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Focus

New Rules Provide Businesses Little Aid With Privilege Issue

By Joseph S. Wu

One of the key drivers of today's high-cost electronic discovery is the need to preview records before actual production to ensure that privileged materials are not disclosed and, potentially, waived. This tension between the need to protect privileged materials and the likely expense of doing so was before the drafters of the pending amendments to the Federal Rules of Civil Procedure. Yet, instead of tackling the issue, the new rules have largely bypassed it, leaving businesses with substantial electronic records to their own devices.

For those involved with e-discovery, the high cost of conducting a full, pre-production privilege review of potentially discoverable electronically stored information is old news. The key factor that drives ESI discovery cost is volume. For each piece of paper corporate America generates, it correspondingly generates 20 times the volume in electronic form. The problem escalates as businesses throw paper away while retaining ESI in their information systems — even after it is deleted from view.

A compounding factor is the plummeting costs of ever-increasing data-storage capabilities. A USB flash (thumb) drive with 128 MB capacity in 2002, for example, costs the same today as a 4.0 GB USB drive. This trend applies to new generations of desktop PCs, laptops, servers and portable electronic devices such as smart phones, PDAs and BlackBerrys. All of them are subject to discovery.

In today's mechanized world, most communications, including those with or among counsel, are captured or reflected in ESI. New attorneys are routinely assigned a BlackBerry or TREO on their first days on the job, even before the ink is dry on their business cards.

But the problem goes much deeper. For example, the relative ease of distributing privileged ESI content to a wide audience within a company, and the probability of its further replication to potential outsiders or a lower-ranked employees (thereby potentially waiving the privilege protection), have made it worthwhile for requesting parties to dig deep into the discovery of ESI.

An even greater problem facing corporate America is that privileged content is often not apparent on the surface of an electronic record. WORD and EXCEL documents, for example, often contain embedded data (hidden text) that can be revealed only when viewed in their native, electronic formats. And as executives often use the WORD "track changes" function (for example) to debate issues with counsel, a production of such files without a careful preview will increase substantially the likelihood of unwitting privilege disclosures. For this and other reasons, corporate clients and their legal counsel understand the critical need to conduct a pre-production privilege review before responsive records (including ESI) are produced.

The conflict arises when in-house and outside counsel meet to compare notes. This is when in-house counsel reports the approximate volume of potentially discoverable ESI and outside counsel estimates the likely fees and costs required to harvest, cull, process, review and produce responsive ESI. On any midsize litigation today, the cost of lawyers conducting privilege reviews likely may surpass hundreds of thousands of dollars.

"Proceed at Your Own Risk" Approach

The committee notes to amended Rule 26(b)(5) and Rule 26(f)(4) show that the drafters struggled to find a solution to lessen this burden on all litigants. But after years of deliberation, not much was done to resolve the core problem.

The new rules require counsel to deal with this troublesome issue early after defendant's first appearance. Under new Rule 26(f)(4), counsel must discuss at the Rule 26(f) early meeting ways to allow for "post-production" assertion of privilege. If an agreement can be reached, new Rule 16(b)(6) invites the court to bless counsel's agreement by including the agreement in the court's Rule 16 scheduling/case management order.

The committee notes to new Rules 26(f)(4) and 16(b) offer the possible agreements counsel may consider. A likely favorite is the popular claw-back agreement, in which counsel agree that, if the producing party makes a privilege objection to a document previously produced, receiving counsel agrees to allow the producing party to claw back the privileged record.

Another arrangement mentioned in the committee notes is the quick-peek agreement, in which opposing counsel is invited to preview an adversary's ESI before sending out an actual Rule 34 document demand. The theory behind this approach is that, after the peek, counsel will be in a better position to narrow the scope of the Rule 34 request and, thus, reduce the amount of responsive information producing counsel may have to preview for privilege content. And if, during the quick peek, opposing counsel sees any privileged content, the agreement would deem such revelation an unintentional, nonwaiver of

protected privileged content.

The companion Rule 26(b)(5)(B), as amended, then says that, whenever a party makes a privilege objection (and clearly states the basis for the objection), the receiving party may not use the information. Instead, the receiving party must return or destroy the alleged privileged information or sequester it and seek court intervention. If the receiving party, before receiving the objection, — disclosed it to a third party, the receiving party must take reasonable steps to retrieve it.

The question remains, What do these new rules offer businesses in their continuing struggle with the massive cost of e-discovery privilege reviews? Not very much.

First, while much chatter is being made by commentators and e-vendors of claw-back, quick-peek or similar agreements, the single most critical risk is still being ignored: What good is it to corporate America if an adversary agrees to return a privileged ESI after it has read and studied the privileged content? Unless a solution can help unring a bell, will savvy businesses ever view these agreements between counsel as sufficient cover to justify eliminating the cost of pre-production privilege review.

Put another way, under a lawyer's ethical obligation to protect a client's utmost confidence, can outside counsel ever recommend to their clients a production of potentially responsive ESI without a privilege review? How would one's legal-malpractice carrier view this recommendation?

Second, even if there are claw-back or quick-peek agreements, the committee notes make clear that a presiding court does not have to make them part of the Rule 16(b) scheduling order. And these agreements between counsel do not automatically deem the disclosed, privileged information unwaived. Here, Committee Notes to Rule 26(b)(5)(B) makes clear that this new rule is not meant to address, as a matter of law, whether a prior production under these agreements will constitute automatic nonwaiver. The rule (and the suggested types of agreements) is merely to allow the presiding judge to take these party agreements into account - in view of case law on privilege waivers - when faced with a party's motion to compel on the grounds that the prior production of privileged content constitutes a waiver.

Third, as most commentators point out, even if counsel's agreement is adopted by the court's Rule 16(b) scheduling order, it likely may not insulate the disclosing party when faced with a demand by a nonparty who argues that disclosure of privileged content was a waiver for them. It is because of potential nonparty attacks that recent efforts have been made to amend Federal Rules of Evidence 502, which would make certain that such limited disclosure under Rules 26(b)(5)(B) and 16(b) will not constitute privilege waivers under Federal Rules of Evidence.

But two additional problems remain. First, no one knows when the proposed Rule 502 will be adopted, if ever. Second, even if adopted, the new Rule 502 may have no effect in cases in which the forum state's rules of evidence would control (such as in diversity cases).

Finally, outside counsel should be wary even if a court adopts the parties' agreement in its Rule 16(b) scheduling order after the amended Rule 502 comes into effect. This is because privileged content is quite often not the only reason why a pre-production review by outside counsel is necessary. Corporate clients' obligation to protect the privacy of its employees and related stakeholders, for example, may mandate such a pre-production review. The potential threat of disclosure of trade secrets or other proprietary information covered under a confidentiality agreement with a third party also may lead to significant risks if such information were released as part of a bulk ESI production without prior review by outside counsel.

The new rules are applicable only to attorney-client and attorney work-product privileges. The new rules and the committee notes are silent about other confidential information that clients may be obligated by agreement or by law to maintain in confidence, thus leaving them little choice but to shoulder the cost of a pre-production ESI review.

Right Back Where We Started

The new rules made great strides in federal procedural jurisprudence. But with regard to privileged matters, Dec. 1 likely will come and pass without much consequence. Under the current rules, parties are free to discuss and consent to post-production privilege protections. Courts today (before the amendments) are also open to consider joint stipulations of counsel on ways to allow for post-production assertion of privileges based on a showing of need and good cause.

The only real advance offered by the new rules is the requirement that counsel discuss these issues no later than the Rule 26(f) early meeting. This movement is a positive step, because experienced counsel know that often it is best to work out discovery issues, particularly ESI discovery, sooner rather than later. But it is doubtful whether these new rules will help corporate America face the ongoing escalation of litigation costs relating to e-discovery.

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