trial court’s discovery process, Justice Powell noted, and because the rules authorizing discovery are adopted by the legislature, discovery is a matter of “legislative grace.” \textit{Id.}

Once a litigant gains access, however, Justice Powell implied that a very weak first amendment right to disseminate discovered information exists. “[A]n order prohibiting dissemination of discovered information before trial is not the kind of classic prior restraint that requires exacting First Amendment scrutiny.” \textit{Id.} at 33-34 (emphasis added). The Court noted that such an order applies only to materials acquired through one source—the discovery process; the order does not prohibit dissemination of the same information obtained independently of judicial process. \textit{Id.} Restrictions on dissemination of discovery materials involve a litigant’s first amendment rights “to a far lesser extent than would restraints on dissemination of information in a different context.” \textit{Id.} at 34 (emphasis added). Justice Powell stated that this lesser first amendment right may be “subordinated” to “other interests,” \textit{id.} at 32 n.18, and does not receive the traditional heightened first amendment scrutiny. For a detailed criticism of the majority’s analysis, see Note, \textit{Seattle Times v. Rhinehart: Making “Good Cause” a Good Standard for Limits on Dissemination of Discovered Information}, 47 U. PITZ. L. REV. 547, 558-68 (1986).

Justice Brennan’s concurring opinion, in which Justice Marshall joined, expressed concern over the majority opinion’s vague reference to the nature of the first amendment right. Justice Brennan interpreted the majority opinion as recognizing that “pretrial protective orders . . . are subject to scrutiny under the First Amendment.” \textit{Seattle Times}, 467 U.S. at 37 (Brennan, J., concurring). Justice Brennan concurred because he believed that “the respondents’ interests in privacy and religious freedom are sufficient to justify this protective order and to overcome the protections afforded free expression by the
abridged unless the court issued a protective order. In other cases, a constitutional claim may not run counter to the first amendment claim of the party seeking dissemination. If such a case arises, a trial court might give greater deference to the first amendment claim of the party seeking to disseminate discovered information.

II. THREE APPROACHES TO FIRST AMENDMENT REVIEW OF PROTECTIVE ORDERS

Judicial application of the *Seattle Times* standard has varied because courts that have considered whether to issue or uphold a protective order prohibiting dissemination of discovery materials have lacked a clear standard to guide them. As a result, courts have adopted three alternative approaches to the problem. One alternative strictly construes *Seattle Times* and finds no first amendment right to disseminate. A second approach applies the reasoning embodied in the public’s right of access doctrine to the dissemination of discovery materials. The third alternative characterizes the dissemination of discovery materials as commercial speech entitled to limited constitutional protection.

A. STRICT CONSTRUCTION OF *SEATTLE TIMES*

Under a strict construction of *Seattle Times*, a litigant has no first amendment right to disseminate discovery information made available solely for purposes of trying the lawsuit. Courts adopting this approach have refused to consider arguments that the first amendment protects the right to disseminate discovery information.
nate discovery materials.43

In *New York v. United States Metals Refining Co.*,44 the Third Circuit strictly construed the *Seattle Times* standard. In *United States Metals*, the State of New York desired to publish an expert report that concluded that quantities of air pollutants emitted by a metals refining plant were harming nearby Staten Island residents.45 The report had been prepared from information gathered by New York during discovery.46 New York petitioned the court to modify the trial court's protective order prohibiting dissemination on first amendment grounds.47 The Third Circuit, citing *Seattle Times* extensively,48 refused to modify the order. The court found that the order implicated no first amendment interests because the data was acquired through the discovery process.49 At least one other court has strictly construed *Seattle Times* to reach a similar conclusion.50

The Third Circuit's strict construction of *Seattle Times*, however, failed to take into account the competing legal claims that distinguish *Seattle Times* from *United States Metals*. In *Seattle Times*, the Supreme Court affirmed the trial court's issuance of the protective order only after weighing the constitutional rights of religious freedom and privacy asserted by Rhinehart against the right to free expression asserted by the newspaper.51 In *United States Metals*, however, the defend-

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44. 771 F.2d 796 (3d Cir. 1985). In *United States Metals*, the State of New York filed a citizen's suit against United States Metals Refining Company under the Clean Air Act. *Id.* at 798.

45. *Id.* at 802.

46. *Id.* at 798. Pursuant to discovery, the state entered the refinery's smelting plant to inspect and collect dust samples.

47. *Id.* at 798-99.

48. *Id.* at 802-03 (citing *Seattle Times*, 104 S. Ct. at 2207-08).

49. *Id.* at 803 ("Since the pretrial protective order here applies only to information developed from dust samples New York discovered by means of the court's processes, it does not constitute a violation of New York's first amendment rights.").

50. In *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 621 (D.D.C. 1984), a nonparty, The Washington Post, sought judicial modification of a protective order on first amendment grounds. The Post wished to publish details of an air crash that were revealed through the discovery process. *Id.* at 622. The court dismissed The Post's motion, reasoning that, under *Seattle Times*, no first amendment interest attached to discovery materials. *Id.* at 623.

51. See supra note 38 and accompanying text.
ant opposing dissemination did not assert a constitutional right in conflict with New York’s first amendment interest. The Third Circuit ignored this distinction.\(^5\)

The Third Circuit’s summary disposition of New York’s first amendment claim in *United States Metals* was therefore inappropriate. Such an approach prevents a trial court from considering the crucial issue of whether the first amendment requires courts to allow dissemination of discovery materials in the absence of a competing constitutional interest. Courts have already recognized that the judicial forum, as well as extrajudicial comment by litigants during pending litigation, embody constitutionally-protected rights to political speech and free expression.\(^5\) These and other cases suggest that litigants en-

\(^{52}\) Indeed, the protective order in *United States Metals* was grounded upon a clearly nonconstitutional concern. The refinery moved for the protective order out of a concern that trade secrets would be disclosed through deposition testimony and acquired by competitors. *United States Metals*, 771 F.2d at 798. The trial court issued the protective order two months before dust samples were collected. *Id.*

\(^{53}\) The Third Circuit’s amended findings indicate, however, that the original protective order was broadly phrased and encompassed concerns other than the release of trade secrets. *Id.* at 804-05. The court found that good cause existed because release of the report might “seriously harm” the refinery’s business reputation and create public panic in the Staten Island area. *Id.* at 805. Because New York was pursuing further testing, the court reasoned that immediate release of the report would be premature. *Id.* The court, however, refused to characterize New York’s claim as constitutionally-based, id. at 803, and therefore did not consider the refinery’s interests in that light. *Id.* at 805.

\(^{54}\) *See In re Primus*, 436 U.S. 412, 431 (1978) (holding that an ACLU attorney’s solicitation of a client is protected by the first amendment because the ACLU “engaged in litigation as a vehicle for effective political expression and association”). *See also In re Halkin*, 598 F.2d 176, 187 (D.C. Cir. 1979) (“Litigation itself is a form of expression protected by the First Amendment.”). The *Halkin* court characterized the plaintiff’s proposed release of CIA documents received through discovery as “political expression.” *Id.*

\(^{55}\) *See, e.g., Halkin*, 598 F.2d at 196-97 (finding trial court order prohibiting disclosure of CIA documents deficient as an ungrounded suppression of political expression); CBS, Inc. v. Young, 522 F.2d 234, 238-40 (6th Cir. 1975) (issuing mandamus compelling vacation of trial court “gag” order prohibiting counsel and parties from discussing Kent State killings with media); Chicago Council of Lawyers v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975) (stating that courts “should be extremely skeptical about any rule that silences [an attorney’s] voice”), cert. denied sub nom Cunningham v. Chicago Council of Lawyers, 427 U.S. 912 (1976); Chase v. Robson, 435 F.2d 1059, 1062 (7th Cir. 1970) (issuing mandamus compelling vacation of trial court order prohibiting counsel and defendant from discussing draft card destruction with media).

\(^{56}\) *See supra* note 54.

\(^{57}\) *See In re San Juan Star Co.*, 662 F.2d 108, 115 (1st Cir. 1981) (finding that the right to disseminate discovery materials is founded upon the individ-
joy a first amendment right to disseminate discovered information absent a competing constitutional claim.

B. EXTENDING THE RIGHT OF ACCESS ANALYSIS TO DISSEMINATION OF DISCOVERY MATERIAL

A second approach to the dissemination issue extends the public right of access analysis developed by the Supreme Court in *Richmond Newspapers, Inc. v. Virginia* to the dissemination of discovery materials. In *Richmond Newspapers*, the Supreme Court determined that the first amendment protects a right of access to criminal proceedings. The Court in *Richmond Newspapers* considered the historical and structural 

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58. See, e.g., *Krause v. Rhodes*, 671 F.2d 212, 216 (6th Cir.) (ordering release of litigation materials pertaining to the Kent State killings), *cert. denied sub nom. Attorney Gen. of Ohio v. Krause*, 459 U.S. 823 (1982); *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471 (S.D.N.Y. 1982) ("[I]f a request for documents . . . resulted in material that exposed the corrupt workings of a government agency, the party receiving the documents would certainly have a First Amendment interest in disseminating this information.") (dictum).


61. *Richmond Newspapers*, 448 U.S. at 554-69. See *Press-Enterprise*, 464 U.S. at 635-37 (emphasizing the historical expectation of open jury selection); *Globe Newspaper*, 457 U.S. at 605 (noting that "the criminal trial historically has been open"); *Richmond Newspapers*, 448 U.S. at 577-78 (plurality opinion of Burger, C.J.) (analogizing the right of access to courtrooms to the right of public assembly).

62. *Richmond Newspapers*, 448 U.S. at 588. See also *Press-Enterprise*, 464 U.S. at 637 (Stevens, J., concurring) (arguing that the validity of an access claim ought to be based on whether it makes a positive contribution to this process of self-governance"); *Globe Newspaper*, 457 U.S. at 606 (recognizing
functions of judicial proceedings to reach its result. In applying the *Richmond Newspapers* analysis, courts have permitted the right of access to be compromised only by a compelling government interest.\[63\]

Whether the *Richmond Newspapers* right of access analysis applies to the issue of dissemination of discovery material is, however, unclear.\[64\] The *Seattle Times* Court held that, in at least some circumstances, no first amendment right extends to the dissemination of discovery materials.\[65\] The *Richmond Newspapers* right of access analysis, however, implies that first amendment protection depends upon the historical-structural function of the proceeding in question. The choice of analysis is crucial. The *Seattle Times* standard requires only good cause to prohibit dissemination; the *Richmond Newspapers* test requires a compelling interest to deny access.\[66\]

A case considering nonparty access to a bill of particulars illustrates the difficulty of determining whether *Seattle Times* or *Richmond Newspapers* supplies the proper standard for review. In *United States v. Smith*,\[67\] the District Court for the Middle District of Pennsylvania and the Third Circuit disagreed over which test governed the question of pretrial media

that public scrutiny of criminal trials "enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole"). The *Richmond Newspapers* opinions provide some examples of the structural benefits of public access to criminal trials: access checks judicial abuse, encourages witnesses to testify truthfully, augments public understanding and respect for the judicial process, and satisfies society's "latent 'urge to punish.'" 448 U.S. at 569-71 (plurality opinion of Burger, C.J.); see also id. at 596-97 (Brennan, J., concurring).

63. See *Globe Newspaper*, 457 U.S. at 606-07. In *Globe Newspaper*, the state argued that protecting young victims from trauma was a compelling interest that justified trial closure. The Court stated that this interest may be compelling in individual cases, but held that the prophylactic state law was unconstitutional in denying public access in all cases. Id. at 607-08.


65. See supra note 42 and accompanying text.

66. Appellate courts' standards of review for these cases illustrate the significance of this distinction. A good cause determination is reviewed under an abuse of discretion standard. *Seattle Times*, 467 U.S. at 28. A constitutional analysis requires stricter appellate review. *Koster*, 93 F.R.D. at 479-80.

access to documents filed with the court. Although both courts denied media access, each court based its decision on different precedents. While the district court denied access by applying Seattle Times, the Third Circuit used the more exacting Richmond Newspapers analysis. The inconsistent approaches of the two decisions illustrate the need for a single, more definite standard.

Whether the Seattle Times or Richmond Newspapers doctrine controlled in Smith turned primarily on each court’s determination of whether access was sought to a preliminary or a trial proceeding. Under this approach, when a party seeks access to a preliminary proceeding, Seattle Times is dispositive.

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68. Compare 602 F. Supp. at 395 (rejecting Richmond Newspapers and relying on Seattle Times) with 776 F.2d at 1110-13 (rejecting Seattle Times and relying on Richmond Newspapers). The document was a bill of particulars naming unindicted co-conspirators in an alleged scheme to acquire government contracts by bribing public officials. 602 F. Supp. at 390-91.

69. See 602 F. Supp. at 397 (“[P]rotection of the unindicted co-conspirators’ right to privacy constitutes good cause for maintaining the list containing their names under seal.”); 776 F.2d at 1114 (“[T]he trial court had a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals.” (footnote omitted)).

70. 602 F. Supp. at 395-96.

71. 776 F.2d at 1110-13.

72. Both the district court and the Third Circuit in Smith considered this factor, but each reached a different conclusion. (The two courts in Smith also noted that Richmond Newspapers involved a criminal case, whereas Seattle Times involved a civil case, and that Richmond Newspapers dealt with nonparty access while Seattle Times dealt with party access.) The district court stressed that the media sought access to a document obtained in discovery which had never been used at trial. 602 F. Supp. at 390-91. The district court thus concluded that access to a preliminary proceeding was involved and therefore the Seattle Times rule applied. Id. at 395-96. The court therefore determined that a good cause analysis under Seattle Times addressed the media’s first amendment concerns. Id. at 397.

73. The Third Circuit in its analysis noted initially that the case concerned a criminal charge and that a nonparty sought access. 776 F.2d at 1107. These factors suggested that Smith involved the same right of access question as Richmond Newspapers. The Third Circuit also gave weight to the similarities between a bill of particulars and an indictment. Id. at 1111. The court concluded that the stage of proceedings was more akin to trial than to discovery and therefore applied the Richmond Newspapers analysis. Id. The court then found that a compelling government interest justified an intrusion upon first amendment rights. Id. at 1114.

74. The Court in Seattle Times distinguished pretrial discovery from information revealed during later stages of the judicial process and held that no right of access attached to discovery proceedings. Seattle Times, 467 U.S. at 37. Although the opinion does not expressly draw this line, the dichotomy is implicit in the Court’s determination that protective orders implicate first amendment rights “to a far lesser extent than would restraints on dissema-
Other courts also have determined which doctrine controls on the basis of whether access was sought to preliminary or trial proceedings.\textsuperscript{74} In Tavoulareas v. Washington Post Co.,\textsuperscript{75} for example, the Court of Appeals for the District of Columbia Circuit remanded for analysis under Seattle Times the district court's decision to unseal discovery materials.\textsuperscript{76} Like Seattle Times, Tavoulareas was a civil case in which a party sought to disseminate pretrial discovery materials.\textsuperscript{77} Although the action was tried, the documents in question were not used and thus did not become part of the judicial proceeding.\textsuperscript{78} As a result, the Richmond Newspapers public right of access analysis did
not enter into the appellate court's decision.\textsuperscript{79}

In view of its limitations, the \textit{Richmond Newspapers} public right of access analysis may not be very useful for determining whether to allow dissemination of discovery materials. A claim to disseminate discovery materials involves a question of public access only if a nonparty is requesting access to discovery materials for purposes of dissemination.\textsuperscript{80} The \textit{Richmond Newspapers} analysis does not apply, however, in the usual instance when a litigant is seeking to disseminate discovery material that cannot be characterized as part of a trial proceeding.\textsuperscript{81} A court in such a situation must issue or reject the protective order by using \textit{Seattle Times} or distinguishing \textit{Seattle Times} in favor of another standard.

C. DISSEMINATION OF DISCOVERY MATERIALS AS COMMERCIAL SPEECH

The third and most novel approach to the dissemination issue treats discovery material as equivalent to commercial speech,\textsuperscript{82} which is given limited first amendment protection.\textsuperscript{83}

\textsuperscript{79} The D.C. Circuit did not mention \textit{Richmond Newspapers}, its progeny, or the public right of access issue. 737 F.2d at 1171-73.

\textsuperscript{80} \textit{See}, e.g., \textit{In re Reporter's Comm. for Freedom of the Press}, 773 F.2d 1325, 1331 (D.C. Cir. 1985), discussed \textit{supra} note 74.

\textsuperscript{81} \textit{See}, e.g., \textit{Tavoulareas v. Washington Post Co.}, 724 F.2d 1010 (D.C. Cir.), \textit{vacated on reh'g en banc}, 737 F.2d 1170 (D.C. Cir. 1984), discussed \textit{supra} notes 75-79 and accompanying text.


Counsel dissemination of discovery materials arguably is "for profit" and even may be a form of solicitation if done with the goal of acquiring clients or reducing expenses. \textit{See}, e.g., \textit{Rheingold, The MER/29 Story—An Instance of Successful Mass Disaster Litigation}, 56 CALIF. L. REV. 116, 122 (1968) (stating that plaintiffs' lawyers in the subject case cooperated, by sharing discovery materials, to maximize "economy of effort and expense"). Counsel dissemination is clearly "for profit" if discovery materials are sold for direct monetary remuneration. \textit{See}, e.g., \textit{Kehm v. Proctor & Gamble Mfg. Co.}, 724 F.2d 630 (8th Cir. 1984), \textit{aff'd} 580 F. Supp. 913 (N.D. Iowa 1983), discussed \textit{supra} note 6. In \textit{Kehm}, plaintiff's counsel sold the trial briefs, exhibits and transcript for $1200 per package while the toxic shock syndrome case was on appeal. 580 F. Supp.
Under this third theory, protective orders prohibiting dissemination of discovery materials are subject to the test established by the Supreme Court in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York.* This test analyzes infringements of commercial speech by considering four issues: whether the speech is lawful and not misleading; whether a substantial government interest underlies the infringement of speech; whether a direct relationship exists between the infringement and the government interest; and whether the infringement is more extensive than necessary.

In *Kleiner v. First National Bank of Atlanta,* the Eleventh Circuit used the commercial speech doctrine to determine whether a protective order restricting communications with potential plaintiffs in a class action infringed upon first amendment rights. Defense counsel violated the protective order by conducting a telephone campaign to solicit class exclusion requests from potential class members. The district court

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fined defense counsel. On appeal, the Eleventh Circuit upheld the sanction, citing Central Hudson. The lawyers' actions, which the court labeled as commercial speech, were condemned as "a classic example of major potential abuse which necessitates restraint."

The Kleiner decision has limited application to the dissemination issue because the case did not involve discovery materials. In addition, the Kleiner court failed to distinguish Seattle Times, despite the relevance of the Supreme Court opinion. Kleiner nonetheless implied that commercial speech is not limited to the solicitation of clients and that, as long as counsel's

from the class. See FED. R. CIV. P. 23(c)(2). Following the opt-out notice, defense counsel began a telephone campaign that reached over 3000 potential class members, about 2800 of whom opted out of the class action. Kleiner, 751 F.2d at 1197-98.

90. The district court also cited counsel for contempt, but the citation was later vacated. 751 F.2d at 1198. Sanctions totaled $50,000; attorneys' fees of $58,577 were also assessed against the law firm and defendant jointly. Id. at 1199.

91. Id. at 1207.

92. Id. After discussing the commercial speech doctrine at length, the Eleventh Circuit concluded that counsel's telephone campaign "indubitably amounted to speech of a commercial bent." Id. at 1203 n.22. The court, however, did not use the four-part Central Hudson test, but instead turned to In re San Juan Star Co., 662 F.2d 108 (1st Cir. 1981). It presumably did so because Kleiner, like San Juan Star, involved pretrial communications and a judicial order. Mixing the two standards is awkward, however, because San Juan Star did not mention commercial speech.

San Juan Star endorsed a "heightened sensitivity" standard to determine whether first amendment rights were unjustly compromised by protective orders restricting the dissemination of discovery materials. 662 F.2d at 116; see supra note 30. Following San Juan Star's lead, the Eleventh Circuit examined the district court order for the severity and likelihood of perceived harm, precision and duration of the protective order, and availability of less onerous alternatives. Kleiner, 751 F.2d at 1206 (citing San Juan Star, 662 F.2d at 116).

93. Kleiner, 751 F.2d at 1206.

94. The Eleventh Circuit cited Seattle Times for the narrow proposition that "a fair and just result often presupposes restraints on speech of the parties," Kleiner, 751 F.2d at 1206 (citing Seattle Times Co. v. Rhinehart, 467 U.S. 20, 32 n.18 (1984)). With little explanation, the court instead turned to San Juan Star. See supra note 92. This analytical oversight is puzzling given the sweeping language in Seattle Times regarding constitutional protective orders in general and in the San Juan Star case in particular.

Moreover, Seattle Times essentially overruled San Juan Star. The Supreme Court granted certiorari to hear Seattle Times to resolve a conflict between the standard that the Washington Supreme Court applied below and the standard that the First Circuit Court of Appeals applied in San Juan Star. Seattle Times, 467 U.S. at 28-29. In its analysis, the Court declined to require "heightened First Amendment scrutiny" of the protective order, id. at 36, thus implicitly overruling San Juan Star.
action is commercial in nature, it is commercial speech.95

Application of a commercial speech standard to the dissemination of discovery materials is troublesome for several reasons. Although most dissemination is commercial in nature in that it profits a lawyer's practice, either directly or indirectly,96 discovery materials also are used in parallel litigation97 or published in the public interest.98 These latter uses are noncommercial in the sense that they are based on the need for evidence or public awareness, rather than on a desire for profits.99 Many typical dissemination cases thus might not fall under the commercial speech standard.

There is, moreover, little to be achieved in using a commer-

95. The Kleiner court reasoned that “[c]ommercial speech consists of expression related largely or solely to the economic interests of the speaker and the audience.” 751 F.2d at 1203 n.22 (citing Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 561 (1980), and Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 762 (1976)). Because the campaign was motivated by counsel's desire to save defense dollars, the court held that the communications were “designed to advance business interests” and, hence, were commercial speech. Id.

96. The court in Kleiner found that counsel's pursuit of class exclusion requests was commercial speech because it was expression designed to advance the business interests of the speaker and audience. Id. See also supra note 95. Certainly most of what lawyers do, including the dissemination of discovery materials, is similarly designed to advance the mutual business interests of lawyer and client. For specific examples, see supra note 82.

97. See infra notes 120-131 and accompanying text.

98. See infra notes 132-139 and accompanying text.

99. The noncommercial/commercial speech classification is one of degree. The Kleiner court recognized this by stating that the expression in question must be “largely or solely” related to economic interests in order to be commercial speech. 751 F.2d at 1203 n.22. The Supreme Court has implicitly acknowledged the discretionary nature of speech classification. In evaluating the constitutional implications of professional ethical rules that prohibited a lawyer who worked at a nonprofit agency from soliciting clients, the Court classified the lawyer's acts as political rather than commercial expression. In re Primus, 436 U.S. 412, 422-25 (1978). See also NAACP v. Button, 371 U.S. 415, 428-29 (1963) (holding that legal staff activities were political expression protected by the Constitution). See generally J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 940 (2d ed. 1983) (differentiating commercially motivated speech from commercial speech).

Some speech that appears commercial to the nonlegal community is accorded no protection under the commercial speech doctrine. This realization stems from the Supreme Court's rationale for recognizing commercial speech. The Court held that constitutional protection was founded upon the “informational function” served by commercial speech. Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 563 (1980); see also supra note 83. If this function is not advanced by the speech in question, no constitutional protection is warranted. J. NOWAK, R. ROTUNDA & J. YOUNG, supra at 943.
cial speech standard instead of Seattle Times. The second and third prongs of the commercial speech test are specifically answered by Seattle Times.\textsuperscript{100} The Court in Seattle Times held that restricting the dissemination of discovery materials constituted a substantial government interest\textsuperscript{101} and that protective orders were directly related to this interest.\textsuperscript{102} The fourth prong of the commercial speech analysis may also be addressed by Seattle Times. Although the Court did not specifically require that a less burdensome alternative exist, the Court implied that this factor may also be included within the Seattle Times test.\textsuperscript{103} Thus, the commercial speech standard involves virtually the same considerations as the Seattle Times test and does not shed any new light on the question of whether a protective order should restrict the dissemination of discovery materials.

III. A PROPOSAL TO BALANCE INTERESTS

Appropriate exercise of the broad judicial discretion granted in Seattle Times requires that a court weigh the competing interests involved when determining whether good cause exists to grant a protective order prohibiting the dissemination of discovery materials.\textsuperscript{104} Such a balancing test would promote the benefits of judicial discretion\textsuperscript{105} by allowing courts to check

\begin{itemize}
  \item \textsuperscript{100} Seattle Times does not, however, address the first prong of the commercial speech test: whether the speech is lawful and not misleading. See supra note 85 and accompanying text.
  \item \textsuperscript{101} 467 U.S. at 34-35. This interest was identified as the need to stop abuse of the discovery process through delay, expense, and violations of individual privacy. \textit{Id. See also supra} note 34 and accompanying text.
  \item \textsuperscript{102} 467 U.S. at 34-36.
  \item \textsuperscript{103} \textit{See supra} note 35 and accompanying text.
  \item \textsuperscript{104} Courts have routinely used a balancing test when deciding whether to issue a protective order for the discovery of trade secrets. 8 C. WRIGHT & A. MILLER, supra note 2, § 2043, at 302 (citing the Advisory Committee Note to Rule 5-08 of the Proposed Federal Rules of Evidence, 46 F.R.D. 161, 271 (1969)). See, e.g., Covey Oil Co. v. Continental Oil Co., 340 F.2d 993, 999 (10th Cir.) ("The claim of irreparable competitive injury [from the production of trade secrets] must be balanced against the need for the information in the preparation of the defense."), \textit{cert. denied}, 380 U.S. 964 (1965); United States v. IBM Corp., 67 F.R.D. 40, 47 (S.D.N.Y. 1975) ("If disclosure [of trade secrets] is shown to work a clearly defined and very serious injury, continued sealed protection of the information will be maintained until the requirements of the fair administration of justice overrule this protection."). This Note proposes a test similar to that currently used by courts to determine whether and how to permit the discovery of trade secrets.
  \item \textsuperscript{105} The Supreme Court in Seattle Times indicated a strong desire to leave primary responsibility for protective orders at the trial court level. The Court
party harassment,\textsuperscript{106} maintain an orderly discovery process,\textsuperscript{107} and provide relief as justice requires.\textsuperscript{108} In addition, a balancing test incorporating specifically-enumerated factors would provide greater guidance than that provided by an undefined good cause standard.\textsuperscript{109} Unchannelled judicial discretion in the use of protective orders creates difficulties not only for the judge and parties debating the protective order, but also for appellate courts reviewing under an abuse of discretion standard.\textsuperscript{110} A balancing test creates a framework for evaluating good cause at both the trial and appellate levels.

\begin{itemize}
\item Stated that "[t]he trial court is in the best position to weigh fairly the competing interests of parties affected by discovery." 467 U.S. at 36. See also Covey Oil Co., 340 F.2d at 999 ("The balancing [process] demands the exercise of sound discretion by the trial court.").
\item Protective orders are a valuable trial court tool in managing complex cases. These orders efficiently set forth rules for discovery in cases involving large volumes of documents and extensive depositions. By tailoring a general protective order for all discovery, the trial court not only avoids review of each document or deposition, but also places the onus on the party desiring dissemination to plead its case with specific documents. See In re Agent Orange Prod. Liab. Litig., 96 F.R.D. 582, 585 (E.D.N.Y. 1983) (suggesting that the umbrella protective order might lead to court review of "only those particular documents a party wishes to disseminate"); Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 529 F. Supp. 866, 879 n.18, 914 (E.D. Pa. 1981) (fearing that substantial discovery delays would arise if the court must individually review the millions of documents produced).
\item See Zenith Radio Corp., 529 F. Supp. at 912 ("[C]ourts have a general responsibility to do justice. Litigants in many cases cannot be guaranteed a fair trial of their claims and defenses if necessary documents and materials are not produced; at the same time, the court must seek to protect from unwarranted harm parties whose rights may ultimately be vindicated at trial.").
\item The Supreme Court in Seattle Times held that a protective order is constitutional if a trial court finds good cause, but the Court failed to define good cause. 467 U.S. at 37. See supra note 36 and accompanying text. One court appropriately observed that good cause is "a rather amorphous concept, not amenable to precise definition." Koster, 93 F.R.D. at 479. This ambiguity runs counter to the thrust of the Federal Rules of Civil Procedure. The Rules are to be construed "to secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. Greater clarity is essential to avoid repetitious litigation of similar issues.
\item Seattle Times, 467 U.S. at 36 (supporting this standard of review). An abuse of discretion standard gives the trial court wide latitude and, as a result, leaves the appellate court with few guidelines for review.
\end{itemize}
A trial court, when determining whether good cause exists to issue a protective order precluding the dissemination of discovery materials, should consider several important factors: the existence of a constitutional claim asserted by an interested party, the rights to litigation materials which may arise from the nature of the litigation, the interests of the public in dissemination of materials, the potential commercialization of the discovery process, the effects of unfair publicity, and the potential exploitation of federal process in forwarding state actions. No single factor should control, and application of the test should not depend on whether the entity seeking dissemination is a nonparty instead of a party. Instead, the factors operate as a checklist for the trial court's use.

A. CONSTITUTIONAL RIGHTS

Constitutional rights may arise as valid interests in protective order litigation despite language in Seattle Times to the

111. Indeed, the weight to be given to each interest may vary, not only in terms of the interest against which it competes, but also according to the good faith of the party, the adequacy of protective measures, and the availability of other means of proof or other sources of the same information. See 8 C. WRIGHT & A. MILLER, supra note 2, § 2043, at 302 (citing the Advisory Committee Note to Rule 5-08 of the Proposed Federal Rules of Evidence, 46 F.R.D. 161, 271 (1969)); Dore, supra note 3, at 16-17. For a discussion of how these factors may affect the weight given to competing interests in the decision to use a protective order, see Koster, 93 F.R.D. at 480-82 (denying a protective order in a sexual harassment case because privacy interests were mitigated by extensive publicity prior to the lawsuit).

112. The proposed test places the person seeking access in the same position as an original discoverer. If the applicant is the original discoverer, obviously, no new result occurs. If, for example, the applicant is an attorney or a party involved in collateral litigation, however, the proposed test requires the applicant to show that the materials sought fall within the scope of discovery, see FED. R. CIV. P. 26(b)(1)-(4), and those opposing dissemination must prove that the harms of dissemination outweigh the need established by the applicant. See Wilk v. American Medical Ass'n, 635 F.2d 1295, 1301 (7th Cir. 1980) (holding that a nonparty is entitled to discovery materials "on the same terms" as the plaintiffs). See generally Note, Nonparty Access to Discovery Materials in the Federal Courts, 94 HARV. L. REV. 1085, 1094 (1981) ("Although a sealed record signifies a prior judicial determination of the need for confidentiality, the new litigant stands on similar footing to the original discoverer."). An exception to this rule may arise if the nonparty discoverer is the government. See Martindell v. IT&T Corp., 594 F.2d 291, 296 (2d Cir. 1979) (denying government access to discovery materials from a parallel private suit because of the government's extensive investigatory powers outside of the discovery process). Contra AT&T Co. v. Grady, 594 F.2d 594, 597 (7th Cir. 1979) (allowing government access to discovery materials from a parallel private suit), cert. denied, 440 U.S. 971 (1979).
A valid constitutional claim to the dissemination of discovery materials arises when the person seeking to disseminate asserts a first amendment claim and the party opposing dissemination does not assert a competing constitutional claim. A valid claim may also exist when the applicant for the dissemination of discovery materials is a nonparty with a colorable claim to the public's right of access.

Judicial recognition of such valid constitutional claims would in some cases lead to a determination that a party has a right to disseminate discovery materials. As noted above, the court in *New York v. United States Metals Refining Co.* adopted a strict interpretation of *Seattle Times* and prevented dissemination of a report compiled during discovery describing the harmful effects of pollution from defendant's plant. Had the *United States Metals* court applied a balancing test, however, it would have reached a different conclusion. The court would have allowed dissemination of the report because the defendant asserted no constitutional right in opposition to the Attorney General's first amendment claim. Thus, where an

113. For example, the Court in *Seattle Times* stated that "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." 467 U.S. at 32. See also supra note 37 and accompanying text.

114. This situation arose, for example, in *New York v. United States Metals Ref. Co.*, 771 F.2d 796 (3d Cir. 1985), discussed supra notes 44-49 & 52-53 and accompanying text. In that case, the New York Attorney General's Office sought to lift a protective order that restricted the publication of a report stating that a processing plant was releasing air pollutants at levels which were harmful to nearby residents. Id. at 798-99. The Attorney General's Office based its claim on the first amendment; the defendant opposed on nonconstitutional grounds. See supra note 52.

115. Typically, the public's right of access will be asserted by the media. See, for example, *In re Korean Air Lines Disaster of Sept. 1, 1983*, 597 F. Supp. 621 (D.D.C. 1984), discussed supra note 50, and *In re Reporter's Comm. for Freedom of the Press*, 773 F.2d 1325 (D.C. Cir. 1985), discussed supra note 74. In both cases, the media sought access to and dissemination of discovery materials on the ground that the first amendment guaranteed access to matters of public interest. For limitations on this claim following *Seattle Times*, see supra notes 72-81 and accompanying text.

116. See supra notes 44-49 & 52-53 and accompanying text.

117. 771 F.2d 796 (3d Cir. 1985).

118. Id. at 798-99.

119. In amending its findings, the court held that publication of the report might damage the refinery's business reputation and might create public panic. *Id.* at 805. Although the court found good cause for the protective order, no balancing process occurred because the court refused to recognize New York's claim as constitutionally-based. *Id.* at 803, 805. See also supra note 53 and accompanying text. In view of the limited scope of *Seattle Times*, see supra notes 37-38 and accompanying text, and preceding case law, see supra notes 54-
asserted valid first amendment claim to disseminate discovered material is unanswered by a competing constitutional claim, a court should recognize the right to disseminate and refuse to issue a protective order. In cases such as United States Metals, such an approach would ensure that information vital to the public interest is not unnecessarily withheld from publication.

B. THE RIGHT TO LITIGATION MATERIALS

Strong policy considerations favor dissemination of discovery materials when the materials are sought for use in similar or related litigation. The Supreme Court recognized a right to gather litigation materials in Ex Parte Uppercu. Uppercu involved an action to gain access to sealed depositions and exhibits from a resolved case. The Court granted petitioner access to the depositions and documents, declaring a "new right" to obtain evidence. Since Uppercu, recognition of the right to gather litigation materials has become common in trial and appellate courts. As a result, courts have frequently found the right dispositive in denying protective orders that prohibit

57 and accompanying text, New York's constitutional claim outweighs the refinery's nonconstitutional concerns and dissemination should be allowed.

120. 239 U.S. 435 (1915).

121. The case from which the discovery materials were sought involved a government action against a manufacturer for penalties under the Immigration Act. The action was settled before trial and all depositions and documents were sealed by court order. Id. at 438. The government paid the petitioner in Uppercu for services rendered in that earlier case. The petitioner was later forced to defend against two additional claims, both arising from the facts of the earlier lawsuit—one for a portion of the government payment, and the other for attorneys fees. Petitioner sought the prior discovery materials to prove alleged admissions made by the first plaintiff in deposition and to establish that the attorney worked for the government and not for the petitioner. Id. at 438-39.

122. Justice Holmes concluded that "[t]he necessities of litigation and the requirements of justice found a new right of a wholly different kind. So long as the object physically exists, anyone needing it as evidence at trial has a right to call for it, unless some exception is shown to the general rule." Id. at 440.


124. Taken as a whole, the decisions which find that the right of access to
either attorney collaboration\(^{125}\) or nonparty access to discovery materials.\(^{126}\)

litigation materials is dispositive emphasize two themes. Protective order petitions which are based on a desire to prevent access to litigation materials needed in parallel litigation will usually not be granted. Olympic Ref. Co. v. Carter, 332 F.2d 260, 265 (9th Cir.), cert. denied, 379 U.S. 900 (1964); Carter-Wallace, Inc. v. Hartz Mountain Indus., Inc., 92 F.R.D. 67, 69 (S.D.N.Y. 1981). More specifically, courts have refused to find good cause when a protective order is sought to prevent attorney collaboration or nonparty access. United States v. Hooker Chems. & Plastics Corp., 90 F.R.D. 421, 426 (W.D.N.Y. 1981) ("Hooker also argues that the disclosure of information garnered through discovery will be detrimental to its position in parallel lawsuits. This is unquestionably true. However, this is not a reason for a court to impose a protective order."); Parsons, 85 F.R.D. at 726 n.1 ("[T]he court does not consider the possibility that plaintiff will share the results of discovery with any other litigant any part of defendant's showing of good cause to justify a protective order.").

The second theme found in right to litigation materials cases suggests that justice and fair play demand dissemination to third parties when to do otherwise would leave the parties with unequal access to information relevant to the case. These inequities take many forms, for example, lack of access to limited expert witnesses, In re Upjohn Co., 81 F.R.D. at 484, time wasted taking numerous depositions of individuals already deposed upon similar areas of inquiry, Carter-Wallace, Inc., 92 F.R.D. at 69-70, ignorance of a witness' past testimony, Olympic Ref. Co., 332 F.2d at 266, and the inability to match the expertise of counsel who have routinely litigated the same issues and similar facts, Ward v. Ford Motor Co., 93 F.R.D. 579, 580 (D. Colo. 1982).

\(^{125}\) See, e.g., Ward, 93 F.R.D. at 580 (vacating protective order issued by United States magistrate that prohibited plaintiff's attorney from disseminating discovery materials to group of approximately 50 attorneys involved in similar litigation); Waelde v. Merck, Sharp & Dohme, 94 F.R.D. 27, 30 (E.D. Mich. 1981) (denying protective order in a drug products liability action on the grounds that "the Federal Rules do not prohibit collaboration among litigants"); Hooker Chems. & Plastics Corp., 90 F.R.D. at 426 (holding in Love Canal lawsuit that "[u]se of the discovery fruits disclosed in one lawsuit ... in collaboration among plaintiffs' attorneys[] comes squarely within the purposes of the Federal Rules of Civil Procedure"); Patterson, 85 F.R.D. at 154 ("There is nothing inherently culpable about sharing information obtained through discovery."); Williams, 50 F.R.D. at 32 (refusing to issue protective order upon defendant's fear that "plaintiffs in the various suits" will share discovery).

\(^{126}\) See, e.g., Wilk, 635 F.2d at 1299 (modifying Illinois protective order to grant New York Attorney General's Office access to over 100,000 discovery documents and 100 depositions); AT&T Co. v. Grady, 594 F.2d 594, 595 (7th Cir. 1979) (modifying protective order to grant the United States access to discovery materials from similar litigation for use in antitrust suit), cert. denied, 440 U.S. 971 (1979); Olympic Ref. Co., 332 F.2d at 266 (modifying protective order to grant private party access to documents and interrogatories filed by defendant in prior government antitrust action); Carter-Wallace, Inc., 92 F.R.D. at 70-71 (modifying protective order to grant plaintiff access to depositions taken in previous litigation by different plaintiff); In re Upjohn Co., 81 F.R.D. at 484-85 (modifying protective order to grant plaintiffs access to depositions taken in another jurisdiction in a case that had been assigned to multidistrict litigation). But cf. Martindell v. IT&T Corp., 594 F.2d 291, 296 (2d Cir. 1979) (denying government access to depositions taken under protective order in
At least one court has held that the right to litigation materials may outweigh an opposing claim for a protective order even though the party seeking protection has made a Seattle Times showing of good cause. In Cipollone v. Liggett Group Inc.,\(^{127}\) the District Court for the District of New Jersey modified a protective order to allow plaintiffs’ counsel to use litigation materials from the pending action in a parallel products liability case against the same tobacco manufacturer.\(^{128}\) The court weighed the defendants’ interest in suppressing dissemination against plaintiffs’ need for the discovery materials.\(^{129}\) The court concluded that dissemination of discovery materials for use in similar litigation was efficient\(^{130}\) and just.\(^{131}\)

previous litigation); United States v. United Fruit Co., 410 F.2d 553, 554-56 (5th Cir.) (denying nonparty access to information restricted by protective order in prior litigation), cert. denied, 396 U.S. 820 (1969). See generally Marcus, supra note 1, at 41 ("By far the most important justification for granting nonparties access to discovery information is their need to use the information in other litigation.").


128. 106 F.R.D. at 585-86. Plaintiffs requested modification of a protective order that prohibited plaintiffs’ attorneys and their expert witnesses from using discovery materials in similar cases. Id. at 577-78.

129. The defendants’ interest in suppressing dissemination focused on two goals: streamlining the litigation currently before the court, id. at 579, 584, and preventing plaintiffs’ counsel from using the information in other cases, id. at 584. The plaintiffs’ interest in dissemination centered upon involvement of counsel and experts in similar litigation. Id. at 578.

130. Id. at 585. The court agreed with defendants that blanket protective orders are generally an efficacious means of managing complex litigation. Id. at 583. See supra note 107. The court added, however, that the defendant had the burden of proving good cause before a protective order could be issued. 106 F.R.D. at 583. The court rejected the defendants’ justification for such an order as “quite conclusory.” Id. at 584. See supra note 129.

The court concluded that dissemination was ultimately more efficient than issuing a protective order. 106 F.R.D. at 586. The court stated:

There may be some claimants who do not have the resources or such able and dedicated counsel as in this case to pursue the thorough investigation which these cases require. To require that each and every plaintiff go through the identical, long and expensive process would be ludicrous. Even from the point of view of the defendants . . . , it would seem that they would benefit by avoiding repetition of the same discovery in each and every case.

Id. at 577.

131. The court found that strong public interest in the hazards of tobacco smoking demanded dissemination of the discovery materials. 106 F.R.D. at 576-77. The court reasoned:

It is difficult to envision that [the smoking risks known to the tobacco industry] involve “secrets” in the traditional sense. . . . Indeed they may be secrets in the sense that the industry would prefer them to
C. THE PUBLIC INTEREST IN DISSEMINATION

The public interest in dissemination of discovery materials is an important factor for courts to consider when determining whether to issue a protective order. This interest is based upon the principle that certain discovery material is of independent public importance. For example, the public benefits from remain confidential, but not in the sense that their concealment from the press and public would be consistent with the first amendment. The court relied on the first amendment in ordering dissemination because, in its opinion, Seattle Times "held the first amendment clearly to be implicated" by the public interest in plaintiff Rhinehart and his religious followers. The court's constitutional analysis was unnecessary because Seattle Times did not consider the right to litigation materials issue.

Upon review, the Third Circuit found that the district court's interpretation of Seattle Times was incorrect. Cipollone v. Liggett Group Inc., 785 F.2d 1108, 1118-20, 1123 (3d Cir. 1986). The Third Circuit reversed and remanded, instructing the district court to construe Seattle Times strictly, as set out in New York v. United States Metals Ref. Co., 771 F.2d 796, 800-03 (3d Cir. 1985). The court's constitutional analysis was unnecessary because Seattle Times allowed it to completely ignore the lower court's analysis regarding the right to litigation materials issue.


Legal actions which stem from political or religious beliefs also hold independent public importance. See, e.g., NAACP v. Button, 371 U.S. 415, 429, 433 (1963) (Litigation as a "form of political expression" is protected by the first amendment which the government may regulate only with "narrow specificity."); In re Primus, 436 U.S. 412, 439 (1978) (Solicitation of litigants for ex-
dissemination of discovery materials that reveal the inner workings of government or of large private corporations and industries.\textsuperscript{133}

Product liability actions generate important public information.\textsuperscript{134} In \textit{In re Agent Orange Product Liability Litigation},\textsuperscript{135} for example, the District Court for the Eastern District of New York lifted a protective order that prohibited dissemination of discovery documents to allow public access to information gathered by the plaintiffs.\textsuperscript{136} \textit{Agent Orange} involved a class action by Vietnam War veterans against private companies and the government for injuries caused by wartime exposure to a defoliant.\textsuperscript{137} Following settlement of the class action, when the veterans sought access to and dissemination of the protected discovery materials, the court concluded that the need for disclosure outweighed the need for further protection.\textsuperscript{138} Strong public concern about the litigation and the class mem-

\textsuperscript{133} See Note, supra note 132, at 1656 ("The [public] interest in releasing such information does not evaporate merely because the information was obtained through discovery rather than some other means.").


\textsuperscript{135} 104 F.R.D. 559 (E.D.N.Y. 1985).

\textsuperscript{136} Id. at 573-74. The protective order required confidential treatment for all documents produced. Furthermore, all documents specially designated as confidential by defendants were to be returned to defendants or destroyed at the end of the litigation. Id. at 563.

\textsuperscript{137} \textit{In re Agent Orange Prod. Liab. Litig.}, 98 F.R.D. 539, 547 (E.D.N.Y. 1983).

\textsuperscript{138} The court based its decision to lift the protective order on two grounds. First, the court held that a presumption of public access to discovery materials existed. 104 F.R.D. at 568. The court held that the good cause requirement of Rule 26(c) and the requirement for filing of discovery materials under Rule 5(d) created a presumption that discovery materials are open to public scrutiny. Id. at 567-68. Second, the court was unable to find good cause to support continuation of the protective order. Id. at 570. The settlement had obviated the rationale behind the original imposition of the protective order. \textit{Id.} The court further found that none of defendants' new contentions had established good cause. Defendants argued after the settlement that the documents produced contained irrelevant and even prejudicial material which defendants would not have produced in the absence of a protective order. \textit{Id.} at 570-71. The court rejected defendants' reliance argument because it implied that a "permanent exception" to the good cause rule should be made for all cases with massive document productions. \textit{Id.} at 571-72.
bers' desire to have access to the information influenced the court's decision.\textsuperscript{139}

The realm of information that has independent public importance is, of course, broad. This does not mean, however, that courts should shy away from considering this factor. Instead, courts should look to the effect of a protective order. If the protective order thwarts public policy or hinders dissemination of information affecting the public welfare, courts should require the party opposing dissemination to articulate private rights that outweigh the identified public interests.

D. COMMERCIALIZATION OF THE DISCOVERY PROCESS

Protective orders may be warranted to prevent the sale of discovery materials. The sale of discovery materials is ethically dubious\textsuperscript{140} and an unwanted commercialization of the discovery

\textsuperscript{139} Id. at 573-74. According to the court, the public concern stemmed from the controversy uniquely surrounding the Vietnam War, \textit{id.} at 574, as well as the potential health risks due to exposure to dioxin alleged by plaintiffs. \textit{id.} at 572, 574. Other arguments also influenced the court's decision. Proponents of dissemination argued that the veteran class members needed access to sealed documents to evaluate the settlements received. \textit{id.} at 572. Although represented by counsel, the veteran class had no other plausible opportunity to acquire knowledge of the proof against defendants. \textit{id.} at 572-73. The court reasoned that "[c]ontinued dissatisfaction, suspicion and unease among the veterans and their families will surely continue in the absence of full disclosure." \textit{id.} at 573.

\textsuperscript{140} Although the American Bar Association Code of Professional Responsibility does not directly address the sale of discovery materials, several provisions suggest that such activity raises serious ethical concerns. Of course, if the sale involves confidences or secrets of a client, it violates Canon 4, unless the client knowingly consents to the sale. \textit{MODEL CODE OF PROFESSIONAL RESPONSIBILITY} Canon 4 (1981) [hereinafter \textit{MODEL CODE}]. In most instances, however, the sale of discovery materials involves disclosures of a party-opponent rather than a client.

The sale of discovery materials also raises doubts about a lawyer's ability to exercise independent professional judgment. \textit{MODEL CODE Canon 5}. For instance, the Code exhorts a lawyer to "scrupulously" avoid acquiring publication rights relating to the client's legal affairs. \textit{MODEL CODE EC 5-4}. See also \textit{MODEL CODE DR 5-104(b)} (prohibiting a lawyer from acquiring publication rights from a client with respect to the lawyer's employment). The sale of discovery materials would seem as ethically dubious as the acquisition of publication rights. Both actions may steer a lawyer "consciously or unconsciously, to a course of conduct that will enhance the value" of the discovery materials or the publication rights "to the prejudice of his client." \textit{MODEL CODE EC 5-4}. See generally \textit{MODEL CODE EC 5-7} (stating that it is undesirable for a lawyer to become "financially interested in the outcome of the litigation"); \textit{DR 5-107(A)} (prohibiting acceptance of compensation from one other than the client, except upon the knowledgeable consent of the client); \textit{DR 7-107(G)} (limiting publicity which is "reasonably likely to interfere with a fair trial").
Courts may control potential commercialization of the discovery process in two ways. First, courts may supervise dissemination, either by protective order or by expressly requiring notification of the court before any documents are disseminated to nonparties. This allows for a case-by-case determination of the propriety of dissemination. Alternatively, courts may rely upon the ethical standards of the bar association to determine whether dissemination is appropriate in a given case.

Although all commercialization may not be undesirable, valid concerns about an adversary's intended use of discovery information should weigh in favor of issuing a protective order.

E. UNFAIR PUBLICITY

Parties frequently request protective orders to avoid widespread publicity. Litigants armed with dramatic discovery materials and media savvy may threaten a party with an unde-


142. See In re Upjohn Co., 81 F.R.D. at 485 (requiring counsel to notify court before discovery materials are disseminated); Williams, 50 F.R.D. at 33 (suggesting that counsel opposing dissemination move for a protective order if fears are realized).

143. See Williams, 50 F.R.D. at 33 (suggesting that counsel examine Canon 2 of the Model Code of Professional Responsibility before agreeing to provide discovery materials for publication).

144. See id. at 32-33. Attorney collaboration, even if formally organized to facilitate the dissemination of discovery materials against a single manufacturer, has met with court approval. Ward v. Ford Motor Co., 93 F.R.D. 579, 579-80 (D. Colo. 1982). One court also has found that charging referral fees is reasonable. Williams, 50 F.R.D. at 33. Another court even found acceptable the sale of discovery materials to cover out-of-pocket costs. In re Upjohn Co., 81 F.R.D. at 484-85. Another court, however, held counsel in civil contempt for a similar sale. Kehm, 724 F.2d at 630-31, discussed supra notes 6, 82 & 141.

sirable wave of publicity. Parties requesting a protective order under these conditions usually focus on two constitutional concerns: the right to privacy and the right to a fair trial. A valid privacy argument alone, however, may not be sufficient to establish the good cause necessary for issuance of a protective order. Moreover, several courts have questioned whether unrestricted publicity abrogates an individual’s right to a fair trial. Where publicity involves “lurid subject matter” or occurs in a small community, however, courts have held that constitutional issues are implicated.

Courts are nevertheless reluctant to issue a protective order to prevent unfair publicity. Some courts feel that it would be impossible to enforce such a protective order because, if publication subsequently occurs, it is difficult to determine the source of publication. Courts therefore have favored alternatives to protective orders, such as extensive voir dire or appropriate jury instructions.

(refusing protective order which would restrict plaintiff from media exposure in sex discrimination suit).

146. See, e.g., Krause, 671 F.2d at 217; Koster, 93 F.R.D. at 480-81.
147. See, e.g., CBS, Inc. v. United States Dist. Court for the Cent. Dist. of Cal., 729 F.2d 1174, 1179 (9th Cir. 1983).
148. At least one court has held that privacy concerns are not good cause for a blanket protective order. Koster, 93 F.R.D. at 481. But cf. Seattle Times, 467 U.S. at 34-35 (recognizing that privacy and religious rights, at least when taken together, create a substantial interest which justifies a protective order).
149. Several courts recently have questioned whether pretrial publicity significantly affects the jury pool. See, e.g., CBS, Inc., 729 F.2d at 1179 (“[E]ven when exposed to heavy and widespread publicity many, if not most, potential jurors are untainted by press coverage.”); In re NBC, Inc., 635 F.2d 945, 948 (2d Cir. 1980) (finding that, although Abscam had lead to heavy media exposure, “only about one-half of the prospective jurors indicated that they had ever heard of Abscam” and of those only 8 or 10 “had anything more than a most generalized kind of recollection what it was all about”); United States v. Mitchell, 551 F.2d 1252, 1262 n.46 (D.C. Cir. 1976) (finding that “without undue effort, it would be possible to empanel a jury whose members had never even heard of the [Watergate] tapes”).
152. See CBS, Inc., 729 F.2d at 1181.
154. See CBS, Inc., 729 F.2d at 1182-83 (“The Supreme Court has emphasized that these traditional devices used for combating prejudice are powerful tools that should be adequate to defuse prejudicial pre-trial publicity.”).
F. EXPLOITATION OF THE FEDERAL COURTS

Protective orders may also prevent counsel from knowingly or unknowingly exploiting the federal court system. This problem arises most often in two contexts. In the first, a party may pursue both a state and federal action against the same defendant to take advantage of liberal federal discovery rules.\footnote{See, e.g., Beard v. New York Cent. Ry., 20 F.R.D. 607 (N.D. Ohio 1957) (plaintiff filed complaint and discovery requests in federal court after state court denied same request). This practice violates the principle that federal discovery may not be used to subvert discovery limitations in other proceedings. Wilk v. American Medical Ass'n, 635 F.2d 1295, 1300 (7th Cir. 1980). Moreover, litigants are generally precluded from discovering collaterally what cannot be discovered in the pending litigation. Id. In addition, initiation of discovery proceedings in federal court can be restricted to avoid exploitation. See, e.g., Sperry Rand Corp. v. Rothlein, 288 F.2d 245, 249 (2d Cir. 1961) (enjoining plaintiff from using information obtained through discovery in pending action in parallel litigation).} In addition, a party may abuse the discovery process by seeking helpful business information about a competitor for the purpose of gaining a competitive advantage.\footnote{See, e.g., United States v. United Fruit Co., 410 F.2d 553, 555-56 (5th Cir.) (denying access to discovery materials because the party's purpose "was admittedly one of self-interest to obtain advance information about the proposed competitive plans, practices and policies"), cert. denied, 396 U.S. 820 (1969).} Courts have condemned both of these practices.\footnote{See id.; Sperry Rand Corp., 288 F.2d at 249.} Courts do not, however, presume exploitation but require a specific showing of bad faith.\footnote{See, e.g., AT&T Co. v. Grady, 594 F.2d 594, 597 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979); In re Upjohn Co. Antibiotic Cleocin Prods. Liab. Litig., 81 F.R.D. 482, 484 (E.D. Mich. 1979), aff'd, 664 F.2d 114 (6th Cir. 1981); Parsons v. General Motors Corp., 85 F.R.D. 724, 726 n.1 (N.D. Ga. 1980).} Absent such a showing of bad faith, courts generally permit dissemination.\footnote{See, e.g., United States v. Hooker Chems. & Plastics Corp., 90 F.R.D. 421, 426 (W.D.N.Y. 1981) (allowing federal litigants to use discovery in state suits "provided there is no attempt to exploit the federal litigation discovery process solely to assist litigation in a foreign forum"); Johnson Foils, Inc. v. Huyck Corp., 61 F.R.D. 405, 410-11 (N.D.N.Y. 1973) (denying defendant's proposed protective order preventing use of discovery materials in a state forum because movant made no showing of bad faith).}

CONCLUSION

Litigants involved in complex litigation routinely request protective orders to restrict the dissemination of discovery materials. The Supreme Court in Seattle Times granted trial courts broad discretion to issue these orders. Although a court may issue such an order only upon a showing of good cause, the
Supreme Court in *Seattle Times* provided no guidelines for determining specifically what constitutes good cause. Guidelines are particularly necessary for proper resolution of the dissemination issue because first amendment implications arise when a court issues a protective order restricting dissemination.

A balancing test consisting of a checklist of interests promotes the most appropriate exercise of judicial discretion in protective order cases. Such a test provides the court and the parties with both flexibility and clarity, establishes a framework within which a court may determine whether good cause exists, and rests upon a sound interpretation of *Seattle Times*.

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