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What You Should (and Shouldn't) Agree To In Agreed Protective Orders

by Brenda M. Johnson

Corporate defendants routinely ask plaintiffs' attorneys to enter into agreed protective orders before complying with discovery requests. It can be tempting, both to plaintiffs' counsel and to the court, to simply sign off on these orders just to get things moving. However, an overly broad protective order that gives too much power to the producing party, and does not accurately spell out the respective duties of the parties under the order, can create more problems than it solves, and can lead to burdensome and unnecessary problems in the course of litigation. Before agreeing to a proposed protective order plaintiffs' counsel *and* the trial court should carefully consider whether the order is necessary in the first place, and whether defendant's proposed terms and conditions are actually justified.

An agreed protective order should track Rule 26(C)

Defense attorneys often propose protective orders that define confidentiality broadly, and give the producing party (namely, the defendant) a great deal of latitude in deciding what can be designated as confidential. Do not let this go unchallenged.

A trial court's power to enter a protective order is circumscribed by Rule 26(C), even when the parties are willing to agree to broader constraints on disclosure.¹ As one court put it, "[a] judge cannot delegate the determination of whether there is 'good cause' to the lawyers in the case."²

Thus, even if the parties are willing to stipulate to an order that exceeds the scope of the rule, the trial court still has an obligation to make its own independent determination as to whether "good cause" exists to enter the order, and whether the proposed nondisclosure categories are, in fact, authorized by Rule 26(C).³

Based on this, federal courts have denied joint motions for protective orders that exceed the scope of Rule 26. In *Maxchief Invests., Ltd. v. Plastic Dev. Group, LLC*,⁴ for instance, Judge Thomas W. Phillips of the Eastern District of Tennessee recently denied a joint motion for a blanket protective order when the parties made no effort to show there was good cause for the order, and the categories of protected materials were far broader than any Rule 26(c) category.⁵

Judge Phillips was highly critical of the parties' three-sentence motion, which made no effort whatsoever to satisfy the good cause requirement. As Judge Phillips noted,

when parties agree to a blanket protective order, do not show—*specifically*—that the documents subject to the protective order will contain sensitive information whose disclosure will cause harm, and retain the right to decide which of these documents they will exclude from discovery, then they abuse Rule 26(c) by converting to their own use the inherent discretion that belongs to the Court. This scenario describes what the parties have done here.⁶

He also criticized the scope and imprecision of the proposed order, which “cast the widest of nets, seeking to protect ‘any document, information or other thing’ that, in [the parties’] judgment, they ‘deem[]’ to be confidential or highly confidential.”⁷ Notably, Judge Phillips criticized the use of the term “not limited to” in defining potentially confidential materials, as it could allow the parties to “keep practically any item off limits” to disclosure.⁸

Likewise, in *Solar X Eyewear, LLC v. Bowyer*,⁹ Judge James Gwin of the Northern District of Ohio denied a joint motion for protective order when the parties failed to make an adequate showing of good cause, and the proposed order was overly broad. Like Judge Phillips (who would later rely on Judge Gwin’s opinion), Judge Gwin was critical of the fact that the proposed protective order was “so broad and speculative as to defy any credible assertion of particularized injury” as required under Rule 26(c).¹⁰ He was particularly critical of the fact that the proposed order would have extended to information that “may” qualify as a trade secret, or “could” harm a party’s business interests.¹¹

What’s it take to show good cause?

These opinions, as well as the case law on which they rely, are a good foundation from which to challenge overbroad and imprecise language. But what kind of language should you insist on? Here, both Ohio and federal case law offer guidance.

Good cause is a fact-specific issue, but there’s one point where the courts agree – simply claiming the information is confidential isn’t enough.¹²

To satisfy Rule 26(C), the party seeking protection “must articulate specific facts showing ‘clearly defined and serious

injury’” that would result if the documents or information were disclosed.¹³ It’s not enough for a defendant to claim general injury to reputation, especially if it’s a business enterprise.¹⁴ Instead, a business enterprise must make a “particularized” showing of pecuniary or economic harm that would result from disclosure.¹⁵

Thus, in place of broad and imprecise terms such as “including, but not limited to,” “may,” or “could,” a protective order should be limited to documents or information that, if disclosed, “**will** work a **clearly defined injury** to the requesting party’s business.”¹⁶ Ohio courts have adopted and applied this standard, expressly stating that “any lesser standard would be insufficient and would compromise our system of justice.”¹⁷ You should insist on language that tracks this standard.

Make sure the burden of showing “good cause” stays with the designating party

To avoid confusion later, any proposed agreed confidentiality order should also spell out what the case law already says, which is that confidentiality designations must be made in good faith, and that “the party claiming confidentiality bears the burden of proving that the purportedly confidential documents are, indeed, confidential, as defined in the governing confidentiality order.”¹⁸

A confidentiality designation “should be viewed as equivalent to a motion for protective order” under Rule 26(C), subject to the same requirements, and subject to the same risk of sanctions under Rule 37 if made without good cause.¹⁹ In the context of agreed protective orders, good faith requires “a document-by-document or very narrowly drawn category-by-category assessment” in making initial confidentiality designations.²⁰ Language that emphasizes the designating party’s

initial duty to act in good faith, combined with language that expressly places the burden of defending confidentiality designations on the party claiming confidentiality, should be a standard part of any agreed order.

The order should acknowledge that different standards apply when it comes to filing documents under seal

Confidentiality in discovery is one thing, but when it comes to filing documents with the court, other considerations arise. Unlike discovery materials, there is a strong presumption that the public will have access to materials filed with the court – especially if they are part of a dispositive record or are used at trial.²¹ “Good cause” under Rule 26(c) is not enough to defeat this presumption, which can only be defeated for “the most compelling reasons.”²²

The standard for confidentiality at the discovery phase doesn’t address these issues. To avoid confusion and delay as your case proceeds, you should make sure that any agreed protective order includes a separate provision acknowledging that the order does not extend to materials filed with the court or used at trial. It should also provide a procedure for filing documents or information under seal that won’t delay your case preparation or impose unnecessary burdens. One possibility, for instance, would be to include a provision that would allow you to file confidential materials under seal on a provisional basis, while setting a deadline for the defendant to file a motion with the court explaining why confidentiality should be preserved.²³

Conclusion

An agreed protective order shouldn’t impose unnecessary burdens on plaintiffs or the court – and it doesn’t have to. There’s no reason that you, or

the trial court, should have to accept confidentiality terms that aren't supported by law, and aren't necessary to protect a defendant's legitimate concerns. ■

End Notes

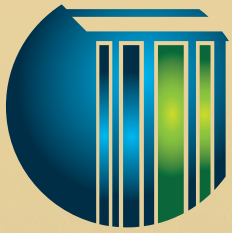
1. See, e.g., *Jepson, Inc. v. Makita Elec. Works*, 30 F.3d 854, 858 (7th Cir. 1994) and cases cited therein.
2. *Certain Underwriters at Lloyd's v. United States*, No. 2:08-cv-481, 2010 U.S. Dist. LEXIS 81484 at *2, 2010 WL 2683124 (S.D. Ohio July 1, 2010) (citing *Citizens First Nat. Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999)).
3. *Jepson* at 858.
4. No. 3:16-cv-63, 2017 U.S. Dist. LEXIS 24307, 2017 WL 710956 (E.D. Tenn. Feb. 22, 2017).
5. *Id.* at *11-*12.
6. *Id.* at *11.
7. *Id.* at *11.
8. *Id.* at *12.
9. No. 1:11-cv-763, 2011 U.S. Dist. LEXIS 100421, 2011 WL 3921615 (N.D. Ohio Sept. 7, 2011).
10. *Id.* at *6.
11. *Id.* at *6.
12. *Eberhard Architects, LLC v. Schotenstein, Zox & Dunn Co.*, 8th Dist. Cuyahoga No. 99687, 2013-Ohio-5319 at ¶14; see also *Ro-Mai Indus. v. Manning Props.*, 11th Dist. Portage No. 2009-P-006, 2010-Ohio-2290 at ¶ 28.
13. *Kline v. Mortg. Elec. Sec. Sys.*, No. 3:08-cv-408, 2014 U.S. Dist. LEXIS 141027 at * 14, 2014 WL 6617263 (S.D. Ohio Oct. 1, 2014); see also *Eberhard*, supra at ¶ 14; *Hope Acad. Broadway Campus v. White Hat Mgmt.*, 10th Dist. Franklin No. 12AP-116, 2013-Ohio-911 at ¶¶ 29, 31; *Koval v. Gen. Motors Corp.*, 62 Ohio Misc.2d 694, 697 (Cuyahoga C.P. 1990).
14. See, e.g., *Glenmeade Trust Co. v. Thompson*, 56 F.3d 476, 484 (3d Cir. 1995); *Wauchob v Domino's Pizza, Inc.*, 138 F.R.D. 539, 546 (N.D. Ind. 1991).
15. See *Glenmeade Trust*, supra; see also *Cook Inc. v. Boston Scientific Corp.*, 206 F.R.D. 244, 247-248 (S.D. Ind. 2001) ("Proponents of protective orders must make particularized showings of the competitive harm likely to result from the disclosure of protected information.").
16. *Koval v. Gen. Motors Corp.*, 62 Ohio Misc.2d 694, 697 (Cuyahoga C.P. 1990).
17. *Id.* at 697. *Koval* has been followed by other Ohio courts, most notably the First and Tenth District Courts of Appeals. See *Byrd v. U.S. Xpress, Inc.*, 1st Dist. No. C-140260, 2014-Ohio-5733 (citing *Koval*); *Hope Acad. Broadway Campus v. White Hat Mgmt.*, 10th Dist. Franklin No. 12AP-116, 2013-Ohio-911 (same).
18. *Gross v. Morgan State Univ.*, No. JKB-17-448, 2018 U.S. Dist. LEXIS 21411, at *9 (D. Md. Feb. 9, 2018) (quoting *Flo Pac. LLC v. NuTech, LLC*, No. WDQ-09-510, 2011 U.S. Dist. LEXIS 163147, 2011 WL 13214114 at *2 (D. Md. Apr. 12, 2011)).
19. See David M. Herr, MANUAL FOR COMPLEX LITIGATION, § 11.432, n. 134 (4th ed. 2017) (commenting on burden).
20. *Gross v. Morgan State*, supra, at *9-*10.
21. See, e.g., *Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978); *Poliquin v. Garden Way*, 989 F.2d 527, 533 (1st Cir. 1993).
22. *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 70 (1st Cir. 2011).
23. See Lori E. Andrus, *Fighting protective and secrecy orders, Sunshine is the best disinfectant*, Plaintiff Magazine, Aug. 2014 (<https://www.plaintiffmagazine.com/recent-issues/item/fighting-protective-and-secrecy-orders-2> (last accessed Apr. 25, 2019)).

Editor's Note

As we finalize this issue of the *CATA News*, we invite you to start thinking of articles to submit for the Winter 2019 - 2020 issue. If you don't have time to write one yourself, but have a topic in mind, please let us know and we'll see if we can find a volunteer. We would also like to see more of our members represented in the Beyond the Practice section. So please send us your "good deeds" and "community activities" for inclusion in the next issue. Finally, please submit your Verdicts & Settlements to us year-round and we will stockpile them for future issues.

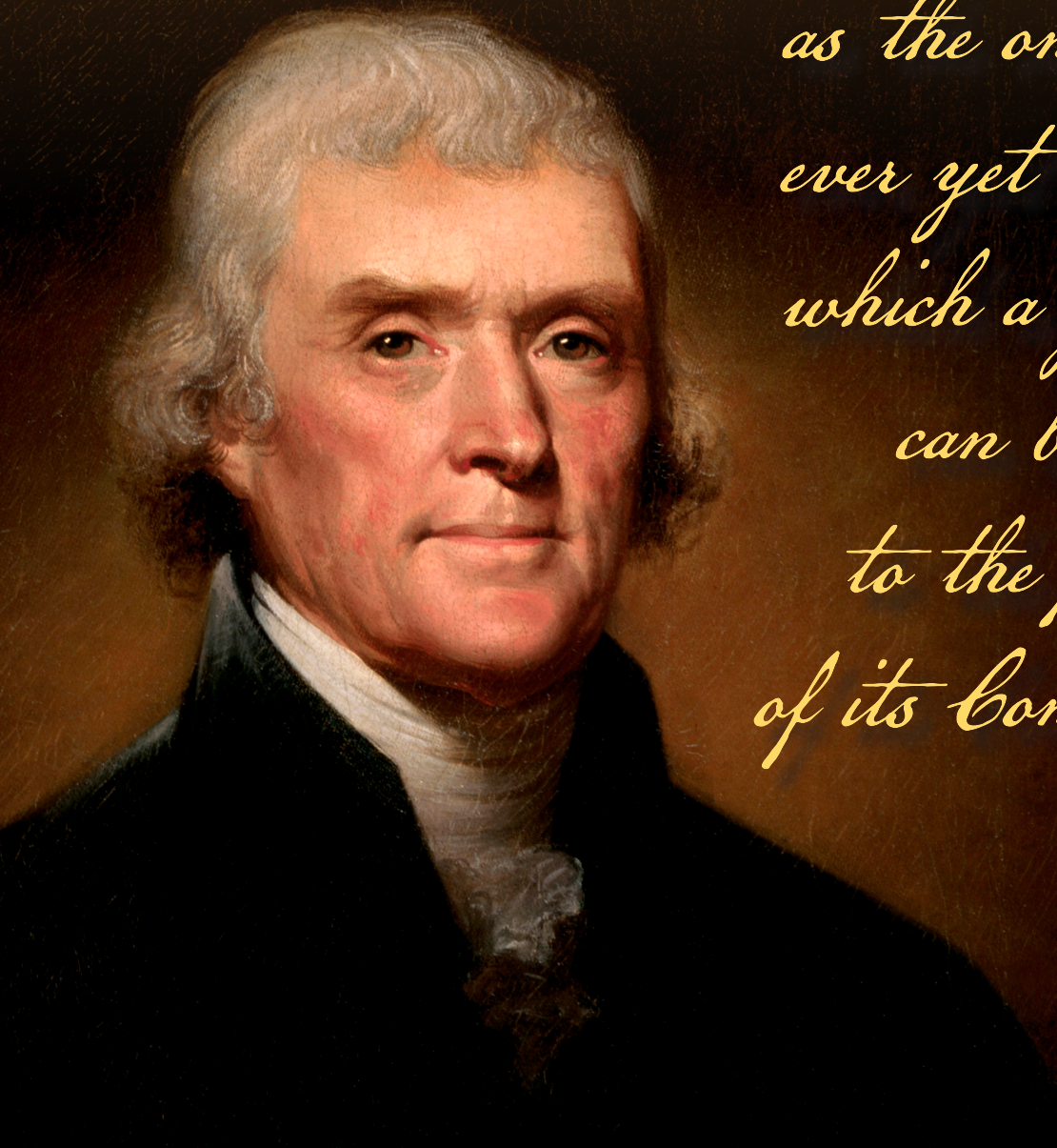
From everyone at the *CATA News*, we hope you enjoy this issue!

Kathleen J. St. John, Editor



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News



*"I consider trial by jury
as the only anchor
ever yet imagined by
which a government
can be held
to the principles
of its Constitution."*

- Thomas Jefferson

President's Message: Right To Trial By Jury Under The Seventh Amendment *p.2*

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