EXTRA

THE MYTH OF PROTECTIVE ORDERS

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Can a non-party move to intervene in your case and seek to vacate the protective order you agreed to with opposing counsel, even years after settlement? Surprisingly, YES, and it is easier than you would think.

The use of protective orders in litigation under Federal Rule 26(c) and state law analogs to protect sensitive business information and trade secrets is common. When stipulated by the parties, courts typically sign such "blanket" protective orders without an evidentiary showing, since those orders often reduce or eliminate discovery disputes.

But what if, after settlement, some third party — typically a public interest group or a publication interested in the subject matter of the case or documents — files a Rule 24(b) motion to intervene to obtain access to confidential documents, both filed under seal and produced in discovery? This procedural device has been used to upend protective orders and unseal court documents based on the public's "right to know."

LEGAL STANDARDS GOVERNING INTERVENTION

Rule 24(b) entitled "Permissive Intervention" provides:

1. In general on timely motion, the court may permit anyone to intervene who:
   a. Is given a conditional right to intervene by a federal statute; or
   b. Has a claim or defense that shares with the main action a common question of law or fact.
2. Delay or Prejudice. In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original party's rights.

At first blush, it would seem the timeliness standard cannot be met because the case is settled and over.

Courts, however, tend to allow third parties to intervene to challenge protective orders even years after the case has closed. Courts have generally adopted a four-factor test enunciated in *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 785-87 (1st Cir. 1988), which include:

1. How long the intervenor knew or should have known that the parties no longer adequately protected its interest;
2. Prejudice to the existing parties from the intervenor's delay, as well as whether intervention would impact the settlement and the intervenor's reasons for seeking to participate;
3. Prejudice to the intervenor if no intervention were permitted; and
4. The existence of extraordinary circumstances.

Public Citizen held that the appropriate inquiry is "when the intervenor became aware that its interests in the case would no longer be adequately protected by the parties," and it found that a multi-year delay by an intervenor was immaterial.

In analyzing prejudice to existing parties, the court concluded that intervention related to an ancillary issue and would not disrupt resolution of the case's merits. The third and fourth factors were similarly assessed in favor of the interviewer because "[t]here is a strong public interest in the documents at issue, which concern an important public health issue." Id. at 787; see also *Boca Raton Cmty. Hosp. Inc. v. Tenet Health Care Corp.*, 271 F.R.D. 530, 535-536 (S.D. Fla. 2010) (delay is "not fatal" where a party moves to intervene only to obtain documents); *Blum v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 712 F.2d 1349, 1353 (9th Cir. 2013) ("Motions to intervene for the purpose of seeking modification of a protective order in long concluded litigation are not untimely."); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) ("[The] timeliness requirement is to prevent prejudice in the adjudication of rights of existing parties, a concern not present when the existing parties have settled their dispute and intervention is for a collateral purpose.").

The next consideration is whether the intervenor has a claim or defense in common with a question of law or fact in the main action. Even though plaintiff and defendant — not the intervenor — agreed to the protective order, the judicial consensus is that intervention to challenge the protective order satisfies the common question requirement. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) (citing cases).

LEGAL STANDARDS FOR OBTAINING PROTECTED DOCUMENTS

Once intervention is granted, the intervenor's quest for obtaining documents begins. The standard for obtaining the documents and overriding a protective order depends on whether the documents are "court records" or discovery documents.

Court Records

Because courts are public forums, the public has an interest in accessing court records so citizens can "keep a watchful eye on the workings of public agencies." *Nixon v. Warner Commcns.*, 435 U.S. 589, 597-98 (1978). That said, the public's right to court records is not unfettered and may be outweighed if the filings have become a vehicle for improper purposes, such as spite, promoting public scandal, circulating libelous statements, or releasing trade secrets. *Kamakana v. Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006).

A party seeking to keep a judicial record sealed must meet the "compelling reasons" standard, which derives from the principle that resolution of disputes on the merits is at the very heart of the public's understanding of the judicial process and, as such, is open to the public. Id. at 1177, 1179. This is a stringent standard that rejects conjecture or conclusory assertions of harm, and requires the party to delineate compelling reasons supported by specific factual evidence for each document it wants sealed. The party must demonstrate the specific harm that will result if the document is disclosed, which the court balances against the competing interests of the public access. *Ctr. for Auto Safety v. Chrysler Grp. LLC*, 809 F.3d 1092, 1096, 97 (9th Cir. 2016).

Where the documents at issue relate to an ongoing public safety risk, the public's interest in access to judicial records is particularly strong. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1180 (6th Cir. 1983); *In re Air Crash at Lexington Ky.*, 2009 WL 1683629, at *8 (E.D. Ky. June 16, 2009).

It is important to note, however, that not everything filed with the court automatically

constitutes a "judicial record" subject to the compelling reasons standard. Because the compelling reasons standard is predicated on open access to the courts and merits adjudications, many courts have limited the compelling reasons inquiry to court-filed documents used to resolve cases on the merits, such as dispositive motions. *Ctr. for Auto Safety,* 809 F.3d at 1099.

Some even have gone so far as to hold that documents filed in support of undecided dispositive motions are not subject to the heightened scrutiny because they are not part of the adjudicatory process. These courts draw a distinction between "adjudicative records" (documents considered and relied on by the court) and "nonadjudicative records," only imposing the compelling interest standard on the former. *Aviva USA Corp. v. Vazirani,* 902 F. Supp. 2d 1246, 1275 (D. Ariz. 2012) (records submitted with a motion for summary judgment remained sealed, even though there was "some doubt" as to their trade secret status, because the court did not rely on them); *Garber v. Pharmacia Corp.,* 2009 U.S. Dist. LEXIS 97536, at *7 (D.N.J. Oct. 20, 2009) (Where the Court did not base its grant of summary judgment on those documents, they "are not properly considered part of the 'judicial record' ... [and] are not subject to the public access doctrine."). Note, this distinction is hardly universal.

Discovery Documents

Unlike documents filed with the court, there is no presumption of public access to documents produced in discovery. *Bond v. Utreras,* 585 F.3d 1061, 1073-74 (7th Cir. 2009). The public's right of access is limited to historically public sources of information, and documents produced in discovery but not admitted into evidence are not a traditional source of public information. *Seattle Times Co. v. Rhinehart,* 467 U.S. 20, 33 (1984).

Per Rule 26(c), the standard for maintaining the confidentiality granted by a protective order is "good cause." While a blanket protective order allows the party to freely designate documents as confidential, upon challenge, the party must meet the good cause showing. *Cipollone v. Liggett Group, Inc.,* 755 F.2d 1108, 1122 (3rd Cir. 1986). Although the burden of establishing "good cause" is lower than "compelling reasons," good cause needs to be demonstrated by showing a specific prejudice or harm if the document is disclosed — and some courts hold that this showing must be made for each document. *Gulf Oil Co. v. Bernard,* 452 U.S. 89, 102 n.16 (1981); but see *Foltz v. State Farm Mut. Auto. Ins. Co.,* 331 F.3d 1122, 1137 (9th Cir. 2003).

HELPFUL HINTS

- If your case or documents relate to public safety or a newsworthy topic, you should weigh the benefits of moving for a protective order and obtaining a court determination of "good cause" you can rely on. While this approach is more costly early on, it will provide the safeguard of a court finding later.
- Scrutinize the documents you designate as confidential. Overdesignating or misdesignating can be costly if an intervenor is able to show that confidentially-designated documents are not proprietary or trade secrets, or already public.
- To preserve confidentiality, it is imperative to file complete and thorough affidavits. You must articulate with specificity why each document — or at least each homogeneous category of documents — should remain confidential. You must delineate how, upon disclosure, each document can be used by a competitor and why that would likely happen. The more detail, the greater your chance of preserving confidentiality.
- Consider incorporating into your settlement a provision prohibiting the opposing party, who knows the documents, from participating in any post-settlement proceedings to assist the intervenor.

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