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Chancery Court Loosens Restrictions of Confidentiality Designation, Trusting Lawyers' Good Faith

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It is common practice in Chancery Court cases to enter into a stipulated confidentiality order permitting the parties to designate certain documents as confidential and to limit their disclosure and use by the parties in the pending litigation.

Frequently, the confidentiality orders contain several classifications that can be utilized by the parties to restrict even further the disclosure of certain documents to counsel for the parties or to designated persons.

A letter opinion by Vice Chancellor John W. Noble illustrates how the Chancery Court responds to challenges to those restrictive designations. In *Grunstein v. Silva*, C.A. No. 3932-VCN (July 2, 2012), the court determined a motion by one party to vacate the "highly confidential" designation placed on documents by the other party and to expand the number of attorneys who could view the documents.

According to an earlier decision by the court, the case was an action seeking damages, imposition of a constructive trust, and an accounting in connection with the breach of an alleged oral partnership agreement to carry out the acquisition of a company providing health care to the elderly. In the course of the litigation, one of the plaintiffs, CFG, produced pleadings and court filings from a case pending in Maryland and documents of its own that it had already produced in the Maryland action. CFG designated all of the documents as "highly confidential," which meant that only four lawyers at one of the firms representing the defendants were allowed to view those documents. The defendants moved to vacate the "highly confidential" designation or, in the alternative, to require CFG to go back and determine which of the documents were actually entitled to that designation. In addition, they sought to allow access to the documents by additional attorneys from the same defense firm.

CFG argued that many of the documents were not relevant to the case and it had only agreed to produce them because the defendants agreed the documents could be designated as highly confidential. CFG also said it would agree to let additional attorneys view the documents, provided they certified "that neither ... [they] nor any of their current or former clients are involved in health care or financing and that they won't represent clients in those areas [during the pendency of the case]." CFG argued that the defense firm was already involved in litigation in New York against one of the plaintiffs, and it feared the defense firm might also represent other actual or potential customers or competitors of CFG.

Noble distinguished between the court documents and the discovery documents. The court documents were designated "highly confidential" pursuant to an order entered by the Maryland court. Although the parties actually made the designations, they were made pursuant to a protective order entered by that court. Noble said he was "necessarily wary" of de-designating documents as "highly confidential" when a court in another state had given its imprimatur to the designations. Moreover, as a practical matter, the author of a key document singled out by the defendants had been deposed after the document had been produced and all of the important facts in the documents could have been brought out then. Under the circumstances, Noble refused to de-designate any of the court documents.

The discovery documents, on the other hand, were not created for the Maryland litigation but just happened to have been produced in that action. Although they were designated "highly confidential" in the Maryland action, the designations were deemed not to be binding on the Chancery Court. (It appears from the opinion that the discovery documents were all from CFG's files, and not from the files of other parties in the Maryland action.) The parties were in disagreement about whether CFG had agreed to review the "highly confidential" designations for the Chancery Court action, and CFG maintained that they were mostly irrelevant to the pending matter. Moreover, the discovery documents were voluminous (238,000 pages).

Noble directed that CFG's counsel — significantly, not CFG personnel — should review all of the discovery documents that referred to the company that was the subject of the acquisition to determine "in good faith" whether those documents were entitled to be designated "highly confidential." With respect to the other discovery documents, the burden shifted to the defendants, and Noble said that they could request CFG to de-designate any documents they believed in good faith to be relevant or likely to lead to the discovery of admissible evidence and not entitled to treatment as "highly confidential."

With respect to the defendants' request to expand the number of attorneys who could view the "highly confidential" documents, Noble, after noting that "an attorney's professional responsibilities will often be sufficient assurance that she will not improperly use or disclose confidential information," nevertheless recognized the unique circumstances of the case, including the defense firm's representation of parties in the New York action. Noble rejected the certification sought by CFG as too broad and presenting too much of a risk of "unknowing and unintentional violation," and therefore determined that other attorneys from the defense firm could view the documents if they certified that "during the pendency of this case they will neither be involved in the New York litigation, nor represent any client in a matter involving the purchase or sale (including financing) of any nursing home or adult assisted living center."

The decision in the case has all the earmarks of a typical Chancery Court discovery ruling. The result is highly pragmatic and takes into account the demonstrated concerns of all the parties. The court gives deference to the authority of a sister court without sacrificing the discovery rights of the parties before it. Finally, the court relies heavily on the good faith and judgment of the attorneys to implement its solution. The specific instruction that counsel review the designations underscores the key role that the court expects counsel to play in handling discovery matters.

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