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Confidentiality in Civil Discovery: From Camouflage to Confidence

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I. Introduction

105. One of the most frustrating and daunting tasks that a civil litigator may confront is negotiating a confidentiality order. Unless a lawyer regularly drafts and negotiates contracts, the potential for a misstep is high. However, with an understanding of a few structural elements, the lawyer can easily break down the topic down into component parts.

106. The purpose of this article is not to provide a form document to follow blindly, but to review the elements that a practitioner may want to include in a confidentiality order or agreement, and the reasoning for each. With an understanding of these elements, the language of an order or agreement will be easier to negotiate. A well-thought out and planned confidentiality order can easily facilitate and speed up the discovery process.

107. More important to keep in mind is that, due to the eternally flexible nature of litigation, each and every contingency for confidentiality is not, and cannot be, addressed. Instead, a better understanding of the purpose and need for confidentiality agreements and orders, as well as the substantive and procedural elements of an agreement or order, will help the many puzzle pieces fit together into something workable.

108. Because they have their own set of purposes and pitfalls, this article will not cover confidentiality clauses in settlement agreements or releases. Instead, it will focus only on confidentiality agreements and orders in civil discovery based in Florida law.

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II. Purpose of Confidentiality

Why confidentiality?

109. Litigation is supposed to be a search for the truth. But our system is an adversarial one and the importance of confidentiality is relentlessly ingrained in every lawyer. Conversations with clients are protected by the attorney-client privilege. The lawyer's own musings are protected by the doctrine of work product. Negotiations during court-ordered mediation are privileged. Sometimes it seems that the entire purpose of pre-trial discovery in civil suits is to keep information hidden from opposing counsel. The Florida Rules of Civil Procedure temper a litigator's inclination to hide things,² but even then, there is still opportunity for obfuscation. In fact, civil discovery disputes can be the least civil of all interactions between lawyers.

110. Some civil litigators approach discovery the way that the Rules seem to contemplate and encourage: each side shares all relevant information with the other side, and the parties can make a fair evaluation of the other's position, leading to mediated and agreed settlements where appropriate.³ However, most discovery requests first prompt the other side to respond with an objection instead of freely providing all the documents requested.

111. The practical rule of discovery is that, if a privilege can be asserted by opposing counsel, it will be. For the lawyer asserting privileges, or the protection of the doctrine of work product, or claiming that something is confidential, it is an exercise in protecting and advocating for the client. For the lawyer whose discovery requests prompt these responses, it is an exercise in wondering what is being hidden, or questioning why obtaining something the Florida Rules of Civil Procedure authorizes seems like pulling teeth. After all, if the other side strenuously objects, then there must be something worth finding out. Or, maybe not. Sometimes a client just does not want business-sensitive information getting out in the public realm.

112. Sometimes, there is a happy medium in the clash between the right to protect things that should generally be kept private and what an opponent wants and needs to know. A confidentiality order entered by the trial court, or a confidentiality agreement between counsel, can facilitate discovery for the purposes of litigation while keeping the information in limited circulation and out of the public eye.

113. If an opponent says that they think their employee manual is a trade secret, and the requesting party just needs to know if the manual included directions on how to handle a situation like the one being litigated, it may simply not be worth the time to litigate whether or not the manual really is a trade secret before being able to get a copy of it in discovery. In that kind of case, as in a slip-and-fall injury case, counsel can usually agree on terms without the court's involvement. On the other hand, sometimes the claim that a client list

² *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970); [Florida Rules of Civil Procedure](#).

³ *Surf Drugs, Inc. v. Vermette*, 236 So. 2d 108, 111 (Fla. 1970).

is a trade secret is the core element of the case, as when the claim is a violation of a non-compete agreement. In those cases, the strategy of having the court resolve the issue may be a necessary step in proving a case.

Is the subject of the proposed agreement or order permissible?

114. Under Florida law, lawyers are not permitted to keep some kinds of information from the public record. Section 90.506 of the Florida Evidence Code allows for the protection of trade secrets, as long as doing so does not conceal a fraud or work an injustice.⁴ The term “trade secret” is not defined in the Evidence Code, but it is defined elsewhere in Florida Statutes. A trade secret is a piece of information, document or data that has independent value by not being known by others who could gain economic value from it, and that is maintained as secret by its owner.⁵ Federal statutes define trade secrets in a very similar manner, incorporating the same elements of economic value and previous withholding of the information from the public.⁶

115. While the definitions of “trade secret” have inherent factual considerations that can certainly be litigated, the admonition to “not conceal a fraud or work an injustice” of the Evidence Code is even more open to interpretation. In some cases, the application of the fraud exception to the trade secret privilege is clear, for example, in commercial or contract litigation when there is an affirmative defense of fraud.⁷ In other cases, a judge will need to decide if the privilege can be claimed or if the exception applies.⁸

116. Florida’s “Sunshine in Litigation Act” also puts limits on what lawyers can keep out of the public record. A confidentiality agreement that conceals a public hazard, as defined by statute, is “void, contrary to public policy, and may not be enforced.”⁹ “Public hazard” is defined as “an instrumentality, including but not limited to any device, instrument, person, procedure, product, or a condition of a device, cause injury.”¹⁰ Agreements in cases that may touch on public hazards should acknowledge that a judicial determination of the existence of a public hazard can invalidate an agreement created for the purpose of facilitating discovery.

117. The statutory definition of public hazard has been mainly applied in products liability cases, where the hazard is clear and tangible, like in a tire failure case.¹¹ Asbestos, another

4 Fla. Stat. § 90.506 (2014).

5 Fla. Stat. § 688.002(4) (2014).

6 18 U.S.C. §1839(3) (2012).

7 *Becker Metals Corp. v. West Florida Scrap Metals*, 407 So. 2d 380 (Fla. 1st DCA 1981).

8 See, e.g., *Rare Coin-it, Inc. v. I.J.E., Inc.*, 625 So. 2d 1277, 1278–79 (Fla. 3d DCA 1993).

9 Fla. Stat. § 69.081(4) (2014).

10 Fla. Stat. § 69.081(2) (2014).

11 *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899 (Fla. 3d DCA 2003).

real product, has also been found to be a public hazard.¹² The Fourth District Court of Appeals has found that the concept of a public hazard, as defined in the Sunshine in Litigation Act, does not extend to economic fraud that causes only financial loss. Instead, it must be a tangible danger to public health or safety. For example, improper credit practices are not considered public hazards under the Act.¹³ Similarly, insurance practices that may cause financial harm are not a public hazard, at least under the Sunshine in Litigation Act.¹⁴ If confronted by a request from an opponent to keep a “public hazard” confidential, a lawyer has a very good reason to not agree and also to seek the court’s intervention.

118. Other types of information that counsel may want to keep confidential are less debatable or open to interpretation. In addition to trade secrets, Florida law makes many types of documents and information confidential and thus not discoverable. Many of these things are listed in Rule 2.516 of the Florida Rules of Judicial Administration, which describes what information can be filed under seal.¹⁵ Other categories are scattered throughout the statutes, such as identifying information about the victim of a sexual battery.¹⁶ If these protected categories of documents need to be disclosed in litigation, a confidentiality order or agreement is the best way to balance the need for the information with the right to keep some information private.

When to consent to confidentiality?

119. As with any discovery dispute, the Florida Rules of Civil Procedure, and — by extension — Florida’s judges, expect opposing counsel to attempt to resolve disagreements between themselves wherever possible.¹⁷ If the outcome of a trial court’s potential consideration is clear, counsel should not waste their own time, or the time and resources of the court, and should reach their own agreement. But the lawyer’s ethical duties to their client mean that if there is an argument that can be made in good faith, it should be presented.

120. Trade secrets are illustrative of what is expected when it comes to consent. The process a trial court will undertake when considering a claim of trade secret protection is clear.¹⁸ First, the court must decide if the information at issue meets the definition of trade secret, usually by conducting an *in camera* review. As with any privilege, the party claiming the privilege as a basis to resist discovery bears the burden of proving that the privilege applies.

12 *ACandS, Inc. v. Askew*, 597 So. 2d 895 (Fla. 1st DCA 1992).

13 *Stivers v. Ford Motor Credit Co.*, 777 So.2d 1023 (Fla. 4th DCA 2000).

14 *State Farm Fire and Cas. Co. v. Sosnowski*, 830 So. 2d 886 (Fla. 5th DCA 2002).

15 Fla. R. Jud. Admin., Rule 2.516 (2014).

16 Fla. Stat. § 794.024 (2014).

17 Fla. R. Civ. P. 1.380(a)(2).

18 See, e.g., *American Exp. Travel Related Services, Inc. v. Cruz*, 761 So. 2d 1206, 1208-09 (Fla. 4th DCA 2000); *Rare Coin-it, Inc. v. I.J.E., Inc.*, 625 So.2d 1277, 1278-79 (Fla. 3d DCA 1993).

121. If the court determines that it is a trade secret, the party asking for the discovery must show that the information is reasonably necessary to the litigation. The party resisting discovery must make a showing of good cause to continue protection of the information so that, if the information is ordered produced, the trial court can order it produced under terms that take into account the interests of all involved parties and the public.¹⁹ As with any other litigation situation, sometimes the facts are undisputed and the result predictable enough that no objection should be made.

122. Relevancy is still the touchstone of discovery. A party cannot obtain information that is not reasonably calculated to lead to the discovery of admissible evidence merely by agreeing to keep it confidential.²⁰ But, if the information is relevant, it can be discovered even if it is statutorily confidential, as long as the information is protected by an appropriate confidentiality order.²¹ However, the reverse is not necessarily true. Information subject to a previously entered confidentiality order in different litigation in a different state is not automatically subject to discovery in later litigation.²²

123. Outside of consideration by the court, litigants who reach a confidentiality agreement through counsel cannot use that agreement as a basis to expand the scope of discovery, even if the court gives its imprimatur by converting it to an order. The normal rules still apply to determine the proper scope of discovery. For example, it would be error to allow parties to use a confidentiality order as the basis to compel a response to an otherwise impermissible request for information from a non-party.²³

124. A lawyer also does not have to accept a previously-entered confidentiality agreement. Different lawyers and different courts may have agreed to or ordered confidentiality under different circumstances and different law. In *ACandS, Inc. v. Askew*, the First District Court of Appeals refused to enforce a confidentiality order entered in a prior asbestos litigation where the order made no mention of the good cause for its entry, the scope of what was covered, and purported to limit the parties to the agreement to use the information only for the purposes of the single litigation case. As a non-final order, no court had an obligation to enforce it where to do so would cover up a public hazard.²⁴ The lesson here is that litigators should never blindly use nor accept the argument that something has “always been done this way.”

19 Fla. Stat. § 90.506 (2014).

20 *McDonald's Restaurants of Fla., Inc. v. Doe*, 87 So. 3d 791, 794 (Fla. 2d DCA 2012).

21 See, e.g., *In re J.B.*, 101 So.3d 407 (Fla. 2d DCA 2012); *Homeward Residential, Inc. v. Rico*, 110 So.3d 470 (Fla. 4th DCA 2013).

22 *Residence Inn by Marriott v. Cecile Resort Ltd.*, 822 So. 2d 548, 550 (Fla. 5th DCA 2002).

23 *Inrecon v. Village Homes at Country Walk*, 644 So. 2d 103 (Fla. 3d DCA 1994).

24 *ACandS, Inc. v. Askew*, 597 So. 2d 895 (Fla. 1st DCA 1992).

When is the timing right for a confidentiality agreement?

125. After a lawyer has decided that a confidentiality order is appropriate or inevitable, the timing of when it should be written down is dependent on a number of variables, including the type of confidential information at stake, the venue, the individual judge's preferences, and client desires. In a case where the information to be kept confidential is the identity of a sexual battery, the defendant likely will not be able to even answer the complaint until the identity is disclosed. A confidentiality agreement or order will need to be one of the first things accomplished in that kind of case.

126. Lawyers will sometimes know in advance that the litigation will involve claims of confidentiality in discovery. Business litigation can involve client lists. Patent litigation may involve secret processes. Cases that involve franchise terms may require keeping those terms confidential. Premises liability cases may involve requests for policy and procedure manuals. When these sorts of requests can be anticipated, the question and content of a confidentiality order or agreement should be raised as soon as possible.

127. Federal courts expect that counsel will discuss this type of discovery issue as part of counsels' Rule 16 case management conference. The Southern District of Florida requires, as part of Local Rule 16.1(b)(3)(H), that the Joint Proposed Scheduling Order include "any proposed use of the Manual on Complex Litigation," which in turn includes a proposed confidentiality agreement.²⁵ The Middle District's rule is similar. Local Rule 3.05(c)(2)(C)(iii) suggest that the initial discovery plan may include agreements relating to the "handling of confidential information."²⁶ Florida's complex litigation rule includes "the necessity for a protective order to facilitate discovery" as something that must be considered during an initial case management conference.²⁷

128. In other cases, the issue can be deferred until it is certain that confidential information will be requested or that the claim will be raised. For example, a party can assert a trade secret privilege claim in response to a discovery request. The party that first sought the information can then decide how to handle that claim of privilege by taking several possible actions, including:

- proposing a confidentiality agreement to facilitate production;
- filing a motion to compel to have the trial court determine the validity of the claimed privilege and, if appropriate, the terms of a confidentiality order; or
- abandoning the discovery request.

129. Sometimes a party making a discovery request can anticipate that a claim of trade secret may be raised, but will want to wait and see if the opposing party will make the claim. This may happen with requests for policy and procedure manuals from a corporate

25 Fla. R. USDCTSD Gen Rule 16.1(b)(3)(H).

26 Fla. R. USDCTMD Gen Rule 3.05(c)(2)(C)(iii).

27 Fla. R. Civ. P. 1.201(b)(1)(G).

party. In some companies, these documents are closely held secrets, and in others, they will be produced without objection. If a requesting party knows from experience that a particular discovery request will prompt a confidentiality objection, the discovery request itself can include an affirmative statement of willingness to agree to terms. This type of request can reduce delays in the time it will take to obtain the materials.

III. Primary Elements of a Confidentiality Order or Agreement

Court order or written agreement?

130. If counsel have agreed that confidentiality is required, it can be accomplished through either a court order or a written agreement. Florida Rule of Civil Procedure 1.280(c) specifically states that a trial court may enter a protective order “that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way.”²⁸ To obtain such an order, a party can file a Motion for Entry of Confidentiality Order, with or without a proposed order attached as an exhibit. After the motion is filed, counsel can agree to an order, or the parties can take their disputes to the trial court for resolution.

131. The parties also can informally negotiate and reach a Confidentiality Agreement. If they desire, that Agreement can then be adopted by a court order. Nothing in the law prefers an order over an agreement. The law of Florida has long been that stipulations between counsel are enforceable by trial courts. For instance, in *EGYB, Inc. v. First Union Nat’l Bank of Fla*, a 1994 case said that:

It is well settled that a stipulation entered into between parties in good faith and without fraud, misrepresentation or mistake is binding on the parties and the court.²⁹

132. How well settled? The case it cited (and that is still good law) is from 1939.³⁰ Similarly, the Middle District of Florida permits agreements between counsel to be enforced as if they were orders of the court if the agreements are enforced in writing, per the local rule.³¹

133. Ultimately, the decision whether to have a Confidentiality Order or a Confidentiality Agreement depends on the preference of clients and their counsel, the need for documentation in the case, or the level of trial court oversight of discovery. Another factor in cases with the potential for public attention may be the need to inform the press or other non-parties, through the very entry and docketing of a Confidentiality Order, of the existence of judicial

28 Fla. R. Civ. P. 1.280(c).

29 630 So. 2d 1216, 1217 (Fla 5th DCA 1994).

30 *Duncombe v. Smith*, 190 So. 796, 799 (1939).

31 *Capital Corp. Mergers & Acquisitions, Inc. v. Arias Co., Ltd*, Case No. 6:04-cv-158-Orl-28JGG (M.D. Fla. May 4, 2006).

oversight over the confidential nature of discovery. Litigants and their attorneys can agree to conduct discovery in all sorts of ways, with the understanding that some conduct would not withstand challenge by another interested party.

In camera review

134. Where all relevant parties agree to a confidentiality order or agreement, there is no need to have a trial court conduct an *in camera* review of the information at issue. The issues arise when there is an objection by a party or by a non-party, or a dispute over the applicability of a claimed privilege.³² Where there is anything less than complete agreement, the parties should ask the trial court to perform a complete review of the competing interests, up to and including an *in camera* review.³³

135. Objections can come from an unexpected angle. Even where a party may desire to keep information confidential, there may be a reason that requires a different course of action during litigation. In *Goodyear Tire & Rubber Co. v. Schalmo*, the Second District Court of Appeal granted certiorari in favor of Goodyear, where the trial court entered a confidentiality order that did not provide for review of the documents. Goodyear was the party from whom documents were sought. Goodyear based its position on a concern arising from a prior finding that the matter at issue, defective tires, related to a public hazard. The Second District found that a trial court cannot enter a confidentiality order without first determining whether the discovery at issue relates to a public hazard, which in turn might require a determination of whether the topic was a public hazard in the first place.³⁴

Good cause

136. Any confidentiality order or agreement must include a recitation of the good cause for its entry. This can be a simple reference to a statutorily-described privilege, such as a trade secret. A confidentiality order is, at its procedural basis, a protective order. A protective order can cover more items and be more broad than the trade secret privilege provided for in § 90.506 of the Florida Statutes.³⁵

137. In *Auto-Owners Ins. Co. v. Totaltape, Inc.*, the Middle District of Florida found that the trade secret privilege did not apply to the insurance company's claims manuals, because the insured was not a competitor who would benefit from the insurance company's proprietary information. However, even though the information did not strictly meet the definition of trade secret, the insurance company that was resisting discovery had shown good cause for entry of a protective order under Rule 26(c). Because of the nature of the documents, a confidentiality order was still required.³⁶

32 *First Call Ventures, LLC v. Nationwide Relocation Svcs, Inc.*, 127 So. 3d 691 (Fla. 4th DCA 2013).

33 *Gulfcoast Surgery Center, Inc. v. Fisher*, 107 So. 3d 493 (Fla. 2d DCA 2013).

34 *Goodyear Tire & Rubber Co. v. Schalmo*, 987 So. 2d 142 (Fla. 2d DCA 2008).

35 Fla. Stat. § 90.506.

36 *Auto-Owners Ins. Co. v. Totaltape, Inc.*, 135 F.R.D. 199 (M.D. Fla. 1990).

138. Following this logic, litigants do not need to agree or acquiesce to a claim that the discovery at issue is actually a protected trade secret. Instead, the agreement or order must recite sufficient predicate facts that justify entry of a protective order. In many cases, this can be a recitation that the information is merely claimed to be trade secret, or that there is a business purpose in keeping the information out of the public record. If the agreement or order does not show good cause, it can be challenged by third parties,³⁷ which could lead to a waiver.³⁸ A showing of good cause is sufficient to keep the press from intervening to obtain discovery materials.³⁹

Scope of the agreement or order

139. When drafting a confidentiality order or agreement, counsel should consider, if possible, whether it will be limited to a particular document, category of documents, or response to a single discovery request. If the agreement is being executed in response to a specific concern, it may be simpler to draft an agreement that refers only to that one set of concerns. Fewer open-ended eventualities will need to be addressed in the content of the agreement.

140. The concern is that, if an order or agreement is entered referencing a particular discovery request, then anything subsequently requested which might also be confidential would require a separate agreement or written amendment to the existing agreement. A practical compromise is to negotiate an agreement that acknowledges that particular request has been made, and a particular claim of confidentiality has been asserted in response, and therefore the agreement is necessary. It can then go on to address that other similar requests may be made, and will be subject to the same terms. This will prevent multiple agreements from being confused in a single case, while allowing for flexibility and expansion of its terms.

141. In the same concern for flexibility in the future, consider whether to draft a unilateral or a bilateral agreement, or one comprehensive to all parties. Even if there are no pending discovery requests served to a party that invoke confidentiality, there may be some in the future. If counsel is taking the time to obtain a confidentiality order or agreement, it should be broad enough to encompass reasonably foreseeable future situations. Finally, the negotiation process for an agreement that imposes the same terms on all parties generally results in more equitable and fair terms.

Third parties' rights to confidentiality

142. Non-parties to the litigation have just as much right as a party to seek a protective order for confidential information, and arguably, they have a greater right to protection

37 *ACandS, Inc. v. Askew*, 597 So. 2d 895, 898 (Fla. 1st DCA 1992); *In re Alexander Grant & Co. Litigation*, 820 F. 2d 352 (11th Cir. 1987).

38 *S & I Investments v. Payless Flea Market, Inc.*, 10 So.3d 699 (Fla. 4th DCA 2009).

39 *McCarthy v. Barnett Bank of Polk County*, 876 F.2d 89 (11th Cir. 1989).

from unwarranted intrusion. If a confidentiality agreement is made to facilitate discovery from a non-party, all the parties to the litigation need to be part of the agreement. One party who obtains discovery is obligated to share that information with the other parties in the litigation, and arguably, that other party does not have to agree to the same terms of an agreement.

143. In some cases, it might be appropriate to have an agreement with a non-party and treat the non-party differently from the litigants. Carelessly grouping a non-party into the same category as litigants in a confidentiality agreement could give the non-party a contractual right or legal ability to obtain copies of confidential information produced by the parties.

Acknowledgment of confidentiality

144. Many confidentiality agreements or orders require that the signatories to the agreement be able to redisclose the information to experts or other non-parties if they meet certain conditions, such as the execution of a consent to be bound by the agreement. This consent is not necessary; however, it is understandably common.⁴⁰ The decision to require consent or acknowledgement may turn on the level of sensitivity of the information at issue, or the need to track accountability for breach. A clause that says something to the effect that “each person who receives confidential information in furtherance of this litigation must be notified of this agreement and agree to abide by it” is convenient, but may not provide the sureties that the other side may want. This is a point to be negotiated.

145. The real questions are how far counsel’s signature on the agreement or order will go, and how many people it can realistically bind to the terms agreement. Is it just the attorney signing? All attorneys in the firm? Employees and members of the attorney’s firm? Experts? Consultants? Mock jurors? Copying services? Court reporters? Videographers? Outside data-processing services where there is no existing broad-scope confidentiality agreement? While there is a satisfying level of accountability in having every single person who is permitted to review the documents have to execute an acknowledgment, it is not practical. The agreement or order should specify who may have access to the documents, and with what level of acknowledgement. The easiest way to define this in an agreement is to list the categories of people with whom counsel can share information without acknowledgment, like all the members of a firm, and to whom it can be disclosed only on verbal or written acknowledgment, like experts and consultants.

146. Be very cautious of agreements or orders that require a party to get pre-approval for redisclosure, or to notify and provide signed consents for each person to whom the information is redisclosed at the time of execution. Without good cause, these provisions are an incursion into counsel’s work product and ability to consult with non-testifying experts.

⁴⁰ *Capital One, N.A. v. Forbes*, 34 So.3d 209 (Fla. 2d DCA 2010).

147. The agreement also should not infringe on the attorney-client relationship. Provisions that do not allow counsel to share information with their clients are highly disfavored.⁴¹ There are limited situations where in-house corporate counsel, who is involved in business matters that touch on the confidential information in their regular activities, might appropriately be excluded from reviewing the information.⁴² In such a case, judicial review of that provision is strongly recommended.

Limitations on use of confidential information

148. In the same way that a confidentiality agreement or order should not impinge on the attorney-client relationship or the attorney's work-product, it should not presume to tell a party how they may use the information. Counsel should not agree to a term that has the function of an order *in limine*, or that prevents a possible use of the information in the litigation. Generally, agreements should include a term that permits use of the confidential information in conjunction with the pending litigation, and any related appeals, in any way, with disclosure limited as provided in the agreement. The application of the agreement or order to related lawsuits is something that should at least be considered at the time of initial negotiation. If a confidentiality agreement or order is intended to apply to several consolidated or related lawsuits, the agreement should expressly account for each of the lawsuits.

149. A term that limits the use of the confidential information to a single lawsuit is not improper. Sanctions have been awarded and upheld against trial counsel that used financial information, obtained under a confidentiality order in one lawsuit, in a subsequent, unrelated garnishment.⁴³ Although it might seem strange to prevent a lawyer from using knowledge that is already in their head from one lawsuit for the benefit of another client, that analysis does not take into account the fact that the knowledge was gained under a limited set of circumstances, balancing the interests present in the first litigation. Those same circumstances may not exist in the later litigation.

Sharing provisions

150. A point of contention in negotiation of confidentiality orders and agreements is often over ability to share the information obtained with other attorneys and litigants involved in other claims with the same party. In a negotiated agreement, it is rare that all parties would agree to a sharing provision. A party that insists on a sharing provision will also likely not prevail if the issue has to be resolved by the trial judge. At least two different Florida District Courts of Appeal have invalidated sharing provisions,⁴⁴ even when the provision

41 *Volpe v. US Airways, Inc.*, 184 F.R.D. 672 (M.D. Fla. 1998).

42 *Sony Computer Entertainment Am., Inc. v. Nasa Electronics Corp.*, 249 F.R.D. 378 (S.D. Fla. 2008).

43 *Roberts v. Bonati*, 133 So.3d 1212 (Fla. 2d DCA 2014).

44 *Cordis Corp. v. O'Shea*, 988 SO. 2d 1163 (Fla. 4th DCA 2008).

would have required those to whom the information was given to be bound by its terms.⁴⁵

151. The general justification for invalidating open-ended and non-specific sharing provisions is that the showing of need for the discovery and the balancing of interests under § 90.506 of the Florida Statutes is different from case to case.⁴⁶ Under this analysis, it is possible that a sharing provision could be proper in a very narrow and limited set of facts. However, given the apparent reluctance of Florida courts to allow discovery in one case to control discovery in other cases, any attempt at a sharing provision should be done carefully and with consideration of a severability clause.

IV. Secondary Considerations

Burden and manner of designating confidential information

152. Counsel need not specify in their agreement or order a particular manner of designating information or documents as confidential. Sometimes including it in the negotiation process can help define expectations for how the process will go, and including a provision in the agreement will give guidance to non-attorney staff who will likely be the ones to implement the agreement.

153. In terms of file maintenance, an electronic watermark, unique Bates number identifier or stamp on every confidential document, or statement associated with each interrogatory answer, is the most convenient. However, unless there is concern over compliance, it does not need to be spelled out in the agreement. If not included in the agreement or order, sometimes a statement in a cover letter that certain categories of documents are to be maintained as confidential can technically suffice. This may not be ideal in many situations, because then there is nothing on the document itself that would let a party know if it is confidential, or would require constant referencing against an index.

154. It might be more work for the producing party to stamp or watermark each document, as opposed to writing a separate letter or sending a separate index, but a document-by-document approach is consistent with the idea that the burden of establishing entitlement to confidentiality should fall on the party seeking to protect confidentiality. It also makes sense that each document which is allegedly confidential should be individually reviewed and stamped.

Provisions for errors

155. In a comprehensive agreement, counsel may want to specifically provide how to handle errors in disclosures. For example, what if documents are produced, and someone realizes that they should have been designated as confidential? An agreement or order does not

⁴⁵ *Wal-Mart Stores East, L.P. v. Endicott*, 81 So.3d 486 (Fla. 1st DCA 2011).

⁴⁶ Fla. Stat. § 90.506 (2014).

need to acknowledge this kind of possibility. If an order or agreement doesn't make mention of the possibility, a knowledgeable lawyer would likely successfully argue that Florida Rule of Civil Procedure 1.285, Inadvertent Disclosure of Privileged Materials, governing return of inadvertently-produced privileged documents provides a process by default.⁴⁷

156. The rule itself gives practical deadlines: ten days after a party learns of the inadvertent production to make the claim, and twenty days to challenge the assertion of privilege. If the facts of a particular case could be served with different timeframes, or even a requirement that once produced, confidentiality is waived, the parties to the order or agreement should make their intentions clearly known in the written terms of the document.

Use of confidential information during depositions

157. Once confidential information has been subject to discovery, it is foreseeable that counsel from either side may want to utilize it during a deposition or as exhibits to the deposition. Many agreements and orders are silent on the use of materials in depositions, and an explicit terms is arguably not necessary. If there is a term defining the scope of the agreement as allowing a party to use information in furtherance of the lawsuit, that would cover use of the information in deposition.

158. In some cases, however, explicit rules about depositions could be useful. Once information is disclosed in a deposition, without a protective order in place, a waiver has occurred.⁴⁸ To avoid this situation, some of the following conditions might be appropriate:

- if an answer is to be protected as confidential, it must be designated as such during the deposition or within a time certain after receipt of the transcript or with an errata sheet;
- the deposition must be labeled by the court reporter as confidential;
- parties will not attach confidential documents as exhibits to the depositions, but will only identify those materials by identifier numbers;
- a party must notify the producing party in advance if they intend to show confidential information to a witness; or
- that portions of, or entire, depositions may be identified as confidential information.

159. Finally, objections to questions during depositions are not permitted on trade secret grounds.

160. Counsel may also want to address dissemination of depositions containing confidential information. The agreement or order can provide that the status of a deposition transcript will be designated on the record at the end of each deposition, or within a set time. It could also pre-designate any pages of a deposition that contain confidential information as confidential and prohibit redistribution of those portions in advance.

⁴⁷ Fla. R. Civ. P. 1.285.

⁴⁸ *S&I Investments v. Payless Flea Market, Inc.*, 10 So.3d 699 (Fla. 4th DCA 2009).

Filing confidential information

161. The agreement or order should not attempt to limit use of confidential information, in documents, interrogatory answers, or depositions, in furtherance of the case. It should not restrict a party's right to introduce relevant information into the record.⁴⁹ In absence of a provision stating otherwise, the Florida Judicial Administration Rule 2.420 allows filing of documents with the Clerk under seal.⁵⁰ If the confidential information is a small bit of data that need not be in the record, Judicial Administration Rule 2.425 allows for redactions.⁵¹

162. Be cautious entering into agreements that provide for a different process than in these Rules. In state court, confidential information can also be presented to the court *in camera*, and sometimes the need to file the information can be avoided.

163. In federal court, it is a bit different. In addition to the constraints of motion practice, a party must seek leave of court to file a document under seal. The party filing the motion has to show good cause as to why the document should be sealed and kept away from public access. Proving entitlement to confidentiality is generally not something a party can properly show regarding its opponent's documents. When negotiating a confidentiality agreement for federal litigation, the party that wants to keep the material confidential should have to file the motion.

164. Finally, although it may be tempting to include a provision requiring an opponent to agree to allow any motion to file under seal to be filed as an Agreed Motion, a pre-contracted constraint on the ability to take a position in litigation is not ideal.

Challenges to designations

165. As previously explained, a party seeking to claim confidential protections for information or documents has the burden of proving entitlement to the privilege or protection. A confidentiality order or agreement should not flip that burden of proving actual entitlement to the privilege. Many, if not most, confidentiality agreements are entered into for the purpose of facilitating discovery. If the agreement allows a party to designate documents as confidential without review and oversight by a magistrate or court, that self-designation should not control the actual privileged status of the document or information.

166. An agreement or order should not require a party that wants to challenge a designation to immediately file a motion establishing why it is not protected. That flips the burden of proof — a result counsel should not invite. If the agreement is made to facilitate discovery, those considerations can be deferred to pre-trial evidentiary motions. Alternatively, the agreement could attempt to spell out a specific process of notification of challenge to designation, who has to file a motion, and the effect of the outcome of the motion. Be wary

49 *Rocket Group, LLC v. Jatib*, 114 So. 3d 398 (Fla. 4th DCA 2013).

50 Florida Judicial Administration Rule 2.420.

51 Florida Judicial Administration Rule 2.425.

of a provision that tries to limit use of a document if a court denies a motion to file under seal, as is used in federal courts.

Trial exhibits

167. The use of confidential information at trial usually cannot be successfully considered or negotiated during discovery. The requesting party is at a disadvantage and does not know what they will receive. Neither party knows exactly what their trial strategy will be. Therefore, approach provisions governing use of confidential information at trial cautiously. The simplest way to facilitate discovery is to acknowledge that counsel will address trial use of confidential information during the exhibit exchange or in pre-trial evidentiary motions.

Post-trial handling

168. Another provision not necessary — but often included — in an agreement covering discovery relates to the question of what happens to the information at the end of the case. If the agreement or order includes any discussion of the return or destruction of confidential information, make sure that the agreement provides that access to the information can continue through the litigation, post-judgment enforcement, and the final resolution of any related appeals. If there is a potential for related litigation, like a declaratory action, that should also be considered.

169. After stating when the need for the confidential information is done, the agreement or order should define what is to be done with it. The specifics can be deferred, providing that the producing party will have to request in writing what they want done with the information at the end of the case.

170. Some types of information are more sensitive to some clients. If the agreement does not defer the specifics for later delineation, consider the following questions:

- At the conclusion of the litigation, is all confidential information to be returned?
- Can copies be maintained by counsel for record keeping purposes in files?
- Certification that it was destroyed? Which party can exercise the option?
- If confidential information is to be returned, who pays shipping to have it returned?
- Is work product that references the confidential information permitted to be retained and maintained as confidential, or should it be destroyed?

171. The options are not limited, and can be dependent on the nature of the information and the progress of the case. If there are details for destruction outlined in the agreement, consider including those details as defaults, and allowing for alterations “as agreed in writing by all parties to this agreement.”

Continuing confidentiality

172. A confidentiality agreement or order may provide that the confidential nature of the information continues past the end of the litigation. This can be accomplished through defining the scope of permissible use of the information or through an explicit statement that the intent is that the information will remain confidential, except as otherwise provided by court order or the agreement of the parties.

173. Consider carefully how restrictive this term should be if it does not include an exception clause. A trial court does not maintain jurisdiction to modify interlocutory orders, including confidentiality orders, after entry of judgment. A confidentiality order cannot be modified during post-judgment collection proceedings.⁵² An order still can be enforced and sanctions can be granted for violations of a court order.⁵³

174. In cases touching on public hazards, as defined by the Sunshine in Litigation Act, there is a question as to the legality of continuing to maintain information as confidential if the mechanism of injury is determined to be a public hazard. A term that provides for a per se result, without consideration of public hazards, may not be enforceable.

175. The question of the ongoing validity of a confidentiality agreement can be tested, by the parties or by an intervenor, through a motion to set the agreement or order aside under the Sunshine in Litigation Act, which carries with it an entitlement to due process on evidence of status as a public hazard.⁵⁴ Parties to a confidentiality agreement may not want to limit the ability to challenge the propriety of claims of confidentiality if evidence shows that it would cover up a public hazard.

Liquidated damages

176. When drafting confidentiality orders counsel may want to resist the desire to include a liquidated damages clause. In addition to being subject to challenge, such a clause could end up being a limiting factor. The flexibility of a court's enforcement mechanisms through sanctions and contempt will fit any potential situation better than whatever can be negotiated before the documents are even produced.⁵⁵ Moreover, a sanction in the form of actual damages in compensation for the results of a violation of a confidentiality order has been upheld and acknowledged in appellate case law in Florida.⁵⁶

⁵² *Oliver v. Stone*, 940 So. 2d 26 (Fla. 2d DCA 2006).

⁵³ *Roberts v. Bonati*, 133 So. 3d 1212 (Fla. 2d DCA 2014).

⁵⁴ See, e.g., *E.I. DuPont De Nemours & Co. v. Lambert*, 654 So.2d 226 (Fla. 2d DCA 1995).

⁵⁵ *Sony Computer Entertainment Am., Inc. v. NASA Electronics Corp.*, 249 F.R.D. 378 (S.D. Fla. 2008).

⁵⁶ *Roberts v. Bonati*, 133 So. 3d 1212, 1217 (Fla. 2d DCA 2014).

V. Conclusion

177. Although this article is not meant to provide a form fit for all circumstances, the considerations discussed above should help with understanding why certain terms or elements may or may not need to be included in a confidentiality agreement. If the structural and procedural elements are understood, any previously drafted document will be an excellent springboard, including those available in federal trial court orders.

178. Confidentiality has an important place in discovery. Handled properly, it does not obstruct discovery and does not hide the truth. Handled improperly, casually, or without understanding future effects, it can cause problems for both parties seeking to protect their confidential information and parties seeking to discover it.