

Attorney-Client Privilege & Electronic Discovery:

Challenges Created by In-House Communications, Best Practices, and Litigation Alternatives

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Privilege Review Process

- Goal: Locate, identify, and withhold privileged and protected communications
- Log: Identify withheld communications with sufficient information to test claim
- Standard for waiver: Reasonable efforts taken to prevent inadvertent disclosure

Privilege Review Process

- Identify subset of potentially privileged documents: computer-assisted tools and human input
- Document by document review by dedicated team of lawyers
 - Substantive decisions
 - Redactions
 - Logging: automated and human input

Electronic Discovery: Privilege Reviews Are More Complex and More Expensive

- Ever increasing volume
 - More communications captured and retained
 - More potentially privileged documents
- Evolving role of in-house counsel
 - Complex substantive privilege analysis

“The fact that much of the legal advice in this country is now sought and rendered by thumbs on fruit devices . . . that’s something that’s going to lead to, frankly, more things people think” are “privileged that are not. And the mixing of lawyer roles with business roles is a danger. And I think this Court hews to, we want to know what’s the capacity” – business or legal?

Chancellor Strine, *Intel Corp. v. NVICIA Corp.*, C.A. No. 4373-VCS (Del. Ch. Apr. 5, 2010) (Transcript at 11)

Stakes and Costs are High

- Waiver -- or non-waiver disclosure -- can be problematic
 - Subject-matter waiver is no longer a real concern under federal law
- Not all electronic discovery costs are equal
 - Privilege review and logging continue to be time and labor intensive
- Courts punishing parties for inadequate review or logging efforts
 - Monetary sanctions; finding of waiver

Common Challenges Created by In-House Communications

Elements of Attorney-Client Privilege

- A Communication
- Between Privileged Persons
- In Confidence
- For Purposes of Seeking or Obtaining Legal Assistance

Common Challenges to Privilege Review

- Business versus Legal Advice
 - Communication must be “for purpose of seeking or obtaining legal assistance”
 - Courts will examine whether lawyer is performing service that any other business person could perform OR whether lawyer is serving as a legal advisor.

Common Challenges to Privilege Review

- Draft Deal Documents
 - Communications must be made “in confidence”

Common Challenges to Privilege Review

- Work Product Doctrine
 - Attorney’s notes and mental impressions must be “prepared in anticipation of litigation”

Best Practices for In-House Communications

Best Practices to Protect Privilege & Lower Privilege Review Costs

- Remember business advice is NOT privileged
- Use the phone (maybe not voicemail)
- Educate your business contacts
 - documents subject to discovery are likely coming from their files/computer

Email Usage - Best Practices

- Separate business and legal advice to extent possible
- Cut off email strings when subject-matter changes
- Limit recipients (including yourself) to extent possible
- Appropriate use of “privileged and confidential”
- Don’t send emails from your assistant or another email address
- Be thoughtful of content – do not use colorful language

Drafts – Best Practices

- Keep comments easily identifiable as your A/C communication
 - Not inside document, in cover email/memo
 - If in document, use comments/not in text
- Use headers on ALL draft documents (date, author/party, legal)

Litigation Alternatives

Inadvertent Production: Does Disclosure Result in Waiver?

- **Reasonable** steps to prevent disclosure
 - . . . Not Perfection
 - Federal Rule of Evidence 502(b) and developing case law
 - Does not require “eyes on” every document
 - Rule intended to reduce costs and encourage use of computer based analytical tools

Technology Tools for More Consistent & Efficient Review

- Privilege filter (keyword searching; metadata)
- Analytical/Linguistic tools
- Deduping/near-duping
- Email threading

Tools are only as effective as human input, communication and quality control built into the process.

Litigation Options to Protect Privilege & Avoid Review Costs

Non-Waiver Agreements: “Claw-back”

- FRE 502 – agreement can cover inadvertent disclosure or intentional production
 - “reasonableness” of pre-production review *should not* be at issue; case law is developing
 - Agreements can cover nature/scope of review
 - Intentional production: no pre-production privilege review
- State court opinions favor non-waiver agreements

Litigation Options to Protect Privilege & Avoid Review Costs

Agreements to exclude presumptively privileged documents from collection/production/logging

Litigation Options to Protect Privilege & Avoid Review Costs

Agreements to Content/Form of Privilege Log

- Categorical description/designation
- Objective Index
- Line-by-Line logging of subsets of interest or documents outside categories
- Email Strings

Litigation Options to Protect Privilege & Avoid Review Costs

Non-waiver Court Order

- FRE 502(d): Non-waiver order binding in present case and all other state/federal cases
 - Why not have one in every federal case?
 - Can be simple clawback or more innovative limitations on scope of review or logging requirements
- No State Court Corollary

Keep in mind

- Agreements need to be addressed early in case
- “Eyes on” review of all documents not practical or possible
- Not all privileged materials are of equal importance
- Creative approaches will save resources and provide the most protection

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