NORTON ROSE FULBRIGHT

Reexamining Line-by-Line Confidentiality Designations: A Cost-Effective and Cooperative Approach

Andrea L. D'Ambra and Susana Medeiros, *New York Law Journal* — February 10, 2022

While line-by-line designations may make a lot of sense for smaller cases, for larger matters where only a small fraction of the documents reviewed and produced are ever used in motions or trial, parties should focus the expense of line-by-line designations on the documents that really matter.

In recent years, jurisdictions like Washington and California have required or encouraged line-by-line confidentiality designations. Under the Western District of Washington Local Rule 26(c)(2), for example, parties may file protective orders to protect confidential information only if "its protection from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles …" Furthermore, parties are encouraged to use the district's model protective order, which requires parties to clearly identify the "portion(s)" of a document that are confidential in their productions. Model Stipulated Protective Order, W.D. Wa.. Similarly, the Northern, Southern, and Central districts of California encourage parties to use model protective orders that explicitly prohibit mass confidentiality designations and require parties to designate "only those parts of material, documents, items" that qualify for protection, and thereby prohibiting "mass, indiscriminate, or routinized designations." See, *e.g.*, Model Protective Order, N.D. Cal. Because some courts require parties seeking to deviate from the model order to show good cause, parties may be reluctant to negotiate less narrow confidentiality restrictions.

This trend has reached New York to varying degrees as well. In New York federal courts, some judges have adopted model protective orders that require parties to designate the portion(s) of a document that require protection. By contrast, in New York state, the Commercial Division's model protective order explicitly permits parties to designate "any document … *or* portion thereof" as confidential. 22 NYCRR §202.70(g) (Commercial Division Rules), Rule 11-g, Appendix F (emphasis supplied).

While some argue that this furthers transparency and the right to public access of court proceedings, it fails to do that and greatly increases the costs associated with document review and production. The overwhelming majority of documents produced in *discovery* are never seen by anyone but opposing counsel. It also ignores that there are differing standards for the public right of access as between documents produced in discovery, documents used in court documents filed under seal, and documents submitted as evidence in a trial. *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. New England Reinsurance*, 794 F. App'x 213, 215 (3d Cir. 2019) (citing *In re Avandia Mktg., Sales Practices and Prods. Liab. Litig.*, 924

Andrea L. D'Ambra *is US head of technology and US head of e-discovery and information governance at Norton Rose Fulbright US.*

Susana Medeiros *is an associate at the firm.*

F.3d 662 (3d Cir. 2019)). This is because while the public has a strong interest in adjudicative materials submitted into the public record, it does not have the same interest materials merely produced in discovery. See *Shane Grp. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 305 (6th Cir. 2016) ("Unlike information merely exchanged between the parties, '[t]he public has a strong interest in obtaining the information contained in the court record.'") (citation omitted).

Parties can, as part of the terms of the protective order, agree that parties may identify any confidential documents they intend to file into the public record for the producing party's review. Through this review process, the producing party can conduct a closer review to identify only those portions of the document that require protection for use in a motion to seal. Allowing the parties to triage review of confidential materials and focus only on the documents that are filed into the public record will increase the quality of confidentiality designations (as parties can think more critically about confidentiality calls on a smaller set of documents in light of the heightened standard for public access), reduce work for the court (which reviews more thoughtful confidentiality designations in connection with a motion to seal), and ultimately minimize the likelihood of over-designation of documents filed into the public record. Moreover, this process does not need to change the burden on the producing party to establish that the document (or portion thereof) should be protected as confidential.

Moreover, permitting parties to designate protected material on a document-basis serves the court's interest in resolving disputes in a just, speedy, and inexpensive manner *as well as on the merits*. Since the Federal Rules of Civil Procedure were amended in 2015 to explicitly incorporate the principles of proportionality into discovery, courts on both a federal and state level have stressed the need to ensure the cost and burden of discovery is proportional to the needs of the case. Instead of spending a significant amount of time and expense during discovery making confidentiality determinations on all documents produced in the dispute, the parties can focus their time negotiating over the specific documents that actually matter in the case, such as documents that support a dispositive motion or which would be used in trial. Any time spent negotiating over or engaging in motion practice regarding this smaller set of documents is much less than the time spent by the producing party to conduct a granular line-by-line confidentiality review. See *Stiles v. Equifax Info. Servs.*, No. 9:16-CV-81488-DMM, 2017 WL 65884, at *1 (S.D. Fla. Jan. 4, 2017) ("The Court finds that line-byline [sic] designation involves inordinate time and expense and is not necessary in light of the requirement that the Designating Party exercise restraint and justify its confidentiality designations, if challenged."). Indeed, the most important and sensitive documents will likely be subject to additional scrutiny by all parties anyhow, particularly in intense trade secret or intellectual property cases where disputes over the sensitivity of the most important documents is relatively common.

By decreasing unnecessary expenses in discovery, courts reduce the risk that nuisance or meritless litigation is settled to avoid the cost of litigating. Moreover, given the nature of document reviews and how individuals communicate, document-level confidentiality designations blunt the use of irrelevant documents to embarrass parties or their employees. Requesting parties should only be able to use documents to establish relevant facts to help them prosecute their claims and defenses in the case at hand. Their right to use the documents is limited and the privacy of employees and third parties deserves protection.

This is not to say line-by-line designation during initial document review is never appropriate; indeed, it may be appropriate in cases where a small number of documents are at issue. For example in *Rounds v. Hartford*, No. 4:20-CV-04010-KES, 2021 WL 3487102, at *4 (D.S.D. Aug. 9, 2021), the District of South Dakota approved revisions to a protective order to require the parties to "limit confidentiality designations to those portions of the documents that are actually entitled to confidentiality" where only 600 pages of documents were at issue. The *Hartford* court implied that its ruling should not be applied broadly, as line-by-line or paragraph-level redaction may be "impossible" and burdensome in cases involving more documents. Id. The *Hartford* court thus struck the appropriate balance between the needs of the case and the minimal burden of conducting an intensive confidentiality review given the amount of material at issue.

Thus, it would seem more efficient and less expensive for parties to agree in their protective order to a document-by-document confidentiality review prior to production, and expressly reserve a line-by-line confidentiality review for a smaller number of documents such as those used in filings. There are two main concerns parties may raise with this approach: first, the timing of the disclosure, and second, giving one's opponent advance insight into the documents one will use to support a motion.

With respect to the timing concern, this can be easily addressed by setting forth in the confidentiality order a reasonable limit on the number of documents for which pinpoint designations can be requested for any filing (with an ability to seek more under the proper circumstances, and a set number of days a producing party has to provide the designations. This is sensible and practical because a party rarely uses more than a handful of documents to support a motion, and it should not take significant amounts of time to do a line-by-line designation of such a small number of documents.

While the concern around giving one's opponent advance insight into an upcoming motion may seem compelling at first, it is likely (given that the document came from the opponent's production) that the opponent is already aware of the document and even if the opponent is not aware, knowing a document is going to be used in a filing does not change its content. The document is what it is. It also permits the opponent to take measures to defend the confidentiality of its own documents. Further, this advanced disclosure also serves the overarching goal of U.S. civil discovery—to eliminate surprise in proceedings so that parties will more quickly resolve disputes once all the facts are known. See *Rounds v. Hartford*, No. 4:20-CV-04010-KES, 2021 WL 3487102, at *6 (D.S.D. Aug. 9, 2021) (approving procedure where filing party provides notice to designating party of intent to use confidential material, as this encourages pre-motion resolution, not "sandbagging and surprise.").

Courts and the parties should be flexible when considering what confidentiality designation procedure will work best for the case at hand. While line-by-line designations may make a lot of sense for smaller cases, for larger matters where only a small fraction of the documents reviewed and produced are ever used in motions or trial, parties should focus the expense of line-by-line designations on the documents that really matter. This approach also encourages pre-motion cooperation between the parties and re-focuses the parties' energies on the most important materials that are adjudicative of the issues in the case.