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Don't Lose Your Privileges: Managing the Risk of Inadvertent Disclosure in the Digital Era

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Twenty years ago, personal computers were a novelty and e-mail did not exist. Today, however, at least 90 percent of information created is first generated in electronic format.[1] This increase has drastically altered the discovery landscape—especially for privileged communications.

The incredible and ever-increasing amount of electronic data that litigants are now required to review in responding to discovery requests increases the likelihood that privileged communications will be produced during discovery. Even the most diligent document production carries some risk that privileged communications will be inadvertently disclosed. The consequences of such an inadvertent disclosure can be harsh, depending on the jurisdiction and the surrounding circumstances. Indeed, in some jurisdictions, *any* voluntary disclosure of privileged documents is a waiver of the privilege, regardless of the circumstances. It is therefore vital that counsel and their clients take steps to minimize the risk of producing privileged communications during discovery.

Changes to the Federal Rules of Civil Procedure

Earlier versions of the Federal Rules of Civil Procedure, designed with conventional paper discovery in mind, were out of step with the current era of complex electronic discovery practice. Several amendments to the Federal Rules aimed at addressing the complexity of electronic discovery took effect Dec. 1, 2006. These long-overdue amendments acknowledge the volume and importance of electronically stored information, and respond to the increasingly prohibitive costs of document review and protection of privileged documents.

Procedures for Resolving Waiver Disputes

The new Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure provides a procedure for resolving disputes over inadvertently produced documents. Under Rule 26(b)(5)(B), a party who wishes to recover inadvertently produced privileged communications must notify the receiving party of the disclosure, the specific privilege claim, and the basis for the claim. According to the Advisory Committee Notes, because the receiving party must decide whether to challenge the claim of privilege based on the information in this notice, it should be in writing and should state, as

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specifically as possible, the basis for the claim of privilege. This new rule does not provide a time limit for informing the receiving party of the inadvertent disclosure; however, the amount of time before notice is given may be a factor in the particular jurisdiction's substantive law regarding waiver, as discussed below.

After receiving notice that documents have been inadvertently produced, the receiving party may either challenge the privilege claim or must return or destroy the documents. Fed. R. Civ. Proc. 26(b)(5)(B). Should the privilege claim be challenged, the receiving party must sequester the documents and may not use or disclose any of the information to third-parties until the challenge is resolved. *Id.* If the receiving party has already disclosed or provided the information to a third party before receiving notice, the receiving party must take reasonable steps to obtain the return of the information or arrange for it to be destroyed. *Id.*

The receiving party then has the option of submitting the information directly to the court to decide whether the information is privileged or protected as claimed and, if so, whether a waiver has occurred. Fed. R. Civ. Proc. 26(b)(5)(B). If that party does so, it must provide the court with the producing party's grounds for the privilege or protection, and serve all parties. Pending the court's ruling, the producing party must also preserve the information.

Notably, Rule 26(b)(5)(B) does not dictate the substantive principles addressing whether the privilege has been waived. That determination is to be made pursuant to the applicable substantive law, and in the case of attorney-client privilege, state law controls. For work-product privilege, federal law controls.

Non-Waiver Agreements

The amended Federal Rules of Civil Procedure also urge counsel to recognize the risk of inadvertent production and to develop solutions to avoid waiver. Rule. 26(f)(4) was amended to direct parties to discuss privilege issues in preparing their discovery plans, and amended Rule 16(b)(6) allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege protection.

The Comments to Rule 16 acknowledge two types of non-waiver agreements. One is a "claw back" agreement in which the parties agree that any inadvertent disclosure of privileged documents does not constitute a waiver, and the subject documents will be returned upon notification by the producing party. The other is a "quick peek" agreement in which documents are produced for initial examination without any assertion or waiver of privilege. The examining party then designates the documents to be produced, allowing the producing party to then conduct a privilege review of only the documents to be produced.

Case law that pre-dates the amendments to the federal rules suggests that non-waiver agreements should be used with caution and the parties should not view non-waiver agreements as an automatic protection from inadvertent production or as a means to avoid meaningful privilege review.

Case law that pre-dates the amendments to the federal rules suggests that non-waiver agreements should be used with caution, and the parties should not view non-waiver agreements as an automatic protection from inadvertent production or as a means to avoid meaningful privilege review. *See Ciba-Geigy Corp. v. Sandoz Ltd.*, 916 F. Supp. 404, 412-13 (D. N.J. 1995) ("claw back" agreement was rejected because court concluded the agreement was counsel's excuse to bypass meaningful privilege review); *see also Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109, 118 (D. N.J. 2002) (court declined to give effect to agreement between counsel that production of certain documents would not waive privilege protection because such agreements

"could lead to sloppy attorney review and improper disclosure which could jeopardize clients' cases."); *Columbia/HCA Healthcare Corp.*, 192 F.R.D. 575, 577-78 (M.D. Tenn. 2000) (holding that an agreement with the government to produce documents without waiving privilege/work product protection is invalid, rejecting the doctrine of "selective waiver."). Obviously, the sensitivity of the information in the documents may also dictate whether non-waiver agreements would be appropriate in specific circumstances.

The Consequences of Inadvertent Production of Privileged Communications

Depending on the jurisdiction, courts will employ one of three general methods to determine whether the inadvertent production of privileged documents waives the privilege: the strict accountability approach, the lenient approach, and the "middle of the road" approach. The consequences of an inadvertent production can vary dramatically with each method. Accordingly, counsel should take into account the prevailing approach in the jurisdiction where litigation is venued in developing production guidelines and addressing any inadvertent productions.

The Strict Accountability Approach

Under the strict accountability approach, once disclosure of privileged material is made, inadvertent or otherwise, the privilege is waived. Courts following this approach reason that confidentiality is an essential element of the privilege and, once it is lost, it can never be regained. For example, the Federal Circuit in *Carter v. Gibbs*, 909 F.2d 1450, 1451 (Fed. Cir. 1990), applied the strict approach when evaluating whether the privilege was waived on documents the government inadvertently attached to a memorandum. The court stated:

> It is irrelevant whether the attachment was inadvertent…. Granting the motion would do no more than seal the bag from which the cat has already escaped. *Id.*

The D.C. Circuit and the First Circuit also follow this approach. *See In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (applying the strict approach, the court held that disclosure of a memorandum to a government auditor constituted a waiver of privilege); *Texaco Puerto Rico , Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867 (1st Cir. 1995) (holding "it is apodictic that inadvertent disclosure may work a waiver of privilege."); *Ares-Serono, Inc. v. Organa Int'l B.V.*, 160 F.R.D. 1, 4 (D. Mass. 1994) (court held that a strict rule applying a waiver to inadvertently disclosed documents serves to protect the secrecy of patent applications by ensuring that attorneys will more diligently install precautionary measures to avoid such disclosures).

The Lenient Approach

On the other end of the spectrum, a small number of courts use the lenient approach, or a "no waiver" rule. Under this approach, courts only find waiver in circumstances of inadvertent disclo-

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Janet Kwuon Named Director of Complex Litigation E-Discovery

As electronic discovery, document management and now, the Amendments to the Federal Rules of Civil Procedure, continue to increase the potential cost, burden, complexity and risks associated with litigation, Reed Smith has responded with a team of lawyers and practice technology specialists devoted to assisting clients with this rapidly developing area of law.

Reed Smith has appointed Janet H. Kwuon as Director of Complex Litigation Electronic Discovery to head this team and help clients design, implement and memorialize defensible electronic discovery and document production strategies. At the policy and procedure level, this includes the preparation of record retention policies, preservation policies and legal holds, preservation orders, and internal protocols. In the context of specific litigation, specific level, we work with clients to design and implement effective and customized discovery, and document collection and review strategies.

On the electronic vendor and technology side, our Practice Technology Specialists have an average of 14 years of litigation support experience. This group tracks the latest electronic discovery vendors, electronic discovery review applications, and technology, so that we can customize an efficient approach for our clients. We have extensive experience working with vendors, contract review teams, local counsel, Internet-based review tools, and, of course, our own in-house resources. In addition, we have international experience and capabilities in this area, managing electronic data and discovery in cross-border matters, including the assessment of foreign privacy and data management law.

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sure if caused by gross negligence. *See Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 235 (D. Md. 2005). *See also, Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936, 938 (S.D. Fla. 1991); *Kansas-Nebraska Natural Gas Co., Inc. v. Marathon Oil., Co.*, 109 F.R.D. 12, 21 (D. Neb. 1983). The rationale behind this view is twofold. First, these courts reason that the privilege belongs to the client, so an act of the attorney cannot affect a waiver. *Helman v. Murry's Steaks*, 728 F. Supp. 1099, 1104 (D. Del. 1990). Second, a waiver is by definition the intentional relinquishment of a known right, and the concept of an inadvertent waiver is therefore inherently contradictory. *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 954 (N.D. Ill. 1982).

One common pitfall is waiting too long to request the return of inadvertently disclosed materials.

The Middle of the Road Approach

The majority of courts follow a "middle of the road" approach or a balancing test to determine whether an inadvertent production has waived the privilege. This approach acknowledges that a truly inadvertent disclosure is, by definition, an unintentional act and thus is not an effective waiver. However, unlike the "no waiver" rule, this approach focuses on the "reasonableness of the steps taken to preserve the confidentiality of privileged documents." *Ciba-Geigy Corp. v. Sandoz, Ltd.*, 916 F. Supp. 404, 410 (D. N.J. 1995). Under this analysis, courts balance a variety of factors, including:

- the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production;
- the number of inadvertent disclosures;
- the extent of the disclosure;
- any delay and measures taken to rectify the disclosure; and
- whether the overriding interests of justice would or would not be served by relieving the party of its error.

See Ciba-Geigy, 916 F. Supp. at 411. The Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits also follow this approach.[2] The Third Circuit has not definitively addressed the issue of waiver by inadvertent disclosure, but courts within the jurisdiction appear to use the approach outlined in *Ciba-Geigy*. *See Jame Fine Chemical, Inc. v. Hi-Tech Pharmacal, Co., Inc.*, 2006 U.S. Dist. LEXIS 58235, *2 (D. N.J. Aug. 16, 2006).

What constitutes "reasonableness" varies widely from court to court depending on the facts of each case. One common pitfall is waiting too long to request the return of inadvertently disclosed materials. *See Crossroads Sys. (Tex.), Inc. v. DOT Hill Sys. Corp.*, 2006 U.S. Dist. LEXIS 36181 *16 (W.D. Tex. May 31, 2006). Other examples that appear to doom recovery efforts are failure to properly review and screen privileged documents, failure to perform quality control before producing documents to adverse parties, and failure to make meaningful efforts to determine whether attorneys are authors or recipients of documents. *See e.g. Hernandez v. Esso Std. Oil Co.,* 2006 U.S. Dist. LEXIS 47738 *15 (D. P.R. Sept. 18, 2006).

The Proposed Federal Rule of Evidence 502 Approach

The Judicial Conference Advisory Committees on the Bankruptcy, Criminal, and Evidence Rules has proposed an amendment to the Federal Rules of Evidence that would provide a consistent standard for determining the effect of inadvertent disclosures of privileged materials.[3] As currently drafted, Proposed Rule 502 would take the majority view (or the "middle-of-the-road" approach) that inadvertent disclosure constitutes a waiver only if the party did not take reasonable steps to avoid

and prompt efforts to rectify the error. The Proposed Rule also establishes the validity of non-waiver agreements and states that such agreements are binding on third parties if the agreement is incorporated into a court order.[4]

Ethical Responsibilities Regarding Inadvertent Disclosure of Privileged Communications

Recent changes in the ABA Model Rules of Professional Conduct significantly altered attorneys' ethical obligations for occasions when an inadvertent disclosure of privileged communications occurs during discovery. Formerly, an attorney who was inadvertently sent a privileged communication from an opposing attorney was required to refrain from examining the communication and return it. *See* ABA Committee on Ethics and Professional Responsibility, Formal Op. 92-368 (1992). There is no longer any such ethical duty on the part of the receiving attorney.

In 2005, the ABA withdrew the Formal Opinion requiring the return of inadvertently produced privileged communications and issued a new Formal Opinion that requires only that the receiving attorney "promptly notify the sender in order to permit the sender to take protective measures." ABA Committee on Ethics and Professional Responsibility, Formal Op. 05-437 (2005).[5] The consequence of the inadvertent disclosure is not specified and the burden is squarely on the disclosing attorney to take any available protective measures, including a motion for return of inadvertently produced documents.

Strategies to Minimize the Risk of Waiver

- ***Authors Of Privileged Communications Should Designate Them As Privileged:*** Before litigation begins, clients should be advised to designate communications as privileged at the time they are created. Such designations will not only make it easier to defend any challenge to a claim of privilege, but they will also allow for ready identification of the privileged communication during document review. For example, employees should be instructed to mark privileged e-mails as "confidential" and "attorney-client privileged" in the e-mail's re: line. Such a designation makes it clear on the face of the document that it is a privileged communication and will help to prevent widespread dissemination of the communication. It will also make it clear to any outside attorney reviewing the document for litigation purposes that it should be considered a candidate for the privilege log.
- ***Put Document Management Procedures In Place:*** Again, before litigation begins, clients should have a system in place for managing their electronic documents that provides a means of collecting the potentially relevant information that must be reviewed during discovery. Ideally, such a system would include a means of segregating documents that contain privileged communications so that the location of those documents can be readily identified.
- ***Retain Outside Counsel With E-Discovery Expertise:*** Clients with document-intensive litigation should retain outside counsel with significant e-discovery expertise,

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including the ability to initiate and implement efficient and thorough document preservation, collection, and review procedures.

- ***Select Vendors With Appropriate Capabilities:*** Not all document collection vendors are created equal. For example, some vendors have created document review tools that identify duplicates, and near duplicates and also can organize documents by concept. These features not only increase attorney efficiency but can also be vital in coding documents uniformly, which can dramatically reduce attorney review time (often the most expensive element of document review), as well as reduce the risk of inadvertent production.
- ***Consider Use Of Non-Waiver Agreements:*** "Claw back" and "quick peek" agreements should be considered in select circumstances to minimize the risk of inadvertent disclosure of privileged information. Should the parties enter into such an agreement, the agreement should be included in a court order.
- ***Act Quickly When An Inadvertent Production Is Discovered:*** Counsel should act quickly upon any discovery of an inadvertent production to request the return of the document and to follow the procedures set forth in Rule 26(b)(5)(B). As discussed above, a prompt request will strengthen any arguments that the disclosure should not be considered a waiver. Counsel should, likewise, be prepared to demonstrate that reasonable measures were taken during the document review to prevent inadvertent disclosure of privileged information.

Conclusion

In this new era of large-scale electronic document productions, the specter of inadvertent production of privileged documents looms large. While the new Federal Rules of Civil Procedure acknowledge the current state of litigation complexity by providing a procedure for asserting claims of inadvertent production, the courts are still in disagreement about what constitutes a waiver. Consequently, managing the risk of inadvertent disclosure will require staying abreast of the applicable procedural rules and the technology associated with the collection and review of electronic documents, so that counsel and their clients can develop effective and flexible strategies for meeting today's discovery obligations.

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1 The Sedona Principles for Electronic Document Production, July 2005 version at page 11, citing Kenneth J. Withers, *The Real Cost of Virtual Discovery*, 7 Federal Discovery News 3 (Feb. 2001). Available at ***www.thesedonaconference.org***.

2 *See e.g., In re Grand Jury Proceedings*, 219 F.3d 175 (2nd Cir. 2000); *Alldread v. City of Grenada*, 988 F.2d 1425, 1433 (5th Cir.1993); *In re Grand Jury Investigation*, 142 F.R.D. 276 (M.D. N.C. 1992); *Fox v. Massey-Ferguson, Inc.*, 172 F.R.D. 653, 1995 U.S. Dist. LEXIS 21617 (E.D. Mich. 1995); *Gray v. Bicknell*, 86 F.3d 1472 (8th Cir. 1996); *United States ex rel Bagley v. TRW, Inc.*, 204 F.R.D. 170 (D. Cal. 2001); *Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936 (S.D. Fla. 1991); *Shriver v. Baskin-Robbins Ice Cream Co., Inc.*, 145 F.R.D. 112 (D. Colo. 1992); *Edwards v. Whitaker*, 868 F. Supp. 226 (M.D. Tenn. 1994); *Cunningham v. Connecticut Mut. Life Ins.*, 845 F. Supp. 1403 (S.D. Cal. 1994); *Monarch Cement Co. v. Lone Star Industries, Inc.*, 132 F.R.D. 558 (D. Kan. 1990).

3 The proposed amendments to the Federal Rules are posted at *www.uscourts.gov/rules*.

4 *Id.*

5 This is consistent with the Model Rules of Professional Conduct, which specify only that the receiving attorney "promptly notify the sender" that the document was sent. *See* Model Rules of Professional Conduct, R. 4.4(b) (2002).

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