

Lawyer Insights

December 18, 2015

The Kimono Is Open: Strategically Blocking the View

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Published in *Inside Counsel*



Obviously your company does not post its confidential research and development memos to its website. Instead, it takes steps to protect commercially sensitive information from public disclosure. As a result, litigation discovery can feel like being forced to open the kimono and expose the company's most valuable assets.

Fortunately, the mutual desire to protect their own business information generally makes corporate litigants amenable to an agreed confidentiality order. A typical confidentiality order allows each party to limit to whom information can be disclosed in the discovery process by designating documents or testimony as confidential. The usual order provides that, if an opposing party wants to file designated information, it must move the court to keep the information under seal. The burden and cost of justifying that designation, however, remains on the designating party.

With a confidentiality order in place, the initial tendency may be to take a broad view of what information should be designated for protection. After all, information that consists of internal communications and analyses related to the company's business can be considered commercially sensitive. Even if some information is not purely business related, litigants want to take every available measure to limit the amount of sensitive or embarrassing information that becomes public. Although this approach may have benefits, base your confidentiality-designation strategy on an informed consideration of relevant factors, including the ultimate protectability of the information, the cost of designation, and the probability of disclosure.

Will a court agree to protect the information?

A typical confidentiality order requires only that an opposing party request that designated information be kept under seal; it does not require the court to grant the request. When deciding whether to seal information from public disclosure, the court balances your company's interest in protecting its information against the public's interest in access to court proceedings and judicial documents. A thumb sits on the scales on the side of the public's interest. As a result, the court likely will take a narrower view than your company of what should be kept from public disclosure. The court almost certainly will grant a request to seal a document that contains a valuable trade secret because public disclosure would eliminate the trade secret. On the other hand, the court almost certainly will not grant the same request for an email chain that reveals an embarrassing office romance because the email is unlikely to be commercially sensitive. What about an employee's profanity-laced email venting frustrations about your customer? Unless it contains sensitive commercial information about the customer, the court most likely will not grant the request, even though disclosure may have real commercial consequences for the company.

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How are costs affected?

Also consider that the process for requesting that documents be filed under seal varies among jurisdictions. Those processes can be tedious and time-consuming, and the opposing party often will seek to have the designation removed before requesting that the document be filed under seal. The discussions regarding removal of designations prior to filing require effort by counsel and cost to both parties. Limiting confidentiality designations only to those documents that contain truly commercially sensitive information can reduce these costs.

Speaking of costs, it's no secret that document production is a major litigation cost due to the explosion of electronically stored information. Reviewing your own documents for relevance, confidentiality, and privilege prior to production drives that cost. Although the reviewing attorney typically reviews a document for all three characteristics during a single pass, removing one characteristic—confidentiality—from the decision matrix can save time on each document. Even if the time saved on a single document is minor, it can add up quickly over tens of thousands, or even hundreds of thousands, of documents. This is not to suggest that you should abandon designation of documents under a confidentiality order altogether. The financial losses associated with the loss of a single trade secret or divulgence of the company's market strategy could eclipse the cost savings associated with such an approach. Instead, consider whether the confidentiality review of certain document groups can be avoided. For example, consider how likely documents in the possession of certain individuals or older documents are to contain commercially sensitive information. It may be that thousands of daily reports in the possession of an hourly supervisor from 10 years ago safely can be excluded from a confidentiality review, whereas monthly reports compiled by the vice president of research over the last year cannot.

What is the probability of use?

Further, keep in mind that, in a case with hundreds of thousands of documents, fewer than 1,000 likely will be used during depositions. Even fewer will be filed with the court, and fewer than 200 likely will be used at trial (usually a subset of those used in depositions or previously filed). Consequently, most documents never see the light of day. So consider whether a limited confidentiality review with a provision in your confidentiality order for a "claw back" of inadvertently disclosed commercially sensitive information is a viable option. Such a provision operates to permit a re-designation of information as confidential if it is inadvertently disclosed. The ability to claw back inadvertently disclosed privileged information or trial preparation materials is built into the Federal Rules of Civil Procedure, but this concept needs to be included specifically in a confidentiality order to apply to information that is confidential but not privileged or work product. Under all circumstances, it's a good idea to include a claw-back provision for inadvertently disclosed confidential information. Let's face it, documents do sometimes slip through the designation process during review.

Finally, what do you do about the profanity-laced email about a customer? You educate company employees that emails and other written communications are not confidential in the context of litigation except in very limited circumstances and then frequently remind them to treat all written communications, including emails, as if they will be read aloud in a courtroom.