

GUIDELINES FOR PROPOSED PROTECTIVE ORDERS SUBMITTED TO JUDGE FASHING

Procedure for Requesting Entry of a Protective Order

1. Stipulated Protective Orders

In certain cases, the parties may agree that discovery should be governed by a protective order limiting the disclosure, use, and dissemination of confidential information. If all the parties agree concerning the need for a protective order and its scope and form, their counsel should file a stipulated motion for protective order with the proposed protective order attached as an exhibit to the motion. The parties must also e-mail a copy of their proposed protective order (in Word format) to lfproposedtext@nmcourt.fed.us. If the proposed protective order is appropriate, the Court will sign and enter it. If it is not appropriate, the Court will, in its discretion, deny the motion, notify counsel of any objectionable language or provisions, or modify and enter a revised protective order.

2. Opposed Protective Orders

If the parties disagree concerning the need for a protective order and/or its scope or form, the party or parties seeking such an order should file an opposed motion for protective order with the proposed protective order attached as an exhibit to the motion. Where there is an objection to the scope or form of a proposed order, the party or parties opposing the motion shall, in their written response to the motion, provide the Court with proposed language that would resolve their specific objections to the order's scope or form.

Judge Fashing's guidelines for proposed protective orders

The following guidelines have been developed to assist the parties in drafting stipulated protective orders.

1. Recitation of Facts Showing Good Cause Under Fed. R. Civ. P. 26(c)

Any proposed protective order must include a concise but sufficiently specific recitation of the particular facts that, according to the parties, provide the Court with an adequate basis on which to find good cause to issue the order pursuant to Federal Rule of Civil Procedure 26(c).

2. Scope of the Protective Order

The scope of the protective order must be narrowly tailored and specific. It should include a clear and precise description of the categories of documents, information, items, or materials (including electronically created or stored information) that are subject to the protective order, such as “medical records,” “personnel files,” or “tax returns.” Categories such as “all documents a party designates as confidential” or “all business records” are vague and overbroad. The protective order should clearly reflect that its provisions only apply to the named categories of documents, information, items, or materials specifically set forth in the protective order. The protective order should explicitly exempt information or documents that are available to the public or have not previously been kept in a confidential manner.

3. Provisions for Filing Documents Containing Confidential Information Under Seal

The protective order should not contain a blanket provision that requires or allows the parties to file documents containing confidential information under seal without the Court’s approval. As a public forum, the Court’s policy is to provide the public with access to filed documents to the fullest extent possible consistent with the law and the parties’ rights to confidentiality and privacy. Where the sealing of documents is not explicitly mandated by law or regulation (*e.g.*, False Claims Act complaints), a document will only be sealed if the Court finds that there is good cause to withhold the specific document in question from the public by sealing it. The mere designation of information as confidential pursuant to a protective order

may not be sufficient to satisfy the Court's requirements for filing under seal in light of the public's presumptive right of access to the Court's dockets. Rather, where a document containing information subject to a protective order is included in a pleading filed with the Court, the party filing such pleading should also file a motion to seal the document. In accordance with this policy, a proposed protective order must include the following acknowledgement:

The parties acknowledge that this Order does not entitle them to seal all confidential information filed with the Court.

In general, before filing a motion for leave to seal a document filed with the Court, the parties should consider other steps to prevent the unnecessary disclosure of confidential information in court filings, such as redacting confidential information from the document to be filed. If the parties wish to include a provision for filing confidential materials under seal in the proposed protective order, the following language generally would be acceptable:

In the event a party seeks to file any document containing Confidential Information subject to protection under this Order with the Court, that party must take appropriate action to insure that the document receives proper protection from public disclosure, including: (a) filing a redacted document with the consent of the party who designated the document as confidential; (b) where appropriate (e.g., in relation to discovery and evidentiary motions), submitting the document solely for in camera review; or, (c) when the preceding measures are inadequate, seeking leave to file the document or portions thereof under seal by filing a written motion for leave to file under seal. The submitting party may file a document designated as confidential under this Order as a separate sealed exhibit before a sealing order is obtained. However, contemporaneously with that filing, the party must file a motion for leave to file the document under seal, identifying the party that has designated the material as confidential ("the designating party"). If the party filing the document containing confidential information is the designating party, the motion for leave to file under seal should include a declaration identifying the confidential information contained in the document and explaining why the document is sealable. If the party filing the document is not the designating party, the designating party must file a declaration identifying the confidential information contained in the document and stating whether the designated material is sealable, and if so why, within fourteen (14) days of the filing of the motion to file under seal. If the designating party does not file a responsive declaration within the fourteen day time period, the submitting party may file the document in the public record no earlier than four days, and no later than ten days, after the motion is denied.

4. Introduction of Documents Containing Confidential Information into Evidence

The protective order should not attempt to limit the Court's judgment or discretion in any way regarding the treatment, handling, or admission of documents containing confidential information at a hearing or trial. If the parties wish to include a provision regarding the use of documents containing confidential information at hearings and trial, the following language would generally be acceptable:

The terms of this protective order do not preclude, limit, restrict, or otherwise apply to the use of documents at court proceedings. Subject to the Federal Rules of Evidence, a confidential document may be offered into evidence at trial or any court hearing, provided that the proponent of the evidence gives advance notice to opposing counsel of the intended use of the confidential document as may be required by a scheduling or other order. Any party may move the Court for an order that the confidential document be received in camera or under other conditions to prevent unnecessary disclosure. The Court will then determine whether the proffered evidence should continue to be treated as a confidential document and, if so, what protection(s) may be afforded to such information at the trial or hearing.

5. Application to Non-Parties

The protective order should refrain from stating that it is binding on non-parties or that the Court has jurisdiction over non-parties to enforce the protective order's provisions. The Court will not order a non-party to consent to the Court's jurisdiction or to abide by the protective order's terms. The parties may attach a form agreement to the proposed protective order, and a non-party may agree to be bound by the terms of the protective order by signing the agreement. The protective order may include provisions that protect confidential information, documents and materials produced by a non-party or parties who are later added to the action. Any new party to the lawsuit must be given the opportunity to review the protective order and decide whether to stipulate to or contest it.

6. Jurisdiction

Ordinarily the Court's jurisdiction, including jurisdiction to enforce a protective order, terminates upon final disposition of the case. While the protective order should not state that the Court has continuing jurisdiction over the protective order, if the parties agree to be bound by its terms after the litigation ends, the protective order may appropriately state that its provisions will continue in force after the litigation terminates. If the protective order includes such a provision, the parties may also include a provision allowing a party to seek leave to reopen the case to enforce the protective order's provisions.

7. Instructions to the Clerk of the Court

The protective order should not direct the Clerk of the Court to return or destroy confidential documents that are filed in the case.

8. Court Personnel and Jurors

The protective order should neither state nor imply that it is binding on court personnel or jurors. If the protective order would otherwise leave room for interpretation as to this point, it should explicitly provide an exception for court personnel and jurors.