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Minding your Ps and Qs . . . and your @s and *s

John Cord

What should you do if the defendant has given you electronically stored information that you think has been disclosed inadvertently? And what can you do to avoid making the same mistake yourself?

The modern world has been engineered and defined by our relationship with computers. Computers function simultaneously as tools of communication and tools of record-keeping, so they are full of what is known as electronically stored information (ESI).

Attorneys have had to deal with rules on inadvertent disclosure of information since long before computers, but now we are measured by a new standard regarding ESI. Whether you are a technophobe or a technophile, you must be prepared to deal with discovery in the Information Age.

Unintended disclosures of ESI typically involve either attorney-client privilege or attorney work product. Rule 26 of the Federal Rules of Civil Procedure provides that "parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." The attorney-client privilege is the most common type of privilege in litigation. Its underlying purpose is to promote a free exchange between lawyers and clients and to encourage people to seek legal advice.¹

Work product, on the other hand, "seeks to enhance the quality of professionalism within the legal field by preventing attorneys from benefitting from the fruit of an adversary's labor."² It routinely includes interviews, statements, memoranda, correspondence, and mental impressions of counsel.

Courts and Congress have created rules to protect privileged and work-product information, acknowledging the detriment to the legal profession if such materials were freely discoverable. But how should the rules be applied when ESI materials are produced inadvertently?

A special problem

The problem of inadvertently disclosed information is as old as discovery itself. However, unique issues inherent in the management and review of ESI vastly increase the probability that any production will include protected documents. Thorough review is hampered by short court-ordered deadlines for production and the cost of examining each document.

Courts generally follow one of three schools of thought to determine whether a party that inadvertently discloses information waives its ability to protect that information. Under the strict approach, protection is almost always waived, even if disclosure is inadvertent.³ Under the lenient approach, waiver requires intentional and knowing relinquishment of the privilege; inadvertent disclosure can cause waiver only through gross negligence.

For example, in *Bensel v. Air Line Pilots Association*, the District Court of New Jersey found that plaintiff counsel was grossly negligent in providing opposing counsel with documents bearing the name and letterhead of a law firm that represented the client. Because those documents were clearly privileged on their face, counsel had abandoned the attorney-client

privilege regarding them.⁴

Federal Rule of Evidence 502(b), amended in September 2008, bears language similar to court decisions that have adopted an intermediate, balancing approach. The rule says that disclosure does not cause waiver if "(1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B)."⁵

In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, which predated Rule 502's recent amendment, Chief Magistrate Judge Paul Grimm examined the unique problems that inadvertent disclosure of ESI pose and applied an intermediate test.⁶ In that case, the plaintiff argued that some electronic documents (including e-mail messages) that the defendants produced during discovery were not privileged or protected by the work-product doctrine.

The court agreed, finding that the defendants waived any privilege claims they had to all 165 electronic documents, regardless of the fact that those documents clearly were produced unintentionally.⁷

The problem began after the defendants attended a court-ordered "meet and confer" session with the plaintiff and the parties' computer forensic experts to create a joint protocol for ESI in response to the plaintiff's requests. The plan was for the defendants to use nearly five pages of keyword and phrase search terms to identify responsive documents, and then to conduct a privilege/work-product review before production.⁸

On receipt of the responsive documents, the plaintiff identified and segregated those that contained potentially privileged or protected information and notified the defendants of those specific disclosures.⁹ The defendants immediately responded that their production of such information was inadvertent.

The court reviewed the approaches other courts had taken and then delineated the factors in the intermediate test: the reasonableness of the precautions taken to prevent inadvertent disclosure; the number of inadvertent disclosures; the extent of the disclosures; any delay in measures taken to rectify the disclosures; and overriding interests in justice.¹⁰ Applying these factors, the court found that the defendants had not shown that their search for privileged and protected information was reasonable. The defendants failed to provide the court with

the keywords used; the rationale for their selection; the qualification of [the defendant] and his attorneys to design an effective and reliable search and information retrieval method; whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators; or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation.¹¹

The court also noted that keyword searches are associated with well-known limitations and risks; involve "the sciences of computer technology, statistics, and linguistics"; and require knowledge beyond that of a lawyer.¹² The defendants did not provide any evidence that a quality-assurance review was conducted. Furthermore, before the disclosure, the defendants had requested a nonwaiver agreement, which could have preserved privilege despite disclosure. However, because they received an ext. to respond to discovery, the defendants abandoned that request. Therefore, they could not credibly argue that time constraints prevented them from fully reviewing the documents.¹³

ESI clearly poses specific challenges. In *Creative Pipe*, the court acknowledged that a lawyer does not need to conduct a page-by-page privilege review for voluminous production. However, the review must be well planned.¹⁴

Lawyers should seek assistance in crafting computerized search terms and should not limit themselves to simple keyword searches. There are many options, including highly technical Boolean searches, Bayesian classifiers, "fuzzy" search models, clustering searches, and concept and categorization tools. The lesson is that a lawyer arguing inadvertent disclosure must show that his or her search was reasonable, which sometimes means crafting the search with assistance from an expert who has specific scientific or technological knowledge.¹⁵

The extent of Rule 502's effects remains to be seen. However, courts analyzing it will likely be influenced by decisions like *Creative Pipe*, which prominently feature an objective "reasonable" standard, as the rule does. Plaintiff attorneys should educate themselves in the ways of a reasonable privilege and protection review so they can avoid inadvertent disclosure, fight waiver in the event inadvertent disclosures are made, and argue for waiver in the event they receive an adversary's inadvertent disclosure.

On the receiving end

Typically, plaintiff attorneys receive inadvertently disclosed information more frequently than we disclose it, because our individual clients often face large defendant corporations, which typically have far more materials to wade through when responding to discovery requests. Ethical and procedural issues surround our receipt of inadvertently disclosed information.

The applicable ethical rules vary by state, but caution should be taken before using the disclosed information. Generally, most states require attorneys to immediately notify the sending lawyer upon receipt of materials that were likely inadvertently disclosed.

According to an American Bar Association ethics opinion, "A lawyer who receives materials that on their face appear to be subject to the attorney-client privilege or otherwise confidential, under circumstances where it is clear they were not intended for the receiving lawyer, should refrain from examining the materials, notify the sending lawyer, and abide the instructions of the lawyer who sent them."¹⁶ The punishment for disobedience can be severe, including possible monetary sanctions, disqualification from the case, and reprimand or other consequences from the state bar.

Procedurally, the Federal Rules of Civil Procedure expand on what a lawyer must do when notified by an opponent that he or she has received inadvertently disclosed information. Rule 26(b)(5)(B) provides:

After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim.

Following this procedure will allow you to avoid penalties and to concretely determine before trial whether you can use the evidence received or whether it will be discarded as privileged or protected.

Disclosing information

In some cases, you may realize, to your dismay, that you have disclosed something inadvertently. Usually, it is impossible to eliminate all adverse consequences. Your first goal should be to avoid mistakenly disclosing information. Your second objective is to minimize the adverse effects of inadvertent disclosure. The following steps can help.

Search your own document production. If you are producing documents, you should generally review every single document. In some cases, however, the scope of documents to be produced is voluminous, which increases the likelihood of costly mistakes. As a second phase of your privilege review, you can convert all the documents you plan to produce into searchable text using optical character recognition (OCR) software (the OCR function embedded in Adobe Professional, for example).

Then you can perform commonsense searches using terms likely to identify privileged and protected information. Include your name, your firm's name, the names of any of your client's previous attorneys, and the words "attorney," "lawyer," and "advice." Also include the legal descriptions of any possible causes of action (such as negligent misrepresentation and strict products liability), which may point to work product in the case.

Finally, include dates after which your client engaged counsel, and scrutinize those documents to make sure they are not protected (for example, search for "2008" to find e-mail sent after a 2007 complaint was filed). Do not forget the advice of *Creative Pipe*: Expert assistance may be required to craft appropriate search terms, and a quality-assurance review should be performed after completing the search.

Perform a multiple-level review. Do not rely on one person to review voluminous documents for privileged and work-product information. Two associates should review the documents for potentially protected information, then compare the results and discuss the differences.

Take advantage of the 26(f) conference. Under Rule 26(f)(3)(D), parties must submit a statement to the court before the scheduling conference detailing "any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order." If your client has a potentially voluminous document production, you should consider making some sort of agreement with the defendants and having the court adopt it in the form of an order. This type of court-approved agreement—in conjunction with reasonable precautions against inadvertent disclosure, the amended Rule 502, and cases like *Creative Pipe*—minimizes the risk of waiver.

You might use "clawback" and "quick-peek" agreements. Under a clawback agreement, production without intent to waive privilege or protection will not cause waiver, as long as the producing party subsequently identifies the documents mistakenly produced, so the recipient can return the documents.

Under a quick-peek agreement, the producing party provides requested materials for initial

examination but reserves the right to claim privilege or protection. The requesting party designates the documents it wants produced, and the producing party then screens those documents for formal production and asserts privilege and protection claims under Rule 26(b)(5)(A).

One concern that is still largely untested is whether such agreements can prevent unintended waiver under the Federal Rules of Civil Procedure. Even assuming the rules preclude waiver, those rules may actually be substantive in nature, in violation of the Rules Enabling Act. That act requires congressional approval for the creation, abolition, or modification of any evidentiary privilege.¹⁷ Because of this potential problem, courts may construe the agreements as allowing waiver only to the extent allowed by state law.

Furthermore, third parties may not be bound by nonwaiver agreements. In *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, the defendant provided a computer tape to plaintiffs' class counsel upon an agreement that the tape was work product and that production did not waive the privilege.¹⁸ The U.S. attorney sought a copy of that tape, and the court ordered disclosure.¹⁹ There, the disclosure to plaintiff counsel operated to waive the privilege as to third parties, despite the nonwaiver agreement.²⁰ The Court stated simply that the tape was not confidential because it was shared with plaintiffs' counsel; therefore, all privilege claims were waived.

The safest course before making these or other agreements is to verify state rules on waiver and to have the court adopt the agreement in some form of case management order.²¹ In fact, the goal of amended Rule 502 is to provide predictability to confidential document production. The rule's explanatory notes address this concern: "Parties to litigation need to know, for example, that if they exchange privileged information pursuant to a confidentiality order, the court's order will be enforceable." The intent behind the modified Rules of Civil Procedure and Rules of Evidence is to enable attorneys to address the concerns caused by modern-day discovery, which includes voluminous ESI.

Attorneys accustomed to paper discovery are often intimidated by the uncertainties regarding ESI. But the new rules clarify our obligations when propounding voluminous ESI and inform our strategies in trying to secure waiver for our opponents' inadvertently disclosed ESI. Armed with a clear understanding of these rules, every attorney can be prepared to face the challenges that lie waiting in electronic discovery.

John Cord practices law in Baltimore.

Notes:

1. The privilege applies when "(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client." *Montgomery v. Leftwich, Moore & Douglas*, 161 F.R.D. 224, 225-26 (D.D.C. 1995) (citation omitted).
2. *Harding v. Dana Transport, Inc.*, 914 F. Supp. 1084, 1097 (D.N.J. 1996). See also *Hickman v. Taylor*, 329 U.S. 495, 509-13 (1947). The purpose is also codified in Fed. R. Civ. P. 26(b)(3).
3. See *Texaco Puerto Rico v. Dept. of Consumer Affairs*, 60 F.3d 867, 883 (1st Cir. 1995); *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).
4. *Bensel v. Air Line Pilots Assn.*, 248 F.R.D. 177 (D.N.J. 2008).
5. Indeed, the explanatory note to Rule 502 states: "The rule opts for the middle ground: inadvertent disclosure of protected communications or information in connection with a federal proceeding or to a federal office or agency does not constitute a waiver if the holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error." Other decisions adopting the intermediate test include *Alldread v. City of Grenada*, 988 F.2d 1425, 1433 (5th Cir. 1993); *Gray v. Bicknell*, 86 F.3d 1472, 1484 (8th Cir. 1996).
6. 250 F.R.D. 251 (D. Md. 2008).
7. *Id.* at 253-54.
8. *Id.* at 254.
9. *Id.* at 255.
10. *Id.* at 259.
11. *Id.* at 259-60.
12. *Id.* at 260 (internal citations omitted).
13. *Id.* at 262-63.
14. Guidance in creating an effective search can be found in *The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery*, 8 Sedona Conf. J. 189, 200-02, 217-18 (2007).
15. See Fed. R. Evid. 702.
16. Am. Bar Assn. Comm. on Ethics and Prof. Resp., Formal Op. 92-368 (1992).
17. 28 U.S.C. §2074(b) (2006).
18. *In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 845 (8th Cir. 1988).
19. *Id.* at 844.
20. *Id.* at 846-47.

21. See *Hopson v. Mayor & City Council of Balt.*, 232 F.R.D. 228, 240 (D. Md. 2005).

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