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Safeguarding Information During Litigation: Protective Orders and Other Remedies

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SAFEGUARDING INFORMATION DURING LITIGATION: PROTECTIVE ORDERS AND OTHER REMEDIES

One of the most valuable commodities a company has is its proprietary information. For that reason, protective orders have become a pervasive component of modern litigation. Without the safeguards afforded by a protective order, a party's proprietary information may not only be used against it by the opposing party, it may also fall into the public domain.

Protective orders play a vital role in protecting parties from sacrificing the privacy of their proprietary information simply because they have filed or been named in a lawsuit. However, litigating parties must balance the need to protect sensitive information with the need to obtain the information necessary to prosecute and defend their claims. When drafting and negotiating a protective order, counsel must ensure that the order provides a client with the confidentiality it needs without going so far that it hinders a party's claims or diminishes the prospects for enforcement of the protective order.

This paper discusses issues related to drafting agreed protective orders, including procedures for sealing documents, as well as designating documents as "attorneys' eyes only." This paper also discusses cases in which parties have sought to enforce protective orders. Finally, this paper discusses other means of protecting confidential information even when a protective order is not in place.

I. Drafting Protective Orders

A. Protection provided under the Texas and Federal Rules of Civil Procedure

Protective orders are a device where a court prohibits the dissemination of discovery materials. In Texas, protective orders are governed by Texas Rule of Civil Procedure 192.6, which provides that "[a] person from whom discovery is sought, and any other person affected by the discovery request, may move . . . for an order protecting that person from the discovery sought." To protect the movant from "invasion of personal, constitutional, or property rights," Rule 192.6 provides that protective orders may, "among other things," order that the discovery: (1) not be sought, in whole or in part; (2) be limited by extent or subject matter; (3) not be undertaken at the time or place specified; (4) be undertaken only by the method or terms and conditions or time and place directed by the court; or (5) be sealed or otherwise protected subject to Texas Rule of Civil Procedure 76a (sealing court records).

In federal court, Rule 26(c) of the Federal Rules of Civil Procedure provides that a court may enter a protective order prohibiting certain discovery or allowing discovery on specified terms upon a showing of "good cause." The moving party must show that the information implicates privacy, property, or other rights, such as trade secrets "or other confidential research, development, or commercial information" worthy of protection and that the disclosure would create a clearly defined harm. *See* FED. R. CIV. P. 26(c)(1)(g); *see also In re Terra Int'l*, 134 F.3d 302, 305-307 (5th Cir. 1998). In practice, parties in commercial litigation often agree on a protective order, which is submitted to the court for approval. Agreed protective orders suspend the need to demonstrate good cause until such time that the protective order is challenged or sought to be enforced.

B. Issues with Agreed Protective Orders

Although the safeguards of TRCP 192.6 and FRCP 26(c) can protect parties from whom proprietary information is sought, to expedite discovery, litigants often agree to a stipulated protective order that protects discovery materials wholesale, or by category, instead of on a document-by-document basis. In practice, many commercial lawyers rely on standard, boilerplate protective orders. However, many stipulated protective orders are signed without determining whether there is a genuine need for confidentiality or how the order will work in practice. Furthermore, although a standard protective order may generally suffice, counsel should consider a few specific issues before using a standard, "one size fits all" protective order.

The following issues (among others) should be considered and addressed when drafting a protective order: (1) who will be held to the terms of the protective order; (2) what information is considered confidential; (3) how to designate information as confidential; (4) defining who has access to the confidential information; (5) how such information is filed with the court; (6) how to challenge a confidential designation, and which party has the burden to do so; and (7) what happens to confidential information after the litigation ends. This paper focuses on the protocols for sealing documents, using "attorneys' eyes only" designations, and enforcement.[1]

1. Sealing Documents

Protective orders often do more than simply restrict the parties from disseminating confidential information obtained through discovery outside the litigation process. In addition, protective orders often include provisions allowing the parties to file confidential material under seal.

Texas Rule of Civil Procedure 76a governs public access to civil court records and presumes that such records are open to the public. This presumption of openness and the rule's specific procedural framework can give rise to flawed protective orders with unenforceable provisions regarding the sealing of documents. Although parties to a protective order often agree that certain documents must be filed under seal, and that such documents should be submitted to the court in an envelope indicating that the documents are "under seal," such an agreement may be meaningless in the absence of an appropriate court order under Rule 76a.[2]

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[1] For discussion of enforcement issues, s*ee infra*, Part II.

[2] Rule 76a(3) provides that:

> Court records may be sealed only upon a party's written motion, which shall be open to public inspection. The movant shall post a public notice at the place where notices for meetings of county governmental bodies are required to be posted, stating: that a hearing will be held in open court on a motion to seal court records in the specific case; that any person may intervene and be heard concerning the sealing of court records; the specific time and place of the hearing; the style and number of the case; a brief but specific description of both the nature of the case and the records which are sought to be sealed; and the identity of the movant. Immediately after posting such notice, the movant shall file a verified copy of the posted notice with the clerk of the court in which the case is pending and with the Clerk of the Supreme Court of Texas.

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