

**ISSUE: DO YOU NEED TO FILE A PROTECTIVE ORDER TO PROTECT AGAINST UNREASONABLY BURDENSOME REQUESTS?**

**ANSWER: YES**

**Excerpt from *Arkfeld's Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics (2008-2009)***

**§ 3.14 PROTECTIVE ORDERS — RULE 26(C) [A] Burdensome**

A. Overview

B. Requesting Party Strategy

C. Producing Party Strategy

D. Checklist

*A. Overview*

When a motion is filed by a person responding to a discovery request “a court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . (emphasis added).” FED. R. CIV. P. 26(c).

Protective orders are often sought in electronic discovery cases on the basis that retrieval of computer data is unreasonably burdensome or costly and to protect privacy, trade secrets, confidentiality and other privileges.

Cross-references:

- § 7.4(F), *Scope of Production — Rule 26(b)(1)*
  - § 7.4(F)(3), *Relevancy and Overbroad Concerns*
  - § 7.4(G)(2), *Burdensome — Rule 26(b)(2)(C)*
  - § 7.4(G)(3), *Cost Allocation — 26(b)(2)(iii)*
  - § 7.4(I), *Protective Orders — Rule 26(c)B. Requesting Party Strategy*
  - Argue that the mere fact that a document is a computer record or an electronic document does not warrant protection from disclosure.
  - Argue that the producing parties’ privacy concerns and attorney-client data can be adequately protected by a confidentiality order directed at the examining forensic expert.
  - A non-party’s privacy interests can be adequately protected by a confidentiality order.
- C. Producing Party Strategy*

- Argue that trade secrets should be kept confidential and a protective order should be issued.
- Argue that a protective order under Fed. R. Civ. P. 26(c) should be issued for undue expense or burden in order to shift all or part of the financial burden to the requesting party or to limit discovery.

- Set forth specific confidentiality requirements depending on the facts of a case, such as including a method for designating confidential electronic documents and to whom the documents can be disclosed.

- A protective order can be entered to preserve the producing party's privacy concerns. *D. Checklist*

[ ] Are there circumstances such as "annoyance, embarrassment, oppression, undue burden or expense" that would provide grounds to seek a protective order?

[ ] Is it necessary to protect privacy, trade secrets, confidentiality and other privileges?

[ ] Is it necessary for the court to consider cost shifting in the disclosure of ESI?

[ ] Have the parties considered the specific provisions of the protective order including to whom the protective order applies and the conditions under which information may be disclosed?

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