

**PROTECTIVE ORDERS AND PRESERVING
CONFIDENTIALITY DURING LITIGATION**

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A. Preservation of Internal Proprietary Confidential Documents

At the onset of litigation, defendants often are faced with decisions about whether and under what circumstances to produce confidential documents. There remain myriad factors to consider including whether the information is of a type that privacy laws govern and/or whether it is information that is proprietary and commercially sensitive. Similarly, there are several competing demands placed upon Courts in making confidentiality determinations. Court files are public and in general, the public has right to know the business of the Courts as it would any other branch of government. The parties in litigation however also have rights to protect their property from loss of value through public disclosure. Parties may also have rights related to their privacy interest in not having intimate private information disclosed to the public. The question becomes how to strike the appropriate balance between the competing demands.

Although in many jurisdictions, protective orders remain freely available to protect the confidentiality of documents exchanged in discovery, protective order procedures have changed – sometimes dramatically – in certain jurisdictions.

For example, defendants facing product liability suits must be vigilant in protecting sensitive documents during discovery, and should be aware of potential arguments made by plaintiffs or the media charging that disclosure is necessary to safeguard public health and safety. Moreover, defendants need to be mindful that even when protective orders provide some assurance that the initial exchange of documents during discovery will remain private; the public may subsequently acquire some right to access those documents once when they are introduced as evidence in support of motions, during trial or in some limited instances once settlement has occurred.

Over the last 15 years, plaintiffs' advocates and media interests actively have tried to limit the availability of protective orders as well as limiting the sealing of court documents through legislation and rule changes. These efforts have had varying degrees of success – in the 1990's several states passed Sunshine in Litigation Act statutes calling for the more open disclosure of court documents; however, the Committee on Rules of Practice and Procedure of the United States Judicial Conference concluded that no changes to federal protective order practice were necessary.¹ , Companies must remain alert to these issues as advocates continue to emphasize public access at the expense of trade secrets and confidential business information. , This material will provide a good overview of the potential issues with protecting confidential documents through a discussion of three jurisdictions – Texas, Florida and California . This paper will summarize the efforts by the Sedona Conference to promulgate guidelines regarding confidentiality issues including protective orders and highlight practical tips for practitioners relating to protective orders and confidentiality. The presentation that accompanies this paper will also include some additional material at the seminar.

1. Texas Rule 76a

When it comes to protective orders, Texas is a troubling jurisdiction. Whereas defendants often recognize that documents filed with the court on non-discovery matters are presumptively open to public access absent a sealing order, many may not be aware that in Texas, *unfiled* discovery materials may also be open to public access.

¹ In response to an effort to amend Rule 26(c) of the Federal Rules of Civil Procedure to strictly limit discovery protective orders because of claims they were used to conceal hazards from the public, the Federal Judicial Conference conducted a study; the resulting report concluded there was no misuse of protective orders to conceal public hazards. *See, e.g.*, Letter from Paul V. Niemeyer, Chair of the Civil Rules Advisory Committee to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States to the Hon. Henry J. Hyde, Chairman of the House Committee on the Judiciary, March 23, 1998.

Texas Rule of Civil Procedure 76a requires that courts carefully balance public and private interests before sealing “court records”:

Court records, as defined in this rule, are presumed to be open to the general public and may be sealed only upon a showing of all of the following:

(a) a specific, serious and substantial interest which clearly outweighs:

(1) this presumption of openness;

(2) any probable adverse effect that sealing will have upon the general public health or safety;

(b) no less restrictive means than sealing records will adequately and effectively protect the specific interest asserted.

Tex. R. Civ. P. 76a.

Apart from the questionable premise that sealing court files could have an adverse effect on public health or safety, problems arise because Texas defines “court records” in a decidedly non-traditional way: Under Texas Rule 76a(2)(c), court records include “discovery, not filed of record, concerning matters that have a probable adverse effect upon the general public health or safety.”

Until unfiled discovery has been shown to fall within Rule 76a’s peculiar definition of court records, Texas courts may issue protective orders. *See* Tex. R. Civ. Proc. 166b. The existence of Rule 76a, however, poses a threat to discovery confidentiality. Pursuant to this rule, unless a defendant’s interests in confidentiality “clearly outweigh” interests in “general public health or safety,” unfiled discovery—even if subject to protective order—can be opened to public inspection.

Adding to the uncertainty, nothing in Rule 76a explains how discovery documents can be determined to have a “probable adverse effect upon the general public health or safety,” unless one accepts both that the plaintiff’s filed complaint does not already serve to inform the public about the health and safety allegations, and that it is permissible for the court to prejudge the evidence before any finder of fact has adjudicated liability.

The tension created by Rule 76a between confidentiality and protections for trade secrets and other confidential business information, on the one hand, and claims about public health or safety, on the other hand, is clearly reflected in the Texas *General Tire* cases. In *General Tire, Inc. v. Kepple*, 917 S.W.2d 444, 452 (Tex. App. 1996) (“*Kepple I*”), the Texas appellate court set out a two-part test under Rule 76a for sealing confidential records:

1. The proponent of access first has the burden of proving that unfiled discovery meets Rule 76a’s definition of “court records;” and
2. If the proponent of access is successful, the burden then shifts to the party seeking to preserve confidentiality to rebut the presumption that those “court records” should not be sealed.

See id. at 447-48.

In *Kepple I*, the plaintiff allegedly was injured when a tire defect led to a rollover accident. The defendant obtained an interim protective order under Rule 166b (5) (c) covering seven general categories of documents (including tire standards, revisions of those standards, and testing), all alleged to be trade secrets. *Id.* at 449. The interim protective order permitted General Tire to designate information produced during discovery as confidential after determining the information was a trade secret and that disclosure would damage its competitive

position. The order required Kepple to notify General Tire if it disagreed with General Tire's designation of any document as confidential. The confidential order provided for document sharing in that it allowed plaintiff's counsel to disclose documents to any plaintiff's counsel, witnesses, court or jury in any other suit alleging a tire defect.

Three months after issuing the protective order, the district court on its own initiative stated at a pretrial conference that any order limiting dissemination of the documents must comply with Rule 76a. General Tire subsequently filed a motion for protective order or in the alternative a temporary sealing order under either Rule 166b(5)(c) or Rule 76a. Before any further action was taken concerning the documents, the parties settled the lawsuit. The trial court signed an order dismissing the suit with prejudice, without vacating the interim protective order.

After settlement of the case, plaintiff moved to nullify the parties' protective order pursuant to Rule 76a. *Id.* at 447. The dispute centered on reports that plaintiff claimed "proved" that defendant's tires had an inordinately high defect rate. General Tire argued that the disputed materials contained confidential commercial information and trade secrets, that disclosure would give competitors an unfair advantage and that it therefore should not be open to public access. After conducting a hearing into whether the documents would have a "probable adverse effect upon the general public's health or safety," the trial court vacated the parties' protective order and unsealed the discovery materials.

General Tire filed a motion to reinstate the protections of the interim protective order. The court scheduled a hearing on General Tire's motion giving public notice as required by Rule 76a. Three parties intervened in the Rule 76a proceeding: Public Citizen Center for Auto Safety, Inc., Lawyers for Public Justice, and Jill Neviel, an individual. The trial court held that the

documents were court records and that General Tire had not met its burden to seal the documents; the intermediate appellate court affirmed. *Id.* at 451-54.

Fortunately, the lower courts' decisions that these discovery materials constituted court records under Rule 76a were overturned by the Texas Supreme Court in *General Tire, Inc. v. Kepple*, 970 S.W.2d 520, 527 (Tex. 1998) ("*Kepple I*"). The Texas Supreme Court held that plaintiff failed to prove that the disputed documents revealed any public hazard and that because plaintiff failed to "demonstrate some nexus between the alleged defect and the documents at issue . . . the district court abused its discretion in classifying the documents as 'court records' under Rule 76a(2)(c)." *Id.* at 527. More specifically, the Court noted that there were disputes over the accuracy of the data contained in the documents and that, although physical inspections revealed purported defects in defendant's tires, there was no proof that any of the disputed documents exposed those defects.²

Additionally, the Court's opinion provided much needed guidance on Rule 76a. The *Kepple II* court clarified that "the special notice procedures of 76a only apply to the sealing of court records" and do not apply to "the threshold determination of whether particular unfilled discovery is, indeed, a court record subject to the rule." The *Kepple II* court also noted that it was error for the trial court to have "allowed [the] intervenors to have full access to the documents at the first stage, before it determined the documents to be court records." Because

² Recently, in *Clear Channel Communications Inc., v. United Services Automobile Association*, 2006 WL 12711, *1 (Tex. App. Jan. 4, 2006), a Texas intermediate appellate court reversed a protective order and remanded with instructions that the trial court draft a protective order consistent with Rule 76a. In *Clear Channel*, an insurance company sued after a Clear Channel TV station broadcast an investigative story regarding its practice of outsourcing jobs overseas. *Id.* In discovery, Clear Channel sought the insurer's contracts, employee agreements, and corporate and employment policies. *Id.* When the parties could not agree to a protective order, the insurer moved for, and obtained, a protective order that allowed them to unilaterally designate documents as confidential and file them under seal. *Id.* at *2. The defendant immediately appealed the order, arguing that it violated Rule 76a. *Id.* Although at the time of appeal neither party had yet attempted to file documents under the protective order, the appellate court agreed that the protective order violated Rule 76a and reversed. *Id.* at *3-4.

General Tire objected to the designation of the documents as a court record, the trial courts was obligated to first review the documents in camera and make an initial determination as to whether the document constituted a “court record.” On one final note concerning *Kepple II*, the Court noted that “the Benson documents,” documents produced by General Tire to Kepple’s counsel in another lawsuit in another jurisdiction, would be guided by the terms of the protective order in the present action since General Tire constructively agreed to produce the documents in the present action.

In a subsequent case, *In re Continental General Tire, Inc.*, 979 S.W.2d 609, 614 (Tex. 1998), the Texas Supreme Court addressed the interaction of Rule 76a and trade secrets. In *In re Continental General Tire, Inc.*, the defendant argued that it should not be required to provide plaintiffs with trade secret information, namely the chemical formula used to bond parts of the tire together, because protective orders would be ineffective to prevent public disclosure under Rule 76a. The court implicitly agreed that trade secrets *could* be publicly disclosed—citing *Kepple*—but stated that “Rule 76a allows the information to remain sealed upon a showing that it meets the criteria specified in Rule 76a(1) . . . [and] [t]hat a document contains trade secret information is a factor to be considered in applying this sealing standard.” *Id.*

Although the Texas Supreme Court provided some needed guidance in *Kepple II*, given Rule 76a, defendants litigating in Texas state courts may need to proceed with caution and in full recognition of the danger the rule may pose to confidentiality should their opponent or the court decide to make it an issue.

2. Florida Statute section 69.081 -- the “Sunshine in Litigation Act”

Although not identical to Texas, Florida’s approach to protective orders also makes obtaining protective orders and maintaining confidentiality of proprietary and trade secret

documents more difficult. Florida Statute section 69.081 carries the benign-sounding name, the “Sunshine in Litigation Act”. The Sunshine Act provides sweeping protections for public access and a corresponding loss of protections for parties that have legitimate confidentiality concerns. The Sunshine Act does not affect all discoverable documents, but those that are affected are almost certain to be opened to public access.

The Sunshine Act provides:

Except pursuant to this section, no court shall enter an order or judgment which has the purpose or effect of concealing a public hazard or any information concerning a public hazard, nor shall the court enter an order or judgment which has the purpose or effect of concealing any information which may be useful to members of the public in protecting themselves from injury which may result from the public hazard.

Fla. Stat. Ann. § 69.081(3).

Under the Sunshine Act, there are two broad categories of documents — documents that are not “pertinent to public hazards,” and those that are. Documents not pertinent to public hazards may be broadly protected under protective orders and may be sealed on a showing of good cause.³ Those documents that are found to be pertinent to public hazards are provided little or no protection from disclosure. Under the statute’s express terms, there is no protection from disclosure even if the documents contain trade secrets [*see* Fla. Stat. Ann. § 69.081(5)].

³ In *State Farm Fire & Casualty, Co. v. Sosnowski*, 830 So.2d 886, 887 (Fla. Dist. Ct. App. 2002), the court indicated that “financial practices that constitute economic fraud are not a ‘public hazard’ under Section 69.081(d) Florida Statutes (2001).” The Court explained that the term is limited to instances where health and safety issues are implicated, such as in product liability cases. *Id.* At 888.

Florida's statute, unlike those in other States, contains no provision for balancing confidentiality and protections for trade secrets against public health and safety in its express terms. In fact, one of the few protections a defendant may have is procedural – defendants facing the unsealing of confidential information are guaranteed the right to a hearing. *E.I. Dupont De Nemours & Co. v. Lambert*, 654 So. 2d. 226, 228 (Fla. Dist. Ct. App. 1995) (holding that it is a violation of due process not to allow defendants a hearing to defend confidentiality agreements).

As in Texas, product liability litigation involving tires produced a published case demonstrating how these unique protective order rules operate. In *Jones v. Goodyear Tire & Rubber Co.*, 871 So. 2d 899, 900 (Fla. Dist. Ct. App. 2003), the plaintiff allegedly was injured by a tire while he filled it with air. The plaintiff claimed the tire rupture was caused by a design defect – namely that the difference in thickness between the center and sidewall of the tire was too great. Goodyear objected to producing documents to the plaintiff on various grounds such as that the requests were overbroad, burdensome, vague, and constituted trade secrets. Plaintiff requested that Goodyear file the documents that it felt constituted trade secrets with the special master that had been appointed. Goodyear did not file any documents with the special master but did file a motion for a protective order with the Court. Over the plaintiff's objections, the trial court entered a protective order prohibiting "parties and their counsel from disclosing [defendant's] documents obtained during discovery." *Id.* at 905.

The case was ultimately tried, resulting in a jury verdict in favor of the plaintiffs. The trial court subsequently entered a directed verdict for Goodyear and granted a new trial. On appeal, the plaintiffs argued that the trial court erred in directing the verdict and requested

reinstatement of the jury verdict and that the confidentiality order issued by the trial court be vacated.

On appeal, an intermediate appellate court agreed with the plaintiffs and ordered that the plaintiff's jury verdict be reinstated and to vacate the confidentiality order issued by the trial court. In overturning the protective order the Court summarily held that all documents should be made public "since the jury clearly found that [plaintiff] was injured by the tire in question, . . . [and therefore the] tire is deemed a 'public hazard.'" As a result, it concluded that the order protected the confidentiality of documents "which would conceal information regarding this tire," was improper. *Id.* at 906.

On remand, Goodyear sought a hearing and in-camera inspection of the documents covered by the confidentiality order. Goodyear asserted that the Sunshine in Litigation Act does not require the documents to be made public on the basis that the documents are trade secrets and alternatively that the documents don't pertain to the particular make and model of the tire at issue in the litigation. Goodyear also argued that disclosure of its documents by the trial court without an in-camera hearing would violate its due process rights. The trial court examining whether it had jurisdiction to entertain Goodyear's motion found that it lacked jurisdiction and issued an order vacating the confidentiality order allowing public disclosure of all documents; the trial court stayed the vacation of the order pending appellate review.

On appellate review, the *Goodyear Tire & Rubber Co. v. Jones*, 929 So.2d 1081, 1084 (Fla. Dist. Ct. App. 3d Dist., 2005) Court subsequently affirmed. The appellate court noted that the trial court erred by issuing the initial protective order to Goodyear without first holding a hearing to determine which documents related to the claimed public hazard and if any of the documents related to a trade secret. The appellate court admonished the trial court for not

determining whether the tires constituted a public hazard “prior to entering the order, rather than deferring until after trial.” *Id.* at 1084. In addressing Goodyear, the appellate court held that Goodyear waived its right to a hearing on remand because it invited the original error by asking the trial court to enter a blanket protective order without a hearing to determine whether the Sunshine Act was implicated. *Id.* at 1083-84. The appellate court’s ruling left the defendants without any confidentiality protection for their discovery documents.

Given Florida’s statutory restrictions and case law on protective orders, litigants in that state must anticipate their potential impact and develop their strategy accordingly.

3. California Rule of Court 243.1

Unlike Texas and Florida, California has not broadly restricted the availability of protective orders for protecting a defendant’s sensitive documents exchanged in discovery. It does, however, have court rules that control whether those documents will remain confidential once they are filed with the court as, for example, in support of a motion for summary judgment.

Accordingly, in California, parties may stipulate to broad protective orders regarding discovery not filed with the court, but California Rule of Court 243.1 mandates that a party seeking to seal discovery filed with the court must show why the information should be sealed. Rule 243.1’s openness presumption applies to court records, which include “discovery materials that are used at trial or submitted as a basis for adjudication of matters other than discovery motions or proceedings.”

Parties moving to seal court records must file a motion or application for an order sealing the records accompanied by a memorandum of points and authorities and a declaration

containing facts sufficient to justify sealing. Cal. R. Ct. 243.2(b)(1). The sealing motion must demonstrate, under Rule 243.1(d), that:

1. There exists an overriding interest that overcomes the right of public access to the record,
2. The overriding interest supports sealing the record,
3. A substantial probability exists that the overriding interest will be prejudiced if the record is not sealed,
4. The proposed sealing is narrowly tailored, and
5. No less restrictive means exist to achieve the overriding interest.

California does provide procedural protections when documents are lodged so that the court can decide if permanent sealing is proper. Pending determination by the court, such documents must be filed publicly in redacted form “so that they do not disclose the contents of the records” to the public. Cal. R. Ct. R. 243.2(b)(3). If the court denies the motion to seal the documents, “the clerk must return the lodged record to the submitting party and must not place it in the case file unless that party notifies the clerk in writing . . . that the record is to be filed.” Cal. Ct. R. 243.2(b)(6).

While California’s procedures do provide defendants with more assurance that documents produced in discovery will be treated confidentially, even they make clear that defendants in litigation can never have absolute assurance that confidentiality will be preserved indefinitely. As the litigation progresses and those same documents move into the court’s file or are introduced at trial, public access considerations take greater prominence and may eventually lead to disclosure.

4. The Sedona [Draft] Guidelines: Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases

Product manufacturers also should be aware of another development regarding protective orders. In April 2005, The Sedona Conference, a nonprofit law and policy think tank, published a public comment draft of guidelines titled “Best Practices Addressing Protective Orders, Confidentiality & Public Access in Civil Cases” (“Draft Guidelines”, available at www.thesedonaconference.org); the committee working on those guidelines will be meeting again around the time the materials for this conference go to print. As the title suggests, these guidelines will address confidentiality for all aspects of litigation, whether discovery protective orders, access to sealed court records, juror confidentiality, public access to trials, and access to electronic court files.

As presently drafted, product manufacturers and those with intellectual property concerns are likely to have concerns with the Draft Guidelines, particularly on the issue of discovery and protective orders. For example, the Draft Guidelines presently downplay the multitude of legitimate reasons that business have for protecting the confidentiality of their commercial information, trade secrets and other intellectual property. Public comments can be provided to the Sedona group through their web site.

B. Litigation Protective Orders -- Three Common Scenarios

Protective order issues can arise in litigation any number of ways, but regardless of how they do, defendants and their counsel must actively manage the situation in order to protect the confidentiality of sensitive business information and intellectual property alike. Common scenarios in which protective order issues may arise include:

1) Defendant willingly produces documents to Plaintiff, who is amenable to a sweeping and protective confidentiality agreement. The trial court readily signs off on the stipulated protective order, pursuant to which the parties file documents under seal with the court without any further showing. Later, the Plaintiff contends there is no good cause for the order, or the media seeks access to the confidential discovery or sealed court records, or an appellate court vacates the sealing order because the record does not establish sufficient cause for it.

Stipulated protective orders are an efficient way for litigating parties to get discovery under way, and courts often encourage parties to use them because they reduce the number of discovery disputes that wind up in motion practice. With a broad protective order in place, litigants may respond to more discovery, and defendants are more likely to produce sensitive documents believing that they are protected. The goals surrounding quickly resolving disputes on the Court's docket are served.

However, unless defendants take care to establish a record as to why the produced documents are entitled to confidentiality or, if filed, to sealing, then this scenario may well lull defendants into a false sense of security. If no record has been established as to the appropriateness of the protective order prior to trial or settlement, the defendant may not have not have any opportunity to subsequently make an appellate record and may have its documents released to the public domain.

2) *Defendant is ordered by a court to produce sensitive documents under a protective order in a jurisdiction that is more protective of confidential documents. Defendant is subsequently sued in a State where courts are more likely to order production of these the same documents.*

This scenario requires defendants to be particularly vigilant in assessing the States in which they potentially face litigation from the time a first complaint is filed. Once documents have been produced in one jurisdiction, it becomes harder to fight production in another. Accordingly, when it is reasonable to anticipate litigation across many jurisdictions, it may be wise to fight discovery requests from the outset where feasible, rather than broadly produce documents in reliance on a protective order that may not be available in other jurisdictions. Counsel for the defendants should seek to limit the use of documents solely for the purposes of litigation. Additionally, defendants may wish to consider seeking an order that the documents remain under the jurisdiction of the Court that first issued a protective order and that is more protective of confidential documents.

3) *There is a concerted efforts by members of the Plaintiff's bar to bring suit against the Defendant in a jurisdiction--like Florida or Texas --that is more narrowly protective of confidential documents.*

Defendants that have been subjected to such a campaign may wish to fight harder from the outset to narrow the scope of permitted discovery and should establish a thorough and detailed record about why documents are confidential and warrant protection. Defendants obviously need to be mindful that in such states that there is not as much protection for confidential documents and that the rules strongly favor disclosure of information. Defendants may also wish to consider devoting resources, internally or externally, to the issue of managing

discovery to modify the impact of satellite litigation by the Plaintiff. The litigation over public access to documents may be more contentious than the actual merits of the underlying dispute.

C. Best Protective Order Practices for Companies with Confidential Documents

■ *Determine which documents are truly confidential*

In some courts, there is increasing reticence about readily-granting broad, overarching protective orders. Even where courts are amenable to signing such agreements, defendants risk exposure of those documents in other jurisdictions or on appeal, particularly if the orders cover documents that do not truly warrant protection. Defense attorneys should counsel clients that they should have *bona fide* justifications why documents are confidential, and prepare them that they may well need to declare under penalty of perjury that each such document is a trade secret or otherwise confidential commercial information.

It is axiomatic that one result of court emphasis on public disclosure at the expense of corporate confidentiality is that the time—and consequently the costs—spent litigating discovery issues in product liability and other suits increase. The weakening of protective orders requires that defendants spend more money and resources at the discovery stages of litigation in order to establish which documents are confidential. While it may seem less costly and time-consuming to produce everything and get sweeping protective orders, which often include provisions requiring the sealing of documents, defendants should evaluate the risk to confidentiality before doing so as the cost of having trade secrets and other confidential information released into the marketplace could be immeasurable.

■ *Protect the documents early and often – Establish the universe of documents*

Once counsel and their clients have determined which documents are truly confidential, they should fight production of those documents from the beginning by narrowing the scope of discovery. As an emphasis of public access becomes more prevalent, protective orders become less effective and should not be relied on to absolutely protect sensitive documents. Not surprisingly, restrictions on protective orders (and the sealing of court records) have a chilling effect on defendants' willingness to engage in open and broad discovery.

Consequently, defendants should—as early as practicable—establish the universe of discoverable documents. Too often, defendants restrict the universe of documents that they believe *should* be discoverable, while best practices dictate that defendants have a full understanding of the universe of documents that *could* be discoverable. Defendants' counsel should carefully review all documents and, upon finding confidential documents, should prepare clear legal reasoning why those documents are non-discoverable or should be protected by protective order. This method can help ensure that if the court orders production of documents, defendants will be prepared at the outset to protect their confidentiality.

■ *Understand exposure in other states, where protective orders might not withstand scrutiny*

Defendants should be cautious when producing sensitive documents, whether subject to protective order or not. Defendants must understand that even though they are being sued in a jurisdiction that permits broad protective orders, they may face subsequent lawsuits in States less amenable to such orders. Defendants sued in related actions in other States may be forced to produce the same documents as they produced in prior actions. If the related actions are in States like Florida or Texas, defendants may be unable to prevent those documents from being disclosed to the public, irrespective of the protections originally granted them.

■ *Continue to protect the documents on appeal*

Defendants should also protect the record on sealed documents on appeal. The key to protecting documents after the trial court judgment is to create a strong pre-trial record defending the confidentiality of documents. In particular, defendants should be wary of plaintiffs or courts that too willingly sign broad umbrella-style orders. Although such orders may allow defendants discretion to seal documents they deem confidential, defendants may risk public disclosure after the end of trial. If the order is disputed on appeal, it is imperative that there is a clearly established record defending the reasons for sealing court documents.

In particular, defendants should be wary that the courts themselves may not offer clear defensible opinions why documents are being sealed. As a matter of good practice, parties stipulating to a protective order allowing defendants to seal records should establish good cause for enforcement of the order within the four corners of the order. *See ACandS, Inc. v. Askew*, 597 So. 2d 895, 898 (Fla. Dist. Ct. App. 1992) (vacating a confidentiality order that was “totally silent as to the ‘good cause for its entry’” and holding that “enforcement of the . . . order, absent an adequate statement of good cause within the four corners of the order itself, could run afoul of . . . public policy”).

D. Conclusion

With research and development costs and the competitive advantage of certain types of information in a rival’s hands, protective orders are still a crucial weapon in the protection of trade secrets, but defendants can no longer assume they provide impenetrable armor. But given unrelenting calls by plaintiffs’ advocates and the media for more access to discovery materials and court files, the landscape surrounding the entry of protective orders and the sealing of court documents can be treacherous. The more narrowly conceived the protective order request, and

the more judiciously pursued in litigation, the greater the likelihood that defendants will be able to prevail in protecting confidential information from public disclosure when faced with a challenge.