

## Trial Techniques Special Feature

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# Essential practice tips for drafting confidentiality stipulations



By Jeffrey M. Rosin

In many litigations, the parties agree to a “stipulated protective order” at the outset of discovery, which is designed to protect against the disclosure to the public

of proprietary and confidential information of a party to the lawsuit (or third party subpoenaed to produce information in the suit).

Often, these stipulated protective orders have two tiers of confidentiality. They protect against (i) the disclosure of general “confidential” information to the public, and (ii)

the disclosure of “highly confidential” information to parties in the lawsuit. The latter category is often labeled “attorneys’ eyes only,” because only lawyers to the lawsuit are entitled to see the information.

When filed with the court, these stipulated protective orders operate as discovery orders of the court. See *On Command Video Corp. v. Lodgenet Entm’t Corp.*, 976 F. Supp. 917, 921 (N.D. Cal. 1997) (“A protective order is a discovery order subject to the provisions of Rule 37.”) (citing *Westinghouse Elec. v. Newman & Holtzinger, P.C.*, 922 F.2d 932, 935 (9th Cir. 1993)).

But do these stipulations — these court orders — hold up when a party who receives confidential or highly confidential information wants to escape its stipulation and further use or disclose that information?

If properly drafted, the answer is yes. There are a few key ways to help ensure that confidential information disclosed pursuant to a confidentiality stipulation receives maximum protection.

First, on a basic level, the terms “confidential” and/or “highly confidential” should be defined broadly. It should be clear from the definitions of these terms that the intent of the parties is to err on the side of protection.

Further, there should be a limited amount of time for the receiving party to object to the disclosing party’s confidentiality designations. This way, even if the disclosing party has been over-inclusive in its designations of confidential material, the receiving party who “sits on its rights” will face contractual barriers to challenging the designations.

Next, the parties should agree not to use confidential or highly confidential discovery for any purpose other than litigating the action that exists between them at the time the stipulated protective order is signed (“use-limiting” language).

Indeed, in high-stakes business disputes, creative parties and their aggressive counsel may believe that confidential discovery they received in such litigation gives rise to additional claims against their adversary, which they may seek to assert in an alternative forum (“spin-off” litigation). Without use-limiting language, a party may disclose its confidential information to its adversary, only to


find that its adversary uses that information to assert new claims against it.

Third, and to ensure that the use-limiting language is enforceable, a party should be clear in its stipulated protective order that its purpose is to prevent spin-off litigation. That is, a party’s willingness to share confidential information without raising discovery objections and, thereby creating disputes, is in exchange for the other party agreeing to give up any additional claims it might assert in an alternative forum using such confidential information.

Caselaw has shown that where such a purpose in a protective order is clear, use-limiting language is more likely to be enforced. See *Wolters Kluwer Financial Services Inc. v. Scivantage*, 2007 WL 1498114 (S.D.N.Y. May 23, 2007). Indeed, in one case, the court specifically rejected the argument that enforcing such stipulation would effectively “immunize” the defendant from a supposed valid second lawsuit. See *On Command Video Corp.*, 976 F. Supp. at 921-22.

In contrast, parties have run into a problem where the purpose of their confidentiality stipulation is not stated so clearly.

For example, in *Go-Video v. Motion Picture Assn. of America (In re Dual-Deck Video Cassette Recorder Antitrust Litig.)*, 10 F.3d 693, 695 (9th Cir. 1993), the parties’ stipulated protective order contained use-limiting language, but it was not clear that its purpose was anything more than to keep confidential information from the public. Thus, since a new suit using confidential information was commenced under seal, the court found a mere “technical violation” of the use-limiting language in the parties’ protective order.

In short, with broad definitions of confidentiality, a limited time frame to object to confidentiality designations, and use-limiting language accompanied by a clearly stated purpose to preclude spin-off litigation, a party’s stipulated protective order has a greater chance of doing what it is supposed to: protect. 

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