

Protective Orders: Does Yours Cover All the Bases?

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Protective orders are used in litigation to protect a party's propriety or confidential information from being disclosed to the public. Often, parties agree on the terms of the order and submit a stipulated protective order for entry by the court. It is unlikely that you or your opponent prepare a new protective order each time one is needed. Instead, attorneys often work from a form that has been used in the past. This is efficient, but runs the risk of missing key provisions or not complying with the court's local rules. Before relying on a previously drafted protective order, make sure it addresses the following key issues:

What material is protected? Unless the potentially discoverable material is already known and limited in volume, a protective order will not identify specified documents being protected. Instead, the order will identify categories of confidential or proprietary information which, if disclosed, would adversely affect a party's competitive position or business operations. The protective order should be as specific as possible regarding the categories of confidential material protected and the injury that will occur if disclosed. Even if the parties agree to the form of the order, federal and Wisconsin state courts must independently conclude that "good cause" exists for the order. Therefore, the motion to the court must contain specific facts demonstrating good cause.

Who is entitled to review? Material designated "confidential" should be reviewable by the parties, their attorneys (including staff), employees assisting in the litigation, experts (consulting and retained), witnesses who previously had access to the material, court reporters, court personnel, and others who agree to be bound by the order. If the parties contemplate production of highly confidential material, the order should include a second tier of confidentiality for information designated "attorneys' eyes only."

How is a designation challenged? All documents designated "confidential" should be deemed confidential absent a challenge in writing within a specified number of days. The designating party then must respond to the objection within a specific number of days. Courts in the Seventh Circuit require the protective order to state that any interested member of the public may challenge the confidential nature of any document.

What happens to inadvertently produced documents? The order should state that inadvertent production of confidential documents not marked "confidential" will not be deemed a waiver and should identify a number of days after

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discovery of mistaken disclosure within which the producing party may give notice of the disclosure. The receiving parties then should return or certify destruction of the document and its copies within a specified number of days.

What about filing under seal? The designation of a document as confidential under the terms of a protective order does not necessarily mean it will remain confidential if filed with the court. To protect a document filed with the court from public view, it must be filed under seal. Some courts will enter a protective order that permits protected documents to be filed under seal without a separate motion. Other courts will not. Courts in the latter camp, like the Eastern District of Wisconsin, require a separate motion showing that good cause exists to seal a document. Good cause to seal is a higher burden than good cause to enter a protective order. Check your court's local rules and the judge's guidelines with regard to filing under seal prior to preparing the protective order.

What happens when the case is over? The protective order should address what happens to confidential material after the case is resolved. It is common for a protective order to require confidential material to be returned or destroyed. In some cases, identifying and returning or destroying confidential material is easy. In most cases, however, confidential material is intermingled with non-confidential material, creating a time-consuming and expensive endeavor to comply with the order. Consider including in the protective order (or amending an order already entered to include) an option to maintain confidential material indefinitely in accordance with the terms of the order. The protective order should set forth the court's continuing jurisdiction and penalties for non-compliance.

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