AMERICAN COLLEGE OF TRIAL LAWYERS

WHITE PAPER

Protective Orders Governing Discovery in Federal Criminal Cases Should Be Reserved for Appropriate Cases and Tailored to Minimize the Burden on a Defendant's Constitutional Right to an Effective Defense

American College of Trial Lawyers

Federal Criminal Procedure Committee

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Table of Contents

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I. Introduction

Protective orders governing discovery in criminal cases serve valuable purposes. By limiting access to and use of protected materials, protective orders provide assurance to prosecutors and courts that witnesses will not be intimidated or harmed, trade secrets and other confidential materials will not be disclosed, and personal identifying information (PII) will not be misused. In turn, imposition of a protective order expedites production of discovery materials to defendants and their counsel. When a protective order is in place, a prosecutor need not painstakingly review and redact each item of discovery before turning it over to the defendant – which, in document-intensive cases, can shave weeks or months off the timetable for discovery production.

But as protective orders have become a more widespread phenomenon in federal criminal cases, questions have arisen about the appropriate contours of the orders and the limits they place on a defendant's constitutional rights. In the absence of clear guidance from the courts, the nature and prevalence of protective orders vary widely from district to district, prosecutor to prosecutor, and case to case. Some districts have responded by devising model protective orders, but these models vary, too, as does the degree to which the parties in a given district utilize them.

The absence of a uniform national standard sparked a robust conversation within the Federal Criminal Procedure Committee. As a result, the Committee undertook to survey local practices across jurisdictions and examined several exemplars of protective orders from various geographies in different types of cases implicating a range of interests and concerns. This paper summarizes the Committee's research into the goals and purposes of protective orders in criminal cases, and examines the issues arising from their overuse and overbreadth. The Committee recommends a model protective order that balances the government's interests in protection with the defendant's need for access to discovery to prepare an effective defense.

II. Legal Framework

Federal Rule of Criminal Procedure 16(d) allows for the entry of a protective order governing discovery upon a showing of "good cause." Fed. R. Crim. Proc. 16(d)(1). As the party seeking a protective order, "the Government, of course, has the burden of

showing the requisite good cause." United States v. Yassine, 574 F. App'x 455, 461 (5th Cir. 2014); United States v. Carriles, 654 F. Supp. 2d 557, 565-66 (W.D. Tex. 2009). In particular, the government has the burden to show that disclosure of the specified information without a protective order "will result in a clearly defined, specific, and serious injury." United States v. Smith, 985 F. Supp. 2d 506, 522-23 (S.D.N.Y. 2013); United States v. Jones, 2007 WL 4404682, at *2 (E.D. Tenn. Dec. 13, 2007) (rejecting government's request for a Rule 16(d) protective order where government failed to make the requisite showing of good cause). The court's finding of harm "must be based on a particular factual demonstration of potential harm, not on conclusory statements." United States v. Gangi, 1998 WL 226196, at *2 (S.D.N.Y. May 4, 1998) (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 8 (1st Cir. 1986)). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not support a good cause showing." See United States v. Wecht, 484 F.3d 194, 211 (3d Cir. 2007).

Understandably, courts have shown deference to the government's requests for protective orders in cases involving potential threats to witness safety, risks to national security, disclosure of commercial trade secrets, and comparable considerations for which the protections of a court order are necessary and appropriate. See, e.g., United States v. Cordova, 806 F.3d 1085, 1090 (D.C. Cir. 2015) ("Among the considerations to be taken into account by the court will be the safety of witnesses and others, a particular danger of perjury or witness intimidation, and the protection of information vital to national security.")

Yet the discretion afforded to district courts to enter protective orders is "subject always to the Sixth Amendment's limitations." Id. Even when the government makes a showing of good cause for a protective order, therefore, the order "cannot be overly or unnecessarily broad." United States v. Brittingham, 2022 WL 3006849, at *1 (W.D. Va. July 28, 2022). "[C]ourts should take care to ensure that the protection afforded to [discovery] information is no broader than is necessary to accomplish the [proffered] goals" of the protective order. United States v. Lindh, 198 F. Supp. 2d 739, 741–42 (E.D. Va. 2002). More specifically, "in determining whether to accord protection to certain materials, and the extent of such protection, courts should weigh the impact this might have on a defendant's due process right to prepare and present a full defense at trial." Id.; see also Smith, 985 F. Supp. 2d at 544 ("[T]he Court should consider how burdensome a protective order would be on [defendants], being particularly sensitive to the extent to which a protective order would hinder their efforts to defend themselves at trial.").

III. Practical Considerations

Before producing discovery in federal criminal cases, prosecutors frequently ask defense counsel to agree to a protective order placing limits on how the discovery will be handled. If the defense does not agree, the prosecutor typically moves the district court to enter a protective order over the defendant's objection. Some form of protective order is entered in the vast majority of cases in which the government seeks one.

The protective orders proposed by the government vary from district to district and case to case. At times, the prosecutor may simply ask defense counsel to agree that discovery can be used only to defend the indictment in question. In other cases, the prosecutor may insist on limitations on the location and manner in which defense counsel access and/or store the discovery. These limitations may include, for example:

- Restrictions on the lawyer's ability to share the discovery with the defendant;
- Restrictions on the defendant's right to possess the discovery (or, in certain cases, an outright prohibition on the defendant's right to see the discovery at all, or until a specified number of days before trial);
- Requirements that no discovery be given to (or, in some cases, shown to) any witness;
- Requirements that any and all PII be redacted before discovery is shown to the defendant and/or any witness;
- Requirements that references to certain discovery materials be redacted from pleadings and filed under seal if submitted as exhibits to any motions;
- Requirements that defense counsel maintain a log of persons (including experts and investigators retained by the defense) who view discovery and secure their written agreement to be bound by the order; and
- Requirements that defense counsel return or destroy all copies of discovery in their possession or control at the end of the case.

Conditions of this sort impose real burdens on the ability of defendants and their counsel to prepare a case for trial. Limits on a defendant's ability to possess materials covered by a protective order invariably increase the time and expense of reviewing the discovery. This is especially true when the defendant is detained, as

counsel must arrange multiple visits, often to distant facilities, to review discovery under the detention facility's procedures governing, inter alia, the duration of visits and permitted uses of technology. When a protective order contains an outright prohibition on a defendant's access to discovery (or a prohibition that lasts until a few days before trial), the order may impinge on a defendant's rights under the Fifth and Sixth Amendments. No competent defense counsel would be comfortable trying a case without having discussed the discovery with their clients –often the client's assistance is indispensable to make sense of complex facts and identify flaws and falsehoods in witnesses' accounts. Similarly, counsel often cannot conduct meaningful witness interviews if they are inhibited from sharing with witnesses the materials produced by the government in discovery about which the witnesses have knowledge. The requirement that defense counsel log individuals who view discovery is administratively onerous and presumes that counsel may at some point have to share the log with the government, thereby revealing defense strategy by way of a roadmap to the witnesses and experts defense counsel have consulted. The need to file discovery material under seal also poses administrative burdens and is inconsistent with a defendant's right to public proceedings. Even seemingly innocuous conditions like the removal of PII and the return or destruction of materials at the conclusion of the case can present problems, as there may be legitimate reasons to share certain personal identifying information with defense witnesses (e.g., to help identify cooperators who face no risk of harm) and retain case materials (e.g., for a potential § 2255 petition).

To be sure, highly restrictive protective orders advance legitimate governmental objectives in certain cases. Witnesses will be less likely to come forward if they fear retaliation – and where there is a basis to believe retaliation is likely, the government has a very strong interest in concealing witnesses' identities and identifying information. Similarly, restrictions must be placed on the use of materials that constitute or reveal trade secrets in order to preserve and protect confidential proprietary information. And when discovery contains PII that is incidental to the facts of the case (e.g., social security numbers of victims), redaction is often appropriate to protect individual privacy. Protective orders also facilitate production of relevant discovery from third parties pursuant to Federal Rule of Criminal Procedure 17(c) by minimizing the risk that sensitive subpoenaed materials will be used for purposes unrelated to a case and/or lead to harassment or embarrassment of victims or witnesses.

But while protective orders were once reserved for exceptional cases involving special considerations like national secrets or violent criminal organizations, such orders have proliferated in recent years and are now regularly requested in routine matters. Defense counsel commonly acquiesce to the government's requests for onerous protective orders in order to obtain expedited access to discovery – and courts may enter such orders at the parties' request without a demonstration of necessity in a given case. See United States v. Connolly, No. 22-cv-09811-JMF, 2023 WL 2263116, at *2 (S.D.N.Y. Feb. 28, 2023) ("I am not a big fan of these wholesale protective orders …. I signed the protective order because the Government refused to turn over discovery materials in its absence and the defense, in order to move the case along, agreed to it – not because I personally believed a protective order was necessary in this case."). On occasions when a defendant challenges a proposed protective order in court, judges may effectively place the burden on the defense to explain why "standard" conditions – in other words, conditions that have become commonplace through acquiescence – should not be imposed. And on rare occasions when a protective order is violated, generally through mistake or inadvertence, the government may hold up the breach as evidence that even more draconian measures should be imposed the next time around.

Accordingly, the challenge facing courts and practitioners is to strike a proper balance between protection for legitimate reasons and access to discovery for defendants constitutionally entitled to an effective defense. See United States v. Celis, 608 F.3d 818, 833 (D.C. Cir. 2010) (finding no Sixth Amendment violation when "[t]he protective order and its management by the district court reflect an appropriate balancing of interests in the relevant case-specific context").

IV. Toward a Model Protective Order

The orders the Committee collected from jurisdictions across the country varied widely. A two-page order from the District of Utah simply prohibited "[d]efendant, his attorneys, and all other individuals or entities who receive materials in this case … from directly or indirectly providing access to, or otherwise disclosing the contents of, [discovery] to anyone not working on the defense of this criminal case, or otherwise making use of the materials in a manner unrelated to the defense of this criminal case." By contrast, an order from the Northern District of California spanned seven pages and purported to cover not just discovery but also "any

information copied or extracted from" discovery; stated that confidential materials could be "furnished, at this time, to no one other than the defendant's counsel"; and imposed several stringent conditions, including maintenance of a log of individuals who accessed discovery, a prohibition on downloading confidential materials to thumb drive or removable external hard drive unless the device was password-protected, and an express requirement that "when Confidential Materials are attached to email between counsel, the confidential materials shall be encrypted."

Given these wide variations, the Committee undertook to distill the essential characteristics of a protective order that protects the interests at stake without unduly impinging on the defense function. The Committee identified nine such characteristics and believes the protective order should:

1. Apply with equal force to all parties, i.e., require both sides to treat protected materials produced by the opposing party in accordance with the terms of the protective order;
2. Place the burden of identifying protected material on the producing party;
3. Provide for a process for challenging the designation of certain materials as protected;
4. Minimize the category of materials that the defendant cannot possess, and permit the defendant to review all materials in the presence of counsel in all but exceptional circumstances;
5. Permit defense counsel to share protected materials with potential experts and trial consultants;
6. Permit defense counsel and defense investigators to show protected materials to percipient witnesses (and their counsel) whom counsel believe to have relevant knowledge;
7. Not require disclosure of the individuals to whom counsel have disclosed protected materials without further court order;
8. Address the possibility of inadvertent disclosure and provide for a process to address such disclosure, including but not limited to a process for seeking the return or destruction of disclosed materials; and
9. Make explicit that the order does not apply to documents or information produced in discovery that the receiving party, at the time of production, already lawfully possessed.

Based on these characteristics, the Committee is proposing a template for use in appropriate cases by courts and practitioners around the country. While the Committee acknowledges that the unique facts and circumstances of particular cases (e.g., national security, trade secrets) may call for adjustments to any model, the Committee believes the provided Model Protective Order for Federal Criminal Cases, which is based on an exemplar from the Eastern District of Tennessee, is suitable in most cases involving protectable interests. By moving toward a standardized model of this kind, federal courts nationwide can streamline discovery production and minimize pretrial litigation while safeguarding defendants' constitutional right to prepare an effective defense.

V. Model Protective Order

www.actl.com/resource/model-protective-order