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Protecting the Privilege in E-Discovery

By James H. Bowhay

Lawyers of an earlier generation often spoke nostalgically of the “good old days” before the advent of the high-speed copy machines, which made possible large-scale document productions—the onerous hallmark of civil disputes over the last 40 years. Today, many lawyers sound like their elders, bemoaning the problems they face in producing and reviewing enormous amounts of electronic information created and maintained by businesses. Even if we curse this development and question the utility of dredging up the voluminous electronic information required by liberal discovery rules, electronic discovery will remain one of the most difficult and time-consuming parts of the discovery process for many years to come.

One of the principal problems encountered in e-discovery is the review of email and other electronic documents to ensure that the attorney-client privilege, other privileges, and the work-product immunity are not waived as a result of inadvertent production. A number of alternatives will be discussed below that should be considered to avoid the possible problems and collateral litigation that can arise when privileged

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Conflicts of Privilege

By Daniel E. Hinde

Modern litigation frequently crosses state and national borders. Parties file suit in one state over claims that may involve people, events, or discussions from other states—or even other countries. While the states generally all agree on the concept that certain communications should be privileged from disclosure during discovery and at trial, they do not entirely agree on what types of communications enjoy this protected status.¹ For example, some states recognize a privilege

for communications between reporters and their confidential sources or between accountants and their clients, while other states do not.² And even when the states do universally recognize a certain type of privilege—such as the attorney-client and work-product privileges—they do not necessarily agree on the scope of the privilege or the prerequisites for its application. For instance, some states follow the control-group paradigm for the attorney-client privilege, while others adhere to the subject-matter test.³

This lack of uniformity in privilege law can lead to uncertainty in multistate and multinational cases because the state where the suit is pending may not recognize a privilege that individuals in another state expected would apply at the time they made their communication. Or, a party might fortuitously learn that the forum state recognizes a privilege that protects disclosure of a crucial report even though the document was

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Protecting the Privilege

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documents are mistakenly produced.

Another problem involves the requirement to describe any documents withheld in a manner that “will enable other parties to assess the applicability of the privilege or protection.”¹ Given the long “threads” or series of emails that exist, this issue is fraught with more difficulties than may appear at first glance—as any young associate faced with this task will tell you. Indeed, this is not merely a technical problem. If a party claiming a privilege fails to provide adequate information in the privilege log, it is “subject to an order to show cause why [it] should not be held in contempt.”² Some thoughts on how to provide an adequate description in the privilege log, as required by the rules, are also discussed below.

The Problem of Inadvertent Waiver

Both the attorney-client privilege and the work-product protection can be waived. Waiver is triggered by a disclosure of the document or information that is inconsistent with the purpose underlying the respective privilege or immunity.³ In an excellent discussion of the problem of inadvertent waiver, Michele Lange and Kristin Nimsgar properly note in their book on e-discovery that “[d]epending on the jurisdiction, different rules have been applied,” as described below:

There are three main approaches. In the first approach, taken by the D.C. Circuit, nearly any disclosure of the communication or document, even inadvertent, waives the privilege. In the second approach, taken by a minority of courts, the unintentional disclosure does not waive the privilege. The growing trend of cases across the country, however, favors the third approach, a balancing test to determine whether waiver has occurred. Using this approach, courts consider five factors to determine whether waiver has occurred: (1) the reasonableness of precautions taken to prevent the inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of the discovery; (4) the extent of the disclosures; and (5) overriding issues of fairness.⁴

Avoiding inadvertent disclosures, and the uncertain outcomes associated with them, remains an important goal. The sheer volume of electronic documents, however, increases the likelihood that the problem will crop up. As a result, good litigators should pursue strategies to minimize the chance of waiving a privilege and to mitigate the effect of any inadvertent production that does occur.

Use of an Information Technology Consultant

In 2004, the ABA amended its Civil Discovery Standards⁵ to address the new problems resulting from a tremendous increase in the discovery of electronic documents and information. Standard 32 suggests the parties consider stipulating to the use of

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an independent information technology consultant “to ameliorate attorney-client privilege and work product concerns attendant to the production of electronic data.” This standard proposes that the parties stipulate and obtain a court order as follows:

- “Appointing a mutually-agreed, independent information technology consultant as a special master, referee, or other officer or agent of the court such that extraction and review of privileged or otherwise protected electronic data will not effect a waiver of privilege.”
- “Providing that production to other parties of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work-product protection attaching to the data.”⁶
- “Providing that extraction and review by a mutually-agreed independent information technology consultant of attorney-client privileged or attorney work-product protected electronic data will not effect a waiver of privilege or work-product protection attaching to the data.”
- “Setting forth a procedure for the review of the potentially responsive data,” specifying “that adherence to the procedure precludes any waiver of privilege or work-product protection attaching to the data.”⁷
- “Prior to receiving any data, any mutually-agreed independent information technology consultant should be required to provide the court and the parties with an affidavit confirming that the consultant will keep no copy of any data provided to it and will not disclose any data provided other than pursuant to the court’s order or parties’ agreement. At the conclusion of its engagement, the consultant should be required to confirm under oath that it has acted, and will continue to act, in accordance with its initial affidavit.”
- “The requesting party should provide the court and the producing party an affidavit stating that the requesting party will keep no copy of data deemed by the producing party to be privileged or work product, subject to final resolution of any dispute by the court, and will not use or reveal the substance of any such data unless permitted to do so by the court.”

Reaching agreement with your opponent on such a proposed stipulation, however, may not be feasible in many cases where the burden of producing electronic documents and information weighs much more heavily on one party. For example, in a case where the plaintiff has few documents to produce, stipulating to these provisions would likely be seen as unnecessary and a strategic mistake. On the other hand, if the parties both have large amounts of electronic information and documents, it may be possible to reach such an agreement and share the costs of a disinterested information technology consultant—especially if the judge or magistrate suggests that the parties consider the approach outlined in the Civil Discovery Standards.

Additional Tactics

Even if the economics of the case are such that retention of an independent information technology consultant is not feasible, a number of steps can be taken either to help avoid inadvertent disclosure or to mitigate the consequences of such disclosure if it occurs. Lange and Nimsger identify the following tactics for

consideration in their e-discovery treatise:⁸

- “Act proactively by gaining the advanced agreement of opposing counsel regarding any inadvertent disclosure or securing a court order. This should include an agreement that the inadvertent disclosure of a privileged document does not constitute a waiver of privilege, that the privileged document should be returned (or there will be a certification that it has been deleted), and that any notes or copies will be destroyed or deleted.”
- “Examine the scope of the requests and potential production to see if there are ways to limit the production either by objection or by agreement, especially in terms of electronic files.”
- “Ensure that your production system has the requisite checks and balances that can withstand the light of judicial scrutiny for reasonableness.”⁹
- “New evolutions in technology can also assist in reducing the risk of inadvertent disclosure by segregating potentially privileged data for review.”
- “Develop a plan to react in the event you determine that a privileged document has been inadvertently produced.”
- “Ensure that clients are aware of the risks and the decisions made in the production process so that there are ‘no surprises’ even in the event of an inadvertent disclosure.”

Proposed “Clawback” Provision

The e-discovery changes to the Federal Rules of Civil Procedure recently approved by the Judicial Conference of the United States, which are expected to take effect in December 2006, if approved by the Supreme Court, would amend the privileged documents provision of Rule 26(b)(5).¹⁰ In an attempt to deal with the problem of the inadvertent production of privileged or work-product materials, the proposed “clawback” provision would provide that the producing party might notify the receiving party of the claimed privilege. After receiving such notice, the receiving party must return, sequester, or destroy the information, and may not use or disclose it to third parties until the claim is resolved. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it.

While this clawback provision may provide some comfort to the practitioner who has inadvertently disclosed certain privileged information, it will not obviate the need to take every necessary precaution to minimize the frequency and effects of such an occurrence. As a recent article noted, the provision raises as many questions as it answers: How likely is it that a party will discover its error within a reasonable time? Who has time to go back and double check past productions? What is a “reasonable time”?¹¹

Care in Describing Emails and E-Documents

Once a privilege is invoked, the party asserting it must make a prima facie showing that the privilege protects the document in question.¹² As noted above, whether the request is made to a party through a document request or to a nonparty through a subpoena, the producing party must sufficiently describe the withheld document so that the receiving party may determine the applicability of the privilege.

Complying with this requirement of adequate description is

easier said than done. One of the most difficult aspects confronted in performing this task is deciding how to describe a “thread” or series of connected emails, some of which may not be privileged. Clearly, merely including a description of the most recent email at the top of the series and then noting “with attached messages” would not be adequate. Such a cryptic privilege log would be especially problematic in instances where that particular email communication either is not privileged or, even if it is privileged, does not appear to be so, leaving the receiving party reasonably to question why the message is being withheld.

If an entire thread of emails is privileged, a description of each communication in the string should be provided.

As Paul R. Rice notes in his book on electronic evidence, “[t]he fact that e-mail communications are electronically tied together because they were sequentially created does not change their fundamental character. Each e-mail is a separate communication (like separate letters and memoranda).” As a result, “each message needs to be identified and described in a manner that fairly permits the opposing side to assess whether the claim of privilege is valid.”¹³

If the privileged email has been redacted from a document reflecting a thread of communications that has been produced, simply identifying the particular redacted email that has been withheld and providing the document number would seem adequate. On the other hand, if it has been determined that the entire thread of emails is privileged, a description of each communication in the string should be provided, noting that the communications were “forwarded by” or “included in” the next communication in the thread, and so on. Omitting a description of any of the withheld communications could lead to loss of the privilege, a rule to show cause, or other sanctions.

Conclusion

While lawyers and paralegals must use the same amount of care in producing electronic information that they have always used in producing paper documents, the chances of making a mistake—either by inadvertently producing privileged documents or failing to adequately describe the materials withheld—are greatly increased. By taking certain precautions and obtaining stipulations and court orders up front, litigators can minimize the problems they will encounter when these problems inevitably arise. ♦

Endnotes

1. FED. R. CIV. P. 26(b)(5); *see also* FED. R. CIV. P. 45(d)(2) (in the subpoena context, requiring description of the document “that is sufficient to enable the demanding party to contest the claim”).

2. FED. R. CIV. P. 45, advisory committee’s note (1991).
3. *Trepanier v. Chamness*, 2005 U.S. Dist. LEXIS 23293 at *7 (N.D. Ill. Oct. 12, 2005).
4. MICHELE C.S. LANGE & KRISTIN NIMSGER, *ELECTRONIC EVIDENCE AND DISCOVERY: WHAT EVERY LAWYER SHOULD KNOW* (2004).
5. Am. Bar Ass’n, *Amendments to Civil Discovery Standards* (Aug. 2004), <http://www.abanet.org/litigation/taskforces/electronic/home.html>.
6. Standard 32(b) goes on to note that in stipulating to the entry of such an order regarding nonwaiver, “the parties should consider the potential impact that production of privileged or protected data may have on the producing party’s ability to maintain privilege or work-product protection vis-à-vis third parties not subject to the order.”
7. “The order may contemplate, at the producing party’s option: (i) Initial review by the producing party for attorney-client privilege or attorney work product protection, with production of the unprivileged and unprotected data to follow, accompanied with a privilege log, or (ii) Initial review by the requesting party, followed by: (A) production to the producing party of all data deemed relevant by the requesting party, followed by (B) a review by the producing party for attorney-client privilege or attorney work-product protection. Before agreeing to this procedure, the producing party should consider the potential impact that it may have on the producing party’s ability to maintain privilege or work-product protection attaching to any such data if subsequently demanded.” ABA Civil Discovery Standard 32(d), <http://www.abanet.org/litigation/taskforces/electronic/home.html>.
8. LANGE & NIMSGER, *supra* note 4, at 50–52.
9. *Id.* at 50–51. Issues to consider in determining the reasonableness of precautions would include: “Do your procedures for human review assure the necessary inspection of documents to identify and assert privilege claims? Are the review and production systems well organized? Is there a final review of the production set before shipment?”
10. The proposed amendment to Fed. R. Civ. 26(b)(5), *available at* <http://www.uscourts.gov/rules/#top>.
11. Jack Montgomery & Kenyon Shubert, *Meeting the Challenges of Electronic Discovery*, 20 MAINE BAR J. 96, 99 (2005).
12. *In re Grand Jury Investigation*, 974 F.2d 1068, 1070–71 (9th Cir. 1992).
13. PAUL R. RICE, *ELECTRONIC EVIDENCE LAW AND PRACTICE* 165, 167 (2005).

E-Discovery Resources on the Web

<http://www.abanet.org/litigation/taskforces/electronic/home.html>

This ABA website provides access to the text of the 2004 Amendments to the Civil Discovery Standards. It also includes the original version of the Civil Discovery Standards adopted in 1999.

<http://www.uscourts.gov/rules/#top>

This site provides the text of the proposed e-discovery rules approved by the Judicial Conference of the United States in September 2005.

<http://www.lexisnexis.com/applieddiscovery/lawlibrary/eDiscoveryPrimer.asp>

This site contains a brief overview of e-discovery issues.

http://arkfeld.blogs.com/ede/attorney_client_privilege/

This is a blog digesting recent cases and developments relating to e-discovery.