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Protective Orders for Corporate Privacy
Procedures and Practice Tips

by Casey Kaufman

All too often, zealous representation leads counsel to use legitimate litigation tools towards a corrupt end. A perfect example is the use of protective orders to safeguard corporate defendant privacy interests. We need to be educated and remain vigilant regarding these court orders that can have a far reaching impact on our cases. • The purpose of this article is to address the single situation where a defendant requests the protective order to grant defense counsel the discretion to apply privacy protection to documents, deposition transcript, and other information transmitted during discovery.

WHAT IS A PROTECTIVE ORDER?

In 1984, California adopted the Uniform Trade Secrets Act[1] which codified privacy protection for corporate entities and defined a "trade secret" as follows:

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[2]

The definition of trade secret is incredibly broad. During discovery, a corporate defendant will often utilize this breadth to object to requests for relevant information. A protective order is a court order, which allows a party to designate items as confidential at the time of production without the need for piecemeal court approval.[3] These orders are very common in product liability, trade secret, and other types of litigation where proprietary internal policies, designs, patents, user data, etc., are at issue.[4]

Usually, a protective order will have distinct sections that include:

Definition of confidentiality.

Identification of those who are allowed to review confidential documents.

Procedures for using confidential documents during the litigation and in court filings.

Procedures for returning documents at the end of the litigation.

How a designation of confidentiality can be challenged.

An attachment meant for experts, investigators, or others outside of the firm to sign to acknowledge they understand the scope of the protective order and will abide by the same.

An important resource to be aware of is the existence of standard protective orders issued by courts to streamline this process. One that I have used is the Model Protective Order for Standard Litigation created by the US District Court for the Northern District of California.[5] Using a court-created order may be helpful because it carries with it a fundamental element of fairness.

PROCEDURES FOR OBTAINING A PROTECTIVE ORDER

Protective orders may be created by stipulation or by motion practice. If done by stipulation the process is fairly simple. The parties work out the contents of the protective order and then submit it for the judge to sign.

If the protective order is a product of motion practice it can come about in one of several ways. If one were strictly following the Code of Civil Procedure, the party subject to discovery and seeking a protective order is required to "promptly" file a motion with the court including a declaration that the moving party attempted to meet and confer informally to resolve the matter.[6]

In my experience, courts have been very loose on the interpretation of the statutory framework and the term "promptly." Courts have entertained requests for protective orders after responses have been issued and within the context of an opposition to a motion to compel. In *Stadish v. Sup.Ct.* (1999) 71 Cal.App.4th 1130, 1144, the court properly granted a protective order to restrict "dissemination of documents" that were produced after the party waived its trade secret objection. It's advisable to be careful relying on the statutory framework as a procedural block to an opposing party obtaining a protective order.

PRACTICE TIPS FOR THE PROTECTIVE ORDER PROCESS

Just like any other litigation process which parties may conduct on their own, the negotiations of protective orders require attention to detail. Defense counsel will likely try to gain a litigation advantage piggybacked upon reasonable application of privacy protections. There are a few areas where particular attention should be made to avoid inadvertently giving the other party litigation advantage.

THE DESIGNATING PARTY MUST RETAIN THE BURDEN OF PROOF

The party seeking privacy protection carries the burden to establish the "extent and seriousness of the prospective invasion."[7] Every protective order should include a section which defines the procedure that a party shall follow to challenge the confidentiality of any particular document. Designating a document as confidential it makes it harder to use in the litigation, so it is essential the protective order permit a party to challenge confidentiality designations. Merely knowing that a designation can be challenged is often enough to keeps the parties honest.

Often a protective order proposed by defense counsel will outline the procedure whereby the party challenging the confidentiality designation may seek court intervention to justify the propriety of that designation at any time. On its face the procedure may seem fair, but in reality it shifts the burden of proving entitlement to privacy protection from the designating party to the receiving party needing to show that a particular document should not receive protection.

This point cannot be stressed enough. In almost every protective order, I have received from defense counsel, the provision for challenging confidentiality shifts the burden to the receiving/challenging party to show that the document(s) are not confidential. It is essential to require the party making the confidentiality designation to be the party that actually has the burden of proof moving forward. A good example of an appropriate challenging provision is contained in the Northern District of California standard protective order discussed above.

PROVISIONS FOR SHARING CONFIDENTIAL DOCUMENTS WITH OTHER ATTORNEYS

Fundamentally, a party seeks a protective order so that the documents cannot be shared with those outside of the case. Sophisticated entities that are common litigants may try to use the protective order process to provide different documents to different parties with the same claim. This is an unfair litigation advantage that is very difficult to identify given the protective order provisions.

One way to fight this is by including a sharing provision. The sharing provision allows attorneys to share confidential documents with other attorneys in similar litigation to compare and contrast documents produced in response to discovery. This concept of sharing is so important that there's a thriving nationwide organization of automotive defect attorneys which is dedicated to combatting this very issue through the inter-communication of law firms involved in those types of cases.

I request a sharing provision in every one of my protective order discussions. While some courts have recognized that sharing provisions are appropriate, not all courts will grant this request. It is certainly a hot topic among defense counsel — see "Protective Orders and Discovery Sharing: Beware of Plaintiffs Bearing Sharing Agreements"[8] or "Share with Caution: The Dangers Behind Sharing Orders."[9] An attorney should analyze the true need for a sharing provision in the litigation and potentially use it as a negotiating chip in order to get the truly important portions of a protective order via stipulation.

CONCLUSION

Protective orders are a necessary tool to efficient litigation of cases that require the disclosure of confidential information, but we must ensure they are not used in a way that puts our clients at a disadvantage. ◆

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[1]See Cal. Civ. Code §§3426-3426.11.

[2]Cal. Civ. Code §3426.1 (d)(1)-(2).

[3]Code Civ. Proc. §2031.060.

[4]Code Civ. Proc. §2031.060(b)(5).

[5]https://www.cand.uscourts.gov/forms/model-protective-orders/

[6]Code Civ. Proc. §§2016.040, 2031.060(a)

[7]*Williams v. Sup.Ct.* (2017) 3 Cal.5th 531, 557.

[8]82 Def. Couns. J. 453 (2015)

[9]65 Wayne L. Rev. 401 (2020)