Inadvertent Disclosure in E-Discovery: How to Avoid Waiver of Privilege

By Lisa M. Gonzalo – November 3, 2015

Today's world of emails, computer-generated documents, and electronically stored information (ESI) has changed the way we conduct discovery in modern litigation. It is no longer unusual to have thousands—or even millions—of documents exchanged between or among parties during the course of a case. *See, e.g.*, *Lennar Mare Island, LLC v. Steadfast Ins. Co.*, No. 2:12-cv-02182-KJM-KJN, 2015 U.S. Dist. LEXIS 108381 (E.D. Cal. Aug. 17, 2015) (several hundred thousand documents); *In re IndyMac Mortg.-Backed Sec. Litig.*, No. 09-cv-4583, 2015 U.S. Dist. LEXIS 37052 (S.D.N.Y. Mar. 24, 2015) (11 million documents); *In re E.I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, No. 2:13-md-2433, 2015 U.S. Dist. LEXIS 29928 (S.D. Ohio Mar. 10, 2015) (over one million documents); *Zabell v. Medpace, Inc.*, No. 13-252-SJD-JGW, 2015 U.S. Dist. LEXIS 27069 (S.D. Ohio Mar. 5, 2015) (80,000 documents); *In re Processed Egg Prods. Antitrust Litig.*, 302 F.R.D. 339 (E.D. Pa. 2014) (over one million documents).

Juxtapose this modern reality of voluminous e-discovery with the age-old and sacred protection of client confidentiality afforded by the attorney-client privilege, which "contributes to the trust that is the hallmark of the client-lawyer relationship." Model Rules of Prof'l Conduct R. 1.6 cmt. 2. Consider also the work product doctrine, which protects from discovery attorney notes, observations, and thought processes relating to the client representation. Finding these kinds of privileged documents when faced with a universe of thousands or even millions of client documents that need to be collected for possible production can be like finding a needle in a haystack. Before the age of e-discovery, traditional document-by-document review during collection was not the daunting task it is today.

The sheer volume of information in large ESI cases renders traditional document-by-document review impracticable and economically unfeasible, making it costly and challenging to identify and capture privileged information before it is produced. Parties and courts continue to grapple with cost shifting in these kinds of cases. *Compare, e.g.*, *Zubulake v. UBS Warburg ("Zubulake III")*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (placing the burden of costs on the producing party), *with Boeynaems v. LA Fitness Int'l, LLC*, 285 F.R.D. 331, 341 (E.D. Pa. 2012) (ordering prepayment of costs from the requesting party for the demand of disproportionate "additional discovery"). Despite the budgetary constraints in conducting a thorough document review of this magnitude, attorneys still have an ethical obligation to take reasonable steps to protect a client's privileged documents from inadvertent disclosure. Failure to take such steps could result in waiver of the protections afforded these documents and can lead to disastrous results in litigation—both for the client and for the attorney.

Ethical Obligation to Prevent Inadvertent Disclosure and Rule 26 Clawback

Under Model Rule of Professional Conduct 1.6(c), attorneys are ethically obligated to "make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Even where reasonable efforts are made, however, mistakes happen.

At first blush, it appears that Federal Rule of Civil Procedure 26(b)(5)(B) comes to the rescue. Rule 26(b)(5)(B) includes a clawback procedure for retracting accidentally produced information and provides that a producing party should notify the recipient that privileged documents have been inadvertently produced. The party asserting the privilege must also provide the receiving party with a basis for its assertion as to each document withheld. Upon notice that it has received an inadvertently produced privileged document, the receiving party is then required to return, sequester, or destroy the information promptly and is barred from disclosing it until the privilege claim is resolved. The clawback procedure of Rule 26(b)(5)(B) does not, however, address waiver, and the privilege asserted can be challenged.

Producing Party Must Take "Reasonable Steps" to Avoid Waiver

Where a privilege dispute arises, Rule 26 must be considered in tandem with Federal Rule of Evidence 502(b), which provides that when a privileged document is accidently disclosed, the

disclosure will not act as a waiver of the privilege, so long as the disclosure was "inadvertent" and the holder of the privilege "took reasonable steps" to prevent disclosure and to rectify the error. Rule 502 applies only to attorney-client privilege and work product doctrine and not to other kinds of privileges. *See* Fed. R. Evid. 502(a).

Whether "reasonable steps" sufficient to avoid waiver have been taken is a highly fact-intensive inquiry that can lead to unpredictable outcomes. While a "reasonable steps" analysis is guided by the substantive law of the controlling jurisdiction, most jurisdictions follow the middle ground approach suggested by the committee notes to Rule 502(b) and consider a variety of factors, including: (1) the "reasonableness" of the precautions taken to prevent inadvertent disclosure, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) any delay in measures taken to rectify the disclosure, and (5) the ever amorphous "overriding interests in justice" factor. *See, e.g.*, *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008).

Perfection Not Required, but Carelessness Can Be Costly

Reasonableness in this context does not mean that preventative measures have to be foolproof. Rather, "[t]he reasonableness of the precautions adopted by the producing party must be viewed principally from the standpoint of customary practice in the legal profession at the time and in the location of the production." *Johnson v. Ford Motor Co.*, No. 3:13-cv-06529, 2015 U.S. Dist. LEXIS 49975, at *41–42 (S.D. W. Va. Apr. 14, 2015). Although the Rule 502(b) test does not require perfection, carelessness can be costly and may result in waiver of privilege protections. In a large ESI case, examples of kinds of carelessness that have resulted in waiver are failure to test the reliability of keyword searches with appropriate sampling and inadvertently producing a large number of privileged documents. *See Mt. Hawley Ins. Co. v. Felman Prod., Inc.*, 271 F.R.D. 125 (S.D. W. Va. 2010).

Additionally, delay in attempting to rectify the error after discovery of the inadvertent disclosure can also result in waiver. *See Baranski v. United States*, No. 4:11-CV-123 CAS, 2015 U.S. Dist. LEXIS 71584 (E.D. Mo. June 3, 2015) (finding that government's delay of five months before asserting privilege resulted in waiver); *Clarke v. J.P. Morgan Chase & Co.*, No. 08 Civ. 02400, 2009 U.S. Dist. LEXIS 30719 (S.D.N.Y. Apr. 10, 2009) (finding that party's two-month delay in asserting attorney-client privilege on an email resulted in waiver); *Wise v. Wash. Cnty.*, No. 10-1677, 2015 U.S. Dist. LEXIS 50926 (W.D. Pa. Apr. 17, 2015) (finding that counsel's one-and-a-half-year delay after being warned to take action to claw back an inadvertently disclosed privileged document resulted in waiver). Where mistakes happen, counsel should be proactive about rectifying the error quickly.

Clawback Agreements and Rule 502(d) Orders Increase Protection Against Waiver

Given the uncertain outcome of a Rule 502(b) "reasonable steps" analysis, every effort should be made early in the litigation to engage opposing counsel in cooperative dialogue to enter into a clawback agreement. With clawbacks, parties agree to return inadvertently produced documents without waiver, regardless of the degree of care taken by the disclosing party. *See Zubulake III*, 216 F.R.D. at 290. Parties may, for example, agree that *all* protected information may be clawed back. Alternatively, parties can agree to certain specific steps that must be taken to make the outcome of a potential Rule 502(b) reasonableness analysis more predictable. Timing, procedures, protocols, how disputes will be resolved, and whether any nonwaiver agreement will bind third parties are all examples of the kinds of things that can be addressed in a clawback agreement.

Any clawback agreement should be incorporated into a protective order under Rule 502(d). Taking these preventative steps can help parties avoid litigation over inadvertent production issues and give the producing parties "heightened protection" with regard to inadvertently produced privileged documents. *Alliance Indus. Ltd. v. A-1 Specialized Servs. & Supplies, Inc.*, No. 13-2510, 2015 U.S. Dist. LEXIS 45983 (E.D. Pa. Apr. 8, 2015). In *Dover v. British Airways, PLC*, No. CV 2012-5567 (RJD) (MDG), 2014 U.S. Dist. LEXIS 114121, at *7–9 (E.D.N.Y. Aug. 15, 2014), for example, where the parties entered into a stipulated protective order that addressed inadvertent disclosure and contained a provision promising to "avoid litigation of inadvertent production issues," the court found that no implied waiver resulted, even where the party that produced a privileged document conceded that it produced that document twice and admitted it was careless.

Clawback agreements in Rule 502(d) protective orders thus help to minimize the uncertainty of a "reasonable steps" analysis and reduce costs by avoiding future discovery battles. Federal Rule of Civil Procedure 26(f), which requires counsel for parties to confer and work together to develop a joint discovery plan, provides the perfect opportunity to open a dialogue to address waiver and inadvertent production issues before they happen.

Effective E-Discovery Management and Protocol Are Critical

It is also important to have a system and protocol in place for identifying, preserving, collecting, selecting, and evaluating ESI. Having an e-discovery management plan—early in the pretrial process and before discovery is exchanged—is critical for effectively capturing privileged documents in the face of voluminous ESI. The Electronic Discovery Reference Model (EDRM) is the gold standard in providing guidelines for improving quality and efficiency and for reducing cost and manual work associated with e-discovery. While even the best e-discovery management systems are not perfect, having such a system in place increases the likelihood of preserving and protecting against inadvertent disclosure and goes a long way toward laying the groundwork for a successful Rule 502(b) "reasonable steps" analysis should a discovery dispute over waiver later arise.

Identifying Privileged Material and Decreasing the Likelihood of Inadvertent Disclosure

Using keyword searches is one technique for identifying categories of documents that are likely to be privileged. Discovery disputes can often be avoided or minimized by negotiating keyword searches and protocols with opposing counsel early in the litigation. Working closely

with clients to identify all relevant internal and external counsel and other key custodians of potentially privileged documents is also an important early step in the collection of responsive ESI. Once key people and search terms are identified, targeted searches of communications, email addresses, and domain names will likely lead to privileged communications, as will searches for commonly used legal terms and terms or phrases pertinent to a given case.

Other techniques, such as predictive coding and clustering, can also help capture privileged documents without a document-by-document review. Predictive coding is a computer-assisted review whereby decisions by human beings—who mark and identify certain representative samples of documents—are input into a predictive coding engine so that a computer can make those decisions across the entire group of documents. In effect, through sample searches of particular terms, a computer is "trained" to identify the types of documents (in this case, privileged ones) that need to be pulled from a much larger database of responsive ESI. Another technique is clustering, which involves technology that groups large document collections by concept or topic. Courts have recognized use of these technologies as an acceptable way of reducing the burdens associated with reviewing massive ESI collections. *See, e.g.*, *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 127 (S.D.N.Y. 2015); *Dynamo Holdings L.P. v. Comm'r*, 143 T.C. 183 (2014); *Krentz v. Carew Trucking, Inc.*, No. 13-C-1373, 2014 U.S. Dist. LEXIS 69001 (E.D. Wis. May 20, 2014). Regardless of the methods employed, the protocols used for identifying privileged documents should be memorialized, and any such processes used should be subject to quality control and assurance. These steps are critical to providing support for a Rule 502(b) "reasonable steps" analysis, should there be a dispute that requires one.

Conclusion
When faced with a potentially large ESI case, best practices should be followed to avoid inadvertent disclosure and inadvertent waiver of privilege:

> Being proactive at the early stages of discovery is crucial for minimizing litigation risk and avoiding costly and unnecessary discovery disputes.
>
> Working with opposing counsel and clients early in the case to identify and resolve potential ESI issues can help reduce motion practice and protracted litigation.
>
> Entering into clawback agreements and obtaining Rule 502(b) protective orders before discovery is exchanged offers further protection against waiver from inadvertent disclosure.
>
> Having sound methodologies for identifying and capturing potentially privileged ESI not only protects against inadvertent disclosure but also better prepares a producing party for explaining its methodologies to a court should a privilege dispute arise over inadvertent disclosure.
>
> Finally, when all else fails, if privileged documents do slip through, it is critical not to delay but to take immediate steps to correct the error.

Keywords: litigation, commercial, business, e-discovery, electronic discovery, ESI, inadvertent, litigation, privilege, waiver

Lisa M. Gonzalo is with Bressler, Amery & Ross, P.C. in Florham Park, New Jersey.

More Information
» Commercial & Business Litigation Home
» Practice Points
» Articles
» Circuit Notes (archive)
» Programs & Materials
» Related Resources
» Commercial & Business Litigation Committee
- About
- Join

Publications
Commercial & Business E-Newsletter
» Summer 2016

Sound Advice
Recent Sound Advice »
- Not Deposing Expert Witnesses
- When Does a Confidentiality Agreement Act Like a Non-compete?
- Getting Involved with the Section of Litigation Pays Off

» View CBL Sound Advice