

Keeping Toothpaste in the Tube

Protecting Sensitive Business Information in Public Court Proceedings

Every business has confidential information. Sometimes this is nothing more than a customer list or financial records. Other times it is a top-secret formula or business method that is the result of millions of dollars and years of research. Protecting the secrecy of this information during the course of a public lawsuit must be a key element of one's decision-making before filing a lawsuit and one's litigation strategy during a lawsuit. Otherwise this sensitive information will likely find its way into the public domain through either a court filing, testimony in open court, or evidence offered at trial. Trying to protect the information after disclosure will be a lost cause – like trying to put toothpaste back into a tube. Fortunately, Texas law recognizes the value and vulnerability of such information and provides several legal strategies to protect it.

First, if the case is a trade secret lawsuit brought under the Texas Uniform Trade Secrets Act, the trial court is required to preserve the secrecy of materials by reasonable means including holding hearings closed to the public, sealing records of the action, and ordering people involved in the litigation not to disclose an alleged trade secret without prior court approval. This statute recognizes the unique nature of a trade secret lawsuit in which the heart of the case is something that cannot be publicly disclosed or it would render the entire lawsuit meaningless. As one court has noted, little purpose would be served by suing based on a theft of trade secrets because the litigation itself would guarantee that the interest would be destroyed. Accordingly, courts hearing trade secret disputes are given special authority to protect those interests.

Second, even if the lawsuit itself is not a trade secret lawsuit, the Texas Supreme Court has empowered trial courts with broad authority to enter orders protecting trade secrets

under Texas Rule of Civil Procedure 192.6 and Texas Rule of Evidence 507. These rules allow a party to refuse to disclose their trade secrets unless maintaining the secrecy will “conceal fraud or otherwise work injustice.” When disclosure is warranted, the trial court is empowered to enter appropriate protective orders limiting access in a wide variety of ways. With this broad authority, Texas courts have limited access to confidential documents and information, closed courtrooms to the public during sensitive portions of trial, forced court spectators to sign non-disclosure agreements, and bound parties, witnesses and party representatives to orders of secrecy before allowing them to see exhibits or testimony containing confidential information.

Finally, the trial court in every lawsuit is empowered by Texas Rule of Civil Procedure 76a to seal court records in response to a written motion and following public notice and a hearing. In this instance the court is required to weigh the proprietary interest in secrecy against the presumption of openness and any adverse effect that sealing could have upon the general public health or safety. Although time-consuming and laborious, this procedure can adequately protect a company's secrets from the prying eyes of competitors or other industry players.

Of course, failing to seek this relief prior to a court hearing or trial can have drastic and permanent effect as evidenced by one appellate court holding that a party lost its trade secret because it did not ask that the trial court instruct the jury and other non-parties present in the courtroom to not discuss the secret information before it was disclosed. Put another way – once out, you can't put the toothpaste back in the tube.

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