



Fighting protective and secrecy orders

Sunshine is the best disinfectant

BY LORI E. ANDRUS

Protective orders have become routine, particularly in complex cases. All too often, plaintiffs' lawyers agree to sweeping blanket protective orders that are not in their clients' best interest. As busy practitioners, it is tempting to "go along" with the defendants' demands for secrecy, especially when defense counsel is refusing to produce any documents without a protective order. Besides, the tedious work of negotiating a lengthy protective order line-for-line is not glamorous and plaintiffs' lawyers typically prefer to reach agreement and move on to the seemingly more important work in a case, like taking depositions and working with experts.

Temptations and tedium aside, though, when plaintiffs must agree to a protective order, it is critical to negotiate one that is fair. It should not be one-sided. It must be practical in its application and it must be subject to revision should the need arise in the future.

Generally, a party may publicly disseminate materials produced during discovery so long as there is no protective order directing otherwise. Under Federal Rule of Civil Procedure 26(c), a party seeking to protect information from discovery or dissemination must show good cause. "A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted." (*Foltz v. State Farm Mut. Auto. Ins. Co.* (9th Cir. 2003) 331 F.3d 1122, 1130.) "Simply mentioning a general category of privilege, without any further elaboration or any specific linkage with the documents does not satisfy the burden." (*Kamakana v. City and County of Honolulu* (9th Cir. 2006) 447 F.3d 1172, 1184.)

Blanket protective orders are genuinely called for only in extremely limited circumstances. This is because they present

a great potential for abuse and can be a powerful means of maintaining and enforcing secrecy. Plaintiffs' lawyers should oppose defendants' desire for secrecy and, at a minimum, should require defendants to carry their burden of demonstrating "good cause" for blanket protective orders.

Whether a plaintiffs' lawyer can avoid the entry of a protective order altogether will largely depend on the judge. With the explosion of voluminous e-discovery, and with courts overburdened and understaffed, judges are all too often content to sign off on blanket protective orders without any showing of good cause. It may be helpful to respectfully remind the judge that it is the *court's* obligation – and not just the parties' – to scrutinize every request for a protective order, and to enter them only after very careful, particularized review. (See e.g., *AGA Shareholders, LLC v. CSK Auto, Inc.*, No. CV-07-62-PHX-DGC, 2007 WL 4225450, at *1 (D. Ariz. Nov. 28, 2007) [denying stipulated protective order and citing need for particularized showing].)

Negotiating a fair and lawful protective order

Defendants will inevitably want a very broad definition of what is deemed "confidential information." Many over-reach and expect you to rely on them to only designate as confidential documents those documents in which they have a "good faith belief" should be confidential. You should never give defendants such *carte blanche* authority. Instead, the definition of what may be designated as "confidential" should be as objective as possible and bounded by authority wherever possible.

For example, a good definition of "confidential" might refer to state or federal "trade secret" definitions. It might include "personal private information" or "personal identifying information" as this type of information is typically protected

by state and federal privacy laws. A plaintiffs' lawyer could reasonably agree that "proprietary commercial information" is confidential, but consider qualifying that by requiring that proprietary information is only considered confidential if it has commercial value or is of a competitively sensitive nature. Sample language can be found below, after a brief discussion of what should *not* be confidential.

The outer limits of confidentiality

Defendants should not be permitted to convert information that was previously publicly available into "confidential" information through the use of a protective order, so make sure your protective order prohibits such tactics. If documents produced in discovery were also acquired outside the discovery process, those cannot be made confidential – the genie can't be put back in the bottle. The same is true for information obtainable under the Freedom of Information Act or state sunshine laws. And any information that has been widely disseminated (even within an organization or corporation) is not worthy of confidential designation, as it cannot be considered a trade secret.

Information concerning the hazardous nature of a product is not a trade secret. (*Rucklehaus v. Monsanto Co.* (1984) 467 U.S. 986, 1011 n.15 ["If...a public disclosure of data reveals, for example, the harmful side effects of the submitter's product [that] cannot constitute the taking of a trade secret."].)

The mere fact that documents are proprietary is not necessarily justification for confidentiality. For example, a federal court in Kentucky rejected Home Depot's argument that its training manuals and standard operating procedures should be protected. (*Mitchell v. Home Depot U.S.A.* (W.D. Ky. Jun. 14, 2012) No. 3:11-CV-332, 2012 WL 2192279, *5.)

Information that is outdated should not be marked as confidential, as it has



likely lost its competitive value. Likewise, obsolete information, such as data relating to a product that is off the market, is not likely to be commercially valuable or competitively harmful to the company if released.

Where the defendant claims embarrassment as a reason for a protective order, the impact must be demonstrated to be particularly serious – such that it would cause significant harm to a company’s competitive and financial position. Merely embarrassing information that details corporate mismanagement or the injuries occurring from a faulty product is *not* entitled to protection. (See *Kamakana v. City and County of Honolulu* (9th Cir. 2006) 447 F.3d 1172, 1179 [“[t]he mere fact that the production of records may lead to a litigant’s embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records.”].)

Sample language defining “confidential information”

Here’s an example of a definition that is narrowly crafted:

(1) “Confidential Information” shall mean information, recorded, stored, or maintained for any reason in any medium, including but not limited to print, electronic, or digital, that the party designating the information as confidential (the “Designating Party”) reasonably believes to fall within the following definition:

Trade secret,” as set forth in the Uniform Trade Secrets Act, meaning information, including a formula, pattern, compilation, program, device, method, technique, or process that:

Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Research, development, or commercial information that is of a highly competitively sensitive nature and that a reasonably prudent business person in the applicable field would not release to or share with the public in the ordinary course of business, and the release of which would likely cause proprietary, competitive, or economic harm.

Personal information protected from disclosure under [state or] federal law, or where disclosure of that information would be highly offensive to a reasonable person and is not of legitimate public concern.

(2) Notwithstanding any other provision in this Protective Order, the Order shall not apply to:

information that is publicly available, including

information or material that, prior to disclosure, was public information or knowledge;

information and material that were, or after designation became, public information or knowledge (other than by an act or omission of a Party or others subject to this Protective Order); or

information that is legitimately and independently acquired from a source not subject to this Protective Order;

information that has been widely disseminated (whether outside or within an organization or corporation);

information that is more than ___ years old; or

information introduced as an exhibit at trial.

Overdesignation: Prohibit mass, indiscriminate or routinized designations

Once you’ve agreed to an appropriately circumscribed “confidential” definition, you need to ensure against overdesignation by defendants. Your protective order should be explicit about this, and should prohibit “mass, indiscriminate or routinized designations.” Defendants may grumble about such a prohibition, but there is good basis for it. The Model Protective Order from the

Northern District of California includes such language, for example. (See N.D. Cal. Standard Protective Order <http://www.cand.uscourts.gov/stipprotectororder.1>) Several courts have recognized the potential for abuse when defendants marked nearly every document confidential in a routine fashion. (See, e.g., *Del Campo v. Am. Corrective Counseling Servs., Inc.* (N.D. Cal. Nov. 6, 2007) No. C-01-21151 JW (PVT), 2007 WL 3306496 [awarding sanctions against defense counsel for over-designating documents as confidential without justification.])

Attorneys’ eyes only?

Many times, defendants will insist upon a two-tiered confidentiality designation: “Confidential” and “Highly Confidential: Attorneys’ Eyes Only.” Such stringency is rarely called for; in a typical product defect or consumer case, there is no ready justification for this formality, and it merely generates additional disputes and complexity. Even in litigation between competitors (where highly proprietary or sensitive business information might be used for improper competitive purposes), courts should be skeptical of this drastic designation.

Mutuality and fair use

Any fair protective order will include mutual promises and mutual restrictions. Even when a defendant doesn’t insist on “Attorneys’ Eyes Only” designations, they may attempt to hamstring plaintiffs’ lawyers and insist that “confidential” material cannot be shown to your client (or in a class case, to your Class Representatives). This is typically not justified, and is most certainly unfair since the producing defendant is able to see all of plaintiffs’ documents.

A key purpose of a stipulated protective order is to set forth who can view “confidential” information. A fair protective order will make the list of those who can view “confidential” material broad. Inevitably, defendants will attempt to limit that list. In this regard, you should negotiate the ability to show “confidential”



materials to “potential lay witnesses.” Defendants may prefer only “trial witnesses,” but such a limitation will hamper your ability to prepare for trial. For example, you may have someone who you think might be helpful at trial (a former human resources or accounting employee, perhaps) but you won’t know if they will be helpful until you show them the quarterly report you believe was fraudulently drafted. If your protective order includes only “trial witnesses” or “lay witnesses,” your hands may be tied. If your protective order extends to “potential lay witnesses,” you are free to build your case as you see fit.

Defendants may demand that they be notified of the identity of any consulting or testifying experts before confidential information can be disclosed to them. Do not agree to such a provision. So long as consulting and testifying experts agree in writing to be bound by the protective order, and you agree to maintain copies of the experts’ acknowledgement of and agreement with the Protective Order, you should not have to reveal your experts’ identities. The only reasonable exception, need one be made at all, would be where your expert is currently employed by a direct competitor of defendant.

Protective order does not apply to court records

A protective order should expressly state that its protections do not extend to discovery materials filed with the court in connection with dispositive motions, or introduced at trial. Once that happens, the document is a court record and is presumptively in the public record. For a court record to be made confidential, a much greater showing than good cause under Rule 26 is required. Make sure your blanket protective order specifically excludes trial records.

Protocol for challenging confidentiality designations

In addition to negotiating a carefully-circumscribed blanket protective order, it is imperative that you construct a practical mechanism to challenge confidentiality designations. Expressly including a procedure for challenging improper designations will facilitate the resolution of disputes, and can protect against having the burden of justifying confidentiality shift to plaintiffs.

Procedure for filing confidential documents with the court

Filing “Confidential” documents with the Court raises another concern. You never want to find yourself in a position where you are burdened with protecting the confidentiality assertions made by defendants. That’s their burden. But, when plaintiffs need to submit “confidential” documents to the court (when opposing summary judgment, for example, or moving for class certification), you need a mechanism that will keep the burden on the defense, but will not make your job harder. Sometimes defendants seek to solve this problem by demanding that plaintiffs notify defendants before filing any “confidential” material. Never agree to this! It will impede your ability to efficiently prepare your case and will encroach upon your work product and case strategy.

Instead, a fair protective order will permit plaintiffs to submit confidential matter conditionally under seal, and impose a timeframe within which the Designating Party must move the Court to maintain the confidentiality designations. Incorporate the procedures set forth in California Rules of Court 2.550 and 2.551, modified as necessary, to be sure you don’t end up protecting a defendant’s bogus confidentiality designation.

Conclusion

Blanket protective orders tend to tie one arm behind the plaintiff’s back. They prevent us from sharing information with other litigants and generally work to the benefit of corporate defendants. So when you are approached with a form protective order, read it carefully and make it as narrow as you can, knowing that sunshine is the best disinfectant.



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Endnotes:

¹ See, e.g., *In re Roman Catholic Archbishop of Portland in Oregon* (9th Cir. 2011) 661 F.3d 417, 424 (“As a general rule, the public is permitted ‘access to litigation documents and information produced during discovery.’”) (quoting *Phillips v. General Motors Corp.* (9th Cir. 2002) 307 F.3d 1206, 1210); see also *Pintos v. Pacific Creditors Assoc.* (9th Cir. 2010) 605 F.3d 665, 677-78); *San Jose Mercury News, Inc. v. U.S. Dist. Court – N. Dist. (San Jose)*, 187 F.3d 1096, 1103 (9th Cir. 1999);

² Beware of model protective orders. While the Northern District of California’s model protective order contains some helpful language, it also contains an overly broad definition of confidential (“information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protective under Federal Rule of Civil Procedure 26(c)”). Luckily, the Northern District of California’s Local Rules do not require the parties to use the model protective order and counsel may stipulate to or move for another form of protective order. ☒