Will Clients' Confidential Information Stay Safe?

Repercussions possible from decision to release diocese documents

By PATRICK M. FAHEY and SUSAN S. MURPHY

Complex cases necessitate the exchange of information in discovery that the parties consider to be proprietary and confidential. The orderly progression of these cases therefore generally requires the entry of some form of protective order, which enables the parties to honor their discovery obligations without the risk of disclosing their confidential information to the public or even, in some instances, the opposing party. The Connecticut Supreme Court's recent decision in *Rosado v. Bridgeport Roman Catholic Diocean Corp.*, 292 Conn. 1 (2009), may upset this compromise.

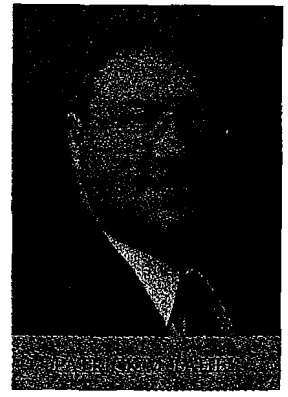
At issue in *Rosado* were protective orders entered during the course of pre-trial discovery in 23 lawsuits brought against the Bridgeport Roman Catholic Diocese and several individual defendants. In reliance on those orders, the parties exchanged discovery and filed numerous documents in connection with various motions. Those lawsuits ultimately were settled and withdrawn. Over a year later, three newspapers moved to intervene and vacate the previously entered protective orders. Following an appeal in 2005, the trial court granted those motions.

The state Supreme Court affirmed. The public, the court reasoned, has a presumptive right of access to "judicial documents," which would be broadly construed to encompass any document filed with the court upon which the court reasonably may rely in support of its adjudicatory function. The court determined that almost all of the documents at issue fell into this category, including both dispositive and non-dispositive motions (such as summary judgment motions and sealed discovery motions) together with their exhibits. Each of those documents was therefore subject to the presumption of public access notwithstanding the previously entered protective orders.

Over a thoughtful dissent, the court adopted a "balancing of the interests" test to assess the merits of the intervenors' motions to vacate. Under that test, the moving party bears the burden of merely establishing that modification of a previously entered protective order is appropriate by, for example, demonstrating that the order was granted improvidently, that the original rationale for the order no longer applies, or that the rationale now no longer outweighs the public's right to access. Once that burden is met, the court balances the countervailing interests of the party opposing modification (such as, that party's reliance on the order) against the public's presumptive right of access.

Need To Re-Litigate?

This standard was easily met in *Rosado*. The court agreed that, because the initial cases had been withdrawn, the original rationale for the protective orders (defendants' right to a fair trial) was no longer implicated and, although additional cases were pending, the public's right to access outweighed the risk to defendants' right to a fair trial. The court further concluded that defendants' reliance on the protective orders remaining permanent was not reasonable because the orders stated they would apply "until further order of this court...."



Rosado has the potential of undermining the efficient litigation of complex matters, calling to question the finality of court orders, interfering with the efficient and voluntary exchange of information in discovery and potentially giving rise to abusive litigation tactics.

The "balancing of the interests" standard essentially requires the re-litigation of the propriety of a protective order at the behest of a third party after confidential information has already been disclosed. Prior to *Rosado*, parties contemplating the production and potential filing with the court of confidential documents were able to litigate the extent of the protection and disclosure of those materials *prior* to their production and filing. Now, litigants will be forced to assess not only disclosure among the parties, but also the prospect of re-litigating the same issues down the road, on an entirely different playing field, where the players are unknown and the confidential information is subject to the public's presumptive right of access. The prospect of having to re-litigate the propriety of such an order in perpetuity is daunting.

The court's conclusion that it was unreasonable for the defendants to have relied on the protective orders compounds this uncertainty. Almost every protective order governing pre-trial discovery contains a provision similar to the one at issue, because such orders apply to the exchange of information in discovery – not at trial. The fact that a party may not rely on a pretrial protective order to seal evidence introduced in open court should not render its reliance on such an order to govern the pretrial process unreasonable. The failure to recognize this distinction poses a very real threat to efficient discovery.

Potential To Disrupt

It is the ability to rely on protective orders that allows parties to dispense with many concerns about whether and how much information should be provided voluntarily, and the inability to rely on a protective order entered by the court has the potential to disrupt the careful balance struck in most cases. If faced with the prospect of having confidential information disclosed to third parties, even years after the termination of the dispute, parties may be wary of conceding objections and producing information in discovery for fear that that information will later be filed with the court.

Finally, as the court recognized, *Rosado* may encourage abusive tactics, such as the filing of irrelevant confidential materials for the sake of harassment. Although the court's suggested solution, the lodging process set forth in Practice Book § 7-4C, may help to avoid the filing of irrelevant materials, that process seems designed to ensure that *relevant* confidential documents will be part of the court file and thus a "judicial document" potentially subject to disclosure years after the case has concluded. In any event, even presuming good faith, the fact that a document may have been properly filed with the court is no solace to the party whose confidential information is later stripped of the protection agreed upon by the parties and sanctioned by the court by virtue of its sealing order.

It remains to be seen how broadly the *Rosado* holding will be applied. In the interim, however, the uncertainty that now surrounds a party's reliance on pretrial protective orders threatens to upset the means of effect an essential compromise among litigants that permits the efficient litigation of complex matters. ■

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