Protective Orders: Alternatives to "Attorney Eyes' Only"

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Federal Rule of Civil Procedure 26 provides for broad discovery: "Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." "Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." These provisions apply with equal force in non-compete and trade secret litigation, but perhaps with greater consequence. After all, the purpose of such litigation is to protect confidential information, not to share it with competitors.

As a result, parties often fight over the extent to which the confidential information they produce in discovery may be shared by opposing counsel with their clients. Producing parties often seek to place "attorney eyes' only" limitations on the documents they produce. Receiving parties are often willing to treat documents confidentially, but they complain that an "attorney eyes' only" limitation will place them at a disadvantage.

Parties sometimes overlook the possibility that such documents may find sufficient protection somewhere in the middle between marking them as "Confidential" and "Attorney Eyes' Only." Namely, producing parties may find the protection they seek by marking documents "Highly Confidential" and seeking heightened restrictions that fall short of limiting the documents to the eyes of opposing counsel. For example, a producing party may agree that receiving counsel can treat documents as "Highly Confidential" with the following limitations:

Receiving counsel may show "Highly Confidential" documents to their clients (the "receiving party") on the conditions that the receiving party may not (1) keep a copy of the "Highly Confidential" materials; (2) view the "Highly Confidential" materials outside the direct supervision of counsel; (3) take notes concerning the content of the "Highly Confidential" materials; (4) discuss or disclose the contents of the "Highly Confidential" materials with or to other employees (excluding named parties) or third parties unless these third parties are technical advisors; and/or (5) use the "Highly Confidential" materials for any purpose other than in connection with the prosecution or defense of the lawsuit.

Naturally, these limitations are not exhaustive or exclusive. Rather, they are simply an example of a possible solution to the seemingly recurrent "Attorney Eyes' Only" dispute. Creative counsel may identify different restrictions that meet their needs. A sample protective order is available in pdf format at the bottom of this post.

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