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E-DISCOVERY

Reducing the costs of privilege reviews and logs

It remains to be seen whether new Federal Rule of Evidence 502 will reap cost savings.

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THE RAPID PROLIFERATION of electronically stored information (ESI) and the potentially devastating effects of privilege waiver have combined to create nearly crippling conditions for even the most sophisticated companies involved in litigation. Reviewing millions of pages of documents for privilege and identifying hundreds, if not thousands, of those documents on a privilege log with all the information required by the federal rules and the courts can take months and, worse, cost hundreds of thousands or even millions of dollars.

When the volume of information to be reviewed is measured in terabytes, the prospect of a page-by-page privilege review seems overwhelming. But when weighed against the prospect of privilege waiver—not simply for an individual document inadvertently disclosed, but potentially for all undisclosed documents relating to the same subject matter—anything less than a page-by-page review seems implausible.

Last year, Congress passed a new rule that was intended to provide a remedy for the increasing costs of protecting privilege—new Federal Rule of Evidence 502. Upon introducing the legislation on the Senate floor, Senator Patrick Leahy, D-Vt., remarked: "Billions of dollars are spent each year in litigation to protect against the inadvertent disclosure of privileged materials....[O]ur proposed legislation...provides that so long as reasonable steps are taken in the prevention of such disclosure...no waiver will result." 153 Cong. Rec. S 15140, S 15142 (Dec. 11, 2007).

But will Rule 502 reap the cost savings intended, and if so, how? The answer lies in the willingness of litigants to take advantage of the rule's protections, which, if used strategically, may help alleviate much of the costs and burdens of both privilege review and logging. However, parties invoking these protections need to carefully consider the risks that remain.

Rule 502 provides three basic protections. Section (a) limits subject-matter waiver to intentional disclosures made for an unfair advantage; thus, parties need no longer fear subject-matter waiver for inadvertent disclosures. Section (b) eliminates waiver for inadvertent disclosures when reasonable steps were taken to protect the privilege. Section (d) extends the protections of court-ordered nonwaiver agreements to third parties. See Fed. R. Evid. 502 and Committee Notes.

Privileged documents can be clawed back if they are disclosed.

Rule 502 applies these protections not only to federal proceedings but to state proceedings as well. Thus, parties now can rely on a universal rule of waiver—although a universal rule does not necessarily mean a universal standard. See *Hopson v. Mayor*, 232 F.R.D. 228, 232 (D. Md. 2005), for a discussion of the three approaches applied by courts prior to the enactment of Rule 502.

Little or no privilege review

So how do these protections reduce costs? Perhaps most significantly, § (d) enables parties to produce documents with little or no privilege review as long as the parties obtain a court-ordered nonwaiver agreement and comply with the terms of the order. If privileged documents are disclosed, they can be clawed back and other parties will be barred from using them. In the absence of a nonwaiver agreement, under § (b) parties still should not need to do a page-by-page privilege review to avoid waiver, as long as other reasonable steps are taken to protect privilege. For example, parties instead could use electronic search tools to identify potentially privileged materials.

Even if waiver is found, § (a) provides a safety net limiting the scope of the waiver. Whether inadvertent or intentional, the most an adversary generally will be able to retain is the particular privileged document that was disclosed, unless fairness requires that related documents also ought to be produced.

Thus, Rule 502's protections, at least in theory, afford parties the option to conduct limited or even no privilege review. This should eliminate the substantial costs of manual review—but only if parties are willing to bear certain risks.

One of the most significant risks of Rule 502 lies with the reasonableness standard of § (b). With little case law interpreting Rule 502 at this time, determining what a court will consider reasonable—short of wholesale review—requires some guesswork and a leap of faith. Only a few decisions have cited Rule 502 to date, and only one has provided any guidance on its interpretation and applicability. See, e.g., *Rhoads Indus. v. Building Materials Corp. of America*, 254 F.R.D. 216 (E.D. Pa. 2008) (applying five-factor test from *Fidelity & Deposit Co. v. McCulloch*, 168 F.R.D. 516 (E.D. Pa. 1996), in finding no waiver, in the absence of nonwaiver agreement).

Three decisions that preceded the enactment of Rule 502 may offer some guidance as to the showing courts will require to assess reasonableness under 502(b). In *Victor Stanley v. Creative Pipe*,

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250 F.R.D. 251, 262 (D. Md. 2008), U.S. Magistrate Judge Paul Grimm emphasized the need for parties using keyword searches to test the search methodology for quality assurance, to explain the rationale for choosing the methodology and to demonstrate the appropriateness and proper implementation of the methodology. In *U.S. v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008), and *Equity Analytics LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008), U.S. Magistrate Judge John Facciola suggested that those tasked with developing the search methodology may be required to satisfy the expert requirements of Federal Rule of Evidence 702, should they be required to defend the reasonableness of the methodology before the court.

If courts follow the approach of these decisions in applying Rule 502(b), the cost savings of forgoing manual review could be eaten up by the costs of developing and defending an electronic search methodology. And any anticipated cost savings could be outweighed by the risk of a finding of unreasonableness and, ultimately, waiver.

Another remaining risk arises from counsel's duty to make a reasonable inquiry under Federal Rule of Civil Procedure 26(g). Even if an electronic search methodology is sufficient to protect privilege under Rule 502, a court nonetheless conceivably could find that the methodology did not constitute a reasonable inquiry under Rule 26(g) by questioning counsel's ability to certify the completeness of a production when no attorney set eyes on each of the documents searched, collected, culled or produced. See *Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-B, 2008 WL 66932, at *3-*6 (S. D. Calif. Jan. 7, 2008), vacated, No. 05CV1958-RMB, 2008 WL 638108 (S.D. Calif. March 5, 2008) (finding that the methodology used to search for and produce documents failed to satisfy counsel's duty under Fed. R. Civ. P. 26(g)).

Lawyers also need to consider their ethical obligation to protect client confidences. Although Rule 502 seemingly permits disclosure of client confidences to an adversary, the rules of professional conduct do not. Counsel, therefore, should ensure that clients are fully informed of the risks and expressly approve any steps taken—or not taken—to protect privilege.

Perhaps the most substantial risk, however, arises from the disclosure of privileged material itself. Simply put, once privileged information is disclosed to an adversary, that information cannot be retrieved, even if the document containing the information can be. The mere fact that certain confidential information becomes known to an adversary can dramatically undermine a party's ability to effectively litigate a case.

In short, Rule 502 enables parties to produce privileged materials to an adversary, be it inadvertently or intentionally, without waiver, but it does nothing to avoid or remedy the practical harm that can arise from such disclosure—nor can it. No rule or remedy can achieve the "eternal sunshine of the spotless mind," and thus at least some manual privilege review still may be prudent in many, if not all, cases.

Cutting manual discovery costs

Notwithstanding these risks, Rule 502 should achieve at least some cost savings in many cases. Rarely does every document need to be reviewed for privilege, particularly in the absence of potential subject-matter waiver. Rule 502 enables parties to limit manual review to only those documents or custodians that pose a real risk of harm from disclosure. One frequently used technique is to search the data for terms likely to identify potentially privileged material—such as lawyers' names and e-mail addresses and the terms "counsel," "lawyer," "privilege," "attorney-client," etc.—and perform a manual review of that subset of documents for privilege.

So what about the costs of manually logging large volumes of documents on privilege logs with the specificity required by Fed. R. Civ. P. 26(b)(5) and the courts? Unfortunately, these costs may be on the rise.

Some courts now require parties to separately log each e-mail in a chain, and failure to do so may constitute waiver. See, e.g., *Rhoads Indus. v. Building Materials Corp. of America*, 254 F.R.D. 238, 242 (E.D. Pa. 2008) (finding privilege waiver for failure to separately log each e-mail in a chain). Compare *Muro v. Target Corp.*, 250 F.R.D. 350, 362 (N.D. Ill. 2007). Although there are some technical solutions to help automate the creation of privilege logs, there currently is no automated or other technical solution for logging distinct e-mails within an e-mail chain. Doing this manually is extremely tedious and time-consuming, and the costs can be substantial.

But rule won't remedy practical harm that disclosure can cause.

Rule 502 may help cut these costs. Section (d) seemingly permits parties to produce documents to an adversary without any privilege review at all, and without any risk of waiver, when the parties obtain a court-ordered nonwaiver agreement. And even if there were a waiver, § (a) limits the scope to those documents disclosed. Together, these two provisions, theoretically, enable a party to withhold only those privileged documents that might undermine the producing party's claims or defenses if disclosed in the instant litigation.

Many of the documents included on privilege logs pose no harm to the party's claims or defenses, and they may be relevant only because of the extremely broad scope of relevance under Fed. R.Civ. P. 26. As a result, many documents typically are withheld for no other reason than that they are privileged.

By permitting parties to produce privileged documents without waiver, and without risk of subject-matter waiver, Rule 502 enables parties to log only those privileged documents that would be harmful if disclosed to the other side, and to produce the rest. If parties are willing to pursue this approach, the costs of manually logging hundreds or even thousands of privileged documents, including distinct e-mails within lengthy chains, may be largely avoided.

Another approach is for parties to agree that certain categories of documents that are unquestionably privileged, such as communications between inside and outside counsel, need not be identified on a privilege log or may be identified in an abbreviated way.

Minimizing risk of disclosure

It remains to be seen whether Rule 502 yields the cost savings intended by Congress. Parties eager to reap those cost savings need to carefully consider the risks attendant to the rule's protections. Certain measures may help parties avoid these risks.

Parties generally should consider seeking a court-ordered nonwaiver agreement. This provides the maximum protection against privilege waiver afforded by the rule, and failure to obtain such an order may be deemed unreasonable by itself in the event of inadvertent disclosure. *Victor Stanley*, 250 F.R.D. at 254-55, 262-63. Rule 502 provides no standards for such an order, and thus parties may be able to fashion these orders as they see fit, subject to the discretion of the court. The rule also does not require that the parties reach agreement before either may approach the court seeking such an order.

In the absence of a nonwaiver agreement, parties should consider using technology to reduce or eliminate the costs of manual review. There is no doubt that search, retrieval and culling technologies can dramatically reduce the cost of privilege review. However, parties that use these technologies need to be prepared to defend them if challenged, which means relying on qualified people to develop and implement technological solutions.

Lawyers should fully apprize their clients of the risks not just of privilege waiver, but also of disclosure of privileged information even when the material containing that information can be retrieved. In many instances a hybrid approach can be used to manually review particularly sensitive information, while technology can be employed to help search and cull data that are less likely to contain privileged information or that may contain privileged information that is not crucial to the case.

Finally, lawyers need to recognize that they, and their clients, no longer need to withhold privileged materials simply because they are privileged. Perhaps the greatest cost savings from Rule 502 will come from limiting manual review and logging of privileged materials only to those documents that may be harmful to the producing party if disclosed to the other side. NLJ