Tuesday November 04, 2008

INTRODUCTION
Privilege review is usually one of the most critical and sensitive aspects of the document review process. Inadvertent production of privileged documents can result in waiver of privilege for the produced materials. If these protections are waived, any privileged documents disclosed may be deemed waived for all purposes, not only as it relates to the current matter but also as a basis for new civil filings. While the Federal Rules of Civil Procedure do provide some structure to resolve the dispute if a party inadvertently produces privileged material—and notifies the adversary—a much safer strategy is to make sure that privileged documents are not produced in the first place.

WHAT IS “PRIVILEGE” FROM A LEGAL PERSPECTIVE?
Privilege is a legal concept that protects from disclosing confidential communications made between attorney and their client for the purpose of obtaining or providing legal advice or services to the client. Basically, legal advice as communicated from attorney to client is exempt from production. The privilege concept applies to both communications an individual makes to their attorney and communications that a corporate client makes with outside and in-house counsel. Similar and related to the attorney-client privilege is the work-product doctrine, which protects disclosure documents and tangible materials prepared by or under the supervision of an attorney, in anticipation of litigation. This allows clients and counsel to share facts and opinions in order to set case strategy. Because such documents are likely to be extremely sensitive, it is crucial to make sure it is not inadvertently disclosed to adversaries.

WHY DOES PRIVILEGE MATTER?
While the penalties for production of privileged documents can be draconian, they are not immediately and irrevocably so. The Federal Rules of Civil Procedure (FRCP) states that if a party believes it has unintentionally produced privileged material they may give notice to the receiving party, who must then “promptly return, sequester, or destroy the specified information and any copies it has” and the party must “take reasonable steps to retrieve” any material it has already disseminated. Furthermore, Rule 26(b)(5)(B) permits the receiving party to bring the privileged issue promptly to the court’s attention for determination.

However, the laws of privilege are not uniform and can drastically change depending on jurisdiction and revisions of procedural and substantive rules. When you couple the complexities of these legal non-conformities with the inherent challenges of performing an effective privilege review on millions of documents within the usual tight timeframe of pretrial discovery, it should be of no surprise that best practices dictate proactive efforts to be made up front to ensure that sifting through large volumes of documents to determine which ones are privileged is done accurately and effectively. It is extremely critical to approach electronic discovery privileged searches with great precision and proper planning.

WHAT IS AN ELECTRONIC DISCOVERY POTENTIALLY PRIVILEGED SEARCH?
An “electronic discovery potentially privileged” search is an electronic method of searching an online review database for specific documents that are likely to be privileged. Attorneys often run online searches utilizing a particular list of terms that they believe are likely to be privileged in nature, such as emails to and from primary outside counsel. Depending on the type of review application, the potentially privileged searches can usually be run against recipient fields (email addresses and display names) and or the text of the documents.
The results of these searches are usually isolated and tagged or placed into custom collections or folders. For example, an attorney may want to run a search for documents containing the name of the general counsel, the name of the outside law firm and the name of all appropriate paralegals. These results are then isolated into a separate folder for further review.

**HOW TO APPROACH POTENTIALLY PRIVILEGED SEARCHES IN DISCOVERY REVIEW**

**Step 1: Consider whether it would make sense to run potentially privileged searches**

There are several factors that come into play when deciding whether to run potentially privileged searches. Some of the factors include whether there is a tight timeframe for discovery requests, whether the review application can support keyword and Boolean-type searching and whether there is a large universe of documents to be reviewed.

For example, imagine you are working on a matter and have two weeks to complete your privilege review. There is one major custodian left to review: a corporate user who has 6 gigabytes of data. One gigabyte of this is email data that consists of roughly 30,000 messages. Another three gigabytes are word processing documents that represent another 100,000 pages. Finally, there are two gigabytes of spreadsheets that represent another 330,000 pages. Considering the tight timeframe and the volume of documents involved, it would likely make sense to run a potentially privileged search for documents because the search will allow you to isolate potentially privileged documents, streamlining the review process and increasing your chances of successfully meeting your deadline.

**Step 2: Communicate clearly to your review team that privileged searches are not a substitute for a privileged review.**

Make sure that you effectively communicate to your entire review team that potentially privileged searches are just a preliminary step toward finding privileged material and are not meant to replace the actual review of documents. For example, many documents that contain the name of the general counsel may return as a hit. However, because in-house attorneys frequently have dual roles as both legal advisors and business executives, not all of these hits may be privileged. Thus, an independent privileged review must be done after the potentially privileged search.

Additionally, documents that are not indexed or OCR’d for text searchability will not get hits, even if genuinely relevant. These types of documents should be individually checked for privileged material. Even the best-constructed potentially privileged search is not guaranteed to catch all privileged material, but it can be a great help for streamlining and maximizing efficiency in your privilege review.

**Step 3: Create the most effective and inclusive potentially privileged search possible**

The key to a solid potentially privileged search is constructing the most effective list of search terms. The first step is to gather the information necessary that will allow you to construct the best and most inclusive potentially privileged search possible. Keywords that are worth considering include law firm names and abbreviated versions of the name, attorney names, and specific attorney e-mail addresses. It is often best to run a wild-carded search that would capture any e-mail to or from someone at the firm. For example: if the firm’s e-mail addresses are structured as first.last@examplefirm.com, a metadata search in all recipient fields for *examplefirm* would pull e-mail to and from attorneys at the firm. This method will also pull e-mails to and from paralegals, secretaries, etc. which may contain privileged material as well. Keep in mind that this type of search will likely pull non-attorney e-mails, so beware of over-inclusiveness.

If you are searching specific attorney names and your review tool supports the function, attorney names are usually best searched for by wildcarding both sides of the last name. Always include in your potentially privileged searches the terms “work product” and “attorney client privilege”. Given the significance of these
types of terms, it is best practice to use a wildcard, if supported by the review application, such as: “work product*”, “priv*”, “attorney client”, etc.

**Step 4: Handle In-House Lawyers’ Data with Extra Care**

In-house lawyers usually wear multiple hats within an organization, including legal counselor, business advisor, and employee. Due to these multiple roles in-house lawyers tend to have large amounts of data, and as attorneys they have high percentages of documents that will likely be deemed as privileged. Thus, data from in-house lawyers—especially general counsel—should be reviewed with extra care.

If you are a corporate law department and are conducting the potentially privileged search, a good way to identify potential sources of privilege is by thoroughly examining your electronic billing software, and exporting a list of counsel that have billed you in the past. Once you export this list, you can use it to construct your potentially privileged search. At that point you can run the search and review the results of the potentially privileged search, make definitive privilege calls, and assemble a privilege log.

**Step 5: Avoid common pitfalls**

Assuming your review tool supports searching for both parent and child, whether or not both a parent and child document should be included in the search is dependent on the overall review strategy regarding family groups. If your review strategy is looking at an email and attachment as one unit—and you are tagging parent and child documents consistently so that if one document is privileged, the entire family group is marked privileged—then the search results should return the entire family group.

It is a good idea to investigate oddities about the format of the corporate e-mail address in question. For example, there may be a number of variations to the corporate email address (especially if the company does business in multiple countries) or personal address (for example, people who are not commonly known by their given name like “Bob” instead of “Robert”).

It is also critical to get an understanding of the underlying facts and the timeframe of events relevant to the litigation. For example, if you are outside counsel working on a trade secret case and the facts in dispute are alleged to have taken place three years ago, it is critical to know the names of attorneys, paralegals, and firms that were around when the events at issue took place. You will want to ensure you have the names of all firms involved if there were multiple firms, not to mention various firm names if there were mergers or other changes.

When clients have a tight production deadline, they sometimes request a potentially privileged search and then simply produce everything that does not return as potentially privileged—without even reviewing the documents they produce. However, potentially privileged searching is not a guarantee that all privileged documents will be identified. Potentially privileged searches are only as good as the terms provided; if the term shows up in a different variation or if there are other privilege-type terms that appear in the data that were not searched, you will be producing privileged documents.

**CONCLUSION**

Inadvertent disclosure of privileged material is a significant problem because of the sheer volume of data subject to discovery in litigation and investigations. The rampant growth in the volume and complexity of ESI makes privilege review one of the most important and sensitive aspects of the document review process. A potentially privileged search is an important efficiency tool that saves time and money within—but does not replace—the review process.

For more information contact: Myriam Schmell
212 225 9251 or mschmell@epiqsystems.com