

Tip of the Month



Balancing the Costs of Privilege Review with the Risks of Waiver

Scenario

A large financial institution is responding to discovery requests in connection with an investor suit relating to certain financial products marketed by the institution. To minimize the costs, the financial institution directs its outside counsel to use search terms to identify potentially privileged documents and to limit attorney review to only those documents that hit on the privilege search terms. Later in the litigation, the financial institution seeks to claw back more than 100 privileged documents that were inadvertently produced. Plaintiffs return the inadvertently produced documents, but move to compel their production and the production of all documents relating to the subject matter of those documents. Plaintiffs argue that given the financial institution's review methodology, the production of the privileged material was not inadvertent and effectively waived protection as to both the specific documents and the subject matter.

Federal Rules of Evidence 502

There is increasing pressure to use advanced technology to help curb the costs associated with electronic discovery. But in doing so, organizations and their counsel should be mindful of the significant risks posed by taking shortcuts when it comes to a privilege review. Rule 502 of the Federal Rules of Evidence was amended in 2008 to address concerns about increased costs of electronic discovery. In particular, the amendments address concerns about the burden involved with attempting to ensure that no privileged documents "slipped through the cracks" of voluminous document productions, and to make clear that the inadvertent production of privileged material does not constitute a broad subject matter waiver.

Rule 502 states that the disclosure of privileged material will not operate as a waiver in a federal or state proceeding if (i) the disclosure is inadvertent; (ii) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (iii) the holder promptly took reasonable steps to rectify the error. Generally, the key consideration in determining whether a waiver occurred is whether the steps taken by the producing party were "reasonable."

The Advisory Committee notes to Rule 502 indicate that relevant considerations include: "reasonableness of precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness." The Advisory Committee also explicitly recognizes the potential use of technology: "a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure."

Some organizations have taken Rule 502 to mean that the use of technology to screen for privilege and work product will relieve the organization of the need to manually review those documents. But the courts do not necessarily agree.

Federal Court Scrutiny

Courts have expressed skepticism toward decisions to rely primarily upon technology to screen for privilege or work product. For example in *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, a West Virginia magistrate judge found that the steps taken by the plaintiff to prevent an inadvertent disclosure were not sufficient, despite the facts that the plaintiff had, among other things: (i) hired an outside e-discovery vendor; (ii) identified, applied and tested search terms to locate privileged documents; (iii) identified, applied and tested searched terms for relevant, non-privileged documents; and (iv) conducted an attorney review of the relevant documents prior to production.¹

Remarkably, in affirming the magistrate judge's order that a waiver had occurred, the district court noted that it did not have to review the process for screening for privileged material because "[t]he ridiculously high number of irrelevant materials and the large volume of privileged communications produced demonstrate a lack of reasonableness."² This decision may indicate that what is relevant in determining whether a procedure is "reasonable" is not only the privilege review itself, but also the procedures employed in the overall document review and production process.

Mt. Hawley Ins. Co. is not an aberration. For example, a Maryland court cautioned that "while it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal; and there is a growing body of literature that highlights the risks associated with conducting an unreliable or inadequate keyword search or relying exclusively on such searches for privilege review."³ And yet another court, this one in Pennsylvania, noted that "[a]n understandable desire to minimize costs of litigation and to be frugal in spending a client's money cannot be an after-the-fact excuse for a failed screening of privileged documents..."⁴ Technology, therefore, may not be the panacea for every organization's concerns about the rising costs of electronic discovery.

Best Practices for Leveraging Technology in Privilege Review

Organizations should not avoid the use of advanced technology for fear of waiver. Rather, organizations and their counsel should carefully consider the risks involved in relying primarily upon technology to help curb the costs of a privilege review, and they should take the time to develop a review workflow that balances the need to minimize costs with the risks of inadvertent waiver.

- Maintain an up-to-date list of attorney names (both inside and outside counsel) and law firms that may appear in privileged or work-product protected material. Providing accurate information to your outside counsel and review team will increase the likelihood of an accurate privilege review.
- Establish a set of search terms specifically designed to identify potentially privileged or work-product material based on terminology used within your organization. The more specific your search terms, the more likely they are to capture potentially privileged documents and withstand scrutiny.
- Evaluate the available technology, including the risks associated with that technology, and conduct tests with samples of your organization's data to ensure effectiveness. Understanding how the technology works and implementing controls to address any risks

may be effective in defending the reasonableness of your procedures.

- Assess which combination of technology and manual review will be most effective for the matter at hand given the costs, the type of data, and the risks at issue in the legal matter. Not all technology, data sources or legal matters are created equal.
- Consider consulting technology professionals or e-discovery counsel. Technology professionals and e-discovery counsel may be able to offer insight into creative approaches for tackling mountains of data.
- Enter into a clawback agreement in accordance with Federal Rule of Evidence 502(e) that includes an express provision detailing the procedure for requesting the return of potentially privileged material.
- Carefully manage and document the review process regardless of the technology selected. Educated and knowledgeable counsel are more likely to convince a court that the process selected was reasonable.

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¹ *Mt. Hawley Ins. Co. v. Felman Production, Inc.*, No. 3:09-cv-00481, 2010 WL 1990555 (S.D. W.Va. May 18, 2010).

² *Felman Production, Inc. v. Industrial Risk Insurers*, No. 3:09-0481, 2010 WL 2944777 at *3 (S.D. W.Va. July 23, 2010).

³ *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 256-57 (D. Md. 2008).

⁴ *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 254 F.R.D. 216, 227 (E.D. Pa. 2008).

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