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NEWSLETTERS

Preventing Your Agreed Protective Order From Interfering With Jury Research

February 25, 2016 | Atlanta | Chicago | Columbus | Dallas | Delaware | Elkhart | Fort Wayne | Grand Rapids | Indianapolis | Los Angeles | Minneapolis | South Bend

Most complex commercial and intellectual property cases involve the discovery of internal business documents and information. Of course, such information was not originally intended for an audience outside the walls of one of the corporate parties. Indeed, such information is often not just sensitive information, but is in fact proprietary or trade secret information that, if disclosed, may adversely impact a litigant's business and potentially destroy a competitive advantage. In such circumstances, clients are typically adamant about obtaining every possible protection against public disclosure of their proprietary information, and rightly so.

In many cases, the parties' interests on this issue are aligned in that both sides have proprietary information they wish to protect from disclosure. This alignment of interests tends to facilitate the parties' willingness to stipulate to protective orders that are very restrictive in scope, often including Attorneys Eyes Only ("AEO") provisions that limit disclosure of documents and testimony to only a small group of insiders. Further, courts are often willing to enter these extremely restrictive orders so long as both sides have agreed to the terms. Once the order is in place, counsel frequently over-designate by marking nearly every document produced in discovery as "confidential" or AEO and by marking entire deposition transcripts as "confidential" or AEO.

Entering into a highly-restrictive protective order and liberally designating materials as "confidential" or "AEO" may, in the early stages of litigation, seem harmless and even wise. However, this approach can lead to problems as a case gets closer to trial. In the first author's role as a jury consultant, he has seen many situations where trial counsel decides to conduct jury research years after entering into a strict protective order and, for years, liberally designating nearly all case information as "confidential." They then realize, for the first time, that the key documents -- the very documents they would want jury consultants and mock jurors to consider -- are all subject to highly-restrictive terms of the protective order and potentially cannot be revealed to mock jurors or even jury consultants.

Of course, if the confidential documents are your client's own documents, then your client can choose to show them to whoever they want, including mock jurors. But, where the confidential documents of interest are the opposing party's documents, this can be a troublesome issue. The questions then become, "What do we do? Can we have a meaningful jury research project if we can't show the mock jurors the key documents in the case?"

The first step in resolving this problem is to engage in a very careful

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reading of the protective order. In some cases, you may be able to find a solution that fits within the terms of the order itself. For example, the terms of the protective order may include a category such as “consultant” that is defined broadly enough to reasonably encompass disclosure to mock jurors acting as “consultants,” even without having the mock jurors read and sign off on the terms of the protective order. There are also sometimes cases where the key, confidential documents that need to be shown to mock jurors are limited and it is possible to mock-up dummy documents that convey the general point well enough for purposes of jury research without disclosing the actual confidential documents and still complying with the terms and spirit of the protective order. In other cases, the best solution might be to have mock jurors actually read and sign the protective order before participating in the research.

In some cases, though, none of those solutions are realistic. Often, the terms of agreed protective orders define the persons who may receive confidential information so narrowly so as to exclude mock jurors, even if those mock jurors would agree to be bound by the confidentiality provisions. In some instances, protective orders even arguably preclude disclosure of the information to the jury consultant. Consider for example, the following language from a protective order recently entered by a federal district court a matter on which the first author was asked to consult:

B. **Qualified Persons – Attorneys Eyes Only Information.**
Counsel for the receiving party shall not disclose documents designated as Attorneys Eyes Only Information other than to the following persons (hereinafter referred to as “**Qualified Persons**”):

- Outside counsel of record for the parties in this action, including those individuals specifically acting at the direction of outside counsel of record, and assigned to and necessary to assist such counsel in the preparation or trial of this action, including their law partners, associates, assistants, paralegals, clerks, stenographic personnel provided that such persons are regularly employed by the outside attorneys or the outside law firm and are not employed by any party;

- The following designated in-house counsel and individuals specifically assigned to and necessary to assist such counsel in the preparation or trial of this action:

    - [Individual One], Vice President & Senior Intellectual Property Counsel; and

    - [Individual Two], Staff Litigation Counsel;

- Independent experts and consultants retained by any party whose assistance is necessary for the preparation or trial of this action but only after the following procedure has been followed: A notice shall be served on counsel for the designating party stating the identity of the outside expert or consultant to whom the Confidential Information is to be disclosed, which shall be accompanied by an executed certification in the form of Exhibit A attached hereto along with a complete and current curriculum vitae of such expert

> or consultant. The designating party shall have fifteen (15) days to object to the proposed disclosure. If such an objection is made, the party seeking to make the disclosure shall not disclose the Confidential Information to the person; provided, however, that the receiving party may – after having conferred with the designating party in an attempt to resolve the dispute without Court intervention – move the Court for an order allowing access for the expert or consultants.
>
> With the exception of the Court and its personnel, disclosure shall be made to persons identified as Qualified Persons only as necessary for this litigation, and only after the person to whom disclosure is made has been informed of the Protective Order, and has agreed in writing to be bound by it, by signing the form of acknowledgment attached to this Protective Order as Exhibit A – Acknowledgment. Attorneys Eyes Only Information shall not be disclosed to any person in any manner not specified in this Protective Order.

Protective order language such as that quoted above is not unusual, and it can cause serious challenges for conducting jury research. Such language would preclude disclosure of AEO Information to jury consultants who are not "regularly employed" by counsel without turning over those jury consultants' CVs to opposing counsel and giving opposing counsel an opportunity to object. Further, the above language would certainly preclude disclosing AEO Information to mock jurors. This can be particularly problematic in cases in which the AEO designation has been overused.

Further, even if a protective order allowed disclosure to mock jurors if they agreed to be bound by its terms, protective orders are frequently dense, multipage documents loaded with legalese. Often it is simply not realistic to expect mock jurors to read and sign off on the order as part of a jury research project. The "acknowledgement" forms that accompany standard protective orders often require a recipient of confidential information to represent that he or she has read the entire protective order, has agreed to abide by its terms, and is submitting him or herself to the jurisdiction of the court in relation to enforcement of the terms of the protective order.

For a mock juror who might be getting paid $250 to participate in a research study, it is often too much to ask to require the mock juror to read 20 or more pages of legalese and then promise, in writing, to submit to the jurisdiction of the court and abide by the terms of the document or else be subject to what are characterized in the document as severe penalties. Also, in some jury research projects there is an interest in withholding the true identity of one or more of the litigants from the mock jurors. That is impossible to do if you ask the mock jurors to read and sign a protective order that necessarily includes the names of all parties to the litigation. Finally, even if mock jurors were to sign off on the protective order, some agreed protective orders include a provision requiring that the identities of all persons executing the protective order acknowledgement be disclosed to all other parties. Sometimes, these terms require that this disclosure occur before confidential information is provided. Typically, counsel would not want to disclose the names and addresses of all their mock jurors to opposing counsel, especially while the litigation is pending.

These issues can be easily prevented early in the life of the litigation by squarely addressing the issue of jury research within the terms of any protective order. Consider, for example, the approach taken in *Irwin Industrial Tool Co. v. Worthington Cylinders Wisconsin, LLC,* Civil Case No. 3:08cv291, 2009 U.S. Dist. LEXIS 22341 (W.D.N.C. Mar. 6, 2009). In *Irwin*, the court entered an agreed protective order that expressly identified "[m]ock jurors, focus group members, and the like selected by counsel or trial consultants or jury consultants in preparation for trial proceedings in the lawsuit" as being a category of individuals permitted to receive "confidential information." Further, rather than forcing mock jurors to sign off on the dense and oppressive "Restricting Agreement" that other consultants would be required to sign, the protective order included a separate, agreed upon, "nondisclosure agreement" that was suitable for administering to mock jurors. Specifically, the "nondisclosure agreement" provided:

> I hereby acknowledge:
>
> 1. I understand that the focus group study in which I have been requested to participate will result in the receipt by me of information considered by third parties to be confidential and proprietary.
>
> 2. In consideration of my selection to participate in the focus group and my receipt of compensation for my participation in that study, I agree to keep all information disclosed to me during the course of such study as confidential, and I will not disclose such information to any other person.

As another example, consider *Emergis Technologies, Inc. v. Midwest Energy, Inc*., Case No. 05-4069-JAR, 2006 U.S. Dist. LEXIS 30511 (D. Kan. May 9, 2006). In *Emergis*, as in *Irwin*, the court entered a protective order that specifically permitted jury consultants and "mock jurors or focus group members" to receive confidential information upon executing a specified nondisclosure agreement specifically intended for mock jurors. In both instances, the nondisclosure agreements did not necessitate having the mock jurors read and agree to the terms of the underlying protective orders.

Terms in an agreed protective order are, however, a two-way street. While highly-restrictive provisions in a protective order may complicate a litigant's ability to conduct meaningful jury research, counsel need to ensure that the provisions are restrictive enough so that their opponent's jury research will not damage their client's reputation or confidential information. Indeed, the whole point of protective orders is to ensure that litigants' confidential information remains confidential and is used only as needed for efforts relating to the underlying litigation. As such, it is imperative that counsel include language in a protective order mandating that opposing litigants will take steps to safeguard their client's confidential information before sharing it with mock jurors. Language such as that above can help ensure that an opposing litigant will have its mock jurors execute nondisclosure agreements or else be subject to ramifications from the court.

Counsel should also consider issues relating to the scope of confidential

information an opposing party may share with mock jurors. For example, if a protective order designates two levels of confidential materials (e.g. “Confidential” and “AEO”), the order should address whether mock jurors will have access to both levels of information. Depending on the circumstances at issue in each case, counsel could also draft language restricting mock jurors from receiving certain types of confidential information such as computer source code, sensitive medical information, or confidential company trade secrets. The objective is to strike the right balance in each case so as to enable counsel to conduct meaningful jury research while safeguarding against potential improper or harmful disclosures.

Counsel can also address in a protective order the terms and conditions upon which an opposing party will learn about a litigant’s decision to hire a jury consultant or conduct a mock jury project. If the protective order stipulates that mock jurors must sign a nondisclosure agreement, it should also address whether and when a litigant must provide copies of those agreements (thus revealing the identities of the mock jurors and the existence of a mock jury project) to the opposing party. Few litigants would want an opposing party to obtain the identities of their mock jurors prior to trial, if ever, but under some circumstances a litigant might want to agree to have both sides tender copies of mock jurors’ nondisclosure agreements at the conclusion of litigation. For example, in *Irwin*, the protective order provided that upon termination of the lawsuit, “counsel for each party will provide a copy of each Non-Disclosure Agreement to counsel for the other party.”

Whatever the issue, the key is that in drafting an agreed protective order, counsel need to think ahead about what impact language in the protective order may have on jury research. Unfortunately, the solution is not as simple as adopting a court’s model protective order. While some jurisdictions – such as the Southern District of Indiana – provide a uniform protective order authorized for use in that jurisdiction, not all such model orders include provisions regarding jury research or consultants. Even then, by definition a model order cannot account for the idiosyncratic needs of each case, such as what scope of information should be off-limits to mock jurors.

Additionally, counsel should be mindful that including detailed language in a draft protective order relating to jury consultants or mock jurors will inevitably alert opposing counsel to plans to potentially utilize such resources. As such in evaluating potential language, counsel need to discern their client’s willingness to disclose the fact that they may consider jury research at some point in the future. That being said, having discussions with opposing counsel at the outset of the case – when jury research is just a possibility – is different than having such discussions later in the litigation process when the client definitively wants to conduct jury research but is faced with a protective order that prohibits them from doing so.

Indeed, it is only through openly discussing the issue with opposing counsel that both sides will be able to draft and agree to language that facilitates both sides’ ability to conduct meaningful jury research while still preserving confidentiality. Further, having an open discussion with opposing counsel early in the litigation will enable the parties to account for, or eliminate, the possibility that the topic of jury research (and any research results) may be subject to discovery.

In having discussions with opposing litigants, counsel can use the Irwin protective order as a template. There, the order expressly authorized mock jurors to receive both confidential and highly confidential information upon executing the nondisclosure agreement appended to the protective order. The language also provided that the nondisclosure agreements will be exchanged with opposing counsel upon termination of the litigation or if "reasonably requested by the designating party for use in an investigation of a violation of this Protective Order."

The approach used by the parties in *Irwin* has some key benefits. First, the order's language clearly states that both mock jurors and focus group members can receive confidential information. Second, the order also explicitly defines the scope of confidential information that can be disclosed to mock jurors. Third, the order appends an approved nondisclosure agreement specifically for mock jurors, to prevent the need to have mock jurors read and agree to be bound by the entire protective order. It also allows for the party conducting the jury research to remain anonymous to the mock jurors if it so chooses.

There are, however, some steps that can be taken in addition to those in Irwin. For example, while the order strongly implies that trial consultants or jury consultants can receive confidential information, it does not say so explicitly. Second, the order contemplates disclosing the identities of mock jurors prior to the conclusion of the litigation if the nondisclosure forms are "reasonably requested" to facilitate investigation into a potential breach of the protective order. The order, however, is silent on whether the topic of jury research is discoverable and whether a party can contact an opposing party's mock jurors. This leaves open the possibility that a litigant could learn the research results or counsel's planned arguments prior to trial. Next, while the parties in Irwrin permitted mock jurors to receive all information produced in discovery, such an approach might not be appropriate or necessary for every case. Finally, the nondisclosure agreement appended to the protective order could be supplemented to more completely convey that fact mock jurors are prohibited from disclosing confidential information in any manner, including via social networking sites. It could also be expanded to explicitly prohibit mock jurors from disclosing any arguments or testimony they heard during the research or even the fact that they participated in a jury research study.

The following checklist may be helpful in considering a potential agreed protective order:

- Determine at the outset of litigation whether a protective order will be necessary
- Consider whether the protective order is going to cover key information that mock jurors would need to know in order for you to conduct effective jury research, and if so, address the scope of information that may be provided to mock jurors
- Consider whether the terms of the protective order might prevent you from sharing information with jury consultants
- Discuss whether your client is willing to tell opposing counsel, as part of the protective order negotiation, that jury research is always

a possibility in any litigation and, consequently, provisions should be included that take that into account

- Consider whether the terms might cause you to have to reveal the identity, work product, or mental impressions of your jury consultant
- Consider whether the terms would require you to have mock jurors sign lengthy and burdensome protective order agreements
- Consider whether the terms would require you to reveal the identities of mock jurors to the other side, and if so, the terms and conditions upon which a party may contact an opposing party's mock jurors
- Consider including a model confidentiality agreement for mock jurors as an attachment to the protective order separate and apart from any confidentiality agreement that may be appended for expert witnesses
- Expressly address privilege waiver issues in the terms of the protective order
- Clearly state in the protective order that the parties agree that mock jury work and the work of jury consultants is not discoverable

Many agreed protective orders contain restrictive language that makes it difficult or impossible to conduct meaningful jury research. But even if a protective order allows for jury research, it could still leave many important questions unanswered. If your client may want to conduct jury research, it is important to carefully review the language of a proposed protective order with your client's goals and objectives in mind. An open and thorough discussion with opposing counsel at the outset of a matter could efficiently address and prevent contentious issues later in litigation. Ultimately, a good protective order should include language that permits the parties to conduct meaningful jury research while still protecting their confidential information.

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