

Recurring Mistakes in Stipulated Protective Orders

1. Frequently, the parties do not make a sufficient showing of good cause as required by Fed. R. Civ. P. 26(c). Such showing should be made separate from the parties' stipulation regarding the terms of the proposed protective order.

2. Frequently, the proposed protective order does not define with sufficient particularity the kinds of information which will qualify a document for designation as “Confidential” and subject to protection under the terms of the protective order. For example, the proposed protective order does not limit the designation to information which has not been made public, or limit the designation to information which the party in good faith believes will, if disclosed, have the effect of causing harm to its competitive position. Sometime, the proposed protective order even purports to provide blanket protection for all documents, material and information produced or disclosed during discovery.

3. Proposed two-tiered proposed protective orders also need to define with sufficient particularity the kinds of information that will qualify a document for designation as or “Attorneys Eyes Only.”

4. The proposed protective order invariably contains provisions identifying the classes of persons to whom protected information may be disclosed, and requiring that all persons to whom protected information is disclosed sign a confidentiality agreement. Frequently, the listing of persons to whom protected information may be disclosed includes the Court and court personnel, and the proposed protective order fails to exclude the Court and court personnel from the requirement to sign a confidentiality agreement. The parties need to make clear that such a requirement does not apply to the Court or court personnel.

5. It is the custom and practice of the Central District of California for the assigned Magistrate Judge to issue protective orders relating to discovery. Sometimes the proposed protective order speaks in terms of what the parties and persons to whom protected information is disclosed are “enjoined” from doing. The proposed protective order should not use the word “enjoined” since Magistrate Judges lack jurisdiction to issue injunctive relief under 28 U.S.C. § 636(b)(1)(A).

6. Frequently, the proposed protective order purports to authorize in advance the filing under seal of documents containing protected information.

However, neither the fact that counsel have stipulated to an under seal filing nor the fact that a proposed filing contains information that one of the parties elected to designate as “Confidential” or “Attorneys Eyes Only” in accordance with the terms of the protective order is sufficient in itself for the Court to find that good cause exists to file the papers or the portion containing the designated information under seal. At the very least, the parties will need to convince the Court in their application that protection clearly is warranted for the designated information or documents. For declarations with exhibits, this means making the requisite showing on an exhibit by exhibit basis. In accordance with Local Rule 79-5.1, the provision in question should provide that, if any papers to be filed with the Court contain protected information, the proposed filing shall be accompanied by an application to file the papers or the portion thereof containing the protected information (if such portion is segregable) under seal; and that the application shall be directed to the judge to whom the papers are directed. For motions, the parties should also file a redacted version of the motion and supporting papers.

7. Sometimes, the proposed protective order purports also to apply to evidence presented at court proceedings and/or trial. The proposed protective order should not include any provisions relating to evidence presented at court proceedings and/or trial. The parties will need to take up that matter with the judicial officer conducting the proceeding at the appropriate time.

8. Sometimes (most likely when lead counsel for both sides are non-local attorneys), the proposed protective order specifies a procedure for resolving disputes over the designation of documents which does not comport with the requirements under Local Rules 37-1 and 37-2 governing discovery disputes (including the requirement that the parties file a Joint Stipulation concerning the matters in dispute).

9. Sometimes, the proposed protective order contains a provision that purports to restrict or limit the rights of the parties in another action to conduct discovery or the subpoena power of another court (e.g., a provision that contains a 21-day no disclosure requirement). The proposed protective order should contain a provision to the following effect: “Nothing in this Order shall be construed as authorizing a party to disobey a lawful subpoena issued in another action.”

10. Sometimes, the proposed protective order specifies that any violation of its terms “**will** constitute contempt of Court,” as opposed to “**may** constitute contempt of Court.”

11. Frequently, the proposed protective order contains a provision which provides that it may be modified on the stipulation of the parties. The proposed protective order needs to make clear that no modification by the parties shall have the force or effect of a Court order unless the Court approves the modification.