

When Secrecy Becomes Routine: New Evidence on the Need for Protective Order Reform

Protective Orders and the Public Interest

What if you found out that one judge's order could have saved the life of your loved one? Or that thousands of lives could have been saved by the release of a few documents uncovered in litigation? These questions are not hypothetical. Protective orders (POs), which require parties to maintain the confidentiality of information unearthed during discovery, have sealed lifesaving information from view in numerous cases, prompting debate on their role in our legal system.

Take the case of Brooke Melton, a twenty-nine-year-old pediatric nurse who died when her Chevy Cobalt stalled on a Georgia highway. During the ensuing wrongful death litigation, her parents uncovered that Brooke's death was caused by a defective ignition switch GM had long known to be faulty. They wanted to share that evidence with the public.

But a 2011 stipulated protective order, entered by a Georgia state court, barred such disclosures, effectively muffling the Meltons while more motorists died. The order had been agreed to early in the litigation, before the full picture emerged, as a common tactical trade-off: plaintiffs' lawyers routinely accept POs believing that, with a PO in place, defendants are apt to divulge documents more readily. By the time the Meltons wanted to speak out, the order compelled their silence.

"We thought that people needed to know.
There were still people out there driving those cars."

- Beth Melton, crash victim's mother

Takeaways

Stipulated (jointly filed) POs are far more common than previously believed, averaging roughly 9,000 requests per year (nearly double prior estimates), and accounting for 45 percent of all PO motions.

Judges deny only 4.1 percent of joint PO requests, and 54 percent of federal judges who ruled on at least 25 stipulated POs did not deny any.

Civil rights and tort cases have especially low denial rates, precisely the areas where public interest in disclosure is highest.

The result is a system that rubber-stamps secrecy, prevents litigants from sharing consequential information with the public, and points to the need for serious policy reform.

Secrecy Kills: A Pattern of Hidden Harm

Protective orders have concealed information relating to products and conduct across a wide range of high-profile cases:

OxyContin	A deposition containing damaging evidence about Purdue Pharma's marketing of the drug was kept under seal for years, even as the opioid crisis deepened.
The Dalkon Shield	Information about the defective intrauterine device was shielded from public view for years as injuries mounted.
Remington rifles	A defect in the Model 700 rifle was concealed across multiple cases, preventing consumers from learning of the danger.
Tobacco	POs barred plaintiffs' lawyers from sharing discovery with one another, forcing each new case to be built from scratch while cigarette companies bore no such burden.
Police misconduct	Disciplinary records have been routinely shielded, preventing the public from identifying patterns of officer misconduct.

A Debate Stalled by Missing Evidence

In federal civil litigation, the discovery default is disclosure. Federal Rule of Civil Procedure 26(c) permits courts to override that presumption, but only in narrow circumstances. Pursuant to Rule 26(c), protective orders are not supposed to be entered willy nilly—or simply on the parties' say-so. They are only supposed to be entered upon a showing of good cause. This is supposed to be a tough standard: courts have held that a finding of good cause "must be based on a particular factual demonstration of potential harm," not "conclusory statements."²

Based on these concerns, reformers have since the 1980s spearheaded reforms to fortify PO practices. Many have repeatedly championed versions of a federal "Sunshine in Litigation Act," which would allow parties to share evidence pertaining to public health and safety with regulators even if that information was subject to a PO.

Yet those reform efforts stalled. Critics argued that reformers had never produced empirical evidence that courts were rubber-stamping POs or that the public was being harmed. Arthur Miller, in a classic 1991 Harvard Law Review piece, called the claim one whose "validity is doubtful," adding that "no evidence has been presented that the current [PO] practice has created significant risks to public health or safety." A 1994 Senate witness from Lawyers for Civil Justice agreed that "protective orders are not preventing the public from obtaining information needed to protect public health or safety, as has been alleged." Defense attorney Robert N. Weiner went further: there was "[n]o serious academic study, no Rand Corp. analysis, no state-by-state survey" that "has suggested any problem with protective orders in our courts."⁵

Secrecy by Stipulation, published in the Duke Law Journal in 2024 by Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters and Aaron Schaffer-Neitz, provides this overdue evidence. Drawing on more than 2.2 million federal civil case dockets and state-of-the-art machine learning tools, the study exposes systematic failures in how courts handle stipulated POs and points to the urgency of reform.

What the Study Found

How common are stipulated POs?

~9,000

stipulated POs per year

From 2005 through 2012, there were roughly 9,000 jointly filed PO requests in the federal civil courts—occurring in 2.8 percent of all civil cases, nearly double prior estimates. The rate of stipulated PO requests was multiple times higher among cases that reached the discovery phase of litigation, and that rate grew more than 60 percent during the observation period, rising from 5.5 percent in 2005 to 8.5 percent by 2012.

45%

of all PO motions are joint

On average, 45 percent of all PO motions filed per year are jointly submitted—two to three times larger a proportion than earlier research suggested.

Are stipulated POs actually scrutinized?

96%

are granted

Judges deny, on average, only 4.1 percent of stipulated PO requests, meaning roughly 96 percent of joint PO motions are granted.

54%

of judges never denied a request

Of the 727 district and magistrate judges who ruled on at least 25 jointly filed PO motions during the study period, 392—or 54 percent—never denied a single stipulated PO request.

Denial rates vary by case type in troubling ways. Civil rights cases and tort cases—precisely the categories most likely to involve facts with significant public interest—produce some of the lowest denial rates, at approximately 3.4 and 3.6 percent, respectively.

What do the orders reveal?

68%

show no good cause

A qualitative review of 300 granted stipulated POs found that 68 percent did not even mention Rule 26(c)'s good cause standard. Only 17 percent provided a good cause determination tailored to the facts of the case; the rest offered no analysis or recycled boilerplate language. In the three circuits that explicitly require individualized findings, only 12 percent of granted orders met that standard.

<22%

are modified

Courts modified the text of fewer than 22 percent of proposed stipulated POs. Where modifications occurred, they typically addressed an unrelated issue—the standard for sealing court records. In many cases, judges simply crossed out the word “proposed,” signed their name, and dated the document.

A review of 100 denied POs reveals the most common reasons courts do push back: provisions that automatically sealed court filings (54 percent of merits-based denials), insufficient good cause statements (50 percent), and overbroad categories of protected documents (45 percent). Notably, after a full denial, 40 percent of cases saw no PO entered at all—suggesting that, in many cases, parties could not ultimately justify the secrecy they had sought.

Why the System Deviates

The gap between Rule 26(c)'s commands and courtroom practice is not accidental. Three structural factors drive it:

Plaintiffs' Lawyers

Plaintiffs' lawyers routinely accept POs as a tactical trade-off, agreeing to secrecy in exchange for faster, fuller document production. By the time the full picture emerges—and disclosure becomes desirable—the order already binds them.

Judges

Busy trial courts, facing jointly filed motions with no one arguing against them, often treat POs as routine administrative matters rather than motions affecting the public interest and requiring independent legal analysis.

Court Rules

Most district court model POs do not require parties to demonstrate good cause. Of 94 federal district courts, 18 have adopted model POs; of those, only 2 facially require a particularized judicial finding.

The result is a fundamental adversarial failure. When a PO is jointly filed, the plaintiff and defendant are effectively pitted together against the interests of the public. There is no one in the room to raise public-interest objections, and so none are raised.

The practical consequences extend far beyond individual cases. Hidden defects stay on the market longer. Regulators act on incomplete information or not at all. Victims of similar injuries cannot find each other or share evidence. And corporations with something to hide gain a structural advantage over individuals who, bound by POs, cannot warn others or coordinate claims.

What Can Be Done? Policy Recommendations

By providing long-overdue empirical evidence that Rule 26(c)'s good cause requirement often receives limited judicial scrutiny in practice, Secrecy by Stipulation moves the policy debate from “whether the system is broken” to “how do we fix it?” Several reforms merit consideration.

01 Resolve the circuit split in favor of mandatory independent review.

Two circuits—the Ninth and Eleventh—permit stipulated protective orders to be entered without an immediate independent good-cause determination. This position contradicts the legislative history of Rule 26(c) and makes it harder to encourage meaningful judicial scrutiny of stipulated POs. The Advisory Committee on Civil Rules should resolve the split in favor of the three circuits—the Third, Sixth, and Seventh—that require independent good cause review even for jointly filed motions.

02 Mandate individualized good cause findings.

Fewer than one in five granted stipulated POs includes a good cause determination tailored to the facts of the case. Rulemakers should amend Rule 26(c) to require courts to make an explicit, particularized good cause finding before entering any PO. District courts should also revise model POs and local rules to build in this requirement; most existing model orders do not require any engagement with Rule 26(c).

03 Adopt targeted public-health and safety carve-outs.

When POs would shield information relevant to public health and safety, heightened scrutiny is warranted. Trade secrets and personal privacy interests legitimately justify POs in many circumstances, but the balance should shift when public safety is at stake. Several states, including Florida, Texas, and Washington, have enacted provisions requiring courts to weigh public health before issuing such POs. A federal analog deserves renewed consideration.

04 Create public-interest intervenor mechanisms.

Because stipulated POs present no adversarial check where both parties favor secrecy, there is no constituency—no litigants, lawyers, or judges—positioned to raise public-interest objections in support of transparency. Policymakers should consider mechanisms that authorize public-interest organizations or government regulators to intervene in proceedings to challenge POs that would shield information bearing on health and safety.

05 Increase judicial training and awareness.

Many judges may simply miss that Rule 26(c)'s good cause standard applies to jointly filed PO motions. Judicial education programs should emphasize that party agreement does not substitute for independent review and should highlight the public costs of rubber-stamping discovery secrecy.

Conclusion

The evidence is clear. Stipulated protective orders are not the exception, but rather a routine feature of federal civil litigation. They are granted when requested in roughly 96 percent of cases, often without meaningful engagement with Rule 26(c)'s good cause standard. More than half of federal judges who ruled on at least 25 such motions over the study period never denied a single one.

The consequences extend well beyond individual cases. Potentially damaging information remains hidden behind court-ordered secrecy, escaping regulatory scrutiny, public awareness, and policymaker attention. The notorious cases that eventually reached public view are not anomalies, but the visible edge of a much larger system that has drifted far from Rule 26(c)'s intended design.

For decades, critics of PO reform demanded evidence that the system was broken before they would consider change. That evidence is now at hand. Rule 26(c) was written to make secrecy the exception. The data show it has become the rule. The work ahead—for rulemakers, judges, and lawyers alike—is to restore that balance.

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¹ Anderson v. Cryovac, Inc., 805 F.2d 1, 7 (1st Cir. 1986).

² Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 715 (2004).

³ Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 478, 501 (1991).

⁴ *The Sunshine in Litigation Act: Hearing on S. 1404 Before the Subcomm. on Cts. & Admin. Prac. of the S. Comm. on the Judiciary*, 103d Cong. 92 (1994) (statement of Alfred W. Cortese, Jr., on behalf of Lawyers for Civil Justice).

⁵ Robert N. Weiner, *Protective Orders and Nest-Feathering: Plaintiffs' Lawyers Around the Nation Are Pressing for Laws That Would Open Discovery Files in Personal-Injury Cases to Public Scrutiny. Their Motivations Are Not Nearly as Pure as Many Suppose*, LEGAL TIMES, Sept. 23, 1991, at 34.

Reference

Nora Freeman Engstrom, David Freeman Engstrom, Jonah B. Gelbach, Austin Peters & Aaron Schaffer-Neitz, *Secrecy by Stipulation*, 74 DUKE L.J. 99 (2024).

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