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Amber M. Bishop

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REMOVE THE MUZZLE AND GIVE RULE 37(b) TEETH: ADVOCATING FOR THE IMPOSITION OF SANCTIONS FOR RULE 26(c) PROTECTIVE ORDER VIOLATIONS IN THE ELEVENTH CIRCUIT

Amber M. Bishop *

INTRODUCTION

Rule 1 of the Federal Rules of Civil Procedure (Federal Rules) indicates that all the federal rules should be interpreted and administered to secure—as much as is feasible—a “just, speedy, and inexpensive determination [in] every action” before the court.¹ Dockets have become increasingly crowded² while discovery has simultaneously become progressively more expensive, time-consuming, and litigious.³ In an attempt to streamline the discovery process,⁴ ease the litigating parties’ financial burden, and prevent disclosure of potentially embarrassing or financially damaging information, courts turn to protective orders.⁵

Federal courts have the ability to issue 26(c) protective orders—orders to prevent, prohibit, or limit disclosure or discovery—to protect a party from “annoyance, embarrassment, oppression, or undue burden or expense.”⁶ Since the 1980s, judges have taken a

* J.D. Candidate 2015, Georgia State University College of Law.

1. Fed. R. Civ. P. 1. “The rules govern the procedure in all civil actions and proceedings in the United States district courts” but are not applicable to certain types of proceedings, including bankruptcy, citizenship, and proceedings involving a subpoena. *Id.*; Fed. R. Civ. P. 81.

2. 8B Charles Alan Wright et al., *Federal Practice and Procedure* § 2284 (3d ed. 1998).

3. See Jacqueline S. Guenego, Note, *Trends in Protective Orders Under Federal Rule of Civil Procedure 26(c): Why Some Cases Fumble While Others Score*, 60 *Fordham L. Rev.* 541, 571 (1991).

4. 1 Steven S. Gensler, *Federal Rules of Civil Procedure: Rules and Commentary* 615 (2014). “It is common for parties to try to streamline discovery by stipulating to discovery protections.” *Id.*

5. See Guenego, *supra* note 3, at 548–49, 554–55, 571.

6. Fed. R. Civ. P. 26(c)(1) (noting that available methods include and are not limited to forbidding disclosure or discovery, specifying time or place, prescribing a specific discovery method, limiting the scope of discovery, or “requiring that a trade secret or . . . commercial information not be revealed or be revealed only in a specified way”).

much harsher view of sanctions for discovery violations.⁷ There is much justification for this tough stance on court-order violations: for instance, violations of protective discovery orders can result in the dissemination of confidential information,⁸ trade secrets, or both, to competitors,⁹ the public,¹⁰ and even potential jurors.¹¹ In response to the very real possibility of financial and business harm, courts often turn to their power to sanction non-compliant parties for violating protective orders to punish and deter such behavior.¹² “When parties . . . engage in bad faith conduct, [the] court should . . . rely on the Federal Rules as the basis for sanctions” where possible.¹³ Rule 37(b)(2) of the Federal Rules of Civil Procedure lists some possible sanctions the court may order if a party fails to obey a discovery order.¹⁴

Rule 37(b) “authorizes sanctions for failure to comply with discovery orders.”¹⁵ There exists, however, a decided lack of consistency within the courts as to whether Rule 37(b) sanctions for violation of *discovery orders* apply to Rule 26(c) protective orders.¹⁶

7. Wright, *supra* note 2.

8. Am. Nat'l Bank & Trust Co. of Chicago *ex rel.* Emerald Inv. LP v. AXA Client Solutions, LLC, No. 00 C 6786, 2002 WL 1067696, at *2–3 (N.D. Ill. May 28, 2002), *aff'd*, 2002 WL 1838144 (N.D. Ill. Aug. 12, 2002) (violating party used “information designated . . . as highly confidential for business purposes unrelated to the lawsuit”).

9. Litton Indus., Inc. v. Chesapeake & Ohio Ry. Co., 129 F.R.D. 528, 530–31 (E.D. Wis. 1990) (acknowledging an economic risk when a party discloses confidential and sensitive information in that the disclosure may ultimately provide a competitor with an unfair advantage).

10. Valdez-Castillo v. Busch Entm't Corp., No. 06-20772-CIV, 2008 WL 4999175, at *2 (S.D. Fla. Nov. 20, 2008). In *Valdez-Castillo*, counsel sent confidential documents purported to contain trade secrets pertinent to the case, but protected within the court order, to the local newspaper, who then published brief excerpts and a front page article. *Id.*

11. *Id.* (noting that local readers of *The Miami Herald*, which published the confidential document with an accompanying front-page article, had the potential to serve as jurors).

12. See Fed. R. Civ. P. 37(b); Natural Gas Pipeline Co. of Am. v. Energy Gathering, Inc., 2 F.3d 1397, 1410 (5th Cir. 1993).

13. *Natural Gas Pipeline*, 2 F.3d at 1410 (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 50 (1991)).

14. Fed. R. Civ. P. 37(b)(2)(A) (If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders).

15. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763 (1980).

16. Compare *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001) (finding that a violation of a protective order does not fall within the scope of Rule 37(b)(2) sanctions), with *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 (9th Cir. 1983) (holding that failure to obey a

The Eleventh Circuit Court of Appeals interprets Rule 37(b)(2) very narrowly and precludes its application to protective order violations;¹⁷ other courts interpret the rule much more broadly.¹⁸ In jurisdictions where Rule 37 does not apply to protective orders, courts must deter and punish pursuant to other sources of authority.¹⁹ These other sources of power potentially limit judges in their punishments.²⁰

Sanctions pursuant to both the court's inherent authority and 28 U.S.C. § 1927 (§ 1927) require detailed findings of bad faith.²¹ Rule 37(b), on the other hand, requires neither bad faith nor willfulness.²² Because of these very different standards, protective order violations not committed in bad faith may go unpunished in those jurisdictions that do not apply Rule 37(b) to protective order violations.²³ This Note proposes that the Eleventh Circuit broaden its narrow

protective order exposed counsel to liability under Rule 37(b)(2)), and *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 490 (5th Cir. 2012) (holding that the imposition of 37(b)(2) sanctions for counsel's violation of a 26(c) order protecting confidential material was well within the court's discretion). See also Joel Slawotsky, *Rule 37 Discovery Sanctions—The Need for Supreme Court Ordered National Uniformity*, 104 Dick. L. Rev. 471, 500 (2000) (noting “there is a substantial amount of discovery abuse that is commonplace” and “without objective criteria” provided by the United States Supreme Court, there will continue to be substantial uncertainty as to what “conduct warrants sanctions”).

17. *Lipscher*, 266 F.3d at 1323 (holding that a violation of a discovery protective order does not fall within the scope of Rule 37(b)(2) sanctions and reasoning that the protective order does not “provide or permit” discovery). In *Lipscher*, one company posed as a law firm in order to obtain from another company data, which they then sold to attorneys wishing “to calculate a statistical range of potential jury verdicts for different types of personal injur[y] [cases].” *Id.* at 1308.

18. *Smith & Fuller*, 685 F.3d at 490 (holding that the imposition of 37(b)(2) sanctions for violations of 26(c) protective orders fall within the court's discretion).

19. *Lipscher*, 266 F.3d at 1323 (finding that because the district court did not invoke its inherent authority, the appellate court need not assess inherent authority's applicability to the case-specific circumstances).

20. See discussion *infra* Part I.

21. *Wallis v. Centennial Ins. Co.*, 927 F. Supp. 2d 909, 920 (E.D. Cal. 2013) (citing *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001)). Detailed findings require a description of the “‘bad faith conduct with sufficient specificity, accompanied by a detailed explanation’ of the reasons justifying the issuance and the amount of the award.” *Galanis v. Szulik*, 841 F. Supp. 2d 456, 461 (D. Mass. 2011) (quoting *F.A.C., Inc. v. Cooperativa de Seguros de Vida de P.R.*, 563 F.3d 1, 6 (1st Cir. 2009)).

22. Fed. R. Civ. P. 37(b).

23. See discussion *infra* Parts I–III. See, e.g., *McDonald v. Cooper Tire & Rubber Co.*, 186 F. App'x 930 (11th Cir. 2006); *Kleiner v. First Nat'l Bank of Atlanta*, 751 F.2d 1193 (11th Cir. 1985).

interpretation of Rule 37(b) to permit Rules-based sanctions of parties who violate protective discovery orders.²⁴

In support of this position, this Note explores the implications of inconsistent sanctions for Rule 26(c) protective order violations.²⁵ Part I examines the court's authority to sanction for court-order violations and that authority's applicability to discovery-order violations.²⁶ Part II discusses discovery protective orders, their purpose, and the consequences of a violation.²⁷ Part III provides an aerial view of Rules 37(b) and 26(c), discussing judicial decisions involving sanctions for protective order violations as they relate to sources of sanction authority.²⁸ Part IV encourages the Eleventh Circuit to impose sanctions for protective order violations using Rule 37(b) in an effort to provide certainty, consistency, and protection for parties before the court.²⁹

I. THE LINEAGE AND BREEDS OF DISCOVERY SANCTIONS

During the course of civil litigation in federal courts, certain conduct or behavior may result in sanctions, which serve to provide deterrence and punishment as authorized by the Federal Rules,

24. As noted by Adam Fitzsimmons, the split amongst the circuits in interpreting Rule 37(b)(2) and its availability when protective orders are violated calls into question the ability of district courts to enforce protective orders. Adam Jeffrey Fitzsimmons, Note, *Protect Yourself: Why the Eleventh Circuit's Approach to Sanctions for Protective Order Violations Fails Litigants*, 48 Ga. L. Rev. 269, 272 (2013).

25. See discussion *infra* Parts I–IV.

26. See discussion *infra* Part II.

27. See discussion *infra* Part I.

28. See discussion *infra* Part III. Part III further expounds upon which federal circuit courts impose Rule 37(b) sanctions on parties who violate Rule 26(c) protective orders—exploring the role of willful versus inadvertent violations—with a special focus given to the states comprising the Eleventh Circuit.

29. See discussion *infra* Part III (discussing the disagreement among courts, judges, and scholars as to whether Rule 37 should be a viable option for courts when faced with a discovery-order violation). Adam Josephs from the University of Chicago contends that a narrow reading of Rule 37 is more appropriate, and thus, “inherent authority is currently the proper mechanism by which courts should enforce protective orders.” Adam M. Josephs, Comment, *The Availability of Discovery Sanctions for Violations of Protective Orders*, 80 U. Chi. L. Rev. 1355, 1356–57 (2013). Fitzsimmons's Note reaches a similar conclusion, suggesting that the Eleventh Circuit reverse its holding in *Lipscher* and broaden its interpretation of Rule 37, in spite of a different and maybe more localized analysis. Fitzsimmons, *supra* note 24, at 272, 295–96.

federal statutes, and the inherent authority of the court.³⁰ Litigators use a vast arsenal of tools and strategies, but discovery is the “most often used procedural tool in the kit of the federal court practitioner.”³¹ Discovery violations occur frequently and vary in severity, as do the resulting sanctions.³² When discovery violations or failures occur, “a district court has broad discretion to withhold or impose sanctions, and, where sanctions are imposed, to determine what [those sanctions] will be.”³³ The authority to impose sanctions for violating court orders is specifically provided for within the Federal Rules, federal statutes, and the inherent authority of the court.³⁴

Without question, the imposition of sanctions falls squarely in the vast realm of judicial discretion.³⁵ When the court entertains motions for sanctions made pursuant to the Federal Rules, as opposed to the court’s inherent power or § 1927,³⁶ the court’s interpretation of the

30. See Robert E. Rodes et al., *Sanctions Imposable for Violations of the Federal Rules of Civil Procedure* 1, 26, 73–74 (1981) (surveying the law, as of 1981, with respect to sanctions for violations of the Federal Rules of Civil Procedure).

31. Maurice Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Colum. L. Rev. 480, 480–81 (1958) (noting that some form of discovery is used in virtually all tort cases and “discovery procedures come before the courts in twenty-five per cent [sic] of the cases filed”).

32. David F. Herr et al., *Motion Practice* § 15.07 (5th ed. 2009) (noting the “wide array of sanctions that may be imposed for the failure to make discovery”). On one end of the sanction spectrum, sanctions can provide for payment of expenses by the disobedient party; at the other end of the spectrum are case-dispositive sanctions: involuntary dismissal and default judgment. Fed. R. Civ. P. 37(b)(2) (listing sanctions for failure to comply with a court order); Fed. R. Civ. P. 41(b) (noting that “[i]f the plaintiff fails to . . . comply with . . . a court order, a defendant may move to dismiss . . . any claim”).

33. Jay A. Stephens, *Civil Discovery Sanctions in the Federal Courts*, 33 American Jurisprudence Proof of Facts 3d § 7 (2014) (footnotes omitted). Courts assess and balance a host of factors when choosing whether to impose sanctions upon a violating party, giving each factor “the weight most appropriate under the circumstances of a particular discovery failure.” *Id.* The nature and particular circumstances—particularly findings of bad faith or purposeful violations—are among those things considered. *Id.* Additionally, the courts consider the risk of prejudice resulting from the discovery failure, the need for specific deterrence, and the judiciary’s interest in sanctions. *Id.*

34. See Rodes et al., *supra* note 30, at 73–79 (including discussion of sanctions imposed according to Rule 37, inherent authority to hold in contempt—codified in 18 U.S.C. § 401—and the Federal Cost Statute—28 U.S.C. § 1927).

35. Herr et al., *supra* note 32, § 15.07[C] (noting “[t]he range of sanctions is dramatic, and courts have broad discretion in selecting an appropriate sanction” and this is an “opportunity to the attorney seeking sanctions” to “steer” the court toward a sanction that is most useful”).

36. See *infra* note 47.

pertinent rule dictates success or failure.³⁷ Courts are free to rely upon statutory or inherent authority to determine the appropriate sanction for behaviors or sanctions not specifically enumerated in the Federal Rules.³⁸ The United States Supreme Court noted that “the inherent power of a court can be invoked even if procedural rules exist which sanction the same conduct,”³⁹ but “[i]n situations where procedural rules [do] prescribe specific sanctions for discovery infractions, reliance on a court’s ‘inherent power’ . . . has been criticized.”⁴⁰ In spite of this criticism, the Eleventh Circuit has affirmed simultaneous sanctions pursuant to § 1927, the Federal Rules, and inherent authority for violations of other types of discovery order violations; yet it finds that Rule 37 does not apply to protective order violations: The Eleventh Circuit therefore imposes sanctions for protective order violations pursuant only to inherent authority.⁴¹

Rule 37(b)(2)(C) provides for the payment of reasonable expenses “[i]nstead of or in addition to the orders above, . . . caused by the failure [to comply with discovery orders], unless the failure was substantially justified or other circumstances make an award of

37. Catherine T. Struve, *The Paradox of Delegation: Interpreting the Federal Rules of Civil Procedure*, 150 U. Pa. L. Rev. 1099, 1119 (2002) (noting that some lower courts have “felt free to strain the Rules’ text, and ignore relevant [Advisory Committee] Notes, in order to implement their own views of desirable policy”). Struve also asserts that “the Court should not reject authoritative sources of meaning in favor of its own policy” and concludes that courts “should accord the [Advisory Committee] Notes authoritative effect.” *Id.* at 1103, 1141. See also *Roadway Express v. Piper*, 447 U.S. 752, 763–64 (1980) (finding that “Rule 37 sanctions must be applied diligently [for failure to comply with discovery orders] both ‘to penalize those whose conduct may be deemed to warrant such a sanction, [and] to deter those who might be tempted to such conduct in the absence of such a deterrent’” (second alteration in original) (quoting *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976))).

38. Note, *Proposed 1967 Amendments to the Federal Discovery Rules*, 68 Colum. L. Rev. 271, 293–94 (1968).

39. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 49 (1991).

40. *Proposed 1967 Amendments to the Federal Discovery Rules*, *supra* note 38, at 293.

41. *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001); *Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1538 (11th Cir. 1993). The Court of Appeals upheld sanctions imposed by the District Court via all three mechanisms where the defendants continually, deliberately, and willfully resisted discovery. *Malautea*, 987 F.2d at 1542–47. The trial court entered a default judgment and assessed costs associated with the “protracted and costly discovery period” per the Federal Rules, ordered the defense attorneys to pay the reasonable costs and attorney’s fees resulting from their behavior pursuant to § 1927, and fined each defendant and defense attorney pursuant to the court’s inherent powers. *Id.* at 1541–42.

expenses unjust.”⁴² The Eleventh Circuit has said Rule 37(b)(2)(C) “gives district judges broad discretion . . . guided by judicial interpretation of the rule.”⁴³ Is Rule 37(b) truly silent concerning an appropriate remedy for protective order violations, such that judicial reliance upon inherent authority or statutory permission is necessary and appropriate? The answer depends upon the individual court’s interpretation of Federal Rule 37(b) and subsequently, the answer to two additional questions: (1) does a protective order “provide or permit” discovery; and (2) does “fail[ing] to obey an order” require willfulness or bad faith?⁴⁴

A. Breeds of Sanctions: Sources of Authority Not Based in the Federal Rules

Any noncompliance with a court order can be grounds for some form of sanction and although the court has several available sanctioning mechanisms, key differences affect the viability and desirability of each method.⁴⁵

42. Fed. R. Civ. P. 37(b)(2)(C).

43. *Malautea*, 987 F.2d at 1542–43 (giving the examples that a “default judgment sanction requires a willful or bad faith failure to obey a discovery order” and “simple negligence . . . or inability to comply will [likely] not justify a Rule 37 default judgment or dismissal” (citing *Societe Internationale pour Participations Industrielles et Commerciales v. Rogers*, S.A., 357 U.S. 197, 212 (1958) and *In re Chase and Sanborn Corp.*, 872 F.2d 397, 400 (11th Cir. 1989))).

44. See discussion *infra* Parts I–III. See, e.g., *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 489–90 (5th Cir. 2012) (holding that the imposition of 37(b)(2) sanctions for violations of 26(c) protective orders fall within the court’s discretion because a protective order provides for discovery by “prescribing the method and terms” to which the parties must abide); *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001) (finding 37(b) sanctions are inapplicable to protective-order violations because a protective order falls outside of the scope of the rule as it does not provide or permit discovery); *United States v. Nat’l Med. Enters., Inc.*, 792 F.2d 906, 910–12 (9th Cir. 1986) (upholding the lower court’s compensatory sanctions against the government for violating the spirit of the protective order and stated that dismissal should only be imposed in extreme circumstances if the conduct is willful and in bad faith); *Belinsky v. Clooten*, 164 P.3d 1163, 1168 (Or. Ct. App. 2007) (noting that the court held “that a party ‘refuses to obey’ simply by failing to comply with [a court] order”) (quoting *Societe Internationale pour Participations Industrielles et Commerciales, S. A., v. Rogers*, 357 U.S. 197, 208 (1958))).

45. One requirement does not vary by mechanism: the Supreme Court clarified that a party’s right to due process requires notice (by the court or opposing party), and the court must grant the violating party an opportunity to be heard. *Malautea*, 987 F.2d at 1542. This restriction applies to the requisite bad faith determination and to assessing fees. *Id.* (interpreting the “Rule 37 requirement of a “‘just’ sanction to represent ‘general due process restrictions on the court’s discretion’” (quoting *Ins. Corp. of Ir. v.*

I. 28 U.S.C. § 1927

Violation of a court order may result in sanctions pursuant to federal statute—§ 1927.⁴⁶ The code section provides that “[a]ny attorney . . . in any court of the United States . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney’s fees reasonably incurred because of such conduct.”⁴⁷

The Eleventh Circuit finds that the statute’s “plain language . . . imposes three essential requirements: (1) the attorney must engage in unreasonable and vexatious conduct;⁴⁸ (2) that conduct must multiply the proceedings; and (3) the amount of the sanction must bear a ‘financial nexus to the excess proceedings.’”⁴⁹

Discovery violations and the resulting motions have the potential to significantly multiply proceedings,⁵⁰ and thus it seems that § 1927

Campagne des Bauxites de Guinee, 456 U.S. 694, 707 (1982)); *see also* *Donaldson v. Clark*, 819 F.2d 1551, 1559–60 (11th Cir. 1987) (discussing that notice can come from the court or party seeking sanctions and the response can be oral or in writing); *Poliquin v. Garden Way, Inc.*, 154 F.R.D. 29, 31 (D. Me.1994) (“Rule 37(b) requires the disobedient party to show that its failure to comply is substantially justified or that other circumstances make an award of sanctions unjust.”).

46. 28 U.S.C. § 1927 (2012).

47. 28 U.S.C. § 1927. Section 1927 (Counsel’s Liability for Excessive Costs) should be read in conjunction with 28 U.S.C. § 1920 (Taxation of Costs) which reads:

A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

28 U.S.C. § 1920 (2012); *see* *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 760 (1980).

48. To determine if conduct is “vexatious,” the court must assess whether the conduct is “objectively ‘harassing or annoying’ so that it reflects a ‘serious and studied disregard for orderly process of justice.’” *An-Port, Inc. v. MBR Indus., Inc.*, 142 F.R.D. 47, 49 (D.P.R. 1992) (quoting *Cruz v. Savage*, 896 F.2d 626, 632 (1st Cir. 1990)).

49. *Meidinger v. Healthcare Indus. Oligopoly*, 391 F. App’x. 777, 779 (11th Cir. 2010).

50. William Schwarzer et al., *California Practice Guide Federal Civil Procedure Before Trial* ¶ 17:655 (2014) (citing *Lyn-Lea Travel Corp. v. Am. Airlines, Inc.*, 283 F.3d 282, 291–92 (5th Cir. 2002)). In *Lyn-Lea*, the court rescheduled a hearing because counsel appeared at a scheduled contempt hearing without the witness, the court justified sanctions under § 1927 by stating that the attorney unreasonably multiplied the proceedings. *Id.* It logically follows that hearings regarding violated discovery orders could possibly be deemed to unreasonably multiply proceedings although it is more

could apply.⁵¹ Protective orders, when realistically drafted and subsequently followed, “save countless hours of judicial time and substantial litigation costs.”⁵² Litigating violations of these same protective orders wastes judicial resources and increases litigation costs, yet § 1927 has not been applied to protective order violations.⁵³ Section 1927 is further limited in that parties, even pro se parties, cannot be sanctioned under § 1927.⁵⁴ The statute is singularly applicable to attorneys, leaving willful or vexatious conduct of the parties unpunished.⁵⁵

Additionally, because § 1927 sanctions are “penal in nature,”⁵⁶ the statute must be “strictly construed” and detailed findings of bad faith conduct are necessary.⁵⁷ The first element—unreasonable and vexatious conduct—is a high standard, one that often requires a detailed showing of bad faith.⁵⁸ Section 1927 is further limited in that the only available sanctions are monetary: the court may award costs, expenses, and attorney’s fees.⁵⁹ On the other hand, sanctions pursuant

likely courts will not do this for hearings within the same suit or same claim. *Id.* ¶ 17:643 (quoting *Jensen v. Phillips Screw Co.*, 546 F.3d 59, 65 (1st Cir. 2008)).

51. An exhaustive search on both WestLaw and Lexis revealed no indications where § 1927 applied to protective order sanctions as of August 22, 2014.

52. Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 2 (1983).

53. Guenego, *supra* note 3, at 542, 571. Although § 1927 has not been specifically applied to the violation of court protective orders, the Southern District of Ohio noted that discovery violations subject the violating party to sanctions pursuant to Rule 26(g)(3), Rule 37(a), Rule 37(b), § 1927, and the court’s inherent power. *Brown v. Tellermate Holdings Ltd.*, No. 2:11-CV-1122, 2014 WL 2987051, at *23 (S.D. Ohio July 1, 2014).

54. Douglas J. Pepe, *Persuading Courts to Impose Sanctions on Your Adversary*, Litig. Winter 2010, at 21, 24. “If you want sanctions against a party, as opposed to your adversary, pick another rule because Section 1927 doesn’t apply. Sanctions are only available against lawyers, not litigants.” *Id.*

55. *Revson v. Cinque & Cinque, P.C.*, 70 F. Supp. 2d 415, 437 (S.D.N.Y. 1999) (citing *Keller v. Mobil Corp.*, 55 F.3d 94, 99 (2d Cir. 1995)), *rev’d in part, vacated in part*, 22 F.3d 71 (2d Cir. 2000); *see also Roadway Express, Inc. v. Piper*, 447 U.S. 752, 772 (1980) (Burger, C.J., dissenting); *Zaldivar v. City of L.A.*, 780 F.2d 823, 831 (9th Cir. 1986). *See supra* note 48 for a definition of vexatious conduct.

56. *Meidinger v. Healthcare Indus. Oligopoly*, 391 F. App’x. 777, 779 (11th Cir. 2010) (quoting *Peterson v. BMI Refractories*, 124 F.3d 1386, 1396 (11th Cir. 1997)).

57. *Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc.*, 38 F.3d 1414, 1416–17 (5th Cir. 1994) (finding that “evidence of recklessness, bad faith, or improper motive must be present”).

58. Pepe, *supra* note 54, at 24.

59. Seth Katsuya Endo, *The Propriety of Considering an Attorney’s Ability to Pay Under § 1927*, 61 Drake L. Rev. 291, 292–93 (2013) (“Until 1980, sanctions imposed pursuant to 28 U.S.C. § 1927 were

to the Federal Rules or the court's inherent authority provide the courts more of the necessary flexibility and are undoubtedly applicable to the violation of protective court orders.⁶⁰

2. *Inherent Power*

Judicial power to sanction pursuant to inherent authority is the “quintessential gap filler,” permitting sanctions when no rule or statute governs the precise violative conduct or when a court wishes to exceed the penalties provided for by the rule or statute.⁶¹ Inherent power is authority necessarily vested in the courts, which allows them to manage judicial affairs and adjudicate claims fairly, effectively, and in an expeditious manner.⁶² The United States Constitution confers “[t]he judicial [p]ower,” not governed by rules or statutes, upon all “Article III courts.”⁶³ Specifically, courts have “inherent authority” to sanction attorneys for any bad faith conduct related to discovery order violations.⁶⁴

The power to sanction bad faith conduct pursuant to the court's inherent power goes far beyond sanctioning mechanisms provided by the Federal Rules or § 1927.⁶⁵ Some courts have found that inherent

limited to “excess costs and expenses, which only rarely involved significant sums.” As a result, these sanctions were seldom the subject of litigation. Illustrating this point, in the 150 years following its enactment in 1813, § 1927 was invoked in only seven reported cases. Since 1980, when Congress amended the section by authorizing the inclusion of attorney's fees as part of the sanction, much greater use has been made of § 1927.” (footnotes omitted).

60. *See infra* Part I.A.2.

61. Pepe, *supra* note 54, at 24.

62. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 42 (1991); *Martin v. Automobili Lamborghini Exclusive, Inc.*, 307 F.3d 1332, 1335 (11th Cir. 2002).

63. U.S. Const. art. III, § 1; *Natural Gas Pipeline Co of Am. v. Energy Gathering, Inc.*, 2 F.3d 1397, 1406 (5th Cir. 1993).

64. *Chambers*, 501 U.S. at 46–47 (finding the ability of the Court to sanction is neither displaced nor limited by statute or the federal rules and instead, “inherent power extends to a full range of litigation abuses”); Philip Talmadge et al., *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 Seattle U. L. Rev. 437, 454 (2010) (noting the court may impose sanctions for failure to cooperate with discovery orders under the relevant rule or “under the court's inherent authority”).

65. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 894 F.2d 696, 703 (5th Cir. 1990). For more examples, see *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1119 (1st Cir. 1989); *Landau & Cleary, Ltd. v. Hribar Trucking, Inc.*, 867 F.2d 996, 1002 (7th Cir. 1989); *Black Panther Party v. Smith*, 661 F.2d 1243, 1281 & n.4 (D.C. Cir. 1981) (MacKinnon, J. dissenting).

power is intended to reach both individuals and conduct not directly addressed by the Federal Rules and statutes.⁶⁶ Notably, Congress’s promulgation of the Federal Rules does not displace a court’s inherent power to impose sanctions upon a party for acting in bad faith; however, where procedural rules provide for specific sanctions, reliance upon a court’s inherent power authority—as opposed to its procedural authority—has been criticized.⁶⁷ Unlike § 1927, which applies only to attorneys, the court’s inherent authority is applicable to all parties appearing before it; the court may assess attorney’s fees against both attorneys and parties pursuant to its inherent power for “act[ing] in bad faith, vexatiously, wantonly, or for oppressive reasons.”⁶⁸ Additionally, inherent power provides greater flexibility in imposing sanctions, allowing the court to respond directly to the harm caused and tailor the sanctions to fit the behavior.⁶⁹ While inherent power is broad-reaching and flexible, it has its limitations. The court’s inherent powers are “shielded from direct democratic controls,” and as such the courts are cautioned to exercise “restraint and discretion.”⁷⁰ Sanctions pursuant to the court’s inherent authority require an express and detailed finding by the court of bad faith; this includes vexatious, wanton behavior or conduct done for oppressive purposes.⁷¹ Express and detailed findings of bad faith present an obstacle, although not an insurmountable one. Unlike Rule 27,

66. *Natural Gas Pipeline Co.*, 2 F.3d at 1407, 1411 (noting that the Federal Rules are not the “exclusive source of a federal court’s powers in civil cases”).

67. *Proposed 1967 Amendments to the Federal Discovery Rules*, *supra* 38, at 293–94.

68. *Chambers*, 501 U.S. at 45–46; *see also* *Alyeska Pipeline Serv. Co. v. Wilderness Soc’y*, 421 U.S. 240, 258–59 (1975).

69. *In re Mroz*, 65 F.3d at 1575 (noting that “[a] primary aspect of [the discretion that flows from the court’s inherent authority] is the ability to fashion an appropriate sanction for conduct which abuses the judicial process” (quoting *Chambers*, 501 U.S. at 44–45)). Courts have even awarded expert witness fees pursuant to inherent power. *Barnes v. Dalton*, 158 F.3d 1212, 1215 (11th Cir. 1998).

70. *Natural Gas Pipeline*, 2 F.3d at 1409 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764 (1980)).

71. *In re Mroz*, 65 F.3d at 1575–76 (noting that where the reputation of a law firm and its attorneys is at stake, evidentiary hearings are appropriate and even encouraged to determine if parties acted in bad faith); *see also* *Roadway Express, Inc. v. Piper* 447 U.S. 752, 767 (noting that “[a] specific finding as to whether counsel’s conduct in this case constituted or was tantamount to bad faith . . . would have to precede any sanction under the court’s inherent powers”).

conduct must surpass equally high “bad faith” thresholds whether assessed under the court’s inherent powers or § 1927.⁷²

B. Lineage: Federal Rule-Based Authority in Rule 37(b)

Section 1927 has yet to be applied to protective order violations, and thus inherent authority and Rule 37 may very well be the only available avenues for deterrence and compensation. As stated, sanctions awarded pursuant to the court’s inherent authority require detailed findings of bad faith.⁷³ Rule 37, on the other hand, has no bad faith or willfulness requirement and permits the court to impose sanctions in situations where it would be unable to do so using inherent authority.⁷⁴ The requirements of Rule 37(b) violations are simply that: (1) a court order was in effect and (2) the order was violated.⁷⁵ Rule 37 is widely applicable, grants federal courts broad discretion,⁷⁶ and should be applied diligently to both penalize and deter.⁷⁷ Although it is certainly within the court’s extremely broad discretion whether to actually impose Rule 37(b) sanctions, sanctions

72. *Cordoba v. Dillard’s Inc.*, 419 F.3d 1169, 1178 & n.6 (11th Cir. 2005).

73. *Wallis v. Centennial Ins. Co.*, 927 F. Supp. 2d 909, 920 (E.D. Cal. 2013); *Fink v. Gomez*, 239 F.3d 989, 992 (9th Cir. 2001). The *Fink* court held that “a district court has authority under its inherent power to impose sanctions when an attorney has made reckless misstatements of law and fact, and has done so for an improper purpose.” *Fink*, 239 F.3d at 990.

74. *Valdez-Castillo v. Busch Entm’t Corp.*, No. 06-20772-CIV, 2008 WL 4999175, at *4-5 (S.D. Fla. Nov. 20, 2008). While “bad faith or willful misconduct” may be necessary in some jurisdictions to warrant the “severest remedies” under Rule 37(b), “lesser sanctions [generally] do not require a finding of willfulness”; *Stephens*, *supra* note 33, § 9. *See also* *Chilcutt v. United States*, 4 F.3d 1313, 1322 n.23 (5th Cir. 1993) (holding that district courts have broad discretion to fashion appropriate sanctions against those who disobey court orders, but noting that the sanction must specifically relate to the misconduct at issue).

75. Fed. R. Civ. P. 37(b).

76. *Poliquin v. Garden Way, Inc.*, 154 F.R.D. 29, 31 (D. Me. 1994). In *Poliquin*, the court ordered counsel to destroy all documents within ninety days after the products liability litigation came to an end. *Id.* The attorney told the court reporter not to destroy the protected transcripts and data because “he disagreed with [the] procedure.” *Id.* Counsel then advised his co-counsel, in a similar case against the same defendant, to request a copy of the transcript from the state court reporter, who transcribed the deposition in *Poliquin*. *Id.* at 30. The district court then exercised its “wide discretion” and ordered the offending party to submit a detailed letter certifying the precise steps he had taken to ensure that the protected material was destroyed and that he had contacted the court reporters to direct them to destroy the material, indicating if he had committed other violations, and if so, describing the steps he was taking to rectify them. *Id.* at 31-33.

77. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 763-64 (1980).

should certainly be applied for willful violations, bad faith, and in some cases even negligence, but arguably not when a party is simply unable to comply.⁷⁸ A significant benefit to imposing sanctions pursuant to Rule 37—as opposed to § 1927—is that sanctions under the Rule are wider reaching in that they are applicable to parties and their counsel.⁷⁹ Furthermore, the court can tailor the punishment (and deterrence) to the offending behavior.⁸⁰

Rule 37(b) authorizes sanctions for a party's failure to comply with a court order.⁸¹ The Rule was adopted in 1937 for the very purpose of enforcing the discovery devices provided for in Rules 26 through 36.⁸² Rule 37(b)(2)(A) provides a range of available sanctions, from ordering reimbursement for incurred costs to dismissing the action or proceeding.⁸³ Rule 37(b)(2)(C) provides for the payment of expenses instead of, or even in addition to, the sanctions provided for in Rule 37(b)(2)(A).⁸⁴ Courts have recognized that “without adequate sanctions, the procedures for discovery would be ineffectual.”⁸⁵ Discovery devices serve as a carrot, streamlining litigation and attempting to decrease the overall cost and burden of litigation.⁸⁶

78. *SAS Inst., Inc. v. World Programming Ltd.*, No. 5:10-CV-25-FL, 2014 WL 1760960, at * 4 (E.D.N.C. May 1, 2014) (citing *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494, 503 (4th Cir. 1977)).

79. *See* Fed. R. Civ. P. 37(b).

80. *Stuart I. Levin & Assocs., P.A. v. Rogers*, 156 F.3d 1135, 1140 (11th Cir. 1998) (noting that “Rule 37(b)(2) provides a range of sanctions that a district court may impose [in its discretion] upon parties and their attorneys for failure to comply with the court’s discovery orders”). In addition to directive and case-dispositive sanctions, Rule 37(b)(2) also provides the court discretion to advise the attorney or party “to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.” *Id.*

81. Fed. R. Civ. P. 37(b).

82. *Fitzsimmons*, *supra* note 24, at 274.

83. Fed. R. Civ. P. 37(b)(2)(A)(i)–(vii); Fed. R. Civ. P. 37(b)(2)(C).

84. Fed. R. Civ. P. 37(b)(2)(C).

Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

Id.

85. *Wanderer v. Johnston*, 910 F.2d 652, 655 (9th Cir. 1990) (quoting 8 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2281 (3d ed. 1970)).

86. *Gensler*, *supra* note 4, at 615. Parties often stipulate to various discovery protections in an effort to streamline discovery and litigation. *Id.*

Sanctions serve as the stick accompanying that very useful carrot; yet the interpretation of Rule 37(b) and its applicability to Rule 26(c) protective orders varies greatly according to the adjudicating jurisdiction.⁸⁷

II. A DOBERMAN OR POODLE JUDICIARY: PROTECTING INTERESTS WITH PROTECTIVE ORDERS

Parties are given wide latitude during discovery and are permitted to explore any non-privileged matter “relevant to the subject matter involved in the [pending] action” to narrow the issues and obtain information leading to the discovery of admissible evidence.⁸⁸ Parties are not, however, limited in their use or dissemination of discovery materials once acquired.⁸⁹ In fact, the Supreme Court held that First Amendment freedoms apply to information gained through discovery, and in the absence of a court order, parties are entitled to disseminate the material as they wish.⁹⁰ As a result, litigants are hesitant to disclose information to opposing parties and often stipulate to umbrella protective orders or petition the court for protective orders to limit the scope, use, disclosure, or dissemination of shared materials.⁹¹

87. See discussion *infra* Part III.

88. Fed. R. Civ. P. 26(b)(1); *Hickman v. Taylor*, 329 U.S. 495, 503 (1947).

89. Andrea Kuperman, Committee on Rules of Practice and Procedure, Case Law on Entering Protective Orders, Entering Sealing Orders, and Modifying Protective Orders 4 (2010) (citing *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 780 (1st Cir. 1988)), available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Caselaw_Study_of_Discovery_Protective_Orders.pdf.

90. See *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31–36 (1984); see also *Okl. Hosp. Ass’n v. Okla. Publ’g Co.*, 748 F.2d 1421, 1424 (10th Cir. 1984); *Am. Nat’l Bank & Trust Co. of Chicago ex rel. Emerald Inv. LP v. AXA Client Solutions, LLC*, No. 00 C 6786, 2002 WL 1067696, at *3 (N.D. Ill. May 28, 2002), *aff’d*, 2002 WL 1838144 (N.D. Ill. Aug. 12, 2002) (parties are generally permitted to disseminate information obtained in discovery as they see fit, however, upon entry of a protective order, dissemination is limited and must comply with the terms of the protective order (citing *Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994))).

91. Guenego, *supra* note 3, at 561–62; Marcus, *supra* note 52, at 9. In complex litigation the parties customarily stipulate to “umbrella” protective devices the parties will use, such as access limits or storage requirements, to protect all materials designated confidential by the producing party. Marcus, *supra* note 52, at 9. Standardized protective orders are emerging due to their frequent use and ability to control expense and minimize delay. *Id.*

When granting a motion for a protective discovery order, courts must balance a variety of factors, including the moving party's need for protection, the reliance interests of the producers, efficiency, fairness, public needs, and the potential impact upon collateral litigants.⁹² District courts have broad discretion in deciding if a protective order is appropriate; once good cause is demonstrated the court may grant an order to prevent annoyance, embarrassment, or undue burden.⁹³ Protective orders are granted to protect both non-confidential information and trade secrets or other confidential information.⁹⁴ Essentially, protective orders allow the court to balance the litigant's needs with the competing need for protection.⁹⁵

The potential harm to litigants, the public, and the judicial system's interest in fairness is expansive when protected materials are disclosed in violation of court-ordered protection.⁹⁶ To truly decide a case upon its merits, parties must reveal sensitive information. The disclosure of confidential documents should be made in reliance upon the protection those orders proffer, but court orders (and limitations) must be respected by the receiving party.⁹⁷ Protective orders themselves serve several interests: they protect trade secrets and confidential information, protect individual privacy, preserve property rights, protect reputations, and prevent parties from misleading the public with out-of-context or incomplete

92. Kuperman, *supra* note 89, at 1–2.

93. *Seattle Times Co.*, 467 U.S. at 36; *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1099 (6th Cir. 1994).

94. Guenego, *supra* note 3, at 543–45, 553.

95. *Coca-Cola Bottling Co. of Shreveport, La. v. Coca-Cola Co.*, 107 F.R.D. 288, 290 (D. Del. 1985). Judges acknowledge that the disclosure of trade secrets in litigation has the potential to destroy a corporation's ability to function and remain competitive. *Id.* Similarly, courts acknowledge that without an order compelling discovery, parties may be unable to make a case. *Id.* (citing *Grasselli Chem. Co. v. Nat'l Aniline & Chem. Co.*, 282 F. 379, 381 (S.D.N.Y. 1920)). Protective orders allow for a balance between these competing interests.

96. *See* discussion *supra* Part II.

97. *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 487 (5th Cir. 2012) (noting that the defendant “sought a strongly worded protective order and had vigorously moved for its enforcement. . . [and opposing counsel] understood the importance of compl[iance]”). Following the inappropriate dissemination of the protected information, the defendant incurred significant expenses in its attempts to identify the violation and enforce the court order. *Id.* at 488.

disclosures.⁹⁸ Litigants disclosing sensitive information can suffer embarrassment, adverse publicity, harm to their reputation and public image, and even face economic devastation when opposing parties violate protective orders.⁹⁹ Courts have acknowledged that, upon its release, protected information has the potential to damage corporate and individual reputations, destroy personal relationships, and ruin entire businesses.¹⁰⁰ Corporations often link drops in stock prices with public disclosure of sensitive information.¹⁰¹ For example, a manufacturer of disposable lighters sought discovery protection in a products liability action arising out of a cigarette lighter explosion.¹⁰² The *New York Times* publicly reported some improperly disclosed information, and the manufacturer alleged a directly-related thirty-three percent drop in its stock prices.¹⁰³

Cases espousing the many harms that protective order violations can cause are plentiful,¹⁰⁴ but the 2007 Zyprexa Injunction serves as one illustration of the expansive harm a company can suffer when court orders are disobeyed.¹⁰⁵ Following a settlement in a products

98. Martin C. Calhoun & Rebecca A. Womeldorf, *When Conspirators Defy Protective Orders: Lessons From In Re Zyprexa Injunction*, Legal Backgrounder, Apr. 27, 2007, at 2, 3.

99. Marcus, *supra* note 52, at 1–2.

100. *United States v. Amodio*, 71 F.3d 1044, 1048 (2d Cir. 1995). The public should not have unlimited access to all material resulting from discovery and litigation. *Id.*; see also *Cipollone v. Liggett Grp., Inc.*, 113 F.R.D. 86, 90 (D.N.J. 1986). In *Cipollone*, the defendant tobacco company argued that disclosed information caused “wide gyrations in the values of the defendants’ stock.” *Cipollone*, 113 F.R.D. at 90. The court acknowledged that the tobacco companies did show an effect on their financial standing, but the court required specific and particularized allegations of how specified documents would cause financial and competitive injury. *Id.*

101. See *Smith v. BIC Corp.*, 869 F.2d 194, 201 (3d Cir. 1989); *Cipollone*, 113 F.R.D. at 90.

102. *BIC Corp.*, 869 F.2d at 196–97, 202 (holding that BIC Corp. was entitled to a protective order preventing the plaintiff from disseminating trade secret information regarding lighter design, product safety, and quality control and testing information).

103. *Id.* at 201.

104. See, e.g., *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 355–56 (11th Cir. 1987) (finding order justified upon assertions that adverse publicity or intimidation could impair the information sharing); *McLin v. City of Chicago*, 133 F.R.D. 527, 528 (N.D. Ill. 1990) (suggesting information might inhibit citizen complaints or subvert and chill police work); *Bradway v. Am. Nat’l Red Cross*, 132 F.R.D. 78, 79 (N.D. Ga. 1990) (revealing blood collection procedures might cause public confusion and a dangerous drop in the blood supply).

105. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 429 (E.D.N.Y. 2007), *judgment entered sub nom. In re Zyprexa Litig.*, No. 07-CV-0504, 2007 WL 669797, at *1 (E.D.N.Y. Mar. 1, 2007), *aff’d sub nom.*, *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186 (2d Cir. 2010). For a summary of the history, facts, and findings see Calhoun, *supra* note 98, at 1–4.

liability action against the manufacturer of a prescription drug used to treat schizophrenia, a plaintiffs' expert and reporter for *The New York Times*, along with an attorney not involved in the suit, engaged in a conspiracy to disseminate protected materials to national newspapers.¹⁰⁶ Publication of the protected documents created serious harm to the manufacturer by revealing valuable trade secrets, confidential preliminary medical research, and merchandising techniques.¹⁰⁷ Disclosure of the confidential information complicated settlement of pending and future cases for the manufacturer and made impartial juror selection more difficult.¹⁰⁸ Furthermore, the breach likely affected future plaintiffs' willingness to bring suit because the very public breach proved that even with court-ordered protection, the parties faced possible public disclosure of their private and personal medical information.¹⁰⁹ Ultimately, violations of the court's protective order harm corporations, harm future plaintiffs' confidence in the system, and weaken faith in the judiciary.¹¹⁰

Eleventh Circuit case law is rampant with sanctions for various discovery mechanism violations. For example, the Eleventh Circuit routinely sanctions for failure to obey discovery orders.¹¹¹ In *Carlucci v. Piper Aircraft Corp., Inc.*, the court noted that it previously went as far as sanctioning a party in spite of the fact that there was "no technical violation of any particular rule."¹¹² Protective

106. *In re Zyprexa Injunction*, 474 F. Supp. 2d at 403; Calhoun, *supra* note 98, at 1.

107. *In re Zyprexa Injunction*, 474 F. Supp. 2d at 429.

108. *Id.*

109. *Id.*

110. *Id.*

111. *See, e.g.*, *Scipione v. Advance Stores Co.*, 294 F.R.D. 659, 665 (M.D. Fla. 2013) (imposing sanctions on the plaintiff for failure to timely provide complete and adequate discovery responses); *Power Guardian, LLC v. Directional Energy Corp.*, No. 5:12-CV-236 (MTT), 2013 WL 3893391, at *4 (M.D. Ga. July 26, 2013) (imposing sanction of default judgment where defendants failed to provide discovery or comply with the court orders to provide discovery); *Signature Pharmacy, Inc. v. Soares*, No. 6:08-CV-1853-Orl-31TBS, 2012 WL 4815726, at *6 (M.D. Fla. Oct. 10, 2012) (granting a motion for sanctions, including attorney's fees and expenses, for non-disclosure and the intentional shredding of discoverable documents).

112. *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1452 n.11 (11th Cir. 1985). "[I]n *Guidry* we upheld sanctions under Rule 37 where the attorney caused unnecessary discovery expense even while 'no technical violation of any particular rule was made by *Guidry's* counsel' because the 'imposition of sanctions in this case was in keeping with the spirit of the rules.'" *Id.* (citation omitted).

orders are not freely given;¹¹³ for a party to receive the protection of a court order, that party must satisfy the good cause standard, which means they must submit “a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.”¹¹⁴ What message is sent to litigating parties and counsel when failing to provide adequate or respond timely to discovery requests is more likely to be punished than disseminating or misusing sensitive, confidential, or court-order-protected documents?

III. USING RULE 37(B) AS GROUNDS FOR SANCTIONING PROTECTIVE ORDER VIOLATIONS: MOST COURTS ALLOW RULE 37 TO BARE ITS TEETH

The party litigating to protect its confidential information typically incurs superfluous attorney’s fees and expenses in efforts to identify violations, alert the court, and enforce existing protective orders.¹¹⁵ If courts interpret Rule 37 as inapplicable to Rule 26 protective orders, an offended party’s sole method of recourse lies with the court’s inherent authority—requiring proof of willful misconduct or bad faith.¹¹⁶ There are two separate approaches for addressing protective order violations: (1) Rule 37 Sanctions and (2) sanctions pursuant to the court’s inherent authority. The Eleventh Circuit has chosen the latter based upon its interpretation of the Federal Rules.

In an effort to assist with interpretation of the Federal Rules, the Advisory Committee on Civil Rules¹¹⁷ has, from its origination,

113. *Farnsworth v. Procter & Gamble Co.*, 758 F.2d 1545, 1547 (11th Cir. 1985). The Federal Rules of Civil Procedure favor full discovery whenever possible. *Id.* Rule 26(c) requires the motioning party to show good cause, but federal courts further demand a balancing of competing interests: interests in obtaining the information and the competing interest of keeping that same information confidential. *Id.*

114. *United States v. Garrett*, 571 F.2d 1323, 1326 n.3 (5th Cir. 1978); *see also* Fed. R. Civ. P. 26(c).

115. *See Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 488 (5th Cir. 2012).

116. *Valdez-Castillo v. Busch Entm’t Corp.*, No. 06-20772-CIV, 2008 WL 4999175, at *7 (S.D. Fla. Nov. 20, 2008). The court noted its inability to sanction the protective-order violation pursuant to its inherent authority due to a lack of bad faith. *Id.*

117. 28 U.S.C. § 2072 (2012). The Rules Enabling Act was an Act of Congress that gave the judicial branch the power to promulgate the Federal Rules of Civil Procedure. *Id.* The Supreme Court appointed the Advisory Committee to draft what would become the Federal Rules of Civil Procedure in 1935, and since 1958 the Advisory Committee on Civil Rules has been in charge of drafting revisions to the rules.

provided an explanatory note with each new rule and amendment.¹¹⁸ These notes serve many purposes: they indicate the purpose of the amendment or rule,¹¹⁹ they help guide future interpretation,¹²⁰ they provide practice tips,¹²¹ and they discuss the rule or amendment's relation to existing law.¹²² The notes on the 1970 Amendments to Rule 37 comment that a variety of rules authorize orders for discovery, including Rule 26(c).¹²³ The notes further state that “[t]he scope of Rule 37(b)(2) is broadened by extending it to include any order which ‘provide[s] or permit[s] discovery,’” and Rule 37(b)(2) sanctions “should provide comprehensively for enforcement of all these orders.”¹²⁴

The Eleventh Circuit disagrees with the Advisory Committee Note suggestions.¹²⁵ Focusing on the specific rule language—“fails to obey an order to *provide* or *permit* discovery”—the court interprets the text to exclude protective discovery orders.¹²⁶ The Eleventh Circuit interprets the Advisory Committee Note’s language to mean that Rule 37(b) should only apply to orders “*for discovery*” and finds

4 Charles Alan Wright et al., *Federal Practice and Procedure* § 1001 (3d ed. 1998).

118. Struve, *supra* note 37, at 1112.

119. *Id.* at 1112 & n.41 (citing the Advisory Committee notes for Rules 4, 26, 30, 33, 45, 53, 77 of the Federal Rules of Civil Procedure, where the notes indicate the general purpose for each amendment).

120. *Id.* at 1112 & n.42 (“Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard” (quoting Fed. R. Civ. P. 50 Advisory Committee notes (1991))).

121. *Id.* at 1113 & n.44 (providing examples of how the committee notes offer practice tips).

122. *Id.* at 1112–13 & n.43 (citing Rule 11 Advisory Committee’s note (1993) (discussing the Rule’s relationship to courts’ inherent powers); Fed. R. Civ. P. 16 Advisory Committee’s note (1993) (same); Fed. R. Civ. P. 37 Advisory Committee’s note (2000) (same)).

123. Fed. R. Civ. P. 37 Advisory Committee’s note (1970). “The scope of Rule 37(b)(2) is broadened by extending it to include any order ‘to provide or permit discovery’ The note specifically references Rule 26(c), Rule 35, and Rules 37(a) and (d). *Id.* “Rule 37(b)(2) should provide comprehensively for enforcement of all these orders.” *Id.* Furthermore, “Rule 37 authorizes the court to direct that parties or attorneys who fail to participate in good faith in the discovery process pay the expenses, including attorneys’ fees, incurred by other parties as a result of that failure.” *Id.* at 1980 Amendment.

124. *Lipscher v. LRP Publ’ns, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001) (quoting Fed. R. Civ. P. 37 Advisory Committee’s note); *see also* *Societe Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207 (1958) (“Rule 37 provides more expansive coverage by comprehending disobedience of production orders by any party.”).

125. Fitzsimmons, *supra* note 24, at 287–88.

126. *Lipscher*, 266 F.3d at 1323 (emphasis added) (quoting Fed. R. Civ. P. 37(b)(2)).

that a Rule 26(c) protective order instead prevents and limits discovery, and therefore, falls outside the scope of Rule 37(b).¹²⁷

In the Eleventh Circuit, parties who violate protective orders are sanctioned only if the court finds the violation was made in bad faith.¹²⁸ This is not an impossible hurdle. The Middle District of Florida invoked its inherent authority to sanction an attorney in a products liability suit who willfully violated a protective order by providing confidential materials to unauthorized persons; the Eleventh Circuit affirmed the imposed sanctions of nearly \$14,000 for acting in bad faith.¹²⁹ Similarly, the District Court for the Northern District of Georgia imposed sanctions against a bank and its counsel for “secretly soliciting exclusion requests from potential members” of the plaintiff class in violation of a protective order.¹³⁰ The Court of Appeals affirmed the validity of a \$50,000 sanction along with the disqualification of lead counsel, relying heavily upon counsel’s direct and willful advice to violate the court order.¹³¹ This decision evidences the possibility of obtaining sanctions in the Eleventh Circuit, but the question is whether, due to the higher threshold of violative behavior required for the courts to sanction under inherent authority, it should be more difficult to do so. Other jurisdictions determine that the standard for sanctioning protective order violations should not require bad faith and instead apply Rule 37 to these situations.¹³² The fundamental disagreement “revolves

127. *Id.* (quoting Fed. R. Civ. P. 37(b)(2) Advisory Committee’s note). The court notes that a protective order is a restraint on discovery and in no way permits or provides discovery. *Id.*

128. *See id.* at 1320; *Mitchell Co., Inc. v. Campus*, No. 07-0177-KD-C, 2009 WL 3110367, at *1 (S.D. Ala. Sept. 24, 2009) (noting that due to a lack of the required finding of bath faith, the court was unable to sanction using its inherent authority); *see also Valdez-Castillo v. Busch Entm’t Corp.*, No. 06-20772-CIV, 2008 WL 4999175, at *6 (S.D. Fla. Nov. 20, 2008) (commenting on its inability to disregard the Eleventh Circuit’s decision in *Lipscher*).

129. *McDonald v. Cooper Tire & Rubber Co.*, 186 F. App’x 930, 931 (11th Cir. 2006). Courts have inherent authority and power to impose sanctions for failure to comply with a court order, including a court order of protection. *See Kleiner v. First Nat’l Bank of Atlanta*, 751 F.2d 1193, 1209 (11th Cir. 1985).

130. *Kleiner*, 751 F.2d at 1196.

131. *Id.* at 1199.

132. *See, e.g., Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 488–89 (5th Cir. 2012); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 (9th Cir. 1983); *Trenado v. Cooper Tire & Rubber Co.*, 274 F.R.D. 598, 600 (S.D. Tex. 2011); *Mitchell Co.*, 2009 WL 3110367, at

around whether Rule 26(c) protective orders are orders that ‘provide or permit discovery.’”¹³³

In *Lipscher v. LRP Publications, Inc.*, the Eleventh Circuit held that Rule 37(b)(2) does not authorize the courts to impose sanctions for accidental or purposeful violations of protective orders,¹³⁴ reasoning that a protective order is not technically “an order to provide or permit discovery.”¹³⁵ In *Lipscher*, LRP was granted a protective order instructing Law Bulletin to return documents related to LRP’s use of Law Bulletin’s third-party jury verdict publications.¹³⁶ Law Bulletin’s legal counsel—Kehoe and Lipscher—failed to return all the documents subject to the protective order and were sanctioned by the district court pursuant to Rule 37.¹³⁷ On appeal, the Eleventh Circuit reversed LRP’s award of reasonable attorney’s fees, costs, and expenses in connection with the motion for sanctions based upon their narrow interpretation of Rule 37 and its applicability to Rule 26(c) protective orders.¹³⁸ Despite incurring nearly \$8,000 in additional costs in fighting Lipscher’s violation, LRP received no compensation as a result of the Eleventh Circuit’s decision.¹³⁹ The court did, however, acknowledge that had the district court invoked its inherent authority, LRP may have been compensated.¹⁴⁰

Many courts question the Eleventh Circuit’s narrow application of Rule 37(b), holding that federal courts are authorized by the Federal Rules to impose sanctions for disobeying a discovery order.¹⁴¹ Even

*1–2. *But see Valdez-Castillo*, 2008 WL 4999175, at *6–7.

133. Fitzsimmons, *supra* note 24, at 286.

134. *See Lipscher v. LRP Publications, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001).

135. *Id.* (citing *Coleman v. Am. Red Cross*, 23 F.3d 1091, 1098–99 (6th Cir. 1994) (Ryan, J., dissenting) (asserting that Rule 37(b) does not apply to Rule 26(c) protective orders)).

136. *Id.* at 1309, 1321–22.

137. *Id.* at 1321–22.

138. *Id.* at 1323.

139. *See id.* at 1322–23.

140. *See Lipscher*, 266 F.3d at 1323.

141. A survey of the federal circuit courts revealed that the Eleventh Circuit stands alone in its narrow interpretation of Rule 37(b)’s applicability to 26(c) protective orders. *Trenado v. Cooper Tire & Rubber Co.*, 274 F.R.D. 598, 600 (S.D. Tex. 2011) (“The court agrees with the many other courts that have concluded that attorney’s fees and costs, as well as other appropriate sanctions, may be awarded under

lower courts within the Eleventh Circuit seem to question the logic of disallowing Rule 37(b) sanctions for violating protective orders.¹⁴² For example, in *Valdez-Castillo v. Busch Entertainment Corp.*, the Southern District of Florida stated that “[i]t may not be entirely obvious . . . why Rule 26(c) protective orders do not enjoy the protections of Rule 37(b) while other discovery orders . . . do, since an agreed protective order may be viewed as allowing discovery to proceed.”¹⁴³ The court further noted that although the plaintiff’s actions admittedly violated the court order, the court was unable to impose sanctions using its inherent authority due to a lack of the requisite bad faith or willful misconduct.¹⁴⁴ Notably, the district court warned that repeated violations of court orders would support a finding of bad faith.¹⁴⁵ The Eleventh Circuit is alone in its narrow

Rule 37(b)(2) for a violation of a protective order.”); *Schiller v. City of New York*, No. 04 CIV. 7921KMK/JCF, 2007 WL 1623108, at *3 (S.D.N.Y. June 5, 2007). “Rule 37(b)(2) of the Federal Rules of Civil Procedure provides for sanctions for the violation of discovery orders.” *Schiller*, 2007 WL 1623108, at *3. *Coleman v. Sears, Roebuck & Co.*, 221 F.R.D. 433, 435–36 (W.D. Pa. 2003) (“If a party believes that the limitations set by the court have been violated, then the party may petition the court to invoke sanctions on the violating party.”). “A violation of a protective order may result in sanctions, including sanctions arising from the court’s inherent powers.” *Static Control Components, Inc. v. Darkprint Imaging*, 201 F.R.D. 431, 436 (M.D.N.C. 2001); Violation of a protective order, by disseminating information designated as highly confidential, is appropriately sanctioned pursuant to Rule 37(b). *CornerStone Staffing Solutions, Inc. v. James*, No. C 12-1527 RS, 2014 WL 310089, at *4 (N.D. Cal. Jan. 28, 2014); *Sandoval v. Am. Bldg. Maint. Indus., Inc.*, 267 F.R.D. 257, 264 (D. Minn. 2007) (“Rule 37(b) of the Federal Rules of Civil Procedure provides for sanctions for the violation of discovery orders, which include protective orders issued under Federal Rule of Civil Procedure 26(c).”); *Lewis v. Wal-Mart Stores, Inc.*, No. 02-CV-0944 CVE-FHM, 2006 WL 1892583, at *3 (N.D. Okla. July 10, 2006) (“Sanctions set forth in [Rule] 37(b)(2) are available for a violation of a protective order entered pursuant to [Rule] 26(c).”).

142. See discussion *supra* Part II.

143. *Valdez-Castillo v. Busch Entm’t Corp.*, No. 06-20772-CIV, 2008 WL 4999175, at *6 (S.D. Fla. Nov. 20, 2008). The motel housekeeper in *Valdez-Castillo* sued the defendant after she was injured by the defendant’s monkeys, reptiles, and birds kept in defendant’s hotel rooms. *Id.* at *1. Plaintiff’s attorney obtained the defendant’s travel protocol and released it to a local newspaper; the newspaper published a front-page story about the case and reproduced excerpts of the protocol. *Id.* at *2. Plaintiff’s attorney realized his mistake and took all necessary corrective steps. *Id.* at *3, *5. The court noted the discovery order violation was “borne of inexperience” and was neither willful nor malicious, yet still considered Rule 37 sanctions. *Id.* at *5. The court was unable to impose sanctions based upon binding decisions by the Eleventh Circuit holding that Rule 37(b) sanctions are inapplicable to Rule 26(c) violations. *Id.* at *6.

144. *Id.* at *7.

145. See *id.* The court noted that in spite of its inability to sanction the protective-order violations, it took these violations “very seriously” and would “have much more difficulty finding a lack of bad faith” after a repeat violation. *Id.*

interpretation of Rule 37's applicability to protective order violations.¹⁴⁶

Choosing to broadly interpret the rule's language, the Fifth Circuit Court of Appeals construes a protective order to provide or permit discovery and thus finds that the court has authority to impose sanctions for violation of the order.¹⁴⁷ The Fifth Circuit recently held that Rule 37(b)(2) does encompass protective orders, awarding sanctions where counsel inadvertently violated the court's protective order by copying confidential information onto discs and disseminating them to attorneys attending a conference.¹⁴⁸ Furthermore, the Fifth Circuit noted that the protective order set clear instructions on when and how to provide and receive confidential information; the court reasoned that "by prescribing the method and terms" of discovery, "the Protective Order was granted to 'provide or permit discovery' . . . within the meaning of Rule 37(b)."¹⁴⁹ In *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, the United States District Court for the Southern District of Texas awarded sanctions to deter future willful violations and to "reflect the seriousness of such [protective] orders."¹⁵⁰

The Fifth Circuit is not alone in its broad interpretation of Rule 37(b).¹⁵¹ In *Falstaff Brewing Corp. v. Miller Brewing Co.*, the Ninth Circuit similarly held that a failure to obey a protective order did result in liability for any reasonable resulting costs and attorney's fees.¹⁵² The court noted that the burden of showing the existence of any special circumstances to substantially justify non-compliance

146. See, e.g., *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 487 (5th Cir. 2012); *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 (9th Cir. 1983); *Trenado*, 274 F.R.D. at 600.

147. See, e.g., *Trenado*, 274 F.R.D. at 600.

148. *Smith & Fuller*, 685 F.3d at 487.

149. *Id.* at 490 (citing Fed. R. Civ. P. 37(b)(2)(A)).

150. *Id.* at 488.

151. See, e.g., *Falstaff Brewing Corp.*, 702 F.2d at 784; see also *Frazier v. Layne Christensen Co.*, No. 04-C-315-C, 2005 WL 372253, at *4 (W.D. Wis. Feb. 11, 2005).

152. *Falstaff Brewing Corp.*, 702 F.2d at 772, 776, 784 (holding that counsel's failure to obey a protective order, by failing to locate and destroy the original and duplicate protected documents, did create liability for any reasonable resulting costs and attorney's fees, reasoning that the inability to locate confidential discovery materials called into question the "integrity of the discovery process").

with protective orders lies with the sanctioned party.¹⁵³ In *United States v. National Medical Enterprises, Inc.*, the Ninth Circuit upheld the district court's sanctions, holding that the authority to issue sanctions is subject to only two limitations: "(1) the sanction must be just; and (2) the sanction must specifically relate to the particular claim at issue in the order."¹⁵⁴

District Courts within the Ninth Circuit continue to impose sanctions for discovery order violations and do so pursuant to Rule 37.¹⁵⁵ In *LifeScan Scotland, Ltd. v. Shasta Technologies, LLC*, the United States District Court for the Northern District of California found LifeScan's conduct sanctionable under Rule 37 and ordered the company to pay the defendants more than \$40,000 in attorney's fees after LifeScan learned the identity of the defendants' distributors from protected material and then alerted those distributors as to pending legal actions.¹⁵⁶ The Central District of California went as far as dismissing a suit with prejudice following two deliberate violations of a protective order, finding that no other sanction would "ensure the orderly administration of justice."¹⁵⁷ The Ninth Circuit further determined that Rule 37(b) sanctions must be compensatory in that they reimburse only for "actual losses."¹⁵⁸

While the Seventh Circuit has not considered the issue of Rule 37(b)'s application to Rule 26(c) protective orders, lower courts in

153. *Id.* at 784 (citing *David v. Hooker, Ltd.*, 560 F.2d 412, 419 (9th Cir. 1977)).

154. *United States v. Nat'l Med. Enters., Inc.*, 792 F.2d 906, 910 (9th Cir. 1986) (imposing compensatory sanctions, including attorney's fees and costs incurred in connection with the motions filed, against the government for violating the spirit of the protective order and for attempting to influence witnesses and the litigation outcome).

155. *CornerStone Staffing Solutions, Inc. v. James*, No. C 12-1527 RS, 2014 WL 310089, at *4 (N.D. Cal. Jan. 28, 2014); *LifeScan Scotland, Ltd. v. Shasta Techs., LLC*, No. 11-CV-04494-WHO, 2013 WL 5949629, at * 7 (N.D. Cal. Nov. 6, 2013); *Life Techs. Corp. v. Biosearch Techs., Inc.*, No. C-12-00852 WHA JCS, 2012 WL 1600393, at *8 (N.D. Cal. May 7, 2012).

156. *LifeScan Scotland, Ltd.*, 2013 WL 5949629, at *7.

157. *Hi-Tek Bags, Ltd. v. Bobtron Int'l, Inc.*, 144 F.R.D. 379, 383-84 (C.D. Cal. 1992). "This Court's Protective Order is clearly an order justified pursuant to [Rule] 26(c) and is therefore certainly a violated 'order' within the scope of [Rule] 37(b). As such, Hi-Tek's second series of violations of this Court's Protective Order triggers the availability of sanctions pursuant to [Rule] 37(b)(2)." *Id.* (quoting *G-K Props. v. Redev. Agency of San Jose*, 577 F.2d 645, 647 (9th Cir. 1978)).

158. *Nat'l Med. Enters.*, 792 F.2d at 910 (quoting *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 (9th Cir. 1983)).

the Seventh Circuit regularly award sanctions for violations of Rule 26(c) protective orders.¹⁵⁹ In 2013, the Northern District of Illinois, Eastern Division acknowledged the “disagreement about whether [the] language of Rule 37(b)(2) encompasses violations of a protective order” but ultimately concluded that Rule 37(b) is applicable to protective order violations, citing the 1970 Advisory Committee notes.¹⁶⁰ The Eastern Division also held that Rule 37 supported sanctions equal to attorney’s fees and expenses where a financial company violated a court protective order by disseminating highly confidential and protected information.¹⁶¹ The Eastern Division further noted that it was not necessary to show more than a “mere” violation of the protective order.¹⁶² In *Whitehead v. Gateway Chevrolet*, the Eastern Division again imposed sanctions pursuant to Rule 37 upon a party that violated a protective order.¹⁶³ Whitehead based her case upon confidential and protected information, to which her attorney was privy while engaged in prior litigation with different clients; the court fined the attorney more than \$15,000, noting the flagrant violation warranted sanctions pursuant to both Rule 37 and the court’s inherent authority.¹⁶⁴

In *Poliquin v. Garden Way, Inc.*, the United States District Court for the District of Maine awarded reasonable attorney’s fees, costs associated with bringing motions related to the violation, and permitted recovery for any other reasonable expenses incurred as a result of the violation where counsel assisted a third party in obtaining the protected material for use in another case against the same defendant.¹⁶⁵ Similarly, the Western District of Wisconsin

159. See *Whitehead v. Gateway Chevrolet, Oldsmobile*, No. 03 C 5684, 2004 WL 1459478, at *3 (N.D. Ill. June 29, 2004).

160. *Instant Tech., LLC v. DeFazio*, No. 12 C 491, 2013 WL 5966893, at *3 (N.D. Ill. Nov. 8, 2013).

161. *Am. Nat’l Bank & Trust Co. of Chicago ex rel. Emerald Invs. LP v. AXA Client Solutions, LLC*, No. 00 C 6786, 2002 WL 1067696, at *1, *3, *7 (N.D. Ill. May 28, 2002) (granting motions for sanctions, including attorney’s fees and expenses incurred from investigating violations of the protective order.), *aff’d*, 2002 WL 1838144 (N.D. Ill. Aug. 12, 2002).

162. See *id.* at *3.

163. *Whitehead*, 2004 WL 1459478, at *5.

164. *Id.* at *4–5.

165. *Poliquin v. Garden Way, Inc.*, 154 F.R.D. 29, 30, 33 (D. Me. 1994).

imposed sanctions on plaintiffs for an unintentional harmless violation to both deter similar future behavior and shift imposed costs.¹⁶⁶ The Eastern District of North Carolina, Western Division, held that Rule 37(b) sanctions are available to the courts when a party violates a protective order.¹⁶⁷

IV. WHAT GOOD IS HAVING A MUZZLED AND CAGED GUARD DOG?

Court orders for discovery protection offer no real protection for parties to litigation in the Eleventh Circuit. Undoubtedly, courts should employ a coherent limiting principle regarding the application of Rule 37.¹⁶⁸ This Note does not advocate Rule 37(b) sanctions for all protective order violations, nor does it recommend sanctions for minor negligent or accidental violations related to discovery orders.¹⁶⁹ Instead, this Note proposes that Eleventh Circuit courts join other federal courts and levy Rule 37's power to sanction—where “just”¹⁷⁰—negligent and inadvertent violations of those protective orders that serve to either limit or encourage a party to provide or protect documents and information during discovery. Imposing

166. *Frazier v. Layne Christensen Co.*, No. 04-C-315-C, 2005 WL 372253, at *4 (W.D. Wis. Feb. 11, 2005). Counsel for the Plaintiff claims that due to the pressures and responsibilities of the case, she forgot to obtain pre-approval of their experts prior to disclosing protected information. *Id.* at *2.

167. *SAS Inst. Inc. v. World Programming Ltd.*, No. 5:10-CV-25-FL, 2014 WL 1760960, at *6–7 (E.D.N.C. May 1, 2014). World Programming provided a highly confidential list of its customers to SAS and marked it “Highly Confidential—Attorneys’ Eyes Only.” *Id.* at * 2. SAS then shared the customer list with unauthorized SAS employees. *Id.* SAS further violated a court protective order when they filed a “Highly Confidential” document gained during discovery with the court and when SAS’s counsel disclosed confidential information to a deponent who had not signed the required confidentiality agreement. *Id.* at *3.

168. Josephs, *supra* note 29, at 1371. “Without a coherent limiting principle, any order issued before or during discovery, no matter how unrelated to the discovery process, may potentially be seen as somehow affecting discovery.” *Id.*

169. Disciplinary sanctions under discovery rules are intended to perform three vital functions: (1) ensure a party does not benefit from its failure to comply, (2) specifically deter and seek compliance, and (3) serve as a general deterrent in both the case at hand and other litigation. *Burnett v. Venturi*, 903 F. Supp. 304, 308 (N.D.N.Y.1995) (citing *Update Art, Inc., v. Modiin Publ’g, Ltd.*, 843 F.2d 67, 71 (2d Cir. 1988)).

170. Eric C. Surette, Annotation, *Sanctions Available Under Rule 37, Federal Rules of Civil Procedure, Other than Exclusion of Expert Testimony, for Failure to Obey Discovery Order Not Related to Expert Witness*, 156 A.L.R. Fed. 601 (1999). “A district court is also permitted under Rule 37 to enter any order that is ‘just.’” *Id.*

sanctions for both negligent and inadvertent discovery protective order violations pursuant to Rule 37(b) would provide certainty, consistency, and protection for parties before the Court.¹⁷¹

Provided that the sole authority by which violations may be punished within the Eleventh Circuit is pursuant to the court's inherent authority,¹⁷² protective order violations receive markedly different treatment when compared to other discovery order violations.¹⁷³ There is no obvious or touted good reason to require an increased standard for protective orders. Similarly, there is no practical reason to exempt non-purposeful protective order violations from punishment and deterrence.

If an attorney's conduct unreasonably causes a delay or increases case complexity, yet falls short of technically violating Federal Rules governing discovery sanctions, theoretically the court may require the attorney to pay opposing attorney's fees and costs pursuant to § 1927.¹⁷⁴ This would, however, require detailed findings of bad faith, and notably § 1927 has not yet been used to punish protective order violations.¹⁷⁵ Reliance upon the court's inherent authority is similarly limited in that clear detailed findings of bad faith are required—an “extremely high” standard of imposition.¹⁷⁶ Rule 37

171. See discussion *supra* Part III.

172. *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001).

173. See *Bratka v. Anheuser-Busch Co.*, 164 F.R.D. 448, 463 (S.D. Ohio 1995) (finding default judgment warranted where employer demonstrates gross negligence and fails to produce documents, prolongs litigation, and multiplies the cost and expense for plaintiff and the court); see also *Arista Records LLC v. Usenet.com, Inc.*, 633 F. Supp. 2d 124, 140–141 (S.D.N.Y. 2009) (holding that sanctions for failure to make disclosures or to cooperate in discovery require a mere showing of violation of a court order); *BankAtlantic v. Blythe Eastman Paine Webber, Inc.*, 12 F.3d 1045, 1046, 1050 (11th Cir. 1994) (upholding award of Rule 37 sanctions against both the law firm and client for withholding evidence in violation of discovery order); *R. De Bouard & Cie. v. S. S. Ionic Coast*, 46 F.R.D. 1, 2–3 (S.D. Tex. 1969) (awarding costs and attorney's fees where plaintiff was forced to compel answers to interrogatories and file a motion for default judgment).

174. *Malautea v. Suzuki Motor Corp.*, 148 F.R.D. 362, 372 (S.D. Ga. 1991), *aff'd*, 987 F.2d 1536 (11th Cir. 1993).

175. Westlaw search performed Nov. 5, 2013: no cases report a court's imposition of sanctions for the discovery of a protective order pursuant to § 1927.

176. *Goldin v. Bartholow*, 166 F.3d 710, 722–23 (5th Cir. 1999) (“[T]he standard for the imposition of sanctions using the court's inherent powers is extremely high. The court must find that the ‘very temple of justice has been defiled’ by the party's conduct.” (quoting *Boland Marine & Mfg. Co. v. Rihner*, 41 F.3d 997, 1005 (5th Cir. 1995))).

may very well be the sole source of protection for court-order protected material that is inadvertently or negligently disseminated or destroyed in violation of a court protective order.¹⁷⁷ This Note suggests expanding the application of Rule 37 sanctions to include situations where parties divulge or provide information in reliance on the court's protection where the court's protective order permits, provides, encourages, or even simply streamlines discovery.

A. Listen to the Breeder: Follow the Advice of the Advisory Committee Notes

The Eleventh Circuit should give considerable weight to the recommendations of the Advisory Committee Notes for Rule 37 because, although not binding, they do provide a sort of “legislative history.”¹⁷⁸ Interpretations provided within the Advisory Committee Notes accompanying Federal Rules amendments, “[a]lthough not binding . . . are nearly universally accorded great weight in interpreting federal rules.”¹⁷⁹ The Supreme Court has turned to the Advisory Committee Notes to determine a federal rule's purpose.¹⁸⁰ Additionally, the Eleventh Circuit courts routinely look to the Advisory Committee for guidance, logic, and intent.¹⁸¹ Since the 1960s, the notes have increased in volume and significance and “now play an integral role in the rulemaking process.”¹⁸² The notes provide

177. See *supra* Part I.

178. Brief for Petitioner at n.31, *Bus. Guides, Inc. v. Chromatic Comm'n Enters., Inc.*, 498 U.S. 533 (1991) (No. 89-1500), 1990 WL 505671, at *24.

179. *Horenkamp v. Van Winkle and Co.*, 402 F.3d 1129, 1132 (11th Cir. 2005) (quoting *Vergis v. Grand Victoria Casino & Resort*, 199 F.R.D. 216, 218 (S.D. Ohio 2000)).

180. See, e.g., *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 550–51 (2010) (interpreting Federal Rule 15(c)).

181. *Hill v. U.S. Postal Serv.*, 961 F.2d 153, 155 (11th Cir. 1992) (focusing on the intent for the Federal Rule's amendment as stated by the Advisory Committee notes). “[I]t would be inequitable for this Court to ignore the intent of the Advisory Committee on Civil Rules, the United States Supreme Court, and Congress by deciding this issue based on the requirements of a soon to be obsolete rule of civil procedure.” *Id.* (quoting *Boliden Metech, Inc. v. United States*, 140 F.R.D. 254, 258 (D.R.I. 1991)); see also *Sundale Assocs., v. City Nat'l Bank of Miami (In re Sundale)* 786 F.2d 1456, 1458 (11th Cir. 1986) (“Advisory Committee chose certainty . . . and its choice should not be overridden . . .”).

182. *Struve, supra* note 37, at 1112.

insight into a Rule's purpose and assist in its interpretation.¹⁸³ Furthermore, the Advisory Committee carries with it “the great prestige that the individual members of the successive Committees, and the Committees themselves, have enjoyed as authorities on procedure.”¹⁸⁴

The Advisory Committee commented specifically upon Rule 37's broadened scope, explicitly mentioning its applicability to Rule 26(c).¹⁸⁵ The Committee went on to advise that Rule 37(b)(2) “should provide comprehensively for the enforcement of all these” orders for discovery and should be used to provide for payment of costs incurred due to a failure to obey a discovery order.¹⁸⁶ Admittedly the notes following Rule 26's 1970 amendment state specifically that responsive protective orders, orders to permit or provide discovery following the denial of a motion for protection, bring Rule 37(b) sanctions into play.¹⁸⁷ The notes are not exhaustive, however, and the mere fact that Rule 26's Notes specifically mention Rule 37's applicability to Rule 26(c)(2) orders does not preclude Rule 37's application to Rule 26(c)(1) orders.¹⁸⁸ Quite the opposite, in fact—the reference to the rule reinforces the Committee's endorsement of Rule 37 sanctions for violations of protective discovery orders and confirms that 26(c) protective orders do in fact “provide or permit discovery.”¹⁸⁹

B. Viciously Mauled or Accidentally Bitten: Is the Harm Really That Different for Protective Order Violations Compared with Other Discovery Order Violations?

Federal Rule 26(c) provides that “[t]he court may, for *good cause*, issue an order to protect a party . . . from annoyance,

183. *Id.* at 1112–13.

184. Brief for Petitioner, *supra* note 178, at n. 31.

185. Fed. R. Civ. P. 37 Advisory Committee's note (1993).

186. Fed. R. Civ. P. 37 Advisory Committee's note (1970).

187. *Id.*

188. Josephs, *supra* note 29, at 1376.

189. *Id.* (quoting Fed. R. Civ. P. 37(b) Advisory Committee's note (1970)).

embarrassment, . . . or undue burden or expense.”¹⁹⁰ The determination of good cause rests upon a balance of seven factors focused upon the importance of the information, ease of obtaining substantially similar information from other sources, and party resources.¹⁹¹ Parties who successfully obtain court-ordered protection meet the substantial burden of demonstrating that disclosure would result in a “clearly defined and very serious injury.”¹⁹² Furthermore, protective orders can “only be enforced through a motion for sanctions,” increasing the cost and burden upon the violated party.¹⁹³ Sanction motions do not address the merits of the case, reflect animosity between counsel, and increase litigation costs.¹⁹⁴ As a result, most judges dislike sanctions motions.¹⁹⁵ However, in light of a court-acknowledged potential injury or harm to the movant, courts should swallow their distaste for sanctions motions, add some bite to the court’s bark, and sanction the violating party to deter, compensate, and punish.

Arguably, the types of harm caused by protective order violations are not markedly different from injuries caused by other discovery order violations, and to the extent they are different, the harms may be greater. Protective orders induce the production of confidential information, and even trade secrets.¹⁹⁶ Parties rely upon the

190. Fed. R. Civ. P. 26(c) (emphasis added).

191. Fed. R. Civ. P. 26(b)(2)(C) Advisory Committee’s note (2006); *Major Tours, Inc. v. Colorel*, 720 F. Supp. 2d 587, 618 (D.N.J. 2010). The seven factors include:

(1) the specificity of the discovery request; [(2)] the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of further information; (6) the importance of the issues at stake in the litigation; and (7) the parties’ resources.

Major Tours, Inc., 720 F. Supp. 2d at 618.

192. *Citicorp v. Interbank Card Ass’n*, 478 F. Supp. 756, 765 (S.D.N.Y. 1979) (quoting *United States v. IBM*, 67 F.R.D. 40, 46 (S.D.N.Y. 1975)).

193. *In re John Adams Assocs.*, 255 F.R.D. 7, 9 (D.D.C. 2008) (quoting *Westinghouse Elec. Corp. v. Newman & Holtzinger, P.C.*, 992 F.2d 932, 935 (9th Cir. 1993)).

194. *Pepe*, *supra* note 54, at 27.

195. *Id.*

196. *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 490 (5th Cir. 2012) (“Cooper produced thousands of pages of trade secrets or confidential information in reliance on the Protective

protection offered by court orders, expecting the court to punish the nefarious or incompetent.¹⁹⁷ Imagine how badly Coca-Cola would suffer if its secret formulae and ingredient lists, known as “Merchandise 7X,” were disclosed to competitors.¹⁹⁸ Importantly, “damage to a corporation’s goodwill or reputation generally is not sufficient to establish a need for confidentiality”; the harm must be more concrete.¹⁹⁹ For example, violation of the protective order in *Dubai Islamic Bank v. Citibank* could have compromised the bank’s security protocols, leaving client records and money vulnerable.²⁰⁰ In another case, disclosure of a trade secret manufacturing process and formula for production may have resulted in a loss of a business advantage,²⁰¹ and disclosure of a patent-pending device in another case had the potential to result in the unauthorized use of a proprietary trade secret and ultimately extreme financial loss.²⁰² The release of operations records would allow competitors to examine a manufacturer’s capabilities and impact price competitiveness.²⁰³ Preventing a plaintiff from disseminating a political candidate’s deposition had the potential to prevent embarrassment to the candidate.²⁰⁴ A protective court order restricts and governs disclosure, but it also signals that the possible “risk of harm to the owner of the trade secret or confidential information outweighs the

Order.”)

197. *Id.* at 489.

198. *See generally* *Coca-Cola Bottling Co. of Shreveport, Inc. v. Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985). The complete formula for Coca-Cola, one of the best-kept trade secrets in the world, is known by two people within the company. *Id.* at 289. Bottling companies brought action against Coca-Cola to determine whether a new diet cola was covered by a bottling syrup pricing contract. *Id.* at 290. The bottlers sought discovery of the secret formulae of several cola products. *Id.* at 291–92. The district court held that the formulas were subject to discovery but were protected by strict safeguards intended to prevent disclosure to Coke’s competitors. *Id.* at 300.

199. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 Harv. L. Rev. 427, 435 (1991).

200. *See* *Dubai Islamic Bank v. Citibank, N.A.*, 211 F. Supp. 2d 447, 449 (S.D.N.Y. 2001).

201. *See* *DDS, Inc. v. Lucas Aerospace Power Transmission Corp.*, 182 F.R.D. 1, 5 (N.D.N.Y. 1998).

202. *See* *Wainwright v. Wash. Metro. Area Transit Auth.*, 163 F.R.D. 391, 397 (D.D.C. 1995).

203. *See* *Miles v. Boeing Co.*, 154 F.R.D. 112, 114–15 (E.D. Pa. 1994).

204. *See* *Flaherty v. Seroussi*, 209 F.R.D. 295, 297 (N.D.N.Y. 2001).

need for discovery.”²⁰⁵ The risks are real. The harms are often irreversible.

Although the harms occur whether disclosure was inadvertent or intentional, the harms suffered by negligent or inadvertent violation of other discovery orders are often less severe than the long-term effects of a violated protective order.²⁰⁶ Sanctions pursuant to Rule 37 are endorsed for non-protective order discovery violations and examples abound in the federal system.²⁰⁷ For example, delayed disclosure of additional witnesses prolongs discovery and inflicts additional costs; this behavior can be sanctioned under Rule 37.²⁰⁸ Failure to comply with a broad discovery order for the production of criminal history has warranted sanctions to attempt to prevent the violating party from benefiting from its noncompliance.²⁰⁹ Furthermore, Rule 37 explicitly provides that sanctions are available for violation of the discovery conference orders²¹⁰ and orders to submit for a physical or mental examination.²¹¹

It seems illogical to think the Supreme Court and Congress intended that a party’s failure to submit for a medical exam or obey an order to answer interrogatories should warrant sanctions pursuant to Rule 37, but they did not intend to extend sanction-protection to failure to obey a protective order. This assumption is illogical, especially considering the heavy burden moving parties shoulder prior to the award of a protective order. Perhaps this inclination is one reason the Eleventh Circuit is currently standing alone without the support of the remaining Federal Circuits.

205. Miller, *supra* note 199, at 434.

206. See *supra* Part III.

207. See *supra* Part III.

208. See *e360 Insight, Inc. v. Spamhaus Project*, 658 F.3d 637, 642–43 (7th Cir. 2011).

209. See *Monaghan v. SZS 33 Assocs., L.P.*, 154 F.R.D. 87, 91 (S.D.N.Y. 1994).

210. Fed. R. Civ. P. 37(b)(2)(A).

211. Fed. R. Civ. P. 37(b)(2)(A)(vii).

C. Is the Eleventh Circuit the Alpha Dog if Other Federal Circuit Courts Don't Follow and Lower Courts Question the Eleventh Circuit's Narrow Interpretation?

The Eleventh Circuit Court's decision in *Lipscher* rests upon a novel interpretation of Rule 37(b), mainly that protective orders neither provide nor permit discovery.²¹² The narrow interpretation is limited to the Eleventh Circuit;²¹³ the 2001 decision has neither influenced nor limited Rule 37's applicability to protective orders within other federal circuits.²¹⁴ District courts outside the Eleventh Circuit continue to sanction for protective order violations.²¹⁵ The District Court of Arizona interprets Federal Rule 37(b) to authorize a district court to sanction for failure to comply with a discovery order, including a discovery protective order.²¹⁶ The Northern District of Illinois considers the issue settled, applies Rule 37 to Rule 26(c), and disregards the Eleventh Circuit's narrow interpretation.²¹⁷ The Western District of New York finds Rule 37 to be applicable to all discovery orders, regardless of willfulness or negligence.²¹⁸

Notably, even District Courts within the Eleventh Circuit question the narrow reading to which they are bound and desire the ability to impose sanctions for both negligent and inadvertent protective order violations.²¹⁹ The Southern District of Alabama was unable to

212. *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001) (quoting Fed. R. Civ. P. 37(b)(2)).

213. See *supra* Part III.

214. See, e.g., *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 784 (9th Cir. 1983); *Trenado v. Cooper Tire & Rubber Co.*, 274 F.R.D. 598, 600 (S.D. Tex. 2011).

215. See, e.g., *Frazier v. Layne Christensen Co.*, No. 04-C-315-C, 2005 WL 372253, at *4 (W.D. Wis. Feb. 11, 2005); *Am. Nat'l Bank & Trust Co. of Chicago ex rel. Emerald Inv. LP v. AXA Client Solutions, LLC*, No. 00 C 6786, 2002 WL 1067696, at *5 (N.D. Ill. May 28, 2012), *aff'd*, 2002 WL 1838144 (N.D. Ill. Aug. 12, 2002).

216. *Lambright v. Ryan*, No. CV-87-235-TUC-JMR, 2010 WL 1780878, at *5 (D. Ariz. May 4, 2010), *aff'd in part, vacated in part*, 698 F.3d 808 (9th Cir. 2012).

217. *Whitehead v. Gateway Chevrolet, Oldsmobile*, No. 03 C 5684, 2004 WL 1459478, at *3-4 (N.D. Ill. June 29, 2004).

218. *Blum v. Schlegel*, No. 91-CV-633S, 1996 WL 925921, at *5 (W.D.N.Y. May 9, 1996), *aff'd*, 108 F.3d 1369 (2d Cir. 1997).

219. *Mitchell Co. v. Campus*, No. 07-0177-KD-C, 2009 WL 3110367, at *1-2 (S.D. Ala. Sept. 24, 2009). In *Mitchell*, Plaintiff failed to return protected documents despite clear directives from the court order. *Id.* The district court noted that due to a lack of the required finding of bad faith, the court was

sanction a party for failure to return protected documents, though the court probably would have, but for the binding decision in *Lipscher*.²²⁰ The Southern District of Florida noted that despite possible deservedness, it was unable to sanction a violating party in the absence of bad faith.²²¹

CONCLUSION

Federal Rule 37 currently authorizes courts to sanction certain types of discovery abuse for the purposes of: (1) penalizing the culpable party or attorney; (2) deterring others from engaging in similar conduct; (3) compensating the court and other parties for the expense caused by the abusive conduct; and (4) compelling discovery and disclosure.²²² The Eleventh Circuit has split from the remaining Federal Circuit Courts in its interpretation of Rule 37(b)'s applicability to Rule 26(c) protective orders. The Eleventh Circuit stands alone in allowing parties who inadvertently or negligently violate protective orders to proceed unpunished. Its decision in *Lipscher* ultimately means that, absent clearly detailed findings (clear and convincing evidence) of bad faith, negligent or accidental protective order violations will go unpunished.²²³

The court's decision in *Lipscher* "staked out a novel claim on the issue" but the decision has not influenced courts within other circuits.²²⁴ Even district courts within the Eleventh Circuit bemoan

unable to sanction using its inherent authority. *Id.* The court then went on to say, "[u]nfortunately, the Court appears to be without any power to impose . . . attorneys' fees [because that option] is foreclosed by [*Lipscher*]." *Id.* See also Valdez-Castillo v. Busch Entm't Corp., No. 06-20772-CIV, 2008 WL 4999175, at *6 (S.D. Fla. Nov. 20, 2008) (commenting on the inconsistent application of Rule 37(b) protections and its inability to stray from the Eleventh Circuit Court of Appeal's decision in *Lipscher*).

220. *Mitchell Co.*, 2009 WL 3110367, at *1-2.

221. *Valdez-Castillo*, 2008 WL 4999175, at *6.

222. *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1453 (11th Cir. 1985); see also *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 643 (1976); *Brown v. Tellerate Holdings Ltd.*, No. 2:11-CV-1122, 2014 WL 2987051, at *25 (S.D. Ohio July 1, 2014).

223. *Lipscher v. LRP Publ'ns, Inc.*, 266 F.3d 1305, 1323 (11th Cir. 2001) (violating party escaped sanctions though they failed to return competitor's documents involving dealings with third parties, which were protected under the court order).

224. See, e.g., *Smith & Fuller, P.A. v. Cooper Tire & Rubber Co.*, 685 F.3d 486, 487 (5th Cir. 2012);

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their lack of authority to impose sanctions for negligent or inadvertent protective order violations.²²⁵ Moreover, district courts outside of the Eleventh Circuit continue to sanction for violations of protective orders.²²⁶ It is clear the Eleventh Circuit stands alone, and for the aforementioned reasons it should rejoin the pack and impose sanctions for protective order violations pursuant to Rule 37.

Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 784 (9th Cir. 1983); *Trenado v. Cooper Tire & Rubber Co.*, 274 F.R.D. 598, 599 (S.D. Tex. 2011).

225. See cases cited *supra* note 219.

226. See, e.g., *Am. Nat'l Bank & Trust Co. of Chicago ex rel. Emerald Inv. LP v. AXA Client Solutions, LLC*, No. 00 C 6786, 2002 WL 1067696, at *5 (N.D. Ill. May 28, 2002), *aff'd*, 2002 WL 1838144 (N.D. Ill. Aug. 12, 2002); *Frazier v. Layne Christensen Co.*, No. 04-C-315-C, 2005 WL 372253, at *4 (W.D. Wis. Feb. 11, 2005).

