PROTECTING CLIENT INFORMATION DURING LITIGATION

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Protecting Business Information During Litigation: the Effective Use of Protective Orders

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The United States is a unique country in many ways, but particularly so in civil litigation. In this country, the First Amendment to the Constitution demands that the public have "open access to the courts" including all of its pleadings, transcripts, and hearings.[1] Relatedly, liberal discovery rules in federal, and most state, courts presumptively mandate that an opposing party in civil litigation will be entitled to view and inspect all information "relevant to any party's claim or defense and proportional to the needs of the case."[2]

So what does a litigant do when information "relevant to any party's claim or defense" contains business information that is confidential, proprietary, or even a trade secret? In many jurisdictions, the answer is to seek a protective order. But special consideration should be given as to how that order is structured, what information it covers, and how the covered information can be used in the litigation.

This article will discuss issues in selecting and implementing various types of protective orders as mechanisms to protect client information in the world of civil litigation.

1 See, e.g., In re Gitto Global Corp., 422 F.3d 1, 6 (1st Cir. 2005) ("[O]nly the most compelling reasons can justify the non-disclosure of judicial records."); Union Oil Co. of California v. Leavell, 220 F.3d 562, 567 (7th Cir. 2000) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

2 Fed. R. Civ. Pro. 26(b)(1).

I. The Trade Secrets Case—the Archetypal Use of Protective Orders.

A trade secrets case presents the classic discovery paradigm—perhaps like no other fact pattern. In trade secret litigation, the plaintiff must disclose the very information it seeks to protect.

In such matters, the plaintiff often asserts that a former employee or her opportunistic new employer has "misappropriated" or "stolen" sensitive business information with the intent to turn the information into a profit. In the initial complaint, the plaintiff may generally describe the types of information that were taken. But soon after, the defendant will successfully argue that more specific information is needed to mount a defense and the plaintiff will be required to provide great specificity regarding the stolen information, its content, and its value. That sensitive business information, including actual documents, if they exist, will be used repeatedly throughout the case – even as exhibits during depositions, to summary judgment motions, and at trial. Basically, in its pursuit to prove that its trade secrets were misappropriated, the plaintiff has to provide that very information to the alleged thief, the court, and potentially, the general public. This paradigm is often understandably infuriating, and concerning, to clients.

However, there are steps that can be taken to protect business information during the course of such litigation. When used strategically, a protective order restricts the use of sensitive business information and mitigates the client's risk.

Rule 26(c) of the Federal Rules of Civil Procedure

provides authority for any federal district court to enter "a protective order" to prevent "annoyance, embarrassment, oppression or undue burden or expenses," including by "requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way."[3] Numerous states have similar analogs in their state rules.[4] This article next looks at common features to consider with protective orders and other techniques litigants can seek in order to protect sensitive business information.

II. Types of Protective Orders and Other Protective Tools.

Standard Protective Order—Confidentiality Designations.

In a standard protective order, the parties agree that designated confidential information will not be shared outside of the litigation. Typically, these standard protective orders provide that information designated as "confidential" can only be reviewed and used in the context of the litigation in which it was produced. Often the protective order will include a basic confidentiality acknowledgment as an exhibit to the protective order and have provisions that require any reviewing party, expert, or other third party sign the agreement and consent to be bound by the protective order before viewing the confidential information. Most often, parties will use this basic protective order when their discovery involves production of sensitive information in need of protection, but that does not rise to the level of proprietary business information or a trade secret. For instance, standard protective orders and "confidential" designations work well in employment discrimination cases when personnel files containing private or personal information about third parties are produced.[5]

While protective orders differ based on the terms to which the parties agree, standard protective orders are generally distinguished from the more heightened levels of protection discussed below in that these orders allow the parties themselves—as opposed to just their attorneys—to view the information as long as the information is not used for non-litigation related purposes.[6]

Dual-tier Protective Orders and Attorneys' Eyes Only.

Some factual situations require heightened protection for particularly sensitive business information. Returning to our trade secret paradigm, a plaintiff is hesitant to allow direct access to its sensitive business information to the nefarious former employee or opportunistic new employer. However, the defendant former employee and new employer will need the information in order to defend themselves. In response to such situations, litigants have developed the concept of dual-tier protective orders.

In dual-tier protective orders, certain confidential or low-level proprietary information receives a baseline designation of "confidential." However, a higher tier designation is available for more sensitive business information. Often, this designation is referred to as "Attorneys' Eyes Only" or "AEO". Under most dual-tier protective orders, this AEO designation means what it says: only the attorneys of record can lay eyes on the information and only for purposes of the current litigation. The actual adverse parties to the litigation, the former employee or the new employer in the trade secret example, are not allowed to view the information – just their attorneys.

"AEO" is the most restrictive protective order designation developed in the American litigation system. Because the AEO designation provides cumbersome restraints on the use of such information, litigants should use AEO designation only where the information is highly sensitive and revelation to the adverse party poses a significant threat of harm to the client. If the AEO designation is applied too broadly, the opposing party may challenge the designation before the court, exposing the designating party to the risk of the designation being removed by the court and the additional expense of litigating that issue. Examples of such highly sensitive business information ordinarily include specific non-public product plans, scientific formulas, business strategy documents, and documents reflecting customer product or purchasing preferences.[7]

While an effective tool in protecting sensitive business information, restrictions imposed by the dual-tier protective order can raise some unique issues during the litigation. When drafting a dual-tier protective order, it is important to consider the practical implications of the AEO restrictions, including the nuances of who exactly will need to view the information and in what form, as well as how the information can be used in the litigation.

3 Fed. R. Civ. Pro. 26(c).

4 See, e.g., N.C. R. Civ. Pro. 26(c); N.Y. C.P.L.R. § 3103; Ill. S. Ct. R. 201(c).

5 See Williams v. Art Inst., No. 1:06-CV-0285, 2006 U.S. Dist. LEXIS 62585, *47-49 (N.D. Ga. Sept. 1, 2006) (granting protective order to allow defendant employer to designate as "Confidential" documents or information containing medical information about third-party employees on short term disability); see also Schoenbaum v. E.I. Dupont De Nemours & Co., No. 05-cv-01108, 2008 U.S. Dist. LEXIS 48064 (E.D. Miss. Jun. 23, 2008) (approving of joint motion for protective order providing for basic "confidentiality" designations of documents).

6 See Robert Timothy Reagan, Confidential Discovery: A Pocket Guide on Protective Orders, Federal judicial Center (2012), at 5, 7, https://www.fjc.gov/sites/default/files/2012/ConfidentialDisc.pdf.

7 Global Material Techs., Inc. v. Dazheng Metal Fibre Co., 133 F. Supp. 3d 1079, 1084 (N.D. Ill. 2015) ("[T]he AEO designation should "only be used on a relatively small and select number of documents where a genuine threat of competitive or other injury dictates such extreme measures.").

Three key questions to explore are:

Is it necessary for anyone else to view the AEO information in addition to the attorneys? If the case is complex or involves technical information, it may be necessary to have someone with expertise in the subject matter view the AEO information in order to help the attorneys understand it. Similarly, an expert witness may be needed to help either side prove, or disprove, its case. Each party to the litigation must think through who needs eyes on the AEO information in order to prepare its case and specifically address that access in the protective order.

Can the AEO information be viewed or received in any way by the parties? During litigation, attorneys often need to discuss the information gained in discovery with their clients in order to verify its veracity or importance, prepare for depositions or trial, or respond to motions. Accordingly, without some ability to discuss the information, an AEO designation can be extremely limiting on an attorney's ability to prepare its case. Thus a balance is needed between protecting the sensitive information and allowing the attorneys to litigate the case. In discussing a protective order, parties should consider whether the attorneys can verbally summarize AEO information for a client, or if certain witnesses can view the information in the attorney's office, provided they do not retain the documents or take any notes. Any such allowances should be memorialized in the protective order.

How can the AEO information be used in the litigation? During the litigation, it will be necessary to use the AEO information. For example, deposition testimony regarding the AEO information may be needed or an AEO document may be an essential exhibit to a party's motion for summary judgment. The parties should consider how the AEO information will be treated in those circumstances and specifically spell it out in the protective order. In the protective order, the parties may wish to ask the court for a standing order that such AEO information can be filed with the court under seal without further motion by the parties.

Three-tier Protective Orders, an AEO Alternative.

Sometimes conflicts between litigants over the necessity of AEO designations, or the various nuances discussed above, lead to a desire to find a middle ground. One compromise is to create a third, intermediate tier of confidentiality designation. This designation can take different forms, but one to consider is designating some documents as "attorneys and client representative only." This type of designation allows counsel for the parties to see all marked documents but also allows the parties to designate representatives of each party (perhaps a member of the in-house legal team or an experienced, but non-operational facing employee) to also view the designated information in order to assist with the litigation.

Courts have approved of such agreements when, like with AEO designations, the situation calls for heightened protection beyond an ordinary "confidential" designation.[8] It should be noted that all client representatives appointed to view such information under a three-tier protective order should execute and sign confidentiality acknowledgements making clear their consent to be bound by the protective order. Finally, litigants should be aware that three-tier protective orders are not without their costs. These orders tend to complicate the discovery process as coding and procedures have to be developed for three—as opposed to one or two—designations.

Motions to Seal Filings and the Courtroom.

As stated at the very beginning of this article, in the United States, the default rule is that the general public has "open access to the courts" including all of its pleadings, transcripts, and hearings. Simply put, in most civil litigation, unless there is an order ruling otherwise, anything filed with the court may be viewed by the general public. Similarly, any hearings and trials are presumptively open to the public. In litigation where sensitive business information is at the heart of the matter, such as a trade secret case, it is virtually impossible, throughout the entire course of the litigation, to avoid referring to such sensitive business information in court filings or at trial. A motion to seal is appropriate in these circumstances. Although the content, scope, and remedy will vary by jurisdiction, most state and federal courts have procedures where a litigant can ask for the filing, or the hearing, to be "sealed." These requests, in general, ask the court to make a pleading or hearing inaccessible to the public.[9]

When evaluating motions to seal, courts must weigh the public's right to access the courts with the litigant's need to protect its sensitive business information.[10] Accordingly, it is important that a motion to seal is narrowly tailored to restrict access to only the sensitive business information that is referenced in the filings or attached as an exhibit,

8 Uniroyal Chemical Co., Inc. v. Syngenta Crop Protection, 24 F.R.D. 53, 58 (D. Conn. 2004) (modifying existing consent protective order to allow for an intermediate designation that "restrict[ed] disclosure of documents marked as such to outside counsel, outside experts, and three designated employees of each company").

9 See Robert Timothy Reagan, Sealing Court Records and Proceedings: A Pocket Guide, Federal Judicial Center (2010), at 1, 5, https://www.fjc.gov/sites/default/files/2012/Sealing_Guide.pdf.

10 See, e.g., In re National Broadcasting Co., 653 F.2d 609, 612-13 (D.C. Cir. 1981); Stone v. University of Maryland Medical System Corp., 855 F.2d 178, 180 (4th Cir. 1988) (providing that sealing may be appropriate "if competing interests outweigh the interest in access").

rather than the entire filing itself.[11] Similarly, when asking the court to close its courtroom for a proceeding, consider asking the court to only exclude the public when it is anticipated that particularly sensitive testimony will be solicited from a certain witness.

III. Litigation Tips for Implementing and Using Protective Orders and Other Mechanisms.

Now that the reader has a firm grasp of the types protective orders and other mechanisms to use when protecting information, the remainder of this article considers best practices for implementing these tools.

Early Client Communication. When litigation begins or is even just threatened, counsel should communicate early with the client about the extent of electronic and other documentary discovery. Early communication will allow counsel to determine what, if any, confidential or proprietary information may be discoverable by an opposing party, and conversely what, if any, similar information the client may be seeking from someone else. Getting out in front of these issues allows counsel to telegraph the risks of putting sensitive business information at-issue in civil litigation and outline the steps that can be taken to mitigate any risk.

Protecting Personal-Private Information. Even though counsel's primary worry in trade secrets cases should be the protection of proprietary information, other information deserves protection too. One of the most common types of information produced as a byproduct of the civil-litigation process is personal or private information. For instance, in employment discrimination cases, the defendant-employer often produces personnel files of the plaintiff-employee and of other employees that are similarly situated. The defendant-employer in such a case should seek a standard protective order and stamp all documents with private, personal information as "Confidential." In addition to seeking a protective order, most courts, both state and federal, have strict rules about the redaction of certain kinds of identifying information like social security numbers,[12] dates of birth,[13] or the names of minor children.[14]

Standing Protective Orders. In order for a protective order to have effect, it must be approved, and entered by the Judge. Many courts have standing protective orders that are freely available for litigants to obtain and edit for their specific purposes or factual circumstances.[15] Before spending time (and money) negotiating with opposing counsel regarding a protective order, check to see if your court has a standing protective order that can be adjusted to fit the needs of your case. If the court does not have a standing protective order, look at a judge's prior cases to see what types of protective orders she has previously entered. Using a protective order that is already viewed favorably by the court can save time and money as well as prevent the risk of negotiating with opposing counsel a document that the assigned judge is ultimately unwilling to issue.

IV. Conclusion.

As long as companies continue making cutting-edge products and developing strong relationships with their clients, the need to protect the secrecy of that information will remain. Protective orders, their variants, and other tools discussed in this article will play an ever-growing role in maintaining that secrecy. We hope this article has provided you with an initial glimpse at the basic types of protective orders, how to use them, and what best practices to take when protecting your client's most important information.

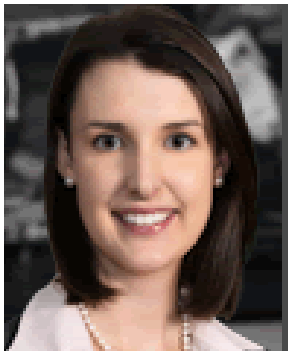
11 See, e.g., Woven Elecs. Corp. v. Advance Group, Inc., No. 89-1580, 1991 U.S. App. LEXIS 6004, at *18-19 (4th Cir. 1991) ("The district court should review the entire record of the trial, including the exhibits and transcripts if any, and seal only those portions necessary to prevent the disclosure of trade secrets."); LifeNet Health v. LifeCell Corp., No. 2:13-cv-486, 2015 U.S. Dist. LEXIS 181256, at *9-11 (E.D. Va. Feb. 11, 2015) (sealing portions of financial records including by redacting "key words and phrases" as partial sealing "balances both the public's and [the protector's] interests").

12 Local Civ. R. 5.2, Western District of North Carolina; Ill. Supr. Ct. R. 15; Tex. R. Civ. Pro. 21(c).

13 Fed. R. Civ. Pro. 5.2 (providing that "[u]nless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, or a financial-account number, a party or nonparty making the filing" should redact most of the identifying information).

14 Ill. Supr. Ct. R. 138.

15 See, e.g., Stipulated Order Regarding Confidentiality of Discovery Material, Local Civ. R. 104.13, District of Maryland, https://www.mdd.uscourts.gov/sites/mdd/files/LocalRules.pdf; Model Protective Order for the Honorable Jed. S. Rakoff, District Judge, United States District Court for the Southern District of New York, http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=737.



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Cabell Clay brings to her wide-ranging clients counseling and litigation experience in both employment matters and commercial disputes.

Cabell appreciates that every business is unique and believes that understanding her clients' business model, culture, and needs is crucial to successful attorney-client partnerships. Whether it involves high stakes litigation defense or review of employment practices and policies, Cabell works with clients to develop advice and strategies that align closely with their long-term goals and interests.

Cabell routinely advises clients on a variety of employment matters, including employment agreements, drafting of restrictive covenants, trade secret protections, employee discipline and terminations, severance agreements, employment handbooks and policies, ADA accommodation requests, FMLA compliance, discrimination and harassment issues, and wage & hour compliance and audits.

She also handles wide-ranging employment and commercial litigation, including trade secret misappropriation litigation, DOL investigations, restrictive covenants disputes, management representation in Title VII, ADA, ADEA, and wage & hour litigation, as well as proceedings before the EEOC and corresponding state and local agencies. Additionally, Cabell has substantial experience in handling class action defense, internal investigations, contract claims, securities and mortgage fraud defense, unfair trade practices claims, and civil appeals.

In addition to her extensive civil trial experience, Cabell spent six months on special assignment as an Assistant District Attorney in the Mecklenburg County District Attorney's Office, where she honed her trial skills by successfully prosecuting misdemeanors in both District and Superior Courts.

Practice Areas

- Class Actions & Multi-District Litigation
- Employment & ERISA Litigation
- Employment & Labor
- Employment & Noncompetition Agreements & Trade Secrets Protection
- Financial Services Litigation
- Litigation
- North Carolina Business Court Litigation
- Trade Secrets Litigation
- Wage & Hour Compliance & Litigation
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