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Irrelevance May Not Justify Redaction

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Scenario

A party to a contract dispute is in the process of reviewing and producing data in discovery. The general counsel of the party knows that information that falls within the attorney-client or attorney work product privileges should be redacted from the data prior to production, but she also wants to know if there are other reasons, including that information is not relevant to the dispute at issue, to redact.

Parties to Litigation Cannot Redact Information Simply Because It Is Irrelevant

Federal Rule of Civil Procedure 26(b)(1) sets out a broad definition for the scope of discovery that does not, on its face, exclude irrelevant information. The rule states that the parties to a case "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." However, a recent federal case clarifies that without some other protection from disclosure, there are indeed substantial risks to redacting information on the sole basis that it is "irrelevant" or "non-responsive."

The defendants in a recent case in the Eastern District of Wisconsin produced more than 6,000 documents, 600 of which were redacted in their entirety. Without asserting any privilege, the defendants argued that the redactions were necessary to protect confidential business information, relying on a 2016 case from the Southern District of Florida in which certain non-responsive redactions were allowed "because of [the defendants'] concern that the documents contained competitively sensitive materials that may have been exposed to the public, despite protective orders." The defendants here failed to explain why the protective order was insufficient to protect their confidential business information. As a result, they were relying solely on the argument that the redacted information was irrelevant as opposed to pointing to any other basis for excluding it from discovery.

The court granted the plaintiff's motion to compel production of the 600 documents, stating that the "potential for abuse exists" if litigants may unilaterally decide what is relevant, and it did not agree that a receiving party must "take the [producing party's] word" for whether redacted information would be irrelevant to the receiving party's claim. The court pointed out that despite an emphasis on proportionality in discovery, the Federal Rules of Civil Procedure still permit discovery of information that is inadmissible as evidence. The court noted that "[t]he practice of redacting for nonresponsiveness or irrelevance finds no explicit support in the Federal Rules of Civil Procedure" and allowing this practice "would improperly incentivize parties to hide as much as they dare."

Appropriate Reasons for Redaction

Attorney-Client Privilege

The attorney-client privilege protects certain communications between an attorney and a client. Generally, for the privilege to apply, there must have been a communication between an attorney and a client for the primary purpose of giving or obtaining legal advice or assistance with the expectation and maintenance of confidentiality.

Work Product Doctrine

The work product doctrine is a qualified immunity from discovery for information prepared by an attorney in anticipation of litigation. The purpose of the doctrine is to ensure that attorneys' representation of clients is not hamstrung by fears that their work product will be used against their clients.

Non-Public Personal Information

Federal Rule of Civil Procedure 5.2 requires that personally identifiable information, such as an individual's full social security number, full taxpayer identification number, full birth date, the name of an individual known to be a minor or a financial account number, be redacted from federal court filings. Unless the court orders otherwise, a court filing may include only (i) the last four digits of the social security number and taxpayer identification number, (ii) the year of the individual's birth, (iii) the minor's initials and (iv) the last four digits of the financial account number.

In addition, Title V of the Gramm-Leach-Bliley Act, its implementing regulations and some state rules enacted in response to the Act impose disclosure and procedural requirements on financial institutions regarding their customers' nonpublic personal information. The act provides that, ordinarily, "a financial institution may not, directly or through an affiliate, disclose to a non-affiliated third party any nonpublic, personal information." Nonpublic personal information includes any personally identifiable information about a customer, or list of customers, that is not publicly available.

Bank Examination Privilege

Confidential supervisory information between financial institutions and certain regulators may be protected under the bank examination privilege. The privilege broadly protects documents, examination reports, communications between financial institutions and regulators, and other information reflecting the opinions, deliberations or recommendations of regulatory agencies.

This privilege, however, "belongs" to the regulator, meaning that only the regulator can invoke it. The financial institution should identify information to which the privilege may apply and may notify the regulator of any requests to produce information potentially protected by this privilege. Regulators that may invoke the privilege include the Board of Governors of the Federal Reserve System, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Consumer Financial Protection Bureau and some state banking agencies.

SAR Privilege

The Bank Secrecy Act requires banks to report "any suspicious transaction relevant to a possible violation of law or regulation." Implementing regulations , such as the Office of the Comptroller of Currency's implementing regulations, require banks to "file a Suspicious Activity Report [SAR] when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act." A bank may not disclose the existence of the SAR or any information that would reveal its existence and may not waive the SAR

privilege. The SAR privilege protects reports, memoranda and other documents that reflect or relate to evaluation of a potential SAR filing.

Conclusion

As recent case law illustrates, a party to litigation runs a substantial risk if it justifies redaction of information based solely on "irrelevance." Instead, counsel should consider whether some other rule, regulation or substantive law protects that information from disclosure. Protections would include the attorney-client privilege, the work product doctrine, rules regarding the disclosure of non-public personal information, the bank examination privilege and the SAR privilege.

For inquiries related to this Tip of the Month, please contact James Coleman at jcoleman@mayerbrown.com.

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