FEATURE
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AVOIDING TRIALS ON SOCIAL MEDIA

OBTAINING PROTECTIVE ORDERS TO PREVENT TRYING YOUR CASE ON SOCIAL MEDIA (OR ONLINE)

BY ANDREW C. STEBBINS & CHRISTINA N. WILLIAMS

Discovery can be a harrowing and intrusive process for all litigants. As federal and state rules allow for broad discovery of information relevant to any party's claims or defenses, individuals and business are compelled to reveal an array of information that is not a matter of public knowledge and that is highly private or personal.

The civil rules do not "differentiate between information that is private or intimate and that to which no privacy interests attach…Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 30 (1984). While private, sensitive, or commercially valuable information disclosed in discovery is often exchanged without issue and only viewed by the limited universe of persons involved in the litigation, this is not always the case.

In the Internet age, a new problem in discovery has arisen. Some litigants use, and abuse, the discovery process to publicize private details gained through discovery on the internet in order to drive engagement and clicks to their accounts, cause harm to their opponent, or impede the litigation process as a whole. When discovery information is published online, it can disrupt discovery proceedings, cause lengthy and expensive disputes, and create parallel "litigation" of a matter online in the court of public opinion.

In our practice, which focuses on online defamation and privacy torts, we know that this type of discovery misuse can occur in any case. Individuals upset by being named in a lawsuit sometimes view discovery as a valuable opportunity to gather "ammunition" against their opponent and publish private information with the intent of discouraging the litigation from moving forward. If the parties are competitors, the information may be used for financial gain to the detriment of the plaintiff.

While these issues are common in our practice, the misuse and publication of discovery information can occur in any type of litigation and to any party. In today's world, where many people willingly share all aspects of their lives, including lawsuits, to the public at large, all litigators should be cognizant of the possibility that information they disclose in discovery may not stay within the confines of the court case. Having a plan in place to address the improper spread of discovery information online is a tool all litigators should have in their arsenal.

As litigators, we all know that discovery is generally not filed with the court without a proper reason for doing so. You do not file answers to Interrogatories unless you intend to rely on the contents in, for example, a motion to compel or motion for summary judgment. Discovery materials often contain information that is inadmissible and will never become part of the record at trial.

While discovery is within the scope of First Amendment protection, "[i]t does not necessarily follow […] that a litigant has unrestrained right to disseminate information that has been obtained through pretrial discovery." *Seattle Times*, 467 U.S. at 31. As stated by the Supreme Court, "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit. […] Thus, continued court control over the discovered information does not raise the same specter of government censorship that such control might suggest in other circumstances." *Id.* at 32. "[R]estraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." *Id.* at 33. While *Seattle Times* was decided nearly thirty years ago, it remains good law and has been called upon by federal courts in recent years in addressing the necessity of limiting the dissemination of discovery information. See, e.g. *Katz v. Steyn*, 2019 WL 13211070 (D.Nev. March 25, 2019); *Springs v. Ally Fin. Inc.*, 684 F. App'x 336, 338 (4th Cir. 2017) (noting that courts have a compelling interest in preventing litigants "from using discovery to mock and harass a private party on the Internet").

Federal Rule of Civil Procedure 26(c), and analogous state rules, generally allow courts to implement limitations on how discovery is conducted, inclusive of the persons with whom that discovery may be shared, upon a showing of good cause.

Many litigators are most familiar with boilerplate, mutual protective orders that courts routinely provide as part of their local rules. These standard orders provide a ready-made solution to general concern that discovery information will be shared with third parties. However, these orders are, generally, applicable only to defined categories of presumptively "confidential information," such as personal identifying information, sensitive financial records, commercially valuable information, and protected health information.

However, the "standard" protective orders do not fully address the issue of publishing

discovery information to the internet and leave the door open for publication of information that, while not "confidential" under the order, can still result in harm to the disclosing party.

If there is reason to suspect that a party may seek to publish information disclosed in discovery it may be worthwhile to craft your own protective order that addresses this issue. You should consider taking this step if, for example, one of the parties is actively posting about the lawsuit online, has indicated they intend to provide their "followers" with updates on the litigation, or if they specifically post about engaging in the discovery process.

If you see any of these red flags, you should first speak to counsel for the party to address your concerns — preferably, before you disclose discovery materials. Some attorneys are unaware of the fact that their client has "gone rogue" and is actively posting information about the litigation or their intent to do so in the future. In having these discussions with your opposing counsel, emphasis should be placed upon the fact that the order will apply to all parties and will facilitate the free flow of information, allowing discovery to proceed smoothly.

Even when these "red flags" are present, you may find your opposing counsel resists agreeing to such an order. It may be that the opposing party is adamant about creating content concerning discovery information because they want to harm your client or believe the new content will result in pecuniary gain. Your opposing counsel may also resist entering into such an order on ideological grounds. Regardless, if there is either an imminent threat that private, discovery information will be published to harm your client, or if such information has already been published, you should involve the Court in getting the protection necessary for your client.

Interestingly, there is limited case law discussing the issuance of protective orders that cover the dissemination of discovery information on the internet. However, the guidance these decisions provide is instructive and demonstrates an appropriate scope and basis for seeking such an order. For example, a protective order should not preclude the dissemination of information that is provided through discovery, but, also, available from another, independent source. See *Katz*, *supra*, at *4 citing *Seattle Times*, 467 U.S. at 37.

Further, the proponent of the motion should provide evidence that the disclosure of discovery materials has caused — or threatens to actually cause through a clear and specific threat — substantial embarrassment or harm to the producing party. *Katz* at *4 citing *Kent v. New York State Public Employees Federation*, 2019 WL 457544 at *3 (N.D.N.Y. 2019).

Additional factors thay may support the issuance of such an order include: if the person seeking to use the discovery materials is doing so for private, commercial gain, the discovery at issue is a video deposition, or that the publication would give rise to unwarranted media attention. *See Katz* at *5. In *Liu v. City of Reno*, 2023 WL 5304490, *6 (D. Nev. 2023), the court specifically looked to the fact that the plaintiff was apparently intending to use discovery materials and the lawsuit as content "to increase engagement on his [YouTube] channel" as a factor that weighed in favor of granting the requested order. This type of fact specific information will undoubtedly help convince the court that such an order related to the dissemination of discovery materials online should be implemented.

Today, we as litigators face many challenges that did not arise in generations past. We have to be aware of new risks that arise and use the procedural tools afforded by the civil rules to craft appropriate protections and remedies in this ever changing landscape. In today's world, where internet engagement and views are king, you have to be aware of an opposing litigant trying to use the legal process, and specifically the discovery process, to try your case on social media, as opposed to the courtroom for clout. While you hopefully never run into an opponent who seeks to use your client's discovery information as fodder for their latest TikTok video or Instagram post, we hope the information provided gives you a starting point to address the situation.

Andrew Stebbins is a partner with Buckingham, Doolittle & Burroughs, LLC, a corporate law firm that counsels middle-market executives and business leaders all over Ohio and beyond. Andrew leads Buckingham's defamation practice group and is based in Cleveland, Ohio. Andrew has been a civil litigator for 13 years. He has handled every aspect of litigation and has served in trial as a lead attorney in both state and federal courts, representing businesses and individuals in a broad spectrum of litigation matters. He has been a CMBA member since 2023. He can be reached at (216) 736-4233 or astebbins@bdblaw.com.

Christina Williams is an associate with Buckingham, Doolittle & Burroughs, LLC in the defamation practice group. She is a litigator and trial attorney who works to protect the reputations of individuals and businesses of all sizes that have been maliciously attacked online. She has been a CMBA member since 2022. She can be reached at (216) 736-4234 or cwilliams@bdblaw.com.