COUNTERING SECRECY

By carefully taking a red pen to defense counsel's protective order, you can obtain discovery while pushing back against over-designation.

By || **Kevin Mahoney**

Thanks to the use of protective orders, secrecy pervades complex civil litigation. While permitted under Federal Rule of Civil Procedure 26(c), protective orders place severe restrictions on using and transmitting documents or testimony marked "confidential" by the producing party, usually the corporate defendant. The typical protective order requires that confidential material be filed under seal with the court, prohibits its use outside of the litigation, and requires it be destroyed or returned at the case's conclusion—a burdensome task in our electronic age. And these protective or "secrecy" orders are often enforceable in perpetuity.

Protective orders are frequently drafted by defense lawyers, who broadly define "confidential" in the agreement, granting themselves wide latitude to over-designate documents and restrict their use outside the case.[1] But while corporate defendants are the main culprits in protective order abuse, they have unwitting accomplices: plaintiffs.[2] In a rush to receive documents at the beginning of discovery, plaintiff lawyers too often sign whatever draft order their adversary insists be signed before they produce documents.[3] These proposals can contain terms that are enormously favorable to the defense but that may go unquestioned.

The "agreed to" secrecy agreement is then rubber-stamped by the trial judge.[4] Armed with a signed order written on their terms, defendants have free rein to over-designate documents, or even entire productions, as confidential. In *Binh Hoa Le v. Exeter Finance Corp.*, for example, the Fifth Circuit noted that 73% of the record before the court was sealed without any apparent objection.[5]

While there is no right of public access to discovery materials, over-designation undermines our public justice system. It inevitably leads to mass sealing of filed judicial records, which enjoy a "potent and fundamental presumptive right of public access that predates even the U.S. Constitution."[6] To seal a judicial record, a party must normally articulate "some significant interest" that "heavily" outweighs the public presumption of access.[7] Protective orders, however, only require "good cause" to enter and usually require sealing.[8] They therefore function as instruments to evade the more stringent sealing standard.[9]

Here, plaintiff counsel are again sometimes complicit. Even if they suspect a produced document that they want to file in court is not truly confidential, the busy plaintiff attorney may simply agree to a motion to seal to avoid time and expense litigating over issues ancillary to the merits. And in doing so they cite the protective order, which was granted by the busy court. This resignation only encourages more over-designation.

Over-designation is not a mere inconvenience—the abuse of secrecy orders hampers corporate accountability. From seat belts to cigarettes, civil justice has dramatically improved consumer safety by shining a light on corporate malfeasance and catalyzing regulatory change.[10] Secrecy orders undermine the power of this vital democratic mechanism by limiting the transmission of important safety information outside of a specific litigation. This delays or prevents corporate action and accountability.

Take just one example—in the early 2000s, many General Motors (GM) vehicles were plagued by faulty ignition switches that caused fatal crashes.[11] For years, rather than take proactive measures to save lives, GM tried to conceal the distribution of information related to the crashes through confidentiality agreements and sealed court records.[12] GM employed similar tactics in the 1980s when faulty fuel tanks caused cars to explode after collisions.[13] Virtually every corporate defendant uses the same playbook to this day.

Given the enormous public safety interest in open civil litigation, there is little justification for the ubiquitous sealing practices that are the norm in present day tort litigation. While broader structural changes are necessary to curb protective order abuse, there are several proactive measures plaintiff counsel can take *now* to combat over-designation.

Read the Contract

First, plaintiff counsel should carefully read the protective order the defendant is asking them to sign. Resist the understandable temptation to "skim and sign" a proposed order to hasten discovery. The protective order is a contract, and it will usually bind the litigants for life, preventing any future use or dissemination of protected material even after the case is resolved. Therefore, never agree to defense-drafted protective orders absent modifications that limit and punish over-designation.

While disputes over confidentiality do delay discovery, negotiating a narrow protective order will signal to the defendant that misuse of the order will not be tolerated. One effective way to do this is by precisely defining what constitutes "confidential" material under the order. In a suit against a business, for example, confidential material should be limited to those documents that, if publicly disclosed, will result in a concrete harm, such as trade secrets or financial information (not embarrassing emails). Narrow provisions in the order also will ultimately reduce the administrative burden associated with filing motions to seal and searching for and destroying produced documents at the end of a case.

In addition, take proactive measures to reduce delay in the production of discovery. Discuss protective orders before any initial case scheduling conference. If there is a disagreement over the scope of the order in the preconference meet and confer, be ready to present your proposed order to the court for a ruling at the conference.

Lawyers also should familiarize themselves with the venue's governing law and local rules before signing a protective order. State court systems are often more skeptical of secrecy orders than the federal courts. In Texas, for example, filed records may not be sealed absent a publicly noticed hearing and a written order from the court explaining the justification for the sealing.[14] Under Florida's Sunshine in Litigation Act, courts are barred from entering an "order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard."[15]

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In federal court, where protective orders are the norm, district courts often publish well-drafted model protective orders on their websites.[16] You should always compare these model orders against any order proposed by a defendant.

Three Essential Provisions

I recommend starting with the Northern District of California's model protective order.[17] This order contains three key provisions that you should ensure are included in your case's protective order, regardless of the venue.[18]

First, the model order combats over-sealing by specifying: the "Stipulated Protective Order does not entitle [parties] to file confidential information under seal."[19] Rather, to seal records under the model order, the parties must articulate the basis for sealing the specific material at issue on a document-by-document basis, in

accordance with the district's stringent sealing standards.[20] The fact that a document is designated as confidential is insufficient, by itself, to justify sealing. Rather, "a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law."[21]

Second, the model order has a dispute-resolution mechanism that, by design, discourages bad faith designations. In the typical defense-drafted protective order, the party contesting a confidentiality designation bears the burden of initiating motion practice. Such an arrangement encourages over-designation—defendants usually bet that plaintiff counsel will be too burdened with other tasks in the case and hesitant to bother a busy court with a document dispute. Indeed, the more documents a defendant designates as confidential, the more burdensome subsequent disputes over designation will be to address and adjudicate.[22]

A good protective order counteracts this perverse incentive by placing the burden of filing a motion over a disputed designation where it should be—on the designating party. Thus, under the Northern District of California's model order, an objecting party simply must write a letter identifying the basis for their objections over their adversaries' designations. If, after a meet and confer, no resolution is reached, the designating party must file a motion to preserve confidentiality within 21 days. If no motion is filed, the designating party automatically waives its confidentiality assertions.[23]

A similar provision had a remarkable effect in litigation against Monsanto over the weed killer Roundup in 2017.[24] In that case, Monsanto produced thousands of damaging documents, all designated as confidential, showing that Monsanto scientists knew for years about the dangers posed by glyphosate, a carcinogenic ingredient found in Roundup.[25] Contending that these documents were not in fact confidential, the plaintiffs served an objection letter under the entered protective order.

When the meet and confer was unsuccessful, a 30-day window under the order opened, requiring Monsanto to move to preserve the confidentiality protections placed on the documents or waive them.[26] Monsanto's lawyers never filed a motion, thereby waiving confidentiality. As a result, the now-public materials were added to the "Monsanto Papers," a collection of documents from the litigation that were published online by the plaintiff counsel and relied on by regulators around the world to reevaluate the safety of glyphosate.[27]

Finally, the Northern District of California's model order punishes over-designation, as any good protective order should. The order requires "restraint and care in designating material for protection" and warns that "mass, indiscriminate, or routinized designations are prohibited. Designations that are shown to be clearly unjustified or that have been made for an improper purpose . . . expose the Designating Party to sanctions."

Negotiating for the inclusion of such language deters over-designation by adding enforcement mechanisms to the governing order. It also signals to opposing counsel that you intend to take proactive measures to combat over-designation. That message will remain on the defense counsel's mind every time they take out their confidentiality stamp.

Protective orders add needless inefficiencies to complex litigation, hamper access to our public judicial system, and prevent the transmission of critical safety information to consumers. While these unfortunate effects justify broad change in the form of rule amendments or legislation, the most immediately effective method is to combat this in the court's adversarial system.[28]

Plaintiffs, not the courts or Congress, are on the frontlines of protective-order disputes. And plaintiff lawyers must take proactive measures to combat over-designation with one of the most powerful tools in their arsenal: the red pen.

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Notes

1. *See* Lori E. Andrus, *Fighting Protective and Secrecy Orders*, Plaintiff Mag., Aug. 2014, https://plaintiffmagazine.com/recent-issues/item/fighting-protective-and-secrecy-orders-2.
2. *See id.* ("All too often, plaintiffs' lawyers agree to sweeping blanket protective orders that are not in their clients' best interest.").
3. *See, e.g.*, *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) ("The secrecy is consensual, and neither party frets that 73 percent of the record is sealed.").
4. *See generally* Seth Katsuyo Endo, *Contracting for Confidential Discovery*, 53 U.C. Davis L. Rev. 1249, 1254 (2020) (discussing lack of judicial scrutiny of agreed protective orders).
5. 990 F.3d at 417.
6. *Mirlis v. Greer*, 952 F.3d 51, 58 (2d Cir. 2020). Not all filed materials are considered judicial records, however. The record must at least play some role in an "adjudicatory function." *See United States v. El-Sayegh*, 131 F.3d 158, 163 (D.C. Cir. 1997).
7. *See, e.g.*, *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1241 (10th Cir. 2012).
8. Fed. R. Civ. P. 26(c)(1).
9. *See* Endo, *supra* note 4, at 54 (observing that reviewed protective orders "often conflated the standard for filing under seal with the lesser standard for keeping unfiled discovery confidential").
10. *See* Phil Hirschkorn, *Q&A: Ralph Nader on Civil Litigation, Tort Reform and His New*

Museum, PBS, Dec. 19, 2015, https://www.pbs.org/newshour/nation/qa-ralph-nader-on-civil-litigation-tort-reform-and-his-new-museum.

11. The Editorial Bd., *Secrecy That Kills*, N.Y. Times, May 31, 2014, https://www.nytimes.com/2014/06/01/opinion/sunday/secrecy-that-kills.html; *see also* Dustin Benham, *Foundational and Contemporary Court Confidentiality*, 86 Mo. L. Rev. 211, 222 (2021) ("Sadly, GM knew of the defect for years, but failed to timely recall the vehicles or adequately disclose the issue to regulators. All the while, litigation involving the ignition defect continued in courts around the country.").
12. Benham, *supra* note 11, at 222.
13. *See* Elsa Walsh & Benjamin Weiser, *Court Secrecy Masks Safety Issues*, Wash. Post, Oct. 23, 1988, https://www.washingtonpost.com/archive/politics/1988/10/23/court-secrecy-masks-safety-issues/09db3810-feb8-4d5e-8d97-69871e384475/.
14. Hon. Craig Smith & Tom Melsheimer, *Open Courts: The Role of Rule 76a in Our Civil Justice System*, 80 Texas Bar J. 355, June 2017, https://www.texasbar.com/AM/Template.cfm?Template=/CM/ContentDisplay.cfm&ContentID=36921.
15. Fla. Stat. §69.081(3) (2023).
16. *See, e.g.*, *Confidentiality and Protective Order*, W.D. Tex., https://www.txwd.uscourts.gov/wp-content/uploads/Forms/Civil/Western%20District%20of%20Texas%20Protective%20Order.pdf; *Stipulated Protective Order*, D. Haw., https://www.hid.uscourts.gov/reqrmts/MJ/FormStipulatedProtectiveOrder.pdf.
17. *Model Stipulated Protective Order (for standard litigation)*, N.D. Cal., https://www.cand.uscourts.gov/wp-content/uploads/forms/model-protective-orders/CAND_StandardProtOrd.Feb2022.pdf.
18. *Id.*
19. *Id.* ¶ 1, 1.
20. *Id.* ¶ 6.3, 6.
21. *Id.* ¶ 12.3, 10.
22. *See, e.g.*, *Hall v. Hartzell Engine Techs., LLC*, 2020 WL 5545121, at *2 (M.D. Tenn., Sept. 15, 2020) ("[I]ndiscriminate designation improperly shifts the burden of applying the protective order to Plaintiffs, who must evaluate each document and determine if the confidentiality designation should be challenged . . . Moreover, were Plaintiffs to faithfully apply the protective order's terms to Defendant's production, the Court would bear the burden of reviewing a slew of needless and likely meritless motions to seal.").
23. *Model Stipulated Protective Order*, *supra* note 17, at ¶ 6.3, 6.
24. Protective and Confidentiality Order, *In re Roundup Prods. Liab. Litig.*, 2023 WL 2723334 (N.D. Cal. Dec. 9, 2016), www.wisnerbaum.com/documents/2-Protective-Order.pdf.
25. *Monsanto Papers: Secret Documents*, Wisner Baum, https://www.wisnerbaum.com/toxic-tort-law/monsanto-roundup-lawsuit/monsanto-papers/.
26. Letter From Baum Hedlund Aristei Goldman P.C. to Hollingsworth LLP (June 20, 2017), https://www.wisnerbaum.com/documents/1-Roundup-Plaintiffs-Letter-re-Confidentiality.pdf.
27. Wisner Baum, *supra* note 25.
28. *See* Endo, *supra* note 4, at 1298 (discussing legislative solutions to protective order abuse).