INTRODUCTION: Stipulated "blanket" or "umbrella" protective orders concerning trade secrets and confidential business information are becoming routine in the Alexandria Division. This may be a by-product of the increasing complexity of civil discovery, or may reflect the practical reality of coping with the strain that electronic discovery imposes on even routine civil litigation, or both. The geometric growth in commercial activity involving intellectual property and information technology has had a concomitant effect on protective order practice when business litigation erupts. Simply put, competitively sensitive information is "at issue" more frequently now than in the past. When a case is filed, and the litigants formulate their joint discovery plan, it is usually closely followed by submission of a proposed stipulated "blanket" or "umbrella" protective order – often including a provision allowing for prospective filings under seal. In the eyes of some, such protective orders may have vices, but they have at least two very appealing virtues: *first*, they allow federal judges to avoid protracted document-by-document disputes on protective order motions; *second*, they permit sufficiently broad discovery on the merits, while imposing narrower limits use and disclosure of the information obtained.

Yet, at the same time, First Amendment, common law, rule-based, and statutory principles upholding the public nature of certain "judicial proceedings" have been reaffirmed. The public acts as a "watch dog," and therefore has a broad right of access to "judicial records." That right of access creates a tension between the litigants' privacy interests in their proprietary information, and the public's right of access to judicial records and proceedings. The resolution of that tension may be found in a careful definition of "judicial records," a careful delineation between the types of "judicial proceedings" to which the broad right of access applies, and a careful articulation of the litigants' interests that may be used to overcome the public's interest.

Where does all that leave commercial litigators these days? Let's see.

I. GENERAL STANDARDS FOR ENTRY OF PROTECTIVE ORDER CONCERNING CONFIDENTIAL BUSINESS INFORMATION

The civil discovery rules explicitly provide that, "for good cause shown," a protective order may be entered providing that "a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way." FED.R.CIV.P. 26(c)(1)(G) (*formerly* 26(c)(7)). This 1970 amendment to the rules governing party-discovery reflected the then-current *common law practice* regarding all forms of discovery – even though *by rule* protective orders previously had been allowed only regarding depositions, under former Rule 30(b). *See* ADV. COMM. NOTES, 48 F.R.D. 487, 505 (1970). A similar rule, expanded in scope in 1991, governs discovery from non-parties. FED.R.CIV.P. 45(c)(3)(B)(i). These amendments reflect both the growing complexity of civil litigation since the time the rules were first enacted in 1938, and the increasing exposure of confidential business information during discovery – sometimes sought in good faith, sometimes not. *See* ARTHUR R. MILLER, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 445-63 (1991) (tracing historical development of discovery rules pertaining to protective orders) (hereafter, "MILLER"). Thus, *rule-based* protective order litigation is a fairly recent phenomenon.

Under these rules, confidential commercial information enjoys a "qualified privilege" from civil discovery. *See Federal Open Market Comm. v. Merrill*, 443 U.S. 340, 356-57, 361-64 (1979).[1] Generally, under Rule 26(c)(1)(G), the party resisting discovery of commercial information must show "good cause" by establishing that the information is confidential and competitively sensitive, and that disclosure would harm it, while the party seeking discovery

[1] The *Federal Open Market* case concerned FOIA requests. As the Supreme Court made clear, the FOIA "trade secret" exemption is analogous to Rule 26(c)(1)(G). *See also EPA v. Mink*, 410 U.S. 73, 86 (1973) (the discovery rules and FOIA exemptions are "rough analogies").

must demonstrate a legitimate need for the information; then, the district court must balance the parties' competing interests, often entering an order limiting disclosure instead of precluding discovery. *Id.* at 362 & n.24; *see also Cook Group, Inc. v. C. R. Bard, Inc. (In re Wilson),* 148 F.3d 249, 251-52 (4th Cir. 1998). This, then, would be the standard for a document-by-document analysis under Rule 26(c)(1)(G) when the motion for a protective order is contested.

But who has time for a document-by-document analysis when hundreds of thousands – even millions – of documents are at issue? Neither the litigants nor the Court do, and so the parties generally propose, and the district courts generally approve, "blanket" protective orders to which the parties have stipulated.

II. STIPULATED PROTECTIVE ORDERS

The Magistrate Judges of the Eastern District of Virginia, Alexandria Division, all of whom have had vast experience conducting or overseeing complex civil litigation, encourage the parties to jointly prepare a protective order, tailored to their needs, for consideration and entry by the Court. These usually are "blanket" or "umbrella" orders, covering all discovery materials – documents, discovery responses, expert reports, and deposition testimony. Occasionally, the parties cannot agree on such an order, or disagree about particular provisions, in which case, the Court will make a discretionary determination to adopt one party's proposal, or will make an independent analysis of the nature and extent of the provisions to be included.

The protective order provisions discussed in this outline are typical of those routinely seen in this Court. These provisions are not offered as "the best practices," nor have they been "approved" by the Court as a preferred form. Instead, they are simple versions of the provisions typically included in a protective order. Below, each provision is analyzed to expose its pros and

cons. This analysis should help you decide which provisions to include – or avoid – in your own protective orders, and the supporting rationale and case law for your contentions, should the matter require a ruling by the Court.

A. BLANKET PROTECTIVE ORDERS

> *Upon consideration of the stipulation of the parties, and it otherwise appearing proper to do so, it is hereby*
>
> *ORDERED that the discovery in this action, whether the information or documents are from parties or nonparties, shall be governed by the following terms:*
>
> *1. This Protective Order applies to all interrogatory answers, responses to requests for admission, documents produced, expert reports, deposition transcripts or tapes, and deposition exhibits (collectively, "Discovery Materials").*

To facilitate discovery and to minimize document-by-document disputes regarding numerous commercially sensitive documents, district courts often enter stipulated "blanket" protective orders, under which the parties make initial designations of confidentiality, subject to the district court's ruling should the other party object. *See* MANUAL FOR COMPLEX LITIGATION 4TH § 11.432 at 64-66 (analysis), and § 40.27 (sample order) (West/Fed. Jud. Cntr. 2004) (hereafter, "MANUAL"); *see also* MILLER, *supra* at 483-84. The federal judges recognize that the alternative to a blanket protective order may be expensive and protracted motions practice on a document-by-document basis. *E.g., In re Alexander Grant & Co. Sec. Litig.*, 820 F.2d 352, 355-57 (11th Cir. 1987) (good cause for entering blanket protective order); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 529 F. Supp 866, 879 (E.D. Pa. 1981) (in the absence of blanket protective orders, judges would be held "hostage" by document-by-document protective order motions). Thus, blanket protective orders facilitate discovery by balancing the parties' rights *inter se* to obtain sufficient information to prepare for trial, by protecting confidential business

information from public disclosure during the discovery phase of an action, and by minimizing the incidence of discovery disputes, which would otherwise strain judicial resources.[2]

A word of caution: If the confidential information clearly is not relevant, it is not an abuse of discretion to deny access altogether. *See, e.g.*, *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977) (district court must use discretion to balance one party's need for discovery against other party's need for confidentiality, *held*, denial of access affirmed); *see also Duplan Corp. v. Deering Milliken, Inc.*, 397 F. Supp. 1146, 1185-87 (D.S.C. 1975) ("party seeking discovery must make a clear showing that the [trade secrets] are relevant"). As one court put it succinctly, a "protective order is not a substitute for establishing relevance or need. Its purpose is to prevent harm by limiting disclosure of *relevant* and *necessary* information." *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1325 (Fed. Cir. 1990) (emphasis in original). I could not have said it better myself. Too often, I believe, the entry of a blanket protective order becomes the excuse for seeking irrelevant information.

B. LIMITATIONS ON USE

> *2. Discovery Materials shall be used only for the purpose of this action and any related litigation or administrative proceedings involving substantially the same issues and some or all of the same parties. There shall be no reproduction of Discovery Materials except for the purposes permitted. As is reasonably necessary for these purposes, copies, excerpts, or summaries of these materials may be made, shown, or given to those persons authorized pursuant to paragraph 3 or 4.*

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[2]/ The federal courts sometimes sort protective orders into three categories: "particularized," in which the showing of "good cause" has been made document-by-document; "umbrella," in which all civil discovery is treated as "confidential" without designations or individualized showings; and "blanket," in which the parties are authorized to make good faith designations of particular documents as "confidential," subject to later review by the Court. *See Bayer AG and Miles, Inc. v. Barr Labs., Inc.*, 162 F.R.D. 456, 465 (S.D.N.Y. 1995). Blanket protective orders are the most common in modern commercial litigation, and may be entered based on a generalized, rather than particularized, showing of "good cause."

A provision limiting the use of confidential discovery materials is a significant protection that should be sought in your protective order. "Liberal discovery is provided for the *sole purpose* of assisting in the preparation and trial, or the settlement, of litigated disputes." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 34 (1984) (emphasis added). "[W]hen the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery is properly denied." *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352-53 n.17 (1978) (citation omitted). Therefore, stipulated and contested protective orders typically include a "use clause," under which the discovery material "shall be used solely for the purposes of this lawsuit … and [use] for any other purpose is expressly forbidden." *See Bush Development Corp. v. Harbour Place Assoc.*, 632 F. Supp. 1359, 1364 (E.D. Va. 1986); *accord Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 993, 999 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965). (***NB:*** *Covey Oil* was cited by the drafters of Rule 26(c)(1)(G) as a basis for the protective order rule. *See* ADV. COMM. NOTES, 48 F.R.D. at 505.) A "use clause" routinely is included in stipulated blanket protective orders, as well. *See, e.g., Bayer AG and Miles, Inc. v. Barr Labs., Inc.*, 162 F.R.D. 456, 458 (S.D.N.Y. 1995) ("confidential" discovery material can be used "solely for the purposes of this litigation and not for any business or competitive use"). Therefore, generally, it is appropriate to limit the use of discovery to the case at hand.

But what about related litigation threatened or already pending between the parties in another forum – should there be discovery-sharing between those actions? And what if an injured plaintiff sues a manufacturer for products liability and the manufacturer's insurer denies a defense and coverage, forcing the manufacturer to sue his insurer – should there be discovery-sharing between those actions? And what if that manufacturer is being sued by hundreds of

other injured individuals – should there be discovery-sharing between plaintiffs in those actions? Should the Court later modify a stipulated blanket protective order to allow a party to share confidential discovery materials with other cases? Well, it depends, and there are no hard and fast rules. These topics are discussed more thoroughly at pages 35-39 below.

C. LIMITATIONS ON DISCLOSURE: LEVEL ONE

> *3. If a party or nonparty contends that any Discovery Materials should be treated as "Confidential Material" (as that term is used herein) because it is competitively sensitive, confidential, or for some other good cause, then that party or nonparty may designate that material as "Confidential" either by a stamped legend if it is a document, or by counsel's statement on the record if the information is elicited in oral form, at the time the document is produced or the information is elicited ("Confidential Material"). Confidential Material shall be maintained in confidence by the receiving party and shall not be given, shown, made available, or communicated in any way to anyone other than the following persons: (a) attorneys of record in this action and their staff; (b) experts retained for the purposes of this action who have first signed a Confidentiality Agreement in the form annexed hereto as Exhibit A (a copy of which shall be given to opposing counsel); (c) the Court, in the manner described in paragraph 7; and (d) the parties and their officers and employees (including in-house counsel) whose assistance is reasonably necessary to assist counsel in this action, provided that each (i) is designated in advance and approved by the other party, and (ii) is first advised of, and agrees to be bound by, the terms of this Protective Order by signing a Confidentiality Agreement in the form annexed hereto as Exhibit A (a copy of which shall be given to opposing counsel).*

Under Rule 26(c)(1)(E) & (G), the Court has discretion to enter protective orders limiting disclosure, instead of precluding discovery altogether. As noted above, "Liberal discovery is provided for the *sole purpose* of assisting in the preparation and trial, or the settlement, of litigated disputes." *Seattle Time*, 467 U.S. at 34 (emphasis added). The discovery rules, however, "do not distinguish between public and private information," and litigants, therefore, may obtain information "that not only is irrelevant but if publicly released could be damaging to reputation or privacy. The government clearly has a substantial interest in preventing this sort of

abuse of its processes." *Id*. at 35. Most often, discovery activities are conducted "in private," and "are not public components of a civil trial." *Id.* at 33. Thus, "restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." *Id*. As recognized by the local rules, the parties are free to enter into confidentiality provisions like this, which limit access to discovery materials. *See* E.D.VA.CIV.R. 5(G) Accordingly, a protective order with a confidentiality provision is specifically allowed.

A protective order limiting disclosure aids "in facilitating resolution" of civil litigation by encouraging full discovery of "all relevant evidence in order to 'secure the just, speedy, and inexpensive determination'" of the action. *In re Grand Jury Subpoena*, 836 F.2d 1468, 1472 (4th Cir. 1988) (quoting FED.R.CIV.P. 1). "Absent such orders, witnesses would be deterred from providing essential testimony in civil litigation, thus undermining the adversary process." *Id*. The extent to which confidential commercial information may be disclosed, however, depends on several factors, including whether the parties are direct industry competitors.

Generally, fairness considerations dictate that the parties should have access to discovery materials – after all, their rights and liabilities are at issue. In fact, under former Rule 30(b), which was the basis for current Rule 26(c), parties generally could not be excluded from depositions. By analogy, one could argue that parties should not be excluded from access to all other forms of discovery. Rule 26(c)(1)(E) & (G), however, permit the Court to impose disclosure limitations without the party-exception found in former Rule 30(b).

In contemporary commercial litigation, other interests (like privacy or competitive sensitivity) may overbear even a party's right to have access to the facts upon which the case will be decided. This is particularly so when the parties are business competitors. In such cases,

harm from disclosure of confidential commercial information may be presumed. *E.g.*, *American Standard, Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987). Two of the most contentious issues under Rule 26(c)(1)(G) concern disclosure to opposing in-house technical personnel and disclosure to opposing in-house counsel. These issues have been decided in numerous contested cases, and provisions governing disclosure to them appear in stipulated protective orders, as well.

In-House Technical Personnel: The party seeking a protective order limiting disclosure of its confidential information under Rule 26(c)(1)(G) bears the burden of showing "that it will be harmed by the disclosure" to in-house technical personnel of the receiving party. *Cook Group, Inc. v. C.R. Bard, Inc. (In re Wilson)*, 149 F.3d 249, 252 (4th Cir. 1998). If that showing is made by the producing party, then the burden shifts to the receiving party to demonstrate its need to make disclosure to its own personnel for the purpose of preparing its case. *Id*. The balancing of those competing interests is committed to the district court's discretion. *Id.* Under these principles, there is no "*per se* rule." *Id*. at 252-53. Instead, the district courts must make case-by-case determinations.

In-House Counsel: There are two general concerns regarding in-house counsel: (1) that he might misuse the opponent's confidential business information (like pricing information) in "competitive decision making," or (2) that he might misuse confidential technical information (like new product research), to undermine the opponent's competitive standing in the future. Thus, when business information is at issue, disclosure to in-house counsel may be prohibited if he is involved in "competitive decision making." *See generally United States Steel Corp. v. ITC*, 730 F.2d 1465 (Fed. Cir. 1984); *Volvo Penta of the Americas, Inc. v. Brunswick Corp.*, 187 F.R.D. 240 (E.D. Va. 1999). And when confidential technical information is at issue, the Court must examine whether in-house counsel participates in technical matters or provides technical-

related legal services, such as patent prosecution. *See Safe Flight Instr. Corp. v. Sundstrand Data Control, Inc.*, 682 F. Supp. 20 (D. Del. 1988). Importantly, there is no *per se* rule for including or excluding in-house counsel from participating in discovery.

In contemporary patent infringement litigation, one often sees a "patent prosecution bar" in the stipulated protective order. Under that provision, in-house counsel and technical personnel of one party who have been given access to the other party's confidential information are barred from seeking or prosecuting patents involving the particular technology or information disclosed therein. A patent-prosecution-bar is controversial, but may be enforced. *See MercExchange, L.L.C. v. eBay, Inc.*, 467 F. Supp. 2d 608, 622-27 (E.D. Va. 206). In some instances, this sort of provision may offer more in theory than it can deliver in practice—it may be difficult to monitor and violations may be difficult both to detect and to enforce.

D. LIMITATIONS ON DISCLOSURE: LEVEL TWO

> *4. If a party or nonparty contends that any Discovery Materials should be treated as "Highly Confidential Material" (as that term is used herein) because it is extremely competitively sensitive, highly confidential, or for some other extraordinary good cause, then that party or nonparty may designate that material as "Highly Confidential" (or "Counsel's Eyes Only," or the like) either by a stamped legend if it is a document, or by counsel's statement on the record if the information is elicited in oral form, at the time the document is produced or the information is elicited ("Highly Confidential Material"). Highly Confidential Material shall be kept confidential by the receiving party and shall not be given, shown, made available, or communicated in any way to anyone other than the following persons: (a) attorneys of record in this action and their staff; (b) experts retained for the purposes of this action (i) who have first signed a Confidentiality Agreement in the form annexed hereto as Exhibit A (a copy of which shall be given to opposing counsel as provided in paragraph 5), and (ii) who have not been disqualified (as provided in paragraph 5); and (c) the Court, in the manner described in paragraph 7. Highly Confidential Material shall not be given, shown, made available, or communicated in any way to any party, or to the officers and employees (including in-house counsel) of any party.*

Counsel's-and-Experts-Eyes-Only: If an even higher level of confidentiality is warranted, parties often include a counsel's-eyes-only or a counsel's-and-expert's-eyes-only level of "highly confidential" information. Such limitations are discretionary, but have long been used by the federal courts where appropriate. *See E. I. du Pont de Nemours Powder Co. v. Masland*, 244 U.S. 100, 103 (1917) (counsel only); *Centurion Indus., Inc. v. Warren Steurer and Assoc.*, 665 F.2d 323, 326-27 & n.7 (10th Cir. 1981) (counsel and experts only); *Covey Oil*, 340 F.2d at 999 (counsel and experts only). The parties often make liberal (if not indiscriminate) use of this higher level designation, however, which may precipitate motions to de-classify the documents.

Sealing Depositions: If Highly Confidential information is being elicited at a deposition, a party may be excluded under a provision like this. Under former Rule 30(b), depositions were taken with "no one present except" parties, party officers, and counsel. In 1970, this limitation was transferred to Rule 26(c)(1)(E), and made applicable to all discovery methods. ADV. COM. NOTES, 48 F.R.D. at 505. That means these limitations may be imposed in the discretion of the Court upon a showing of good cause: "Upon motion … 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, including … that discovery be conducted with no one present except persons designated by the court." FED.R.CIV.P. 26(c)(1)(E). Exclusion of a party, while rare, may be ordered. *See Galella v. Onassis*, 487 F.2d 986, 997 (2d Cir. 1973) (excluding party who had violated prior orders by harassing opponent). Similarly, although rare, the Court may exclude other potential witnesses from depositions. *See Beacon v. R.M. Jones Apartment Rentals*, 79 F.R.D. 141, 142 (N.D. Ohio 1978) (exclusion because of credibility concerns, as under FED.R.EVID. 615). Moreover, depositions are

conducted in private under modern discovery practice and are not public judicial proceedings. *Seattle Times*, 467 U.S. at 33. Thus, excluding the press from a deposition is permissible under Rule 26(c)(5). *Amato v. Scott*, 157 F.R.D. 26 (E.D. Va. 1994); *Kimberlin v. Quinlan*, 145 F.R.D. 1 (D.D.C. 1992); *but see Avrigan v. Hull*, 118 F.R.D. 252 (D.D.C. 1987) (allowing press access to deposition). Finally, since deposition transcripts are no longer filed under Federal Rule 5(d), the transcripts of depositions are likewise subject to sealing – ***except*** to the extent filed or used at trial in adjudication of the merits (see pp. 17 *et seq.* below).

(***NB:*** The much publicized public depositions in the Microsoft antitrust case were conducted under an antitrust statute, which trumped Rule 26(c)(1)(E). *See United States v. Microsoft Corp.*, 165 F.3d 952 (D.C. Cir. 1999). Do not worry about this sort of ruling in your ordinary civil litigation.)

E. DISQUALIFICATION OF EXPERTS

> *5. Prior to the disclosure to an expert of any Highly Confidential Material produced by an opposing party or by a nonparty concerning an opposing party, the identity of the proposed expert shall be disclosed, and a copy of the expert's current resume or curriculum vitae shall be provided to the opposing party by hand delivery or facsimile. The opposing party then shall state its approval or disapproval of the expert in writing within three (3) days (not including weekend days or holidays), which response shall be served by hand delivery or facsimile. If the opposing party disapproves, it shall state its reasons, and it shall not be permitted to raise any other grounds for disapproval thereafter. If the opposing party approves or fails to timely respond, then the disclosure may be made to the expert. If the opposing party disapproves, then either party may seek an order from the Court regarding the expert's participation in the action. No matter which party files the motion, the party objecting to the expert's participation shall bear the burden of showing good cause to exclude the expert. No disclosure shall be made to the expert until an order has been obtained from the Court.*

The Court has the "inherent power" to disqualify one party's expert to protect the legitimate interests of the other. *See Wang Labs., Inc. v. Toshiba, Inc.*, 762 F. Supp. 1246, 1248 (E.D.Va. 1991). Although the existence of that power is clear, often the exercise of it is difficult. *Id.* Generally, the party seeking to disqualify the other side's expert bears the burden of proof. *See English Feedlot, Inc. v. Norden Labs., Inc.*, 833 F. Supp. 1498, 1501-02 (D. Colo. 1993). The Court must balance four competing interests: one party's interest in protecting its confidential information; the other party's interest in retaining the experts it needs to prepare and prove its case; the expert's interests in practicing his profession; and the judicial system's interest in the integrity, fairness, and truth-finding effectiveness of the proceedings. *See Great Lakes Dredge & Dock Co. v. Harnischfeger Corp.*, 734 F. Supp. 334, 336-37, 338 (N.D. Ill. 1990). None of these interests can be ignored or taken lightly, but none can overbear the others.

How the balancing of those interests is done depends on the fact-pattern. There are three typical fact patterns in expert disqualification motions: (1) the proposed expert works for, or consults with, a competitor of the party seeking disqualification; (2) the proposed expert is a former employee of, or former consultant to, the party seeking disqualification; or (3) the proposed expert had consulted with the party seeking disqualification about being its expert, but then became an expert for the other side – a "turncoat expert." Each is discussed below.

Competitor: When potential competitive harm is at issue in an expert disqualification motion, the Court examines five factors: (1) the nature of the expert's relationship to a competitor; (2) the extent of that relationship; (3) whether the relationship presently involves participation in "competitive" decision making; (4) whether the relationship may involve such participation in the future; and (5) whether qualification should be conditioned upon the expert's agreement to limit the expert's relationships with competitors. *See Digital Equip. Corp. v. Micro Tech., Inc.*, 142 F.R.D.

488, 490-92 (D. Colo. 1992). This may be a very difficult assessment for the Court to make on the paper record of a motion to disqualify.

Former Employee or Consultant: The concern here is that the former employee or consultant will do more than share his expertise – he might also share his intimate knowledge of the other party, possibly in violation of a nondisclosure agreement. *See Wang Labs., Inc. v. CFR Assoc., Inc.*, 125 F.R.D. 10 (D. Mass. 1989) (former employee); *Ares-Serono, Inc. v. Organon Int'l B.V.*, 153 F.R.D. 4, 6 (D. Mass. 1993) (former employee). When one party challenges the other party's expert based on a prior relationship, such as employment or consultation, the party must demonstrate that (1) the relationship was confidential, (2) confidential information was imparted to the expert that is (3) "substantially related" to the subject matter of the litigation, and (4) there is a risk of harm to the party from the disclosure of that confidential information to a litigation adversary. *See Marvin Lumber & Cedar Co. v. Norton*, 113 F.R.D. 588, 590-92 (D. Minn. 1986) (consultant). These factors must be carefully weighed.

Turncoat Expert: The decision in *Wang v.Toshiba* squarely decides this issue. The test is whether a confidential relationship was created (with or without formal retention) *and* whether confidential information was imparted to the expert when he was consulted about the case. If so, he should be disqualified. If the lawyer is not careful, this could turn out to be a he-said-she-said contest between the lawyer and the putative turncoat expert. Thus, prior to consulting with an expert notify him in writing that you will be imparting "confidential" information.

NB: The disqualification rules apply to both "testifying experts" and non-testifying experts or "litgation consultants." *See The Beam Sys., Inc. v. Checkpoint Sys., Inc.*, 1997 U.S. Dist. LEXIS 8812 (C.D. Cal. Feb. 5, 1997). Be clear in the stipulated protective order that the confidentiality and approval provisions cover *any* sort of expert.

F. DE-CLASSIFYING CONFIDENTIALITY DESIGNATIONS

> *6. A party's or nonparty's designation of Discovery Materials as Confidential or Highly Confidential Material may be challenged by any other party. The party or nonparty making the designation shall have the burden of proving that the Discovery Material should be treated as designated.*

Parties sometimes seek to challenge the other side's designations of "confidential" or "highly confidential" so that they can make broader disclosure or use of discovery materials. If a protective order has been entered after a particularized showing of "good cause," then the party seeking modification of the protective order to declassify "confidential" documents bears the burden of proof. *E.g.*, *Longman v. Food Lion, Inc.*, 186 F.R.D. 331, 333 (M.D.N.C. 1999). On the other hand, when "confidential" designations have been made unilaterally under a blanket protective order, the party having made the designation has the *initial* burden of proof, and must show "good cause" to continue treating a document as "confidential." *E.g.*, *Factory Mutual Ins. Co. v. Insteel Industries, Inc.*, 212 F.R.D. 301, 303 (M.D.N.C. 2002); *Longman v. Food Lion*, 186 F.R.D. at 333; *Bayer AG v. Barr Labs.*, 162 F.R.D. at 463-64 (stating four-factor test, weighing good cause; nature of the protective order; foreseeability; and reliance). If that initial showing is made, the burden shifts to the party seeking declassification. *See Lee Shuknecht & Sons, Inc. v. P. Vigneri & Sons, Inc.*, 927 F. Supp. 610 (W.D.N.Y. 1996) (applying *Bayer* four-factor test and refusing to declassify documents); *Bayer AG v. Barr Labs.*, 162 F.R.D. at 463-66 (allocating burden of proof under blanket protective order when party seeks to modify protective order to permit disclosure of discovery materials to in-house counsel). Thus, the factual and legal analysis of a declassification motion under a blanket protective order should follow the pattern for a contested protective order motion challenging the confidentiality of a specific document – but there is a twist.

Do not underestimate the effect of the parties' stipulation to the entry of a blanket protective order on a generalized showing of "good cause." Ordinarily, the parties will jointly apply for the protective order, advising the Court that both sides expect discovery to involve confidential and competitively sensitive information. Having made that stipulation to benefit itself, and to induce the other party to make discovery without a document-by-document fight, the party later seeking modification or declassification may be confronted with his stipulation as a reason to deny relief or as a reason to shift the burden to the movant. *See Bayer AG v. Barr Labs.*, 162 F.R.D. at 465 ("party should be held to its agreement," *held*, modification and declassification denied); *Longman v. Food Lion*, 186 F.R.D. at 333 (same); *Factory Mutual v. Insteel*, 212 F.R.D. at 303-04 (same); *see also* MANUAL § 11.432 at 67 & n.148 (reliance may affect modification analysis). Thus, be prepared to overcome your own stipulation when seeking declassification.

You also must find a practical way to present this issue to the Court – either through affidavits, if the disputed documents are voluminous, or through *in camera* review, if they are not. The presentation issue deserves some additional attention.

As noted above, confidential commercial information enjoys a "qualified privilege." *Federal Open Market*, 443 U.S. at 356-57, 361-64. Conducting *in camera* review is a "highly appropriate and useful means of dealing with" difficult privilege issues. *Kerr v. District Court*, 426 U.S. 394, 405-06 (1976) (governmental privilege). But the law does not "go so far as to say that the [district] court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case." *United States v. Reynolds*, 345 U.S. 1, 10 (1953) (military secrets privilege); *United States v. Zolin*, 491 U.S. 554, 571 (1989) (attorney-client privilege). Instead, the district court '"may act on the basis of testimony and affidavits.'"

Young v. CIA, 972 F.2d 536, 538 (4th Cir. 1992) (FOIA). Thus, you must at least be prepared to challenge the other side's designations without *in camera* review.

In camera review is a burden on the parties and the Court, and the Court may not be pressed into service for "groundless fishing expeditions" every time a privilege is challenged. *United States v. Zolin*, 491 U.S. at 570-71. Moreover, whether to use *in camera* review or not is committed to the "sound discretion" of the district court. *Id.* at 572. Accordingly, the intrusive and time-consuming process of *in camera* review is not necessary in every case to adjudicate declassification of confidential commercial information subject to a qualified privilege.

G. FILING UNDER SEAL

> *7. The parties may use any Confidential or Highly Confidential Material as an exhibit or attachment to any motion, or as a deposition exhibit, or as a trial exhibit. However, if a party uses any Confidential or Highly Confidential Material as an exhibit or attachment to any motion, as a deposition exhibit or as a trial exhibit, then that material shall be filed under seal.* ***With regard to filing under seal in accordance with Local Civil Rule 5, the parties submit, and the Court finds, that there will be documents filed in this case that include confidential, proprietary and commercially sensitive information that can only be protected by sealing the documents and those portions of the memoranda that discuss the documents. The Court finds that this information is of a private business nature, is not of great public interest, and this limited sealing is warranted to balance the interests implicated.*** *Pleadings or attachments thereto that must be filed under seal shall be electronically filed and submitted to the Clerk in paper form as required by Local Civil Rule 5.*

Filing under seal has always been a controversial subject, and it has only become more so as we engage in electronic filing and public access to court records over the Internet. More proprietary information is now at issue in civil litigation, yet the press and public also are gaining greater and easier access to judicial records. How are those interests to be balanced? We need to understand the "right of access" to "judicial records" before that balancing can be undertaken.

Judicial Records are Presumptively Public: Under the common law, judicial records are presumptively public: "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978). Under the First Amendment the press and public alike have a right of access to attend trials – both criminal and civil. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (criminal); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (a civil trial is "a public event"); *see also* FED.R.CIV.P. 77(b) ("Every trial on the merits must be conducted in open court … ."). That First Amendment right also has been extended to certain pretrial hearings, depending upon the historical tradition of openness and the value of public scrutiny of that proceeding. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). Where a First Amendment right of access attaches to the hearing, the same right of access applies to papers and documents filed in association with the pretrial proceeding, in both criminal and civil cases. *See In re Washington Post Co.*, 807 F.2d 383, 389-90 (4th Cir. 1986) (access to records of plea and sentencing proceedings); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 252-54 (4th Cir. 1988) (access to summary judgment record). Thus, there are *two* sources of a right of access to judicial records.[3]

Essentially, the right of access is allowed so that the press and public can perform a "watch dog" function, ensuring that the administration of justice is fair, impartial, and effective.

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[3]/ Much of the case law concerning open hearings and access to judicial records has been developed in criminal cases – and often reveals the tension between having public criminal proceedings and preserving the defendant's right to a fair trial before an impartial jury. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547-51 (1976). Although there are different interests implicated in civil litigation, the same principles of openness – open judicial records and open trials – apply to civil cases. *Richmond Newspapers v. Virginia*, 448 U.S. 555, 573 & n.9, 580 n.17 (1980). Get used to the idea that even civil cases are "public property" – literally!

See Virginia Department of State Police v. The Washington Post, 386 F.3d 567, 575 (4th Cir. 2004), *cert. denied*, 544 U.S. 949 (2005); *accord, e.g., Nixon v. Warner Communications*, 435 U.S. at 597-98; *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980). It is important to keep this justification in mind. The press and public may be able to perform that "watch dog" function without knowing all the details, such as confidential or proprietary information involved in the case.[4]

The source of the right of access dictates which judicial records it governs. The common law right of access applies to "all judicial records and documents," while the First Amendment right of access applies "only to particular judicial records and documents" – such as exhibits filed in connection with plea hearings and sentencing hearings in criminal cases, and trial proceedings and dispositive motions in civil cases. *Stone v. University of Maryland Medical Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988). Thus, as soon as your client commences a civil action – or as soon as he has been sued – the *common law* right of access attaches to all the "judicial records and documents" in the case file. Then, as soon as the merits are presented to the Court, the *First Amendment* right of access attaches.

The source of the right of access also determines the standard that must be overcome to keep judicial records under seal. The Supreme Court has recognized that "the [common law]

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[4]/ Although known as the "First Amendment right of access," this right is not reserved for the press. "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally … ." *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972). "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally." *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974). The First Amendment protects a freedom of the press, of course, but it also secures for every citizen freedom of speech, as well as the rights to peaceably assemble, and to petition the government, which together give rise to the First Amendment right of access to judicial proceedings and records. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 575.

right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where the court files might have become a vehicle for improper purposes," such as promoting spite, libel, and public scandal, invading privacy, or injuring a litigant's "competitive standing." *Nixon v. Warner Communications*, 435 U.S. at 598; *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984) (sealing court records permissible to prevent others from "gaining a business advantage" from materials filed with court). Exercising that supervisory power is committed to the "sound discretion" of the district court, which is to be "exercised in light of the relevant facts and circumstances of the particular case." *Nixon v. Warner Communications*, 435 U.S. at 598-99. Thus, compelling private and public concerns may overcome the common law right of access and justify sealing a judicial record. On the other hand, if the First Amendment right of access applies to the judicial records, then access can be denied only if – and only to the extent – necessary to advance "a compelling government interest." *Press-Enterprises I*, 464 U.S. at 510. Given the rarity with which the courts address these issues, the rules are necessarily general, leaving the parties some room to fashion arguments to justify sealing, and leaving the district court some room in which to fashion an appropriate ruling.

Sealing Orders in the Eastern District: In light of this, can you and your opponent simply stipulate to a protective order that provides prospectively that the parties may make sealed filings of confidential documents? Yes – ***if*** you do it right with court approval.

To be sure, sealing judicial records has been – and remains – the exception, not the rule. In modern complex litigation, however, it had become routine to enter stipulated protective orders, which allowed the parties to make sealed filings without a particularized showing for each document. An air of complacency reigned, and these sorts of orders were entered with little

notice. In 2000, however, the Fourth Circuit sent a shockwave through the civil litigation bar, when it re-affirmed the necessary steps for sealing federal judicial records. *See Ashcraft v. Conoco, Inc.*, 218 F.3d 288 (4th Cir. 2000). If the proper steps were not followed, the panel ruled that the sealing order would not be a "valid decree," and the judicial records could be made public. *Id.* That ruling was a sea-change. In cases prior to *Ashcraft*, the Fourth Circuit had routinely remanded the matter for reconsideration of the sealing issue, rather than invalidating the improper sealing order and allowing public access. *E.g.*, *In re Time, Inc.*, 182 F.3d 270 (4th Cir. 1999) (issuing mandamus requiring district court to undertake sealing analysis notwithstanding the prior entry of an umbrella protective order). Thus, the *Ashcraft* opinion forced district courts to reexamine the practice of entering stipulated protective orders.

After *Ashcraft*, the Eastern District of Virginia enacted Local Civil Rule 5, which sets forth the general parameters for sealing judicial records, and also sets forth specific procedures for obtaining protective orders with sealing provisions. In the ten years since this issuance of *Ashcraft*, some problems remain in the implementation of sealing practices under Local Civil Rule 5. This section briefly addresses those problems and suggests some solutions.

Local Rule 5: Local Civil Rule 5 has several important components. First, it prohibits filings under seal except by Court order. E.D.VA.CIV.R. 5(A). Second, if you do not have a sealing order already in place, the rule provides that you may seek one together with a proposed sealed filing, which will remain under seal until the motion is ruled upon. *Id*. (D). Third, the rule explains the mechanics of filing under seal – how the document should be marked, and how it will be identified on the docket. *Id*. (B) & (E). Fourth, the rule allows the parties to stipulate to a protective order restricting access to discovery materials that are not filed with the district court. *Id*. (G). Fifth, the rule explains how a party may obtain a blanket protective order

"providing prospectively for filing documents under seal." *Id*. (C). Those are the major provisions of the rule, but other provisions will be discussed in context below.

Local Rule 5(C): Subsection 5(C) was drafted in an effort to balance the efficient judicial management of cases through use of blanket protective orders, on the one hand, with the competing interest of the public's right of access, on the other. It has worked well, but not perfectly. Parties sometimes mishandle the process of applying for an umbrella protective order with a sealing provision, and sometimes overwork the sealing provision they have obtained.

Under current Fourth Circuit law, the district court must do the following prior to sealing any court records:

> (1) give public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.

Ashcraft, 218 F.3d at 302. Local Civil Rule 5(C) states the manner in which those procedures must be followed in this Court. Here is how Rule 5(C) is intended to work:

First, the Court must give public notice of a request for sealing which will provide interested persons with "a reasonable opportunity to object." *Id*. Individual notice is not required, however, and the Court may give adequate notice either by "notifying the persons present in the courtroom of the request to seal" at the time of the hearing, or by "docketing [the sealing request] in advance of deciding the issue." *In re Knight*, 743 F.2d at 235. In the Alexandria Division, the parties notice their own motions for hearing. E.D.VA.CIV.R. 7(E). If you are moving for entry of a blanket protective order "providing prospectively for filing documents under seal," your notice of hearing must state that a sealing order is sought. E.D.VA.CIV.R. 5(C). Filing such a notice in the publicly accessible docket will satisfy the notice

requirement under *Ashcraft* and *Knight*. Failing to give such notice will be grounds to deny relief, or if relief is granted, will be grounds to invalidate it if it is later challenged.

Second, you must submit a memorandum of law justifying the use of an umbrella protective order that provides for prospective sealing. This memorandum should describe the type of materials likely to be exchanged during discovery that later might be filed under seal, and present legal argument and case law support for the protective order and sealing provision. E.D.VA.CIV.R. 5(C)(1) &(3). Although public access to judicial records is presumed, as discussed above, the Supreme Court has recognized that each district court has discretionary "supervisory power over its own records and files, and access has been denied where the court files might have become a vehicle for improper purposes," such as injury to a litigant's "competitive standing." *See Nixon v. Warner Communications*, 435 U.S. at 597-98; *accord In re Knight*, 743 F.2d at 235. Thus, a litigant's interest in protecting its "competitive standing" may overcome the common law right of access and justify sealing a judicial record. Your memorandum should show why such injury may occur unless sealing is permitted, address why less drastic alternatives will not suffice, and explain how long the sealing order should remain in place. E.D.VA.CIV.R. 5(C)(2) & (4). Failure to address each of these points simply invites the district court to deny your motion.

Third, specific findings must be included in a proposed order. You should propose succinct findings that are supported by your memorandum. If the Court disagrees with your proposed findings, or believes your reasons inadequate, it may deny relief. And if the order is later challenged, ill-conceived or poorly supported contentions might not carry the burden of justifying the sealing order.

Follow these steps properly and your order should be entered, and thereafter you may file confidential documents under seal – up to a point. As explained in the following sections, there are practical and theoretical limits on the parties' right to make sealed filings under a blanket protective order.

Electronic Filings: Before electronic filing, a party filed sealed paper documents in an appropriately marked envelope together with the public versions of the remainder of his filing (also in paper form). Now that the Eastern District of Virginia has electronic filing, the procedure for filing sealed materials has changed. To be sure, "Sealed documents are exempt from electronic filing and therefore must be filed on paper in a sealed envelope marked 'Under Seal' in accordance with Local Civil Rule 5 … ." E.D. VA. ECF POLICIES AND PROCEDURES MANUAL at 17 (Rev'd. Mar. 6, 2010). This does not mean, however, that no electronic filing is made. Here is an example of how sealed filings are now made:

If a confidential document is used as an exhibit to a brief, the brief would be filed electronically and an electronic "placer-holder" exhibit-sheet would be attached, which says something to the effect of, "Exhibit A: FILED UNDER SEAL." Then, a paper copy of the exhibit would be delivered to the Clerk in a sealed envelope, marked "Under Seal," which identifies the case and filing with which it is associated, and includes a "non-confidential descriptive title of the document." E.D.VA.CIV.R. 5(E). If the brief contains a discussion of the contents of the exhibit which reveals confidential information, then a redacted version of the brief would be filed electronically with the place-holder exhibit sheet, and a sealed paper copy of both the brief and exhibit would be delivered to the Clerk in a sealed envelope that is appropriately marked. The redactions from the brief should be only those sections which, if made public, would compromise confidentiality. Sealing the entire brief is rarely appropriate.

Over-designation of Confidentiality: Despite the streamlining virtues of a blanket protective order, there is a countervailing vice – the over-use of unilateral confidentiality designations, which in turn leads to the over-use of sealed filings. This often triggers the Court's wrath and Clerk's impatience – which may be aimed at both parties. If your opponent has been heavy-handed with the "confidentiality" stamp, you should meet-and-confer or bring an early motion to de-classify documents, which may head-off later disputes about sealed filings.

Motion Hearings and Transcripts: Hearings in civil cases generally are conducted in open court. Nonetheless, the Rules do not require that. Although the Rules require that "trials on the merits shall be conducted in open court," the Rules also provide that "Any other act or proceeding may be done or conducted by a judge in chambers … ." FED.R.CIV.P. 77(b). Customarily, all civil motions are conducted in open court in the Alexandria Division. *See* E.D.VA.CIV.R. 7(E) & (J) (movant must notice motion for a hearing, ***but*** Court may rule on papers); *see also* FED.R.CIV.P. 78(a) (motions day) & (b) (motions may be decided on papers). The Federal Judicial Code requires that all sessions of court be transcribed or recorded *verbatim*, and that transcripts or recordings be filed and made available to the public. *See* 28 U.S.C. § 753(b); *see also* E.D.VA.CIV.R. 80 (preparation, filing, and public examination of transcripts). Therefore, transcripts also are public judicial records. Indeed, the Fourth Circuit equates access to hearings and access to the transcripts of hearings for this analysis. *See In re The Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (recognizing First Amendment right of access to hearings, evidence, *and transcripts*, vacating sealing order, and remanding with instructions to reconsider). Just because no one attended your hearing on Friday, does not mean someone cannot read about it on Monday – in *The Washington Post*!

Civil Discovery Motions: As held in *Seattle Times*, the "raw fruits" of civil discovery are not judicial records unless and until "admitted." 467 U.S. at 33. Indeed, generally speaking deposition transcripts, discovery requests, responses, and objections are not filed. FED.R.CIV.P. 5(d)(1). But sometimes it is necessary to file confidential discovery materials with the Court as a basis to obtain civil discovery relief. If that is done, you must follow the procedures in Local Civil Rule 5(C). But can those papers remain sealed?

When discovery materials are filed with the district court, a tension arises between the parties' interests in keeping civil discovery confidential and the public's common law or First Amendment right of access to judicial records. *See Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249 (4th Cir. 1988). The focal issues implicated by this tension are these: (1) whether a public right of access should be recognized regarding a motion concerning civil discovery (as opposed to the merits); and (2) if so, the nature and extent of the showing the parties must make to maintain the confidentiality of discovery materials submitted to the district court in connection with the discovery motion.

"Neither the Supreme Court nor this Court has ever ruled that the mere filing of a document triggers the First Amendment guarantee of access." *In re Policy Management Sys. Corp.*, No. 94-2254, 67 F.3d 296 (table), 1995 U.S. App. LEXIS 25900, *9, 1995 WL 541623 (4th Cir. 1995) (unpublished) ("*PMSC*").[5] Thus, the mere filing of a civil motion attaching confidential discovery documents does not automatically trigger a First Amendment right of access. When called upon to decide whether to recognize a right of public access, the Court must determine (1) if such a right of access has historically been recognized, and (2) if such a

[5] Generally, one cannot cite an unpublished decision except if it is on point and there is on better authority. *See* FOURTH CIRCUIT LOCAL RULE 36(c). The legal analysis in *PMSC* correctly makes an important distinction that is not made in any published Fourth Circuit decision, so I have used *PMSC* as authority.

right would play "a significant positive role in the functioning of the particular process in question." *Press-Enterprise II*, 478 U.S. at 8-10; *In re The Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989). Under this test, a right of access generally is not recognized when confidential discovery materials are filed in connection with a discovery motion. *See Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304 (11th Cir. 2001) (constitutional right of access turns on nature of motion, *held*, right of access applies to adjudicative motions, but not discovery motions); *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157 (3d Cir. 1993) (common law right of access allowed for *nondiscovery* pretrial motions, but not for discovery motions); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 10-13 (1st Cir. 1986) (confidential discovery materials filed with the district court to permit determination of a non-dispositive discovery motion would not give rise to a First Amendment right of access); MILLER, *supra* at 439-40 (the "rationale for a right of access to information used at trial does not [generally] support a right [of access] to information or documents produced during pretrial discovery"); *but see Mokhiber v. Davis*, 537 A.2d 1100 (D.C. 1988) (recognizing common law right of access to discovery motions). The Fourth Circuit has not authoritatively ruled on this issue yet, but the *Rushford* and *PMSC* rulings shed light on the Court's rationale, indicating that a right of access would not be found.

Summary Judgment Motions: A motion for summary judgment in a civil case "serves as a substitute for a trial," and so the First Amendment right of access applies to the judicial filings made in support of, and opposition to, the motion. *Rushford v. The New Yorker*, 846 F.2d at 252-54. Even if a blanket protective order is already in place, *Rushford* requires the district court to reexamine the pertinent "confidential" documents to determine if the First Amendment sealing standards would been satisfied. "The reasons for granting a protective order to facilitate

pre-trial discovery may or may not be sufficient to justify proscribing the First Amendment right of access to judicial documents." *Id.* at 254. Thus, where, a blanket protective order has been entered, which allows the parties to designate discovery materials as "confidential" and to file those materials under seal, the Court must review the materials so filed and independently determine whether those materials should remain under seal. *See In re Time, Inc.*, 182 F.3d 270, 271-72 (4th Cir. 1999). The Court may even raise this issue *sua sponte* if your opponent or the press does not.

Trial Exhibits: Even if a blanket protective order has been entered, the district court must reexamine the issue of sealing when the parties file their trial exhibits: "Trial exhibits, including documents previously filed under seal, and trial transcripts will not be filed under seal except upon a showing of necessity demonstrated to the trial judge." E.D.VA.CIV.R. 5(H). A civil trial is "a public event," and the press and public have the right to attend. *Craig v. Harney*, 331 U.S. at 374. The right of access to civil trial proceedings and associated judicial records arises under the First Amendment. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 580 n.17. Thus, there is a First Amendment right to attend a civil trial, as well as to read and obtain copies of the trial exhibits. To justify sealing the trial record, a party must show a "compelling government interest." *Press-Enterprise I*, 464 U.S. at 510. This is a more substantial showing than that necessary to overcome the common law right of access. And believe me, you will be put to the test if you seek a sealing order for trial exhibits. *See Level 3 Communications, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572 (E.D. Va. 2009) (denying motion to seal). The necessary inquiry for sealing is exhaustive (and exhausting!).

Accordingly, the entry of a blanket protective order allowing for sealing is not enough to justify sealing of trial exhibits. A separate sealing order ***must*** be obtained. Under local practice,

the parties exchange Rule 26(a)(3) exhibit disclosures at the final pretrial conference, but the trial exhibits themselves are not filed until the day before trial. E.D.VA.CIV.R. 79(A). Thus, there is time to obtain a sealing order before you actually file your trial exhibits.

Furthermore, even "demonstrative exhibits" – like power point slides – used at a public hearing are "judicial records," and public access to them may be demanded. *See Rambus, Inc. v. Infineon Technologies AG*, No. 3:00cv524, 2005 LEXIS 8621 (E.D. Va. May 6, 2005). If you bring something into Court, be prepared for everyone present to walk out with a copy of it.

Trial Proceedings: As noted above, presumptively civil trials must be conducted in public. Thus, to obtain sealing of all or a portion of a trial (and its transcript) requires an extraordinary showing. Where a civil litigant's "trade secrets" (or other "confidential business information") are contained in the judicial record, the value of which property rights would be destroyed by public disclosure in a trial or hearing,[6] a sufficient "compelling governmental interest" exists to warrant sealing of the courtroom and the pertinent judicial documents. *See In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1983); *accord Woven Elec. Corp. v. The Advance Group Inc.*, 19 U.S.P.Q.2d 1439, 1443, 1991 U.S. App. LEXIS 14345, *16-*19 (4th Cir. 1991) (citing and following *Iowa Freedom of Information Council*) (district

[6] "Trade secrets" and other "confidential business information" are "property" rights subject to Fifth Amendment protection. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04 (1984) (trade secrets); *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (confidential business information). A "trade secret" may be any information, used for a business purpose, which gives the user an advantage over competitors who do not know it; therefore, the touchstone of a "trade secret" is secrecy, not novelty in the patent sense. *See Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 474-78 (1974). The value of a "trade secret" may be lost if it is published, including through disclosure in the court record. *Compare Religious Tech. Center v. Lerma*, 908 F. Supp. 1362, 1368-69 (E.D. Va. 1995) (trade secret status lost after having been in judicial file for 28 months and posted on internet), *with Hoechst Diafoil Co. v. Nan Ya Plastics*, 174 F.3d 411 (4th Cir. 1999) (trade secrets described in declaration filed, but not sealed, are not lost by mere act of filing). The Court certainly has an interest in protecting against the loss of valuable "trade secret" property rights in this manner.

court may close civil trial and seal trial record as necessary to protect litigant's trade secrets). This is a very unusual and rarely granted protection. Moreover, expect to make a detailed showing that the information really is a trade secret. Generalities and conclusory assertions will not persuade the Court – nor dissuade a determined reporter from *The Washington Post*!

Sealing the Entire Record: Sealing the entire record of a case is a drastic measure. The press and public have a right of access to each aspect of a case – the party names, the pleadings, the motions, the hearings, the transcripts, the orders, the trial, the exhibits, and the judgment. To seal the entire record will require a very substantial showing under the requirements set forth in Local Civil Rule 5(C). *See* E.D.VA.CIV.R. 5(F). The district court must conduct a proper inquiry under both standards – common law and First Amendment – and must consider alternatives to the blanket sealing of the entire record. *See Stone*, 855 F.2d at 180-83 (remanding sealed case for reconsideration and narrowing of sealing order). Suffice it to say that sealing the entire record is rarely warranted and rarely will it be approved.

H. INADVERTENT DISCLOSURE

> *8. The inadvertent production of Discovery Materials which are privileged or protected, or which has not been marked Confidential or Highly Confidential, shall not be a waiver of any privilege, protection, or confidentiality, provided that the producing party shall promptly make a specific request for the return of the inadvertently produced material or for the opportunity to designate its confidentiality.*

Stipulated protective orders routinely contain this sort of "inadvertent" production provision. This particular provision covers inadvertent production of attorney-client communications and work product material, as well as confidential discovery materials. Each, however, is subject to different rules.

Attorney-Client Communications and Work Product Materials: When a litigant inadvertently produces attorney client communication or work product material, the Court will analyze several factors when deciding whether to allow the litigant to recover that material. *See FDIC v. Marine Midland Realty Credit Corp.*, 138 F.R.D. 479 (E.D. Va. 1991). The inadvertent-waiver provision is intended to override, or at least to change the dynamics of, the *FDIC* analysis. The Federal Judicial Center suggests that such stipulated provisions are beneficial in complex cases. *See* MANUAL § 11.431 at 63, and § 40.27 at 752 ¶ (b). And the Federal Rules of Evidence have recently been amended to add protections for inadvertently produced privileged materials, as well as the enforcement of inadvertent waiver provisions in court orders. FED.R.EVID. 502(b), (d) & (e). Be prepared to follow the *FDIC* analysis, relying on the inadvertent-waiver provision and Rule 502 as additional arguments.

Late Confidentiality Designations: The inadvertent production of confidential information also is covered in the typical stipulated protective order, usually by permitting late confidentiality designations. *See* MANUAL § 40.27 at 752 ¶ (b). In contrast with the controversial provision covering inadvertent production of attorney client material, this sort of provision, allowing late designations, ordinarily should be honored by the Court.

I. RETURN, DESTROY, OR RETAIN

> *9. Upon final termination of this action, including all appeals, the parties shall assemble and return all Confidential and Highly Confidential Material, together with all copies thereof, to the producing party or nonparty, or, if directed to do so by the producing party, shall destroy that material; provided, however, that counsel of record may retain one copy of these materials for their files.*

A "return or destroy" provision typically is used in stipulated orders. *E.g.*, *Bayer*, 162 F.R.D. at 458 (quoting order); *see also* MANUAL § 11.432 at 66. That provision will be enforced if the only excuse for non-compliance is that your opponent now considers it to be too much trouble to cull-out material for return or destruction. *See H. L. Hayden Co. v. Seimens Med. Sys., Inc.*, 130 F.R.D. 281 (S.D.N.Y. 1989). Sometimes this "return or destroy" clause contains a *proviso* permitting retention by the receiving party's counsel, subject to all the provisions regulating disclosure and use. And other orders may provide for return to the producing party or destruction, but require the producing party to retain "at least one copy" of destroyed material. Each of those provisions seem wise precautions if there is a reasonable likelihood that additional litigation between the parties might erupt (such as to enforce the judgment or settlement).

From the cases I have seen, the biggest offenders of the "return or destroy" provision are experts. After making a name for himself in a matter, the opposing side's expert may feel the entrepreneurial urge to expand his work either as an expert witness or as a litigation consultant, in which case he may want to reuse your client's confidential information against it – the law does not allow that. *See Glasser v. A. H. Robins Co., Inc.*, 950 F.2d 147 (4th Cir. 1991) (affirming district court's denial of expert's motion to modify protective order to permit him to re-use confidential material); *Cessna Aircraft Co. v. Birch*, 1988 U.S. Dist. LEXIS 6751 (E.D. Va. Apr. 7, 1988) (finding expert in contempt for violating Virginia protective order while acting as an expert in Texas case); *see also MercExchange*, 467 F. Supp. 2d at 622-27 (granting in part, and denying in part, motion to enforce protective order against expert). Similarly, a former expert might be subpoenaed to produce information in another case as an "unretained expert witness." *See* FED.R.CIV.P. 45(c)(3)(B)(ii). Whatever you agree to as a "return or destroy" provision, make sure to get back all confidential information from the other side's expert.

(***NB:*** You might not be able to completely muzzle a former expert witness on the basis of the protective order entered in your case. *See Baker v. General Motors Corp.*, 522 U.S. 222 (1998); *see also* R. Rosen, *Confidentiality Agreements Become Increasingly Elusive*, THE NATIONAL LAW JOURNAL at B7 (July 20, 1998). At least make sure that you do not leave your client's confidential information in his files.)

J. PRODUCTION BY NONPARTIES

> *10. Counsel for the parties shall serve a true and complete copy of this Protective Order on any nonparty on whom a discovery or trial subpoena is served. The entry of this Protective Order upon the stipulation of the parties in no way limits any nonparty from seeking other or further relief from the Court.*

As the Supreme Court has recognized, the privacy interests of nonparties also are at risk during discovery. *Seattle Times*, 467 U.S. at 34-35. Seeking to assure nonparties that their confidential materials will be protected, most stipulated blanket protective orders will include a provision like this – but how does it work? The nonparties, who have not even been served with subpoenas yet, are not parties to the stipulation. Moreover, if the subpoenas are served in other districts, then a Virginia protective order is of no effect there.

The civil rules give the foreign district court which issues a subpoena full authority to protect the confidential information of nonparties: "If a subpoena (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, … the court may order … production only upon specified conditions." FED.R.CIV.P. 45(c)(3)(B)(i). That rule "corresponds to Rule 26(c)(7)" (now 26(c)(1)(G)) ADV. COMM. NOTES, 134 F.R.D. 525, 672-73 (1991). Thus, a parallel protective order may be sought (and probably is needed) in the

foreign district where the subpoena has been issued (and where rights and obligations would be enforced).

The interests of non-parties, whose confidential materials have been obtained through compulsory discovery processes and have then been filed, also must be considered when the district court in which the action is pending decides a sealing issue. *See Pittston Co. v. United States*, 368 F.3d 385, 406 (4th Cir. 2004) (nonparty's confidential business documents may remain under seal); *Bush Development Corp. v. Harbour Place Assoc.*, 632 F. Supp. 1359, 1364 (E.D. Va. 1986) (confidential business records of non-party shall be filed under seal). But if the nonparty fails to take timely action, he may waive his right to seek sealing of his confidential materials. *See Level 3 Communications, supra.* If you are seeking a protective order on behalf of a non-party in the issuing district, do not merely seek "confidential" treatment – seek a sealing requirement, too. As happened in *Pittston*, a non-party may obtain broader protection through sealing than a party.

K. WHAT IS NOT COVERED

> *11. The restrictive disclosure and use provisions of this Protective Order shall not apply to any documents or information which are, or during the litigation become:*
>
> *(a) of public record;*
>
> *(b) filed as a public record with the clerk of any federal or state court in other litigation;*
>
> *(c) filed with any federal or state agency, copies of which are required by that agency to be freely available in their entirety to the public; or*
>
> *(d) published.*

As the Supreme Court has made unimpeachably clear, a protective order may properly limit disclosure of "information obtained through use of the discovery process," but may not limit disclosure of information that is public or has been lawfully obtained through other means,

because that would amount to an impermissible prior restraint. *See Seattle Times*, 467 U.S. at 33-34. Thus, an "exception" clause is appropriately included.

L. MODIFICATION DURING THE LITIGATION

> *12. Each party shall have the right to apply to the Court to modify this Protective Order for good cause shown.*

Modification clauses are typically included in stipulated protective orders, but modification is not always allowed. *See* MANUAL § 11.432 at 67. Once in place, the parties rely on the protective order in making their discovery productions, and it may be unfair to later change the ground rules.

If one party seeks modification of the stipulated protective order while the action is pending, the burden of proof is an important battleground. "If good cause was not shown when a protective order was initially issued, then the party seeking to maintain the order should bear the burden of establishing the need of continued protection. However, if the protective order was supported by a showing of good cause, the burden is on the party seeking modification." *Bayer*, 162 F.R.D. at 463-64 (citation omitted) (denying modification to permit in-house counsel access to opposing side's confidential commercial information). Under a blanket protective order, of course, good cause is not shown up-front; instead, the parties make unilateral designations of confidentiality. Thus, under *Bayer*, the parties share the burden of proof. The party seeking to sustain the protective order must prove its need for "continued protection," while the party seeking modification must prove that the factors provide "good cause" for modification.

The decision in *Bayer* employs a four-factor test – which is more restrictive than that used by other courts, and relies heavily on a reliance factor that some other courts do not.

Excellent guidance on the prevailing analysis for modification is found in 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2044.1 (2010). Despite the flexible balancing test of the prevailing approach, be prepared for the judge to be reluctant to modify the order except for *really* good cause.

M. MODIFICATION AFTER SETTLEMENT OR JUDGMENT

> *13. This Protective Order shall remain in full force and effect during and after the termination of this action, until modified by further order of the Court.*

Even after an action has been settled, adjudicated, or dismissed, the district court still retains jurisdiction to modify – or to enforce – a stipulated protective order. *E.g.*, *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990) (modify); *Cessna Aircraft Co. v. Birch*, 1988 U.S. Dist LEXIS 6751, *11-*13 (E.D.Va. 1988) (enforce). It is important to understand the dynamics of each proceeding – modification or enforcement.

Modification Generally: The decision whether to modify a stipulated protective order to allow broader use of discovery materials is committed to the district court's "sound discretion." *E.g.*, *In re Agent Orange Product Liability Litig.*, 821 F.2d 139, 147 (2d Cir.) (affirming modification of protective order), *cert. denied sub nom. Dow Chemical Co. v. Ryan*, 484 U.S. 953 (1987). The prevailing view is that the Court should flexibly apply a balancing test, without emphasizing any one factor. *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 3D § 2044.1 at 270-73 (2010) (stating prevailing multi-faceted balancing approach). Under the prevailing balancing test, each case must be decided on the facts and circumstances presented.

The factors used include the following: (i) the nature and extent of modification sought; (ii) the need for modification; (iii) the foreseeability of that need when the order was first entered; (iv) the nature of the protective order as stipulated or contested; (v) whether the protective order was entered on a "blanket" basis or for specific good cause; (vi) the reasonable reliance of the producing party on the protective order; and (vii) the status of the party seeking modification. Obviously, as in any flexible balancing test, not every factor is important in every case, and not all factors need to favor the moving party. The analysis also varies depending on who is seeking modification.

You should note that if a blanket protective order has allowed a party to make unilateral designations of confidentiality, then upon a motion for modification, that party would bear the burden of demonstrating "good cause" on a document-by-document basis to maintain that confidential status. *See In re Agent Orange*, 821 F.2d at 147-48. The document-by-document scrutiny is not eliminated by the use of a blanket order, merely deferred until put at issue.

Modification for Discovery-Sharing: Modification of a protective order may be sought to permit the plaintiff to share the defendant's discovery material with other potential or actual plaintiffs having similar claims against the same defendant. You should note that discovery-sharing has been generally encouraged. *See* 8A Wright, Miller & Marcus, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 2044.1 at 273 & n.30 (2010) (collecting "long line of cases"). Yet, there are limitations and countervailing considerations. *Id*. at 273-82. Courts generally have granted *other parties'* motions to intervene to seek modification of use restrictions and to obtain discovery. *E.g., Wilk v. American Medical Ass'n.*, 635 F.2d 1295 (7th Cir. 1980). Nonetheless, some courts have denied *the plaintiff's* own motion to modify a stipulated protective order for the purpose of discovery-sharing. *See Jochims v. Izuzu Motors, Ltd.*, 145 F.R.D. 499 (S.D. Iowa

1992); *Omega Homes, Inc. v. Citicorp Acceptance Co.*, 656 F. Supp. 393 (W.D. Va. 1987). In both instances, the courts have weighed the same factors, but come to different results. The deciding factor appears to be whether the producing party's reliance on a *stipulated* protective order is given great weight, or not.

Modification for Government Investigation: Sometimes, there is a governmental civil, administrative, regulatory, or criminal investigation running on a parallel track to pending private civil litigation. Some courts have refused to modify protective orders to allow the government to have access. *E.g.*, *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979); *H.L. Hayden Co. of N.Y., Inc. v. Siemens Medical Sys., Inc.*, 106 F.R.D. 551 (S.D.N.Y. 1985), *aff'd*, 797 F.2d 85 (2d Cir. 1986). Other federal courts, however, have allowed it. *In re Grand Jury Subpoena*, 836 F.2d 1468, 1473-78 (4th Cir. 1988) (distinguishing *Martindell*); *accord Autry v. K Mart Corp.*, No. 92-105-civ-3-BR, 1995 U.S. Dist LEXIS 18253 (E.D.N.C. Nov. 22, 1995) (allowing EEOC to intervene to seek modification of protective order). If the government wants access to civil discovery in the Fourth Circuit, be prepared to move aside.

Modification for Press Access: The desire to publish a story is as much as reason to intervene and modify a protective order as the desire to share discovery. The right of access is not conditioned upon "a need for it as evidence in a lawsuit," and "a newspaper publisher's intention to publish information concerning the operation of government" is a sufficient reason to intervene to obtain access. *See Nixon v. Warner Communications*, 435 U.S. at 597-98. But motions to intervene filed by other litigants and those filed by the press are treated differently. *See Grove Fresh Distributors, Inc. v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir. 1994) (separately considering motions to intervene, and for access to discovery, filed by other litigants and by the press). A driving factor for press intervention, for example, is whether one of the

parties is a public entity or official. *See Shingara v. Skiles*, No. 05-2376, 2005 U.S. App. LEXIS 18153 (3d Cir. Aug. 24, 2005) (reversing order denying press motion to vacate use restriction in protective order). An order allowing the press to intervene in the middle of the case should be carefully limited, and access may be delayed until dispositive motions are filed or there is a trial. *See In re NASDAQ Market-Makers Antitrust Litig.*, 164 F.R.D. 346 (S.D.N.Y. 1996). Do not let the press juggernaut overrun your case.

Enforcement: After a case is over, the protective order is enforced through contempt proceedings. *See Cessna Aircraft*, *supra*. The accused contemnor may file a motion to modify in response to the contempt motion, but that tactic may be most efficacious if modification is sought before the original protective order has been violated, instead of after. *See Glasser*, *supra* (motion to modify denied, contempt motion withdrawn). The parties, the experts, and even counsel will be subject to contempt enforcement of the protective order. It is not a fun proceeding, and you sure do not want to be the target of the Court's inquiry.

CONCLUSION

Stipulated protective orders are a useful tool, but one that often is difficult for the Court to wield, and that is occasionally abused by an unscrupulous litigant. If you know what to watch out for, you can draft an order that will work in your case with a minimum of court monitoring, few disputes, and – to the relief of all – no enforcement motions.