The Inevitable, Inadvertent **Disclosure of Confidential ESI**

By Richard L. Moore

Mistakes happen. That is an unfortunate fact of litigation. But, certain mistakes, like missing an appeal deadline or blowing a statue of limitations, can strike fear in any litigator. Another – disclosing privileged information – has become more nightmarish in this era of e-discovery. The sheer volume of electronically stored information (ESI) makes the task of screening for privileged information a daunting one.

New civil procedure rules addressing e-discovery and new Federal Evidence Rule 502 attempt to ease some of the burden created by e-discovery, including the inadvertent disclosure of privileged ESI. Despite these new rules and litigants' best efforts, mistakes still occur.

To Waive or Not to Waive

At common law, a client may waive the attorney-client privilege either expressly or by conduct implying a waiver.[1] Historically, courts have taken three different approaches in determining whether the inadvertent disclosure of privileged information has resulted in a waiver.[2]

The strict approach provides for a per se waiver if privileged documents are inadvertently disclosed. While predictable, this approach often leads to a draconian outcome, especially in cases involving large amounts of documents.[3] At the opposite end of the spectrum is the lenient approach, which holds that inadvertent disclosure never constitutes waiver. While also clear-cut, this approach does little to discourage carelessness in protecting privileged information.

The third, and preferred approach, applies a balancing test among five factors to determine if the privilege has been waived.[4] The five factors of the balancing test are:

(1) The reasonableness of the precautions taken;
(2) The time taken to rectify the error;
(3) The scope of the discovery;
(4) The extent of the disclosure; and,
(5) The "overriding issue of fairness."[5]

Advocates of this approach argue that it is best suited to achieving a fair result by accounting for the errors that inevitably occur in modern, document-intensive litigation while punishing carelessness by weighing it in favor of waiver.[6]

Courts are increasingly faced with the challenge of applying these factors to the brave new world of e-discovery, where the determination of what constitutes reasonableness is anything but clear.

Search at Your Own Risk

In Victor Stanley, Inc. v. Creative Pipe[7], the defendant inadvertently produced 165 privileged electronic documents. The plaintiff filed a motion seeking a ruling that the defendant had waived the privilege.[8] Applying the five-factor test, the Court concluded that the defendant had waived the privilege, finding that the first factor, the reasonableness of the precautions taken, weighed strongly in favor of waiver.[9]

What is most disconcerting about this decision is that the steps taken by defendant to try to screen for privilege do not appear unreasonable on their face. The defendant first conducted a privilege search using keyword search terms.[10] Those documents returned using the keyword search were segregated and reviewed by an attorney for privilege.[11] The court held that this approach was not reasonable to prevent inadvertent disclosure.[12]

One of the targets of the court's criticism was the defendant's inadequate quality-control process, specifically its failure to sample the ESI files to confirm the reliability of the searches.[13] More importantly, however, the court held that the defendant failed to establish the qualifications of its counsel to design a "search and information retrieval strategy."[14] The Court explained that while keyword searches are useful tools, they are not all created equally. The court cited the growing body of literature detailing the risks in using unreliable or inadequate keyword searches or relying exclusively on such searches for privilege review.[15] The court cautioned that attorneys acting on their own to develop effective searches may be venturing into an area "where angels fear to tread."[16]

Most attorneys today are comfortable using keywords to perform online research, and a few of us may even feel comfortable "doing a Google" now and then. *Victor Stanley*, however, teaches that we should not assume this background makes us qualified to develop a reliable keyword search for privileged material that will pass judicial scrutiny. As the Court in *Victor Stanley* points out,

the use of keyword searches is fraught with problems and a party relying on such searches needs to be able to defend the implementation of its strategy in the case of inadvertent disclosure.

502 to the Rescue?

On September 19, 2008, Federal Rule of Evidence 502 went into effect. Rule 502 was adopted to help limit the exploding cost of discovery due to litigants having to screen huge volumes of ESI for privilege for fear of inadvertent disclosure.[17] Rule 502 attempts to accomplish this task in a number of ways, including Rule 502(b), which provides that inadvertent disclosure only acts as a waiver if the producing party failed to take reasonable precautions to prevent disclosure and failed to attempt to promptly rectify the error.[18] In *Rhodes Industries, Inc. v. Building Materials Corp. of America*[19], the court had one of the first opportunities to apply Rule 502 to a case involving inadvertent disclosure of ESI.

In *Rhodes* the defendants asserted that the plaintiff had waived the privilege by inadvertently producing a number of e-mails.[20] In its attempt to demonstrate to the court that it took reasonable steps to prevent disclosure, the plaintiff explained that it retained consulting experts to help them develop the procedures to be used in managing electronic discovery in the case.[21] The plaintiff's expert researched software programs and eventually selected a specialized program to perform the searches necessary to locate relevant ESI and screen for privileged material.[22]

Using search terms developed by plaintiff's counsel, the consultant screened the ESI for responsive material, filtered out potentially privileged material, and then removed the privileged material from the documents to be produced to the defendants.[23] The consultant then re-ran the search to be certain that all of the e-mails meeting the criteria had been identified.[24] After revising the search to attempt to further narrow the number of responsive documents, the plaintiff conducted a manual review of e-mails from specific mailboxes, removing privileged documents and logging them in the privilege log.[25] The plaintiff then produced three hard drives containing what it thought to be responsive, non-privileged documents.[26]

In ruling on the motion seeking a finding of waiver, the court conducted its analysis using Rule 502 and the five-factor test.[27] The court first evaluated whether the three prerequisites of the rule had been met – was the waiver inadvertent, were reasonable steps taken to prevent disclosure, and was there an attempt to promptly rectify the error.[28] The court concluded that it was clear the disclosure was inadvertent and that, under the circumstances, the plaintiff timely attempted to rectify the error.[29] Because reasonableness remained in dispute, the court proceeded with its analysis using the traditional five-factor test.[30]

In analyzing the reasonableness of the precautions taken, the court credited plaintiff with purchasing the special software program and hiring a consultant to evaluate the program.[31] The court, however, was critical of plaintiff's failure to use additional search terms to try to identify privileged documents - most notably, the names of all of its attorneys.[32] The court was also critical of plaintiff for relying on an inexperienced associate with little supervision to perform the privilege review.[33] The court also saw a problem with the fact that plaintiff's search was limited to e-mail address lines, not the body of the e-mails.[34] In addition, the court noted that plaintiff produced documents that its keyword search should have caught.[35] Citing *Victor Stanley*, that court opined that relying on keyword searches is risky and proper quality control is a factor in determining reasonableness.[36]

The *Rhodes* court, however, found that the reasonableness analysis in *Victor Stanley* consisted of inappropriate hindsight and should not carry much weight, if any.[37] The court found that no matter what methods an attorney employed, an after-the-fact critique can always find a better way.[38] Instead, the *Rhodes* court concluded that Rule 502 required that reasonableness must be based on an objective evaluation.[39] Nonetheless, the court concluded that the steps taken by the plaintiff were not reasonable. The most influential factor was that, as the plaintiff, the producing party failed to prepare for the segregation and review of privileged documents prior to filing suit. Then, after suit was filed, it failed to commit adequate resources to the task. The court stressed that these steps were completely within the plaintiff's control.[40]

The court ultimately concluded, however, that one of the other five factors – the interest of justice – militated against a finding of waiver due to the serious prejudice that would result to the plaintiff. The court also reasoned that no prejudice would result to the defendants, because they had no right to access any of plaintiff's privileged communications.[41] Importantly, the court did find that the plaintiff had waived the privilege with respect to certain documents, not because of any deficiency in its search strategy, but because it failed to list the documents in its privilege log.[42]

Lessons Learned

As the *Rhodes* court correctly points out, the determination of reasonableness should not be evaluated using hindsight, which will inevitably find a better way. Instead, the evaluation should be based on an objective demonstration of what was reasonable under the circumstances at the time. *Rhodes*, however, also demonstrates that this may be a distinction without a difference and there remains a significant risk that a reviewing court may find a waiver.

When waiver is claimed, *Victor Stanley* and *Rhodes* demonstrate the importance of counsel being able to demonstrate that the steps taken to insure against inadvertent production were reasonable. Factors that a reviewing court will likely consider include whether there were adequate quality control measures in place. Such measures include: proper supervision and training of the individuals performing the privilege review; sampling of the ESI generated by the application of the chosen search terms; and, a post hoc review of the material sent to opposing counsel, to make sure it did not include privileged material. It is also important not to lose sight of the basics. Privileged documents, whether electronic or paper, must still be included in a privilege log to avoid waiver.

Rule 502 encourages the use of advanced analytical software applications and inquisitive tools to screen for

privilege, like the software used by the plaintiff in *Rhodes*.[43] And, while the plaintiff in *Rhodes* was credited for using such tools and hiring an expert, the use of experts and advanced software did not prevent the inadvertent disclosure.

V*ictor Stanley* and *Rhodes* both teach that despite taking what may seem like reasonable steps to prevent it, the inadvertent disclosure of ESI can still happen. One of the key lessons from these cases is that litigants should recognize this possibility and enter into a non-waiver agreement at the start of the litigation to address the issue of inadvertent disclosure. This will help avoid having the determination of waiver left to judicial scrutiny of a methodology that, no matter how thorough, ultimately failed to prevent the disclosure of privileged information.

Proceed with Caution

The civil rules should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.[44] One of the greatest impediments to litigants being able to quickly and inexpensively manage e-discovery is the fear of inadvertent disclosure of privileged communication. Despite new rules and new technology to help ease the burden e-discovery has placed on avoiding inadvertent disclosure, there is still substantial risk that something will go awry. As a result, litigants must not only make every effort to avoid mistakes, but also be prepared to address them when they do occur.

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1 *Grace v. Mastruserio*, 1st Dist. No. C-060732, 2007-Ohio-3942, ¶ 20.
2 *Miles-McClellan Constr. Co. v. Westerville Bd. of Edn.*, 10 Dist. Nos. 05AP-1112, 05AP-1113, 05AP-1114, 05AP-1115, 2006-Ohio-3439, ¶ 14, (citation omitted).
3 *Id.* at ¶ 15.
4 *Id.* at ¶ 14.
5 *Id.* at ¶ 16.
6 *Id.* at ¶ 15.
7 250 F.R.D. 251 (D.Md. 2008).
8 *Id.* at 253
9 *Id.* at 259.
10 *Id.* at 255
11 *Id.* at 256
12 *Id.* at 263.
13 *Id.* at 262.
14 *Id.* at 259-261.
15 *Id.* at 260.
16 *Id.* (*quoting Equity Analytics, LLC v. Lundin*, 248 F.R.D. 331, 333 (D.D.C. 2008).
17 Fed. R. Evid. 502, advisory committee's note.
18 Fed. R. Evid. 502(b).
19 254 F.R.D. 216 (E.D.Pa. 2008).
20 254 F.R.D. at 218
21 *Id.* at 221.
22 *Id.*
23 *Id.* at 222.
24 *Id.*
25 *Id.*
26 *Id.*
27 *Id.* at 223-26.
28 *Id.* at 226.
29 *Id.* at 226.
30 *Id.*
31 *Id.* at 224.
32 *Id.*
33 *Id,*
34 *Id.*
35 *Id.*
36 *Id.*
37 *Id.* at 226.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.* at 227.
42 *Id.* at 226.
43 Fed. R. Evid. 502, advisory committee's note.
44 Fed. R. Civ. P. 1; *see also* Ohio R. Civ. P. 1(B) ("These rules shall be construed and applied to effect just results by eliminating delay, unnecessary expense and all other impediments to the expeditious administration of justice.")