

ARTICLE:

LEGAL PRIVILEGE AND THE HIGH COST OF ELECTRONIC DISCOVERY IN THE UNITED STATES: SHOULD WE BE THINKING LIKE LAWYERS?

By **Daniel R Rizzolo**

The digital era has had profound effects on the practice of litigation in the United States, not the least of which is the paradox that lawyers and their clients have faced trying to protect legal privileges during electronic discovery (e-discovery). The legal gymnastics that must be undertaken in order to protect the relationship between lawyer and client have proven inordinately time-consuming, expensive and fraught with errors. Concerns have been raised by attorneys, who must protect client confidences within the disclosure framework of U.S. discovery law; judges, who have to resolve increasingly complex e-discovery disputes; and clients, who have to pay.

Reform has already occurred. The U.S. Federal Rules of Civil Procedure were updated in 2006 to address the complexities of e-discovery, and the Federal Rules of Evidence were subsequently revised in 2008 in an attempt to reverse the trend toward escalating e-discovery review costs. However, some problems remain, and critics call for additional reform. The U.S. litigation bar, its clients, the courts, and the rule makers have focused their efforts to date on procedural protection in an attempt to mitigate the effect of breaches of legal privilege. It is the heuristic aim of this

article to suggest an alternative to the procedural approach.

Legal privileges in the United States

The laws of the U.S. afford special evidentiary protection to information and communications that arise out of the working relationship between a lawyer and client. These protections come in the form of two closely associated legal rules:

The Attorney-Client Privilege preserves the secrecy of communications between client and legal counsel.

The Work-Product Doctrine shields works created by or for counsel in the context of litigation.

The protections under these rules are afforded by excluding privileged information from disclosure and from being introduced into evidence. The exclusions under the U.S. rules are absolute and are exercised without consideration of the materiality or probative value of the underlying information. They are compelling protections, particularly in light of the broad scope of U.S. discovery. Current underlying policy considerations for maintaining the breadth of the legal privileges are that compliance with the law is encouraged by fostering an open relationship between attorney and client based on trust, and the quality and

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thoroughness of an attorney's preparations are improved when she need not fear that her work will fall into the hands of adversaries.

Together, the Attorney-Client Privilege and the Work-Product Doctrine bind the lawyer-client relationship. As such, attorneys in the U.S. are cautious to a fault when trying to preserve the legal privileges.

Legal privilege law in the U.S. is complex and well developed. There has been voluminous inspection and interpretation by law makers, courts and commentators.¹ The application and scope of the privilege protections often vary by jurisdiction and are particularly susceptible to the volatilities of judicial interpretation. The volume of information causes additional complications during the e-discovery process. The complications and uncertainties posed by what has become a byzantine maze of U.S. privilege law forces a disproportionate allocation of costly resources to what is essentially a clerical exercise in procedure.

The Attorney-Client Privilege

The Attorney-Client Privilege is designed to protect confidential communications between a client and attorney, and is very broad in scope. There are five commonly recognized elements that must be present to claim that a communication is subject to the Attorney-Client Privilege:

A client – the person or entity asserting the privilege must be a client or must be attempting to become a client at the time of disclosure. Under U.S. law, the definition of a client includes private individuals, corporations, and other private organizations. Governmental bodies and public officers are also protected as clients to the extent that the public

interest in open government is not outweighed.

An attorney – the person to whom the communication is made must be a licensed attorney and must be acting as an attorney with regard to the communication. The U.S. definition of an attorney includes outside counsel, and is generally expanded to include in-house attorneys. Communications to agents and subordinates working under the direction of counsel are also generally protected by the privilege.

Confidentiality – the communication must be related to the attorney or subordinate by the client or prospective client in confidentiality and outside the presence of strangers. Confidentiality is the requirement most often contested under privilege law. It takes on new dimensions and must be carefully protected when digital communications are involved. For example, an e-mail or voicemail copied or forwarded to a party outside the attorney-client relationship may be deemed a breach of confidentiality and therefore a waiver of the privilege.

The intent to obtain legal advice – the primary purpose of the communication must be to obtain legal advice or services. The mere fact that an attorney is involved does not automatically make a communication privileged.

A right of claim – the client or prospective client must have asserted the privilege, and the privilege must not have been waived either deliberately or inadvertently.

Once the Attorney-Client Privilege attaches, its

¹ See generally Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine* (5th edn, 2007, ABA) for an excellent and comprehensive survey of Attorney-Client Privilege and Work-Product Doctrine law.

protections are absolute. They cannot be overcome by a showing of need.

The Work-Product Doctrine

The Work-Product Doctrine extends protection to works created in anticipation of litigation by or under the direction of counsel. It is a more recent concept in American jurisprudence than the Attorney-Client Privilege. The Work-Product Doctrine was first recognized by the Supreme Court of the United States in 1947 in *Hickman v. Taylor*,² and has subsequently been codified at both the Federal and state levels.³ There are three threshold questions that must typically be addressed in order for work-product protection to take effect, as discussed below.

Whether the information sought is protected

The most commonly cited formulation of the Work-Product Doctrine is found in Federal Rule of Civil Procedure 26(b)(3) (Rule 26(b)(3)). It applies to 'documents and other tangible things.' This definition has been interpreted to include information committed to a physical format such as hard copy writings, photographs, and diagrams. It has also been extended to digital information. In addition to format, there is a further question of content type, which is weighed on a sliding scale. An attorney's mental impressions and thought processes are afforded an almost absolute level of protection, while at the other end of the spectrum, purely factual information is afforded none.

Whether the work was created in anticipation of litigation

While the Attorney-Client Privilege protects communications regardless of the type of legal work, protection under the Work-Product Doctrine is limited to works prepared in anticipation of litigation or trial.

Whether the work was created by an attorney or an attorney's representative

The common law formulation of the Work-Product Doctrine protects works created by an attorney, members of the attorney's staff, and non-lawyers working under the attorney's direction. It is worth noting that in Federal civil proceedings, Rule 26(b)(3) extends

protection to the work-product of non-lawyers working on behalf of the client, whether or not an attorney supervises them. The works of consultants, investigators, insurers, physicians, employees, and others may be afforded protection providing they were created in anticipation of litigation and not in the ordinary course of business. As a matter of practice, this last distinction is subject to interpretation by the courts. This means that supervision of non-lawyers by counsel significantly reduces the likelihood that a work will be found to have been created in the ordinary course of business.

An important distinction between the Attorney-Client Privilege and the Work-Product Doctrine is that protection of work-product is not absolute. An adversary may obtain discovery of attorney work-product upon a showing of substantial need and material hardship in obtaining the information elsewhere. Should a court decide that work product is discoverable, it must still 'protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative.'⁴

Digital discovery and the increased risk of privilege waiver

The protections of the legal privilege rules are lost through acts that constitute waiver. A waiver may be deliberate or inadvertent. It may be caused by the acts of the attorney, the client, or third parties. The variations and minutiae of U.S. waiver law are seemingly endless.⁵ The focus of this article will be the risks posed by inadvertent waiver during discovery.

An inadvertent waiver may occur when counsel accidentally turns over privileged materials in the course of discovery. In such cases, remedies are limited, and the results can be calamitous for both attorney and client. When the question of inadvertent waiver is adjudicated, the U.S. courts will enter into an analysis to determine whether and to what extent privileges have been waived. The jurisdictions are split into three schools of thought on the effect of inadvertent disclosure:⁶

Lenient – a small group hold that there is no waiver when an inadvertent disclosure occurs.

² 329 U.S. 495 (1947).

³ For instance, see FED. R. CIV. P. 26(b)(3) for the Federal enactment of the Work-Product Doctrine used in civil proceedings.

⁴ FED. R. CIV. P. 26(b)(3)(B).

⁵ See generally Edna Selan Epstein, *The Attorney-Client Privilege and the Work-Product Doctrine*

390-636 (5th edn, 2007, ABA) for an overview of the multiple waiver variations that may come into play under Attorney-Client Privilege law, and Volume 2, 1027-1122 for an overview of waiver law applicable to the Work-Product Doctrine.

⁶ Laurie A. Weiss, 'Protection of Attorney-Client Privilege and Work Product in the E-Discovery Era',

in Vincent S. Walkowiak ed., *Attorney-Client Privilege in Civil Litigation: Protecting and Defending Confidentiality* 163, 166-168 (4th edn, 2008, ABA) for additional discussion of the split of authority in U.S. privilege law.

Moderate – the largest group uses a balancing test to determine whether a privilege waiver has occurred. Factors taken into consideration include the reasonableness of precautions taken to prevent a disclosure, the extent of the disclosure, and the promptness with which remedial actions were taken. If a waiver is found, the court determines the extent of the waiver. It will be typically limited to the disclosed documents but can be extended at the court’s discretion.

Strict – a small minority adhere to a strict liability approach to waiver. They hold that an inadvertent disclosure of privileged materials will constitute a waiver of the privilege with regard to the documents produced and also with regard to the breadth of subject matter covered in those documents (Subject Matter Waiver).

Even in situations where no waiver is found and documents are returned, the result for the client whose privileged materials have been disclosed is not satisfactory. Attorneys describe this situation to trying to put a genie back in the bottle (or as other critics have noted, like trying to un-ring a bell,⁷ or ‘closing the barn door after the animals have already run away’⁸). The damage has been done, and client confidences or litigation strategy have been exposed to an adversary. The client’s position may have been weakened, or the client may have been exposed to new risk outside the pending litigation. The consequences for the disclosing attorney can be catastrophic. Loss of client, fee disputes, malpractice claims, and bar sanctions are all foreseeable results. To make matters worse, the digital era has fundamentally changed the privilege landscape. E-discovery has become a significant problem in the U.S. litigation system because of the volumes and complexities of digital data, a constantly changing landscape, and the fear of breaching client confidentiality. The result is a skittish litigation bar that proceeds with extreme caution during discovery.

Electronic discovery in practice

A brief account of U.S. e-discovery practices is warranted at this point. In the context of commercial litigation, a representative exercise will follow from the issuing of a subpoena to the production of documents

as follows:

Stage	Description
Notice	The defendant is served with a subpoena or other request for digital records. Counsel is engaged.
Identification and Preservation	The defendant issues a notice to its employees indicating litigation has begun, and that documents are not to be destroyed or deleted; works with its counsel and consultants to identify potential sources of relevant information, and negotiates discovery terms with opposing counsel. These terms may include a non-waiver agreement, which will be discussed at a later point in this article.
Collection	The potentially relevant information is collected in a forensically sound manner and forwarded to a specialist in litigation data processing.
Processing	The specialist, following specifications provided by counsel, culls the data using software filters, and removes duplicate records.
Document Review	The remaining information is loaded to a tool designed for legal Document Review and is screened by the defendant’s counsel.
Production	Privileged records are segregated and logged. The remaining responsive records are prepared to negotiated specifications and produced to the requesting party.

Problems with the current process become apparent when data volumes and costs associated with this kind of discovery exercise are considered. At current pricing and productivity rates, representative estimates for the process described above might be as set out in scenario 1 below.

Scenario 1 – Electronic Discovery in 2009⁹

Stage	Records remaining after Stage	2009 Cost (U.S. \$)	Percent of 2009 Cost
Notice	1,696,105,350	19,520	1.0%
Identification and preservation	30,000,600	44,784	2.2%
Collection	20,000,400	100,200	5.0%
Processing	1,038,981	220,550	11.0%
Document Review	42,598	1,515,542	75.8%
Production	42,598	99,855	5.0%
	Total cost	US\$ 2,000,451	100.0%

These figures are representative of a moderately complex e-discovery exercise as it would be conducted

⁷ Ashish S. Joshi, ‘Clawback in Commercial Litigation Agreements: Can You Unring a Bell?’, *Michigan Bar Journal*, December 2008, 34, 36.

⁸ *Victor Stanley Inc. v. Creative Pipe Inc.*, 2008 WL 2221841 at 28 (D. Md. May 29, 2008).

⁹ For the model and detailed analyses used to develop the data presented in the tables in this article, see Daniel R. Rizzolo, *Representative Ediscovery Exercise Corporate Response to Discovery in Commercial Litigation* (2009),

<http://www.rizzologroup.com/publications.html>.

in 2009 for a business named as a party in commercial litigation. They assume that forty employees of the business have been identified as witnesses and that archival media (e.g. backup tapes) are not included in the scope of discovery. Because of the size of the case, it is also assumed that junior attorneys in a law firm, rather than contract attorneys would perform a review of documents. The amounts shown include costs for in-house counsel and IT staff, as well as fees from law firms, forensic consultants and e-discovery service providers.

The major share of the expenditure is allocated to the manually intensive process of 'Document Review'. Before the electronic records may be turned over to an opponent, standard practice requires that a party's counsel review them, one item at a time, to determine whether they are relevant to the issues in the dispute and responsive to the requests in the subpoena (Relevance Review), and protected by the Attorney-Client Privilege or the Work-Product Doctrine (Privilege Review).

During the stages of Document Review and Production, privileged records are digitally flagged, segregated from the responsive population, scrutinized by counsel, and recorded at a summary level on a privilege log. This log is provided to the opposing party and the court as part of the eventual document production.

Interestingly, significant cost efficiencies have been realized in e-discovery in recent years. However, they have bypassed the task of Document Review. Had the discovery exercise described above been performed five years earlier using 2004 pricing, the results would have been as set out in scenario 2 below.

Scenario 2 – Electronic Discovery in 2004¹⁰

Stage	Records remaining after Stage	2004 Cost (U.S. \$)	Percent of 2004 Cost
Notice	1,696,105,350	14,792	0.4%
Identification and preservation	30,000,600	33,924	1.0%
Collection	20,000,400	111,444	3.2%
Processing	1,038,981	2,080,957	59.2%
Document Review	42,598	1,194,450	34.0%
Production	42,598	76,944	2.2%
Total cost		US\$ 3,512,511	100.0%

The nominal cost of the Processing stage would have dropped 89 per cent between 2004 and 2009, due primarily to improvements in technology, standardization of techniques, and competition. For the same period, nominal Document Review costs would have increased by 27 per cent.

The high price of electronic Document Review has afflicted the U.S. litigation system. The economic effect is significant. Accurate statistics on the annual U.S. expenditure for discovery related Document Review are not available, however the magnitude of the problem is demonstrated by considering the following data:

One analysis published in the U.S. projects that US\$4 billion will be spent with e-discovery consultants and vendors in 2009.¹¹ This does not include the costs of Document Review or other fees paid to law firms. Nor does it reflect the investments that U.S. organizations are making in preventive measures.

A 2006 study published by the accounting firm KPMG estimated that attorney Document Review accounts for 58-90 per cent of total expenditure on e-discovery.¹²

Research conducted by the RAND Corporation Institute for Civil Justice in 2008 estimated that the cost of attorney document review is 70-90 per cent of total e-discovery expenditure.¹³

It is possible to extrapolate from this data that the approximate range of annual U.S. expenditure for Document Review is in the region of US\$14-20 billion. Whether accurate or not, the estimate provides an illustration of the size of the problem.

There are other effects that result from the costs involved with e-discovery. The RAND Corporation report previously cited suggests that the cost of e-discovery has changed settlement models and negotiating power in U.S. litigation. This is manifest in a variety of ways, including a situation where a party with few digital documents to consider may take a more aggressive stance with an opponent that has a great deal of data. Parties that are prepared for e-discovery also have an advantage over parties that are not. There is also a disparity in cases where e-discovery costs are likely to

¹⁰ Daniel R. Rizzolo, *Representative Ediscovery Exercise Corporate Response to Discovery in Commercial Litigation* (2009), <http://www.rizzologroup.com/publications.html>.

¹¹ George Socha and Tom Gelbmann, 'Mining for Gold', *Law Technology News*, August 2008, available at <http://www.lawtechnews.com/r5/>

[showkiosk.asp?listing_id=2117297](http://www.kpmg.ch/docs/20060812_A_Revolution_in_E-Discovery_Eine_Revolution_im_Bereich_e-discovery.pdf), in which the Sixth Annual Socha-Gelbmann Electronic Discovery Survey is discussed.

¹² KPMG LLP, *A Revolution in e-Discovery: The Persuasive Economics of the Document Analytic Approach*, (2006), 10, available at http://www.kpmg.ch/docs/20060812_A_Revolution

[_in_E-Discovery_Eine_Revolution_im_Bereich_e-discovery.pdf](http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf).

¹³ James N. Dertouzos, Nicholas M. Pace ad Robert H. Anderson, *The Legal and Economic Implications of Electronic Discovery Options for Future Research* (Rand, 2008), 3, available at http://www.rand.org/pubs/occasional_papers/2008/RAND_OP183.pdf.

exceed the value of the claim. A recent example of this is the case of *Spieker v. Quest Cherokee, LLC*, where e-discovery costs tripled the total amount at issue.¹⁴ Attorneys are quick to embrace tactical advantage, and it should be no surprise that knowledgeable litigators have begun to use the high cost of e-discovery offensively.

The cost of Privilege Review is also affecting non-parties that are subpoenaed for records. Under U.S. rules, a litigant may not subject a third party to undue burden in complying with a subpoena. Should a third party feel that an onerous burden is being forced upon it, the third party may appeal to the presiding court for relief. U.S. courts tend to be more open to burden objections and cost shifting arguments when the recipient of a subpoena is a non-party. However, survey results published by the Sedona Conference in 2008 indicated that 73 per cent of the respondents had witnessed situations where non-parties were subject to undue burden in complying with a subpoena.¹⁵

The problems a third party faces in respect of discovery were demonstrated in the recent Federal appellate decision in the matter *In re: Fannie Mae Securities Litigation*. The U.S. Office of Federal Housing Enterprise Oversight (OFHEO), a government agency, failed to object in a timely manner to a third party subpoena for e-discovery. The lower court ordered OFHEO to comply, and the appellate court concurred. While OFHEO was not a party to the action, the agency was required to spend over US\$6 million, representing nine percent of its annual budget, to meet the request. The bulk of the expenditure went towards Document Review.¹⁶

Finally, the high costs associated with Document Review lead to undue weight and consideration being given to what should essentially be mundane procedural exercises. As will be demonstrated in the next section, the strategic components of Document Review lend themselves to enhancement through technology. Unfortunately, the process is currently mired in expensive and time consuming manual tasks designed to avoid privilege waiver. This practice is draining resources that could be allocated to the substantive merits of a case.

The slow advance of automated Document Review

E-discovery has benefitted from significant technological efficiencies over the last five years. It is

curious that the figures discussed above show an increase in the costs of Document Review between 2004 and 2009. This is primarily due to the effects of inflation and the increased billing rate of lawyers over that period. The productivity gains become clearer when the fiscal fluctuations are removed from the equation. A comparison of the real costs of Processing and Document Review, rather than the nominal costs, is illustrative. After adjusting for the increases in billing rate and inflation (and converting to equivalent 2009 dollars), the cost model shows as follows:¹⁷

Stage	2004 costs (in 2009 U.S. \$)	2009 costs (in U.S. \$)	Percent increase /decrease
Processing	2,297,368	220,550	(90.4%)
Document Review	1,564,250	1,515,542	(3.1%)

While significant productivity gains have been realized in Processing, the productivity of Document Review has stagnated. The reason why Document Review has not benefited from the types of efficiencies that have affected e-discovery Processing is because of the nature of the technologies that are available for each task.

The principal purpose of the Processing stage in e-discovery is to reduce the number of documents by using automated filters. Commonly used data culling tools include programs that identify and eliminate duplicate files, text search engines for key word filtering, date extraction and query tools to limit the review population to a defined period, and programs that select or exclude specified file types. While these are powerful and increasingly sophisticated tools, their functionality is limited to a well-defined set of problems (e.g. find all records that are a bit-for-bit match, find all occurrences of a specified text string within the data population). The solutions to these problems, while technically challenging, are essentially mechanistic. The tasks they perform can be precisely defined. They lend themselves to solution through structured computer programs, which have become relatively generic and reusable across different types of data.

Automated Document Review (ADR) tools must solve problems that require complex analysis. The problems are issue and fact specific. They are greatly influenced by the nuances of human thought and language. Even a basic explanation of the rules to be followed in a

¹⁴ 2008 WL 4758604 (D. Kan. Oct. 30, 2008), 2008 U.S. Dist. LEXIS 88103 (D. Kan. Oct. 30, 2008); *Spieker v. Quest Cherokee, LLC*, "Spieker II", 2009 U.S. Dist. LEXIS 62073 (D. Kan. July 21, 2009).

¹⁵ *The Sedona Conference, Commentary on Non-Party Production and Rule 45 Subpoenas 9* (2008).

¹⁶ *In re: Fannie Mae Securities Litigation*, 2009 U.S. App. LEXIS 9 (D.C. App. Jan. 6, 2009).

¹⁷ Daniel R. Rizzolo, *Representative Ediscovery Exercise Corporate Response to Discovery in Commercial Litigation* (2009), <http://www.rizzologroup.com/publications.html>.

Solutions to the Document Review equation require the kind of complex intelligence that is decades, if not centuries, from maturity in the computer industry.

Document Review can go on for pages. The rules will require interpretation and subjective judgment to execute, and will vary in application according to the particulars of any given document. Solutions to the Document Review equation require the kind of complex intelligence that is decades, if not centuries, from maturity in the computer industry. As a result, ADR tools are used primarily as aides to augment the accuracy and productivity of human reviewers. The types of ADR tools that are starting to gain acceptance in the U.S. include database and software driven algorithms for tasks such as near-duplicate analysis, interactive searching, document clustering, taxonomical and ontological search extension, e-mail conversation threading, record grouping and sorting, linguistic analysis, concept searching, Bayesian classification, and batch tagging.¹⁸

Nevertheless, the bulk of the work performed during the Document Review stage in U.S. discovery continues to be the labour-intensive and tedious review of individual documents. Several reasons have been posited for the continuing reliance on manual review. The relative newness of ADR technology, the disparity and stand-alone nature of current ADR techniques and products that are presently available on the market, the difficulties of proving the reliability of ADR in court, and the investments in training and technical expertise that would be required for law firms to move from the manual review all play a role. However, the biggest concern is the inability of ADR to deal with the strict demands of Privilege Review.

As noted above, there are two tasks that a legal team needs to accomplish during the Document Review stage. The tasks are performed simultaneously, but their success is measured on different scales.

Relevance Review

There are two objectives to a Relevance Review. First, the reviewing attorneys must develop an understanding of the facts underlying their client's case. Second, they must identify documents that are responsive to the opposing party's discovery requests. A successful outcome is achieved when the legal team has developed a thorough and systematized working knowledge of the factual foundation, and conducted a diligent and reasonable search to identify documents responsive to the requests. The legal team is not required to engage in exhaustive efforts. The standard is one of reasonable inquiry appropriate to the circumstances of the case.

Privilege Review

The Privilege Review is almost exclusively a prophylactic exercise. The goal is to identify all of the attorney-client communications and the legal work product and to segregate them from the production set. The legal team is also required to create and produce a privilege log of all responsive documents for which privilege is claimed. Success is measured in absolutes. The exercise is considered a failure if anything less than 100 per cent accuracy is achieved.

ADR applications have been proven effective in Relevance Review. Studies have shown that an ADR enabled Relevance Review, if well planned and well managed, can be more reliable and efficient than human review alone. It has been demonstrated that human review is inconsistent. For instance, a recent study asked five groups of reviewers to identify relevant documents among the same set of 10,000. Each of the five groups identified a different number of documents. The variance between the lowest and highest selection rate was 46 per cent.¹⁹ It has also been demonstrated

¹⁸ *The Sedona Conference, The Sedona Conference Best Practices Commentary on the Use of Search and Information Retrieval Methods in E-Discovery*, 8 *The Sedona Conference Journal* 189, 199-204 & 207-208 (2007) for a discussion of ADR concepts and technologies.

¹⁹ *Thomas Barnett, Svetlana Godjevac, Jean-Michel Renders, Caroline Privault, John Schneider and Robert Wickstrom, Machine Learning Classification for Document Review, DESI III Global E-Discovery/E-Disclosure Workshop, Casa Convalescència, Barcelona, Spain, June 8, 2009, 1,*

4-8 (2008) available at http://www.law.pitt.edu/DESI3_Workshop/Papers/DESI_III.Xerox_Barnett.Xerox.pdf.

that human review can be inaccurate and incomplete. In a 2005 study, manual reviewers and an ADR search engine reviewed 48,000 documents. The reviewers found 51 per cent of the relevant documents. The software found over 95 per cent.²⁰ The efficiencies associated with ADR enabled Relevance Review has also been demonstrated. The KPMG study cited above found that an e-discovery process using a combination of ADR technology and human reviewers would cost 63 per cent less and take less time to complete than one using only human reviewers.

The problems associated with Privilege Review mean that automatic systems cannot be relied upon. Search tools and techniques have not approached the near 100 per cent accuracy levels that attorneys expect for the identification of privileged communications and work product. Recent judicial precedent,²¹ suggesting that the use of search technology alone may not be a reasonable protection of a client's rights during a Privilege Review, has heightened concerns. Consequently, the risks of waiver and disclosure remain. Attorneys are hesitant to produce client documents unless a full visual inspection of the collection is conducted.

Current attempts to rectify the problems

U.S. lawmakers have recently attempted to increase privilege protections and streamline e-discovery by limiting the effect of inadvertent waivers by amending the U.S. Federal Rules of Evidence and Federal Rules of Civil Procedure. Various state rules are in the process of being similarly revised.

The drafters of the Federal rule revisions reacted in large part to the problems caused by Privilege Review. The Federal Rules of Evidence were amended in 2008 to address privilege issues. The Advisory Committee stated that one of the two major purposes for the rules update was to address 'the widespread complaint that litigation costs necessary to protect against waiver of attorney-client privilege or work product have become prohibitive.' The Federal Rules of Civil Procedure were amended in 2006 to address a number of issues related to e-discovery. Among those issues were privilege waiver and the burdens it was imposing upon litigants. The Advisory Committee cited the 'expensive and time

consuming' nature of Privilege Review. It then advocated non-waiver agreements as a means 'to facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents and by reducing the cost and burden of' Privilege Review.²²

Federal Rule of Evidence 502 (Rule 502) is the cornerstone of the new privilege safeguards. It provides three basic protections:

Subject Matter Waiver – the strict approach to full subject matter waiver is limited to situations where the initial disclosure was made intentionally, and the undisclosed information 'ought in fairness to be considered together' with the intentionally disclosed information.

Inadvertent Waiver – in situations where a disclosure was inadvertent, there will be no waiver providing the disclosing party took reasonable steps to prevent disclosure and promptly took steps to correct the erroneous disclosure.

Non-waiver Agreements – Rule 502 recognizes and codifies the common practice of parties agreeing to limit the effect of a disclosure of privileged materials. This includes clawback and quick peek agreements. A clawback agreement is a predefined arrangement between parties on how to handle the inadvertent disclosure and return of privileged materials. Under a quick peek agreement a responding party provides information to a requesting party for preliminary review. The quick peek agreement states that there will be no privilege waiver. The requesting party selects records for production. The responding party then reviews those records for privilege and final production.

A commonly cited problem with clawback and quick peek agreements is that they do not bind third parties. As such, a litigant that has entered into a non-waiver agreement with one party still runs the risk of waiving its claims to privilege against other parties in the same action or in other actions. Rule 502 provides that the protections of a non-waiver agreement can be extended

²⁰ Anne Kershaw, 'Automated Document Review Proves Its Reliability', *Digital Discovery & E-Evidence*, November 2005, 3.

²¹ For instance, see *Victor Stanley Inc. v. Creative Pipe Inc.*, 2008 WL 2221841 at 4-10, 26-27 (D. Md. May 29, 2008), finding that the defendant's use of keyword searches to identify text-searchable, privileged records was not conducted in a manner

sufficient to be considered a reasonable precaution against privilege waiver. The decision also noted that 'nontext-searchable' files would not be identified by a keyword search; see also *United States v. O'Keefe*, 537 F. Supp. 2d 14, 24 (D.D.C. 2008) finding that the adequacy of e-discovery keyword searches is a subject for experts and 'beyond the ken of a layman' such as a lawyer or

judge. Simon Atfield and Ann Blandford, 'E-disclosure viewed as 'sensemaking' with computers: The challenge of 'frames'', *Digital Evidence and Electronic Signature Law Review*, 5 (2008) 62 – 67.

²² FED R. CIV. P. 26(f) (Advisory Committee Note).

against third parties and in other proceedings, if the agreement is incorporated into a court order.

Additionally, Rule 502 attempts to clarify how inter-jurisdictional disputes, including specified state court disputes over waiver will be handled. However, commentators have suggested that there may be practical and legal issues with the enforcement of the rule outside the Federal court system.²³

The Federal Rules of Civil Procedure also add to the framework of waiver protections. Rule 26(f) mandates that parties hold a 'Meet and Confer' session and produce a discovery plan as early as practicable in a proceeding. Among other things, the plan must address the party positions on privilege issues. The advisory committee notes to Rule 26(f) indicate that the plan may incorporate the terms of a clawback or quick peek agreement, although the rules do not require such an agreement. Should the parties come to terms on non-waiver remedies, Rule 26(f)(3)(D) includes a mechanism permitting a party to request that the court make the non-waiver terms part of a binding order.

Rule 26(b)(5)(B) is somewhat analogous to Rule 26(f)(3)(D). It sets forth formal procedures for a party to assert post-disclosure claims of privilege in cases where no waiver agreement has been reached.

In spite of the rule changes, there is continuing debate over the efficacy of the procedural measures. They are at best a partial shield to privilege waiver. To date, they have not had much of an effect on the litigation bar's reliance on Privilege Review. Criticisms of the current approach include:

State-to-State Limitations – Rule 502 is not enforceable in state court proceedings that are not related to any Federal proceedings.

Limitations of Non-Waiver Agreements – while non-waiver agreements are now enforceable in disputes governed by the Federal Rules, they are not valid in all state proceedings. Additionally, a non-waiver agreement is only practical in cases where the parties have an incentive to come to terms. This requires a level of cooperation that is exceptional in a system that is adversarial by definition.

Quick Peek Agreements – if structured and controlled

properly, Document Review under a quick peek agreement seems to hold a great deal of promise to managing the cost and expediency of e-discovery. In practice, attorneys have been extremely hesitant to relinquish control of client documents before they have had a chance to look at them. This is particularly true when there is a chance that privileged materials may be co-mingled with the collection.

Ethical Considerations – nothing in the procedural measures discharges an attorney's ethical obligation to provide competent representation and to maintain client confidences. Even in cases where a non-waiver agreement is in place, an attorney is still required to prepare adequately and take reasonable and competent precautions to prevent the inadvertent disclosure of client confidences. One Federal court has gone so far as to opine that non-waiver agreements may foster 'sloppy Document Review and improper disclosures which could jeopardize a clients' case.'²⁴

Reasonableness Standard – the Rule 502(b) protections against inadvertent waiver only take effect after a court has determined that the producing party took reasonable steps to prevent disclosure. This standard of review leaves much to judicial discretion and is already the subject of controversy.

Containing or Preventing the problem – the single biggest issue with the procedural remedies is that they are after-the-fact solutions. They are nothing more than an attempt to contain the effects of a problem that occurred in the past. They do little to actually prevent the problem. The genie is already out of the bottle.

An Upstream Solution

The current procedural responses attempt to deal with a problem that has occurred before litigation is even contemplated. Privileged communications are made, and work product created, well before records are turned over in discovery. The best time to identify a record as privileged occurs at the time of origin – when an e-mail is sent or received, a document created, a voice mail posted, etc. – not through an after-the-fact,

²³ See generally Henry S. Noyes, *Federal Rule of Evidence 502: Stirring the State Law of Privilege and Professional Responsibility with a Federal Stick*, *Washington and Lee Law Review*, Volume 66, Spring 2009, Number 2, 673-762 for an

examination of the constitutional and practical issues with Rule 502; Thomas F. Munno and Benjamin R. Barnett, 'New Federal Rule of Evidence Arrives: Cost Relief Predictions Are Overstated', *New York Law Journal*, December 1,

2008, *Special Section (Litigation)* at 1.
²⁴ *Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109, 118 (D.N.J. 2002).

subjective review.

Where there is a problem, there is an opportunity, and it is time that the U.S. legal community took a new approach to the challenges of protecting its clients' privilege interests. Lawyers focus on limiting the effect of privilege waiver. To protect the privileges, it will be useful to use technology to resolve the problem.

In concept, a technology-driven, solution at the point of origin (Upstream Approach) is simple. At the time a communication is recorded or at the time that a work is created, an attorney (or for all practical purposes, the attorney's information systems) would be required to clearly identify the digital file as 'potentially privileged' (Privilege Seal). The Privilege Seal would be a data object that would be combined with the source record in a digitally sound manner. This new combined record would serve as the trusted, referential basis for comparison to other digital files (Reference). The Reference must be created and maintained in a readily recognizable, retrievable, reliable, unalterable, and dispositive manner. The attorney would then be obliged to keep a secure copy or other reliable record of the Reference.

The advantage of this Upstream Approach is that References can be found with a basic data query. This will allow the identification of documents for Privilege Review to be automated with a high degree of reliability. Should litigation or other discovery events ensue, the attorney would provide the client with a copy of the client's potentially privileged data (Master Set). The Master Set would be compared digitally against the universe of collected or filtered records (this new approach would afford the reviewing attorneys a degree of flexibility in the e-discovery process), and potentially privileged records would be flagged. The records that have been flagged would be reviewed by the litigation team to ascertain whether they are actually covered by a claim of privilege. A streamlined Relevance Review could proceed at various stages of the process using ADR technology and techniques, or through a quick peek approach.

While the upstream concept is simple, the nuance required for its execution is more complex. A brief consideration of the issues that would need to be addressed includes those noted below.

Responsibility and standard of care

The attorney is the focal point under the Upstream Approach. It is the attorney that would be responsible

for the application of the Privilege Seal at the time of the creation of the file or receipt, and for creation of the Reference. The attorney would also be responsible for maintenance of the Master Set. This framework is only possible if it can be assumed that all privileged records will be under the attorney's control. This would be true under the Attorney-Client Privilege. By definition, all privileged communications pass through the lawyer or someone working directly for the lawyer. This is not necessarily the case with work product. As the rules currently stand, non-lawyers working directly for a client can create works that are protected under the Work-Product Doctrine. Provisions would need to be made to bring either the non-lawyers or their work-product under the control of an attorney.

Responsibility for the execution of the Upstream Approach would impose a new set of professional obligations and a high standard of care upon legal practitioners in the U.S. This includes all legal professionals, whether private attorneys or in-house counsel. While moderately burdensome, this level of professional responsibility for records management is not without precedent. Circumscribed attempts at upstream privilege tagging are already underway by some private and governmental organizations. Other industries in the U.S. are already subject to similar record keeping requirements. For example, securities broker and dealers must keep a comprehensive record of client communications, transaction information, and financial data under a variety of statutory, regulatory, and professional mandates. If the Attorney-Client Privilege and Work-Product Doctrine are truly cornerstones of the U.S. legal system, and if those cornerstones are being undermined by technological change, it is only reasonable to expect the legal profession to adjust.

Capture mechanisms

While the identification and application of a Privilege Seal could be performed manually, the process will be far more reliable and far easier to use and administer if performed automatically. Hardware and software tools will need to be designed to apply Privilege Seals without user intervention. Developers of these tools must accommodate the myriad ways that potentially privileged records could come into a lawyer's hands (e.g. via e-mail, facsimile machine, voice mail, instant messaging, document creation, FTP, audio and video recording, and scanning). They would also need to catch

data across the many types of devices that the records might flow through (e.g. personal computers, e-mail servers, web servers, file servers, telecommunications systems, application servers, facsimile servers, personal data assistants, smart telephones, and portable storage components). Hard copy and other non-digital records would present a different set of challenges under the Upstream Approach. Attorneys would need labelling and logging protocols and mechanisms to support their hard-copy privilege obligations and may choose to use appropriate tools to convert hard copy records to digital format.

Maintenance of the Master Set

After a Reference is created, the attorney will be required to keep it as part of a Master Set. Maintenance of a Master Set will require organization for the data (e.g. by client, matter, date, attorney, mode of creation) so that records can be quickly gathered and provided to clients upon request. It will also require that sound IT storage protocols and practices are in place, that an appropriate, secure and reliable storage medium is deployed, and that a disaster recovery system has been implemented.

Searching Master Sets

There are two primary types of problems that will need to be addressed when a Master Set must be compared to a population of potentially relevant records. The first will be the task of finding identical copies of the potentially privileged records among the collected set. This can be accomplished using the same kind of file identification routines that are used for data deduplication. Hash values would be generated for the records in the Master Set and compared to hash values generated for the collected set. This will allow the e-discovery team to identify bit-for-bit matches of the References among the data collected for Document Review.

The second problem arises because there may be documents in the data collected that closely resemble records from the Master Set but are not bit-for-bit matches. There may also be excerpts from Master Set documents found in the data collected. It is important to remember that while the attorney will gather potentially privileged records, there will be copies of those records in the hands of the client, its agents, and members of the legal team. These records may have been altered outside the lawyer's control. In some cases these

closely matching records will be protected under the privilege. In others, the handling of the document may constitute a waiver. The legal team will need to identify these records, and put them through a Privilege Review.

Even the slightest change to a file will result in a change to its hash signature. For example, the act of printing and saving a document may cause a document to generate a hash signature that no longer matches that of the original document. This marginally altered document would not be found by hash analysis. This is a good example of a case where ADR technology could be used to streamline the Privilege Review. Two examples of how this might work would be a program that looks for Privilege Seals embedded in files in the data collected, and the use of near-duplicate detection techniques to find documents that warrant additional review.

Technical architecture of the Privilege Seal and Reference

It is difficult to separate design issues between the Privilege Seal and the Reference. The two pieces must be integrated for the Upstream Approach to work.

The Privilege Seal will be created digitally and incorporated into the computer record that becomes the Reference. The Privilege seal can function as either a digital analog²⁵ to the privilege stamp that is used on paper records, or it can be enhanced to additionally serve as a source of information about the underlying record. In its most basic form, the Privilege Seal will consist of the insertion of simple, searchable text – such as 'Privileged & Confidential' – into the Reference. Ideally the Privilege Seal will appear on the face of a document that is printed from a Reference or copy thereof. Enhancements to the Privilege Seal architecture could incorporate:

- a. A hash value of the initial, pre-Reference copy of the data file.
- b. Information to help identify the client and matter associated with the record.
- c. File metadata that may be lost or altered upon the creation of the Reference.
- d. Other metadata relevant to the sealing process (e.g. time and date of sealing, agent (human or otherwise) responsible for the sealing).

²⁵ *The author apologizes for this shameless use of such a barefaced non sequitur.*

e. Various levels of encryption.

The concept of the Reference was introduced by George Paul as a mechanism to help with the authentication of digital documents.²⁶ While authentication of privileged records is not a primary reason for adopting the Upstream Approach, the concept of the Reference would go some way to establishing the authenticity of a document. In essence, the Reference is the source record against which future comparisons will be made. Paul states that 'a reference contains the information that is the reference information (the official content), and an implied promise the information will not change through time. A reference by its very nature contains a promised attribute of immutability.' For the purposes of the Upstream Approach, the Reference must either include or be linked to the Privilege Seal. It must be a secure, unchanging data object. It must be a sound basis for comparison to other documents, allowing for both hash-based and near-duplicate analyses, and it must be readily identifiable and searchable.

There are countless ways that a sound technical architecture for the Privilege Seal and Reference combination can be achieved. This article does not purport to recommend any particular approach. Instead, the intention is to begin a heuristic discussion on the topic. Computer science and information technology tools that hold promise for a solution include:

- a. Content Addressable Storage – a data storage protocol appropriate for the storage and retrieval of fixed content. This type of technology could be used for the storage and maintenance of Master Sets.
- b. Cryptography – encryption may be used to 'freeze' and preserve the Reference or Privilege Seal or both.
- c. Data Archiving Applications – a well developed technology used for compliance and e-discovery. Archiving applications consist of a database platform, software, and storage hardware that allow the capture, organization, and retrieval of e-mail and other types of digital files. These applications potentially are ready for off-the-shelf use in a variety of upstream applications.

d. Data Hashing – an approach that reads a file and uses a mathematical function to generate a 'digital fingerprint' that may be used for file comparison. Data hashing could be used for the creation of the Privilege Seal and subsequent file comparisons to the Reference.

e. Digital Watermarking – the embedding of distinguishing information into a data file or stream. Digital watermarking could be used to embed a Privilege Seal in a Reference.

f. Digital Signature – a cryptographic technique used to verify the authenticity and integrity of a data file. Digital Signatures may also include data hashing and trusted time stamp components.²⁷ This is another concept that could be used to create Privilege Seals.

g. Digital Rights Management (DRM) – used primarily to protect copyright of digital material, DRM is a data-security technique that protects a file and limits access rights to specified users.²⁸ It has potential applications as a Reference format.

h. Open Architecture File Formats – application independent file structures used for the communication and sharing of digital files. Adobe's PDF format is probably the most commonly used and robust example. It has many characteristics that would accommodate the creation and maintenance of References.

i. Self-Authenticating File Schemas – several schemas for self authenticating digital records are in the early stages of commercial development. They may prove useful to the implementation Privilege Seals and References in an Upstream Approach.

j. Trusted Time Stamping – a process that securely and accurately tracks the creation and modification times of a data file, typically incorporating hash and digital signature techniques. Trusted time stamping may be appropriate for parts of Privilege Seal creation and validation.

²⁶ George Paul, *Foundations of Digital Evidence*, (ABA, 2008) 56-66, for an introduction to digital references.

²⁷ Note the comments of Stefanie Fischer-Dieskau and Daniel Wilke, 'Electronically signed

documents: legal requirements and measures for their long-term conservation', *Digital Evidence and Electronic Signature Law Review*, 3 (2006) 40 – 44.

²⁸ Rae N. Cogar, 'Information Technology: Getting the Upper Hand', in *The Attorney-Client Privilege*

and Work Product in the Post-Enron Era, (ABA, 2004), 40-41, available at <http://www.abanet.org/buslaw/newsletter/0027/materials/11.pdf> advocating the use of DRM technology to protect privileged communication and works.

Ultimately courts will need to address the issue of legacy records, factoring the cost of manual review into decisions on the burdens imposed by various discovery requests.

Overuse of the privilege designation

Some commentators have raised concerns that overuse of privilege designations may weaken a party's claim to privilege protection. The practice of marking attorney-client communications and work-product with a privilege stamp is generally recommended by commentators and has become commonplace with the advent of computer generated documents. While the use of a privilege designation is evidence that a privilege may exist, it is not proof positive of privilege in and of itself. Attorneys and ultimately courts are required to assess whether all the tests of privilege are met.

Under the Upstream Approach described above, the Privilege Seal would designate a record as 'potentially privileged.' This practice would result, by definition, in the tagging of many documents that would not be considered privileged under scrutiny. If a discovery request is received, records with a Privilege Seal would have to be reviewed by attorneys to determine whether a claim of privilege actually exists. While manual review would still be necessary, it would be limited to a very small subset of discovery documents.

Legacy Records

The Upstream Approach is for the future. It will only protect records affixed with a Privilege Seal after the date that the approach is adopted. This leaves the problem of legacy records, created before adoption and not tagged with a Privilege Seal. The legacy records would still have to be screened through a manual Privilege Review.

Parties with significant litigation exposure may choose to retroactively analyze their data to create Master Sets of legacy privilege records. Other parties

will continue to bear the risk of high Document Review costs for their legacy records. Ultimately courts will need to address the issue of legacy records, factoring the cost of manual review into decisions on the burdens imposed by various discovery requests. In the meantime, the volume of legacy data increases daily, which commends early adoption of an Upstream Approach.

Conclusion

In some respects, the concerns over the application of U.S. privilege law during e-discovery are becoming moot. A more cavalier approach to privilege waiver in civil litigation is developing in the U.S. This is partially the result of escalating discovery costs. The Attorney-Client Privilege and the Work-Product Doctrine also have come under attack from other sources in recent years. The principal threats have been:

- a. A case-by-case, judicial narrowing of the privileges, carving out endless exceptions to the general rules.
- b. Governmental and prosecutorial over-reaching with regard to compelled waiver of privilege, particularly in the arena of securities law, tax investigations, and corporate prosecutions.
- b. Highly publicized disputes over apparent privilege abuse through over-use, particularly in the U.S. tobacco litigation of the 1990's.

On the other hand, a backlash against the encroachments on the legal privileges is beginning to take place. At the time of the writing of this article, a bill entitled the 'Attorney-Client Privilege Protection Act of

2009' is under deliberation in the U.S. Senate.²⁹ This bill would prohibit the government from demanding or rewarding privilege waiver. Stressing the importance of the privileges in an adversarial system of justice, the bill's sponsor, Senator Arlen Specter has noted that 'the right to counsel is largely ineffective unless the confidential communications made by a client to his or her lawyer are protected by law.'³⁰

Preserving the legal privileges should be a priority for U.S. legal practitioners. Even in their semi-diluted state, the Attorney-Client Privilege and Work-Product Doctrine are powerful safeguards of a legal client's rights and interests. They are also intertwined with the economic value of legal services in the U.S. The privileges provide an incentive to clients to obtain legal advice. Without them, the demand for legal services is reduced. It has also been reasoned that the legal privileges help to keep down the cost of information flow in litigation. Accordingly, clients that seek legal advice and are open with their attorneys are acting in an economically efficient manner. Given the financial effects discussed in this article, it would seem that this second type of economic incentive to obtain legal services would be weakened in cases that involve e-discovery.

This article has looked at the principal mechanics and underpinnings of the Attorney-Client Privilege and the Work-Product Doctrine. It has focused on legal, financial, and functional challenges that e-discovery has presented to U.S. privilege rights. It has also proposed a practical and achievable solution to the problems.

At present, the Attorney-Client Privilege and Work-Product Doctrine are still in effect. The risk of inadvertent privilege waiver during e-discovery remains a material concern for litigators. The current remedies

for privilege waiver are imperfect. The costs of Privilege Review are still high, and there is little relief in sight. Litigants and litigators are forced to decide – and this is the paradox – between spending a king's ransom to conduct an extensive, manual Privilege Review and risking an inadvertent waiver by turning over records unseen.

The profession also would be well served to start looking at upstream solutions in the very near future. There are a number of avenues to be pursued and issues to be worked out. There are lessons to be learned from early adopters of upstream methodologies and technologies. There are opportunities to adopt professional guidelines and rules that would spur the profession toward an Upstream Approach. There are technical matters to be worked out and standards to be set before any kind of wide spread adoption can take place. Finally, as with any kind of mass change (and in the legal industry in particular), there is much to be debated.

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²⁹ *Attorney-Client Privilege Protection Act of 2009, S. 445, 111th Congress § 1 (2009).*

³⁰ *155 Cong. Rec. S2331 (daily ed. February 13, 2009) (statement of Senator Specter).*