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Irresistible Evidence Under Federal Rule 26(c): Proving Annoyance, Embarrassment, and Undue Burden

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Irresistible Discovery: Rule 26(c)

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Overview of Program

- Legal Standard
- Evidence that Captures a Court's Attention
  - Undue Burden or Expense
  - Trade Secrets
  - Annoyance
  - Embarrassment
  - Oppression
- Cost-shifting and Sanctions

Legal Standard

Legal Standard: Rule 26(c)(1) Protective Orders

- *"In General.* A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action."

Legal Standard: Rule 26(c)(1) Procedure

- Rule 26(c)(1) provides a basis and process for seeking protective orders.
- Process generally:
  - Must meet and confer first to resolve dispute.
  - If party seeking discovery refuses to withdraw or limit the requests, the responding party seeks a protective order.
  - Always check local rules or standing orders because some jurisdictions or chambers have very specific procedures for how discovery disputes, including those under Rule 26(c), must be presented to the court
    - *See e.g.*, Central District of California L.R. 37-2
- *Note*: Rule 26(c) applies to both parties and non-parties.

Legal Standard: Rule 26(c)(1)(A)-(H) Bases

- The standard of proof the movant must meet is a "good cause" standard.
- Rule 26(c)(1) lists four basis for limiting discovery:
  - Annoyance
  - Embarrassment
  - Oppression, or
  - Undue burden or expense.
- Trade secrets and confidential business information are also grounds for a protective order.

Legal Standard: Rule 26(c)(1) Sliding Scale

- Court has broad discretion to permit or restrict discovery.
- Court is empowered to restrict discovery under Rule 26(c) even if the discovery sought is relevant.
- In practice, however, the basis for limiting discovery under Rule 26(c) works on a sliding scale with the relevance standard under Rule 26(b)(1).
- The more relevant and essential the discovery is, the harder it will be to resist. The more tangential the discovery is to the core issues of the case, the more persuaded a Court may be to limit it.

Legal Standard: Rule 26(c)(1) Sliding Scale

- Wright and Miller, 8A Fed. Prac. & Proc. Civ. § 2036, Grounds for Protective Orders (3d ed.) (citations omitted).
  - "To justify restricting discovery, the harassment or oppression should be unreasonable, but 'discovery has limits and * * * these limits grow more formidable as the showing of need decreases.' Thus even very slight inconvenience may be unreasonable if there is no occasion for the inquiry and it cannot benefit the party making it."

Legal Standard: Rule 26(c)(1) Good Cause

- Meeting the "good cause" standard is best accomplished by advancing evidence and specificity.
- This can include:
  - Affidavits or declarations
  - Specific metrics such as dollar amounts, hours, etc.
  - Deposition testimony
  - Written discovery
  - Documentary evidence
  - Requests for judicial notice of public information or prior cases

Evidence that Captures the Court's Attention

Undue Burden or Expense

Undue Burden or Expense: Documents and Written Discovery

- What constitutes an undue burden or expense is very fact specific and exists on a sliding-scale with relevance.
- A strong motion will include detailed explanations and/or evidence such as:
  - Affidavits or declarations from individuals directly knowledgeable about the costs and burdens associated with responding
  - Deposition testimony or written discovery responses that make a similar showing or provide the information in another form
- Bottom line: the more specific and the more supported the motion is, the better chance it has to be successful.

Undue Burden or Expense: Documents and Written Discovery

- For documents or ESI, a common basis for challenge is the sheer volume of data or documents sought.
  - Volume should be considered in conjunction with the relevance/importance, or lack there of, of the information.
- To challenge document requests as unduly burdensome consider evidence establishing metrics such as:
  - The volume of data or documents in pages, gigabites, etc.
  - How long the review would take
  - The cost of third party review, outside counsel time, or cost of employee time to respond
  - The relative availability of the information
- Challenging specific categories of documents, or specific custodians, is also more likely to be successful than general arguments of burden.

Undue Burden or Expense: Depositions

- Courts are often more reluctant to issue a protective order limiting a deposition entirely due to undue burden or expense.
- Rule 30 provides many specific limitations, such as number of depositions, hours per deposition, limits on duplicative depositions and the need for enumerated topics for a Rule 30(b)(6).
- Video deposition technology has, in many circumstances, reduced the costs and burdens of depositions further.

Undue Burden or Expense: Depositions

- A court may limit depositions for undue burden or expense if:
  - The witness is of advanced age or frail health
  - The same or similar testimony has been or could be obtained from more pertinent witness(es)
  - A litigant is seeking to re-depose a witness where no good cause is present
  - A litigant has reached the limits on depositions provided for in Rule 30 but is seeking more and has not established more are warranted
  - A motion to dismiss is pending

Annoyance, Embarrassment, Oppression

- "[U]pon motion the court may limit the time, place, and manner of discovery, or even bar discovery altogether on certain subjects, as required 'to protect a party of person from annoyance, embarrassment, oppression, or undue burden or expense.'" Crawford-El v. Britton, 523 U.S. 574, 599, 118 S. Ct. 1584, 1597, (1998) quoting Fed. R. Civ. P. 26.

Seattle Times Co. v. Rhinehart

- Watershed decision: Seattle Times Co. v. Rhinehart, 467 U.S. 20, 36–37, 104 S. Ct. 2199, 2209–10, 81 L. Ed. 2d 17 (1984)
  - State court found identification of all persons who had made donations over a 5-year period together with the amounts donated would "result in annoyance, embarrassment, and even oppression"
  - Washington Supreme Court affirmed finding no abuse of discretion in trial court's decision to issue protective order
  - SCOTUS affirmed: "We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other **s**ources, it does not offend the First Amendment."

Seattle Times (cont.)

- Rule 26(c) furthers a substantial governmental interest unrelated to the suppression of expression.
- Liberal discovery is provided for the sole purpose of assisting in the preparation and trial, or the settlement, of litigated disputes.
- Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c).

Seattle Times (cont.)

- Pretrial discovery by depositions and interrogatories has a significant potential for abuse.
- This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties.
- The Rules do not distinguish between public and private information. Nor do they apply only to parties to the litigation, as relevant information in the hands of third parties may be subject to discovery
- There is an opportunity, therefore, for litigants to obtain—incidentally or purposefully—information that not only is irrelevant but if publicly released could be damaging to reputation and privacy

Embarrassment

- Miscellaneous Docket Matter No. 1 v. Miscellaneous Docket Matter No. 2, 197 F.3d 922, 926 (8th Cir. 1999)
  - Appellants hired a press spokesperson and issued press releases, but tried to justify their actions in light of a local rule which prevented them from contacting potential class members.
  - Appellants had circulated to the press a declaration filled with lurid details of a woman who claimed defendant had harassed her, but could offer no real justification for this action
  - Court found: "we can see no purpose in circulating the declaration other than to harass and embarrass Opperman."
    - "[d]iscovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public." *Joy v. North,* 692 F.2d 880, 893 (2d Cir.1982), *cert. denied,* 460 U.S. 1051, 103 S.Ct. 1498, 75 L.Ed.2d 930 (1983).
    - "[D]istrict courts should not neglect their power to restrict discovery where 'justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.' " *Herbert v. Lando,* 441 U.S. 153, 177, 99 S.Ct. 1635, 60 L.Ed.2d 115 (1979) (quoting Rule 26(c)).

Embarrassment (cont.)

- A.W. v. I.B. Corp., 224 F.R.D. 20, 94 Fair Empl. Prac. Cas. (BNA) 179 (D. Me. 2004):
  - plaintiff in an action under Title VII asserting a hostile environment sexual harassment claim was entitled to a protective order precluding defense counsel from inquiring about the plaintiff's sexual history except to the extent that such inquiry:
    - (1) was permitted by the court's order;
    - (2) concerned the plaintiff's conduct at the premises of the defendant's workplace, with the alleged harasser or others; or
    - (3) concerned sexual events that entailed violence or trauma to the plaintiff, including but not limited to those events expressly identified by the plaintiff's psychiatrist.

    91 A.L.R. Fed. 2d 381 (Originally published in 2015)

Bad Faith

- United States ex rel. Baltazar v. Warden, 2014 WL 4436990 (N.D. Ill. 2014),
  - Granting protective order based on improper deposition questions where:
    - tone of the deposition was hostile and confrontational
    - intent of the questioning was to accuse the plaintiff of lying despite knowledge to the contrary
    - questioning was repetitive, irrelevant, utterly distasteful, and disrespectful,
    - designed solely to unreasonably annoy, harass, and embarrass the plaintiff.

    91 A.L.R. Fed. 2d 381 (Originally published in 2015)

Bad Faith (cont.)

- Slaughter v. Atkins, 2010 WL 2035785 (M.D. La. 2010)
  - former university president claimed the defendant university foundation and board members failed to renew his contract in retaliation
  - Board member moved for protective order regarding questions about the substance of board meetings held after the termination
  - Court found questions were in bad faith and designed to unreasonably annoy or embarrass the board member
  - Court entered protective order precluding plaintiff from inquiring about multiple topics regarding the school's reorganization plans, budgets, and layoff plans.

Privacy Interest

- "Although the Rule contains no specific reference to privacy or to other rights or interests that may be implicated, such matters are implicit in the broad purpose and language of the Rule." Seattle Times Co. v. Rhinehart, 467 U.S. 20, 35 n.21, 104 S. Ct. 2199, 2208 n.21 (1984)

- Scott v. Lackey, 2008 WL 2444518 (M.D. Pa. 2008)
  - defendant objected to a deposition question as to his residential address on the ground that it was irrelevant and might endanger his privacy,
  - Held: defendant was entitled to a protective order where the plaintiff had not demonstrated a valid need for the defendant's address to conduct discovery.
  - Also held defendant was entitled to a protective order permitting him to refuse to answer a question as to whether he had ever been arrested, finding that such a question was designed to annoy, embarrass, or oppress the defendant.
    - Reasoning: the defendant's general character was not at issue & the plaintiff made no attempt to demonstrate the relevance of an arrest to the defendant's credibility

Relationship to Relevance

- “[T]he requirement of Rule 26(b)(1) that the material sought in discovery be ‘relevant’ should be firmly applied, and district courts should not neglect their power to restrict discovery where ‘justice requires [protection for] a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Herbert v. Lando, 441 U.S. 153, 177, 99 S. Ct. 1635, 1649(1979)
- Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 353 n.17, (1978) (finding that order requiring class-action defendant to compile list of plaintiff class members was not a discovery order since it did not meet the relevancy requirements)

Protection Beyond Privilege

- “Rule 26(c) is broader in scope that the attorney work product rule, attorney-client privilege and other evidentiary privileges because it is designed to prevent discovery from causing annoyance, embarrassment, oppression, undue burden or expense not thus to protect confidential communications.” Boughton v. Cotter Corp., 65 F.3d 823, 829–30, 32 Fed. R. Serv. 3d 821, 26 Envtl. L. Rep. 20196 (10th Cir. 1995)
  - Holding district court has the discretion to issue a protective order prohibiting the deposition of an opposing party under Rule 26

Trade Secrets

- “Fed.R.Civ.P. 26(c)(7) … provides that a district court ‘for good cause shown,’ may order ‘that a trade secret of other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.’” Federal Open Market Committee of Federal Reserve System v. Merrill, 443 U.S. 340, 355–56, 99 S. Ct. 2800, 2810 (1979).

Trade Secrets (cont.)

- "One seeking a protective order under that rule must establish that the information sought is confidential." Am. Standard Inc. v. Pfizer Inc., 828 F.2d 734, 740 (Fed. Cir. 1987)
- Trade secret definitions vary but, essentially, to be a trade secret information must be kept secret and must derive economic value from that secrecy.
  - Need to show reasonable steps to protect secrecy
- Trial court has full discretion to decide whether the circumstances warrant extending a protective order to trade secrets Jazz Photo Corp. v. U.S., 439 F.3d 1344, 1357–58, 27 Int'l Trade Rep. (BNA) 2185, 78 U.S.P.Q.2d 1180, 1191 (Fed. Cir. 2006)

Examples of Trade Secrets

- quantitative product formulas;
- marketing plans;
- formulas for food or drink;
- information relating to marketing decisions;
- product fabrication;
- source code,
- development plans;
- beta tester information

Scope of Protective Order

A protective order may include any of the following relief:

- forbidding the disclosure or discovery;
- specifying terms, including time and place, for the disclosure or discovery;
- prescribing a discovery method other than the one selected by the party seeking discovery;
- forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;
- designating the persons who may be present while the discovery is conducted;
- requiring that a deposition be sealed and opened only on court order;
- requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and
- requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

§ 41:118. Protective orders permitted under Rule 26(c), 7 Annotated Patent Digest § 41:118

Discovery vs. Trial

- A protective order may limit disclosures in discovery or keep information confidential
- BUT – this does not necessarily protect the information indefinitely
- Courts routinely deny motions to seal information that was produced confidentially, but which may be presented at trial
- Strong preference under the rules that public has an interest in the outcome of litigation

Cost-shifting or Sanctions

Cost Shifting: Rule 26(c)(1)(B)

- Courts are empowered to cost-shift to impose the cost of responding on the party seeking the discovery.
- 2015 Advisory Committee Note: Rule 26(c)(1)(B):
  - Prior to the 2015 Rule amendment, some courts exercised cost-shifting authority. "Explicit recognition [of cost-shifting] will forestall the temptation some parties may feel to contest this authority."
  - However, "[r]ecognizing the authority does not imply that cost-shifting should become a common practice."

Cost Shifting: Rule 26(c)(1)(B)

- The leading case on cost-shifting is *Zubulake v. USB Warburg LLC*, 217 F.R.D. 309, 322 (S.D.N.Y) which sets out seven factors:

  1. The extent to which the request is specifically tailored to discover relevant information;

  2. The availability of such information from other sources;

  3. The total cost of production, compared to the amount in controversy;

  4. The total cost of production, compared to the resources available to each party;

  5. The relative ability of each party to control costs and its incentive to do so;

  6. The importance of the issues at stake in the litigation; and

  7. The relative benefits to the parties of obtaining the information

- Other courts have suggested that cost-shifting is a appropriate remedy only when seeking inaccessible data, such as back up tapes or archived information.

Sanctions: Rule 26(c)(3)

- Rule 26(c)(3) also allows courts to award expenses in bringing the motion, however, it must be done through Rule 37(a)(5):
- "(5) *Payment of Expenses; Protective Orders.*
  - (A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:
    - (i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;
    - (ii) the opposing party's nondisclosure, response, or objection was substantially justified; or
    - (iii) other circumstances make an award of expenses unjust."

Sanctions: Rule 26(c) and Rule 37(a)(5)

- Rule 37(a)(5)(B):
  - "*If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust." (emphasis added).

Sanctions: Rule 26(c) and Rule 37(a)(5)

- The critical factors in awarding expenses are the litigants' conduct in negotiating and responding to discovery:
  - The degree to which the requests violated Rule 26(c) (*i.e.* sought to impose burden, sought to embarrass)
    - Whether objections to the discovery were substantially justified
  - Failure to meet and confer
  - Refusal to negotiate at all or in good faith
  - Failure to respond to reasonable requests for extension or accommodation in responding

Thank You

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