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## A PRACTICAL APPROACH TO RULE 26(c) PROTECTIVE ORDERS IN AVIATION LITIGATION

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**T**HE SUBJECT OF secrecy in the litigation process has become a major issue, with diverse viewpoints being presented in almost every legal journal. Although the larger controversy might eventually be resolved, a present need exists for efficiency in addressing protective orders during the discovery portion of the litigation process. The premise of this article is that there may well be information that should be protected in aviation-related litigation concerning product liability and terrorist-caused aviation disasters. This article, therefore, presents a procedure that has proved to be useful in facilitating discovery and accommodating the use of protective orders while minimizing court involvement in the process. The procedure has been accepted by opposing parties and by courts in both types of actions.<sup>1</sup>

Rule 26(c) of the Federal Rules of Civil Procedure authorizes a court's issuance of orders protecting informa-

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<sup>1</sup> The proposed protective order procedure was accepted in a product liability action by the court in *Dejong v. Bell Helicopter Textron, Inc.*, 124 F.R.D. 207 (W.D. Mo. 1988) (Case No. 86-3504-CV-S-2), and the order is presented in Appendix A. After agreement by the parties and acceptance by the court, the procedure is being used in *In re Inflight Explosion on Trans World Airlines Aircraft Approaching Athens, Greece on April 2, 1986*, No. MDL-727 (E.D.N.Y. filed 1987), a terrorist bombing case. The plaintiffs' committee also proposed this procedure in the Pan Am 103 cases, *In re Air Disaster at Lockerbie, Scotland on December 21, 1988*, No. MDL-799 (E.D.N.Y. Jan. 3, 1990) (1990 LEXIS 7485).

tion upon the motion of a party.<sup>2</sup> Most aviation cases addressing product liability or terrorist-caused aviation disasters require extensive discovery. Both types of litigation necessitate inquiry into information that one party wants to keep confidential, which will prompt that party to move for a protective order under Rule 26(c). Unfortunately, the basic scope and purpose of discovery is lost in the ensuing melee over what should be protected. That is, discovery is designed to provide litigants with all of the information that is necessary to correctly and completely frame the issues for trial.<sup>3</sup>

Although some aspects of discovery remain constant, the basis and scope of protective order requests vary by the type of litigation. In product liability actions, protective orders are sought to guard trade secrets or proprietary information from potential competitors. In terrorist cases, protection is allegedly sought to avoid publicizing security measures. In both instances, however, the process of formulating a protective order can slow discovery and possibly work against the interests of all parties. The party proposing a protective order in either type of action runs the risk of having confidential information exposed if counsel overreaches by seeking a blanket protective order that cannot be justified. The party opposing a motion for a protective order can delay discovery by insisting on full

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<sup>2</sup> Rule 26(c), in pertinent part, states the following:

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters [and] . . . (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way . . . .

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

<sup>3</sup> See *Hickman v. Taylor*, 329 U.S. 495, 501 (1947) (discussing discovery as a means to narrow and clarify issues as well as to ascertain the facts relevant to those issues).

disclosure even though some of the requested information actually qualifies for protection.

Over the past few years, a means of accommodating both sides has evolved, allowing efforts to stay focused upon the fundamental issue framing purpose of discovery. The basic steps of the procedure include the following:

1. Identify information that should be protected;
2. Identify information that cannot be protected;
3. Identify information for which the need for protection is at issue; and
4. When there is disagreement, fight the protective order battle.

This article approaches these steps in two parts. Part I summarizes the basic principles that courts have crafted to determine whether trade secret information deserves protection. The section also presents court decisions concerning such trade secret protective practices. Because litigation arising from terrorist action is relatively new, the basic principles center on the protection of trade secrets. The considerations underlying these principles, however, are largely adaptable to terrorist actions. Relying upon the basic principles, Part II then addresses the procedures developed for handling protective order issues in product liability and terrorist actions.

## I. BASIC PRINCIPLES

An attorney should consider the basic principles presented in this section before proposing or preparing a response to a proposed protective order. By following these basic principles, a lawyer can shorten the time required to formulate protective order issues.

### BASIC PRINCIPLE ONE: PROTECTIVE ORDERS ARE NOT FAVORED AND SHOULD BE SOUGHT ONLY UPON SOLID JUSTIFICATION

Our judicial system is the one nonaccountable branch of government. The open court principle assures that the

public functions as a check on the judicial system.<sup>4</sup> A fundamental tenet of American jurisprudence is that the courts and their records are a matter of public record.<sup>5</sup> Secrecy is the exception, not the rule.<sup>6</sup> Furthermore, the discovery rules were designed to "make a trial less a game of blindman's [bluff] and more a fair contest with the basic issues and facts disclosed *to the fullest practicable extent*."<sup>7</sup>

"The Federal Rules of Civil Procedure create a statutory presumption in favor of open discovery, extending even to those materials not used at trial."<sup>8</sup> A wide use of protective orders conflicts with that fundamental and important principle of openness. Consequently, the Rules limit the use of protective orders and the scope of information that should be kept from the public. Rules 26(c)(4) and 26(c)(7) allow a party to request protection of certain information upon proper justification.<sup>9</sup> In considering such requests, courts are to construe Rule 26(c) so as "to secure the just, speedy, and inexpensive determination of every action."<sup>10</sup> Thus, under the basic principles of our system, the parties should communicate in an honest effort to minimize the amount of information protected without attempting to "straight-jacket the discovery procedure . . . on the basis of speculative

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<sup>4</sup> See *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

<sup>5</sup> See generally, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 564-73 (1980) (providing the historical background of open trials); *Warner Communications*, 435 U.S. at 597 (holding that a common law right of access to trial records exists to the extent necessary to supervise the judicial branch).

<sup>6</sup> See *Citicorp v. Interbank Card Ass'n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979) (noting that one who seeks to avoid disclosure by a Rule 26(c) protective order bears a heavy burden of proof).

<sup>7</sup> *United States v. Proctor & Gamble Co.*, 356 U.S. 677, 682 (1958) (emphasis added).

<sup>8</sup> *John Does I-VI v. Yogi*, 110 F.R.D. 629, 632 (D.D.C. 1986); see also *Tavoulareas v. Washington Post Co.*, 724 F.2d 1010, 1015 n.10 (D.C. Cir. 1984) (emphasizing that the Federal Rules of Civil Procedure establish a statutory presumption of openness in discovery).

<sup>9</sup> In most instances, Rule 26(c)(7) should apply to product liability actions and Rule 26(c)(4) should govern terrorist actions.

<sup>10</sup> *Wilk v. American Medical Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980) (citing *FED. R. CIV. P. 1*); see also *Tavoulareas*, 724 F.2d at 1017-19 (discussing court construction of *FED. R. CIV. P. 26(c)*).

assumptions.”<sup>11</sup>

### BASIC PRINCIPLE TWO: PROTECTIVE ORDERS PROTECT SPECIFIC INFORMATION

Rule 26(c) of the Federal Rules of Civil Procedure protects *information*. The grant of a protective order turns on an analysis of the *content* of the discovery requests and the documents that are responsive to them.<sup>12</sup> The key focus is upon the information in whatever form it appears.<sup>13</sup>

The crux of any protective order battle is whether an item of information merits protection. In product liability cases, determining what should be protected can be complex. Under Rule 26(c)(7), only information that is a “trade secret, or other confidential research, development, or commercial information” is entitled to protection. Too often, the court and opponents of a motion for a protective order cannot determine from the motion what information might be entitled to protection. While vagueness might seem advantageous to the proponent, such tactics waste the court’s time and subject the proponent’s client to a strong likelihood that his truly confidential information may not be protected. Improperly framed motions for protective orders are usually the result of poor pleading practices, unfamiliarity with the technology involved in the case, or “puffing.” A sug-

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<sup>11</sup> *Neonex Int’l Ltd. v. Norris Grain Co.*, 338 F. Supp. 845, 854 (S.D.N.Y. 1972); see also *John Does I-VI*, 110 F.R.D. at 659 (discussing the need for honest discovery efforts to avoid undue speculation and delay).

<sup>12</sup> *Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 481 (S.D.N.Y. 1982). The court determined that the preferable option is “to review the contents of each deposition individually, restricting dissemination of only such information as [is] found specifically likely to [cause injury to the defendants].” *Id.* (citation omitted); see also *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp. 866, 884 (E.D. Pa. 1981) (stating that resolution of document confidentiality requires an analysis of the contents, not just a general description of the documents).

<sup>13</sup> *Procter & Gamble Co. v. Nabisco Brands, Inc.*, 111 F.R.D. 326, 331 (D. Del. 1986). In denying trade secret status to information gathered by the defendant and classified as “secret,” the court noted that “not all ‘information’ which is ‘secret’ necessarily qualifies for trade secret protection. The document must contain information which deserves protection.” *Id.* (citation omitted).

gested approach to analyzing and limiting such motions is discussed below.

### A. *State Law Defines Trade Secrets*

State law defines trade secrets. Most states define trade secrets either under section 757 of the Restatement of Torts<sup>14</sup> or the Uniform Trade Secrets Act.<sup>15</sup> In diversity cases, federal courts look to state law for the definition of a trade secret.<sup>16</sup> Often a choice of law must be made to determine what definition of trade secret should be used before seeking a protective order. For example, aviation cases in federal court are commonly transferred from one district to another.<sup>17</sup> When an action has been so transferred, the law of the transferor forum provides the basis for decision in the transferee forum,<sup>18</sup> including the

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<sup>14</sup> RESTATEMENT OF TORTS § 757 comment b (1939). Section 757 defines a trade secret as follows:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.

*Id.*; *see, e.g.*, *Smith v. BIC Corp.*, 869 F.2d 194, 199 (3d Cir. 1989) (holding that Pennsylvania has adopted the Restatement definition of trade secret).

<sup>15</sup> *See, e.g.*, CAL. CIV. CODE § 3426.1(d) (West 1990).

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and (2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

*Id.*

<sup>16</sup> *See, e.g.*, *Smith*, 869 F.2d at 199 (in deciding whether to protect information under Rule 26(c), the Third Circuit looked to Pennsylvania law).

<sup>17</sup> 28 U.S.C. § 1404(a) (1982). "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." *Id.*

<sup>18</sup> *Van Dusen v. Barrack*, 376 U.S. 612 (1964). The court concluded "that in cases . . . where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms." *Id.* at 639; *see also Ferens v. John Deere Co.*, 110 S. Ct. 1274 (1990) (holding that a transferee court must also

choice of law principles of the transferor forum.<sup>19</sup> Since state law provides the fundamental definitions, the applicable state law must be determined.

*B. Only the Party Possessing Information Can Demonstrate the Need for Confidentiality and the Harm of Disclosure*

Once the appropriate state trade secret law is identified, the determinative question is whether the information to be protected is truly a trade secret. Even if a trade secret is involved, a showing of "good cause" is required to justify protection from disclosure.<sup>20</sup> Good cause must be shown with particularity.<sup>21</sup> In ruling on the protective order, a court also considers the relative hardship that would be suffered by the nonmoving party if the order were granted.<sup>22</sup>

General allegations of trade secrecy and harm do not establish good cause for protection.<sup>23</sup> Logically, the party possessing the trade secret or other confidential information is the one who must establish good cause because only that party possesses the knowledge required to meet the burden.<sup>24</sup> A particularity requirement assures that

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follow the choice of law rules of the transferor court when the plaintiff seeks the transfer).

<sup>19</sup> *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) (holding that conflict of law questions were to be settled by Delaware law, when an action for breach of a New York contract was filed in Delaware federal court).

<sup>20</sup> *General Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973) (holding that Rule 26(c) requires a showing of good cause through specific factual allegations prior to the issuance of a protective order), *cert. denied*, 414 U.S. 1162 (1974).

<sup>21</sup> *Id.* Specifically, the court stated that a showing of good cause "contemplates a 'particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.'" *Id.* (citation omitted); *see also* *United States v. Garrett*, 571 F.2d 1323, 1326 (5th Cir. 1978) (holding that the lower court erred in issuing a protective order barring all discovery based upon an unsupported government request and without citing any justification).

<sup>22</sup> *General Dynamics*, 481 F.2d at 1212.

<sup>23</sup> *See Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986); *Garrett*, 571 F.2d at 1326 n.3; *Cuno Inc. v. Pall Corp.*, 117 F.R.D. 506, 508 (E.D.N.Y. 1987).

<sup>24</sup> *American Standard Inc. v. Pfizer, Inc.*, 828 F.2d 734, 740 (Fed. Cir. 1987); *Heat & Control, Inc. v. Hester Indus., Inc.*, 785 F.2d 1017, 1025 (Fed. Cir. 1986); *Carter Prods., Inc. v. Eversharp, Inc.*, 360 F.2d 868, 872-73 (7th Cir. 1966); *In re*

court records will remain public to the fullest possible extent.<sup>25</sup> Indeed, unquestioned acceptance of a manufacturer's unsupported statements that some information deserves confidentiality could lead to extreme embarrassment for the manufacturer's attorney as the proceedings progress.

Under Rule 26(c)(7), the party seeking a protective order has the burden of demonstrating good cause by showing that the specific material sought to be protected is *actually* kept confidential<sup>26</sup> and that its disclosure will cause *specific* harm to that party.<sup>27</sup> More specifically, the requirements for protection under Rule 26(c)(7) include a showing that the information is in fact a trade secret, that the release of that information will result in demonstrable harm, and that good cause for protection exists.<sup>28</sup>

Courts have attempted to formulate a good cause definition for trade secrets. For example, the Federal District Court for the District of Columbia explained that "[t]o establish good cause under Rule 26(c) the courts have generally required a 'particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements. . . .'"<sup>29</sup> That is, "[w]ith respect to the claim of confidential business information, this standard demands that the company prove that disclosure will result in a

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Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litig., 101 F.R.D. 34, 40 n.6 (C.D. Cal. 1984).

<sup>25</sup> *Petroleum Prods. Antitrust Litig.*, 101 F.R.D. at 40 n.7 (citing *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983)).

<sup>26</sup> *United States v. IBM Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975). In determining whether to protect a trade secret, the court will consider the measures taken by the movant to guard the information. *Id.* at 47.

<sup>27</sup> *General Dynamics*, 481 F.2d at 1212 (stating that the court must consider the burden to the opposing party that results from the issuance of a protective order); *Kamp Implement Co. v. J.I. Case Co.*, 630 F. Supp. 218, 219 (D. Mont. 1986) (stressing that few courts will issue a broad protective order, absent a showing of serious injury); *United States v. Exxon Corp.*, 94 F.R.D. 250, 251 (D.D.C. 1981) (requiring a specific demonstration of serious injury to establish good cause for protection of business information); *Davis v. Romney*, 55 F.R.D. 337, 340 (E.D. Pa. 1972) (requiring a particularized showing of harm).

<sup>28</sup> *Cuno*, 117 F.R.D. at 507; *Zenith Radio*, 529 F. Supp. at 866.

<sup>29</sup> *Exxon*, 94 F.R.D. at 251 (quoting 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2035 (1970)).

'clearly defined and very serious injury to its business.'"<sup>30</sup> During the IBM antitrust cases, the Federal District Court for the Southern District of New York also stated that good cause requires an applicant "to demonstrate that disclosure of allegedly confidential information will work a *clearly defined and very serious injury* to his business."<sup>31</sup> Certain common elements of the good cause requirement have emerged from decisions involving trade secrets or confidential information. Some of these elements are set forth below.

### 1. *The Proponent Must Actively Guard Its Trade Secrets*

Trade secrets demand a sort of secrecy pledge by those to whom they are revealed. The proponent must show that the entire organization has endeavored to control access to such information and that measures are taken to safeguard secrecy.<sup>32</sup> To satisfy this requirement, the proponent cannot make general allegations but must show the actual scope of distribution of specific information and the means of protecting the confidentiality of such information during distribution.<sup>33</sup> State trade secret law can assist in determining the acceptable safeguards.

### 2. *The Information Sought to Be Protected Must Be Current*

Only current data or information is protected. If information is not current, a difficulty arises in showing how its release can cause commercial harm.<sup>34</sup> Courts have re-

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<sup>30</sup> *Id.* (quoting *United States v. IBM Corp.*, 67 F.R.D. 40 (S.D.N.Y. 1975)).

<sup>31</sup> *IBM*, 67 F.R.D. at 46 (emphasis in original).

<sup>32</sup> *Reliance Ins. Co. v. Barron's*, 428 F. Supp. 200, 203, *aff'd on rehearing*, 442 F. Supp. 1341 (S.D.N.Y. 1977). The court will follow traditional trade secret guidelines in deciding whether the organization has attempted to protect the information. The factors considered include "(1) the extent to which information is known outside the business; (2) the extent to which information is known to those inside the business; (3) the measures taken to guard the secrecy of the information; and (4) the value of the information to the business and its competitors." *Id.*

<sup>33</sup> *See Parsons v. General Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980) (holding that crash test results and design information were not confidential because GM failed to specify the means by which secrecy was maintained and no particularized need for confidentiality was established).

<sup>34</sup> *IBM*, 67 F.R.D. at 49 (ruling that protection was unavailable for outdated but

fused to protect business records and other such data that were five years old,<sup>35</sup> three years old,<sup>36</sup> and even one year old.<sup>37</sup> The basic criterion underlying these determinations was whether the data revealed anything concerning the movant's contemporary operations.<sup>38</sup> This concept applies to aviation product liability actions when a party seeks protection for results of test data or design compromises made by a manufacturer for an aircraft no longer in production. In order to gain protection, the proponent should demonstrate that release of such information would have an effect on that manufacturer's current operations.

### 3. *Patented Information Cannot Be Protected*

If the information sought to be protected has been patented by the proponent, a protective order is unobtainable because the patent process is based upon public disclosure.<sup>39</sup>

### 4. *Information That Is Ascertainable Through Inspection or By Reverse Engineering Cannot be Protected*

A trade secret is destroyed if a product containing that secret is placed upon the open market and the secret can be ascertained through inspection.<sup>40</sup> Further, the Third Circuit has held that a sale on the open market submits trade secrets to public disclosure through "reverse engineering," which was explained as follows:

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allegedly confidential information, unless the movant established that disclosure would cause a clearly defined and very serious injury to business).

<sup>35</sup> *Exxon*, 94 F.R.D. at 252.

<sup>36</sup> *United States v. Lever Bros. Co.*, 193 F. Supp. 254, 258 (S.D.N.Y. 1961), *cert. denied*, 371 U.S. 932 (1962).

<sup>37</sup> *Rosenblatt v. Northwest Airlines, Inc.*, 54 F.R.D. 21 (S.D.N.Y. 1971).

<sup>38</sup> *See Zenith Radio*, 529 F. Supp. at 877, 891 (noting that difficulty arises in drawing temporal boundaries to govern protection of information, particularly when deciding how the information impacts the contemporary operations of a party).

<sup>39</sup> *Midland-Ross Corp. v. Sunbeam Equip. Corp.*, 316 F. Supp. 171, 177 (W.D. Pa.), *aff'd per curiam*, 435 F.2d 159 (3d Cir. 1970). The court held that "[t]he very act of publishing a trade secret in a patent destroys the secretive nature of that which is disclosed therein." *Id.*

<sup>40</sup> *Id.*

Even though a marketed product would have to be rendered inoperative and examined by a skilled engineer in order for a discovery to be made of the trade secrets therein, the sale of such a product nevertheless constitutes a public disclosure which will defeat a claim founded upon the trade secrets contained in the product.<sup>41</sup>

In aviation cases, the general public, including a competitor, may well have access to aircraft or aircraft systems. Manufacturers publish masses of technical data to support aircraft certification as required by the Federal Aviation Administration.<sup>42</sup> To secure a protective order, a proponent must demonstrate that the information it seeks to protect is incapable of being reverse-engineered from the aircraft itself or from the technical information that the manufacturer has released to the public either pursuant to a statutory duty or for commercial reasons. Furthermore, courts have been reluctant to protect information that is not novel and probably already known or that could be reconstructed from openly available data by those familiar with the field.<sup>43</sup>

#### 5. *Information Capable of Being Deduced Through Observation Cannot Be Protected*

Confidential business information or data from which a competitor can deduce the business operations of a movant are treated differently. In the IBM antitrust cases,

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<sup>41</sup> *Id.* (citing *Midland-Ross Corp. v. Yokana*, 293 F.2d 411, 413 (3d Cir. 1961)). The Third Circuit has continued to adhere to the principle of reverse engineering. See *Smith*, 869 F.2d at 199-200.

<sup>42</sup> Certification Procedures for Products and Parts, 14 C.F.R. §§ 21.1-.621 (1990); Airworthiness Standards: Normal, Utility and Acrobatic Airplanes, 14 C.F.R. §§ 23.1-.1589 (1990); Airworthiness Standards, Aircraft Engines, 14 C.F.R. §§ 33.1-.99 (1990); Maintenance, Preventative Maintenance, Rebuilding and Alteration, 14 C.F.R. §§ 43.1-17 (1990).

<sup>43</sup> *Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1008 (3d Cir. 1976) (holding that the methodology to calculate back pay proposal was not protected information because it was known by those in the field of employment discrimination law); *John Does I-VI*, 110 F.R.D. 633 (holding that "a unique body of knowledge" insufficiently identified information requiring protection in a fraudulent misrepresentation action against a nonprofit corporation offering self-realization courses).

the court weighed the age of data against how that data might assist a competitor in determining information about the movant's current operations.<sup>44</sup> That analysis turned on whether an informed competitor could arrive at similar deductions through the compilation of data generally available in the industry and through observation of the movant's actions within the industry. Thus, the fundamental considerations are the age and usefulness of the information and the ease with which competitors can gain access to it.<sup>45</sup>

Similarly, with respect to manufacturing, processing, or design information, protection is unavailable for an alleged trade secret that only involves the following: (1) concepts that are matters of general scientific knowledge; (2) material that is ascertainable through the application of general scientific or engineering principles; or (3) data compiled through the use of measuring methods that are of general scientific knowledge in the industry.<sup>46</sup> Even observations and photographs made by the proponent cannot be protected unless the subject matter meets the standards required for protection.<sup>47</sup>

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<sup>44</sup> *IBM*, 67 F.R.D. at 47-49. The court reviewed pretrial orders protecting portions of testimony that covered revenues, sales, and manufacturing data. The age of the data ranged from 3 to 15 years. Although the data was not readily available to the public, the court found that value of the data to competitors was too speculative and did not warrant protection. *Id.*

<sup>45</sup> See *In re "Agent Orange" Prod. Liab. Litig.*, 104 F.R.D. 559, 574 (E.D.N.Y. 1985). "An important factor in determining whether disclosure will cause competitive harm is whether the information that the party seeks to protect is current or stale." *Id.* at 575; see also *Exxon*, 94 F.R.D. at 252 (holding that the age and content of allegedly confidential documents did not establish a need for protection). In *Exxon*, the company sought restrictions on the release of 500 documents. At the time of the motion for a protective order, the government had possession of all of the documents. In denying the motion, the court reviewed the age and content of the materials, finding that all of the documents were at least five years old and contained no information that would harm Exxon's competitive advantage. *Id.* at 251-52.

<sup>46</sup> *IBM*, 67 F.R.D. at 48-49.

<sup>47</sup> *Procter & Gamble*, 111 F.R.D. at 329. *Procter & Gamble*, a patent infringement case, involved an attempt to gain access to various documents, including photographs of a Keebler facility. The court ruled that Keebler failed to satisfy the burden of showing that the photographic information was a trade secret under Rule 26(c). That is, the photographs did not contain any confidential information

Often, manufacturers claim that information concerning the performance evaluation, processing, testing, designing, or general development of its aircraft is unique. General acceptance of this proposition, however, is doubtful because it is difficult to conceive that unique information permeates all such activities by any manufacturer. In aviation litigation, discovery requests often seek design and test data developed to establish technical parameters for airframe or system design. Vibrational testing, material process specifications, flight test data, and other technical data adequate to ensure proper operation of an aircraft or system are based upon techniques generally known within the aircraft industry. Such techniques have evolved to meet regulatory standards as well as the research and development needs of the aerospace industry.

The proponent must specify how such information is unique to that manufacturer and establish that the data or technique is not generally known or used throughout the aviation industry. The proponent who claims that information is unique, however, also runs the risk of demonstrating the enhanced need of the party requesting that information.<sup>48</sup>

#### 6. *Disclosure to the Government May Bar Protection*

When information that is claimed to be confidential was previously disclosed to the government, that information is a matter of public record and cannot be the subject of a protective order.<sup>49</sup> For example, the Type Certificate

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and were taken from a vantage point available to anyone passing the facility. *Id.* If extended beyond a certain point, however, this observation standard might destroy any proprietary or confidential standing. For example, one skilled in the field of photoanalysis could determine considerable information about the performance of a jet aircraft by analysis of the size and shape of its engine intakes.

<sup>48</sup> *American Standard*, 828 F.2d at 734. "Need is enhanced when information is uniquely available from the party from whom it is sought." *Id.* at 743; see *Heat & Control*, 784 F.2d at 1025; *Carter Prods.*, 360 F.2d at 872-73.

<sup>49</sup> *Parsons*, 85 F.R.D. at 726. The court held that information relating to the design of a fuel system was not confidential because the manufacturer admitted that some of the information was previously disclosed to the government. *Id.*

Data Sheet, repair and flight manuals, and any Federal Aviation Administration (FAA) airworthiness directives are matters of public notice.<sup>50</sup>

When information has been voluntarily produced to the government, but not disclosed, the movant still must specifically demonstrate that the information which it seeks to protect is a trade secret or confidential commercial information.<sup>51</sup> This consideration may arise in aviation litigation when a manufacturer has released information to the government through interaction with the FAA. Thus, although the FAA has the right to refuse to release "proprietary data" pursuant to a Freedom of Information Act<sup>52</sup> request, the manufacturer still must justify protection from discovery under Rule 26(c)(7).

### BASIC PRINCIPLE THREE: BLANKET PROTECTIVE ORDERS ARE NOT FAVORED

Often, a party will propose a blanket protective order. Respondent counsel, who may not have the faintest idea whether the material merits protection, may agree to such a protective order to get on with discovery, which can be a mistake for two reasons. First, although courts dislike blanket protective orders,<sup>53</sup> a court may force the litigant who later seeks relief from a blanket protective order to live with the results of the bargain to which he agreed.<sup>54</sup>

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<sup>50</sup> For reference to some reporting and certification requirements, see *supra* note 42.

<sup>51</sup> Rule 26(c) provides that a protective order shall issue only upon a showing of good cause, and the movant bears the burden of showing the necessity to protect the information. As discussed above, good cause requires a specific demonstration of need. *Garrett*, 571 F.2d at 1326 n.3; see *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. 27, 29 (E.D. Mich. 1981).

<sup>52</sup> 28 U.S.C. § 501 (1982).

<sup>53</sup> See, e.g., *John Does I-VI*, 110 F.R.D. at 633 (holding that defendants failed to establish with adequate specificity that documents contained proprietary information that would justify blanket protection).

<sup>54</sup> See *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653, 659 (D.D.C. 1986); *Zenith Radio*, 529 F. Supp. at 893. According to the *Tavoulareas* court, when parties benefit from and rely upon a former protective order and the order served the ends of Rule 26, then "the burden of demonstrating good cause is tempered by its reliance on the protective order . . . [and] [t]his is so even though the protective

Second, a blanket protective order shifts the burden from the proponent of protection to the respondent, contrary to Rule 26(c), by forcing the respondent to determine, after the fact of production, whether protected information merits any protection at all. Accordingly, blanket protective orders "only postpone, rather than prevent, the need for the [c]ourt to closely scrutinize discovery materials to see if the seal is justified."<sup>55</sup>

Under most blanket protective orders, the party possessing the information unilaterally can mark as confidential any document it chooses to produce. Such *a priori* presumptions of confidentiality contravene the requirement of Rule 26(c)(7) for a particularized showing.<sup>56</sup> Even more fundamentally, blanket protective orders force the respondent to analyze information to determine whether the proponent has met the burden of showing cause for protection. The respondent must then seek the Court's intervention each time it questions the validity of a particular classification. Such reversal of the burden required under Rule 26(c)(7) has been rejected by the courts.<sup>57</sup>

Most courts that have addressed blanket protective orders have done so after a motion for reconsideration by a party who had stipulated to such an order and then sought declassification from that order. This pattern is true of the case most cited by proponents of blanket or-

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order may originally have been entered before, or even without, a finding of good cause." *Tavoulareas*, 111 F.R.D. at 659.

<sup>55</sup> *John Does I-VI*, 110 F.R.D. at 632.

<sup>56</sup> See, e.g., *Kamp Implement*, 630 F. Supp. at 219 (holding that the movant bears the burden of showing the necessity for a protective order by pleading particular or specific facts). But cf. *Public Citizen v. Liggett Group*, 858 F.2d 775, 777, 790 (1st Cir. 1988) (granting a blanket protective order because massive numbers of documents prevented defendant from physically designating each individual document as confidential or secret), *cert. denied*, 488 U.S. 1030 (1989).

<sup>57</sup> See, e.g., *Agent Orange*, 104 F.R.D. at 568-69 (placing the burden on the manufacturer to show good cause for continued protection of confidential material under a protective order); *Petroleum Prods. Antitrust Litig.*, 101 F.R.D. at 34 (ruling that defendants had burden of showing that their confidentiality interest outweighed public access interests, when justifying the continuation of a protective order).

ders, *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*<sup>58</sup> Proponents do not usually mention, however, that the *Zenith Radio* court was called upon to declassify many thousands of documents after more than ten years of discovery under a protective order previously agreed to by the parties to that action.<sup>59</sup> Generally, no acceptable justification will exist for agreeing to a blanket protective order at the beginning of aviation product liability actions.

#### BASIC PRINCIPLE FOUR: RETROACTIVE PROTECTION IS NOT AVAILABLE

A protective order cannot allow a proponent to retroactively classify documents previously produced. Prior production moots a motion for a protective order.<sup>60</sup> A protective order must be obtained before the date set for production of discovery, and failure to move by that date will likely preclude such objection and request later.<sup>61</sup> When more than one action over the same issue is involved, the proponent cannot avoid discovery in one action or argue retroactive confidentiality on the basis of disclosure of the same documents to an adversary bound by a protective order in another action.<sup>62</sup>

#### BASIC PRINCIPLE FIVE: PROTECTED INFORMATION CAN BE SHARED

The limitations inherent in some protective orders restrict the ability of a party to pursue an action at law. The most common limitation concerns sharing the fruits of discovery with other attorneys involved in similar litiga-

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<sup>58</sup> 529 F. Supp. 866 (E.D. Pa. 1981).

<sup>59</sup> *Id.* at 873-74.

<sup>60</sup> *United States v. IBM Corp.*, 70 F.R.D. 700, 701 (S.D.N.Y. 1976).

<sup>61</sup> *Mitsui & Co. v. Puerto Rico Water Resources Auth.*, 93 F.R.D. 62,67 (D.P.R. 1981); *see also* *United States v. Portland Cement Co.*, 338 F.2d 798, 803 (10th Cir. 1964) (holding that orders for protection of parties or deponents must be issued prior to the taking of depositions); 8 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 2035 (1970).

<sup>62</sup> *See* *Carter-Wallace v. Hartz Mountain Indus.*, 92 F.R.D. 67, 69 (S.D.N.Y. 1981).

tion. Sharing of data is encouraged by the courts because it is consistent with "the just, speedy, and inexpensive determination of every action."<sup>63</sup> Courts have thus rejected restrictions on the sharing of information as adverse to the proper function of the judicial system.<sup>64</sup> Broad protective orders that absolutely forbid such exchange of information are inconsistent with the Federal Rules of Civil Procedure and the underlying public interest in an efficient judicial system.<sup>65</sup>

Courts review numerous factors when a respondent opposes a protective order sought by a large corporation. For instance, the court in *United States v. Hooker Chemical & Plastics Corp.*<sup>66</sup> considered the disparity in resources between an individual plaintiff and a large corporation.<sup>67</sup>

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<sup>63</sup> FED. R. CIV. P. 1; see, e.g., *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 579-80 (D. Colo. 1982) (holding that a plaintiffs' attorneys' discovery information exchange group reduces the effort and expense incurred by all parties and vacating the protective order prohibiting such exchanges); *Waelde v. Merck, Sharp & Dohme*, 94 F.R.D. at 28-30 (noting that the Federal Rules of Civil Procedure do not prohibit collaboration and sharing of information by litigants); *Parsons*, 85 F.R.D. at 726 (stating that the federal rules do not prevent collaboration among litigants). Recently, the Texas Supreme Court reviewed the law applicable to restrictions on sharing of information. The court rejected such restrictions, holding that shared discovery is an "effective means to insure full and fair disclosure." *Garcia v. Peeples*, 734 S.W.2d 343, 347 (Tex. 1987). The court further noted that shared discovery makes the system more truthful and efficient. *Id.*

<sup>64</sup> *John Does I-VI*, 110 F.R.D. at 633; see also *Kamp Implement*, 630 F. Supp. at 219-20 (noting that the possibility that a party may share the discovery with another person or entity is generally not considered as part of a good cause showing for a protective order).

<sup>65</sup> See, e.g., *John Does I-VI*, 110 F.R.D. at 631, 635-36 (stating that a broad protective order may be unduly burdensome and prejudicial, which would not satisfy the court's duty to ensure an efficient resolution to all actions).

<sup>66</sup> 90 F.R.D. 421, 426 (W.D.N.Y. 1981).

<sup>67</sup> *Id.*

Use of the discovery fruits disclosed in one lawsuit in connection with other litigation, and even in collaboration among plaintiffs' attorneys, comes squarely within the purposes of the Federal Rules of Civil Procedure. . . . Such cooperation among litigants promotes the speedy and inexpensive determination of every action as well as conservation of judicial resources. This is particularly the case in lawsuits where the resources available to the parties are uneven. [Otherwise,] [i]ndividuals who are plaintiffs might have a most difficult time extracting information . . . .

*Id.* (citations omitted).

The *Hooker* court also held that the use of a procedure whereby the proponent designates documents as "confidential" under a "general practice" does not mean that the proposed practice must be adopted by the *unconsenting* respondent.<sup>68</sup>

## II. A PROCEDURE FOR PROTECTIVE ORDERS

Courts recognize that discovery disputes can take up inordinate amounts of their time.<sup>69</sup> Federal district courts have formulated local rules that attempt to reduce this problem. Local solutions range from requiring a simple certification by counsel that they have attempted without success to resolve the dispute<sup>70</sup> to elaborate procedures requiring parties to file one document stipulating to the issues they want resolved.<sup>71</sup> The basic purpose of such

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<sup>68</sup> *Id.* at 425. Although large corporate parties often agree to broad protective orders as a means of protection from competing businesses and potential litigants, an unreceptive party is not bound to accept this practice. *Id.*

<sup>69</sup> *See, e.g.,* *Cipollone v. Liggett Group, Inc.*, 784 F.2d 1108, 1122 n.19 (3d Cir. 1986) (discussing the usefulness of umbrella protective orders, the court stated that "[i]n a very large case, the document-by-document approach" might be so time-consuming that it "could cripple the court").

<sup>70</sup> *See, e.g.,* W.D. Pa. R. 4(a)(2). The Western District of Pennsylvania local rule requires in pertinent part:

The Clerk of Court shall not accept for filing under the Rules of Civil Procedure any motion relating to discovery unless said motion is accompanied by a Certificate from counsel of record certifying that they have conferred and consulted with respect to each matter set forth in said motions and are unable to resolve the differences which exist. Said Certificate shall set forth the exact time and place of the conference and consultation. Where counsel for movant cannot furnish the required Certificate he shall furnish an alternate Certificate stating that opposing counsel has refused to so meet and confer or to sign the required Certificate or stating such other facts and circumstances supporting the absence of the required Certificate and movant's efforts to obtain compliance by opposing counsel.

*Id.*

<sup>71</sup> *See, e.g.,* C.D. Cal. R. 7.15. The Central District of California local rule provides in pertinent part:

7.15.1 *Meeting of Counsel.* Prior to the filing of any motion relating to discovery pursuant to FR Civ P 26-37, counsel for the parties shall meet in person in a good faith effort to eliminate the necessity for hearing the motion or to eliminate as many of the disputes as possible. It shall be the responsibility of counsel for the moving party to arrange for the conference. Unless relieved by order of the Court

rules is to force the parties to work out their own discovery problems. Although courts have the discretion to fashion appropriate protective orders,<sup>72</sup> the results can be less than desirable when they are forced *sua sponte* to fashion protective orders because the parties cannot agree on the issues involved.<sup>73</sup>

The basic approach discussed in this section, which is an important development in the protective order process, allows the parties to work out a protective order that combines an agreement on the method for determining what information is protected with an agreement on how to handle protected material. This procedure accommodates both sides, and more importantly, speeds up the resolution of disputes, permitting discovery to proceed as rapidly as possible. The basic directive under which this protective order procedure was developed is Rule

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upon good cause shown or agreement of the parties, counsel for the opposing party shall meet with counsel for the moving party within ten (10) days of service upon him of a letter requesting such meeting and specifying the terms of the discovery order to be sought.

7.15.2. *Moving Papers*. If counsel are unable to settle their differences, they shall formulate a written stipulation specifying separately and with particularity each issue that remains to be determined at the hearing and the contentions and points and authorities of each party as to each issue. The stipulation must be set forth in one document which shall contain all such issues in dispute and the contentions and points and authorities of each party. The stipulation shall not refer the Court to other documents in the file. For example, if the sufficiency of an answer to an interrogatory is in issue, the stipulation shall contain, verbatim, both the interrogatory and the allegedly insufficient answer, followed by each party's contentions, separately stated. The stipulation shall be filed and served with the notice of motion. In the absence of such stipulation, or a declaration of counsel of non-cooperation by the opposing party, the Court will not consider any discovery motion unless otherwise ordered upon good cause shown. The motion shall be heard on the next succeeding Motion Day which shall be no earlier than ten (10) days after the filing of the motion.

*Id.*

<sup>72</sup> *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 684 (5th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986).

<sup>73</sup> For example, although the decision was not *sua sponte*, the *Cipollone* court was forced to reluctantly uphold a protective order because the plaintiff refused to keep the information confidential. *Cipollone*, 784 F.2d at 1108.

26(b)(1) of the Federal Rules of Civil Procedure.<sup>74</sup> Under this rule, the scope of discoverable subject matter can be far-ranging in both product liability and terrorist litigation. Although information may become protected at some point, the basic policy of the federal rules is that a litigant is entitled to see information relevant to the litigation subject matter.<sup>75</sup>

A maxim exists that, during litigation, attorneys face too many tasks to waste time playing a game of "blindman's bluff" with information. Frequently, these same attorneys will not have the technical background in either product development or antiterrorist security properly to frame issues concerning confidentiality. Under the procedure presented in this section, litigants gain efficiency by framing the basic protective order issues and hammering out an approach to protective orders prior to taking such issues to the court. This procedure is particularly important for terrorist cases in which relevant information might involve sensitive security matters.

The procedure set forth below involves some measure of compromise between the parties but improves efficiency for both sides and for the court. Sample protective order agreements for both a product liability action and a terrorist action are presented as Appendices A and B to this article.<sup>76</sup> Because the content of any particular pro-

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<sup>74</sup> FED. R. CIV. P. 26(b)(1).

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds 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.

*Id.*

<sup>75</sup> For a discussion of the purposes of discovery, see *supra* notes 4-11 and accompanying text.

<sup>76</sup> The procedure presented in Appendix A was used in *DeJong v. Bell Helicopter Textron, Inc.*, 124 F.R.D. 207 (W.D. Mo. 1988) (Case No. 86-3504-CV-S-2).

protective order agreement can be as varied as the subject matter under litigation, only the general format of these agreements is described below.

#### *A. Statement of Purpose*

Litigants need to clearly understand the proposed agreement in the specific context of the litigation at hand. For terrorist actions, this understanding is particularly important because dire consequences could result for persons far removed from the litigation. The release of confidential information needed to fully litigate such actions could tragically affect these persons. Product liability actions do not have such dramatic possibilities, but when the parties must first consider the underlying bases for protection, the subsequent disputes are properly framed for resolution. A statement of the purpose for a protective order procedure will also assist a court faced with a protective order dispute.

The following example, agreed to by counsel in the TWA 840 bombing case, illustrates both the form and rationale for a statement of purpose:

#### STIPULATION AND PROTECTIVE ORDER

Plaintiffs and defendant Trans World Airlines, Inc., (hereinafter "TWA") hereby stipulate and agree to the terms of this Protective Order as set forth below. This Protective Order is agreed to gain recognition of the following:

- a. That the nature of the instant action can involve discovery into areas of information regarding security procedures which could be considered to be highly sensitive;
- b. That during the course of the instant action plaintiffs may seek discovery of information which could be considered to be confidential under Rule 26(c), Fed. R. Civ. P.

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The procedure presented in Appendix B was used in *In re Inflight Explosion on Trans World Airlines Aircraft Approaching Athens, Greece* on April 2, 1986, No. MDL-727 (E.D.N.Y. filed 1987).

c. That there should be no confusion over the nature, range and extent of confidential information; and

d. That the burden of showing good cause for protection of the information sought to be protected lies with the party from whom discovery is sought. Rule 26(c), Fed. R. Civ. P.<sup>77</sup>

In the early stages of litigation, the parties often tend to approach the issue of protection like blind bulls in a dark room. A preliminary meeting between counsel for each party to work out the basic purpose of a protective order within the particular litigation will narrow the issues regarding protection, thereby speeding up discovery.

## B. *Initial Procedure*

### 1. *Notification*

The party seeking discovery has the burden of asking the right questions. Often, early discovery requests are wide-ranging, but if they are not vague, the answering party has a duty to supply answers and produce documents and material responsive to such requests. The answering party must respond within thirty days to discovery requests under Rules 33(a) and 34(b) of the Federal Rules of Civil Procedure.<sup>78</sup> Determining whether discovery requests cover information that might qualify for protection is not a lengthy process. The requesting party may reasonably ask that the party who has the duty to produce information notify them earlier than the thirty day period if the respondent plans to seek protection for requested information.

The notification period can vary depending upon the action. In product liability cases, a fifteen day interval is

<sup>77</sup> See Appendix B; *Explosion on Trans World Airlines Aircraft*, No. MDL-727 (E.D.N.Y. filed 1987).

<sup>78</sup> Rule 33(a) states in pertinent part that "[t]he party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories . . . ." FED. R. CIV. P. 33(a). Rule 34(b) states in pertinent part that "[t]he party upon whom the request [for production] is served shall serve a written response within 30 days after the service of the request . . . ." FED. R. CIV. P. 34(b).

not unreasonable because requested information tends to be more readily available for assessment. In terrorist cases, particularly those situations that involve geographically diverse sources of information, a period of twenty days is more reasonable. Because the circumstances of each action can vary, counsel should negotiate the shortest possible notification period consistent with practicality.

## 2. *Meeting of Counsel*

Counsel for the party seeking protection is required to call a conference for all counsel seeking discovery in order to disclose the information for which he seeks protection. In turn, counsel for the discovering party is obligated to submit to an oath of confidentiality as the price of admission to the conference. The purpose of this meeting is threefold. First, discovering counsel will be able to see the documents for which the other party seeks protection. Second, the party who seeks protection will still maintain control of the documents containing the information. Third, and most important, during the meeting, counsel may be able to reduce the amount of information subject to controversy. A sample product liability order describes the purpose of the meeting as follows:

2. That counsel for the party seeking protection arrange for a review by counsel for all interested parties of the material for which a Protective Order is to be sought in order to determine:

a. Those items of information considered to be confidential by the proponent for which confidentiality merits protection without disagreement.

b. Those items of information for which the proponent must seek a showing pursuant to Rule 26(c), Reg. R. Civ. P.<sup>79</sup>

Although the party seeking protection bears the burden of justification under Rule 26(c), discovering counsel may

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<sup>79</sup> See Appendix A; *DeJong*, 124 F.R.D. at 207.

readily agree that certain information will qualify for protection. Further, particularly in terrorist actions, some information may deserve total in camera treatment. A preliminary meeting is the best place to work out the specific means of handling such information.

Some information may not merit protection. The counsel seeking discovery can most easily ascertain whether the information warrants protection. For many reasons, certain information may not be protected regardless of the criteria of Rule 26(c). For example, when the same information is available through an outside source unrelated to the litigants, protection may be moot and the parties may well drop the issue of production.<sup>80</sup> Ultimately, counsel for the party seeking protection must justify the protection. If no justification exists for one particular item of information, counsel might want to convince his client to stop seeking protection on that point and concentrate on more crucial and protectable information.

Finally, a body of information will exist that discovering and responding counsel will dispute. This data represents the information for which counsel seeking protection must bear the burden of showing good cause under Rule 26(c). As a result of this interchange, counsel for both parties will be able to more precisely formulate their arguments, not only for protection but also for establishing the method by which the information should be guarded if protection is granted.

The meeting is a winnowing process that reduces and defines the amount of information over which a protective order battle must be fought. By agreeing to such meetings, the parties can better adhere to their discovery schedule, while preserving their rights regarding protection. The party producing the information must still abide by the comprehensive production requirements of Rule 26(b)(1) and must produce all nonprivileged infor-

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<sup>80</sup> See, e.g., *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (holding that information identical to that covered by a court's protective order but gained through independent means may be disseminated).

mation. Therefore, such a meeting does nothing to injure his position in the litigation. All counsel has done is protect information that his client regards, rightly or wrongly, as deserving protection.

### C. *Post-Meeting Procedure*

Once the meeting of counsel has been held, the proponent of protection is obligated to seek protection for specific information. By this time, the issues have been defined, and the total amount of material potentially subject to a protective order battle has possibly been reduced. The essential point is that discovery has proceeded because counsel for the party seeking discovery has had access to the requested information. Although discovering counsel is still under an obligation of confidentiality, this restriction does not prevent the attorney from further refining the discovery plan, or at least pressing forward with further areas of inquiry relevant to the action based upon what he has learned at the meeting. Safeguards for the proponent of protection are worded in Appendix B for the terrorist case as follows:

3. With respect to information in dispute, all counsel shall be under a duty not to disclose, outside the bounds of confidentiality, any such information received during any meeting contemplated under paragraphs 1-2, unless and until the Court has ruled that this information is not entitled to confidential treatment. Should the Court rule that confidential treatment is not warranted for particular information, that affirmation shall be produced in open discovery.

One further point merits consideration. In product liability or terrorist cases, counsel often may not be familiar with the subject matter under consideration or may lack sufficient technical knowledge to assess the claim of confidentiality made by the proponent. Under these conditions, counsel may want to have an expert available for consultation. Obviously, any such expert can be covered by a confidentiality order, subjecting him to the same re-

strictions as counsel. The identity of that expert consultant, however, will be disclosed to the other party. This consideration must be balanced against the inability of counsel to disclose information learned at the meeting until the information is ruled upon. Such tactical decisions can only be weighed by counsel addressing a particular issue.

#### D. *Post-Ruling Procedure*

Often, relevant and important unprotected information will be contained in documents containing other information that might be protected. Because the point of protective orders is to protect information and not documents, the process proposed in this section includes a further requirement. That is, information for which protection has been obtained should be underlined without obliteration. If the protected information is not so designated, then there might be confusion over what information is and is not protected. This method is particularly important when protected documents are disclosed to other persons involved in the action and further assures that each person who deals with the protected information knows exactly what information for which he or she is responsible. One byproduct of this effort is to allow counsel for the parties to more readily use unprotected information found in documents containing protected information. This requirement is set forth as follows in the sample product liability protective order:

6. Should a document be made the subject of a Protective Order, that document shall be marked "CONFIDENTIAL" and those portions of that document containing such confidential information shall be clearly marked by underlining or other means which will not obliterate text or other information. The term "document" shall include deposition transcripts, exhibits, interrogatory answers or anything else which reproduces or paraphrases information so marked.<sup>81</sup>

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<sup>81</sup> See Appendix A; *DeJong*, 124 F.R.D. at 207.

Although this procedure may seem cumbersome for the parties, the benefit in maintaining confidentiality by being particular is that the later stages of discovery and trial will be more efficient. The party seeking protection bears the burden of showing that an entire document and all of its contents should fall under a protective order.

### III. CONCLUSION

Given the present reality of crowded court dockets, parties engaged in the litigation of aviation products liability and terrorist cases are best advised to resolve potential protective order disputes prior to seeking resolution by a court. The procedures presented above represent one such approach to resolving discovery disputes. Although the individual facts and circumstances of each case will dictate how details are handled, the broad procedural guidelines proposed above establish a solid foundation upon which parties can negotiate the scope of the discovery process.

## APPENDIX A

This example of a type of protective order for a products liability case was used in *Dejong v. Bell Helicopter Textron, Inc.*, 124 F.R.D. 207 (W.D. Mo. 1988) (Case No. 86-3504-CV-S-2).

## ORDER

This stipulated Order applies to documents produced by any party to the instant action in response to the requests of any other party for production, and for which a Protective Order is sought pursuant to Rule 26(c), Fed. R. Civ. P. IT IS HEREBY ORDERED:

1. That upon receipt of Interrogatories or Requests for Production, or during deposition proceedings contemplated in the Federal Rules of Civil Procedure, the party who claims commercial confidentiality and wishes to seek a Protective Order pursuant to Rule 26(c), Fed. R. Civ. P., shall promptly notify the other party of their intent. In the case of Interrogatories or Requests for Production, such notification regarding portions of such Interrogatories or Requests for Production shall be made by objection within fifteen (15) days of the receipt thereof setting forth with reasonable specificity the precise information sought to be protected.

2. That counsel for the party seeking protection arrange for a review by counsel of all interested parties of the material for which a Protective Order is to be sought in order to determine:

- a. Those items of information considered to be confidential by the proponent for which confidentiality merits protection without disagreement.

- b. Those items of information for which the proponent must seek a showing pursuant to Rule 26(c), Fed. R. Civ. P.

3. That counsel shall be under a duty to consider the proceedings of any such meeting as confidential unless

and until the issue of protection is set forth by the proponent pursuant to Rule 26(c), and ruled upon by the Court.

4. That the party seeking protection for information and/or documents shall show the need for such protection of each item pursuant to Rule 26(c), Fed. R. Civ. P., and the construction of this Rule set forth by the courts, and will include:

a. a demonstration that the material sought to be protected is a trade secret or is subject to commercial confidentiality;

b. a demonstration that disclosure might be harmful;

c. a demonstration that the material is treated as confidential by the proponent person or organization;

d. a demonstration that disclosure would result in harm or competitive disadvantage.

5. Parties opposing a proposed Protective Order will then be given the opportunity to rebut the contentions of the proponent.

6. Should a document be made the subject of a Protective Order, that document shall be marked "CONFIDENTIAL" and those portions of that document containing such confidential information shall be clearly marked by underlining or other means which will not obliterate text or other information. The term "document" shall include deposition transcripts, exhibits, interrogatory answers or anything else which reproduces or paraphrases information so marked.

7. Counsel for any party may disclose such protected documents and their contents to only the following persons:

a. Counsel of record in this action;

b. Persons regularly employed by counsel of record who have need to use the documents in connection with work on this action;

c. The parties or prospective witnesses;

d. Persons used as experts or expert witnesses by the parties or their counsel.

8. Any person to whom any document is disclosed (except counsel for a party herein) shall be required to execute a disclosure agreement in the following form as a condition of his or her access to the document:

### DISCLOSURE AGREEMENT

My name is \_\_\_\_\_

My residence address is \_\_\_\_\_

My business address is \_\_\_\_\_

I have read and fully understand the provisions of the Protective Order that has been entered by the Court in the lawsuit styled Barbara DeJong, individually and as Administratrix and Personal Representative of the Estate of David DeJong, deceased, Lance DeJong and Jason DeJong, minors, Plaintiffs, v. Bell Helicopter Textron, Inc., Texas Helicopter Corporation, Gifton McCreary, Willard Twiggs and Sharon L. Wehrenberg, as statutory trustees of TEXAS HELICOPTER CORPORATION, TEXAS HELICOPTER INTERNATIONAL, INC., FRISBY AIRBORNE HYDRAULICS, INCORPORATED, THERMO NATIONAL INDUSTRIES, INC., DOES II AND III, INDIVIDUALLY, Civil Action No. 86-3504-CV-S2 in the United States District Court for the Western District of Missouri (Southern Division).

I agree to strictly comply with the terms of that Order. I will not disclose the documents nor any information they contain in any form to persons other than those specifically authorized by the Protective Order, and I will not use the documents or any information they contain other than for purposes of this lawsuit.

My pledge of secrecy with respect to the documents set forth in this Protective Order under this agreement continues after the lawsuit is over, and extends to other documents and information disclosed to me in the future under the terms of this Protective Order, during the course of this lawsuit in this matter, as well as to documents and information already disclosed to me which are held to be subject to this Protective Order.

I understand that violation of the Protective Order or this disclosure agreement may constitute contempt of court.

Date: \_\_\_\_\_

9. At the conclusion of this lawsuit, all documents covered by this Protective Order, and all copies thereof, shall be returned to counsel for the party seeking protection within ten (10) days.

## APPENDIX B

This example of the type of protective order appropriate for terrorist cases was used in *In re Inflight Explosion on Trans World Airlines Aircraft Approaching Athens, Greece on April 2, 1986*, No. MDL-727 (E.D.N.Y. filed 1987). The necessity for protecting information that could have sensitive security implications rendered this procedure more circumspect than that for product liability cases.

## STIPULATION AND PROTECTIVE ORDER

Plaintiffs and defendant Trans World Airlines, Inc. (hereinafter "TWA") hereby stipulate and agree to the terms of this Protective Order as set forth below. This Protective Order is agreed to in recognition of the following:

- a. That the nature of the instant action can involve discovery into areas of information regarding security procedures which could be considered to be highly sensitive;
- b. That during the course of the instant action plaintiffs may seek discovery of information which could be considered to be confidential under Rule 26(c), Fed. R. Civ. P.
- c. That there should be no confusion over the nature, range and extent of confidential information; and
- d. That the burden of showing good cause for protection of the information sought to be protected lies with the party from whom discovery is sought. Rule 26(c). Fed. R. Civ. P.

## PROTECTIVE ORDER

1. When a discovery request is received, TWA will indicate which documents or other forms of information responsive to that request contain information which it considers to be entitled to confidential treatment under this Order. Plaintiffs' counsel will review all said documents and, if plaintiffs agree that any documents should

be confidential, said documents will be handled pursuant to this Protective Order. As to those documents to which counsel have not agreed, TWA will within twenty (20) days provide to plaintiffs a list which designates each such document in an unclassified manner and which shall indicate the reason and support as to why each such document should be confidential. Discovery will proceed as to these disputed documents; however, plaintiffs will treat said documents as confidential until their classification has been resolved, and in the interim, said documents shall be disclosed, discussed or communicated to others only as permitted pursuant to paragraph 5(2) below.

2. Upon receipt of such a listing, counsel for plaintiffs and defendant TWA shall confer to determine whether they can agree as to the classification of any documents on said list.

3. With respect to information in dispute, all counsel shall be under a duty not to disclose, outside the bounds of confidentiality, any such information received during any meeting contemplated under paragraphs 1-2, unless and until the Court has ruled that this information is not entitled to confidential treatment. Should the Court rule that confidential treatment is not warranted for particular information, that information shall be produced in open discovery.

4. For those documents either agreed to as, or ruled as containing information which is confidential, TWA shall affix the word "CONFIDENTIAL" on each page thereof which contains confidential information.

5. Any information designated as confidential, including any information, the contents thereof, any notes, drafts, summaries, excerpts or copies thereof, and any information obtained or derived therefrom which relates to or could reveal the content of such confidential information shall be used only for the preparation and trial of this litigation, including appeals, and not for any other purpose whatsoever and shall not be disclosed, discussed or

otherwise communicated in any way to anyone except as follows:

(1) To the parties and to counsel of record for each party and employees of such counsel or independent contractors working in a ministerial or clerical capacity for such counsel (e.g., photocopying equipment operators); provided, however, that counsel of record shall undertake to assure that the parties, counsel and all of counsels' employees and independent contractors, as that term is used in this subparagraph, shall maintain the confidentiality of any material designated as confidential. Confidential documents shall not be distributed to the parties themselves.

(2) To consultants or experts, including employees or independent contractors of such experts employed by a party or counsel to a party to assist in the preparation for and trial of this litigation or any appeal therein; provided, however, that counsel who retains any such consultant or expert and their employees or independent contractors shall obtain the agreement of each such consultant or expert to be bound by the terms of this Protective Order by having each consultant or expert execute a copy of the Confidentiality Affidavit (hereinafter "Affidavit"), attached hereto as Attachment A, and provided further that retaining counsel shall;

(a) obtain execution of the Affidavit by each consultant or expert prior to the disclosure of any confidential information; and

(b) maintain a current list of each and every consultant or expert in (a) above and the original of their Affidavits in retaining counsel's custody. For the purposes of this subparagraph 5(2), consultants and experts are defined to include those persons who are qualified by their experience, training or expertise to testify concerning airline security procedures and information including such matters as security profiles. Furthermore, consultants and experts as defined in this subparagraph 5(2), include only those persons who are subject to the jurisdiction of the United States District Courts.

(3) To witnesses or potential witnesses (other than the parties themselves); provided, however, that such witness or potential witness is identified in writing to counsel for TWA not less than 4 business days before disclosure to such witness or potential witness (any objection by TWA to disclosure to such witness or potential witness which cannot be resolved among counsel for TWA and counsel for plaintiffs will be submitted by TWA to the Court within 4 business days after such witness is identified for immediate resolution); and provided further that plaintiffs' counsel shall obtain the agreement of such persons to be bound by the terms of this Protective Order by having each such person execute a copy of the Affidavit; and provided further that counsel shall follow the same procedure as in (2)(a) and (b) above. If a witness will not agree to this confidentiality procedure, that person will not be provided with said confidential documents or receive confidential information unless by agreement of the parties or by Court order. However, on direct or cross-examination at deposition or trial, any counsel may show a non-agreeing witness confidential documents or disclose confidential information unless such conduct is specifically objected to, in which case the Court shall then decide the controversy.

(4) To court reporters utilized in connection with any deposition in this action and their employees; provided, however, that prior to disclosure to any court reporter, such court reporter shall agree to be bound by the terms of this Stipulation and Protective Order by executing a copy of an Affidavit.

(5) To the Court; provided, however, that all portions of motion papers, memoranda, affidavits, exhibits, transcripts and other papers filed with the Court that contain, refer to, or paraphrase any material or information designated as confidential shall be marked "CONFIDENTIAL PURSUANT TO COURT ORDER" and shall be filed with the Court under seal, until further order of the Court. All oral presentations to the Court which refer to any design-

nated confidential information shall be held in camera, unless the Court orders otherwise.

6. Counsel obtaining copies of said confidential information shall maintain control of any such information in their custody and shall assure that copies of documents thus obtained are not disclosed to any persons who are not cleared pursuant to this Protective Order for disclosure, including Counsel and their parties who have not signed this Protective Order. Confidential information shall not be recopied for any purpose other than in preparation for this litigation. All such copies of confidential information, other than those reproduced in filings of the parties with the Court or attached thereto (which are governed by subparagraph 5(5) above), shall be returned to TWA in accordance with the provisions of paragraph 9 below.

7. To the extent that any party considers the testimony of any deponent in this litigation to be entitled to confidential treatment under this Order, the use and dissemination of said testimony shall be subject to the same procedure, restrictions and limitations described herein as are applicable to documents containing confidential information. To this end, the court reporter taking and transcribing the testimony of any such deponent shall be directed to furnish copies thereof to no one except counsel of record for the parties to this litigation and to the deponent and/or his counsel. Only those portions of any transcript that deal with confidential information will have to be treated as confidential under this Order, although the entire transcript will be confidential until the non-confidential portions are identified. Such non-confidential portions are not governed by this Order.

8. Every person, except Counsel, the parties and counsel's employees or independent contractors, to whom confidential information is to be disclosed in any way in any format including, but not limited to documents, information or testimony, shall state his/her consent to be bound by the terms of this Stipulation and

Protective Order by executing a copy of the Affidavit. Such Affidavits shall be kept by the party's counsel of record disclosing said confidential information and shall be provided to counsel for TWA within thirty days of the final termination of all of that counsel's cases in the instant litigation.

9. Except as provided hereinabove, within the ninety days after the conclusion of this litigation:

(1) All documents, including recorded testimony, containing information designated as confidential, and all copies thereof, in the possession or custody of any party or its counsel, other than TWA, shall be returned to counsel for TWA;

(2) All notes, memoranda, summaries, or other writings or recordings, and all copies thereof, which contain information designated confidential, in the possession, custody or control of the parties, their counsel or other persons retained by them to assist in this litigation, shall be returned to the respective counsel for each party, and that counsel shall then destroy or return to counsel for TWA all such confidential information in his possession; and

(3) All plaintiffs' counsel who sign this Order will provide to counsel for TWA a written, signed representation that paragraph 9 has been complied with.

10. Upon motion, any party may for good cause shown apply for modification, waiver, or variance of the terms of this Stipulation and Protective Order.



## **Comments**

