



Cover Your Assets: Drafting Effective Protective Orders

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August 8, 2014

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Protective Orders

- Fed. R. Civ. P. 26(c)
 - A court may “for **good cause**, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense”
 - “**Good cause**” “generally signifies a sound basis or legitimate need to take judicial action” *Wiggins v. Bruce*, 173 F.R.D. 226, 229 (N.D. Ill. 1997)
- Various state court standards
- Typically, a “compelling reason” must exist for denying the public access to documents filed with the court

Risks from “Boilerplate” Protective Orders

- Cases are not one size fits all
 - Different documents / different matters
 - Different issues / different matters
- Enforcement concerns
 - Rules vary between federal and state courts—even by judges within the same court

Goals and Considerations

- Protect client's interests and confidential information
 - Tiered levels of protection
 - Inadvertent production
 - Deposition designations
 - Procedure for filing under seal
 - Procedure for challenging designations
 - Proper use of the information
 - Disclosure to third parties (experts, etc.)
 - Post-litigation obligations
- Workable for that case—and future cases
- Obtain court approval—justify your requests



Protective Orders: Key Issues

- “Sharing” Provisions
- Inadvertent Disclosure
- Tiered Designations
- Sealing
- Post-Litigation Obligations



“Sharing” Provisions

- Arguments by plaintiffs’ counsel in support of “sharing”:
 - Decrease costs
 - Increase efficiency
 - Need to use information to pursue future cases
- Concerns—reasons to oppose “sharing” provisions:
 - Inability to protect confidential information
 - Shared documents may not be relevant, or even discoverable, in other actions
 - Unrestricted sharing (and purchase) of documents among plaintiffs’ counsel
 - Ammunition for additional cases
 - Logistical nightmare for courts
- Case law exists both allowing and prohibiting

Inadvertent Disclosure: The Rules

- Fed. R. Evid. 502(b). Protected if:
 - **Inadvertent** disclosure
 - **Reasonable** steps to prevent disclosure
 - **Reasonable** steps to rectify error
- Fed. R. Civ. P. 26(b)(5)(B)
 - If notified of inadvertent disclosure must: return, sequester, or destroy the information; not use or disclose the information; take reasonable steps to retrieve the information; promptly present under seal to the court for determination of claim
 - Producing party must preserve information until claim resolved

Inadvertent Disclosure: Use of Clawback Agreements

- **Benefits:**
 - Added protection for privileged information
 - Save time, expense
 - Particularly useful in large, complex litigation
- **Concerns:**
 - Differing case law and court interpretation
 - Abuse by one party
 - Disagreement between the parties
 - Some courts have used as a reason to order broad discovery



Inadvertent Disclosure: Best Practices for Clawback Agreements

- Incorporate into the Protective Order
- Review applicable law
- Carefully consider scope and timing of your production
- Don't get sloppy! Undertake a privilege review
- If seeking to modify FRE 502(b), explicitly do so (i.e., define "reasonable steps," "inadvertent")
- Establish procedure for invoking—and in case of disagreements
- Consider procedure for the clawback of testimony

Inadvertent Disclosure: Intersection with Ethical Rules

- **Rule 1.6, Comment 18.** Lawyer must act competently to safeguard information from inadvertent disclosure
 - Must take reasonable efforts. Factors to consider:
 - sensitivity of the information
 - likelihood of disclosure if safeguards not employed
 - cost of additional safeguards
 - difficulty of implementing safeguards
 - extent to which the safeguards adversely affect the lawyer's ability to represent clients
- **Rule 4.4(b).** Lawyer who received document and knows or reasonably should know document inadvertently sent must promptly notify the sender

Tiered Designations: Best Practices

- Consider the scope and nature of your document production
- Consider nature of case and any business concerns
- Carefully define the different tiers and consider protection wanted
 - Viewing, keeping, and use of materials should be addressed
- Cautiously label documents “attorney’s eyes only”—sanctions can be imposed if not done properly. *Fears v. Wilhelmina Model Agency, Inc.*, 02 Civ. 4911, 2001 U.S. Dist. LEXIS 12850, at *6 (S.D.N.Y. July 25, 2003)

Sealing Documents: Best Practices

- Consider jurisdiction and judge
- Most courts require approval from judge prior to filing under seal—therefore:
 - Establish efficient mechanism for filing under seal
 - Obtain approval from opposing counsel
 - Be realistic about timing and other constraints
 - Ensure designating party has sufficient time to explain why document(s) should be sealed

Post-Litigation Obligations: Best Practices

- Ensure Protective Order remains enforceable post-litigation
- It's not over till it's over
 - Comply with destruction or return provisions—make sure other side does as well
- **Throughout the litigation and after—comply with the Protective Order!**



Protective orders are a staple of modern litigation. So much so, in fact, that lawyers often rely on boilerplate protective orders without considering the unique circumstances of each case—including the facts, jurisdiction, individual judge, and impact a boilerplate protective order may have on future cases. These materials address some key issues related to protective orders—issues to consider before using a boilerplate protective order.

Fed. R. Civ. P. 26(c) and “Good Cause”

Under Federal Rule of Civil Procedure 26(c), a party may move for, and a court may grant, a protective order to “protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” But courts may grant protective orders only “for good cause.” Fed. R. Civ. P. 26(c)(1). The protection of “a trade secret or other confidential research, development, or commercial information” constitutes a “good cause.” Fed. R. Civ. P. 26(c)(1) (G). State rules of civil procedure frequently mirror these requirements of federal civil procedure. *See, for example*, Minn. R. Civ. P. 26.03. While “good cause” must exist for the issuance of a protective order, many courts have held that a “compelling reason” must exist for denying the public access to documents filed with the court. *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (explaining the reasons for overriding the public’s right to access judicial documents).

The party seeking the protective order often bears the burden of proving (1) that the requested material is either a trade secret or confidential information and (2) “that disclosure would cause an identifiable, significant harm.” *Macario v. Pratt & Whitney Can., Inc.*, Civil Action No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *4-5 (E.D. Pa. Dec. 20, 1990); *Parsons v. Gen. Motors Corp.*, 85 F.R.D. 724, 726 (N.D. Ga. 1980).

Courts deny protective orders when the movant provides evidence insufficient to establish that the requested material is (1) confidential and (2) likely to cause significant harm if shared. *See, e.g., Parsons*, 85 F.R.D. at 726 (denying motion for protective order and finding defendants’ “allegations of competitive harm [were] vague and conclusory when specific examples are necessary”).

Yet courts routinely grant motions for protective orders. Courts usually have broad discretion to limit the boundaries of discovery. *See In re Paul W. Abbott Co.*,

Inc., 767 N.W.2d 14, 17-18 (Minn. 2009). And parties should disclose confidential information only when “it has been shown to be both relevant and necessary to the prosecution of the case.” *In re Remington Arms Co., Inc.*, 952 F.2d 1029, 1033 (8th Cir. 1991). Indeed, parties “have an interest in preventing the dissemination of confidential information,” and there is “no right to use pretrial discovery in one case for the prosecution of another case.” *Sasu v. Yoshimura*, 147 F.R.D. 173, 176 (N.D. Ill. 1993); *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 31 (1982) (stating that a litigant does not necessarily have an “unrestrained right to disseminate information that has been obtained through pretrial discovery”). A substantial body of case law illustrates the willingness of courts to grant protective orders involving confidential information and trade secrets.

“Sharing” Provisions

While courts routinely grant protective orders, one area of disagreement that can arise between plaintiff and defense counsel is the question of whether confidential information produced in one lawsuit can be used in other lawsuits either involving the same counsel, product or issues.

There are many concerns with allowing confidential information produced in one lawsuit to be used in other litigation. Doing so greatly impacts a party’s ability to protect its confidential information, and to monitor who has access to such information. Allowing confidential documents to rest in plaintiff’s counsel’s control without any meaningful oversight renders a defendant vulnerable to improper use and disclosure of the documents. In addition, confidential information produced in one case may not be relevant—or even discoverable—in other actions. Yet, permitting the entry of a sharing provision essentially gives plaintiff’s counsel the power to circumvent discovery rules in other cases and jurisdictions, and makes plaintiff’s counsel the arbiter of what is “relevant” in other matters. If confidential information is shared, it also potentially provides ammunition for additional cases. Likewise, if confidential information is shared, courts may find themselves attempting to enforce and monitor protective orders entered into in other jurisdictions—a situation that could create an enforcement nightmare in courts across the country.

Plaintiffs’ counsel, on the other hand, may present several arguments in favor of a sharing provision. For example, plaintiffs may claim allowing confidential

information to be shared reduces the cost of future litigation, and helps to conserve resources and maximize efficiency. Plaintiffs may also argue they are entitled to share the information to pursue future litigation.

Below are summaries of sample cases both prohibiting, and allowing, “sharing” provisions in protective orders.

Sample Case Law Prohibiting “Sharing” Provisions

- *Scott v. Monsanto Co.*, 868 F.2d 786, 792 (5th Cir. 1989) (prohibiting use of discovery materials to “the plaintiffs, their representatives, their counsel, and their experts or consultants”).
- *Menendez v. Wal-Mart Stores East LP*, No. 1:10-cv-53, 2012 U.S. Dist. LEXIS 4143, at *11-13 (N.D. Ind. Jan. 11, 2012) (overruling plaintiffs’ objection that defendants’ proposed protective order was too restrictive because it did not contain a sharing provision).
- *Zappe v. Medtronic USA, Inc.*, No. C-08-369, 2009 WL 792343, at *1 (S.D. Tex. Mar. 23, 2009) (denying plaintiffs’ motion for a protective order seeking to allow their counsel to share the defendants’ confidential documents with other “similarly situated litigants”).
- *Bertetto v. Eon Labs, Inc.*, Civ. No. 06-1136 JCH/ACT, 2008 U.S. Dist. LEXIS 119233 (D. N.M. May 29, 2008) (striking sharing provision in a protective order because under the provision “the court would be abdicating its role in approving future discovery, as well as potentially usurping a collateral court’s role in managing discovery in a collateral case).
- *Gil v. Ford Motor Co.*, No. 1:06CV122, 2007 U.S. Dist. LEXIS 65269, at *18 (N.D. W. Va. Sept. 4, 2007) (entering non-sharing protective order that prevented dissemination of trade secret information outside of litigation).
- *Star Scientific, Inc. v. Carter*, 204 F.R.D. 410, 417 (S.D. Ind. 2001) (limiting disclosure of trade secret information to the parties and counsel involved in that case to avoid potential danger of the defendant losing a competitive advantage).
- *Wal-Mart Stores East, L.P. v. Endicott*,

81 So.3d 486, 490 (Fla. 2011) (sharing provision was improper because it posed dangers that “(1) a foreign litigant could circumvent stricter discovery laws by relying on the sharing provision, and (2) Florida trial courts could be required to handle enforcement disputes for other jurisdictions.”).

Sample Case Law Permitting “Sharing” Provisions

- *Charter Oak Fire Ins. Co. v. Electrolux Home Prods.*, 287 F.R.D. 130 (E.D.N.Y. 2012) (holding that plaintiff’s interest in sharing information in other lawsuits maximizes efficiency and weighs against granting a protective order).
- *Idar v. Cooper Tire & Rubber Co.*, Civil Action No. C-10-217, 2011 U.S. Dist. LEXIS 26013, at *6-10 (S.D. Tex. Feb. 17, 2011) (denying protective order that prohibited sharing among similarly situated litigants because the policy in favor of “avoiding[ing] duplicative and costly discovery” outweighed the alleged confidentiality of the shared information).
- *Macario v. Pratt & Whitney Can., Inc.*, Civil Action No. 90-3906, 1990 U.S. Dist. LEXIS 17411, at *4-6 (E.D. Pa. Dec. 20, 1990) (rejecting defendant’s proposed protective order precluding plaintiff from sharing confidential information with nonparties because defendant offered “only a speculative showing of potential harm” and gave the Court no “background from which it could determine whether or not these documents and materials [were] entitled to confidential treatment”).
- *United States v. Hooker Chem. & Plastics Corp.*, 90 F.R.D. 421, 425-426 (W.D.N.Y. 1981) (denying protective order for failure to cite specifics instances of ways the sharing of information could create a competitive disadvantage and explaining that federal rules encourage sharing even if shared information may be used in parallel litigation).

Inadvertent Disclosures and Clawback Agreements

As the volume of documents that must typically be collected, reviewed and produced in litigation continues

to grow, the use of “clawback” agreements has become increasingly common. Clawback agreements establish a procedure for the return and destruction of inadvertently disclosed information protected by the attorney-client privilege or attorney-work product doctrine. Another important consideration, when entering into a protective order, is therefore to determine whether to enter into a protective order allowing clawback rights.

The federal rules can work in conjunction with clawback agreements. For example, Fed. R. Evid. 502 provides, in part:

- (b) **Inadvertent Disclosure.** When made in a federal proceeding or to a federal office or agency, the disclosure does not operate as a waiver in a federal or state proceeding if:
- (1) the disclosure is inadvertent;
 - (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and
 - (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

Fed. R. Evid. 502(b).

Fed. R. Civ. P. 26(b)(5)(B) states:

Information Produced. If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.

Fed. R. Civ. P. 26(b)(5)(B).

The federal rules contain provisions that frequently work in conjunction with clawback agreements; however, the interpretation of, and law applicable to, such

agreements can vary, particularly if the case is pending in state court. In order to ensure a client’s interests are protected, it is therefore important to understand the applicable law since this may, at times, impact whether to enter into a clawback agreement, and the specific provisions to include in such an agreement.

If a decision is made to enter into a clawback agreement, and in many cases doing so can save time, expenses, and help prevent against the waiver of privileged information, there are several guiding principles to take into consideration:

- *Incorporate the clawback agreement into a protective order.* Clawback agreements may not be enforceable against third parties unless they are incorporated into a protective order. See Fed. R. Evid. 502(d).
- *Review applicable law.* As discussed above, ensure you have an understanding of the applicable law so your client’s interests are protected.
- *Clearly establish that inadvertent production is not a waiver.* “The order should state that it is designed to protect [attorney-client privileged] or [work product privileged] information disclosed in discovery from waiver due to production pursuant to the court order.” Nathan M. Crystal, *Inadvertent Production of Privileged Information in Discovery in Federal Court: The Need for Well Drafted Clawback Agreements*, 64 S.C. L. Rev. 581, 623 (Spring 2013) (listing several best practices for drafting clawback agreements).
- *Carefully consider the scope and timing of your production.* Doing so will help you enter into a clawback agreement best suited to protect your client’s interests.
- *Don’t get sloppy! Undertake a privilege review.* Clawback agreements are not “a license to ‘be asleep at the switch.’” Ashish S. Joshi, *Business Litigation: Clawback Agreements in Commercial litigation: Can You Unring a Bell?*, 87 Mich. Bar J. 34, 36 (2008). In fact, several courts have rejected “blanket” inadvertent disclosure provisions and held a producing party was required to conduct a reasonable privilege review before producing documents. See, e.g., *United States v. Sensient Colors*, Civil No. 07-1275(JHR/JS), 2009 U.S. Dist. LEXIS 81951, at *15-17 (D.N.J. Sept. 9,

2009); *Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 412-414 (D.N.J. 1995); *but see Rajala v. McGuire Woods LLP*, No. 08-2638-CM-DJW, 2010 U.S. Dist. LEXIS 73564 (allowing defendant to clawback documents even though it did not conclude a pre-production review); *Adair v. EQT Production Co.*, Case No. 1:10CV00037, 2012 U.S. Dist. LEXIS 90250, at *1 (W.D. Va. June 29, 2012) (ordering, over defendant's objection, electronic search and production of documents without an individualized privilege review). Moreover, even if the party to whom the privileged materials were disclosed is required to return the materials, they have still had the benefit of reviewing privileged information—a bell you cannot “unring.” Joshi, *supra*.

- *If seeking to modify the standards in Fed. R. Evid. 502(b), explicitly do so in the agreement—and then follow whatever procedures are agreed upon.* For example, consider whether to incorporate into the agreement definitions of “inadvertent disclosure” and “reasonable steps,” including the amount of pre- and post-production review required. As part of this analysis, consider whether to define search terms and quality procedures that will be used. Likewise, even if “reasonable steps” is not defined in the clawback agreement, ensure you are able to provide details regarding the procedures used to undertake the review and to prevent against inadvertent disclosure.
- *Establish a procedure for invoking the protection -- and in case of disagreements.* Also consider including a requirement that the party who receives inadvertently produced privileged material will notify the producing party, and a time frame for such notification.
- *Consider including a procedure governing the clawback of testimony.* A witness may also disclose privileged information; consider including a provision for removing such testimony from the record.

See Nathan M. Crystal, *Inadvertent Production of Privileged Information in Discovery in Federal Court: The Need for Well Drafted Clawback Agreements*, 64 S.C. L. Rev. 581 (Spring 2013); Michael Lackey, Kim Leffert & Michael Bornhorst, *Best Practices for*

Preparing a Clawback Agreement, Mayer Brown Electronic Discovery & Records Management (Oct. 31, 2012), <http://www.mayerbrown.com/Electronic-Discovery--Records-Management---Tip-of-the-Month-Best-Practices-for-Preparing-a-Clawback-Agreement-10-31-2012/>.

The Use of Tiered Designations

A party may produce documents, or provide testimony, that they believe should be subject to enhanced protections, beyond simply labeling the documents “confidential.” In such situations, the parties may incorporate into the protective order tiered levels of protection for certain documents—including those marked “confidential,” “highly confidential,” or “attorney’s eyes only.” Parties hoping to protect confidential or trade secret information through the use of tiered designations must carefully balance the need for protection against the likelihood that a court will approve the designations. In *Fears v. Wilhelmina Model Agency, Inc.*, 02 Civ. 4911, 2001 U.S. Dist. LEXIS 12850, at *6 (S.D.N.Y. July 25, 2003), for example, a party labeled all documents “confidential—attorneys’ eyes only.” The court explained that “[i]t is difficult, if not impossible, to imagine that every piece of paper being produced ... is so sensitive that a blanket designation” is justified. *Id.* The court further stated that the blanket designation resembled bad faith, subjecting the party to the risk of sanctions. *Id.* See, e.g., *Cook Inc. v. Boston Sci. Corp.*, 206 F.R.D. 244, 247-49 (S.D. Ind. 2001) (granting tiered designations allowing varied access to confidential information for trial counsel and in-house counsel but requiring parties to exhaustively define the precise boundaries of the material subject to the designations); *In re Ullico Inc. Litig.*, 237 F.R.D. 314, 317-318 (D.D.C. 2006) (imposing sanctions on party who breached “an overarching requirement of good faith” by designating 99% of its documents “confidential”).

Along similar lines, the parties in *Team Play, Inc. v. Boyer*, No. 03 C 7240, 2005 U.S. Dist. LEXIS 3968, at *2 (N.D. Ill. Jan. 31, 2005), agreed to a protective order creating two categories of documents: “Confidential Information” and “Highly Confidential Information.” Parties could share “Highly Confidential Information” with only witnesses, outside counsel or outside experts. *Id.* The plaintiff labeled 4,137 of the 6,000 documents it produced “Highly Confidential Information.” *Id.* at *4. The court rejected the plaintiff’s labeling. *Id.* at *3. It stated that, “[w]here a party’s use of the ‘Attorney’s Eyes Only’ designation is sweeping it can be a form of

discovery abuse and result in the blanket modification of a protective order as well as the imposition of sanctions on the designating party.” *Id.* “Once the designation has been challenged, it is the burden of the designating party to justify the need for enforcement of the protective order in accordance with its terms.” *Id.*

One commentator provided the following analysis regarding an alternative approach to the use an “attorney’s eyes only” designation:

When an ‘attorney’s eyes only’ provision may not be warranted, one alternative to consider is using a ‘highly confidential’ designation that can serve as a middle ground between ‘confidential’ and ‘attorney’s eyes only.’ Often this middle ground may provide the needed protection while also minimizing the stigma associated with an ‘attorneys’ eyes only’ designation. A carefully worded ‘highly confidential’ designation provision could prevent the other party from (1) keeping a copy of the materials, (2) viewing the materials outside presence of counsel, (3) taking notes on contents of the materials, (4) discussing or disclosing contents of the materials with any other employees or third parties, (5) using the materials for any other purpose outside the prosecution or defense of lawsuit, or (6) any combination of these. While not exhaustive, these limitations may provide sufficient protection and alleviate the need for an ‘attorneys’ eyes only’ designation. A creative use of a variation of these limitations, tailored to the needs of each case, may provide a solution for litigations hoping to avoid an ‘attorney’s eyes only’ dispute with an opposing party.

Timothy Lendino, C. King & Evan Sauda, *Confidentiality and Protective Orders*, Smith Moore Leatherwood LLP (July 2013), <http://www.smithmoorelaw.com/Confidentiality-and-Protective-Orders-08-05-2013>.

While there are many situations where the use of tiered confidentiality designations is justified—and, in fact, essential—there are certain steps a party can take to increase the likelihood a court will approve the use of such designations, including the following:

- Consider the scope and nature of your expected document production to determine the different levels of protection that will likely be necessary;
- Consider the nature of the case and any

potential business concerns, so these issues can be effectively communicated to the court;

- Carefully define the different tiers of protection requested—address issues related to viewing, keeping, and use of the materials; and
- Cautiously label documents “attorney’s eyes only” or “highly confidential”—as noted above, sanctions can be imposed for over-designating documents.

Sealing Documents

In most situations, a protective order should also include an agreed upon procedure for filing documents under seal. Any party hoping to file documents under seal should first investigate the procedural requirements for filing under seal, which often vary by jurisdiction and judge. For example, in *Stone v. Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988), the Fourth Circuit Court of Appeals explained that “[t]he common law presumes a right to inspect and copy judicial records and documents.” *Id.* (citing *Nixon v. Warner Commc’ns*, 435 U.S. 589, 597 (1978)). The court also stated that “[t]he common law presumption of access may be overcome if the competing interests outweigh the interest in access.” *Stone*, 855 F.2d at 180. To balance these competing interests, the Fourth Circuit adopted a set of procedural safeguards. *Id.* at 181. Before granting a motion to seal, the district court must (1) issue public notice of the request to seal, (2) consider “less drastic alternatives to sealing,” and (3) “state the reasons for its decision to seal supported by specific findings, and the reasons for rejecting alternatives to sealing.” *Id.* (citing *In re Knight Publ’g Co.*, 743 F.2d 231, 235 (4th Cir. 1984)). As a result, motions to file under seal in the Fourth Circuit should thoroughly explain the circumstances justifying the use of a seal rather than less drastic alternatives. Similarly, in the Sixth Circuit Court of Appeals, a party requesting to file under seal “must provide an adequate and specific explanation as to why the [materials] should be sealed and apprise the court of the specific harm that will occur if the [materials are] not sealed.” *United States v. Woods*, No. 12-6307, 2013 U.S. App. LEXIS 14850, at *2 (6th Cir. April 26, 2013).

Further, jurisdictions disagree on the definition of ‘judicial record.’ In the Third Circuit, for example, a document is a ‘judicial record’ to which the public has a right of access if the document is “physically on file with the court.” *Pansy v. Borough of Stroudsburg*, 23

F.3d 772, 782 (3d Cir. 1994). By contrast, the First Circuit excludes documents filed with the court if the documents relate exclusively to discovery. *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986).

As this case law demonstrates, courts have not adopted a one size fits all approach to the process for sealing documents. To increase the chances that a court will allow a party to file documents under seal, counsel should therefore engage in the following analysis:

- Consider the jurisdiction and judge, including any specific local rules governing the process for filing documents under seal;
- Work to obtain agreement with opposing counsel to incorporate into the protective order an efficient and protective, yet permissible, mechanism for filing documents under seal;
- Be realistic about timing and other constraints when drafting a proposal for filing documents under seal; and
- Ensure the designating party has sufficient time to explain why the document(s) should be sealed.

See Timothy Lendino, C. King & Evan Sauda, *Confidentiality and Protective Orders*, Smith Moore Leatherwood LLP (July 2013), <http://www.smithmoorelaw.com/Confidentiality-and-Protective-Orders-08-05-2013>.

Post-Litigation Obligations

It is important to ensure a protective order remains enforceable after the litigation, and to addresses post-litigation obligations, including the prompt return or destruction of sensitive documents when the litigation concludes.

Along those lines, one recent case demonstrates

the need to consider the impact of electronic storage systems on the ability to destroy information. In *Oxford Info Tech., Ltd. v. Novantas LLC*, 78 A.D.3d 499 (N.Y. App. Div. 2011), after settling the litigation, plaintiff's counsel learned that large amounts of defendant's confidential business data had inadvertently been backed up on the plaintiff's law firm's disaster recovery back-up tapes. It would be costly for the data to be removed, so plaintiff's counsel attempted to modify the protective order to permit it to retain the information with proposed safeguards. *Id.* at 499. The court denied plaintiff's motion and noted that plaintiff's counsel "have demonstrated experience in and sophisticated knowledge of electronic discovery matters" and "should have foreseen the potential problem and addressed it while negotiating the Confidentiality Order." *Id.* at 500.

"*Oxford Info* teaches that attorneys should be astutely aware of the pitfalls of hosting data subject to protective orders and confidentiality agreements on their firm's own servers." Gibbons P.C., *New York Appellate Court Refuses to Amend Confidentiality Order to Address Runaway Data Issue*, E-Discovery Law Alert (Feb. 28, 2011). Some suggestions to address this issue include hosting sensitive data through a third party service, or, if the data must be housed locally, working closely with IT staff to carefully control where data resides and whether it is backed up. *Id.* In general, parties should consider electronically stored data issues when drafting and entering into protective orders.

Finally, counsel must also make sure to comply with the terms of the protective order—both during and after the litigation. It is important to safeguard both your client's confidential information, but also any confidential information received pursuant to a protective order from the opposing part, or third parties. It is likewise good practice to ensure all members of the litigation team are informed of, and comply with, the terms of the protective order.

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Nicole Narotzky is a partner in the firm's Litigation Group. She specializes in product liability litigation and has successfully defended major medical device and pharmaceutical manufacturers in federal and state courts throughout the country. Nicole has significant experience with the issues of federal preemption and regulatory control over claims involving FDA-approved medical devices. She also has extensive experience representing clients in a variety of commercial disputes, including construction law and intellectual property disputes.

Areas of Practice

- Appeals
- Business Litigation
- Construction & Real Estate Litigation
- Intellectual Property Litigation
- Tort & Product Liability

Selected Client Successes

- ABA Death Penalty Project: Pro Bono Representation for Death Row Inmate
- I-35W Bridge Collapse Litigation: Defense of Engineering Firm
- World-Leading Medical Device Company: Representation Through Claims and Litigation

Professional Activities

- American Bar Association
- Minnesota State Bar Association
- Hennepin County Bar Association
- Ramsey County Bar Association
- Minnesota Women Lawyers: Community Action Committee
- American Intellectual Property Law Association
- Defense Research Institute

Recognition

- Recognized on Minnesota Rising Stars list as part of the Super Lawyers® selection process, 2014 (Minnesota Rising Stars is a designation given to only 2.5 percent of Minnesota attorneys each year, based on a selection process that includes the recommendation of peers in the legal profession.)

Education

- University of Minnesota Law School - J.D., magna cum laude, 2003; Honors: Order of the Coif
- Brown University - B.A., with honors, 1999; Major: Political Science