

Ex. D**Subject:**RE: 3ABN**Date:**Tue, 7 Oct 2008 14:47:49 -0500**From:**Greg Simpson**To:**Bob

Bob-

I would agree with Clarification No. 1.

Regarding Clarification No. 2, I didn't mean to suggest that you can disclose the contents of the document by describing the "issues" to which it pertains at the sub-atomic level. Taking your example only a bit further, you might say "The document pertains to the issue of whether Person X knew Fact Y on Date Z but did nothing about it." By identifying the issue with reference to each component fact, you would give away the content of the document and thereby cleverly circumvent the confidentiality order. I agree with the general proposition that you may disclose the issue to which the confidential document relates. You must avoid describing the issue so finely that you end up disclosing the content of the document. The safer course would be to leave it more general than that, and say simply that "the document relates to 3ABN's handling of the wills and estates personnel issue." Leave your argument for the sealed portion of the brief.

Regarding Clarification No. 3, I would agree that you can use any descriptors of the document that do not reveal the substance of the document. You can say who it is to, who it is from, who received it, and its date. Regarding the subject matter of the document, my response to Clarification No. 2 applies equally. You may state generally what it relates to, e.g., personnel matter, accounting issue, whatever, but must be cautious not to describe it so completely that you give away the confidential part of it.



Consider this as a rule of thumb: If you want to say something about the document because it helps your argument or casts my clients in a bad light, it needs to be said in a document that is under seal. But if you just want to identify the document so the judge can find it and look at it, the comment does not need to be under seal.



Another rule of thumb: If your description of a confidential document is so suggestive that it ends up on the internet blogs about this case, I think you have gone too far. There shouldn't be enough information revealed publicly to permit anybody to draw negative inferences against my clients. I realize this is an after-the-fact test, but I want you to understand how I will be viewing your public commentary on documents that we have designated as confidential.

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