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Confidentiality Agreements: Two Lurking Problems

By John M. O'Connor and Carrie Maylor DiCanio

Business litigation these days frequently involves the production of voluminous documents in discovery. At the same time, clients may want their documents to be held confidential and to limit the persons who can examine them. The solution is usually for the parties to make the document production and related discovery subject to a confidentiality agreement.

Given the time pressures inherent in meeting discovery deadlines, and the prodigious number of documents to be reviewed and produced, counsel may adopt a confidentiality agreement that's been used before and a "Let's worry about that later" approach when it comes to identifying specific documents that will be subject to the agreement.

However, kicking the can down the road in this fashion can lead to trouble later on. Two items that are problematic are "attorneys' eyes only" provisions and attempts to require that documents filed in court be sealed.

What About the Client?

Attorneys' eyes only provisions generally prohibit documents so designated from being disclosed to anyone other than the attorneys litigating the matter, including prohibiting disclosure to the client. Yet many attorneys are not aware that such provisions may run afoul of two important and related principles:

1. A client is entitled to participate meaningfully in litigation in which it is involved.
2. Outside counsel has an ethical obligation to inform the client of information obtained in the litigation so that the client can make informed decisions.

For these reasons, both case law and the New York Rules of Professional Conduct effectively counsel that attorneys' eyes only provisions must be strictly limited to trade secrets or information that is akin to a trade secret in

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that it would provide competitors with an advantage.

In the *Gryphon* case, the New York Appellate Division held that documents should not be designated "attorneys' eyes only" when such a designation "prevents counsel from fully discussing with their clients all of the relevant information in the case so as to properly formulate a defense to the action against them."[1] In so holding, the First Department also pointed out that the defendants in the *Gryphon* case were not business competitors of the plaintiffs; instead the parties were simply adversaries in litigation. Claims of "prejudice" in litigation, not involving trade secrets, do not justify marking documents "attorneys' eyes only."[2]

Similarly, the New York Rules of Professional Conduct compel lawyers to keep their clients informed to an extent that would violate most attorneys' eyes only provisions. Specifically, Rule 1.4 (b) requires counsel to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." The rules also require a lawyer to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," to "keep the client reasonably informed about the status of the matter," and "promptly comply with a client's reasonable requests for information." Rule 1.4(a) (2-4). If an attorneys' eyes only provision prohibits counsel from consulting with in-house counsel or business principals concerning certain documents or information obtained in discovery, complying with that provision can result in a violation of the New York Rules of Professional Conduct.

What About the Public?

Provisions that require the sealing of "confidential" documents that are submitted in court are also problematic. The Appellate Division has held that there is a strong public interest, grounded in both constitutional and common law, in providing the public with access to documents and information that a court may use to render a decision.[3] In light of the "broad constitutional presumption" arising from the First and Sixth Amendments, "any order denying access must be narrowly tailored to serve compelling objectives, such as a need for secrecy that outweighs the public's right to access."[4] The right of the public to access is also recognized in common law principles, which have "long recognized that civil actions and proceedings should be open to the public in order to ensure that they are conducted efficiently, honestly, and fairly."[5]

Accordingly, rules in New York prohibit sealing of court records "except upon a written finding of good cause" that must specify the grounds for the sealing and must "consider the interests of the public as well as the parties."[6] Even where the litigants agree to sealing, the strong public interest in the transparency of judicial proceedings may override their agreement.

The classic situation in which there might be "good cause" for sealing would be a true trade secret, perhaps a patented manufacturing formula. In contrast, a claim of "prejudice" in the litigation is not sufficient, especially where the opposing party is not a business competitor but is only a garden variety adverse party.[7]

The New York City Bar Association website provides a model confidentiality agreement (http://www.nycbar.org/pdf/report/ModelConfidentiality.pdf) that is endorsed by New York's Commercial Division. The model agreement does not contain an attorneys' eyes only provision; however, it does contain "sealing" provisions that can create both logistical and legal complications down the road.

The "Moral" of the Story?

The takeaway here is that while it may seem convenient in the midst of document production to sign off on a confidentiality agreement and worry about the ramifications later, some provisions may warrant more immediate scrutiny and analysis so as to avoid significant problems later. And designating a document that will be filed in court as "confidential" should be limited to those situations, such as trade secrets, in which sealed filings are actually warranted.

ENDNOTES

[1] *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.,* 28 A.D.3d 322, 325 (1st Dep't 2006) ("Gryphon"); see *TC Ravenswood, LLC v. National Union Ins. Co.,* No. 400759-2011, 2015 N.Y. Misc. LEXIS 4940, at *10 (N.Y. Sup. Ct. New York County, June 10, 2015) (parties were not competitors; alleged harm in other litigation insufficient).

[2] *Gryphon* at 326.

[3] *Danco Labs., Ltd. v. Chemical Works of Gedeon Richter, Ltd.* 274 A.D.2d 1, 6 (1st Dep't 2000).

[4] *Gryphon,* 28 A.D.3d at 324.

[5] *In re Conservatorship of Brownstone,* 191 A.D.2d 167, 168 (1st Dep't 1993).

[6] 22 NYCRR section 216.1.

[7] *Gryphon*, 28 A.D.3d at 326; Ravenswood at 8; *Mosallem v. Berenson,* 76 A.D.3d 345 (1st Dep't 2010); *Mancheski v. Gabelli Group Capital Partners,* 39 A.D.3d 499 (2d Dep't 2007).

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