Objecting to Protective Orders and Motions to File Documents Under Seal in Pretrial Discovery[1]

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INTRODUCTION

This memorandum is a brief introduction into opposing protective orders either offered by the defense for stipulation, or motions for protective orders and motions to have pretrial discovery documents filed under seal.

It is not uncommon that defense counsel in § 1983 litigation respond to discovery requests with a vast litany of objections. When plaintiff's counsel either meet and confers in preparing for a motion to compel, the defense typically offer to provide plaintiff's counsel the documents if they stipulate to protective orders and sealing the documents they feel are responsive. However, it is my position that plaintiff's counsel should almost never agree to either, especially when it is in the context of seeking personnel records of police officers to determine if they had have engaged in prior bad conduct, seeking the identification of eyewitnesses to an incident, or seeking records of prior incidences of misconduct in order to prove claims of supervisory liability or Monell liability. I would never recommend stipulating to a protective order for a broad category of promised, but unseen documents, as the cases below show that most courts are reluctant to modify the protective order even where the plaintiff can show that the documents are neither confidential or deserving of the courts protective order.

Rather, it is my strong recommendation that your duties to the client and the court require vigorous opposition a protective order and even more vigorous opposition to agreeing to file documents with the court under seal unless you are absolutely clear that such protections are warranted. In short, do not be lulled into stipulating to save yourself the time and effort of filing a motion to compel discovery, but rather file your motion and object to the protective order and use the law as set forth below to bring transparency to the efforts of your litigation so that the public can see and understand the value of defending civil rights and preventing future

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[1] This memo is derived in part from The Rutter Group's California Practice Guide: Federal Civil Procedure Before Trial Chpt. 11, Part III, C. Protective Orders and other independent research.

violations of civil rights.

Some of the primary principles are as follows. "Courts long have recognized that public monitoring of the judicial system fosters the important values of quality, honesty, and respect for our legal system." *In re Providence Journal*, 293 F.3d 1, 9 (1st Cir. 2002). Public access promotes confidence in the judicial system. As the Seventh Circuit has written:

> The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification. *Union Oil Co. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000).

Public access also serves as a check against abuse and corruption. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) ("In comparison of publicity, all other checks are of small account.") Public access also ensures the appearance of fairness. See, e.g., *Richmond Newspapers*, 448 U.S. at 569 ("A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted.").[2]

OPPOSING PROTECTIVE ORDERS

Upon motion by a person responding to a discovery request, and for good cause shown, the court "may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense." [FRCP Rule 26 (c.)].

Protective orders provide a safeguard for parties and other persons in light of the otherwise broad reach of discovery. [FRCP Rule 26 (c), Advisory Comm. Notes (1970); *United States v. CBS, Inc.*, 666 F.2d 364, 368-369 (9th Cir. 1982)]

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[2] From ACLU'S Brief in *Asociación de Periodístas de Puerto Rico v. Muller*, CIVIL ACTION NO. 3:06-1931 (JAF) (DCPR) filed 10-27-2008, attached as part of the materials for this NPAP workshop.

FRCP Rule 26 (c.) lists the following eight categories of protection available by court order:

- discovery not be had;
- discovery be had on certain conditions including designation of time and place;
- discovery be limited to particular methods;
- discovery be limited in scope;
- persons attending discovery be limited;
- depositions be sealed;
- trade secrets or other confidential research, development, or commercial information not be disclosed or disclosed only in a certain way; or,
- parties simultaneously file discovery under seal. [FRCP Rule 26(c)(A)-(H)]

This list is nonexhaustive; the trial court has wide discretion to impose other limits on discovery. [*United States v. CBS, Inc*., supra]

A party may also seek a protective order against the obligation to provide early disclosures (FRCP Rule 26 (a). Granting or denial of relief from such disclosure obligations will apparently be determined under the same standards for protective orders generally (see below).

The trial court has broad discretion over a request for protective orders regarding discovery; the trial court's exercise of this discretion may be reversed only upon a clear showing of abuse of discretion. *Chem. & Indus. Corp. v. Druffel*, 301 F.2d 126 (6th Cir. 1962); *Galella v. Onassis*, 487 F.2d 986 (2d Cir. 1973). Under the liberal discovery principles of the federal procedure rules, those who oppose discovery or disclosure thereof carry a heavy burden of showing why discovery should be denied or protected against disclosure. *Blankenship v. Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975).

The fruits of pretrial discovery are, in the absence of a court order to the contrary, presumptively public. *San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir. 1999); *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 944-45 (7th Cir. 1999) ("[T]he public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding.").

To obtain a protective order, the party resisting discovery or seeking limitations thereon must show "good cause" for its issuance. [FRCP Rule 26 (c); *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (court must find good cause even if parties stipulate to protective order); *Gray v. First Winthrop Corp.*133 F.R.D. 39, 40 (ND Cal. 1990) (citing The Rutter Group, California Practice Guide: Federal Civil Procedure Before Trial Chpt. 11, Part III, C. Protective Orders.)]

The moving party must make a clear showing of "good cause," a particular and specific need for the order. [*Blankenship v. Hearst Corp*., 519 F.2d 418, 429 (9th Cir. 1975); *Pearson v. Miller*, 211 F.3d 57, 72 (3rd Cir. 2000) (a properly asserted claim of absolute privilege is good cause for protective order.] This "good cause" requirement is generally held applicable even to stipulated protective orders. [See *Makar-Wellbon v. Sony Electronics, Inc*., 187 F.R.D. 576, 577-578 (ED WI 1999); *San Jose Mercury News*, 187 F.3d at 1102 (holding that to gain a protective order, the movant must make a "particularized showing of good cause with respect to any individual document"); *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (holding that "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26 (c.) test").

The following factors may be relevant in determining the existence of "good cause" for a protective order:

- whether the information is being sought for a legitimate purpose;
- whether disclosure will violate any privacy interest;
- whether disclosure will cause a party embarrassment;
- whether disclosure is important to public health and safety;
- whether sharing of information among litigants will promote fairness and efficiency in the litigation;
- whether the party seeking the protective order is a public entity or official; and,
- whether the case involves issues of public importance. [See *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 787-791 (3rd Cir. 1994).]
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The party seeking the protective order has the burden of showing the nature of a specific injury, e.g., a injury shown to legitimate interests in privacy; i.e., monetary injury is not required. [*Pearson v. Miller*, supra, 211 F.3d at 72-73.]

Even if "good cause" for a protective order is shown, the court must still balance the interests in allowing discovery against the relative burdens to the parties (and nonparties). [*In re Coordinated Pretrial Proceedings in Petroleum Prods., Antitrust Litig.* 669 F.2d 620, 623 (10th Cir. 1982); see also *Wood v. McEwen*, 644 F.2d 797, 801-802 (9th Cir. 1981) (motion granted where "real question" was whether the plaintiff had a substantive claim.]

When discovery is sought from third parties, a protective order may be more easily obtained. [*Dart Indus. Co., Inc. v. Westwood Chem. Co.*, Inc. 649 F.2d 646, 649 (9th Cir. 1980).] Thus, whenever you represent the party seeking a protective order, consider whether the discovery sought may adversely affect the rights of third parties. If so, consider having the third party interpose an objection so that the standard for obtaining protection may be reduced. However this is not always sufficient. (Eg., see *Ericson v. Ford Motor Co.*, 107 F.R.D. 92, 94 (ED AR 1985) (wrongful death suit against auto manufacturer, plaintiff sought the names of all customers who had reported similar incidents. Auto manufacturer sought a protective order claiming that release of the information would be "misleading and harmful to its reputation," however the court denied the request for a protective order, holding that mere embarrassment is not a sufficient showing of good cause.

Just as district courts have the authority to issue protective orders, they also have the authority to modify them. Typically, the required showing for modification must be more substantial than the "good cause" requirement for obtaining the protective order in the first place. *Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734 (2d Cir. 2000). Courts may also consider whether the parties relied on the order and whether the parties stipulated to the terms of the order. *Factory Mut. Ins. Co. v. Insteel Indus., Inc.*, 212 F.R.D. 301 (M.D.N.C. 2002). Thus, in the case of stipulated protective orders, the party seeking to modify the protective order has a higher burden of showing justification for modification of the order. *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594 (7th Cir. 1978).

SEALING ORDERS AND THE PUBLIC'S RIGHT OF ACCESS TO COURT FILES.

Most courts recognize a presumption of public access to court records based on common law and First Amendment (free press) grounds. The public therefore normally has the right to inspect and copy documents filed with the court. [See

Nixon v. Warner Comm., Inc., 435 U.S. 589, 597 (1978) 98 S.Ct. 1306, 1312; *Globe Newspaper Co. v. Superior Court for Norfolk County*, (1982) 457 U.S. 596, 603, 102 S.Ct. 2613, 2618; *Phillips ex rel. Estates of Byrd v. General Motors Corp*., 307 F.3d 1206, 1212 (9th Cir. 2002)]

However, every court has inherent, supervisory power over its own records and files. Thus, even where a right of public access exists, access may be denied where the court determines that court-filed documents may be used for improper purposes. [*Nixon v. Warner Comm., Inc.*, supra, 435 U.S. at 598, 98 S.Ct. at 1312; *Hagestad v. Tragesser*, 49 F.3d 1430, 1433-1434 (9th Cir. 1995)]

Courts generally will not automatically approve stipulations to seal matters on file with the court containing confidential information. Rather, parties seeking a sealing order must provide (1) a specific description of particular documents or categories of documents they seek to protect; and (2) affidavits showing "good cause" to protect those documents from disclosure to others. [*Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 776 (3rd Cir. 1994) (parties must show disclosure will cause a "clearly defined and serious injury.")] Thus, even if the parties may stipulate to a protective order sealing confidential information, unless sufficient "good cause" is shown there is no assurance that the court will grant the order.

An important consideration is that Federal courts are flooded with lodged stipulations or motions for protective orders that sealing of documents filed with the court to prevent public disclosure of typically ill-defined "confidential information." Most such requests or stipulations seek to allow the parties to file "confidential" or "protected" information under seal with the clerk of the court without prior court approval. Attorneys should recognize that such provisions impose extraordinary burdens on the clerk of the court, law clerks, judges, and other court staff both to observe the order and specially handle "sealed" documents. When documents are sealed, they must be described obscurely in the docket, which degrades the usefulness of the docket as an index to the court file. Sealed documents are literally sealed in separate envelopes kept separately in a safe. Sealing, thus, presents a risk of loss. Further, no law clerk or judge can retrieve the court file for review because there is no longer a single case file. Hearings become awkward due to concern about observing the sealing order. Writing decisions about the merits is made more difficult and time consuming. To be sure, in a proper case, these difficulties must be accommodated. However,

sealing of documents usually only allows lawyers opportunity to put off dealing with the underlying issues in the case.

Where good cause is shown for a protective order, the court must nonetheless balance the potential harm to the moving party's interests against the public's right to access the court files. Any protective order must be narrowly drawn to reflect that balance. The order must state that any member of the public has the right to challenge the sealing of any particular document. [*See Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944-945 (7th Cir. 1999); *Makar-Wellbon v. Sony Electronics, Inc.*, 187 F.R.D. 576, 577-578 (ED WI 1999)]

However the public's right of access does not apply to documents that were filed under seal pursuant to a valid protective order. Because the court has already determined that "good cause" exists to protect this information from public disclosure, the party seeking access must present "sufficiently compelling reasons why the sealed discovery information should be released." [*Phillips ex rel. Estates of Byrd v. General Motors Corp.*, supra, 307 F.3d at 1213; *United States v. Corbitt*, 879 F.2d 224, 228 (7th Cir. 1989).]

Sealed discovery documents do not lose their protected status because they are attached to a nondispositive motion, e.g., motion for transfer. [*Phillips ex rel. Estates of Byrd v. General Motors Corp.*, supra, 307 F.3d at 1213] ("(I)t makes little sense to render the district court's protective order useless simply because the plaintiffs attached a sealed discovery document to a nondispositive sanctions motion filed with the court.")]

However, the result is different where a sealed document is attached to a dispositive motion decided by the court (e.g., summary judgment). As part of the record supporting the judgment, the document must be open to public inspection. [See *Phillips ex rel. Estates of Byrd v. General Motors Corp.*, supra, 307 F.3d at 1213]

Respectfully, R. Samuel Paz.