

Guarding the Privilege: Best Practices for Electronic Document Production

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Imagine you are defending a deposition when opposing counsel reaches into his briefcase and pulls out a document on which he intends to question your client. You recognize the bates stamping on the document as your own and begin to think it looks suspiciously similar to the type of email message sent between you and your client. You suddenly come to the gut-wrenching realization that your firm has inadvertently produced a document protected by the attorney-client privilege. Your mind begins to race: is this the only privileged document you produced? If not, how many more are there? Have you inadvertently produced the proverbial "smoking gun" that you could have avoided producing because it is protected by work product immunity? Will you be deemed to have waived the attorney-client privilege over the entire subject matter of that particular document?

Although the revelation that you have inadvertently produced a privileged document can be particularly frightening, be mindful that significant due diligence and planning on the front end of production of a large volume of documents, especially of electronically stored information (ESI), can limit the chances that a protected document will be inadvertently produced and minimize the consequences should such a mistake occur. This article will discuss some "best practice points" that litigators should observe when embarking on a large electronic document review.

BEFORE THE REVIEW

The majority of important decisions to be made with respect to a document review of ESI should be made by the document review project manager or other responsible attorney before any reviewer looks at a single document.

Education, Information Management and Identification

Courts are becoming increasingly unsympathetic to litigators that lack the personal knowledge to supervise e-discovery properly. *See, e.g., Qualcomm Inc. v. Broadcom Corp.*, 2008 WL 66932 at *9 (S.D. Cal. Jan. 7, 2008) (noting attorneys "must take responsibility for ensuring that their clients conduct a comprehensive and appropriate document search" and must conduct a "reasonable inquiry" into ESI). Thus, litigators should take the necessary steps to acquire in-depth knowledge on

issues that might arise in e-discovery through continuing legal education courses, self-study, firm-provided training sessions, or consultation with other attorneys or specialists. It will be impossible for attorneys to advise clients on how to preserve and harvest ESI without first understanding the nature and properties of that information themselves. Possessing the relevant knowledge will enable litigators to be successful in the first step of an electronic document review, which is the information management and identification phase.

It is critical that litigators understand the volume of ESI they will be required to review and the various types of information their clients might possess. This is important because the type of ESI, whether it be email messages, Word or Excel documents, or PDFs, will influence decisions that must be made down the road, such as parameters regarding production that will be agreed upon with opposing counsel, the form of software that should be used to perform the actual review, and whether an outside ESI vendor should be employed. Once a litigator has made the requisite inquiry into his client's information systems and identified individuals with relevant ESI, he can go into the parties' Rule 26 planning meeting prepared to discuss the limitations that might be appropriate for the particular review in question.

During this stage, you should gather information regarding relevant witnesses, in-house counsel, personnel involved in communications with in-house and outside counsel, and the names and nicknames of any outside counsel or law firms. When you are gathering this information, it is important to keep in mind the history of the particular fact scenario involved in the litigation. The attorneys and law firms initially involved in the litigation may have changed or been replaced completely. As a result, you should be diligent in uncovering every single attorney or law firm whose name has any chance of popping up in a privileged document. As discussed below, this important information will go a long way towards screening for privilege when you are performing keyword searches.

Planning Meeting

It is important for litigators to limit the realm of ESI that must be searched and produced during the meet and confer with opposing counsel. If a litigator has done his appropriate due diligence before this meeting through education and information gathering, he will be adequately prepared to discuss the parameters of an electronic review. For instance, it is probably not necessary to scour the email account and computer files of every single employee of a company in order to respond to document demands. Thus, perhaps the attorneys can agree to produce the email accounts from only key individuals or witnesses or limit the number of computers to be searched. Reducing the realm of searchable information decreases the risk that a privileged document will be overlooked and accidentally produced.

Protective Order

As soon as possible, and preferably during the parties' 26(f) planning meeting, the parties should agree to the consequences of inadvertent disclosure of privileged information and put this information into a written document. The agreement should contain provisions stating that an inadvertent disclosure does not constitute a waiver of any privilege, as well as a procedure for returning/destroying any document inadvertently produced. *See, e.g., Alcon Mfg., Ltd. v. Apotex, Inc.*, 2008 U.S. Dist. Lexis 96630 (S.D. Ind. Nov. 26, 2008) (ordering return or destruction of inadvertently produced privileged documents

pursuant to clawback agreement in parties' protective order). Once both parties have hashed out this agreement, they should seek to have the court enter it as an order. Under new Rule 502, passed in September, 2008, this action will prohibit any inadvertent disclosure from being deemed as a waiver of the privilege in any other court proceeding and against non-parties. *See* Fed. R. Evid. 502(d)-(e).

Search Protocol/Terms

After the attorneys set reasonable limitations on the persons and computers to be searched for ESI, litigators can limit the volume of information to be reviewed even further by agreeing to run relevant searches of the ESI. Often, the parties can agree to some method of keyword searching. "Keyword searching" can be thought of as document set-based searching using simple words or word combinations, with or without Boolean or other operators. However, it is critical that attorneys understand the consequences and dangers inherent in keyword searches, particularly pertaining to the screening of privileged materials. In a recent case, *Victor Stanley, Inc. v. Creative Piping, Inc.*, 250 F.R.D. 251, 259-260 (D. Md. 2008), the parties agreed on a process to search ESI and retrieve relevant and/or responsive documents to be produced. However, the defendants later discovered that 165 documents had been inadvertently produced. The court determined that the defendants had waived any claim of privilege with respect to these documents because they "failed to demonstrate that the keyword search they performed on [] text-searchable ESI was reasonable" and that the keyword search was not properly designed, executed or supervised. The next section will set forth guidelines you should follow to ensure your keyword searches are appropriate to withstand judicial scrutiny.

PERFORM DUE DILIGENCE IN SELECTING AND OPERATING YOUR ESI PLATFORM

One of the most crucial decisions you must make during your electronic document review project is the selection of an ESI outside vendor or software platform to meet your need to convert the ESI into some sort of searchable, uniform database. You may choose to outsource your document review to an ESI vendor or you may choose to use sophisticated software operated by trained, in-house personnel. A good ESI vendor or software will be easily maneuverable and can store large amounts of data. The more options for searching that are available, the more likely one is to find and properly withhold privileged documents. Some of the critical aspects of any software platform are detailed below.

Search Capabilities

A good ESI platform should permit keyword, metadata and full-text searching. In addition, it should allow searching using "Boolean" operators and other searches that mimic human language. Some of the basic search methods that a good ESI platform should typically allow are as follows:

- Boolean Operators: using terms such as the words "AND" or "OR" to retrieve particular "sets" of objects or ideas.
- Proximity Searching: Allowing reviewers to search for one or more words that appear near another word or group of words. For instance, the term "/"s" in between two words will find any sentence containing both of those words.
- Wildcard operators: Using characters such as asterisks and exclamation points to find word stems with various endings. For example, suppose a main attorney that has worked on a particular case is named Nicole but is often referred to as Nicky. A

search for this attorney in a set of emails using the exclamation point wildcard, "Nic!" would return all emails containing Nicole OR Nicky.

- "Fuzzy" search models: As technology becomes more advanced, litigators should begin to consider using "fuzzy logic" search models. Instead of relying on exact word matches to retrieve documents, fuzzy searches try to reduce words to their core elements and then match all forms of the word. For instance, some of these type of searches rely on the principle that the middle of a word is less likely to change than the beginning or end and, therefore, these searches count matching letters and assign higher relevance to words with matching letters at the center than at the beginning or end. These searches often assign a percentage of relevance to each particular result, with the most relevant documents appearing first in your retrieval set.

Keep in mind that the broader your search capabilities are, the better you are able to find and catalogue certain documents, such as those that are privileged or protected by work product immunity.¹ The more sophisticated your search methodology, the more likely a court will find that you took reasonable precautions to protect against inadvertent disclosure of privileged information. *See, e.g., Victor Stanley*, 250 F.R.D. at 259-260 (assessing whether defendants employed "simple" keyword searches or employed more sophisticated techniques such as proximity operators in deciding reasonableness of precautions).

Tagging

Some software platforms allow reviewers to create categories of documents and "tag" documents to be placed in these categories as they are reviewed. Segregation and labeling of documents are often considered reasonable steps that should be taken to avoid inadvertent disclosure of privileged information. *See, e.g., LaSalle Bank Nat'l Assn. v. Merrill Lynch Mortgage Lending*, 2007 WL 2324292 (S.D.N.Y. 2007).

Production and Privilege Logs

ESI software should be capable of producing privilege and/or production logs. The existence of a quality privilege log is often regarded by courts as a reasonable step taken to avoid inadvertent disclosure of privileged information, especially because it may alert opposing counsel to a document's privileged nature. *See, e.g., Rhoads Indus. v. Bldg. Materials Corp.*, 2008 WL 4916026 (E.D. Penn. Nov. 14, 2008) (holding plaintiff had waived privilege as to several inadvertently produced documents that did not appear on its privilege log). Creation and maintenance of an orderly privilege log is evidence to the court that one was attempting to take adequate precautions against disclosure of sensitive information.

Clearly there are many factors to consider when choosing an ESI software platform. However, exercising due diligence and choosing the right such platform can go a long way in protecting against

¹ Some other methods of searching include statistical methods, such as clustering, "dimension reduction systems," probabilistic search models, and concept and categorization tools such as thesauri, taxonomies and ontologies. These methods are described and explained in The Sedona Conference Journal Fall 2007 "ESI Symposium" report. *See* 8 Sedona Conf. J. 189 at Appendix (Fall 2007).

inadvertent disclosure of privileged information and ensuring that you will be deemed to have taken reasonable steps against such inadvertent disclosure.

Formulate Focused Inquiries

Once you have chosen your ESI software and loaded your electronic information, you should do some in-depth analysis of your overall goals of the document review. Keyword searching is most effective when litigators have properly focused their legal inquiry. Again, the need for focus in keyword searching demonstrates the importance of gathering as much information as possible before you even begin to review documents. You must have a clear picture of your case and your case objectives, the discovery demands to which you are responding, the type of information through which you are searching and what you expect to find while searching. If you have done your homework and have clearly defined your case, your keyword searching will be much more effective.

ENSURE THAT APPROPRIATE PERSONNEL ARE SELECTING SEARCH

Be sure that you select appropriate persons to formulate the keywords for your searches. You should also be prepared to explain the rationale of your selection. In *Victor Stanley*, for instance, the defendants did not advance any rationale behind their selection of one individual defendant and two attorneys who formulated 70 keywords. This failure contributed to the court's finding of privilege waiver. Persons selecting keywords for searches should be knowledgeable about the facts leading to the litigation and the litigation itself. They should serve in an appropriate level in your client's organization so that they will have all the relevant information and the appropriate competence in selecting keywords. In-house or corporate counsel are likely good candidates for aiding in the formulation of keyword searches.

SEARCH FOR INDIVIDUAL ATTORNEY NAMES AND LAW FIRM

Keep in mind that keyword searches can be particularly effective for retrieving individual names and dates. Thus, once you have your ESI loaded onto your review platform, you should always run searches using the first and last names of attorneys, including in-house attorneys and outside counsel, and the full and short names of any law firms. If your database contains email messages, it is important to search for domain names of particular law firms. For example, if Burr and Forman, LLP is your firm of choice, you should run a search for "burr.com" on your ESI. This will ensure that you find all communications from any Burr attorneys, including those who may have only performed "spot work" on your particular case. If you have chosen the correct type of software, you will likely be able to "tag" the results of these searches in bulk and move them *en masse* to the database's privilege log.

QUALITY CONTROL

Even well-designed and thought out searches can go awry. As a result, it is imperative to perform initial quality control checks of your search results. These checks help guarantee the reliability of your keyword search and ensure that your searches are neither over-inclusive nor under-inclusive. If one keyword search returns 15,000 documents and your database only contains 20,000 documents, it is probably best to redefine your search to return a more manageable results set. Alternatively, if your search returns 15 documents out of 20,000, it is probably too narrow. Therefore, once keyword searches are run, responsible attorneys should review a portion of the documents of each result set to ensure that the keyword searches are reliable.

DOCUMENTATION

Finally, it is important to document and expect to explain your methodology in selecting your ESI platform, your rationale in selecting keywords and persons from which to gather keywords, and your quality control processes. In *Victor Stanley*, the court held that there was a privilege waiver because the defendants did not explain any of the following: the rationale for keyword selection; the qualifications of the persons tasked to design an effective and reliable search and retrieval method; whether the search was a simple keyword search or employed more sophisticated techniques; whether the results of the search were analyzed to assess reliability; and the quality of the search's implementation. 250 F.R.D. at 259-260. In *In re Seroquel Products. Liability Litigation*, 244 F.R.D. 650, 660 n.6, 662 (M.D. Fla. 2007), the court chided a defendant's use of a keyword search in selecting certain ESI for production, noting the defendant's failure to provide information "as to how [the defendant] organized its search for relevant material [and] what steps it took to assure reasonable completeness and quality control."

Depending on the size and complexity of your document review, you may want to consider the propriety of hiring a computer expert or consultant to aid you in explaining your methodology to the court in the event that you encounter a situation where you are arguing against privilege waiver due to an inadvertent disclosure. *See, e.g., United States v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. Feb. 18, 2008) (ruling that a party challenging another party's use of certain search terms must do so through expert testimony).

CONDUCTING THE ACTUAL REVIEW

Once you have completed information gathering, selected a software platform, formulated and executed your keyword searches, and sampled your result sets to ensure reliable keyword searches, it is time to begin the actual review. Because you have thought ahead throughout the review process, the actual review should go fairly smoothly if you follow a few simple precautions that are outlined below.

Training

The document review project manager must ensure that his or her reviewers have a comprehensive understanding of the factual and legal issues of the case, the objectives of the document review, and the types of documents they are likely to encounter. To make certain privilege stays protected, the reviewers need to be given physical copies of names, firms and other relevant terms (which should have been collected during the information gathering stage), so they can be on the lookout for potentially privileged information. In this regard, it is helpful to have sample documents to go through with the reviewers so they know how to recognize privileged documents.

Involve Attorneys As Much As Possible

Be sure that actual attorneys, as opposed to non-lawyer assistants, are performing the document review. Furthermore, senior attorneys need to carefully supervise non-lawyer assistants and junior level attorneys who perform document related tasks. Courts do not look kindly on litigators claiming inadvertence due to errors of such assistants. *See, e.g., F.H. Chase, Inc. v. Clark/Gilford*, 341 F. Supp. 2d 562 (D. Md. 2004); *see also Amgen, Inc. v. Hoechst Marion Rousell, Inc.*, 190 F.R.D. 287, 292 (D.

Mass. 2000) (privilege waived where protected documents were produced after copying by third party vendor before being quality checked by attorney).

Categorization

Assuming your ESI platform is able, it is helpful to create categories to which reviewers can assign documents as they review them. For instance, documents might be categorized as "Nonresponsive," "OK to Produce," "Attorney-Client Privileged," "Attorney Work Product," or "Further Review." Further Review is a helpful category in which reviewers can place documents about whose status they are uncertain, either because the reviewer does not know if the documents are privileged or responsive, or because he or she feels safer having the responsible attorney give the document a second glance for other reasons. Once the review starts, the responsible attorney or project manager should review the individual categories of documents periodically to ensure uniformity among several reviewers. If problems in a certain category arise or if the project manager realizes an additional category would be helpful, he should have a method to disseminate this information to the team simultaneously. In that regard, it is likely a good practice to create an email listserv containing each team member's email address so that everyone involved can keep abreast of problems and solutions as they develop.

PRODUCTION

After keyword searches have been run, documents have been reviewed and categorized, privilege logs have been created, and any necessary documents or categories have been re-reviewed, you will be ready for production. You will have to choose whether you wish to produce documents in tangible form, such as paper, or whether they will be produced in an electronic format, such as a CD-ROM. Most ESI software platforms allow users to print (also known as "blow back") documents. Thus, one could blow back the entire database labeled "OK to Produce," place these documents in boxes and produce them to the opposing party. Or, one could have the "OK to Produce" category burned onto a compact disc which could then be labeled and sent to the opposing party. Although you are close to the finish line, you still must observe precautions at this stage.

Perform a Final Quality Check

As seen in various cases, it is imperative that a responsible attorney does a final quality check before documents are to be produced to the opposing party. *See, e.g., F.H. Chase; Amgen, supra.* This is especially important if your firm has used a third party review service or copy vendor to prepare the documents for production. In one case, for instance, a legal assistant sent the electronic databases to a third party copy vendor for bates stamping, inadvertently including the privileged documents database. Once the firm received the bates stamped documents from its copy vendor, the supervising attorney turned the documents over to opposing counsel without further review. This failure to supervise is precisely the type of action that will lead a court to find that one has not taken reasonable steps to ensure against the inadvertent disclosure of privileged documents.

POST PRODUCTION

Regardless of how careful you are on the front end, there is always the chance that you will wind up in that fateful deposition with thoughts of privilege waiver swirling in your head. As a result, you should not be caught unprepared in the event of an inadvertent disclosure. After all, part of the court's

decision in determining whether you have waived privilege is influenced by the steps you took after the inadvertent disclosure occurred. *See* comments to Rule 502 ("The rule does not require the producing party to engage in a post-production review to determine whether any protected communication or information has been produced by mistake. But the rule does require the producing party to follow up on any obvious indications that a protected communication or information has been produced inadvertently.").

The best practice is to promptly request return or destruction of the document in question and to invoke the inadvertent disclosure provision of the protective order you entered into with opposing counsel. Then, you should act swiftly in reviewing as many of the documents as possible to ensure that no more privileged information was inadvertently produced. You can do this by running new keyword searches on your production set or, if volume permits, by manually reviewing each document already produced. Should you happen to find more privileged documents, identify them by bates number and immediately request their return or destruction by opposing counsel. *See, e.g., LaSalle Bank*, 2007 WL 2324292 at *5 (recognizing that an inadvertent disclosure may be remedied where the privilege is immediately asserted upon discovery of the disclosure and a "prompt" request is made for the return of the document); *United States v. Rigas*, 281 F. Supp. 2d 733, 741 (S.D.N.Y. 2003) (party contacted adversary on same day of disclosure to request document's return).

CONCLUSION

Although the realization that you have produced a privileged document can be particularly upsetting, it will not be as alarming if you can take comfort in knowing that you followed a clearly defined process throughout your electronic document review. This process must begin early, be subjected to frequent quality checking, and must be able to be modified "on the fly" if necessary due to evolving technologies. With the sheer volume of electronic information that litigators are forced to contend with in this modern era, courts will be tolerant of an occasional inadvertent disclosure if you have taken the proper steps to prevent that disclosure both before and after the fact.

ABOUT THE PRESENTER(S)

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Kermit Kendrick practices in Burr and Forman's Litigation section focusing on consumer finance, transportation and asbestos litigation. In 2008, Kermit was selected as a future lead litigator for CSX Transportation Inc. In addition, he has represented major pharmacies in a nationwide class action, and has handled insurance defense work as well as personal injury and property damage work for a major furniture retailer.

Kermit received his B.S. in Accounting from the University of Alabama in 1990 and his J.D. in 2000 from the University of Alabama School of Law. While at the Capstone, Kermit was a four-year starter for the Crimson Tide football team from 1985-1988. He was an All-SEC performer in 1987 and an All-American selection in 1988. During law school, Kermit received the Jerome Hoffman Leadership Award and was a member of the Farrah Law Society and the Bench & Bar Legal Honor Society. He served on the Student Bar Association as Vice President and as Senator and was on the Dean Nathaniel Christopher Award and Selection Committee.

Kermit is a member of the Alabama State Bar and the Mississippi State Bar. He is admitted to the U.S. District Courts for the Northern, Middle and Southern Districts of Alabama and the U.S. Court of Appeals for the Fifth Circuit. Kermit is also a member of the American Bar Association, the Defense Research Institute and the Alabama Defense Lawyers Association, as well as a graduate of the TIPS Leadership Academy and ABOTA/TIPS Trial Academy. Kermit also serves as a member of the Firm's hiring committee.