Want to Litigate in Private? Opt for Arbitration.

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Non-compete and trade secret litigation inherently involves disclosure of confidential information. Plaintiffs argue that defendants took or used the plaintiff's confidential information, and they often want the defendants to turn over their files for review. Defendants often complain that the plaintiffs are engaged in a fishing expedition or that they are entitled to review the plaintiff's files in order to pressure test the trade secret claims.

Once the parties come to grips with the reality that they will have to exchange confidential information with their opponents in order to prosecute or defend the litigation, the reality sets in that this information could become part of the public record if it is filed with the court. It is at this time that their attorneys begin exploring the use of protective orders.

Protective orders are orders by courts that allow parties to produce information in lawsuits subject to certain ground rules on how the information may be used or who is allowed to see it. These orders commonly contain language authorizing the parties to file alleged confidential information under seal so that it is not accessible by the public.

Some litigants expect this protection as a matter of course, but most courts recognize that the parties' interest in confidentiality is counterbalanced by the public's interest in free access to judicial records.

As one federal court recently put it, "the public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding." (A copy of this decision is available in pdf format below.) In making this observation, the court relied on precedent from the United States Seventh Circuit Court of Appeals. The Seventh Circuit, like many other appellate courts across the country, has "insisted that litigation be conducted in public to the maximum extent consistent with respecting trade secrets…." These courts observe that when parties choose to resolve their disputes in court, "they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." According to the Seventh Circuit, "[p]eople who want secrecy should opt for arbitration." That is not to say that courts will not protect trade secrets. Courts have a range of options spanning from permitting documents to be filed under seal to allowing redaction of confidential information. But if a litigant desires true privacy, the Seventh Circuit has a point. Arbitration is an option that may fit the bill.