eDISCOVERY BEST PRACTICES:
REDUCING YOUR RISK OF INADVERTENT DISCLOSURE

Attorneys are bound by ethics rules to protect client confidences, have competency with respect to changes in law and technology, and supervise junior attorneys and vendors.[1] In addition, federal and state laws, international law, and specific contractual terms create obligations regarding the protection of privileged and confidential information.

These ethical and legal obligations are put to the test with the ever-increasing volume of electronically stored information (ESI) that is potentially subject to electronic discovery. Unfortunately, the volume of ESI makes it likely that, despite best efforts, inadvertent disclosures will occur.[2] "I can virtually guarantee some privileged material will slip through," said U.S. magistrate judge Andrew Peck.[3]

To address this likelihood, attorneys, their support staff and litigation teams, and outside vendors need to understand what they are protecting and why, as well as how to protect against inadvertent disclosures and minimize consequences when disclosures occurs.

Appropriate use of technology and rules-based solutions minimizes costs and adverse effects.

The efficient and appropriate use of technology, when coupled with rules-based solutions, minimizes litigation costs and protects clients and the litigation from inadvertent disclosures and potential adverse effects.

USING PRACTICE RULES TO PROTECT PRIVILEGED AND CONFIDENTIAL INFORMATION

The Federal Rules of Civil Procedure (FRCP) and the Federal Rules of Evidence (FRE) provide options attorneys can use to manage the disclosure, whether inadvertent or not, of privileged and confidential information. In this context, "privilege" refers to the attorney-client privilege and work product. Confidential information, such as trade secrets or personal information subject to privacy and data protection laws,[4] is not protected by rules dealing specifically with "privilege," though other rules do provide protections.

FRCP 26: CLAWBACK PROCEDURES AND PROTECTIVE ORDERS

FRCP 26(b)(5)(B) outlines the procedure for asserting a claim of privilege after material has been produced in discovery. This subsection does not address *waiver* of the information contained in the production, but rather the process of "clawing back" privileged information. The subsection works in tandem with subsection (f), which requires parties to discuss privilege issues as part of their discovery plan. Any agreements of the parties can be included in court orders, such as an FRCP 26(c) protective order, FRCP 16 (b) scheduling order, or an FRE 502(d) order.[5]

"FRE 502 seeks to minimize costs related to litigation."

Subsection (c) provides the court's ability to enter a protective order, which can include requiring that trade secrets or other confidential information not be revealed, or be revealed only in a specified way.[6]

FRE 502: REASONABLENESS STANDARD; PROTECTIVE ORDERS

FRE 502 seeks to minimize costs related to litigation, particularly with respect to electronic discovery.[7] "The idea [behind FRE 502] was to speed up production and to include use of automated or semi-automated processes," said Gareth Evans, partner at Gibson, Dunn & Crutcher, LLP, founder of the firm's e-discovery group, and member of the Sedona Conference E-Discovery Working Group 1.

Subsection (b) provides that inadvertent disclosure of privileged information does not waive privilege if the holder of the privilege took reasonable steps to prevent disclosure and promptly took reasonable steps to rectify the disclosure. Assessment of reasonableness is a multifactor process, and includes examining the precautions taken; time taken to rectify the error; scope of discovery, including the number of documents involved and time for review; the extent of the disclosure; and issues of fairness.[8]

Subsection (d) provides that a federal court may enter a confidentiality order with respect to the release (inadvertent or otherwise) of privileged information in the case before it. The order binds parties and nonparties and applies in other federal and state court proceedings, except in instances of a separate disclosure of the same information in another federal or state court. Importantly, an agreement between the parties is binding only on the parties to the agreement unless it is incorporated into a 502(d) order.[9]

ACHIEVING "REASONABLENESS" AND REDUCING INADVERTENT DISCLOSURE

As discussed above, federal practice rules provide mechanisms for protecting privileged and confidential information. Despite these protections, there is no way to "un-ring the bell" of disclosure – the other party has seen privileged or confidential information. "The other side has information which will inform their litigation strategy greatly and that information could become public intentionally or unintentionally," said Evans of Gibson Dunn. Therefore, avoiding inadvertent disclosure when possible may be preferable.

"Federal practice rules provide mechanisms for protecting privileged and confidential information."

Further, in the context of an FRE 502(b) evaluation, attorneys will need to have acted "reasonably." The following practices[10] are worth considering when structuring review and production processes, and can be useful for both meeting the "reasonableness" standard and potentially reducing the likelihood of inadvertent disclosure.

- Have in place a defined system and protocol for identifying, preserving, collecting, and evaluating ESI. A well-defined process will reduce time required for production, reduce cost, and improve accuracy of the production. Be sure to understand the technology to be used in preparing a responsive production. Evans said that "attorneys need to be very aware of the process for searching, reviewing, and producing ESI."

- Develop and seek appropriate orders and agreements under the civil practice rules of the jurisdiction. Judge Peck said "[i]t is akin to malpractice if you're the producing party and you have more than five documents to produce, to not consider or obtain a 502(d) order."[11] In addition, cross-reference agreements and orders.

- Confer with opposing counsel as appropriate to develop an agreed discovery plan. Discuss items mentioned above as well as search terms and method; key custodians, and internal and external counsel for privilege searches; and techniques, such as predictive coding and clustering.

- Use automated tools to reduce the amount of material to be reviewed by members of the litigation team. Consider Boolean searches, concept searches, metadata filters, language-based approaches, statistical clustering, email threading tools, and other proprietary strategies. Consider using tools that allow for categorization and clustering of documents to speed review. Work closely with an e-discovery specialist to assist in narrowing search processes to produce a responsive collection.

- Ensure documents flagged for redaction are redacted. Have a system in place to track documents needing to be reviewed to ensure that they are reviewed, and make sure team members understand the system.

- Before producing, run quality control searches on the proposed production using the system and process developed for the initial production to ensure that responsive materials are provided and privileged materials have been culled out. Sample the results to check for accuracy. Rerun privilege searches.

While there are no guarantees that these steps will prevent an inadvertent disclosure, they are reasonable steps to take to attempt to prevent such a disclosure.

APPROPRIATE USE OF TECHNOLOGY REDUCES COSTS

The steps outlined above may seem overwhelming and expensive. While technology required to effectively handle review of ESI may seem costly, attorneys and parties should remember that the cost of a review of ESI, if human beings had to perform the same function, would be many times more and take significantly more time. Learning the ins and outs of effective use of technology, coupled with proper use of practice rules, protects privileged and confidential information and reduces costs.

ABOUT CANON DISCOVERY SERVICES

Canon Discovery Services has a skilled, dedicated team of discovery professionals with a proven track record in solving complex discovery matters. Backed by over twenty years of experience, we help law firms and corporate legal departments develop practical, defensible eDiscovery response plans to support successful outcomes. Our services range from ESI processing, culling and analysis, document review, hosting and production to implementing information governance and readiness response programs. Canon Discovery Services is a part of Canon Business Process Services, a subsidiary of Canon U.S.A. Visit us at cbps.canon.com.

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[1] See, for example, ABA Model Rule 1.1, 1.6, 1.15, 5.1 and 5.3 and specific state-specific rules. See also, Lisa M. Gonzalo, "Inadvertent Disclosure in E-Discovery: How to Avoid Waiver of Privilege", American Bar Association, Nov. 3, 2015, http://apps.americanbar.org/litigation/committees/commercial/articles/fall2015-1115-inadvertent-disclosure-ediscovery-avoid-waiver-privilege.html.

[2] Fed. R. Civ. P. 26 (b)(5) advisory committee's note, 2006 Amendment.

[3] Rhys Dipshan, "Federal Judges Give 4 Ways to Survive E-Discovery Expectations," Sep. 13, 2017, https://www.law.com/sites/almstaff/2017/09/13/federal-judges-give-4-ways-to-survive-e-discovery-expectations/.

[4] The Sedona Conference Principles, Third Edition: "Best Practices, Recommendations & Principles for Addressing Electronic Document Production," 19 Sedona Conf. J. 1, p. 151, forthcoming 2018. https://thesedonaconference.org/publication/The%20Sedona%20Principles.

[5] Ibid., pp. 162-63. See also, Fed. R. Civ. P. 26 (b)(5) advisory committee's note, 2006 Amendment; The Sedona Conference: "Commentary on Protection of Privileged ESI," Nov. 2014 at 9; and Lisa M Gonzalo, "Inadvertent Disclosure in E-Discovery: How to Avoid Waiver of Privilege", American Bar Association, Nov. 3, 2015.

[6] Fed. R. Civ. P 26 (c)(1)(g); Sedona Conference Best Practices, pp. 162-3.

[7] Fed. R. Evid. 502 advisory committee's note, 2008.

[8] Ibid. See also cases cited therein (*Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.,* 104 F.R.D. 103, 105, S.D.N.Y. 1985, and *Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 332, N.D. Cal. 1985). See also, *Victor Stanley, Inc. v. Creative Pipe, Inc.,* 250 F.R.D. 251, 259, D. Md. 2008.

[9] Fed. R. Evid. 502 advisory committee's note, 2008.

[10] See generally, The Sedona Conference, "Commentary on Achieving Quality in the E-Discovery Process," p. 15 Sedona Conf. J. 265, 2014; Sedona Conference Best Practices, pp. 156-58, and Sedona Conference: "Protection of Privileged ESI," pp. 19-32, See also, Gonzalo, "Inadvertent Disclosure in E-Discovery: How to Avoid Waiver of Privilege"

[11] Rhys Dipshan, "Federal Judges Give 4 Ways to Survive E-Discovery Expectations."