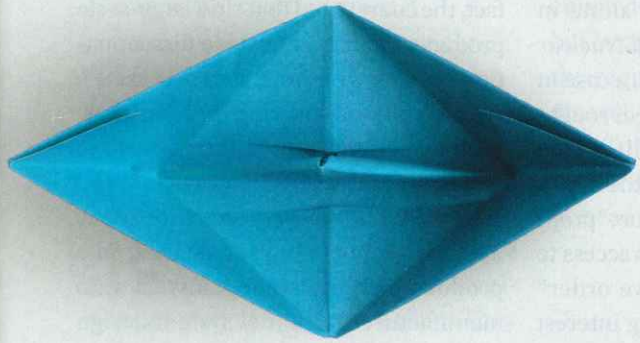
SHARING IS THE LAW

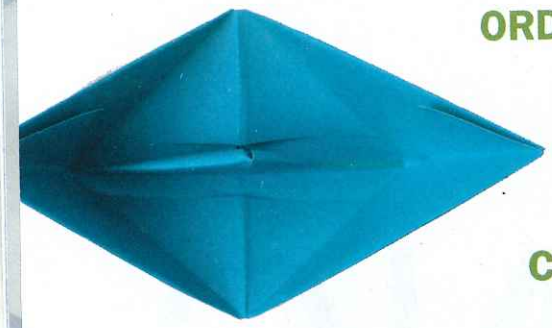


By || Ilyas Sayeg

When fighting Goliath, here's how to support the position that sharing discovery should be allowed, whether you're negotiating a protective order or challenging an existing one.

As plaintiff attorneys, we fight for individual consumers against Goliath, Inc.—the corporate behemoth that needlessly hurts our clients in pursuit of profit. And in doing so, we know that our clients are unlikely to be the only ones who have been harmed; there could be hundreds or thousands of others. We also know to expect a large and complex discovery fight. With its massive resources, Goliath can undertake a unified strategy to litigate all of these cases, regardless of jurisdiction, plaintiff, or plaintiff counsel.

But, often, our clients and all of the similarly injured plaintiffs represented by other law firms are each stuck waging independent war due to Goliath's insistence on language in a protective order that prohibits sharing or communicating about discovery. It typically reads like this: "Plaintiff agrees that discovery designated as confidential may not be used for any purpose other than the preparation and trial of *this* litigation."



YOUR PROTECTIVE ORDER NEEDS CERTAIN SAFEGUARDS FOR GOLIATH'S GOOD-FAITH DESIGNATIONS OF CONFIDENTIALITY, AS WELL AS THE COURT'S TIME.

When defendants push for these types of protective orders, it forces us, our clients, and the court into a protracted and costly discovery war. If we could all share discovery with collateral litigants, we could short circuit this and fast forward to the merits of the case—and obtain justice for our clients. Thankfully, pertinent case law around the country shows that sharing is *the law* in many jurisdictions. Here's a start for how to support that position when negotiating protective orders and how to challenge a protective order that precludes sharing.

Courts Routinely Favor Sharing Provisions

The seminal case that courts routinely cite (and you should, too) when promoting sharing provisions is *Foltz v. State Farm Mutual Automobile Insurance Co.*, where the court analyzed "when parties other than the original litigants may gain access to materials that a court has placed under protective seal."[1] The claims involved allegations of a conspiracy between the defendants to defraud insureds of personal injury protection owed to them under their automobile policies.[2] The court granted the plaintiffs' motion to amend the protective order to include a sharing provision, reasoning that "allowing the fruits of one litigation to facilitate preparation in other cases advances the interests of judicial economy by avoiding the wasteful duplication of discovery."[3]

The Ninth Circuit is not alone in supporting sharing. In *United Nuclear Corp. v. Cranford Insurance Co.*, a case in which corporate plaintiff insureds sought discovery from a collateral litigation against an insurer defendant, the Tenth Circuit held that the district court "properly granted collateral litigants access to discovery under its protective order" considering the countervailing interest of "saving time and effort in the collateral case by avoiding duplicative discovery."[4]

And in *Mitial v. Group*, the Southern District of Florida analyzed a dispute regarding the distribution of discovery to collateral law firms in a case involving violations of the Fair Labor Standards Act.[5] The plaintiffs wished to share discovery with other litigants who would be required to be bound by the same terms of the confidentiality order.

The court noted the "multitude of legal authority" cited by the plaintiffs establishing that the "'use of the discovery fruits disclosed in one lawsuit in connection with other litigation, and even in collaboration among plaintiffs' attorneys, comes squarely within the purposes of Federal Rules of Civil Procedure . . . [and] promotes the speedy and inexpensive determination of every action as well as conservation of judicial resources.'"[6]

Likewise, state courts have issued opinions supporting sharing. In *Byrd v. U.S. Xpress, Inc.*, the Ohio Court of Appeals provided a lengthy analysis of discovery sharing issues, noting that "so many sharing cases arise in the mass-tort or products-liability context" because of the similarity between lawsuits.[7] The court noted that sharing can decrease litigation costs by reducing "the 'wasteful' and 'unnecessary' duplication of discovery."[8] The court also stated that "sharing may promote public health and safety as, for example, when attorneys share information about a harmful product or commercial practice."[9] In fact, the court noted that "in a large-scale products-liability case, wide dissemination of otherwise protected materials—such as manufacturing processes or product designs—can ultimately lead to increased consumer safety."[10]

In *Garcia v. Peeples*, the Texas Supreme Court analyzed sharing in a products liability suit against an auto manufacturer for a fuel system design defect.[11] The plaintiff sought to share discovery with "other persons involved in similar suits against automakers."[12] The court lamented "the adversarial approach to discovery," which often keeps the truth about relevant matters "submerged beneath the surface of glossy denials and formal challenges to requests until an opponent unknowingly utters some magic phrase to cause facts to rise."[13] The court also recognized that federal courts have "overwhelmingly embraced" sharing to streamline discovery.[14] It overturned the trial court's refusal of the plaintiff's sharing request.[15]

And the Washington Court of Appeals, following resolution of the claims in *A.G. v. Corp. of Catholic Archbishop of Seattle* (a matter relating to sexual abuse of minors by clergy), stated that "the only effect of lifting the

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[protective] order is that the documents will be available in other cases while still being protected from disclosure."[16] The defendant archdiocese had "filed a motion to enforce the return or destruction of certain discovery documents in accordance with a stipulated protective order the parties had signed."[17]

The plaintiffs' law firm, which represented other victims who alleged abuse against the archdiocese, argued that the request would be inefficient and waste resources.[18] Denying the archdiocese's motion, the trial court modified the protective order allowing opposing counsel to "retain the documents because they were the subject of ongoing discovery disputes in other cases," and the appellate court affirmed.[19]

Consider Goliath's Privacy Interests and the Court's Time

To successfully negotiate a sharing provision, your protective order still needs certain safeguards for Goliath's good-faith designations of confidentiality, as well as the court's time. They may vary from court to court and case to case.

Safeguards in federal courts. The Ninth Circuit required reasonable restrictions on collateral disclosure in *Foltz*, including ensuring a process for the issuing court to first make a "rough estimate of relevance" of the materials subject to sharing and holding collateral litigants to the same restrictions as contained in the original protective order.[20] Any "disputes over the ultimate discoverability of specific materials covered by the protective order must be resolved by the collateral courts."[21]

When a third-party tobacco company sought to amend a protective order in a prior case to access confidential discovery produced by a health care corporation, a Florida district court noted that any fear the corporation may have over the further dissemination of its confidential documents was "easily remedied" by making the tobacco company subject to the terms of the original protective order.[22]

And the Manual for Complex Litigation states that "judges should encourage techniques that coordinate discovery and avoid duplication. . . . If the material is subject to a protective order, the court usually may accommodate legitimate privacy interests by amending the order to include the new litigants within the order's restrictions."[23]

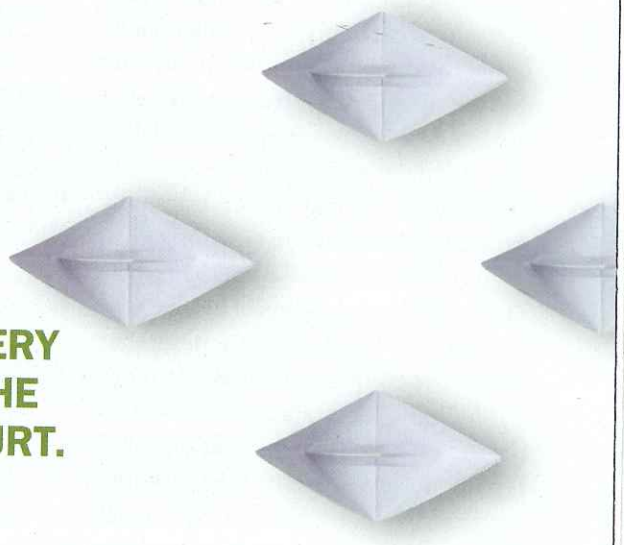
Safeguards in state courts. The Ohio Court of Appeals in *Byrd* held that the trial court erred by allowing the requested sharing provision—not because the court disfavored sharing provisions but because the one in question lacked the requisite safeguards on sharing to protect the defendants' privacy interests. To pass muster, the court required similarity, showing of appropriateness or need for a sharing provision, notice and opportunity to object, and finality (so that the court is not bound to collateral litigants in perpetuity).[24]

California courts, in protecting defendants' interest in privacy while ruling in favor of sharing, require that disclosure can be made only to counsel in similar cases, where such collateral counsel executes a stipulation agreeing to be bound by the original protective order and where plaintiff counsel must notify defense counsel when disclosure is made.[25]

In all, these cases show that courts typically require some combination of the following requirements in a sharing order:

- a general showing of the relevance of the requested documents
- a general showing of the need for the requested documents
- a requirement to bind those accessing the shared documents to the underlying protective order
- providing defendants with notice when sharing
- providing defendants with an opportunity to object to sharing
- requiring disputes regarding sharing, discoverability of shared documents, or violations of the underlying protective order to be handled by the collateral court.

INSIST ON A PROVISION REQUIRING THAT ANY LITIGATION OVER THE SHARED DISCOVERY IS HANDLED IN THE COLLATERAL COURT.



Given these factors, whether you are in federal or state court, it is a good idea to include a provision limiting sharing to a strictly defined class of collateral litigants. For example, share only with filed cases against the same defendant

for injuries caused by the same or a substantially similar product. This will help ensure that you conform to *Foltz*'s "rough estimate of relevance" and *Byrd*'s similarity requirements.

Also insist on a provision requiring that any litigation over the shared discovery is handled in the collateral court. This simplifies issues of what happens if, for example, Goliath objects to sharing or claims that the collateral litigants violated the protective order. Goliath may use that strategy to tie you (and your judge) up in a collateral litigant's discovery fight. This also complies with *Foltz* in that the collateral court should deal with any particular discoverability issues. Your judge will appreciate this because it protects your court from litigating the collateral parties' issues in perpetuity.

No Legitimate Basis to Protect Against Disclosure to Other Litigants

When negotiating your sharing provision, Goliath should be made aware that courts explicitly reject defendants' desire to prohibit plaintiffs from sharing and communicating about confidential discovery as a basis for confidentiality. For example, the Ninth Circuit stated that while disclosure may harm a litigant by exposing it to liability in other litigation, "a litigant is not entitled to the court's protection from this type of harm."[26]

And the Tenth Circuit held that "defendants' desire to make it more burdensome for [collateral litigants] to pursue their collateral litigation is not legitimate prejudice."[27] Likewise, the District of New Jersey noted that "courts have emphatically held that a protective order cannot be issued simply because it may be detrimental to the movant in other lawsuits. . . . The harm possibly emanating therefrom does not form a basis for a protective order."[28]

Case law in support of sharing provisions is overwhelmingly strong. Courts have provided clear guidance on how to safeguard defendants' legitimate concerns while rejecting the purported "harm" of access for collateral litigants. Look with extreme skepticism at attempts to prohibit you from sharing discovery with collateral litigants, and remind defendants: Sharing is the law. T

Ilyas Sayeg *is an attorney at Maglio Christopher & Toale in Sarasota, Fla., and can be reached at isayeg@mctlaw.com.*

Notes

1. 331 F.3d 1122, 1127 (9th Cir. 2003).
2. *Id.* at 1127–28.
3. *Id.* at 1131.
4. 905 F.2d 1424, 1428 (10th Cir. 1990) (noting that whether materials are discoverable by collateral litigants is a question for the collateral courts to determine).
5. 2012 WL 12868405 (S.D. Fla. May 29, 2012).
6. *Id.* at *4 (citing *United States v. Hooker Chems. & Plastics Corp.*, 90 F.R.D. 421, 426 (W.D.N.Y. 1981)); *see also Boca Raton Cmty. Hosp., Inc. v. Tenet Healthcare Corp.*, 271 F.R.D. 530 (S.D. Fla. 2010) (noting the importance of avoiding duplicative discovery efforts in amending a protective order to include a sharing provision).
7. 26 N.E.3d 858, 865 (Ohio Ct. App. 2014).
8. *Id.* at 864 (citing *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 861 (7th Cir. 1994)).
9. *Id.* at 864.
10. *Id.* at 865.
11. 734 S.W.2d 343 (Tex. 1987).
12. *Id.* at 346–47.
13. *Id.* at 347.
14. *Id.* (citing *Wilk v. Am. Med. Ass'n*, 635 F.2d 1295, 1299 (7th Cir. 1980)); *Am. Tel. & Tel. Co. v. Grady*, 594 F.2d 594, 597 (7th Cir. 1979); *Phillips Petroleum Co. v. Pickens*, 105 F.R.D. 545, 551 (N.D. Tex. 1985); *Ward v. Ford Motor Co.*, 93 F.R.D. 579, 580 (D. Colo. 1982); *Carter-Wallace v. Hartz Mountain Indus.*, 92 F.R.D. 67, 70 (S.D.N.Y. 1981); *Patterson v. Ford Motor Co.*, 85 F.R.D. 152, 154 (W.D. Tex. 1980); *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980).
15. *See id.* at 348.
16. 271 P.3d 249, 253 (Wash. Ct. App. 2011) (citing dissenting opinion in *State ex rel. Ford Motor Co. v. Manners* 239 S.W.3d 583, 589 (Mo. 2007)); *see also Autin v. Goetz*, 524 S.W.3d 617, 640 (Tenn. Ct. App. 2017) (approving of the modification of a protective order following the conclusion of the matter and stating "if access to protected materials can be granted without causing harm to legitimate privacy interests, access should be granted") (citing *Ballard v. Herzke*, 924 S.W.2d 652, 660 (Tenn. 1996)).
17. *Id.* at 250.
18. *Id.* at 251.
19. *Id.* at 250.
20. *Foltz*, 331 F.3d at 1132–33.
21. *See Foltz*, 331 F.3d at 1133; *see also Wilk*, 635 F.2d at 1301.
22. *Boca Raton Cmty. Hosp., Inc.*, 271 F.R.D. at 537; *see also In re Linerboard Antitrust Litig.*, 333 F. Supp. 2d 333, 340 (E.D. Pa. 2004) ("Where collateral litigants are concerned, however, the court need not balance prejudice against secrecy because secrecy can be preserved by subjecting the intervenor to the provisions of a protective order.").
23. Fed. Jud. Ctr., *Manual for Complex Litigation*, §20.14 (4th ed.).
24. *Byrd*, 26 N.E.3d at 867–68.
25. *See, e.g., Raymond Handling Concepts Corp. v. Superior Ct. of Calif.*, 45 Cal. Rptr. 2d 885, 887 (Cal. Ct. App. 1995); *see also Westinghouse Elec. Corp. v. Newman & Holtzinger*, 46 Cal. Rptr. 2d 151, 154 (Cal. Ct. App. 1995). And in Florida, while courts rejected the requested sharing provisions in two cases, they both cited favorably to *Foltz* and indicated support for sharing orders that adequately protect the producing party's privacy interests. *See Wal-Mart Stores East, L.P. v. Endicott*, 81 So. 3d 486, 489–90 (Fla. Dist. Ct. App. 2011); *Cordis Corp. v. O'Shea*, 988 So. 2d 1163, 1167–68 (Fla. Dist. Ct. App. 2008).
26. *Foltz*, 331 at 1137.
27. *United Nuclear Corp.*, 905 F.2d at 1428.
28. *Nestle Foods Corp. v. Aetna Cas. & Sur. Co.*, 129 F.R.D. 483, 486 (D.N.J. 1990); *see also Cipollone v. Liggett Grp., Inc.*, 113 F.R.D. 86, 90–91 (D.N.J. 1986) (The court stated that such injury not only fails to meet the standard required for a protective order under Rule 26(c) but also violates Rule 1's admonition to construe all federal rules to secure the just, speedy, and inexpensive determination of every action.); *Parsons*, 85 F.R.D. 724 at fn.1 ("The federal rules do not foreclose collaboration among litigants, and the court does not consider the possibility that plaintiff will share the results of discovery with any other litigant any part of defendant's showing of good cause to justify a protective order."); *Mitial*, 2012 WL 12868405, at *4 ("While Defendants rely on the speculative and hypothetical nature of any future lawsuits as a basis for precluding Plaintiffs from sharing discovery obtained in this lawsuit with other attorneys, the fact remains that most other courts have not been persuaded by that argument.").