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Look Before You Leap: ESI And Inadvertent Waiver

Poor e-mail screening can result in release of privileged documents

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Consider this situation: You represent a plaintiff in federal court and think you have mastered the e-discovery beast. Before filing the case, you hired a consultant to help with the huge volume of e-mails and other electronically stored information (ESI). The consultant suggested sophisticated software to screen the ESI, and worked with the lawyers to develop a list of search terms to narrow the ESI and isolate potentially privileged documents. From the remaining ESI, you had an associate review e-mails in specific individuals' e-mailboxes. The result? You produced 78,000 e-mails on three hard drives along with two privilege logs, which the associate prepared based on her document review.

And then disaster strikes—opposing counsel calls to say you have produced privileged documents, so you scramble and ultimately produce an additional log that identifies more than 800 privileged e-mails you claim were inadvertently produced. The defendants file a motion arguing you waived the privilege, briefs are filed, and the court holds a hearing. To your great embarrassment, at the hearing the consultant reveals that the software program identified 2,000 potentially privileged e-mails that were never included on any privilege log. After the hearing, it takes a week to review these e-mails and to produce yet another privilege log, which (after removing duplicates and upon closer inspection) includes about 335 e-mails. What will the court do?

It is clear courts have become less tolerant of blunders in the not-so-new world of ESI, even though ESI may very well be new to some clients and lawyers.

In the first case to apply new Federal Rule of Evidence 502, the federal court in *Rhoads Industries, Inc. v. Building Materials Corp.* (Eastern District of Pa.), considered a very similar situation.

The first issue for the court was whether to apply Rule 502, because the case was filed before Rule 502's effective date of Sept. 19, 2008. Rule 502 directly addresses protections against the waiver of the attorney-client privilege and work product doctrine, and it has important implications beyond federal courts—to documents produced in state court proceedings and federal investigations. Rule 502(b) provides:

> Inadvertent Disclosure.—When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure was 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

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applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).

In deciding to apply Rule 502, the court noted congressional intent to apply Rule 502 to pending cases "insofar as is just and practicable." The court specifically found that Rule 502 "sets a well-defined standard, consistent with existing mainstream legal principles on the topic of inadvertent waiver."

Second, the court considered the burden of proof and held that while a party claiming privilege bears the burden of proving it applies, a party claiming waiver must prove the waiver.

Finally, the court considered whether there was a waiver and, if so, its scope. As the court observed, Rule 502 represents a middle ground of various approaches to waiver. While not contained in Rule 502 itself, the Advisory Committee Note describes a multifactor test, drawn from prior cases, which was designed to be flexible enough for judges to apply in any situation. These factors, none of which is dispositive, include "the reasonableness of the precautions taken, the time taken to rectify the error, the scope of discovery, the extent of disclosure and the overriding issue of fairness." The court cited these factors as well as pre-Rule 502 case law in its jurisdiction, which sets forth a substantially similar test.

After thoroughly examining the facts, the court found that four of the factors favored the defendants, and significantly noted that the plaintiff had undertaken steps too little, too late to segregate and review privileged ESI. Yet, the court found that the interest of justice strongly favored the plaintiff, because the loss of privilege "can lead to serious prejudice." In resolving the dispute, the court held that there was no waiver of the privilege for documents logged within weeks of the inadvertent disclosure (the approximate 800 e-mails included on the privilege log produced after the disclosure). But, the court ordered the production of documents logged several months later after the initial hearing (the 335 e-mails identified by the software program).

Strings And Chains

The discovery dispute, however, did not stop there. After the initial ruling, the parties had questions about applying it to the ever-vexing issue of e-mail chains. In its second opinion, the court clarified that the plaintiff had to produce certain privileged e-mails in an e-mail chain as a sanction for failing to timely log them.

Specifically, the court held that where the plaintiff had not logged the top, or most recent, e-mail, even though it had logged earlier e-mails in an e-mail string, the plaintiff had to produce the top e-mail, but with an important caveat—prior e-mails in an e-mail string could be redacted if they were included on an earlier log. Similarly, the court ordered the plaintiff to produce any prior e-mails in an e-mail string that were not previously logged, even if the top email had been previously logged. The court said the plaintiff "had an obligation to log separately all of the prior messages in the email string" even though it did not need to "disclose that the underlying messages were part of an email string subsequently forwarded to counsel."

The court's pair of rulings in *Rhoads Industries* contains important lessons for litigators—thoroughly consider issues involving the review of ESI and inadvertent disclosure well *before* you produce documents or prepare a privilege log. Based on these decisions and teachings from other recent cases, it is clear courts have become less tolerant of blunders in the not-so-new world of ESI, even though ESI may very well be new to some clients and lawyers.

Despite the difficulty of processing voluminous ESI and identifying privileged documents within ESI, more due diligence, including appropriate sampling tactics, must be employed when reviewing and producing ESI. In the unfortunate situation of inadvertently producing privileged documents, litigants can rely on Rule 502(b) for guidance if and when a court must rule on whether there was a waiver. To get the most from Rule 502's protections, as early as practicable it is important to stand back and look at the overall reasonableness of your efforts to identify privileged documents and to properly list them on a privilege log. Better yet, litigants can use Rule 502's other provisions at the outset to have courts enter protective orders dealing directly with waiver issues, and such federal orders will give them protection even in state court proceedings. ■