1980

Protective Orders and Third-Party Government Access to Civil Discovery: A Modest Proposal

Pamela A. Mathy

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Recommended Citation
Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol9/iss1/4

This document is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Review by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.
PROTECTIVE ORDERS AND
THIRD-PARTY GOVERNMENT ACCESS
TO CIVIL DISCOVERY: A MODEST PROPOSAL

Pamela A. Mathy*

Reasoning from the liberal discovery preferred in the Federal Rules of Civil Procedure the government has recently requested access to materials produced in a private civil suit for use in its own civil suit.\(^1\) In theory the government has unlimited resources to devote to litigation, but in fact many practical restraints apply. A sharing-of-discovery rule, which would accord the government no new discovery rights but which would assure it of the most efficient means possible of enforcing its existing rights, would be a small step toward aiding the prompt disposition of government cases in a way that is totally consistent with the federal discovery rules.\(^2\)

---


2. Because of the practical limitations on the resources available to the government and the importance of many rights protected only by the government, the case for third-party government access to discovery materials is most compelling. Many of the same reasons for establishing a rebuttable presumption in favor of the government will also apply to private third-party access although additional exceptions to
The federal discovery rules do not prevent a civil litigant from voluntarily providing the government with materials produced during discovery. The rules do contain provisions whereby one party may request or all parties may stipulate to a protective order entered "to protect a party or a person from annoyance, embarrassment, oppression, or undue burden or expense. . ."3 The central legal and tactical question presented by the government's motion for access to discovery materials is whether a protective order ought to be entered to prevent this sharing or whether an existing protective order ought to be modified or vacated to facilitate the sharing. This Article will discuss the circumstances under which the government may seek and obtain modification or vacation of existing protective orders in order to obtain in one request materials to which it would otherwise be able to obtain access only after a time-consuming discovery practice of its own.

The concept of sharing discovery with interested litigants has been recognized only recently in the case law and is in a process of evolution. The first requests for entry, modification, or vacation of protective orders were made by private parties attempting to facilitate wider access to discovered materials or to prevent another party from disseminating information obtained in discovery to other parties. The district courts reviewing third-party requests for sharing have applied the balancing test applicable to the entry of protective orders to requests for modification or vacation of protective orders.4 Theoretically, a third party may desire access to discovery in order to obtain at one time essential testimony which would otherwise be unavailable. In fact, the economies of sharing have been the motivating factor in every reported case discussing third-party access. With the central concern of efficiency in mind courts ruling on private third-party requests for sharing have merely supplemented the factors balanced in a decision whether to enter a protective order with those implicated by a motion for vacation or modification of a protective order.5 This elaborate bal-

3. FED. R. Civ. P. 26(c); see note 34 infra; text accompanying notes 24-40, 52-53 infra.
4. See text accompanying notes 120-151 infra.
5. See text accompanying notes 190-230 infra. The question of third-party government access is likely to arise mainly in the complex case where the savings in lit-
ancing test has been accepted by district courts ruling on the government's requests for access to discovery and by appellate courts reviewing their decisions. Courts ruling on third-party governmental access have balanced the additional interests of the government in deciding questions of access.

When the handful of district and appellate court cases treating the government's right to seek modification or vacation of a protective order are viewed as a whole it can be seen that the same factors have been referred to by more than one court as resolving the competing interests. Unfortunately, a factor which militated against access in one case has often been used to justify access in another. Thus, an examination of the case law merely enables one to collect the factors relevant to government access: the status of the movant as private or government litigant; the scope of the requested access; the reliance, if any, on an existing order; the question of whether there was stipulation to the order; and the reasons for

6. See text accompanying notes 120-151, 190-230 infra.
7. Other than an expressed concern with augmenting the considerable powers of the government to obtain materials it requires to discover its case, see note 59 infra, there has been no comprehensive discussion of the government's interests in obtaining the documents. See Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979).
8. See text accompanying notes 136-139 infra.
9. See text accompanying notes 237-241 infra. Although reliance could be used to differentiate procedurally between district court treatment of motions to enter protective orders and motions to modify or vacate existing orders which have already been used to structure discovery, in fact it has never been so used. For a discussion of cases concerning reliance, Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979); American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978); Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964), see text accompanying notes 195-241.
10. Some courts have ruled that deference to a stipulated protective order should be the norm. See, e.g., GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129, 131-32 (S.D.N.Y. 1976).

If parties are to be encouraged to stipulate to the sequence, timing, and content of discovery, the necessary question of what legal standard should apply to modification of a stipulation still must be addressed. There is not a universally recognized requirement that parties successfully opposing modification of stipulations be restored to the same position they would have if no agreement had been made, but all courts balance the equities and refuse modification unless such refusal would work manifest injustice. See, e.g., Fairway Constr. Co. v. Allstate Modernization, Inc., 495 F.2d 1077, 1079 (6th Cir. 1974); United States v. Harding, 491 F.2d 697, 698 (10th Cir. 1974); Sherman v. United States, 462 F.2d 577, 579 (5th Cir. 1972); Greenspahn v.
seeking access. Because few courts have defined the factors with care and because courts have proceeded in a vacuum, either unaware of the growing body of case law with which their holdings must be reconciled or hesitant to commit themselves to a rule when a factually tied ruling will suffice, the case law provides only the groundwork for a comprehensive rule on third-party government access to discovery. Certainly the most serious indictment of the balancing test is that it has not identified and resolved successfully the conflict between the competing interests in government access to discovery. Further, a balancing test used as a ratio decidendi of motions to modify protective orders is unsatisfactory itself regardless of its application by the courts. A balancing test rarely provides to a litigant a blanket assurance that discovered materials will be available for or protected from transfer to the government. Although it may not always be just to provide a litigant with that assurance, the balancing test may create a burden of supervision at least when it is confronted with the massive discovery conducted in large cases and the discovery tactics used to prolong small cases. In addition the balancing test is undiscriminating; it accords all of the competing interests an equal weight when in fact the interests are not in parity.

This Article proposes that government access to discovery material be encouraged through the adoption of a rebuttable presumption of access in accordance with the spirit and goals of the Federal Rules of Civil Procedure. To provide a background for an

Joseph E. Seagram & Sons, Inc., 186 F.2d 616, 620-21 (2d Cir. 1951); Maryland Cas. Co. v. Rickenbaker, 146 F.2d 751, 753 (4th Cir. 1944). If the order was collusively entered or if it exceeds the "good cause" justifications for protection, parties must not be permitted to control the scope of discovery. See Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949, 954-55 (8th Cir.), cert. denied, 441 U.S. 907 (1979); United States v. G.A.I. Corp., 596 F.2d 10, 16 (2d Cir. 1979).

11. See text accompanying notes 124-127 infra.
12. See text accompanying notes 53-59, 231-251 infra.
13. See note 37 infra.
14. In cases where the potential recovery is great, parties have the incentive to exhaust every possible avenue of discovering new evidence; the longer discovery lasts, the more remote is the possible adverse judgment and the closer is the possible settlement. See McAllister, The Big Case: Procedural Problems in Antitrust Litigation, 64 HARV. L. REV. 27 (1950).
15. In cases involving a relatively small potential recovery the balance struck creates a dilemma because one party may have the incentive to protract discovery beyond the value of the case in order to induce settlement or dismissal and to discourage other similarly situated potential litigants from filing a suit. See F. JAMES & G. HAZARD, CIVIL PROCEDURE § 6.2, at 178 (2d ed. 1977).
16. See text accompanying notes 252-273 infra.
analysis of the existing cases on the sharing of discovery, the discussion initially focuses on necessary preliminary matters—the mechanics of federal discovery rules on protective orders, the competing interests which must be weighed in resolving sharing-of-discovery disputes, the standing of the government as a nonparty to request third-party access, and the jurisdiction of courts of appeals to review a district court's discovery rulings.

The examination of the case law on government access is organized by forum. District courts have generally denied the government's request for access; however, whether access has been granted or denied, the focus of those courts has been flawed since the factors identified as resolving the question have been ill-defined and are idiosyncratic. Appellate courts have been more tolerant of government third-party access to discovery. Several circuit courts have viewed the problem of sharing with greater sensitivity to the developing body of case law but have not necessarily identified the factors employed in the balancing test with any greater precision. The holdings of the cases when taken together have a scattershot effect. The difference in relative receptiveness of the two forums provides both the focal point of the problem and a tool useful in organizing a demonstration of why there is a need for a uniform sharing rule, how the proposed rule evolved, and what variables should be balanced in resolving questions of access.

17. See text accompanying notes 24, 25-40, 53 infra.
18. See text accompanying notes 53-59 infra.
20. See text accompanying notes 86-119 infra.
22. Courts of appeals that have permitted nonparty government access include United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979); American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1979), cert. denied, 440 U.S. 971 (1979). Courts of appeals barring nonparty access to civil discovery include Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979); see note 190 infra.
The proposal for a uniform sharing rule provides that there be a presumption of government access to discovery materials when the materials are not subject to a valid claim of privilege, are relevant to an already-initiated civil investigation or litigation, and when there is no evidence that the government is exploiting its civil case to obtain materials which would otherwise be unavailable to it. This approach adequately advances the two policy goals of federal discovery: The establishment of workable rules to enable parties to plot out the course of discovery without frequent recourse to the courts for interpretation, and the availability of a workable public forum for the resolution of legal disputes. The rebuttable presumption preserves self-regulation of discovery to as great a degree as possible while at the same time assuring the expeditious, efficient, and public disposition of federal claims.  

CASE LAW ON PROTECTIVE ORDERS AND GOVERNMENT ACCESS TO DISCOVERY

Preliminary Questions

Although the argument for the adoption of a rebuttable presumption in favor of government access to discovery materials is developed primarily through an analysis of the balancing test used in the cases to decide third-party requests for access to discovery, that case law is unsatisfactory for several reasons. For example, district courts have often failed to specify what interests are being bal-

---

23. The proposed rule speaks only to government access to private discovery and does not directly address the permissibility of private litigants, sharing their discovery with other private litigants—e.g., by selling or distributing photocopied discovery materials to other interested litigants—or the permissibility of private litigants, obtaining the government’s civil or criminal discovery. Protective orders have been modified so that private plaintiffs in an antitrust suit could have documents produced in a government antitrust suit. See Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964); see also American Securit Co. v. Shatterproof Glass Corp., 20 F.R.D. 196 (D. Del. 1957) (modifying protective order so that private defendant in patent infringement suit could have documents produced in prior private suit by plaintiff against other defendants).


The issue of government access to private discovery to further its own criminal investigation is also outside the scope of the rule. Important fifth amendment objections can be raised to government access to private discovery in order to fulfill its criminal investigatory powers. See Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 297 (2d Cir. 1979); United States v. American Radiator & Standard Sanitary Corp., 272 F. Supp. 691, 701-02 (W.D. Pa. 1967).
advanced while appellate courts have often unnecessarily reviewed discovery orders and, in focusing exclusively on the specific controversy presented, have only slightly advanced the systematic analysis of sharing. Although the case law is used to establish the thesis of the Article negatively, the policies of the federal discovery rules provide the affirmative reasons for sharing. Thus, a brief introduction at this time to the mechanics of pretrial practice with respect to protective orders and to the basic terminology of the competing interests in sharing is helpful. Further, because only one district court and one appellate court have explored the question of whether the government as a nonparty has the standing to obtain access to discovery materials subject to a protective order, it is useful to set out the parameters of the standing issue. As we shall see, since the government can easily gain standing and since courts tend to grant it standing de facto even when it has failed to request it properly, standing is a false issue. The jurisdictional problems of appellate decisions on the sharing issue are more troublesome. With the exception of the Eighth Circuit Court of Appeals, appellate courts have reached the issue of nonparty access to discovery by interlocutory appeal without first finding a jurisdictional basis for that interlocutory appeal. In fact, a district court’s protective order should rarely be reviewable.

The proper policy on modification of protective orders must flow from an appreciation of the mechanics of the rules and the state of the case law, where the policies of the rules are made concrete in application to requests for protection or access. A discussion of the mechanics of the rules, the standing of a nonparty movant for access, and the propriety of appellate review is necessary before a closer examination of district and appellate case law is undertaken.

**The Problem: Protective Orders and the Discovery Rules.** —Prior to the adoption of the Federal Rules of Civil Procedure in 1938, prior to the adoption of the Federal Rules of Civil Procedure in 1938,24 pretrial development of issues of law and fact was narrowly defined and often difficult.25 Under common law rules

---


25. Historically, every bill in equity was said to be a bill of discovery and the sworn statements taken from the parties and others constituted the evidence upon which the chancellor decided the case. In time, equity did develop discovery devices that were the precursors to the modern discovery rules. Common law, on the other hand, depended almost entirely on the pleadings to give notice of the claims and defenses until the late nineteenth century when statutory machinery for obt-
the pleadings were the primary device for giving notice of the nature of the plaintiff’s claim and of the defendant’s defense, as well as for bringing out the facts of the case. Additional discovery could be had only of the facts which pertained to the case of the party seeking discovery and which would constitute admissible evidence at trial. The Federal Rules of Civil Procedure made available new procedural mechanisms designed to eliminate the obstacles to more extensive pretrial factfinding. There had been concern that delaying the probing of an adversary’s claim until the time of trial, the usual result under the common law rules, abetted the concealment and the fabrication of evidence. The motivating spirit of the federal rules was to minimize the possibility that judicial decisionmaking would rest upon an incomplete array of facts. With the adoption of the discovery rules “[n]o longer [could] the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case.”

Discovery rights under the present federal rules are not unfettered, however. The main restriction is that discovery may be had only of matters relevant to the subject matter of the underlying...
suit. Nor may discovery be had of privileged matters or, unless the materials are otherwise unavailable, of work product. The broad scope of discovery is further made subject to Rule 26(c) which expressly authorizes a trial court to issue a protective order to limit either the scope of discovery or the scope of access to discovered materials. Rule 26(c) provides: "Upon motion by a party . . . and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."

The most common type of protective order limits the disclo-

---

32. FED. R. CIV. P. 26(b). The spirit underlying the 1938 discovery rules, as described in Hickman v. Taylor, 329 U.S. at 501, illustrates two main changes in federal discovery. First, the rules broadened the scope of discovery significantly. Second, the flexibility of specific rules gives judges the opportunity to exercise a great degree of control over their dockets.

Current efforts at discovery reform have focused on the subject matter restriction to discovery and have concluded that the scope of permissible inquiry is too broad. For example, an ABA report on discovery reform has advocated a change to Rule 26(b)(1) which would limit the scope of discovery in all cases to the issues implicated in that case. ABA SPECIAL COMM. FOR THE STUDY OF DISCOVERY ABUSE, REPORT TO THE BENCH AND BAR 2-3 (1977); see notes 259, 268 infra. The issue-related restriction is the same as that contained in the original 1938 discovery rules and in at least one district court's local rules on complex litigation. N.D. OHIO R. 4 (Complex Litigation).

33. FED. R. CIV. P. 26; see notes 55, 265 infra.

34. Rule 26(c) of the Federal Rules of Civil Procedure provides:

(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 one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

Id. (emphasis added.)
sure of information to specified parties and prohibits their using the information for any purpose other than preparing for trial. A second type of protective order limits the use of disclosed information to any independent third party, such as an accountant, who submits a tabulation or a statistical summary to the party. In this way the discovering party never sees the confidential data. In either case the protective order must be narrowly drawn to avoid unnecessary infringement of first amendment rights, and the "good cause" requirement of Rule 26(c) insures that all documents filed and proceedings held in federal civil litigation are open and a matter of public record absent a legitimate reason to restrict public access. The burden of showing "good cause" rests on the party seeking the protective order, and its satisfaction generally has


37. The debate on whether attorneys and parties retain their first amendment rights in discovery materials has been lively. In International Prods. Corp. v. Koons, 325 F.2d 403 (2d Cir. 1963), the court of appeals upheld an order sealing a deposition which described illegal payments made to officials in South America and forbade the parties and attorneys from publicizing the information outside of the trial. Id. at 407. The court agreed that dissemination of the information would be "'contrary to the best interests of the foreign policy of the United States.'" Id. at 405 (quoting affidavit of Appellant). One court in dictum has read Koons to stand for the proposition that parties waive their first amendment rights in discovery materials when they enter the discovery process. Rodgers v. United States Steel Corp., 536 F.2d 1001, 1006 (3d Cir. 1976). Other courts have disagreed, however, including the Court of Appeals for the District of Columbia in the well-reasoned majority opinion of In re Halkin, 598 F.2d 176, 187 (D.C. Cir. 1979); see Reliance Ins. Co. v. Barron's, 428 F. Supp. 200, 204 (S.D.N.Y. 1977); Davis v. Romney, 55 F.R.D. 337, 344 (E.D. Pa. 1972). Thus, even a well-drawn protective order should not be read as a waiver of first amendment rights but correspondingly a properly drawn protective order supported by a showing of "good cause" as required by the federal rules is not violative of the first amendment.


39. For discussions of the requirements of "particularized need" or "good cause," see Schlagenhauf v. Holder, 379 U.S. 104, 118 (1964); General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204 (8th Cir. 1973); Guilford Nat'l Bank v. Southern Ry., 294 F.2d 921, 923 (4th Cir. 1962); Alltment v. United States, 117 F.2d 971,
been interpreted by reviewing courts as requiring the application of a balancing test.\textsuperscript{40}

A balancing test theoretically permits a court to examine any relevant factor in deciding if dissemination of described information results in annoyance, embarrassment, oppression, or undue burden. In fact, the case law on entry of protective orders has focused on similar factors of privilege,\textsuperscript{41} trade secrets,\textsuperscript{42} and other types of confidential commercial information.\textsuperscript{43} In short, the court weighs the \textit{need} for protection against the \textit{preference} for public access to pretrial and trial materials. Absent the existence of one of those traditional benchmarks, however, a litigant rarely is able to predict whether items sought to be protected from disclosure will in fact be held in camera. Because other material seldom will warrant protection, the uncertainty operating against the proponent is not necessarily important. The presumption is that trials are to be held in a public forum and that matters produced in preparation for trial are available for public inspection. The party desiring protection must justify the need for and the means of protection. Finally, the balancing test employed to decide the propriety of entrance of

\begin{itemize}
\item Regardless of "particularized need" each party should have reasonable access to information relevant to the case. See E.I. Du Pont De Nemours Powder Co. v. Masland, 244 U.S. 100, 103 (1917); Olympic Refining Co. v. Carter, 332 F.2d 260, 265 (9th Cir. 1964); Haritney Pen Co. v. United States Dist. Court, 257 F.2d 324, 331 (9th Cir. 1961); C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2008 (1970).
\item 41. \textit{See, e.g.}, American Civil Liberties Union v. Brown, 609 F.2d 277, 282-83 (7th Cir. 1979); Davis v. Romney, 55 F.R.D. 337, 340-42 (E.D. Pa. 1972).
\end{itemize}
a protective order encompasses the accommodation achieved in the Federal Rules of Civil Procedure as a whole between full and open discovery and safeguarding against unrestrained rummaging through an opponent's files, the imposition of excess cost, and the invasion of an opponent's preparation for litigation.

Arguing from the liberal discovery preferred in the federal rules, several district courts have used the same balancing test applicable to entry of protective orders in order to rule on a private nonparty's request to use discovery materials produced in that case. These district courts have both granted and denied motions for access without expressly differentiating among the procedural distinctions involved in requests for entry, modification, and vacation or the different substantive burdens masked by the procedural practices. The method of balancing uniformly has also been accepted by district courts ruling on requests for nonparty government access to discovery even though the case law is far from settled. District courts have viewed such requests with disfavor while courts of appeals have been more receptive.

An illustrative case on nonparty access is Williams v. Johnson & Johnson in which plaintiffs were suing the manufacturer Johnson & Johnson for redress for injuries incurred through the use of defendant's oral contraceptives. Johnson & Johnson desired entry of a protective order to prevent plaintiffs from divulging to nonparties information obtained through discovery. Plaintiff had indicated an intention to share discovered materials with others similarly situated who had filed suit against Johnson & Johnson or other manufacturers of similar contraceptives. The district court denied the motion for entry of a protective order after weighing the advantages of sharing against the defendant's unsubstantiated allegation that sharing would "stir up" litigation.

44. See text accompanying notes 121-139 infra.
45. In fact there are different considerations presented on entry versus modification or vacation. For example, a party may rely on an existing protective order but can have no justifiable expectation that materials will not be disclosed prior to judicial approval of a protective order.
46. See text accompanying notes 142-149, 221-229 infra.
47. See cases cited notes 21-22 supra.
49. Id. at 33.
50. Id. at 32.
51. Id. at 33.
52. Id. For further discussion of Williams v. Johnson & Johnson, see text accompanying notes 121-123 infra.
If a litigant wishes to protect materials against disclosure to a nonparty he or she should request the entry of a protective order. Preferably, the order should be stipulated to by all the parties to the litigation. Ideally, the proposed order should identify the nonparty, private or governmental, as an entity whose access is being precluded. The types of materials falling under the purview of the proposed order should be detailed to support an argument that counsel has carefully considered what materials are appropriately withheld from the nonparty if it should seek access to them. Narrow provisions also lessen the likelihood that the order infringes first amendment rights in discovery. Finally, litigants must be able to make their case for protection using the rubric of the balancing test.

As shall become apparent, it is a difficult task to strike a balance between the competing interests of the parties. The task is not greatly simplified even when the interests to be balanced and the factors used to gauge and weigh the interests are clearly defined. To place the case law in perspective it is helpful to sketch the competing interests in the protection of discovery materials.

As stated earlier, in the case of entry of a protective order the court balances the party’s need for protection of trade secrets, privileged information, and confidential commercial information against the opponent’s need for free access to and use of discovered documents in litigating the case. Further, the court’s interest in expeditious, inexpensive, and efficiently conducted litigation encourages entry of protective orders only when they in fact are necessary to encourage the full disclosure of all relevant evidence. If a protective order is not entered with respect to matters worthy of protection the producing party may not reply promptly, candidly, or without first attempting costly motions to strike or quash discovery requests. If matters not worthy of protection are included within the scope of a protective order the commitment to open use of discovery materials is defeated, and the reasons for motions to modify or vacate protective orders filed by the nonproducing party are increased.

53. See note 37 supra.

54. See text accompanying notes 41-43 supra. In In re The Upjohn Co. Antibiotic Cleocin Prods. Liab. Litigation, 27 F.R. Serv. 2d 392 (E.D. Mich 1979), the court opined that information in which the business defendant has a privacy interest might also qualify for protection even if it is not a trade secret or even if it does not confer a competitive advantage. Id.
In the case of modification or vacation of protective orders to permit nonparty government access, the interests of the parties take on added dimensions. The producing party is not only concerned that materials worthy of protection are not disclosed but also with the tactics of litigation. First, the producing party is concerned that it may have turned over documents pursuant to a protective order without contemplating that it may have prejudiced a future suit against the government. It also may have produced documents calculating that it would litigate difficult evidentiary questions later or it may have produced documents only because it could not afford to litigate the need for protection. In either case, once the government has entered the picture the stakes rise. Finally, the private party is especially concerned that, if documents and materials are turned over to the nonparty, legal analyses and other work product of opposing counsel are not.

55. Three courts have spoken recently on the issue of the transfer of work product to the government pursuant to the modification of a protective order. In Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979), Judge Medina's concurrence contains both a strong indictment of government access to work product and an excellent synopsis of the reasons militating against the sharing of work product:

Further, I am convinced that the Government's purpose is not merely to obtain the answers as given by the various witnesses, but to take advantage of the work product of the lawyers who have asked innumerable questions during the course of taking the numerous depositions involved in this case. In a case of this nature, involving a large number of experienced and able lawyers, there is much to be found in the questions propounded by the various lawyers. These questions are based on information obtained in earlier investigations and depositions, and they give hints as to further possible investigations, interpretations, and so on.

Id. at 298-99 (Medina, J., concurring in result) (emphasis in original).

On the other hand, in United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979), a different panel of Second Circuit judges implied that if the government can validly obtain documents through a civil investigative demand it can also obtain the "analytical memoranda [which] can be of assistance in the interpretation of the accumulated data." Id. at 14. Pursuant thereto, a district judge attempted to sort out work product privileges, GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129 (S.D.N.Y. 1979), but Judge Pierce ruled that GAF would not waive its work product privilege in complying with a civil investigative demand. Finally, Judge Greene presiding in United States v. American Tel. & Tel. Corp. ruled that MCI waived any work product privilege they had when they agreed to disclose items which they had discovered from ATT in the related MCI Communications Corp. v. American Tel. & Tel. Corp., 462 F. Supp. 1072 (N.D. Ill.), aff'd, American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1978), case and when they agreed to provide "any explanatory material or information which would be helpful to an understanding of the items produced." United States v. American Tel. & Tel. Co., No. 74-109 (D.D.C., filed Jan. 22, 1980).

The significance of the tangled web of work product is not only that the govern-
In contrast, the nonproducing party may be ambivalent as to whether the government should have access to materials it obtained through discovery on the opposing party. The nonproducing party may even oppose government access to information it would desire the government to have because it fears establishing a precedent of sharing. More likely, the nonproducing party will favor government access. In antitrust cases, for example, there are strong tactical advantages to assisting the government's case. First, if the government prevails, the relief ordered could address the competitive concerns of the private litigant. Second, section 5(a) of the Clayton Act permits the use of findings made in a government case as prima facie evidence in a private case. Even in non-antitrust cases, the adversary model of litigation can only encourage an opponent to be relieved when a new front is opened against an opposing party.

The government agency that desires nonparty access is attempting to obtain documents to assist in completing an ongoing investigation or litigation in the most efficient way possible. As any litigant, the government should not be interested in undermining protective orders since it too has need for them. The government should be interested in obtaining only documents to which it has a right of access, in the fastest and least expensive manner; but since the government is acting as an advocate, instances of overreaching can be expected to occur. The courts in mediating requests for modification or vacation should be concerned that modification or vacation granted too readily will discourage liberal discovery, will unfairly penalize one party for good faith compliance with discovery requests, and will encourage discovery disputes. Further, courts must be careful not to increase unnecessarily the government's already substantial information-gathering powers by permitting the government, through civil discovery-sharing, to obtain materials that assist a criminal case or materials that it would receive additional information through sharing to which it would not otherwise be entitled but also whether once the party has turned over the work product to the government, the producing party himself can obtain the work product. Under Judge Greene's order, since MCI waived its work product privilege, ATT would be able to obtain those materials shared with the government. Under this interpretation a producing party may not oppose the transfer of work product to the government once it has lost or conceded defeat on the basic issue of sharing discovery, since it may then be able to obtain the opponent's work product for himself.

57. See American Civil Liberties Union v. Brown, 609 F.2d 227 (7th Cir. 1979).
58. See note 23 supra.
The function of a sharing rule is not to expand the government's rights of discovery but to speed its access to materials to which it is otherwise entitled.

The Standing of the Nonparty Government to Obtain Access to Discovery Materials.—In a determination of nonparty government access, a threshold issue is whether the government has any right to challenge or seek review of a district court order on discovery. The general rule is that one not a party to a proceeding cannot make a motion for relief. The federal rules provide mechanisms for nonparties to intervene in ongoing proceedings for the limited purpose of challenging or seeking modification of a protective order. Some courts, however, have created an exception to the rule that it is reversible error to conduct a proceeding on behalf of a nonparty.

Of the many district and appellate courts to address the question of nonparty access to discovery materials only one district court and two appellate courts have addressed the standing of a nonparty to seek access. The district court addressing the question in Union Carbide Corp. v. Filtrol Corp. concluded that since Mobil Oil had not become a party to the suit in which the discovery was produced Mobil did not have the standing to move for

---

59. Judge Medina's concurrence in Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 297 (2d Cir. 1979), is persuasive on the hazards of lightly augmenting the government's powers of obtaining information: "The Government has broad investigative authority, including the power to subpoena persons and documents before the Grand Jury. I am not inclined to increase these powers by a balancing process and otherwise, and I concur in the position that the Government is 'an adversary litigant, confined in its powers.'" Id. at 298 (Medina, J., concurring in result) (quoting GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129, 133 (S.D.N.Y. 1976)).


60. FED. R. CIV. P. 7(b); see Spangler v. Pasadena City Bd. of Educ., 552 F.2d 1326, 1339 (9th Cir. 1977); Moten v. Bricklayers, Masons and Plasterers Int'l Union, 543 F.2d 224, 227 (D.C. Cir. 1976) (per curiam). Further, a nonparty does not have standing to appeal from a decision in the action adverse to its interests. Warth v. Seldin, 422 U.S. 490, 498-99 (1975); Barlow v. Collins, 397 U.S. 159, 164 (1970); Utility Contractors Ass'n v. Toops, 507 F.2d 83, 85-86 (3d Cir. 1974).

61. FED. R. CIV. P. 24(b)(2).

62. See, e.g., SEC v. Lincoln Thrift Ass'n, 577 F.2d 600 (9th Cir. 1978); United States v. Louisiana, 543 F.2d 1125 (5th Cir. 1976); Roach v. Churchman, 457 F.2d 1101 (8th Cir. 1972); Smartt v. Coca-Cola Bottling Corp., 337 F.2d 950 (6th Cir. 1964), cert. denied, 380 U.S. 934 (1965).

modification of the protective order governing the access to discovery.\textsuperscript{64} The Second and the Fifth Circuits both overlooked the technical defects presented when the government sought access to discovery materials without having first formally intervened in the case.\textsuperscript{65} Notwithstanding the relaxation of the rules for the benefit of the government the Second Circuit took the time to outline the preferable way by which the government is to present matters in pending cases:

The Government may not, however, simply by picking up the telephone or writing a letter to the court (as was the case here), insinuate itself into a private civil lawsuit between others. The proper procedure, as the Government should know, was either to subpoena the deposition transcripts for use in a pending proceeding such as a grand jury investigation or trial, in which the issue could be raised by motion to quash or modify the subpoena, see Rule 17(c), F.R.Crim.P., or to seek permissive intervention in the private action pursuant to Rule 24(b), F.R. Civ. P., for the purpose of obtaining vacation or modification of the protective order.\textsuperscript{66}

Should the government be unable to intervene through the permissive intervention mechanism of the rules\textsuperscript{67} it, as a nonparty, may be able to seek review of a district court order adverse to its interests through a petition for a writ of mandamus\textsuperscript{68} against the district court.\textsuperscript{69} Finally, should the government be unable to se-

\begin{thebibliography}{99}
\bibitem{64} \textit{Id.} at 557.
\bibitem{65} The Second Circuit held that the district court’s entertainment of the government’s motion for modification or vacation of the protective order amounted to a “de facto grant of permissive intervention” and in the absence of the opposing party’s failure to challenge the government’s status, the government had the standing to seek review of the district court’s adverse decision. Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 293-94 (2d Cir. 1979).
\bibitem{66} The Fifth Circuit held that it would waive the requirement of a formal motion for intervention when the district court invited the government to file a motion for modification of a protective order without first seeking intervention. Smith v. National Provisioner, Inc., 589 F.2d 786, 788-89 (5th Cir. 1979). Acknowledging that some courts have held that it is reversible error to conduct proceedings at the request of nonparties, \textit{id.} at 788, the court noted that the “Fifth Circuit has been lenient in hearing the appeals of nonparties” taken from the entry of discovery orders. \textit{Id.}
\bibitem{67} 594 F.2d at 294 (citations omitted).
\bibitem{68} \textit{Fed. R. Civ. P.} 24(b) (requires “timely application” for intervention).
\bibitem{69} For a discussion of extraordinary writs, see text accompanying notes 103-112 \textit{infra}.
\bibitem{69} Society of Prof. Journalists v. United States Dist. Court, 551 F.2d 559 (4th Cir. 1977), \textit{cert. denied}, 434 U.S. 1022 (1978). The Second Circuit, however, has
\end{thebibliography}
cure by mandamus what it has failed to do by intervention, it may be possible for a party to the suit to argue the government’s interests in access on behalf of the government. Certainly, the nonproducing party may telegraph its concurrence or neutrality with respect to an interposed government request for access by not filing an objection to a motion for sharing. It is arguable, however, whether private parties may go beyond that and argue rights which belong either to the government or to the public as a whole under extension of the concept of private attorney general. In our adversary model of justice, there are distinct jurisprudential reasons for insisting that only the government or congressionally designated proxies may argue the government’s rights. Nonetheless, while it tactically may be preferable for the government to state its own case and while it may be prudent for district courts to view a party’s request for sharing with the government with caution, a party should be permitted to make such a request. The same policy reasons that encourage the adoption of the sharing rule militate in favor of approval of a party’s request for government access.

The Jurisdiction of Courts of Appeals to Review District Court Discovery Orders.—District courts at present generally disallow modification of protective orders for the benefit of the government. It is in the developing body of appellate law on government access that one can discern both the acceptance of the balancing test as the ratio decidendi of sharing requests and the acceptance of the principle that the policies of the Federal Rules of Civil Procedure do not preclude sharing and may in fact favor sharing. The appellate law contains in nascent form the bifurcated proposal for a sharing rule made in this Article.

District courts are usually the courts of first and last resort in

stated in dictum that mandamus is not available when “the only purpose was to obtain modification of a pretrial order for investigative purposes.” Martindell v. International Tel. & Tel. Corp., 594 F.2d at 294 (citations omitted).

70. The concept of private attorney general is used to encompass legislatively created instances when private litigants may argue public rights. 15 U.S.C. § 15 (1976), which lets private parties file treble damage suits for any violation of the antitrust laws, is the paradigm private attorney general statute. That statute was intended to enlist the support of private parties to the Department of Justice’s tasks in enforcing the antitrust laws. See, e.g., Locklin v. Day-Glo Color Corp., 429 F.2d 873 (7th Cir. 1970), cert. denied, 400 U.S. 1020 (1971); Bergen Drug Co. v. Parke, Davis & Co., 307 F.2d 725 (3d Cir. 1962); Kinnear-Weed Corp. v. Humble Oil & Refining Co., 214 F.2d 891, 893 (5th Cir. 1954), cert. denied, 348 U.S. 912 (1955).

71. For a discussion of the nonproducing litigant’s interests in sharing discovery with the government, see text accompanying notes 53-59 supra.

72. See text accompanying notes 231-273 infra.
deciding questions relating to discovery in pending suits. Rules applicable to the appeal of any interlocutory order, including discovery orders, are restrictive. Through a long line of cases, the Supreme Court has made it clear that interlocutory appeal is to be discouraged, but at least one court of appeals has so expanded the requirements for interlocutory review that, if adopted by other courts, district court orders on sharing may routinely be reviewed. Thus, consideration of the jurisdictional bases for appellate review of discovery orders is essential.

Examining the requirements of interlocutory appeal will demonstrate that few discovery orders are or should be appealable. Because district courts at present are disallowing modification of protective orders for the benefit of the government, an argument encouraging the narrow interpretation of existing standards of interlocutory appeal will not make it easier for the government to gain access to discovery material. It is important, however, not to rely on the appellate courts' relatively more sympathetic view of requests for sharing but rather to encourage the adoption by district courts of a comprehensive rule on sharing discovery with the government. Facilitation of government access should take place through alteration of the substantive rules regulating nonparty access to discovery and not through further erosion of jurisdictional standards.

**Jurisdictional Rules Applicable to Interlocutory Appeal.**—Under the federal rules a final judgment is usually the prerequisite to appeal. "Finality," however, has been subjected to

---


74. See Socialist Workers Party v. Grubisic, 604 F.2d 1005, 1007 (7th Cir. 1979) (per curiam). For a discussion of the law of the Seventh Circuit on this issue, see text accompanying notes 87-101 infra.

75. 28 U.S.C. § 1291 (1976) provides:

§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

Id.

Title 28 U.S.C. § 1292(a)(1) (1976) provides:

(I) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the Dis-
various definitions and exceptions. In 1949 the Supreme Court in
Cohen v. Beneficial Industrial Loan Corporation\textsuperscript{76} elaborated a
test to embody the various common law exceptions that had devel-
oped to the finality rule. The Court held that an otherwise collat-
eral order is a “final decision” within the meaning of section 1291 if
(1) it is a final determination of a claim of right “separable from,
and collateral to, rights asserted in the action”\textsuperscript{77} (2) it is of suffi-
cient importance to warrant immediate review; and (3) review can-
ot await final judgment because “[w]hen that time comes, it will
be too late effectively to review the . . . order, and the rights
conferred . . . will have been lost, probably irreparably.”\textsuperscript{78} Be-
cause the purpose of the final judgment rule is “to combine in one
review all stages of the proceeding that effectively may be re-
viewed,” the rule does not foreclose interim appeal from an order
that cannot be reviewed meaningfully at a later stage.\textsuperscript{79} Thus, the
Cohen rule establishes a significant exception to the final order rule
crucial to the litigant who seeks review of discovery orders which
ordinarily are not final.

Whether a discovery order raises important and unsettled is-
issues of law separable from the merits and demanding immediate
review under the collateral order doctrine is a question which has
been answered in the negative by the Supreme Court and federal
appellate courts since 1906. In Alexander v. United States\textsuperscript{80} the
Supreme Court ruled that a witness must refuse to testify or to
produce pursuant to a discovery request and be held in criminal
contempt before a right to review the discovery order, inferen-
tially, and the contempt citation, directly, arises.\textsuperscript{81} Alexander
imposed an important qualification on the collateral order rule
when review of discovery orders is sought. A party wishing to ob-

\textsuperscript{76} 337 U.S. 541 (1949).
\textsuperscript{77} Id. at 546.
\textsuperscript{78} Id.
\textsuperscript{79} Id.
\textsuperscript{80} 201 U.S. 117 (1906).
\textsuperscript{81} Id. at 121. \textit{See also} Cobbledick v. United States, 309 U.S. 323 (1940); Lampman v. United States Dist. Court, 418 F.2d 215 (9th Cir. 1969); Borden Co. v. Sylk, 410 F.2d 843 (3d Cir. 1969); Digital Data Sys. v. Carpenter, 387 F.2d 529 (5th Cir. 1967); American Express Warehousing, Ltd. v. Transamerica Ins. Co., 380 F.2d 277 (2d Cir. 1967).
tain collateral review of a discovery order must refuse to comply with the order on discovery, be held in criminal contempt, and, unless a stay of the contempt citation is granted by the district or appellate court, risk incarceration to prove his or her good faith in seeking collateral appeal.

Since the Supreme Court’s articulation of the finality standard in Cohen, several courts of appeals have addressed the issue. In Covey Oil v. Continental Oil Co., the Tenth Circuit challenged the Alexander rule, applying the collateral order doctrine of Cohen to permit the immediate appeal of an order denying a motion to quash a subpoena duces tecum requesting the production of trade secrets from a nonparty. The court noted that “[t]he threshold question of appealability is not to be decided by rote, because cognizance must be given to the competing requirements of finality and fairness to the witness.” The court found that the issue to be raised by interlocutory appeal was severable from the merits of the underlying suit and that due to the nature of the information to be produced the appellant could suffer irreparable harm if appeal were delayed. The court distinguished the logic of the Alexander rule by holding that “[t]hese non-party witnesses should not be required to expose themselves to the hazard of punishment in order to obtain a determination of their claimed rights.”

The Seventh Circuit Court of Appeals has also deviated from a strict application of the Alexander rule. In American Telephone & Telegraph Co. v. Grady, the court applied the Cohen rule to permit A.T.T. to secure immediate review of an order which enabled MCI, who was suing A.T.T. under the antitrust laws, to turn

82. 340 F.2d 993 (10th Cir.), cert. denied, 380 U.S. 964 (1965).
83. Id. at 996.
84. Id. (footnote omitted).
85. Id.
86. Id. at 996-97.
87. See Socialist Workers Party v. Grubisic, 605 F.2d 1005 (7th Cir. 1979) (per curiam); American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979); cf. Carter Prods., Inc. v. Eversharp, Inc., 360 F.2d 868, 870-72 (7th Cir. 1966) (district court order denying motion to compel deportation testimony and production of documents was held final and appealable). The Carter court stated: “On the merits we think the district court’s order is erroneous,” and what “is critical is whether the party unsuccessfully seeking the subpoena has any other means of obtaining review.” Id. at 872 (footnote omitted) (quoting Horizons Titanium Corp. v. Norton Co., 290 F.2d 421, 424 (1st Cir. 1961)).
88. 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).
89. For a recent comprehensive discussion of the elements of the Cohen Rule under Seventh Circuit law, see First Wis. Mortgage Trust v. First Wis. Corp., 571 F.2d 390, 393 (7th Cir. 1978) (adopted en banc).
over to the Department of Justice certain documents it had obtained during the course of discovery. The government intended to use those documents in the prosecution of its related civil antitrust case pending against A.T.T. in another district. The court held that because the discovery order directs MCI to turn over the discovered material to the government, ATT does not have the option sanctioned in Alexander in order to challenge and stop the transfer of custody of the materials. For these reasons, this court finds Alexander to be inapposite, applies the "collateral order" doctrine of Cohen, and holds that the particular species of discovery order under review is final and appealable.

The Seventh Circuit in American Telephone & Telegraph v. Grady adopted the same strategy as employed by the Tenth Circuit in Covey Oil. In both instances, the court ruled that the policy reasons articulated in Alexander did not apply to a nonparty who was not able to stop the transfer of documents, be held in criminal contempt for noncompliance, and appeal; thus an order which otherwise met the rigorous muster of Cohen should be considered final for purposes of appeal.

In Socialist Workers Party v. Grubisic the Seventh Circuit adopted an even more expansive approach. In that case Illinois State's Attorney Carey appealed a district court order refusing to quash a subpoena which required nonparty Carey to produce the

90. The government sought access to all of the materials discovered in the MCI case alleging that its action encompassed virtually all the anticompetitive practices of which plaintiffs complain here. Discovery in the MCI case commenced early in 1974. 594 F.2d at 595.


92. 594 F.2d at 596 (citation omitted) (footnote omitted).


94. The courts in both Covey Oil and Carter Prods., v. Eversharp, Inc., 360 F.2d 888 (7th Cir. 1966), use the dictum in Cobbledick v. United States, 309 U.S. 323, 329 (1940), to reinforce their move from the conclusion that the policy reasons of Alexander do not apply to the thesis that the Cohen test is satisfied and should apply. In Cobbledick the Supreme Court noted that "[d]ue regard for efficiency in litigation must not be carried so far as to deny all opportunity for the appeal contemplated by the statutes." Id. (footnote omitted). However, since the Cohen rule is not statutory, it is arguable whether the courts are indeed effectuating the legislative intent underlying the jurisdictional statutes or are instead unduly expanding the number of cases which are considered directly appealable.

95. 604 F.2d 1005, 1007-08 (7th Cir. 1979) (per curiam).

96. Id. at 1006.
transcript of a state grand jury proceeding. Plaintiffs Socialist Workers Party had filed a civil rights action alleging political harassment during 1969 and 1970 through a conspiracy involving the Legion of Justice, a right wing paramilitary organization, members of the Chicago Police Department, and members of the 113th Military Intelligence Group of the United States Army. Plaintiffs served a subpoena duces tecum on the State’s Attorney requesting him to produce state grand jury transcripts which would show that certain defendants’ deposition testimonies contradicted earlier testimony which they had given before the grand jury. The district court ordered the State’s Attorney to produce the requested materials for the plaintiffs. On appeal the Seventh Circuit noted the inapplicability of Alexander to a nonparty, deemed the requirements of the Cohen rule to be satisfied, and permitted appeal because immediate collateral review was a prerequisite to any meaningful appellate review of the district court order.

The expansiveness of the Grubisic decision lies not in the size of the class of litigants exempted from Alexander but in the method by which the Court came out from under the Alexander rule. First, the court cited Covey Oil for the proposition that the Alexander rule should not apply when nonparties challenge discovery orders. The court similarly distinguished Alexander in order to permit appeal under the Cohen rule but concluded that the State’s Attorney’s status as nonparty or as elected official alone was not a “sufficient bas[is] on which to carve out a general exception to the Alexander rule.” Thus, the court fashioned only a narrow extension of the Cohen-Alexander principle to apply in favor of nonparty elected officials. However, the method of expanding the exemption from Alexander, that of requiring some factor in addition to nonparty status, could be followed by other courts wishing to bypass Alexander in individual cases.

Due to the statistical infrequency of elected officials chal-

97. Id.
98. The district court ruled that plaintiffs had demonstrated “a compelling necessity with sufficient particularity for discovery of the grand jury transcripts” when the evidence was needed for impeachment of witnesses, was relevant to the disposition of the present case, and was otherwise unavailable to the plaintiffs. Portions of the unpublished district court order are reproduced at id.
99. Id.
100. Id. at 1007.
101. Id. at 1008. Perhaps the only other significant factor presented in the case which would favor immediate review is the fact that the documents which Carey was ordered to produce were transcripts of a state grand jury.
lenging discovery rulings in cases to which they are not a party, the court virtually has limited the holding of Grubisic to its facts. The court may not have greatly expanded the scope of the Cohen rule, but undoubtedly the case underlines the uncertainty involved in formulating in advance a rule of decision applicable to the species of discovery order under review. Although it is beneficial for courts to rescue worthy litigants from the cul de sac in which they frequently find themselves when objecting to discovery orders, it is not at all evident that further expansion of the Cohen rule is the best means by which to do so.\textsuperscript{102}

\textit{Extraordinary Writs as Alternatives.}—Extraordinary writs are an alternative avenue by which appellate courts may intervene in ongoing litigation in order to supervise the administration of justice in the district courts.\textsuperscript{103} Mandamus, the most frequently encountered extraordinary writ when review of discovery orders is sought, would issue to correct gross abuse of discretion on the part of the district court judge in entering, modifying, or vacating a protective order.\textsuperscript{104} For example, in Iowa Beef Processors, Inc. v.

\begin{flushright}
\textsuperscript{102} For a comparison of the rules applicable to the issuance of writs of mandamus with the Cohen exception, see text accompanying notes 109-112 infra.

The words of the Third Circuit Court of Appeals are relevant to the issue of the elasticity of Cohen:

We have detected what appears to be an irresistible impulse on the part of appellants to invoke the "collateral order" doctrine whenever the question of appealability arises. Were we to accept even a small percentage of these sometime exotic invocations, this court would undoubtedly find itself reviewing more "collateral" than "final" orders. Borden Co. v. Sylk, 410 F.2d 843, 845-46 (3d Cir. 1969).

\textsuperscript{103} Writs of prohibition, certiorari, and mandamus are common law writs which issue under the terms of the Judicial Code and the All Writs Act. 28 U.S.C. § 1651(a) (1976); F.R. APP. P. 21.

\textsuperscript{104} Before granting issuance of an extraordinary writ courts must conclude that the writ is "in aid of [the courts'] respective jurisdictions" and that issuance is "agreeable to the usages and principles of law." 28 U.S.C. § 1651(a) (1976). In accordance with this first requirement of the All Writs Act extraordinary writs traditionally have been restricted to those situations in which a lower court has acted beyond its jurisdiction, taking an action which it has no power to take, see Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 25 (1943), or when the court has so abused its discretion that there is "usurpation of power." De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217 (1945). With respect to the second requirement of the All Writs Act, it generally has been read to require that the court balance the policies behind the general rule of finality against the parties' arguments for immediate review. 9 J. Moore, Federal Practice § 110.26, at 286 (2d ed. 1975). The standards applicable to the second prong of the § 1651 test are not equivalent to those applicable to an acceptance of an appeal under § 1292(b) lest an extraordinary writ become the pro forma way to "appeal" a denial of certification. See text accompanying notes 75-94 supra.
\end{flushright}
Bagley\textsuperscript{105} the Eighth Circuit treated the notice of appeal filed from an order approving of sharing as a petition for writ of mandamus, granted the writ, and ordered the district court to reinstate the protective order.\textsuperscript{106} The court concluded that the Cohen rule did not apply because an order partially lifting a protective order is the "functional equivalent of an order compelling the production of documents or testimony"\textsuperscript{107} but that, since the problem was unique and the questions presented capable of recurring prior to any opportunity to review a final judgment, review by mandamus would be appropriate.\textsuperscript{108}

Mandamus is not intended to provide a wide scope of appellate review for otherwise nonappealable orders. However, it can be and is used to fill an "unintended lacuna"\textsuperscript{109} and to permit courts to review extraordinary rulings. Since the criteria usually identified by courts in justifying review by way of mandamus are similar to the composite factors of the Cohen "collateral order" rule,\textsuperscript{110} the difference between review under those two approaches is problematic. It would seem that to the extent that courts adhere strictly to the traditional view mandamus may pose a more stringent burden of persuasion on the party requesting review. Yet from the court's standpoint mandamus may constitute the preferable method of reviewing interlocutory discovery orders. First, the stricter burden of proof assures that courts will review discovery orders only when there is a compelling reason to do so. Second, review by way of mandamus avoids frequent recourse to the Cohen rule, recourse which may have the unintended effect of encouraging the appeal of other types of interlocutory orders. Finally, mandamus offers the remedy required by most petitioners. There is usually no need for a court reviewing a discovery order to do more than either refuse

\textsuperscript{105}601 F.2d 949, 953 (8th Cir.), cert. denied, 441 U.S. 907 (1979).

\textsuperscript{106}Id. The court noted that it properly could construe a notice of appeal as a petition for a writ of mandamus when the issue of the propriety of mandamus has been raised from the outset and has been fully briefed. Id.

\textsuperscript{107}However, an order compelling discovery is not appealable under the law of the Eighth Circuit. See id. at 952-53.

\textsuperscript{108}Id. at 953-54. But cf. Martindell v. International Tel. & Tel. Corp., 594 F.2d 291, 294 (2d Cir. 1979) (writ of mandamus would not be made available to government where it was sought for purpose of modification of pretrial order to aid government's investigation).

\textsuperscript{109}9 J. Moore, supra note 104, ¶ 110.28, at 305.

\textsuperscript{110}601 F.2d at 953-56; see note 104 supra; text accompanying notes 77-79 supra.
to disturb the trial court's action or to vacate the district court's order. More complex types of review, such as modifying a portion of the district court's reasoning, are not required. Since mandamus offers the least risk of undue interference in the trial court's supervision of the discovery process and since it also minimizes the need for in-depth review of often clear-cut decisions, courts increasingly should prefer mandamus as the means by which to raise the issue of the propriety of discovery orders.

In conclusion, an issue which possesses as much immediacy to the parties as the trial court's handling of the discovery process is the scope and availability of appellate review of discovery orders. Although prompt review is often a prerequisite to meaningful review, discovery orders rarely warrant interlocutory review. There is a definite trend toward application of the Cohen rule in favor of nonparties or parties who do not have custody of the material and thus cannot refuse to comply and risk contempt. In light of the longstanding acceptance of the Alexander rule and the undoubted hesitancy of most appellate courts to expand their jurisdiction over discovery orders, deviation from Alexander will be neither frequent nor radical. If Socialist Workers Party v. Grubisic is any indication, appellate courts may rationalize selective expansion of the broad exemption from Alexander in favor of nonparties by requiring a nonparty to demonstrate some factors in addition to those iden-

111. 601 F.2d at 953. The Supreme Court stated in In re Rice, 155 U.S. 396 (1894):

The writ of mandamus cannot be used to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law.


112. 601 F.2d at 954. Since a notice of appeal will rarely be construed as a petition for a writ of mandamus, courts will address these issues in the framework in which they are presented by the litigants. To the extent that the law is not clear in any circuit regarding the manner in which review of discovery orders should be sought, it may be preferable for a litigant to file a conditional writ of mandamus and a notice of appeal. The careful litigant may also wish to seek certification of the order from the trial court. This brief outline of main and fall-back positions which the conservative litigant needs to take illustrates at least one benefit to the present uncertainty regarding the means to secure review of discovery orders: regardless of the standard of proof which shall apply, review is discouraged by the very fact that requesting review is a costly process.

113. See text accompanying notes 82-92 supra.
tified in Covey Oil in order to gain immediate review. This procedure has the appearance of a restrictive jurisdictional standard but in fact does little more than assuage the discomfort caused by the erosion of historically restrictive standards applicable to interlocutory review. Until the additional factors are identified in the case law, a nonparty litigant has little ability to predict the likelihood of his or her securing immediate review or to gauge the type of arguments to advance in support of or in opposition to a request for interlocutory review.\(^{114}\)

It is desirable to preserve for appellate courts some discretion in deciding when interlocutory review is warranted. However, the ambiguity of the courts’ collective gloss on Cohen\(^{115}\) is so great that it may encourage requests for appellate review connected more directly with a desire to delay proceedings in the district court or to force settlement of a lawsuit than with an assessment of the legal desirability of immediate review. Further, immediate appeal of discovery orders delays trial and thereby increases the chance that witnesses will disappear or become unavailable, that evidence will grow stale, and that the financial reserves of the parties will become depleted.\(^{116}\) Finally, excessive interlocutory appeal changes the relation between trial and appellate courts\(^{117}\) and, in the area

---

114. Certification under 28 U.S.C. § 1292(b) (1976) is an alternate way to secure the review of an otherwise nonappealable order. Section 1292(b) requires that the district court enter findings that its order “involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” Id. If the district court chooses to enter the findings, the court of appeals may in its discretion accept an appeal. From the standpoint of judicial economy, a request for certification may be the most preferable way to seek review of a discovery order because it leaves the initial determination of the need for review of a given discovery determination clearly with the district court. The fact that there are apparently no reported cases of a court of appeals reviewing a discovery order under this statutory provision may indicate that its main deficiency as an avenue of review is its requirement that the litigant gain the approval of both the trial court and the appellate court before he or she can present the case on the merits.


117. In fact, except for American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979), and Olympic Refining Co. v. Carter, 332 F.2d 260 (9th Cir. 1964), where the Seventh and Ninth Circuits made less than faithful interpretation of the Cohen rules, the courts of appeals addressing the question of
of discovery, weakens the authority of the trial judge. Plaintiff and defense counsel alike have urged that trial judges take strong control of discovery from the beginning of the suit, discourage briefing and oral argument of discovery motions, and deny reconsideration of their orders, as a partial solution to the present discovery malaise.¹¹⁸

Interruption of trial for review by extraordinary writ presents the same policy considerations. Because district courts currently are disallowing modification of protective orders for the benefit of the government, a disinclination toward review whether by interlocutory appeal or extraordinary writ will not currently assist government access.¹¹⁹ However, facilitation of sharing must be achieved through alteration of the substantive rules regulating nonparty access and not through further erosion of jurisdictional standards.

District Court Cases

Motions to Enter or Modify Protective Orders in Regulating Private Nonparty Access to Discovery Materials.—One ground for entry of a protective order is to preclude or to limit the disclosure of materials in order to minimize the likelihood of substantial and serious harm resulting from dissemination of the information. Two instances of serious harm would be violation of a privilege or the disclosure of information in which the party has a privacy interest. In the case of a business defendant, disclosure of trade secrets or information helpful to a competitor usually qualifies as a privacy interest to justify the entry of a protective order.¹²⁰ The same principle of balancing the need for the material against the harm of disclosure has been used in cases deciding the modification of protective orders to prevent a private litigant from obtaining discovery materials produced in a case in which he was not a party.

Williams v. Johnson & Johnson¹²¹ may be the first published nonparty access have not made a separate determination of their jurisdiction. While commentators might be grateful that appellate courts have reached the substantive issues, their method of doing so in the long run is counterproductive. See Wright, The Doubtful Omniscience of Appellate Courts, 41 MINN. L. REV. 751 (1957); cf. Iowa Beef Processors, Inc. v. Bagley, 601 F.2d at 949 (review of sharing order by mandamus).


¹¹⁹. See text accompanying notes 120-189 infra.

¹²⁰. See cases cited notes 41-43 supra and accompanying text.

case dealing with the sharing of discovery materials to apply clearly a balancing test to resolve competing interests in nonparty access. Defendant Johnson & Johnson moved for entry of a protective order to forbid plaintiffs from disclosing information obtained through discovery to nonparties. The district court declined to enter a protective order noting three theoretical advantages to the sharing of discovered materials with other actual or potential plaintiffs: the saving of time and money, the promotion of efficient disposition of cases, and the absence of any showing that sharing would stir up litigation. These considerations constituted sufficient reason to defeat defendant’s unsubstantiated allegation that plaintiff intended to share discovered materials with plaintiffs in related cases and that such sharing would harm the defendant. Because the court’s discussion of competing interests in disclosure is attenuated, the case is significant primarily for historical purposes. Nonetheless, the court’s preference for sharing as a way to give life to the mandate of the Federal Rules of Civil Procedure that cases be resolved quickly, justly, and inexpensively is an apt beginning to a discussion of nonparty access to private civil discovery.

A second district court also refused to enter a protective order that would have limited the use of discovered materials to the parties in the instant litigation. In Johnson Foils, Inc. v. Huyck Corp., defendant desired the entry of a protective order because he anticipated that plaintiffs would share their discovery materials with other litigants suing companies related to the defendant. Plaintiff agreed that an order protecting confidential and secret information would be appropriate but disputed the scope of defendant’s proposed order. The court noted that the problem before it was the practical one of allowing liberal discovery and use of discovery materials in furtherance of the Federal Rules of Civil Procedure while at the same time safeguarding confidential information. The court struck the balance on entry of protective orders to prevent nonparty access as follows: “To wit: unless it can be

122. Id. at 32.
123. Id. at 33. The court noted the difficulty in drawing a line between the legitimate educative activities of attorneys and the drumming up of business from those who might otherwise settle or sue. Id.
125. Id. at 409-10. Defendant sought to limit the use of the discovered materials to the litigation of the instant case and sought to limit the number of individuals, including experts, who might have access to the information. Id.
126. Id. at 409.
shown that the discovering party is exploiting the instant litigation solely to assist in other litigation before a foreign forum, federal courts do allow full use of the information in other forums."

The breadth of the court’s language is not to be misconstrued. Although the court appeared to treat "exploitation" as the sole factor to be considered in deciding nonparty access to discovery materials, the import of the holding best should be read as enumerating exploitation as an especially important factor to be weighed in the balance. The court also considered the nature of the information for which protection was sought, the general preference for liberal discovery and unfettered use of discovered documents, and the failure of the movant to advance other specific reasons necessitating protection. The court’s decision illustrates that the burden is on the movant to make a specific showing of the need for an order protecting the sensitive information. The mere fact that an opposing litigant wishes to share discovered materials with other potential or actual litigants will not justify entry of a protective order unless a movant can demonstrate that the case and the fruits of its discovery are being exploited solely to assist the related litigation.

In contrast, a district court in Illinois granted defendant’s motion for entry of a protective order to limit plaintiff’s use of discovered documents to prosecution of the case at hand. In *Milsen Co. v. Southland Corp.*, a case concerning price-fixing and anticompetitive mergers in the grocery market, the court held that the “good cause” required for entry of a protective order was satisfied by plaintiffs’ representations that they intended to give a wide array of documents to nonparties, some of whom were plaintiffs in another action against defendants. Although this holding is the strongest statement in favor of the entry of protective orders to prevent disclosure of discovered materials to nonparties, the opinion does not contain a description of the documents sought to be discovered. Since the “diversity and breadth of the documents requested” were important features of the holding, the extent of

---

127. *Id.* at 410 (citations omitted).
128. *See id.*
129. *Id.*
130. 1972 Trade Cases ¶ 73,865, at 91,629 (N.D. Ill. 1972).
131. *Id. But see* Williams v. Johnson & Johnson, 50 F.R.D. 30, 33 (S.D.N.Y. 1970) (court did not find sale of fruits of discovery to other litigants to be impermissible, apparently so long as sale was to another attorney prosecuting similar case).
132. *Id.*
the rule is not easily ascertained, and the precedential value of the
decision is thereby diminished. Further, the holding flows from
an appreciation of the federal discovery rules different from that of
Johnson & Johnson and Johnson Foils. The Milsen court concluded
first, that the purpose of discovery is to enable parties to prepare
their own cases and second, that the limitation in the use of docu-
ments to the case at hand could not therefore unduly hinder the
plaintiff. Given the fact that a presumption of nondisclosure does
not adequately reflect the policies of Rule 1 of the Federal Rules of
Civil Procedure, the court's conclusion that plaintiffs will share
the materials with litigating third parties may not be sufficient rea-
son to prevent disclosure.

Similarly, a district court in California denied a request to
modify a protective order when modification would have permitted
a nonparty access to selected discovery materials. In Union Car-
bide Corp. v. Filtrol Corp., nonparty movant Mobil Oil Corp.
sought modification of a stipulated protective order governing the
discovery in Union Carbide's patent infringement action against
Filtrol. Modification would have enabled Mobil to gain access to
depositions of employees of Filtrol. The district court held that
where there was nothing in common between movant's patents and
plaintiff's patents, and where movant had no interest in the out-
come of plaintiff's patent case, movant did not have standing to re-
quest modification of the protective orders. Moreover, assuming
jurisdiction and ruling on the merits of Mobil's request, the district
court noted that Mobil had failed to meet its burden of showing ei-
ther that the documents were relevant to its case, so that it was
not merely seeking to take unfair advantage of Union Carbide's
know-how and the expense incurred in taking the depositions.

---

133. As noted, the case for entry or vacation of a protective order is peculiarly
tied to the facts. See text accompanying notes 25-53 supra. The failure to set forth
the facts which premise this discovery ruling destroys the precedential value of
the case.

134. 1972 Trade Cases ¶ 73,865, at 91,629 (citing Crabtree v. Hayden Stone,
Inc., 43 F.R.D. 281, 283 (S.D.N.Y. 1967)).

135. FED. R. CIV. P. 1, provides in part: "[These rules] shall be construed to
secure the just, speedy, and inexpensive determination of every action."


137. Id. at 554.

138. See text accompanying notes 206-207 infra. Access to depositions may en-
tail different policy considerations than does access to documents since the depo-
ments may have given the deposition in reliance on the protective order.

139. 278 F. Supp. at 557-58.

140. Id. at 556, 558.
or that there was “good cause” to modify the protective order.\textsuperscript{141} “Good cause” is satisfied when the movant affirmatively shows a need to obtain the documents, that is, that the documents are relevant, are available, are necessary for proof of movant’s case, and are not readily obtainable through other means. Absent satisfaction of the “good cause” test it would be unfair to permit Mobil to obtain “the benefit of the ingenuity, the know-how, and the expertise used by Union Carbide”\textsuperscript{142} in fashioning its own discovery requests.

The district court cases treating the question of the use of protective orders to prevent nonparty access to discovered materials share several common features. First, the question of nonparty access generally arises in cases involving more complicated factual backgrounds or proof—for example, the pharmaceutical tort\textsuperscript{143} or patent infringement suit.\textsuperscript{144} Sharing discovery, then, heretofore has been a problem for the “big case” to which available case-management techniques have not been applied.\textsuperscript{145} Second, all the cases resort to a balancing of equities to resolve the question of access.

The \textit{Johnson Foils} court examined the nature of the information protected or sought to be protected, the need for access, and bad faith.\textsuperscript{146} The \textit{Union Carbide} court in addition closely examined the standing of the movant to seek access and the possibility of according to the movant an unfair advantage through permitting him access to the work product of the discovery party.\textsuperscript{147} On the other

\textsuperscript{141} \textit{Id.} at 558; see text accompanying notes 195-196, 203 \textit{infra}. Good cause is not met by mere relevance to the case, nor by a showing that the documents are available only from a party, nor by a showing that counsel wishes only to assure himself that he has not overlooked something. 278 F. Supp. at 558.

\textsuperscript{142} 278 F. Supp. at 559. The court stated:

\textbf{To give Mobil the depositions would give it the advantage of Union Carbide’s time, effort, and expense in taking the depositions. It would also give Mobil access to trade secrets or special knowledge imparted to the depositions by the tactics and strategy of the questioning by Union Carbide’s counsel under the aegis and with the assistance of Union Carbide’s technical expert. Mobil should not in fairness have the benefit of the ingenuity, the know-how, and the expertise used by Union Carbide to pose questions and elicit answers.}

\textit{Id.}

\textsuperscript{143} \textit{See}, e.g., Williams v. Johnson & Johnson, 50 F.R.D. 31 (S.D.N.Y. 1970).

\textsuperscript{144} \textit{See}, e.g., \textit{Union Carbide Corp. v. Filtrol Corp.}, 278 F. Supp. 553 (C.D. Cal. 1967).

\textsuperscript{145} \textit{See} note 5 \textit{supra}. Case-management techniques can help speed the disposition of civil actions by assuring that discovery begins and ends quickly and by using pretrial conferences to require the parties to narrow issues for trial. For further discussion of these methods, see notes 258-259 \textit{infra}.

\textsuperscript{146} \textit{See} text accompanying notes 124-129 \textit{supra}.

\textsuperscript{147} \textit{See} text accompanying notes 136-142 \textit{supra}.
hand, the Milsen court measured an expansive request for sharing against the good cause test applicable to entry of protective orders to prevent sharing.\textsuperscript{148} In sum, although there is a commitment to a balancing test to decide questions of access, there is no overwhelming agreement on the factors to be balanced, or on the logic of focusing on some factors to the exclusion of others. Third, the courts still are uncertain as to the appropriate federal policy on the sharing of the fruits of discovery with decisions cutting across the spectrum. The law in the Southern District of New York is quite liberal: unless a party is exploiting discovery “solely to assist in other litigation,”\textsuperscript{149} sharing nonsensitive information is permissible. The law in the Northern District of Illinois, at least prior to the Seventh Circuit’s decision in American Telephone & Telegraph Co. v. Grady\textsuperscript{150} is quite restrictive. The mere suggestion that the plaintiff will turn discovered documents over to other plaintiffs also suing the defendant is sufficient to deny modification. In other words, there is a presumption against sharing discovery if the materials are to be used to litigate another case. The Central District of California adopts a middle approach. It follows the Southern District of New York’s preference for sharing but considers more factors in its balancing test, which theoretically adds preconditions to access. Thus, modification of a stipulated protective order, which would have expanded the access to enumerated depositions, was denied but not until the court had examined the components of the standing, relevancy, and “good cause” proofs for modification.\textsuperscript{151}

The upshot is that district courts have extended the balancing test applicable to entry of protective orders for the benefit of a party to the entry, modification, or vacation of protective orders in deciding private nonparty access. Each court has operated in a vacuum, weighing the equities in each case without attempting to fashion a comprehensive rule. As shall be seen in the following section, the same balancing test has been extended to apply to re-

\textsuperscript{148} See text accompanying notes 130-135 supra.


\textsuperscript{150} 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979). The court in Grady permitted modification for the benefit of a nonparty governmental department. Id. at 597. It is an open question whether the same logic will be applied with respect to a nongovernmental nonparty. For a further discussion of Grady, see text accompanying notes 212-219 infra.

quests for entry, modification, or vacation of protective orders for the benefit of a governmental nonparty. The uncertainty caused by the failure to define the factors balanced and the conflicting holdings of courts on the permissibility of sharing once the balance has been struck is as evident in the case law on government access as it has been in the law on private party access.

**Motions to Enter, Modify, or Vacate Protective Orders in Regulating Governmental Nonparty Access to Discovered Materials.**—There are five major reported district court cases ruling on the right of the federal government to gain access to discovery materials produced in a case to which it is not a party. Two of the cases rule on motions to vacate a protective order, and three on motions to modify a protective order. The clear trend of the district court law has been to forbid a party from turning copies of discovered documents to aid the government in prosecution of its related case.

**Motions to Vacate Protective Orders.**—The two district courts which have considered the propriety of vacating protective orders for the benefit of the government have balanced the government's interest in the expeditious handling of government cases, the private litigant's interest, if any, in assisting the government's case, and the interests of the producing litigant in preventing dissemination of justifiably protected information, in guarding against burdensome discovery requests, and in parceling out the damages of potential adverse judgments by attempting to litigate just one case at a time. In comparison with the district court law on protective orders and private nonparty access, these cases have more

---


154. However, two of the cases, United States v. ARA Servs., Inc. and Zenith Radio Corp. v. Matsushita Elec. Indus. Co., rely on the district court opinion in GAF Corp. v. Eastman Kodak Co., 415 F. Supp. 129 (S.D.N.Y. 1976) [hereinafter cited as GAF]. The reasoning of this case is suspect after the Second Circuit opinion in United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979).

155. *See* text accompanying notes 53-59 *infra.*
thoroughly delineated the competing interests in access. However, with respect to factors such as reliance on prior stipulation to the scope of discovery or the government's reasons for needing access through sharing, these courts have emphasized factors collateral to the interests of either of the parties or of the government. These factors, best described as the court's interests in vacating protective orders, include concern with the burdens created by the active case management presumably required if vacation is granted. Although these same concerns may be present when the government desires only modification of a protective order or when a private party requests access to private discovery, it was not until the government's requests for access were litigated that the court's own interests in case management were balanced along with the interests of the parties and the government. The fact that this interest was not considered by courts considering modification of protective orders for the benefit of private parties illustrates again the ad hoc development of the sharing rule.

In *Data Digests, Inc. v. Standard & Poor's Corp.*[^156^], plaintiff sought vacation of a protective order to enable it to communicate to various governmental agencies information that it had obtained through discovery in its Clayton Act suit[^157^]. Judge Weinfeld rejected the proposal on the ground that some of the material was privileged, that the government had adequate alternate means by which to obtain the documents, and that vindication of the public interest lay with the Department of Justice, notwithstanding plaintiff's contention that a private attorney general theory may have permitted another result[^158^]. The implication of Judge Weinfeld's ruling is that unless the government itself argues that the policies of the Federal Rules of Civil Procedure are furthered by government access, the court will not weigh the public interest in sharing discovery. Clearly this ruling is too restrictive. While it frequently may be preferable for government counsel to intervene to argue their own case for access, a party should not be disqualified

---


[^157^]: The protective order was entered by the late Judge McLean. Judge Weinfeld found it particularly troublesome that plaintiffs did not present their request for modification in a timely fashion to Judge McLean. *Id.* at 43; *cf.* Union Carbide Corp. v. Filltrol Corp., 278 F. Supp. 553, 556 (C.D. Cal. 1967) (district court refused to implement sharing order without approval of district court judge presiding over case in which documents were produced).

automatically from arguing the government’s case for it. The district court always has the additional authority to request an amicus filing from the government or to deny a motion for vacation or modification of a protective order without prejudice to the government’s intervening and making the request on its own behalf.

Similarly, a California district court denied the State of California’s motion made on behalf of a nonparty, the Federal Trade Commission, to vacate a protective order which limited the use of all discovered documents to the case at hand.\textsuperscript{159} The trial court refused to vacate in toto the protective order because doing so would involve “some element of a breach of faith . . . since the discovery was had under the protection of [the protective order] and conceivably there may be in the documents or depositions matters which are for some reason properly the subject of a protective order.”\textsuperscript{160} The court declined to require the defendants to justify the applicability of the protective order vis-a-vis each item they wished to remain protected because “[s]ome person would then be required to pass upon those justifications”\textsuperscript{161} and it would have been too burdensome to require the court to referee the disputes. Finally, the judge concluded that there was no equitable or practical alternative but to proceed under the protective order as originally framed.\textsuperscript{162}

The hostility of these two district courts to requests for vacation of protective orders in order to provide the government access to discovered materials cannot be attributed solely to the fact that the movant requested vacation of an already existing protective order. In both cases the judges considered the option of modification regardless of whether it was formally presented by the movant. Reliance on the protective order, the availability of alternate means for the government to gain access, and the unwillingness of the courts to sort out those documents which were properly subject to protection from those that were not, were all factors leading to denials of the motions to vacate. That all of these factors are equally applicable to private nonparty access was not discussed. Nor did either court identify the competing interests in government access and strike a balance between them.

\textsuperscript{159} In re Coordinated Pretrial Proceedings in W. Liquid Asphalt Cases, 18 F.R. Serv. 2d 1251, 1252 (N.D. Cal. 1974).
\textsuperscript{160} Id.
\textsuperscript{161} Id.
\textsuperscript{162} Id.
In addition, the two courts also focused on the task of managing litigation as militating in favor of preserving the status quo of the protective order. The California court, involved in multidistrict litigation, properly was concerned with the practical necessity of discovery referees. The unavailability of referees or special masters, however, does not seem to be a valid reason for denying the government access to documents to which it might otherwise be entitled. The 1938 discovery rules placed the district court judge firmly in control of the overseeing of his or her civil docket. For the court to default on this mandate of liberal discovery, especially in multidistrict cases for which special processing techniques have been created, is either an attempt to turn back the clock on federal discovery or a deliberate provocation to rules committees and to Congress to provide additional assistance to courts to supervise their cases.

Motions to Modify Protective Orders.—District courts have been more willing to modify protective orders than to vacate such orders altogether. Modification, perceived as a less restrictive alternative than vacation, should be particularly attractive to a court interested in meaningful yet not burdensome discovery. Perhaps because modification deals with gradation and not gross differentiations, courts ruling on motions to modify protective orders...
also have provided a more detailed analysis of the policy reasons underlying their decisions. In GAF Corp. v. Eastman Kodak Co. 167 plaintiff GAF requested modification of a stipulated protective order to permit the transfer of 52 documents to the Department of Justice out of more than 80,000 produced under the aegis of the protective order. 168 Judge Frankel denied that motion noting (1) that the parties expressly agreed that discovery was being demanded solely for the preparation of the instant case; (2) that defendant had relied on the scope of the protective order for years and had complied in good faith with all discovery requests; and (3) that the government as investigator has "awesome powers, not lightly to be enhanced or supplemented by implication." 169 Consistent with the rationale of Data Digests, Judge Frankel declined to consider status as a private attorney general to be an authorization for corroboration with governmental investigations. 170 Should the government need the information, it can obtain it through civil investigative demands 171 or grand jury subpoenas. When there has been no assurance that the materials sought will be used in a civil and not a criminal case, to accede to demands of access would too severely negate the litigant's expectation of privacy. 172 Although the wisdom of the result achieved in GAF I is open to debate, Judge Frankel's decision contains the first careful dissection of the moving plaintiff's, the producing defendant's, and the beneficiary government's competing interests in sharing discovery.

Subsequent to the decision in GAF I Congress expanded the scope of civil investigative demands to enable the Antitrust Divi-

168. Id. at 130.
169. Id. at 132. The Court also noted that the Government had given no assurance that it would restrict use of the documents to prosecute a civil case only. Id.; see note 23 supra.
170. 415 F. Supp. at 133. Judge Frankel stated:
It may be that the sometimes romantic notion of the "private attorney general" should entail collaborative activity alongside the public attorney general. If that is to become an agreed conception, however, it should happen as a judgment of legislative policy, not as a judicial inference from rules fashioned for purposes of discovery in private litigation. Moreover, if the legislative judgment were ours, we might well conclude that the power of Government to investigate is not in clear and present need of enhancement. Id.; see note 70 supra.
171. At the time of GAF I, 15 U.S.C. § 1312(b)(1)(A) (1976) provided that the government must give notice of "the nature of the conduct constituting the alleged antitrust violation" at the time of service of the demand. Material produced in response is limited in its use.
sion of the Department of Justice to demand both documentary and nondocumentary evidence from nontargets as well as targets of the Division’s investigations.\textsuperscript{173} Employing that tool the Antitrust Division requested GAF to turn over not only the fifty-two documents and analyses which were the subject of Judge Frankel’s ruling but all documents produced by Kodak. Judge Owen in \textit{United States v. GAF Corp.},\textsuperscript{174} denied the nonparty government’s motion for modification of the protective order holding that the amendments to the civil investigative demand authority of the Antitrust Division were not intended to empower the Division “to obtain documents of a target company from an adversary in litigation that had obtained them in the course of such litigation . . . merely because the adversary was temporarily ‘in possession, custody, or control of them.’ ”\textsuperscript{175} The adversary “has a clear interest in presenting the target’s documents in the most unfavorable light possible,”\textsuperscript{176} and absent congressional intent to the contrary the civil investigative demand did not accord the Antitrust Division the benefit of GAF counsel’s time and efforts in sorting and analyzing the discovered materials.\textsuperscript{177} In other words, if the government had to have the documents it was free to obtain them unsorted from Kodak itself.

Similarly, a district court in Pennsylvania declined to grant in toto plaintiff’s motion to modify a protective order to permit it to transfer discovered documents to the International Trade Commission.\textsuperscript{178} Although Judge Higgenbotham acknowledged that the government would have access to all documents that were a part of the public record, he declined to expand the scope of this access to include documents which might \textit{not} have been designated properly as confidential under the protective order because those documents

\textsuperscript{174} 449 F. Supp. 351 (S.D.N.Y. 1978) [hereinafter cited as \textit{GAF I}], rev’d, 596 F.2d 10 (2d Cir. 1979).
\textsuperscript{175} \textit{Id.} at 354 (quoting 15 U.S.C. § 1312(a) (1976)).
\textsuperscript{176} \textit{Id.}
\textsuperscript{177} \textit{Id.} at 355.
had been produced only for the litigation of the present case.\textsuperscript{179} The court commented in dictum that to permit the International Trade Commission to obtain access to discovered materials through their proposed indirect means would subvert the purposes of compulsory process\textsuperscript{180} and would exacerbate the already complicated discovery process.\textsuperscript{181} The court cited Judge Frankel’s decision in \textit{GAF I} and extended its holding to apply to a nonparty government’s request for access to nonconfidential materials produced in private litigation even absent an explicit agreement that the documents were to be used only in that case.\textsuperscript{182}

In \textit{United States v. ARA Services, Inc.}\textsuperscript{183} a Missouri district court granted the Federal Trade Commission’s motion for permission to copy certain documents produced by defendant ARA Services for Palmer News, a plaintiff suing ARA Services in another district court.\textsuperscript{184} Some of the documents produced by ARA for Palmer News to which the Federal Trade Commission wanted access were covered by a protective order which indicated that documents produced were to be used only for the purposes of the instant litigation and not for any business or other purposes whatsoever.\textsuperscript{185} Copies of the documents so produced were, of course, in the custody of ARA Services. The district court, with no reasoning, but citing to \textit{GAF I}, granted the motion to compel discovery only of those documents not covered by the protective order entered in \textit{Palmer News, Inc. v. ARA Services, Inc.}\textsuperscript{186} The court expressly left the terms of the protective order intact.

In sum, district court cases ruling on motions to modify or va-
cate protective orders in order to facilitate government access to discovered documents have examined the scope of the protective order, the type and degree of reliance on it, and the likelihood that modification would require courts to become involved in lengthy discovery disputes. Although every district court that has examined the issue has entered a fact-specific holding concluding that an existing protective order should not be modified to permit government access, there is no reason to assume that the results achieved through an application of the same balancing test on other facts could not favor the government. Much of the expressed concern over governmental access to discovery materials should disappear with the adoption of collateral discovery reforms that provide procedures whereby district courts can routinely elicit assistance in supervising discovery and with the acknowledgment by district courts of the importance of exercising strong supervisory authority over the progress of pretrial discovery. Finally, the government could maximize its likelihood of success in obtaining modification or vacation of protective orders under existing district court rules by giving assurances that the shared materials would only be used by the government in a specified civil investigation.

**Court of Appeals Cases**

Four circuit courts of appeals have addressed the question of the circumstances under which a civil protective order, issued pursuant to Federal Rule of Civil Procedure 26(c), will preclude a nonparty governmental agency or department access to discovered documents. These courts have reached their decisions using bal-

---

187. See text accompanying notes 267-269 infra.
188. See text accompanying 267-272 infra.
190. The Fifth Circuit Court of Appeals in Smith v. National Provisioner, Inc., 589 F.2d 786 (5th Cir. 1979), dismissed the appeal taken by the chairman of two House subcommittees from a district court's refusal to modify a protective order in order to give the nonparty subcommittees access to documents which they had subpoenaed. Id. at 790-91. The basis of the court's ruling was the failure of the chairman to obtain a House resolution before they sought to intervene in court to effectuate their subpoena. Thus the court's opinion on the merits of the sharing refers more to congressional authority than to the law of protective orders. But see note 194 infra (discussing Fifth Circuit view on nonparty standing to request access). The three other courts addressing the question are the Second, the Seventh, and the Eighth. Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 786 (5th Cir. 1979); United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979); Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979); American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).
ancing tests which in turn have focused on a common set of factors. Ascertaining the law of any circuit is thus largely a function of collating the factors balanced. Even though the balancing tests are imperfectly cast, inadequately defining the factors to be balanced or neglecting to consider the standing of a nonparty movant for access, the cases are an important advancement to the rule on sharing.

Court of Appeals Decisions Finding Modification of Protective Orders Impermissible.—The Eighth Circuit Court of Appeals, in *Iowa Beef Processors, Inc. v. Bagley*, 191 held that it was an abuse of discretion for the district court to permit modification of a protective order when disclosure of the documents to the House Subcommittee on Small Business Administration could moot some of Iowa Beef Processor's claims for relief. 192 The court disallowed the district court's grant of full disclosure, 193 but did allow for limited modification of the protective order. Additionally, the court of appeals noted that after the district court had concluded that entry of the protective order was appropriate, it was an abuse of discretion to modify the order without first making a finding that the "good cause" which once favored its entry, no longer existed. 194

The Second Circuit has also denied government-nonparty access to depositions. In *Martindell v. International Telephone & Telegraph Corp.*, 195 the government requested access to deposi-
tions taken in a stockholder's derivative suit arising out of I.T.T.'s expenditures to influence Chilean elections. The depositions had been taken pursuant to a stipulated protective order which provided that discovered documents would be used only in the pending suit. The district court denied the nonparty Department of Justice access to the depositions. The court of appeals affirmed, holding that I.T.T. had relied on the scope of the protective order throughout the several years of litigation, and suggested that the government could attempt to obtain the information it requested through the many discovery devices available to it.

Court of Appeals Decisions Finding Modification of Protective Orders Permissible.—The most recent Second Circuit case on the modification of protective orders for the benefit of a nonparty department or agency of the government arose out of the GAF-Kodak antitrust litigation. In 1976, the district court denied plaintiff GAF's motion to turn over to the government fifty-two documents obtained in discovery pursuant to a stipulated protective order. In 1977, the district court in GAF II denied the government's petition to compel the transfer ruling that the newly enhanced civil investigative demand did not authorize the government to obtain documents protected by a stipulated protective order in existence for five years when the documents were otherwise available to the government. The Second Circuit reversed, ruling in United States v. GAF Corp. that the district court has the power to enforce civil investigative demands against a party for documents which it obtained in discovery of a target and that it should reconsider modification of the protective orders to permit government access and to permit Kodak to make a "particular showing of the need for protection of specific materials" in order to justify their continuance.

196. Id. at 292.
197. Id. at 296-97.
198. United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979).
199. 415 F. Supp. 129 (S.D.N.Y. 1976); see text accompanying notes 167-172 supra.
200. Id. at 132. The petition was filed pursuant to 15 U.S.C. § 1314(a) (1976).
201. See text accompanying notes 168-171 supra. The Antitrust Division could obtain the documents through the usual avenues of discovery, although such documents would not have been screened by GAF's counsel. United States v. GAF Corp., 449 F. Supp. 351, 353 (S.D.N.Y. 1978).
202. 596 F.2d 10 (2d Cir. 1979) [hereinafter cited as GAF III].
203. Id. at 16 n.9. Judge Mulligan, dissenting, would have prohibited the terms of the newly amended civil investigatory demand statute from superseding a stipu-
On rehearing, the Second Circuit addressed the problem of reconciling GAF III with Martindell, handed down five days after GAF III. The court narrowed Martindell, ruling that it stands for the proposition that the government's request for access to discovered materials, absent the issuance of a civil investigative demand or a subpoena, does not require modification of a stipulated protective order when the plaintiff has long relied on its scope during the course of discovery. In addition, the court noted that in Martindell there was a request, not for documents and analyses, as requested in GAF II, but for depositions on a matter in which witnesses could have invoked a constitutional privilege but had not done so due to reliance on the protective order.

In the Second Circuit, then, following the recharacterization of Martindell in GAF III, a “formal” request by the government for discovered documents relevant to the prosecution of its own case shifts the burden to the party objecting to discovery to show again the requisite particularized need. Little weight seems to be accorded to the fact that the original protective order may have been entered pursuant to the stipulation of the parties. Thus, one party may have to bear a substantial burden in opposing moves by another party to facilitate the government's suit. The most disturbing feature of the reconciliation of Martindell with the GAF line of cases is that instead of limiting Martindell to its facts—government seeking to aid its civil or criminal investigation through discovery—the court chose to emphasize the importance of reliance on protective orders. And while the rule resulting from GAF III is relatively clear—a party who has long relied on the terms of a protective order can defeat a request for modification unless some “good cause” for modification has been advanced—the indicia

Id. at 17 (Mulligan, J., dissenting). There is no basis in Judge Mulligan’s order for concluding that a protective order entered after the effective date of the new amendments could not be defeated by a civil investigative demand.

204. Id. at 18.
205. 594 F.2d 291 (2d Cir. 1979).
206. 596 F.2d at 18 n.1.
207. Id. at 18.
208. Id. But see Martindell v. International Tel. & Tel. Co., 594 F.2d 291, 297 (2d Cir. 1979) (Medina, J., concurring in result): “I believe that such an agreement, if valid at the time made, should be honored without doing any balancing as to the benefits to be derived from disregarding it.”
209. 596 F.2d at 16. For a discussion of the threat imposed by a rule permitting the sharing of discovery among nongovernmental litigants, see note 218 infra.
of its most important term, reliance, is not easily assessed.\textsuperscript{210}

\textit{American Telephone \& Telegraph Co. v. Grady}\textsuperscript{211} represents the contribution of the Seventh Circuit to this growing body of law. Shortly after MCI Communications Corporation commenced its private antitrust suit against A.T.T.\textsuperscript{212} a protective order was entered to govern the subsequent use of "all documents and other discovery materials produced in response to any documents request made upon plaintiffs or defendants in the . . . [case] . . . and to any deposition or portion of a deposition as to which confidential status is requested by either party."\textsuperscript{213} The protective order was entered at the request and consent of all parties. Later in 1974, the Department of Justice filed its civil antitrust suit against A.T.T. in another district. In 1977, the Antitrust Division moved for modification of the protective order applicable to discovery in \textit{MCI Communications Corp. v. American Telephone \& Telegraph Co.} in order to gain access to \textit{all} discovered materials.\textsuperscript{214} The Antitrust Division alleged in its motion that its action encompassed almost all of the anticompetitive practices of which plaintiffs complained in the present suit and thus denial of its motion for modification would require the government to engage in a long and costly discovery process to obtain the same documents, none of which were immune from discovery\textsuperscript{215} in the government suit. The district court granted the government's motion for modification and the Seventh Circuit affirmed.\textsuperscript{216} The court noted that where a protective order is agreed to by the parties there is a higher burden on the parties or the movant to justify its modification, and modification can be ordered only upon a finding of "exceptional considerations."\textsuperscript{217}

\begin{itemize}
\item \textsuperscript{210} For a more detailed discussion of the significance of "reliance," see text accompanying notes 237-241 infra.
\item \textsuperscript{211} 594 F.2d 594 (7th Cir. 1978), \textit{cert. denied}, 440 U.S. 971 (1979).
\item \textsuperscript{213} 594 F.2d at 595 (quoting Motion of the United States to Permit Access to Pretrial Discovery and Cooperation of Counsel, \textit{MCI Communications Corp. v. American Tel. \& Tel. Co.}, 462 F. Supp. 1072 (N.D. Ill. 1978)).
\item \textsuperscript{214} 1979-1 Trade Cases \$62,449, at 76,659.
\item \textsuperscript{215} \textit{Id.} at 76,660. A.T.T made no showing that any claim of privilege was waived or that anything discovered would be protected otherwise from discovery. 594 F.2d at 597.
\item \textsuperscript{216} 594 F.2d at 597.
\item \textsuperscript{217} \textit{Id.}
\end{itemize}
The court found no factors indicating exceptional considerations. First, both MCI and the government filed their complaints in close proximity to one another but the government did not seek immediate access to materials discovered in *MCI Communications Corp. v. American Telephone & Telegraph*, thus lending support to the theory that the government was not exploiting MCI's case in order to aid its own case, since the government was able to prepare a complaint without the benefit of any other case's discovery. Second, there had been no showing that anything discovered in the MCI suit would be immune from discovery in the government suit. In addition, the government had terminated its criminal suit so that the documents would only be used in the civil suit. Thus the facts of the case themselves preempted the concerns expressed by the Second Circuit in *Martindell*.

In conclusion, each circuit court of appeals addressing the issue has applied a balancing test to decide the permissibility of modifying a protective order to permit government access. When

---

218. The importance of the existence of a privilege that would prevent the government's discovery of the documents in a related case is highlighted in the legal skirmishes taking place in United States v. American Tel. & Tel. Co., Civ. No. 74-1698 (D.D.C., filed Jan. 22, 1980). A.T.T. has requested access to the documents that MCI turned over to the government following the modification of the protective order in *MCI Communications Corp. v. American Tel. & Tel. Co.* MCI was empowered to transmit not only discovery materials but also any explanatory material or information which would be helpful to an understanding of the items produced. 594 F.2d at 595, 597. Thus, MCI transmitted abstracts and summaries of discovered documents as well as the documents themselves. The government has asserted a work product privilege on behalf of the private parties arguing that if they must "assume the risk" of losing privilege claims they will not agree to share discovery with the government. A.T.T. argues that the government should not be able to make a case with documents to which A.T.T. does not have access. On February 1, 1980, Judge Greene reaffirmed his earlier order of January 22, 1980, and held that MCI waived its work product privilege when it disclosed the materials to the government. United States v. American Tel. & Tel. Co., No. 74-1698 (D.D.C., filed Jan. 22, 1980); accord, *D'Ippolito v. Cities Serv. Co.*, 39 F.R.D. 610 (S.D.N.Y. 1965) (disclosure of document to party with "common interests" does not waive work-product privilege vis-a-vis adverse party). In *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129 (S.D.N.Y. 1979) the same court rejected the *D'Ippolito* standard and ruled that GAF did not waive its attorney-client privilege in disclosing a summary of discovery materials to the government when Kodak had not demonstrated that such disclosure increased the probability that Kodak would obtain the information. Subsequently, the District of Columbia Court of Appeals reversed Judge Green's order ruling that the "short term" benefits of sharing and waiver are outweighed. "In the long run, however, this would encourage trial preparation and vigorous advocacy and would discourage any party from turning over work product to the government." United States v. American Tel. & Tel. Co., Nos. 80-1141 and 880-1513 (D.C. Cir. Sept. 16, 1980).

219. See text accompanying notes 167-170 supra.

220. 594 F.2d 291, 295 (2d Cir. 1979).
examined together, the cases offer a fair compendium of the sorts of factors to be weighed in the balancing test: Did the parties stipulate to the protective order;\textsuperscript{221} was there a high degree of reliance on the protective order (how lengthy and extensive has discovery been);\textsuperscript{222} does the government have any other means available to secure the information;\textsuperscript{223} were any privileges waived during discovery which bar nonparty access;\textsuperscript{224} is it practicable to give access to the government but prevent any further disclosure;\textsuperscript{225} does the government have the standing to make a motion for the documents;\textsuperscript{226} did the government request access to all discovered materials or only documents and analyses and not depositions?\textsuperscript{227} The particular weight any one factor bears is open to question, depending on the other facts of the case and the briefing skills of the advocates. In addition, there is the question of which party is to bear the burden of proof on the question of modification of an existing protective order. The Second Circuit in \textit{GAF III} noted that when the government makes a “formal” request for documents discovered in another case by issuance of civil investigative demand or a subpoena, the party at whose behest the protective order was originally entered must justify again the reasons for the order by a showing of particularized need.\textsuperscript{228} The Seventh Circuit in \textit{Grady}, also applying a balancing test, placed the burden of justifying modification on the government when it held that the district court must make a finding of “exceptional considerations” in order to modify a stipulated protective order.\textsuperscript{229} Although the allocation of the burden of proof may itself influence the substantive decision on

\textsuperscript{221} Iowa Beef Processors, Inc. v. Bagley, 601 F.2d 949 (8th Cir.), cert. denied, 441 U.S. 907 (1979); United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979); American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

\textsuperscript{222} Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979); American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

\textsuperscript{223} United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979).

\textsuperscript{224} American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979); see note 265 infra.


\textsuperscript{226} Id.; Smith v. National Provisioner, Inc., 589 F.2d 786 (5th Cir. 1979); see notes 60-70 supra.

\textsuperscript{227} United States v. GAF Corp., 596 F.2d 10 (2d Cir. 1979); American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

\textsuperscript{228} 596 F.2d at 16 n.8.

\textsuperscript{229} 594 F.2d at 497.
sharing, the type of case to be made from "good cause" to "exceptional considerations" is the most important factor.

The problems with the balancing tests are two-fold. First, the factors to be balanced have not been defined with a specificity to enable parties to structure their argument to the courts or to predict in advance the weight which any factor will be accorded. Second, the balancing test is over-inclusive. Some interests need not be balanced at all, and a presumption in favor of access in certain circumstances would result in both adherence to the policies of the federal discovery rules and more satisfactorily predictable decisions. The following section suggests a rule based on a presumption of sharing of civil discovery materials with the government, one that is supported by the policies of the Federal Rules of Civil Procedure and that eliminates the uncertainty attendant upon application of the current balancing tests.230

PROTECTIVE ORDERS AND SHARING DISCOVERY MATERIALS WITH THE GOVERNMENT

Courts have adopted a balancing test as a method for separating the legitimate from the illegitimate requests for transfer of discovered documents. Litigants are concerned with protective-order strategies, that is, with the best way by which to protect or to guard against protection of information from disclosure. A balancing test, however, does not aid the parties in easily resolving questions on the scope of discovery. Since recourse to the courts on many problems is inevitable, the jurisdictional rules which govern appellate review and the procedural mechanisms of supervision of discovery by trial courts are of lasting importance.231

The first portion of this section deduces a rule on the sharing of discovery materials with the government. The proposed approach advocates government access to civil discovery materials unless the party at whose behest the protective order was entered or its privy can demonstrate particularized need for preclusion of gov-

230. Some courts have purported to use a balancing test in ruling against government access but in fact the balance has been so weighted against the government's position that a presumption against modification of protective orders for the benefit of the government exists. As the majority in Martindell noted, there are some cases where unbalanced enforcement of an existing protective order would thwart the public interest in effective resolution of claims. 594 F.2d 291, 296 n.7 (2d Cir. 1979). As the preceding sections have shown, except for the Second Circuit's decision in Martindell which is of dubious merit after GAF III, there is no persuasive appellate court case which argues against access.

231. See text accompanying notes 72-119 supra.
government access. The proposed rule thus establishes a general presumption in favor of government access but identifies three criteria from the many singled out under the balancing tests as important limitations on the government's right to access, limitations sufficient to rebut the presumption of sharing. The section then identifies the conflicting interests regarding a sharing rule and concludes that facilitating government access whenever possible by means of a rebuttable presumption is well-suited to the effectuation of the goals of federal discovery.

The Limits of the Balancing Test

The balancing test adopted by every circuit court of appeals and by most district courts232 reviewing the question of modification of protective orders possesses the major disadvantage of any balancing test, that is, it gives little clear guidance to the litigant concerning the likely results achieved on its application. In theory, the balance is struck in different places depending upon the facts presented so that it is possible to fashion a rule of decision which reflects the operative facts. In practice, the factors to be balanced cannot or have not been defined with sufficient specificity. Thus, the litigant, even in the three circuits that have addressed the issue of government access, will be at a loss in ascertaining the most appropriate arguments to be raised in arguing for or against access. Litigants in the Seventh Circuit have one relatively definitive appellate case to guide them233 but whether that case will be broadly read by district courts previously hostile to requests for modification of protective orders is open to question. Litigants in the Second Circuit must test the bounds of the hasty reconciliation of the GAF line of cases with Martindell. Litigants in the Fifth and Eighth Circuits, due to the pithiness of the decisions of their respective appellate courts, are virtually operating without the benefit of any precedent whatsoever. It is only when the cases are read together that an understanding of the law on sharing can be formed.

Of the many factors considered relevant under the balancing test, three may be abstracted, any one of which in a given case would be sufficient to rebut the proposed presumption in favor of nonparty government access to discovery. The first factor is privi-

232. See text accompanying notes 120-230 supra.
233. American Tel. & Tel. Co. v. Grady, 594 F.2d 594 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979); see text accompanying notes 211-218 supra.
lege: the government has been granted access under the balancing test even where there has been reliance on a stipulated protective order so long as none of the materials disclosed are privileged.234 Second, the material must be relevant. The government has been granted access only when the information discovered was to be used in its civil case or investigation.235 The third limitation involves good faith. The Seventh Circuit’s approach is that if a litigant can demonstrate that the government is exploiting its case or investigation solely to obtain the fruits of discovery in another case, its access to the discovered material will be denied under the balancing test. Further discussion of these three benchmarks of privilege, relevance, and lack of exploitation as developed in the case law provides a useful introduction to their role under the proposed rebuttable presumption of government access to civil discovery.

Absence of privilege and the relevance of the requested materials are preconditions placed on the compliance with any discovery request in a federal civil suit.236 In that sense, reconciling those two factors under the balancing test is misleading; a categorical precondition cannot be bargained or “balanced” away. Nonetheless, the special consideration given the factors under the test underlines their significance to the granting of any discovery request including those that would result in the sharing of materials. Cutting across the issue of relevance of the requested materials has been the judicial treatment of “reliance” on the scope of an existing protective order. Although some courts, for example the Seventh Circuit in American Telephone & Telegraph Co. v. Grady237 and the Ninth Circuit in Olympic Refining Co. v. Carter,238 have granted government access notwithstanding the fact that the parties have relied on stipulated protective orders in shaping discovery, other courts have considered reliance to be a cogent reason for defeating government access. The definitions of impermissible reliance have differed, however. On the other hand, the Second Circuit in Martindell cited the age of the protective order and the policy reason of enforcing only “providently” granted protective orders so that witnesses will not “be inhibited from giving essential

234. See text accompanying notes 201-229 supra. But see Martindell v. International Tel. & Tel. Corp., 594 F.2d 291 (2d Cir. 1979); notes 195-197, 204-207 supra (access was denied in part because prospective order was suspended).

235. See text accompanying notes 219 supra, 234-241 infra.

236. See text accompanying notes 218-220 supra.

237. 594 F.2d 594, 596 (7th Cir. 1978), cert. denied, 440 U.S. 971 (1979).

238. 332 F.2d 260, 266 (9th Cir. 1964).
testimony in civil litigation."\(^{239}\) A district court in California denied modification of a protective order noting the judicial economy in constructing an "umbrella" under which the parties may produce documents without doubting that they will not be disclosed to nonparties and without needing complicated judicial intervention in refereeing discovery disputes.\(^{240}\) However, neither the allegation of reliance nor the age of the protective order adequately explains by itself the reason for refusing to modify a protective order. As the district court noted in *MCI Communications Corp. v. American Telephone & Telegraph Co.*

We believe this reliance argument fails for two reasons. First, the defendants simply have not shown that anything discovered by MCI in this case would be protected from discovery in the District of Columbia case. There is no claim that any privilege objection was waived; indeed, a special master in this case has spent a great deal of time ruling on the many claims of privilege that were asserted. There is no reason to believe that the rulings would be any different in the District of Columbia. Defendants point to various matters in certain depositions which they say are "embarrassing," but this is a claim we find to be exaggerated and, in any event, without legal significance.

More than this, however, we do not believe that defendants were justified in regarding either the pretrial order or the discussion with the Department of Justice attorneys as constituting a guaranty that material produced to MCI would be protected from discovery by other parties. As far as the protective order is concerned, it is in terms subject to change by further order of the court. It does not purport to furnish a lifetime guaranty, and even if it did, it would be difficult for a sophisticated litigant to take such a grandiose assurance literally.\(^{241}\)

\(^{239}\) 594 F.2d 291, 295 (2d Cir. 1979). *But see id.* at 298 (Medina, J., concurring in part):

A plaintiff in a civil litigation is bound by the terms of an agreement he has made to restrict the access of nonparties, including the Government, to the products of discovery. . . . In the instant appeal the protective order “expressly anticipated” the arrival of Government investigators on the scene and sought to prevent their access to the products of discovery. *Id.* (Medina, J., concurring in part) (quoting *GAF Corp. v. Eastman Kodak Co.*, 415 F. Supp. 129, 132 (S.D.N.Y. 1976)).


\(^{241}\) 1979 Trade Cases 62,449, at 76,659, 76,660 (N.D. Ill. 1978). In addition, litigants should realize that reliance on a protective order will probably never be sufficient to overcome a grand jury subpoena.
One can conclude that the best analysis of the effect of reliance on an existing protective order is to counsel courts and litigants to assume that the parties have relied on an existing court order but to discount the significance of that reliance when the documents requested by the government are relevant, when no privilege would bar sharing, and when the government has requested the documents in good faith.

Examination of the "bad faith" or "exploitation" factor is more problematic. The concept of bad faith is destined to play an important role in the law on modification of protective orders if only because of the difficulty in allocating the burden of proof on modification. The general rule is that the movant bears the burden of demonstrating the propriety of a suggested court action. However, since protective orders may always be modified and since the original movant who convinced the court to enter the protective order has the information likely to justify continued protection, there is logic to the Second Circuit rule which allocates the burden of proof on vacation to the party at whose behest the order was originally entered.242 A sensible compromise, hinted at in the Seventh Circuit's reference to bad faith,243 is to require the movant to demonstrate the circumstances justifying vacation but to permit the case to be rebutted by a showing that the government is acting in bad faith.244 What constitutes bad faith is a question to which we will return in a moment.

The rule proposed here is an amalgam of the Second and the Seventh Circuit's positions on the question of the burden of persuasion. A movant will bring to the court's attention the need for entry, modification, or vacation of a protective order with respect to the issue of government access to materials. Once a motion for government access has been filed, however, regardless of whether the government itself has requested access to discovery materials pursuant to a validly issued civil investigative demand or subpoena or by motion with supporting affidavit, the burden shifts either to the party at whose behest a protective order was entered or to the party opposing government access. In so allocating the burden of

242. For further discussion of this rule, see text accompanying notes 202-210 supra.
proof on protecting documents to the party who wishes them protected, the proposed rebuttable presumption extends current Second Circuit law. By making the presumption in favor of government access rebuttable, the rule can incorporate limitations on access already recognized in appellate decisions. Just as any party's right to discovery is not absolute, the government's right to access to already discovered documents is not absolute. Still to be determined, however, is the issue of what cases will defeat a government request for access. The Seventh Circuit's concept of bad faith is one likely candidate.

A prima facie definition of bad faith might be proof that the government has initiated an investigation or filed a case solely to obtain the fruits of discovery. Proof in this case is difficult since conclusive evidence of bad faith would almost always be in the hands of the government agency and not the party. However, arguments can be made from inferences based on the amount of time between initiation of the private suit, the government's request for access, and the initiation of the government's suit. A fine-tuning of this test might prohibit government access to discovered materials when it is only investigating alleged violations but has not yet filed a suit. However, under the liberal pleading requirements of the Federal Rules of Civil Procedure, this formulation has the disadvantage of requiring a district court to make a preliminary assessment of the merits of the government case in order that the line between investigation and litigation be meaningful. At the minimum, it would mean that the district court must examine why and when the government commenced its investigation in order to satisfy itself that the government has a need for the information. But it does prohibit the government from making its case solely from the fruits of another's discovery. Because the judgment entered against the defendant in a government suit has important ramifications for the party, equity demands that the government not be allowed to bootstrap its case on that of a private party. The federal discovery rules may indeed entitle the government to an economical means of making its case and of putting in its proof but they do not authorize a substitute for the government resolving its own investigative priorities and developing its own case. Further, the rules minimize the chance that the sharing of discovery can become a means for one party to harrass another.\textsuperscript{245} Therefore, the

\textsuperscript{245} See text accompanying notes 55-59 \textit{supra}. 
rebuttable presumption in favor of government access to discovery materials does not preclude consideration of the motivations of the government in seeking access.

Under the presumption, motions made by the government for access to discovery materials will be granted as a matter of course and the custodial party will be required to turn over copies of discovered materials to the government246 unless any party opposing sharing interposes an objection sufficient to rebut the presumption. At least three factors sufficient to rebut the presumption of government access can be identified. Discovery materials will not be shared with the government when: first, the materials are not relevant to the government’s investigation or case; second, the materials are privileged or represent work product247 or are trade secrets or other confidential commercial information;248 or, third, the materials have been sought by the government in bad faith. The preconditions that the documents be relevant and not privileged are nothing more than a reaffirmation of the general prerequisites to any discovery whatsoever in the federal system.249 The incorporation of the bad-faith exception to the sharing rule is a recognition of the importance of preventing government access to discovery materials at the outset if the government is not seeking the documents for the furtherance of a pending case or investigation or if the pending investigation is a sham.

These three exceptions to the sharing rule, then, have been selected from the panoply of factors that have been considered by appellate courts in application of balancing tests. Other factors accorded significant weight by the appellate courts in assessing the government’s right to access—for example, the length of reliance upon existing discovery orders250—still can be argued by a party opposing government access but they will not be dispositive absent the presence of one of the three categories of exceptions which re-

246. The costs of complying with the government request must be borne by the government.
247. FED. R. CIV. P. 26(b)(3) prohibits the discovery of documents and things “prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative” only upon a showing of substantial need of the materials and that the party is unable “without undue hardship to obtain the substantial equivalent of the materials by other means.”
248. FED. R. CIV. P. 26(c) empowers the trial judge to prohibit the disclosure of trade secrets or “other confidential research, development, or commercial information” or to rule that the information may be disclosed only in a specified way.
249. FED. R. CIV. P. 26(b)(1).
250. See text accompanying notes 237-241 supra.
but the presumption of access. The three exceptions embody such significant concerns about the appropriate conduct of discovery that they should be examined in every case in which the government requests access.

The bad-faith exception in particular has the desirable effect of categorizing many of the most amorphous objects of inquiry under the concept of exploitation. The bad-faith exception at the same time incorporates a limited balancing test. Questions of whether the government has exhibited bad faith in seeking ready access to discovery materials reduce to a decision of whether it is fair for the government to obtain access to documents from a third party instead of through a discovery proceeding in its own case. A court will need to make difficult comparisons between the nature of the private and government suits, and to decide whether government access will likely obviate the need for costly government discovery to obtain documents accessible through sharing or whether it will permit the government to obtain indirectly what it could not obtain directly. Although the flexibility of the balancing test employed in the bad-faith exception is desirable because considerations of fairness which are indicia of bad faith can only be imperfectly defined in advance, a conservative construction of bad faith is required, lest the exception swallow the rule.

Supervision of the Discovery Process

Discovery rules are not neutral in their substantive consequences. As noted, the trend of appellate law has been to permit the modification of protective orders to aid the government in litigating its own case. However, this disposition has been reached without even one straightforward exposition of the costs and benefits of the implementation of such a rule. Theoretically the federal discovery rules in their entirety are neutral in potential effects and are not designed to favor either plaintiffs, defendants, or any particular class of litigant. Nevertheless, the rules can change the practical effect of applicable substantive legal rules in some cases. For example, in the instance of sharing discovery, it may be possible for the government to maintain an action which otherwise would be too expensive to litigate to judgment or to litigate at all. It may also be possible that the government will obtain discovery

251. See text accompanying notes 55-59, 213-214 supra.
252. See note 258 infra.
materials through third-party access which it may not have obtained had it conducted its own discovery.\textsuperscript{253} It is important to ascertain that these practical effects are underwritten by the goals of discovery in general.

Discovery affords the prime opportunity for mutual knowledge of parties' cases. The federal rules express their own mandate to facilitate the "just, speedy, and inexpensive determination of every action."\textsuperscript{254} This liberal policy of discovery is supported by two implicit tenets.

First, the language of the rules describes only the boundaries of permitted inquiries. Thus a large amount of discretion is delegated to the trial court and to the parties in regulating the discovery process to assure its efficiency. Especially after the 1970 amendments to the Federal Rules of Civil Procedure\textsuperscript{255} the discovery rules reflect the policy judgment that the rules are to minimize conflict between the parties and to decrease the supervisory burden of the courts. The broad scope of discovery permitted under the rules does not eliminate conflict entirely, of course, because discovery takes place in an adversary system where each side wishes to control the case by defining the scope of the subject matter of inquiry. The rules include extensive discretionary judicial powers in supervising discovery, such as the entry of protective orders.\textsuperscript{256} The rules also provide means for the parties to alert the

\textsuperscript{253} For example, the government may not have deposed the same individuals, asked the same questions, obtained the same documents, or probed with the same perspicuity.

\textsuperscript{254} \textit{Fed. R. Civ. P. 1.}

\textsuperscript{255} The history of the federal rules on discovery, from their adoption in 1938 through the 1970 amendments illustrates a steady evolution of discovery rights and a delegation of a greater degree of power to attorneys to police the discovery process. For example, the 1938 rules limited interrogatories to one set per party, as under the 1912 equity rules, but they removed the time limits applying to when they could be served. The 1946 amendments removed the one set limitation on interrogatories and with the adoption of the 1970 amendments, the judge no longer ruled on objections to interrogatories. \textit{Fed. R. Civ. P. 33(a).}

\textsuperscript{256} In addition to Rule 26 protective orders, Rule 30 permits a party to request the court to advance or to postpone the date on which a deposition may be taken or to regulate the technique by which it is recorded or to end a deposition or to order that the deposition be taken before the judge. Rule 27 empowers the court in its discretion to fix conditions under which depositions may be taken before trial or during appeal. Rule 28 permits the court to specify persons before whom a deposition can be taken. Under Rule 35 the trial court may order that a party undergo a physical or mental examination.
court to discovery abuse\textsuperscript{257} and for the court sua sponte to impose sanctions for abuse.\textsuperscript{258} The federal scheme, then, is not one of precisely worded rules but of more general directives and proscriptions which take on meaning when applied to specific factual situations.\textsuperscript{259}

Second, the preference built into the rules is that discovery, as other phases of trial, is to take place in the public. The only provision for limiting the items that may be investigated in discovery or for limiting the disclosure of items discovered is contained

\textsuperscript{257} Fed. R. Civ. P. 41(b) empowers a defendant to move for dismissal of an action based on plaintiff's failure to comply with any rule or order of the court. Rule 37, the primary rule on the imposition of sanctions on any party for failure to make discovery, outlines the procedures by which any aggrieved party may apply for an order compelling discovery, \textit{id.} 37(a) for expenses incurred because another party failed to admit the the genuiness of any document or matter, \textit{id.} 37(c), for reasonable expenses incurred by the failure of a party to attend his own deposition, \textit{id.} 37(d), and for the imposition of other sanctions upon a party's failure to comply with a court order on discovery, \textit{id.} 37(b).

\textsuperscript{258} Fed. R. Civ. P. 16(6) permits the trial court to direct the parties to appear before it for a pretrial conference to consider any "matters as may aid in the disposition of the action." The court shall embody in an order action taken at the conference, such as, the matters admitted, the method of proof at trial, the schedule of discovery. The parties' compliance with the terms of this order is governed by the law of contempt. Further 28 U.S.C. § 1927 (1976) enables the court to hold any attorney or pro se litigant who "so multiplies the proceedings in any case as to increase costs unreasonable and vexatiously" personally liable for the excess costs.

\textsuperscript{259} Nonetheless, it is interesting to note that the discovery strategy used by a litigant is likely to depend upon the status of a party as plaintiff or defendant. The results of a Judicial Center Study support the hypothesis that plaintiffs and defendants alike use discovery to postpone a ruling on the merits of the case and to manipulate costs for their tactical impact. Those results indicate that over 80\% of the responses to interrogatories and over 60\% of the document requests were filed more than 30 days after the discovery request was filed with the court. Although a compelling motion can be sought 30 days after the discovery request, most attorneys wait 91-120 days before filing a motion to compel discovery. This is true even though substantially more than 75\% of the motions to compel on which there is a ruling are decided in favor of the movant. P. Connolly, E. Holleman & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery 18-19 (Federal Judicial Center 1978). From this data the following two conclusions can be drawn. First, both plaintiffs and defendants must gain from delay in discovery since most litigants do not use available mechanisms to obtain discovery. Second, the Rule 37 compelling process is not effective because counsel do not seek the court's assistance to secure compliance with the discovery rules. The Judicial Center Study does not disclose the proportion of plaintiffs and defendants who request compelling motions but on the assumption that both sides engage in discovery to an equal extent, and on the assumption that plaintiffs and defendants were represented in equal numbers in the population of litigants studied on this issue, the conclusions to be drawn from the Judicial Center Study would apply equally to plaintiffs and defendants.
in Rule 26(c) which requires a party to demonstrate "good cause" for entry of an order to protect a party from "annoyance, embarrassment, oppression, or undue burden or expense." 260

The two general tenets together serve the supervening purpose of the federal rules to maximize the "just, speedy, and inexpensive" 261 disposition of federal litigation. The federal rules maximize the possibilities for pretrial interrogation of witnesses and examination of documents, enabling parties to secure information when it is fresh, encouraging the elimination of fictitious issues before trial, simplifying the presentation of evidence at trial, and minimizing the chances that witnesses will be coached or that their testimony will be manufactured. These same goals are well served by a rule which permits discovery materials to be shared with the government.

The proposed rule does not contain a blanket admonition that all discovery materials be shared with the government. A blanket rule would, of course, greatly reduce the supervisory burden of the courts since the plain language of the rule adequately informs counsel of the legality of their proposed courses of action. By delineating only these exceptions to government access, 262 the proposed rule does increase the certainty of uniform interpretation. Two of the exceptions are really categorical preconditions on any discovery whatsoever. The third exception, for bad faith, uses a balancing test to determine the appropriateness of discovering other documents. Nonetheless, other factors may prove relevant depending upon the facts presented, 263 and the balancing test of the bad-faith exception will permit a court to consider unique arguments. It is enlightened self-interest at least as much as a desire to give life to the federal discovery process which encourages litigants to share material with the government. 264 Requests for sharing ma-


262. See text accompanying notes 233-244 supra.

263. See text accompanying notes 219-229 supra.

264. See notes 55-59 supra.
terials with the government must be scrutinized to insure that self-interest and discovery policies coincide.

Thus, the proposed rule improves the self-regulatory feature of discovery but does not eliminate a need for creative judicial management. That fact alone should not argue against its adoption, however, for two important reasons. First, there is no formulation of a sharing rule, other than a blanket prohibition on sharing, that will not require judgments to be made on the advisability of government access to named materials and that will not raise the question of who is to make the judgments. Liberal discovery rules themselves presuppose judicial intervention. Liberal discovery may increase the costs of taking evidence before trial just by increasing the opportunities for discovery. Further, liberal discovery highlights concepts such as privilege and relevance which immunize materials from discovery but which also are defined only with difficulty. Finally, liberal discovery may make possible the prosecution of actions futile under the common law rules because the defendant himself possesses the evidence of wrongdoing.

The presumption in favor of sharing discovery with the government mitigates the tendency for liberal discovery to increase the pretrial costs. There is no need to require the government to engage in time-consuming and costly discovery when it can obtain the same documents through nonparty access. The sharing rule also incorporates existing law on privilege and relevance already accorded a central place in federal discovery but does not change their definitions or cause them to be applied in new situations. Finally, the bad-faith exception will prevent the government from filing suits for the purpose of acquiring its proof later through access to documents discovered in a private case. Government counsel may be aided by the intelligence with which well-qualified private attorneys conduct discovery, but this unforeseeable advantage certainly is not sufficient reason to argue against the adoption of the presumption although it may suffice to rebut it. Certainly discovery is structured by the perspicuity and intelligence of counsel,

265. No definition of “privilege” is provided in the federal rules. Federal substantive law will supply the definition except in diversity cases when the law of the appropriate state governs. Federal definitions of privileges (attorney/client, priest/penitent, interspousal, and self-incrimination) are not recognized uniformly in the states.

266. If, on the other hand, the private attorney leaves some unanswered questions in his discovery, the government is not precluded from undertaking additional “mop-up” discovery.
but our models of litigation cannot afford to so enshrine the competitive ideal of litigation that dissemination of information is impeded.

An additional reason why any increased need for judicial management under the presumption test should not prevent its adoption is that the type of inquiry involved is of the sort commonly conducted by district courts in other areas of discovery supervision: Is there a valid privilege which attaches to any of the materials? Are the documents relevant to the government’s inquiry? Is there any other reason that strongly militates against government access? In addition, these types of decisions are capable of being transferred to masters or magistrates\textsuperscript{267} who, under several proposed amendments to federal discovery procedures,\textsuperscript{268} will be available


\textsuperscript{268} There were recently two proposals for discovery reform being actively discussed. The Judicial Conference of the United States is considering proposals to amend the Federal Rules of Civil Procedure in order to alleviate the abuses of the discovery process. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, Revised Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure (Feb. 1979), \textit{reprinted in} 80 F.R.D. 323 (1979) [hereinafter cited as Rules Committee Proposals]. Proposed Rule 26(f) permitted the parties to force the trial judge to hold a discovery conference if they cannot agree on the plan and timing of discovery. Proposed Rule 30(b) permitted depositions to be taken by telephone, to be recorded by nonstenographic means, and to be used at trial for any purpose permitted by the Federal Rules of Evidence. Id. at 33-34. Proposed Rule 37(b)(2) expanded the authority of the trial judge to impose sanctions for failure to comply with a discovery conference order, and for failure to participate “in good faith” in framing a discovery plan by agreement. Id. at 344. Subsection (f) of Proposed Rule 37 empowered the trial court to impose sanctions on the United States for failure to participate in good faith in discovery. Id. at 347. Proposed Rules 26(f), 37(b)(2), and 37(b)(f) were approved by the Supreme Court and Congress and became effective as of Aug. 1, 1980.

The proposed rules reform was prompted by the Special Committee for the Section of Litigation of the American Bar Association, Report on the Study of Discovery Abuse (Oct. 1977) [hereinafter cited as ABA Report]. The ABA Report also suggested a change in Rule 26(b)(1) to limit the scope of discovery to the issues implicated in the case at hand, see note 272 infra, and to limit the number of questions to be asked by a set of interrogatories to 30 questions. These suggestions, however, were rejected in the Rules Committee Proposals and at the Judicial Conference of September 19-20, 1979. The Advisory Committee note to proposed Rule 26(f) of the Rules Committee Proposals states:

The Committee believes that abuse of discovery, while very serious in certain cases, is not so general as to require such basic changes in the rules that govern discovery in all cases. A very recent study of discovery in selected metropolitan districts tends to support its belief. P. Connolly, E.
to decide routine, mechanical discovery questions, and to supervise actively the more complex cases.269

Thus, the proposed rule promotes the self-regulatory feature

Holleman, & M. Kuhlman, Judicial Controls and the Civil Litigative Process: Discovery (Federal Judicial Center, 1978). In the judgment of the Committee abuse can best be prevented by intervention by the court as soon as abuse is threatened.

80 F.R.D. at 332.

In sum, there is widespread concern over discovery abuse but there is wide disagreement over how the abuse should be eliminated. In general, the ABA Report reflects the view that the opportunities for discovery abuse are best controlled by limiting the scope of permissible inquiry on discovery whereas the Judicial Conference proposals are aimed at differentiating the discovery procedures applicable to different types of cases. For a discussion of the Proposed Rule 37(f) which would authorize the imposition of sanctions on the government, see Note, Preferential Treatment of the United States Under Federal Civil Discovery Procedure, 13 GA. L. REV. 550 (1979).

269. The main conclusion of the Federal Judicial Center Study is that strong judicial controls designed to insure that discovery begins quickly and is completed within a specific period of time will shorten the time for discovery and the time needed for the deposition of the case. P. Connolly, E. Holleman & M. Kublman, supra note 259, at xi. The Judicial Center Study contains substantial evidence that the quantity of discovery is not a problem. For example, 52% of federal cases had no recorded discovery requests and 95% had 10 or fewer requests. On the other hand, in the 48% of federal cases in which discovery did occur, the abuse could reside in the quality as well as the quantity of discovery requests. Id. The Prettyman Report, which recommended special procedures for antitrust and other long cases, contained the following observation:

The problem of unnecessary delay, volume, and expense in these trials is much the same as is the problem of efficiency in any undertaking in which numbers of people and masses of material are involved. . . .

The person who must insure that a case of this nature is thoroughly prepared prior to trial is the trial judge himself.

Yankwich, supra note 165, at 65.

The innovative case-management techniques implemented in United States v. American Tel. & Tel. Co., No. 74-1698 (D.D.C., filed Jan. 22, 1980), are an example of systematic isolation of the issues which will require trial time. Discovery commenced early in 1978 and is supervised by a magistrate and two experts appointed as special masters. Judge Harold Greene set a discovery cut-off date of April 1, 1980 and a trial date of September 1, 1980 and compelled the parties to file Statements of Contentions and Proof (SOCAPs) in order to narrow the issues for trial. The government's SOCAP I, for example, listed the factual allegations that will comprise its case and A.T.T. responded listing the elements of its defense. Four rounds of SOCAPs were contemplated to increasingly narrow the issues and attempts to obtain stipulations are scheduled after the close of all discovery. This effort in judicial management is already being cited as a model for the handling of complex litigation. Legal Times of Washington, Feb. 4, 1980, at 1, col. 1.

In sum, although some commentators advise a revision of Rule 26 to narrow the scope to permissible inquiry on discovery, see note 32 supra, there is a strong case to be made for preserving the broad scope of discovery but fashioning a system wherein discovery procedures can be differentially applied to protracted or to other problem cases.
of the federal discovery rules. Whether discovery will be productive, prompt, and efficient will often depend on the supervisory zeal of the trial court and the disinclination of the appellate courts to entertain costly interlocutory review. A rule which approves government access to discovery materials minimizes the chances that cases will be tried twice, once in discovery and once on the merits. Further, any rule that reduces the opportunities for costly discovery also minimizes the strategic value of the use of discovery to induce settlement. To the extent that the sharing issue will arise typically in the "big case" where discovery is extensive, the rule meshes well with the impetus for discovery reform: namely, cutting down on the quantity of discovery and therefore on the time and costs of litigating cases.

The second tenet of federal discovery, that pretrial and trial proceedings should be held in the public unless there is an adequate showing to justify nondisclosure, is also advanced by a rule that maximizes the government's access to discovery materials. The rebuttable presumption recognizes that in some cases the expectations of the parties may need to be readjusted in order to give effect to the government's interest in efficient dispute resolution. In consonance with the goals of swift resolution of discovery, the proposed rule resolves conflicts on the scope of discovery in favor of the government unless the opponent demonstrates a bar to disclosure. The presumption clearly prevents parties from using a protective-order strategy to prevent government access absolutely.

Although some uncertainty accompanies the utilization of a rebuttable presumption, such a test also preserves for courts flexibility in dealing with the issue of government access and provides general guidelines and rules of decision to litigants. This flexibility is especially required to evaluate privacy bars to disclosure. The rebuttable presumption decreases the costs of litigation of government cases. The rule gives prominence to other rules which immunize particular matters from discovery and which safeguard against unrestrained rummaging through an opponent's files or obtaining wholesale the party's preparation for trial. A party is not defenseless in facing a government demand for discovery materials. A reasonable demand of counsel may be to adjust the discovery schedule to accommodate for the loss of simultaneity in discov-

270. For a discussion as to whether a litigant waives any privilege he may have in documents which he shares voluntarily with the government, see note 218 supra.
and for the fact that the government may have "discovered" its case and be pressing for stipulations, admissions, and a trial date long before its opponent has completed its discovery.272

Because of the general preference for public knowledge of what the government is doing, government counsel is or should be reluctant to agree to the entry of protective orders. Analogously, it would be unfortunate if nongovernmental litigants who have little or no interest in preserving the right of the public to access to court proceedings should be able to frustrate that interest through an over-exercise of prudence in seeking entry of protective orders. There are powerful reasons for limiting pretrial secrecy, only one of which is the preservation of the government's access to discovered materials that are relevant, not privileged, and otherwise available for use in its related case. Thus, any uncertainty that may be caused by a rule which permits modification of protective orders is worth its cost. In practice, the uncertainty caused by application of the rule may not be so great as it might appear. Most discovery disputes are not taken to courts because of jurisdictional bars, successful informal resolution, a desire to minimize court-related expenses, or uncertainty as to outcome. There is no reason to conclude that these deterrents will not apply to the resolution of questions of access. Further, an amendment to the Federal Rule of Civil Procedure 26(c) expressly approving of the principle of sharing discovery materials with the government would quickly assure litigants of a uniformity in district courts which heretofore has been lacking.273 Until such a time as the proposed rule is firmly

271. The Advisory Committee in adopting the 1972 amendments found the practice of awarding priority in discovery to the party who introduced it to be "unsatisfactory and unfair" and that the better practice is to permit simultaneous discovery. The proposed amendments are published at 48 F.R.D. 487, 507 (1970). Similarly, the Manual for Complex Litigation provides for simultaneous discovery. FEDERAL JUDICIAL CENTER, supra note 164, § 0.50.

272. However, the departure from the simultaneity rule in this instance is of a special sort not ordinarily encountered in the case of complex litigation. Sharing discovery with the government does not disturb the progress of discovery in the original case. But, it gives to the government a head start in its suit or investigation against one of the parties. In this sense, one district court's decision that sharing is permissible imposes burdens on another trial court in supervising its discovery, at least to the point of making a determination as to whether special arrangements are needed to restore the balance usually provided through simultaneous discovery.

273. FED. R. CIV. P. 83 authorizes courts to promulgate rules to regulate practice in ways not inconsistent with the federal rules. Pursuant to this authority at least two district courts have established time limits on discovery. See Greyhound Lines,
established, however, the development of the case law is depen-
dent upon the perspicuity of litigants and reviewing courts.

CONCLUSION

This Article is an amalgam of the general and of the specific. The specific question under examination, the modification of protective orders to permit government access to the fruits of discovery, has required an investigation of the law applicable to protective orders and their modification. In general, courts have adopted a balancing test to determine whether modification is permissible in any given case. In turn, necessarily implicated in the discussion are the larger questions of the proper role of the district court in monitoring discovery and of appellate courts in reviewing discovery orders. The trend of appellate law is to permit modification of protective orders and to permit government access to the fruits of discovery absent proof of bad faith on the part of the government in seeking the discovered materials. This trend is an adequate first step in remedying the present problems connected with the conduct of discovery in the ordinary civil case. What is yet to be discerned is whether courts of appeals will capitalize on recent liberal interpretations of the Cohen collateral order rule, persist in reviewing by way of appeal the species of discovery orders here discussed, and thereby undercut the authority of trial courts to supervise the discovery process and to enforce their studied conception of the appropriate course.

The proposed rule establishes a presumption in favor of sharing discovery material with the government but identifies three cases sufficient to rebut the presumption of access. The government may not obtain discovery materials as a third party if a categorical bar to discovery exists because: (1) the materials are not relevant; (2) the materials are subject to a valid claim of privilege, are work product, trade secrets, or contain other confidential commercial information; or (3) if the government exhibits bad faith in seeking access as determined through the application of a balancing test. The establishment of a rebuttable presumption simultaneously encourages the prompt disposition of government litigation and fur-

Inc. v. Miller, 402 F.2d 134, 144-45 (8th Cir. 1968); Freehill v. Lewis, 355 F.2d 46, 48 (4th Cir. 1966). The benefits to embodying discovery control in local rules include publication of the practice of the district and diminishment of enforcement problems when the uniform policy is known. P. Connolly, E. Holleman & M. Kuhlman, supra note 259, at 84.
thers the mandate of the Federal Rules of Civil Procedure to dispose of cases expeditiously and in the public forum. It is a rule which well serves the goals of federal discovery.