



# Ethics of Non-Disclosure Agreements and Protective Orders

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# + Non-Disclosure Agreements

A Case Study



# NDA's and Source Code Disclosure



- In some contexts, obtaining source code has been flatly impossible
  - See, e.g., TrueAllele (*California v. Billy Ray Johnson*)
- But there seems to have been some move towards disclosure in PG context under extremely restrictive non-disclosure agreements (NDAs)
  - Note: Probabilistic genotyping may have different pressures & incentives than other forensic techniques
- But the conditions of disclosure can create real issues, both ethical and practical, for defense counsel



What are you agreeing to?

# + Non-Disclosure (Obviously)

- (i) Not to disclose or release Protected Information to any third party except with the specific prior written consent of ESR or except as expressly otherwise permitted by this Agreement;
- (ii) To keep confidential all Protected Information;

Disclosure permitted only to “those of Recipients’ Affiliates who

- (i) require such information for the Inspection in the Case
- (ii) are informed of the confidential nature of the Protected Information and the obligations set forth in this Agreement, and
- (iii) **are subject to a legally enforceable written obligation to maintain the Protected Information according to the terms of this Agreement.**

# + Non-Disclosure (Less Obviously)

7. *Legal Proceedings.* If Recipients or any of Recipients' Affiliates become legally compelled (by oral questions, interrogatories, requests for information or documents, subpoena, civil or criminal investigative demand, or similar process) to make any disclosure that is prohibited or otherwise constrained by this Agreement, Recipient or such Affiliate will provide ESR with prompt written notice of such legal proceeding(s) so that it may seek an appropriate protective order or other appropriate relief including, but not limited to, an order to have any testimony or records sealed, or waive compliance with the provisions of this Agreement. In the absence of a protective order or Recipients' receiving such a waiver from ESR, Recipients or Recipients' Affiliates are permitted (with ESR's cooperation but at Recipients' expense) to disclose that portion (and only that portion) of the Protected Information that Recipients or Recipients' Affiliates are legally compelled to disclose, provided however, that Recipients and Recipients' Affiliates must use reasonable efforts to obtain reliable assurance that confidential treatment will be accorded by any person to whom any Protected Information is so disclosed.



- What does it mean to be “legally compelled (by oral questions, interrogatories, . . . Or similar process)”?
- Is a defense attorney putting on her own expert “legally compelled” to do so?
- Or asking a particular question? Putting on a particular defense?

+ Ok, so what's protected?

Everything!

- (i) Any and all information concerning the products or services offered by ESR including without limitation STRmix™ Product;
- (iii) Any intellectual property owned by ESR and/or used in connection with ESR's operations and affairs and any computer software and programs, including, but not limited to, the STRmix™ Product and any object and source code related thereto, computer software and database technologies, systems, structures, and architectures (and related processes, formulas, composition, improvements, devices, know-how, inventions, discoveries, concepts, ideas, designs, methods, and information); and



# What happens if you comply?



9. *Return or Destruction of Protected Information.* Pursuant to the Access Policy or any applicable Order, and unless otherwise agreed upon in writing by the Parties, Recipients are permitted to type or take handwritten notes during the Inspection (“Inspection Notes”). After Recipients conclude their participation in the Case, Recipients shall promptly deliver to ESR any and all Protected Information, documents, records, notes, memoranda, electronically stored data, and any Inspection Notes, together with all copies and summaries thereof in possession or under the control of Recipients or Recipients’ Affiliates. Alternatively, if ESR requests or gives prior written consent to Recipients’ request, Recipients shall destroy any and all Protected Information, documents, records, notes, memoranda, electronically stored data, and any Inspection Notes, together with all copies and summaries thereof in possession or under the control of Recipients or Recipients’ Affiliates. Any such destruction must be certified by Recipients’ or an authorized representative of Recipients, in writing, to ESR and include a list of the destroyed materials.



Deliver to ESR or destroy “any and all Protected Information, documents, records, notes, memoranda, electronically stored data, and any Inspection Notes, together with all copies and summaries thereof in possession or under the control of Recipients or Recipients’ Affiliates.”



# + What happens if you breach?

Hope you like Ohio!



## UNITED STATES DISTRICT COURT Northern District of Ohio

Patricia A. Gaughan, Chief Judge | Sandy Opacich, Clerk of Court

(g) Jurisdiction; Service of Process; Governing Law. The Parties acknowledge and agree that this Agreement shall be exclusively governed by and enforced in accordance with the laws of the State of Ohio without regard to its conflict of law principles. The Parties hereby consent and submit themselves to the exclusive jurisdiction and venue of the Court of Common Pleas of Summit County, Ohio or the United States District Court for the Northern District of Ohio to resolve any claims, disputes, actions, or proceedings seeking to enforce any provision of, or otherwise arising out of, this Agreement. The Parties

Waiver of any personal jurisdiction,  
improper venue, or forum non-conveniens  
claims



# An injunction. . . and money, too

11. Remedies. Without limiting any of ESR's rights and/or remedies at law or in equity, RECIPIENTS ACKNOWLEDGE AND AGREE THAT AN AWARD OF MONEY DAMAGES WOULD BE INADEQUATE FOR ANY BREACH OF THIS AGREEMENT BY RECIPIENTS OR RECIPIENTS' AFFILIATES, AND ANY SUCH BREACH OR THREATENED BREACH WOULD CAUSE ESR IMMEDIATE, SUBSTANTIAL, AND IRREPARABLE HARM. RECIPIENTS AGREE THAT IN THE

EVENT OF ANY BREACH OR THREATENED BREACH OF THIS AGREEMENT, ESR WILL BE ENTITLED, WITHOUT THE REQUIREMENT OF POSTING A BOND OR OTHER SECURITY, TO EQUITABLE RELIEF INCLUDING IMMEDIATE INJUNCTIVE RELIEF AND SPECIFIC PERFORMANCE. SUCH REMEDIES WILL NOT BE EXCLUSIVE REMEDIES FOR ANY BREACH OF THIS AGREEMENT BUT WILL BE IN ADDITION TO ALL OTHER REMEDIES AVAILABLE TO ESR AT LAW OR IN EQUITY. WITH RESPECT TO ANY ACTION OR PROCEEDING BY ESR REQUESTING INJUNCTIVE RELIEF AND/OR SPECIFIC PERFORMANCE AS CONTEMPLATED IN THIS SECTION 11, RECIPIENTS HEREBY WAIVE ANY AND ALL RIGHTS TO A TRIAL BY JURY.



Money damages “inadequate” (so there’s an implicit agreement to an injunction) but they can still get them!

+ Anything else?

More money!

(e) Costs; Attorneys' Fees. Recipients agree that if they are held by any court of competent jurisdiction to be in violation, breach, or nonperformance of any terms of this Agreement, then Recipients shall be required to pay any and all costs or expenses (including reasonable attorneys' fees) incurred by ESR related to the enforcement of any provision(s) herein. Said costs and expenses shall be in addition to any other relief to which ESR may otherwise be entitled to at law or in equity.



**Ethical Issues**

# + What's at issue here?

- Competence
- Diligence (or dearly departed zealous representation)
- Conflicts of interest
- Document retention
- Restriction on right to practice





### **RULE 1.1: COMPETENCE**

**(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**

**(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.**

## Competence

### Rule 1.1

- Signing an NDA requires- negotiation of a commercial non-disclosure agreement touching on contract law, personal liability, and intellectual property
- Maybe institutional defenders can help, but doesn't solve every problem



# Other Competence Problems

NDA requires agreement to terms of the access policy, which in turn:

- Expert can't be a competitor
  - Real issue in PG context, though may be a problem for protective orders too
- Examination is supervised; no tablets or phones are permitted
- **“[O]nly the taking of handwritten notes is permitted during the disclosure”**

- Is this the basis for a competent representation?
- Can an expert do her job under such circumstances?
- How equivalent (or not) is this to the kinds of restrictions defenders face daily?



# + Diligence & Zealous Representation

## RULE 1.3: DILIGENCE

- (a) A lawyer shall act with reasonable diligence and promptness in representing a client.
- (b) A lawyer shall not neglect a legal matter entrusted to the lawyer.
- (c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

**Cmt. 1: A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and in advocacy upon the client's behalf.**





## Diligence

- Representation may require a robust challenge to evidence, likely involving the “Protected Information” (which is everything)
- Is zealous advocacy precluded when an agreement such as this is signed?
  - See relationship with competence
  - Note “zeal” no longer part of NY Rules but (hopefully) a part of daily practice
- Note that as with competence, if this is only way of getting information, maybe better to sign
  - At a minimum, shouldn’t stop arguments to courts about why you can’t sign
- Except . . . are there other conflicts of interest?

# + Conflict of Interest

## **RULE 1.7: CONFLICT OF INTEREST: CURRENT CLIENTS**

**(a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:**

**(1) the representation will involve the lawyer in representing differing interests; or**

**(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.**

Cmt. 1- The professional judgment of a lawyer should be exercised, within the bounds of the law, **solely for the benefit of the client and free of compromising influences and loyalties.** Concurrent conflicts of interest, which can impair a lawyer's professional judgment, can arise . . . from the lawyer's own interests.



# Conflict of Interest

## Client Interest

- Exposing any and everything wrong with system and source code
- Vindicate Constitutional rights
- Challenge piece of forensic evidence
- Not having attorney seek written permission from state's experts for a cross-question or otherwise
- Perhaps key distinction from other contexts is liberty interest

## Lawyer's Interest

- Not being sued in Ohio
- Monetary damages
- Attorney's fees & costs
  - None of which at issue with protective order
  - Other issues may be implicated, if less strongly

# + Document Retention

- Expert notes/report not expressly required by statute to be retained, however likely falls into documents theoretically belonging to client

**RULE 1.16:  
DECLINING OR TERMINATING REPRESENTATION**

(e) Even when withdrawal is otherwise permitted or required, upon termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to avoid foreseeable prejudice to the rights of the client, including giving reasonable notice to the client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, promptly refunding any part of a fee paid in advance that has not been earned and complying with applicable laws and rules.

Question: Is this a document “that the client would foreseeably need to establish substantial personal or property rights”? NYSBA Opinion #623 - 11/07/1991 (38-90) . . . **Like say, an appeal?**



# Restrictions on Right to Practice



- Does the agreement in effect restrict the right to practice?
- NYSBA Op. “A settlement proposal that calls on the lawyer to agree to keep confidential, for the opposing party's benefit, information that the lawyer ordinarily has no duty to protect, creates a conflict between the present client's interests and those of the lawyer and future clients”
- Right of lawyer to use her expert knowledge!

## **RULE 5.6: RESTRICTIONS ON RIGHT TO PRACTICE**

- (a) A lawyer shall not participate in offering or making:
  - (1) a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement; or
  - (2) an agreement in which a restriction on a lawyer's right to practice is part of the settlement of a client controversy.
- (b) This Rule does not prohibit restrictions that may be included in the terms of the sale of a law practice pursuant to Rule 1.17.

- Of course, may be other issues- protective order, etc., which create same result



# Significant ethical issues are posed by these agreements!!!

- Consider raising with court as part of other source code disclosure arguments
- Consider how these issues interact (or don't) with protective orders, which are likely to be part of any disclosure
- Consider raising institutionally
- Consider asking for ethics opinions



# *Dominguez: A Case Study*

- Defense requested access to source code to STRMix, a probabilistic genotyping software developed in New Zealand
- STRMix agrees to access---in contrast to competitors---but under the non-disclosure agreement just outlined
- In rare defense win, court agreed with defense counsel that ESR, maker of STRMix, was part of prosecution team and that the evidence was thus discoverable directly from the state (subject to a protective order)
- State took interlocutory appeal and won, but court left open ability to get source code
- On remand, STRMix said they would not give code without NDA, and court refused to require defense attorney to sign
- Pleaded to a reduced charge, essentially time served





# *Traces of Crime: How New York's DNA Techniques Became Tainted*

The city's medical examiner has been a pioneer in analyzing complex DNA samples. But two methods were recently discontinued, raising questions about thousands of cases.

**The New York Times**

## **Researchers say a breathalyzer has flaws, casting doubt on countless convictions**

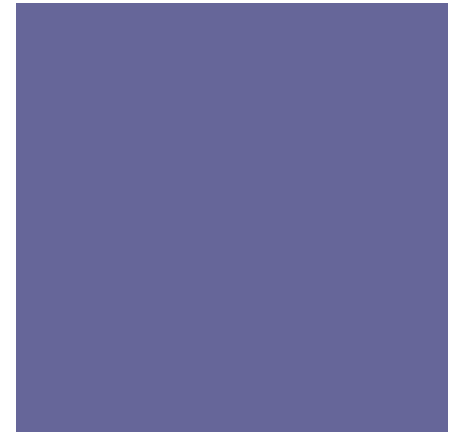
Exclusive: Two researchers say a police breathalyzer, used across the US, can produce incorrect breath test results, but their work came to a halt after legal pressure from the manufacturer.







# Protective Orders



# + Protective Orders



- In source code context, protective orders (usually) the back stop for a non-disclosure agreement between parties
- May ameliorate some of the ethical issues
- In theory, court also obliged to protect constitutional rights, unlike private company
  - Won't have some of the monetary and venue issue at NDA
- But there are still ethical issue with (at least reflexively) signing protective orders/failing to object to them
  - And note interests are different outside of a source code context

# + What's the standard?



- “The party seeking a protective order has the burden of showing that **good cause** exists for issuance of that order . . . Good cause exists when a party shows that disclosure will result in a **clearly defined, specific and serious injury.**”  
*U.S. v. Smith*, 985 F.Supp.2d 506, 523 (S.D.N.Y.,2013) (internal citations and quotation marks omitted)



# Ethical Issues



- Plainly an obligation to object to protective orders that don't meet these standards
  - Diligent representation requires objection
- Requires a thorough examination of whether you can diligently and competently represent client with such an order in place
  - Do these restrictions prevent you from a representation in line with rules?

# + Other Obligations



- One issue that remains with protective orders is restrictions on the right to practice/other obligations to clients
- Many orders include the following: “Shall be used by the defense solely for purposes of defending this action”
  - What about things like laboratory reports?
    - Cop Accountability Project at LAS
    - Widespread lab scandals
- Also stare decisis problems



# Constitutional Implications



- Pew Center report last year was that only 2% of federal cases go to trial
  - 90% end in guilty pleas, 8% dismissed
- What do rights to a public trial and the right of public access mean when there are so few trials?
  - Can there be *any* vindication of these rights in the pretrial setting?
  - If so, do protective orders this broad prevent it?
  - Consider whether there are new arguments to be made in light of lack of trials



**Thank you!**

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