

Protective Orders in Products Liability Litigation

Use of Protective Orders in Products Liability Litigation to Safeguard Confidential Documents

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You have the feeling of being between a rock and a hard place. You are one of three attorneys representing a plaintiff with serious injuries from an allegedly defective product. You are in discovery, and the product manufacturer refuses to produce certain documents without a protective order. Your fellow attorneys have asked you to work out the terms of the protective order, but they are not making it easy. One of them simply wants you to agree to whatever is necessary in order to get the documents needed for your case, while the other has urged you to take a hard line in negotiating the terms of the protective order, and to only agree to what is required under the rules. What do you do?

1. Legal Background.

In general, parties to litigation may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense in the action. *See* ORCP 36B(1); FRCP 26(b)(1). With regard to confidential documents and information, ORCP 36C(7) and FRCP 26(c)(7) allow a party to move to protect "trade secret or other confidential research, development, or other commercial information."^[1]

In federal court, the case which provides the most guidance in the Ninth Circuit is Foltz v. State Farm Mutual Automobile Insurance Company, 331 F.3d 1122, (9th Cir. 2003). Under Foltz, prior to entry of any protective order, a party is required to make a good cause showing that, *for each document it seeks to protect*, a specific injury or harm will result if no protective order is granted. *Id.* at 1131. The burden is on the party requesting the protective order to demonstrate that: (1) the material in question is a trade secret or other confidential information within the scope of Rule 26(c); and (2) that disclosure would cause an identifiable, significant harm. *Id.* at 1132. Broad allegations of harm, unsubstantiated by specific examples or articulated reasons, do not satisfy the test. *See* Beckman Industries, Inc. v. International Ins. Co., 966 F.2d 470, 476 (9th Cir. 1992).

In State Court, the appellate law is not as helpful in providing guidance. Generally, the scope of discovery is very broad and the restrictions imposed upon it are directed chiefly at the use of, rather than the acquisition of, the information discovered. Vaughn v. Taylor, 79 Or. App. 359, 364-65, 718 P.2d 1387, *rev. den.* 301 Or. 445 (1986). Although the granting or denial of a protective order is discretionary with the trial court, Farmers Ins. v. Hansen, 46 Or. App. 377, 611 P.2d 696 (1980), showing "good cause" is not an idle phrase, and in the context of the discovery statutes means a substantial reason - one that affords

a legal excuse. *See State v. Pettit*, 66 Or. App. 575, 578, 675 P.2d 183, 185 (1984). In addition, because ORCP 36C is almost identical to Rule 26(c) of the Federal Rules of Civil Procedure, federal court decisions which have applied the federal rule are instructive in applying the Oregon rule. *Carton v. Shisler*, 146 Or. App. 513, 516, n. 3, 934 P.2d 448, 450, n.3 (1997); *Vaughan v. Taylor*, *supra*, 79 Or. App. at 363, n.3.

Irrespective of the need for a good cause showing, for a variety of reasons litigants often stipulate to protective orders. In this regard, the following issues should be considered when contemplating or negotiating a protective order in a products liability case.

2. **Preliminary Question: Do you want the Court involved in crafting the agreement?**

There are many factors to be considered when deciding whether to agree to a stipulated protective order. These include the facts of each case, the flexibility of the parties, the level of trust and cooperation between the parties and counsel, the importance and sensitivity of the information sought, and whether the action is in state or federal court. The preferences of the particular judge also influence this decision. What type of protective order does that judge usually grant? Does the judge favor expansive protective orders or narrow ones? Does she or he require a party to make a good cause showing as to the particular documents to be protected, only as to general categories of documents, or no substantial showing at all? Will the judge require evidence of some harm that will result if the protective order is not issued, or will representations of counsel in briefings suffice? And what is the judge's position on attorney sharing and return of documents?

3. **The Nitty Gritty: What issues should the protective order address?**

Whether negotiated by the parties or ordered by the court, many if not all of the following issues often must be resolved before a protective order is complete. For reasons of efficiency and control of the litigation, it is desirable for the parties to reach an agreement on as many of these issues as possible before seeking a ruling from the court.

The Scope of the Protective Order.

Parties must decide whether to limit the order to specific documents or categories of documents, or to allow any document to be designated as protected with some type of provision to challenge this designation later. The order may need to address not only the confidentiality of protected documents themselves, but also information and documents generated from confidential material. This would include such work product as attorney notes and summaries. The order should also address who the protected documents can be shared with. This could include clients, attorney staff, experts, the court, mediators, court reporters, deponents, witnesses in preparation for deposition or trial, and attorneys handling similar cases. The issue of sharing with outside attorneys is discussed in more detail later in this article.

The protective order should also address whether it will apply at the time of trial. Since a different set of public policy concerns and case law applies to the extent to which trials should be public, the parties may want to consider adding a provision to the effect that:

"This Order shall not apply to the disclosure of protected documents or the information contained therein at the time of trial through the receipt of documents produced pursuant to this Order into evidence or through the testimony of witnesses. These issues may be taken up as a separate matter upon the motion of any party, who shall not be prejudiced in any such motion by any of the provisions of this Order."

Maintaining Confidentiality

Once the parties decide who the documents can be shared with, the next step is to determine what further protections are needed to insure confidentiality. Some parties insist that anyone who will have access to the documents must sign the protective order, which can be burdensome and difficult to manage, while others rely on the attorneys to ensure that those involved in the litigation understand the requirements of the protective order and that confidentiality is maintained.

Generally experts and attorneys handling other similar cases are asked to agree to be bound by the terms and conditions of the protective order before being allowed access to any documents. The parties must decide whether this agreement must be in writing and whether the parties should be informed of the identify of the experts and attorneys with whom documents are shared. Since identifying experts prior to trial in state court, and prior to the disclosure dates in federal court, gives the other side a litigation advantage, the protective orders we have agreed to require the attorneys to maintain a list of the experts to whom documents are disclosed and allow the adverse party to seek disclosure of this list upon a showing of good cause. With regard to sharing with other attorneys who are prosecuting similar cases, there are policy arguments both ways as to whether disclosure should be allowed. When attorney sharing is agreed to, most protective orders we have entered into treat them the same as experts.

Finally, there needs to be some mechanism to protect confidential documents and information contained in motions and exhibits filed with the court. Protective orders typically require confidential documents to be filed under seal. A sample provision to accomplish this is:

"In the event that any protected document or the information contained therein is included with, or the contents thereof are in any way disclosed, in any pleading, motion or other paper filed with the Clerk of any Court, such protected documents and/or information shall be filed under seal and it shall be kept under seal by the Clerk until further order of this Court."

In federal court some judges may require stronger language, such as:

"If a party files under seal any document produced under this Protective Order, a party seeking to preserve the secrecy of any such document must make the showing required pursuant to Fed. R. Civ. P. 26 and Foltz v. State Farm Mutual Automobile Ins. Co., 331 F.3d 1122 (9th Cir. 2003), in order to maintain the Protective Order as to such document. Before seeking to maintain protection of documents filed with the Court, a party must assess whether redaction is a viable alternative to complete nondisclosure."

Challenging the Designation of a Document as Confidential

Because the party producing documents usually unilaterally designates documents as confidential, a mechanism should exist in the protective order whereby this designation can be challenged. The burden of showing that the material is a legitimate trade secret or other material covered by ORCP 36C(7) or FRCP 26(c)(7) should remain on the party who wants the documents to be protected, however orders vary on how this issue is procedurally brought to the Court's attention.

One option is to make the party designating the document as confidential have the responsibility, after reasonable notice, to move the Court to have the document protected. Here is one sample provision along these lines:

"In the event that any party, in good faith, disagrees with the designation of any documents and/or information as protected and subject to this Protective Order, said party shall send a written notice to the producing party with copies to all parties specifying the documents and/or information in question and shall confer regarding the status of the documents or testimony in question. If the parties cannot agree within thirty (30) days of receiving a written notice specifying the document(s) and/or information in question, the producing party shall file a Motion to Preserve Protected Status. Any documents and/or information in question shall continue to be treated as protected and subject to this Order unless the Court or tribunal orders otherwise. Should the producing party or other interested party fail to file, within thirty (30) days of receiving such written notice, a motion with the Court to preserve protected status of such documents and/or information, the challenged documents and/or information shall be deemed not protected. The burden of proof regarding confidentiality shall be on the party designing the document as confidential."

Another option, which places the burden of bringing a motion on the party to whom the documents are given, would be a provision along the following lines:

"Notwithstanding anything to the contrary which may be set forth herein, a party may apply to the Court at any time for an Order: (a) granting a modification of this Protective Order with respect to any confidential material; (b) determining that information previously designated as confidential is not confidential; and (c) granting additional protective relief with respect to any confidential material. Nothing in this Order shall be deemed to shift the burden of proof regarding confidentiality."

Sharing Protected Documents with Similarly Situated Litigants.

The Ninth Circuit has clearly indicated that it strongly favors access to discovery materials to meet the needs of parties engaged in collateral litigation Foltz v. State Farm, *supra*, 331 F.3d at 1132-33. In Oregon state court, whether documents provided in one case may be shared with attorneys representing other similarly situated parties depends more on the discretion of the judge. The primary argument against allowing sharing is that it becomes harder to protect the confidentiality of information. One solution is to require the attorney with whom information is shared to agree to be bound by the protective order. This can be accomplished in a variety of ways, including: requiring the attorney with whom information is to be shared to agree in writing to be bound by the terms of the order; requiring the attorney to sign a copy of the protective order itself; or requiring the attorney to sign a one-page agreement that is attached as an exhibit to the protective order. As with experts, it must also be decided whether all of the parties should be informed of the identity of the attorneys with whom documents are shared, or whether good cause must be shown before the identity of such other attorneys is disclosed to the other parties.

From a plaintiff's perspective, the proper purpose of a protective order is to prevent trade secrets and other confidential information from reaching the product manufacturer's competitors, and sharing between attorneys handling similar cases does not pose a substantial risk of this occurring. The primary advantages of permitting sharing of confidential documents among similarly situated litigants are efficiency, the cost and time savings from having to start each individual case from scratch, the ability of similarly situated plaintiffs to freely discuss the nature of the product defect, and to identify situations where the different documents are inadvertently, or intentionally, produced to different parties.

One of the issues that almost always comes up regarding the issue of attorney sharing is the definition of "a similar case" or "similarly situated plaintiff." The injured party will want a broader definition of similar cases in order to explore whether the same component part or product defect exists across various product lines. Product liability defendants often seek to limit sharing to the identical year, make and model of product. This limitation makes it extremely difficult to make meaningful comparisons across product lines.

There are many different provisions dealing with the issue of attorney sharing. Here is an example that was agreed to in a recent product liability case we handled:

"Information contained in the protected documents may be disclosed to other lawyers who have been retained in connection with other 'Similar Cases' against (identify parties) pursuant to the following conditions:

1. *'Similar cases,' for purposes of this Order, means . . .*
2. *The lawyer to whom copies of the protected documents are provided must acknowledge, in writing, that he or she will be bound by the terms and conditions of this Protective Order, and will submit*

3. *to the jurisdiction of this Court in connection with any proceedings in connection with enforcement;*
4. *The lawyer to whom copies of the protected documents are provided may disclose the information contained in the copies to their experts or other persons employed by the lawyer or assisting the lawyer in preparation for, or at the trial of, a 'similar case'; and*
5. *The lawyer to whom copies of the protected documents are provided may not further disseminate the protected documents to lawyers retained in other 'similar cases,' without the express written consent of (identify parties), or by further order of this Court."*

Deposition Testimony

Because deposition testimony and exhibits used in depositions often contain information subject to a protective order, the parties should address in their protective orders how deposition transcripts and exhibits will be handled. One possibility is that entire deposition transcripts, including all exhibits, be designated confidential. This, however, results in non-confidential material being designated as protected. A more precise approach is to require the producing party to designate only the specific pages and exhibits that contain trade secrets or other confidential information. A sample provision along these lines would be:

"If pretrial deposition testimony or exhibits contain confidential information, counsel for the party seeking protected treatment of that information shall within twenty (20) days after receipt of the transcript of the deposition notify all other counsel in writing that the deposition testimony or exhibit is considered protected and designate the specific portions of the deposition transcript or exhibit, which shall thereafter be subject to the provisions of this Order. Prior to twenty (20) days after receipt of the transcript of any deposition, all information in the deposition transcript and exhibits shall be considered and treated as protected, subject to the provisions of this Order."

Documents Acquired through Other Sources.

Litigants may wish to consider the status of documents considered confidential by one party, but obtained through some other means. This might occur where prior litigation involving the same type of case has gone to trial or documents are obtained from a state or federal agency. So long as these documents were obtained legally and ethically from another source, it is difficult to argue that such documents should have confidential status. Some protective orders directly address this issue while others do not. An example of language which deals with this issue is:

"If a documents or their content are obtained by a party from a source other than the party who designated the document as confidential, that party shall be relieved of complying with the terms of this Order as to such protected documents."

There is, however, a legitimate caveat to this provision: If an attorney had to agree to a protective order in another case to obtain the documents, then such documents should still have protected status.

How confidential documents are treated after litigation has concluded.

Producing parties often request that confidential documents be returned or destroyed after litigation has concluded. However, because sharing of documents among similarly situated litigants is encouraged, and because attorneys may end up in similar litigation against the same party in the future, there may be resistance to including a requirement of return of the documents in the protective order. Because this issue is often resolved as part of settlement negotiations, one approach is to agree to reserve the issue until conclusion of the litigation. The protective order can provide that, if the parties cannot reach an agreement, then the matter can be decided by the Court at that time.

If return or destruction of the documents is agreed to, or ordered by the Court, it is important to distinguish between the actual documents and work product based on those documents. The order may allow the attorney to retain work product or it may require work product to be destroyed. However, the order should not require the attorney to provide work product to the adverse party, which would nullify the work product privilege.

4. Conclusion.

There are many forms of protective orders, and what makes sense in one case may not make sense in another. In any case, the issues set forth above should be considered before agreeing to, or moving for, a protective order.

Concluding that you can't please all of your fellow attorneys all of the time, and in the spirit of not crossing any bridges until they are reached, you negotiated a protective order that ensured plaintiff would receive all of the relevant confidential documents necessary to prosecute the case, but left the issue of sharing the documents with other attorneys open until a similarly situated litigant appeared.

[1] Protective orders can be sought for other purposes, for example to protect against undue hardship, limit the scope of discovery, seal depositions and even to regulate the sharing of tangible evidence, but these are beyond the scope of the current article. *See generally* ORCP 36C and FRCP 26(c).