Confidential Discovery: A Pocket Guide on Protective Orders

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Table of Contents

Introduction

This pocket guide is about the use of protective orders to keep discovery confidential in both civil and criminal cases. Although a strong presumption of public access applies to evidence admitted at trial or considered by the court to decide the merits of a case, parties now undertake discovery away from the court. Experience has proved confidentiality protective orders to grease the wheels of discovery in many cases. Parties are often more willing to produce requested discovery when they know that such production does not necessarily make the information public.

This pocket guide is not about other types of protective orders, such as protective orders that protect a party from having to produce requested discovery,[1] or what state courts often call restraining orders—orders preventing parties from engaging in conduct potentially injurious to the safety of others. This pocket guide is also not about sealing the court's own records. That is the topic of *Sealing Court Records and Proceedings: A Pocket Guide* (2010).

Confidential-discovery protective orders have generated case law in civil cases more often than in criminal cases, so this guide's initial focus is civil cases. Many of the principles discussed apply, however, to criminal cases, which are discussed specifically near the end of this guide.

Civil Discovery

A civil action between two parties establishes a subpoena power by the court that parties use to demand information from each other.[2] A party is presumptively entitled to all information in an opposing party's control material to the action, so long as the requesting par-

1. *See, e.g.*, Fed. R. Civ. P. 26(c)(1)(B)–(H).
2. *See, e.g.*, Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982).

ty knows how to ask for it. The use of the court's subpoena power to obtain material information from an opposing party is known as discovery.

There was a time when discovery was filed with the court. That made discovery part of the court record, to which the public has a presumptive right of access. That is not the practice now. Courts' storage obligations remain quite large, but they are considerably diminished by the current practice of not routinely accepting discovery for filing.

Parties now retain discovery themselves. Ordinarily, discovery is shared with persons not party to the suit only when one of the parties chooses to share it.[3] Producing parties, however, often seek limits on receiving parties' distribution of the producing parties' information. This could be accomplished by private agreement; it is often accomplished by a protective order issued by the court.

Good Cause

Upon a showing of good cause, the court has discretion to issue a protective order that forbids a party from disclosing to other persons specific information acquired in discovery.[4] The burden of showing good cause falls at all times on the party seeking protection.[5]

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3. Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 780 (1st Cir. 1988) ("Certainly the public has no right to demand access to discovery materials which are solely in the hands of private party litigants.").

4. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 785–86 (3d Cir. 1994) (describing the discretion as inherent power).

5. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003) ("A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted."); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786–87 (3d Cir. 1994) ("The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party

For civil cases, this discretion is articulated in Federal Rule of Civil Procedure 26(c)(1)(A): "The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, . . . forbidding the disclosure of discovery . . . ."[6] The rule permits the court to issue a protective order only if the parties cannot accomplish the goals of the order by private agreement: "The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."[7]

"'Good cause' is established when it is specifically demonstrated that disclosure will cause a clearly defined and serious injury. Broad allegations of harm, unsubstantiated by specific examples, however, will not suffice."[8]

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seeking the order."); Miller v. City of Boston, 549 F. Supp. 2d 140, 141 (D. Mass. 2008) ("The proponent of a Protective Order bears the burden of establishing 'good cause' for its continuation," footnote omitted.); *see also* Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122 (3d Cir. 1986) ("It is correct that the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order; any other conclusion would turn Rule 26(c) on its head.").

6. *See also In re* Alexander Grant & Co. Litig., 820 F.2d 352, 355 (11th Cir. 1987); Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982); MCL 4th § 11.432, at 66–67 (Federal Judicial Center 2004).

7. Fed. R. Civ. P. 26(c)(1); *see* Forest Prods. Northwest, Inc. v. United States, 453 F.3d 1355, 1361 (Fed. Cir. 2006) (holding that the district court was correct to deny a motion for a protective order because the mover "neither conferred with the [other party] to resolve the dispute nor demonstrated good cause").

8. Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995); *see also* Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003); Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1118–21 (3d Cir. 1986) (holding that "the good cause analysis, although by no means toothless, is significantly less strin-

"Annoyance, embarrassment, oppression, or undue burden or expense" is not shown lightly.[9]

> [B]ecause release of information not intended by the writer to be for public consumption will almost always have some tendency to embarrass, an applicant for a protective order whose chief concern is embarrassment must demonstrate that the embarrassment will be particularly serious. As embarrassment is usually thought of as a nonmonetizable harm to individuals, it may be especially difficult for a business enterprise, whose primary measure of well-being is presumably monetizable, to argue for a protective order on this ground. To succeed, a business will have to show with some specificity that the embarrassment resulting from dissemination of the information would cause a significant harm to its competitive and financial position.[10]

The First Amendment

Parties presumptively have a right, in part protected by the First Amendment, to share what they learn in discovery with other persons, including news media, as they see fit.[11] A protective order must be based on good cause, because it infringes this presumptive right.

A discovery protective order may not forbid a party from disclosing information it has acquired from sources other than discovery, even if the information is also included in discovery.[12]

The public has a common-law right and a First Amendment right to court records, but the public, including news media, do not

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gent than the least restrictive means test"); United States v. Garrett, 571 F.2d 1323, 1325–26 (5th Cir. 1978).

9. United States *ex rel.* Davis v. Prince, 753 F. Supp. 2d 561, 567–68 (E.D. Va. 2010) ("the annoyance or embarrassment must be particularly serious").

10. Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986) (citations omitted).

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

12. Int'l Prods. Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963).

have common-law or First Amendment rights to discovery not filed with the court.[13]

Blanket Orders

If the amount of discovery potentially subject to valid protective orders is large, then courts often issue blanket protective orders, which are also sometimes called umbrella protective orders.[14] Typically, a blanket protective order permits a party to designate parts of its produced discovery as confidential upon a good faith belief that there is good cause for the designated discovery to be included in the protective order.[15]

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13. Bond v. Utreras, 585 F.3d 1061, 1066 (7th Cir. 2009) ("[T]here is no constitutional or common-law right of public access to discovery materials exchanged by the parties but not filed with the court. Unfiled discovery is private, not public.").

14. Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 777 (1st Cir. 1988) (because of the volume of discovery documents it would be physically impossible for the defendants to designate individually each document containing confidential or secret information); *In re* Alexander Grant & Co. Litig., 820 F.2d 352, 357 (11th Cir. 1987) ("We conclude that in complex litigation where document-by-document review of discovery materials would be unpracticable, and when the parties consent to an umbrella order restricting access to sensitive information in order to encourage maximum participation in the discovery process, conserve judicial resources and prevent the abuses of annoyance, oppression and embarrassment, a district court may find good cause and issue a protective order pursuant to Rule 26(c)."); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122 (3d Cir. 1986) ("It is equally consistent with the proper allocation of evidentiary burdens for the court to construct a broad 'umbrella' protective order upon a threshold showing by one party (the movant) of good cause."); MCL 4th § 11.432, at 64–66 (Federal Judicial Center 2004); *see also* Poliquin v. Garden Way, Inc., 989 F.2d 527, 532 (1st Cir. 1993); United States *ex rel.* Davis v. Prince, 753 F. Supp. 2d 561, 566–67 (E.D. Va. 2010).

15. Chicago Tribune Co. v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1307 (11th Cir. 2001); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122 (3d Cir. 1986).

Protection by a blanket protective order is only provisional.[16] If the designation is later challenged, the court must find good cause to protect the specific discovery for the discovery to be protected as confidential.[17]

Stipulated Orders

It is common for parties to present to the court a stipulated protective order for the court to sign. Such an order becomes an order of the court only upon the court's issuing it. It is not sufficient for the parties to file it.[18] It is only proper for the court to issue the order upon the court's finding that the order is supported by good cause.

In litigation over fiduciary duty, the defendant waived attorney–client privilege by relying on an advice-of-counsel defense, and the courts determined that the waiver was broader than the defendant preferred.[19] The parties stipulated to a protective order, which they filed with the court, but which the court never endorsed.[20] The defendant filed an ultimately unsuccessful summary judgment motion under seal, attaching attorney-client communications deemed confidential as exhibits.[21] The plaintiff moved to unseal the motion and the exhibits and declared their intention to not

16. Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 790 (1st Cir. 1988) ("Although . . . blanket protective orders may be useful in expediting the flow of pretrial discovery materials, they are by nature overinclusive and are, therefore, peculiarly subject to later modification."); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122 (3d Cir. 1986) ("After the documents [are] delivered under this umbrella order, the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents.").

17. *Cipollone*, 785 F.2d at 1122.

18. Glenmede Trust Co. v. Thompson, 56 F.3d 476, 480–81 (3d Cir. 1995).

19. *Id.* at 480,486–87.

20. *Id.* at 480.

21. *Id.* at 481.

treat them as confidential.[22] The defendant sought from the district court a reversal of its broad holding of waiver and an endorsement of the stipulated protective order.[23] The district court denied both requests, finding that the stipulated order was not supported by good cause.[24] The court of appeals denied mandamus.[25]

Attorney Eyes Only

Sometimes, a party is not only concerned about non-parties having access to discovery, but the party is concerned about the opposing party's having access to it as well. Trade secrets are a common example.[26] Courts sometimes issue protective orders that prohibit the attorney receiving discovery from sharing certain portions of discovery with the client.[27]

A protective order that contemplates a party's sharing discovery with opposing counsel but not with the opposing party can facilitate discovery in cases involving especially sensitive information.

Restricting a party's access to discovery that is granted to a party's attorney can serve other goals as well. For example, it was within a district judge's discretion to issue a protective order for-

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.* at 483.

26. R.C. Olmstead, Inc. v. CU Interface, LLC, 606 F.3d 262, 269–70 (6th Cir. 2010).

27. Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1469–72 (9th Cir. 1992) (affirming a protective order denying in-house counsel's access to discovery marked for attorney eyes only); Layne Christensen Co. v. Purolite Co., 271 F.R.D. 240, 242–43, 247. (D. Kan. 2010) (finding good cause for the designation of some discovery as for attorney eyes only).

bidding one party, a troublesome paparazzo, from attending the deposition of the opposing party, Jacqueline Onasis.[28]

The precise concern for limiting access to discovery may not depend only on whether the person granted or denied access is an attorney; it may depend upon whether the person is a competitive decisionmaker.[29] Sometimes, for example, outside counsel pose less of a concern than in-house counsel.[30]

The court may be asked to modify a protective order or redesignate attorney-eyes-only discovery as merely confidential if a party believes the change warranted by circumstances, such as a decision to use the discovery as evidence.[31]

An attorney-eyes-only protective order can be incorporated into a blanket protective order. The parties may designate certain discovery they produce as confidential, forbidding the opposing party from disclosing it to other persons, and certain other discovery as for attorney eyes only, forbidding the opposing attorney from disclosing it even to the attorney's client. These designations are provisional and must be supported by a finding of good cause by the court if challenged later.

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28. Galella v. Onassis, 487 F.2d 986, 997 (2d Cir. 1973).

29. *In re* Deutsche Bank Trust Co. Americas, 605 F.3d 1373, 1381 (Fed. Cir. 2010); .U.S. Steel Corp. v. United States, 730 F.2d 1465, 1468 (Fed. Cir. 1984); Pfizer Inc. v. Apotex Inc., 744 F. Supp. 2d 758 (N.D. Ill. 2010); Maderazo v. Vanguard Health Sys., 241 F.R.D. 597, 600 (W.D. Tex. 2007)..

30. Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1469–72 (9th Cir. 1992); Sony Computer Entertainment America, Inc. v. NASA Electronics Corp., 249 F.R.D. 378, 383 (S.D. Fla. 2008).

31. *E.g.*, Haemonetics Corp. v. Baxter Healthcare Corp., 593 F. Supp. 2d 298, 302 (D. Mass. 2009) (approving a motion to redesignate discovery marked for outside counsel eyes only as merely confidential).

Modification

"It is well-established that a district court retains the power to modify or lift confidentiality orders that it has entered."[32]

Subpoena

If a party is in possession of discovery produced by an opposing party that is subject to a protective order and the party receives a subpoena to produce the confidential discovery, then the party should seek from the court that issued the protective order a modification to the order permitting compliance with the subpoena.[33]

Courts are wary of improper motives. In litigation against a drug manufacturer, an expert witness wanted to disseminate confidential discovery.[34] He encouraged an attorney to use a marginally related case to subpoena the discovery, which the expert turned over without giving the manufacturer an opportunity, as required by the protective order, to challenge the subpoena.[35] The attorney disseminated the discovery to news media.[36] The court of appeals affirmed the district court's injunction against further dissemination and order that the improperly obtained discovery be returned.[37]

In some circuits, including the Fourth, the Ninth, and the Eleventh, a grand jury subpoena automatically trumps a protective or-

32. Pansy v. Borough of Stroudsburg, 23 F.3d 772, 784 (3d Cir. 1994); *see* MCL 4th § 11.432, at 67–69 (Federal Judicial Center 2004).

33. Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949, 952 (8th Cir. 1979) (modification sought to comply with a congressional subpoena duces tecum).

34. Eli Lilly & Co. v. Gottstein, 617 F.3d 186, 189 (2d Cir. 2010).

35. *Id.* at 189–91.

36. *Id.* at 189.

37. *Id.* at 189, 191, 197.

der issued in a civil case.[38] "The interest in fostering grand jury investigations outweighs the district court's interest in efficiently disposing of its civil cases."[39] In other circuits, including the First and the Third, a grand jury subpoena does not trump a civil protective order if the person seeking to quash the subpoena can demonstrate exceptional circumstances that clearly favor the protective order over the subpoena.[40] In the Second Circuit, a grand jury subpoena trumps a civil protective order only if the government can "show improvidence in the original grant of the protective order or compelling need or extraordinary circumstances that would justify allowing the government access to the [protected discovery]."[41]

Reliance

Before modifying a protective order, the court must consider the parties' reliance on the order.[42] "Where there has been reasonable reliance [on a protective order, the court should not modify the order] absent a showing of improvidence in the grant of the order or some extraordinary circumstance or compelling need."[43]

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38. *In re* Grand Jury Subpoena Served on Meserve, Mumper & Hughes, 62 F.3d 1222, 1226 (9th Cir. 1995); *In re* Grand Jury Proceedings, 995 F.2d 1013, 1015, 1020 (11th Cir. 1993); *In re* Grand Jury Subpoena, 836 F.2d 1468, 1477 (4th Cir. 1988).

39. *In re Grand Jury Proceedings*, 995 F.2d at 1017.

40. *In re* Grand Jury, 286 F.3d 153, 156, 158, 162, 165 (3d Cir. 2002) (affirming a decision that the grand jury subpoena prevailed); *In re* Grand Jury Subpoena, 138 F.3d 442, 445 (1st Cir. 1998) (same).

41. *In re* Grand Jury Subpoena Duces Tecum Dated April 19, 1991, 945 F.2d 1221, 1226 (2d Cir. 1991).

42. SEC v. Merrill Scott & Assocs., 600 F.3d 1262, 1271–74 (10th Cir. 2010); SEC v. The Street.com, 273 F.3d 222, 229 (2d Cir. 2001); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 790 (3d Cir. 1994); *see also* FDIC v. Ernst & Ernst, 677 F.2d 230, 232 (2d Cir. 1982).

43. *The Street.com*, 273 F.3d at 229.

A court of appeals affirmed a district court's modification of a protective order to grant news media access to a deposition transcript, because the testimony was a matter of public importance and the deposition had been attended by persons not bound by the protective order.[44] Because of the presence of outside persons, the parties could not have reasonably relied on the protective order to protect the deposition's confidentiality.[45]

A district court observed, "A blanket protective order is more likely to be subject to modification than a more specific, targeted order because it is more difficult to show a party reasonably relied on a blanket order in producing documents or submitting to a deposition."[46]

Intervention

A non-party may challenge a protective order or seek to modify it upon the court's granting the non-party permission to intervene.[47]

For an outside person to disturb a protective order, the person must demonstrate standing.[48] Courts often find that news media have standing to challenge protective orders.[49]

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44. *Id.*

45. *Id.* at 233.

46. *In re* Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig., 255 F.R.D. 308, 319 (D. Conn. 2009) (granting a motion to intervene and modify a protective order to permit the intervening party access to confidential discovery for use in similar litigation).

47. Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 896 (7th Cir. 1994); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 777–78 (3d Cir. 1994) (reversing a trial court's denial of a newspaper's intervention to seek modification of an order preserving the confidentiality of a settlement agreement and remanding for a determination of whether the confidentiality order was justified by good cause.); Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 472 (9th Cir. 1992); *In re* Beef Indus. Antitrust Litig., 589 F.2d 786 (5th Cir. 1979); Massachusetts v. Mylan Labs., Inc., 246 F.R.D. 87, 91–93 (D. Mass. 2007); *see* Fed. R. Civ. P. 24(b).

One court determined that standing was more difficult to demonstrate in a closed case.[50] In an action against police officers, that eventually settled, discovery included files of citizen complaints, and these were subject to a protective order.[51] The district court granted a journalist's motion to vacate the protective order.[52] The court of appeals vacated the district court's modification of the protective order because it determined that the journalist did not have standing to challenge the protective order in a closed case.[53]

Decisions on motions to intervene to modify a protective order are reviewed for abuse of discretion.[54]

Efficient Discovery in Other Cases

If a party has obtained protected discovery, and a non-party would be entitled to the same discovery in another case, then the court presiding over the first case has discretion to modify the protective order to permit the party to share the discovery with the non-party.[55] Such a modification can make discovery in the second case more efficient.[56]

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48. Deus v. Allstate Ins. Co., 15 F.3d 506, 525 (5th Cir. 1994).

49. *E.g.*, Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 898 (7th Cir. 1994).

50. Bond v. Utreras, 585 F.3d 1061, 1071–72 (7th Cir. 2009).

51. *Id.* at 1065.

52. *Id.*

53. *Id.* at 1065, 1071–72.

54. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1130 (9th Cir. 2003); Griffith v. Univ. Hosp., L.L.C., 249 F.3d 658, 661 (7th Cir. 2001); Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 472 (9th Cir. 1992).

55. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1131–33 (9th Cir. 2003) ("No circuits require the collateral litigant to obtain a relevance determination from the court overseeing the collateral litigation prior to requesting the modification of a protective order from the court that issued the order."); Wilk v. AMA, 635 F.2d 1295, 1299 (7th Cir. 1981); *see* United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979) (holding that discovery materials received in a

For example, a court of appeals reversed a district judge's refusal to modify a protective order to grant the State of New York access to protected discovery in a similar case in New York's action alleging a conspiracy to disadvantage the chiropractic profession.[57]

The court must consider the original parties' reliance interests respecting the protective order. The court must also consider any other factors that counsel against or in favor of the modification.

For example, a court of appeals affirmed a district judge's refusal to modify a protective order in a class action, because the efficiency produced by the modification was outweighed by the burden of having to notify class members of the modification and the potential upset to the class-action settlement that might result.[58]

Sealing

If information subject to a protective order is filed with the court, such as attached to a discovery motion or a motion for summary judgment, the information should not be sealed unless the court

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civil suit subject to a protective order are nevertheless subject to the Justice Department's antitrust division's statutory civil investigative demand); *see also In re* Film Recovery Sys., 804 F.2d 386, 389–90 (7th Cir. 1986); Olympic Refining Co. v. Carter, 332 F.2d 260, 265–66 (9th Cir. 1964).

56. Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122, 1131–33 (9th Cir. 2003) ("Allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery."); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 787 (3d Cir. 1994) ("Circumstances weighing against confidentiality exist when confidentiality is being sought over information important to public health and safety, and when the sharing of information among litigants would promote fairness and efficiency.").

57. Wilk v. AMA, 635 F.2d 1295, 1296–97 (7th Cir. 1981).

58. Griffith v. Univ. Hosp., L.L.C., 249 F.3d 658, 659, 661, 663 (7th Cir. 2001).

finds that the specific information satisfies grounds for sealing a portion of the court's presumptively public record.[59]

Protective orders commonly state that a party filing protected discovery with the court will seek to have the protected information sealed. The filing should not be sealed, however, merely because the parties wish it to be sealed; sealing decisions must be made by the court.[60]

Criminal Cases

Courts can enter discovery protective orders in criminal cases as well as in civil cases.[61]

Although the Federal Rules of Civil Procedure codify the standard for confidential-discovery orders in Rule 26(c)(1)(A), the Federal Rule of Criminal Procedure governing discovery protective orders, Rule 16(d), concerns, by its terms, protection from discovery obligations rather than restrictions on disclosure to third parties.

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59. Brown v. Advantage Eng'g, Inc., 960 F.2d 1013, 1014, 1016 (11th Cir. 1992) (holding that it was an abuse of discretion to seal court records without a compelling reason); Joy v. North, 692 F.2d 880, 884, 893–94 (2d Cir. 1982) (finding that it was improper for the district court to seal a discovery document filed to support a summary judgment motion).

60. Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co., 178 F.3d 943, 944 (7th Cir. 1999) ("The parties to a law suit are not the only people who have a legitimate interest in the record compiled in a legal proceeding."); *In re* Southeastern Milk Antitrust Litig., 666 F. Supp. 2d 908, 916 (E.D. Tenn. 2009) (referring to a magistrate judge the task of determining what filings should be unsealed upon a determination that the court had permitted the sealing of filings too readily); *see* Robert Timothy Reagan, *Sealing Court Records and Proceedings: A Pocket Guide* 19 (Federal Judicial Center 2010) (procedural checklist note 1).

61. Fed. R. Crim. P. 16(d)(1); United States v. Buchanan, 604 F.3d 517, 524, 527 (8th Cir. 2010) (concerning a stipulated protective order governing discovery in a crack cocaine prosecution).

Confidential-discovery protective orders are used frequently in prosecutions related to national security, such as prosecutions for terrorism or espionage. Discovery in these cases can include classified information, and the court typically ensures that the defendant is represented by an attorney with an appropriate security clearance.[62] A protective order may prevent cleared counsel from sharing classified information with the client.[63] It will certainly prohibit the sharing of classified information with persons not cleared to receive the information by the Executive Branch.

Protective orders can also protect unclassified information in criminal cases.[64] In one case, the district judge found good cause to prohibit the defendant from disseminating without court permission records from a journalist's not-yet-published inverview with the defendant (protecting the journalist's economic interests) and non-parties' medical records (protecting their privacy).[65] The judge did not approve a provision of the proposed protective order that called for fruits of protected discovery to be filed under seal automatically; the judge required filings to be sealed only upon specific approval by the court.[66]

Appeal and Mandamus

Some courts review decisions on issuing protective orders, modifying protective orders, and intervention to challenge protective or-

62. Robert Timothy Reagan, *National Security Case Management: An Annotated Guide* 9 (2011).

63. *In re* Terrorist Bombings of U.S. Embassies in East Africa, 552 F.3d 93, 115–30 (2d Cir. 2008).

64. United States v. Carriles, 654 F. Supp. 2d 557, 562 (W.D. Tex. 2009).

65. *Id.* at 567–68; *see id.* at 565 (holding that because there had not been a showing that sensitive discovery would be extensive a blanket protective order was not necessary).

66. *Id.* at 570–72.

ders by interlocutory appeal.[67] Other courts review these decisions by mandamus.[68]

Courts of appeals review for abuse of discretion district court decisions on whether to grant or modify protective orders.[69]

67. SEC v. The Street.com, 273 F.3d 222, 228 (2d Cir. 2001) (modification); Grove Fresh Distribs., Inc. v. Everfresh Juice Co., 24 F.3d 893, 895 (7th Cir. 1994) (intervention); Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 472 (9th Cir. 1992) (intervention); McCarthy v. Barnett Bank, 876 F.2d 89, 90 (11th Cir. 1989); Stack v. Gamill, 796 F.2d 65, 68 (5th Cir. 1986) (intervention); Martindell v. ITT Corp., 594 F.2d 291, 293–94 (2d Cir. 1979) (intervention); *see* MCL 4th § 15.11, at 210 (Federal Judicial Center 2004);.

68. Glenmede Trust Co. v. Thompson, 56 F.3d 476, 483 (3d Cir. 1995) (whether to grand a protective order); Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1118 (3d Cir. 1986) (whether to grant a protective order; Wilk v. AMA, 635 F.2d 1295, 1298 (7th Cir. 1981) (modification); Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949, 953–54 (8th Cir. 1979) (modification).

69. Rohrbough v. Harris, 549 F.3d 1313, 1321 (10th Cir. 2008); SEC v. The Street.com, 273 F.3d 222, 228 (2d Cir. 2001); Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 472 (9th Cir. 1992); Brown Bag Software v. Symantec Corp., 960 F.2d 1465, 1469 (9th Cir. 1992); McCarthy v. Barnett Bank, 876 F.2d 89, 91 (11th Cir. 1989); Wilk v. AMA, 635 F.2d 1295, 1299 (7th Cir. 1981).

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