The case review is coming to a conclusion and your eager deputy general counsel has a suggestion to reduce the obscene costs of document production and privilege review. According to an article he read, the December 1, 2006, amendments to the Rules of Civil Procedure, specifically Rule 26(f)(4), allow a party to show the other side potentially privileged documents without waiving the privilege and/or work-product protection. So, maybe you can bypass the expensive privilege log if you get the other side to agree to a clawback or a "quick peek"! He is obviously proud of himself, and ends the presentation with "You see, I can add value!" Good idea or bummer? The jury is out on this but one thing for sure: it's got a good deal of unquantified risk.

Clawbacks, Quick Peeks, and Running with Scissors

BY JOHN K. VILLA

The Problem

Thanks to electronically stored data, the volume of information subject to discovery has increased exponentially in the past decade. Although programs and search terms can be devised to locate potentially responsive data for production, they cannot identify those documents that may be privileged and thus should be withheld from production. These factors, aggravated by increasingly short court-ordered time frames to produce documents, present prickly issues for litigants in major litigation. In particular, the document-by-document privilege review can vastly increase the costs of discovery.[1]

A Proposed Solution

To address this problem, the Supreme Court has approved several amendments to the federal discovery rules, which became effective on December 1, 2006.[2] Pursuant to amended Rule 26(f)(4) of the Federal Rules of Civil Procedure, the parties are required to focus on resolving possible waiver issues at the outset of the litigation by developing a discovery plan that presents the parties' proposals as to "any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order[.]"[3] Where such an agreement is reached, amended Rule 16(b)(6) authorizes the court to include the agreement in its scheduling order.[4]

According to the Advisory Committee Notes accompanying these amendments, preproduction agreements governing postproduction claims of waiver may minimize the costs and delays that have become an integral part of ediscovery: "[I]n certain cases [these agreements] can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party."[5] Specifically endorsed by the advisory committee is the use of non-waiver or "clawback" agreements, in which the parties agree that production of privileged or protected material, without an intent to waive the privilege or protection, will not constitute a waiver as long as the responding party identifies, and the receiving party returns, the mistakenly produced material.[6] As construed by the advisory committee, such an agreement precludes the assertion of a claim of waiver by a party who receives privileged or protected material as the result of an inadvertent production.[7]

The Rules Commentary suggests another possible procedure—the "quick peek"—which allows the opposing party certain requested materials for initial examination without waiving any privilege or protection. The reviewing party designates only those documents it wants and the producing party can assert its privileges only as to those.

The $64,000 question is whether these amendments validate clawback agreements and quick peeks as a foolproof means of preserving privilege or the protections of the work-product doctrine. In other words, with a clawback or quick peek agreement in place, can you follow the suggestion of your eager litigator and forego privilege review before complying with an edocument request or sharing your documents since, pursuant to their agreement, any production of privileged or protected material would not result in waiver?[8]

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The Risks

If only life were so easy. Unfortunately, such a construction of the amendments would render them substantive in nature—and contrary to the Rules Enabling Act,[9] which requires the approval of Congress for the creation, abolition, or modification of any evidentiary privilege.[10] Recognizing this fact, the commentary to the amended rules coyly cautions that "[t]he proposed amendment does not address the substantive questions whether privilege or work product protections has been waived or forfeited[.] . . . The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information."[11]

To be a bit more direct, although the amended rules expressly endorse the use of clawback agreements, their efficacy "depend[s] on the substantive law of the jurisdiction in which the litigation is pending[,]"[12] which, like the law on inadvertent disclosure and waiver,[13] varies widely among the jurisdictions.[14] Perhaps more important, even if the agreement would be binding on the parties to the litigation, its enforceability against third parties remains an open question.[15] As one court has bluntly observed, "[a]bsent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule."[16]

Belt and Suspenders?

Despite the risks of inadvertent disclosure and doubts about the effectiveness of clawback agreements, one court has suggested an approach to mitigate the risk of waiver: The existence of a court order compelling production that incorporates a non-waiver agreement, and evidence that reasonable measures were undertaken to protect against waiver.[17] Relying first on Rule 501 of the Federal Rules of Evidence and its grant of authority to federal courts "to define new privileges by interpreting 'common law principles . . . in the light of reason and experience[,]'"[18] the federal district court in Maryland then looked to Supreme Court Standard 512, which, as a proposed rule approved by the Supreme Court though not adopted by Congress, constitutes "evidence [of] the common law of privilege and therefore may be applied under Rule 501 if reason and experience make such application appropriate."[19] Standard 512 precludes the admission of privileged material where its disclosure was either compelled erroneously or made without an opportunity to claim the privilege.[20]

Drawing on cases applying the principles of Standard 512 to the inadvertent disclosure of privileged material caused by an accelerated discovery schedule imposed by the court,[21] the Maryland federal court concluded that parties who have executed non-waiver agreements with respect to the production of electronic information could avoid third party claims of waiver under the following circumstances: (a) the party claiming the privilege took reasonable steps given the volume of electronically stored data to be reviewed, the time permitted in the scheduling order to do so, and the resources of the producing party; (b) the producing party took reasonable steps to assert promptly the privilege once it learned that some privileged information inadvertently had been disclosed, despite the exercise of reasonable measures to screen for privilege and, importantly; (c) the production had been compelled by court order that was issued after the court's independent evaluation of the scope of electronic discovery permitted, the reasonableness of the procedures the producing party took to screen out privileged material or assert post-production claims upon discovery of inadvertent production of privileged information, and the amount of time that the court allowed the producing party to spend on the production.[22]

According to the court, the foregoing method for preserving privilege claims falls "within the context of existing substantive privilege law, which the proposed rule changes cannot trump." Few litigants may be willing to rely upon the court's proposal in view of the current turmoil in the case law on the issue of waiver and the effect of clawback agreements.[23]

So what is a company to do?

Review the status of clawback/non-waiver jurisprudence in the jurisdiction where the case is pending. There may be little or no risk. New Rule 26(b)(4) may work.

Consider whether there are, or probably will be, other parties not currently involved in the litigation who may be interested in the possibility privileged documents. If not, your third party risk is greatly reduced!

Evaluate the costs of a privilege review. Agreements can exempt large groups of documents as privileged such that the cost of the review may become more acceptable.

Thank your deputy general counsel and tell him to keep reading the legal magazines.

Have a comment on this article? Email editorinchief@acc.com.

NOTES

1. "[R]eviewing electronically stored information for privilege and work product protection adds to the expense and delay, and risk of waiver, because of the added volume, the dynamic nature of the information, and the complexities of locating potentially privileged information. Metadata and embedded data are examples of such complexities; they may contain privileged communications, yet are not visible when the information is displayed on a computer monitor in ordinary use or printed on paper." Judicial Conference of the United States, "Report of the Judicial Conference Committee on Rules of Practice and Procedure" (Sept. 2005) ("2005 Committee Report"), at C-24 to C-25, available at *www.uscourts*

.gov/rules/Reports/ST09-2005.pdf.

2. The proposed rules were developed by the Civil Advisory Rules Committee of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States ("Advisory Committee"), and, along with the Advisory Committee Notes, can be found in the 2005 Committee Report. *See* n. 1, *supra; see also* Thomas Y. Allman, "The Impact of the Proposed Federal EDiscovery Rules," 7 Sedona Conf. J. 31, n. 2 (Fall 2006).
3. 2005 Committee Report, *supra* n. 1, at C-32. Form 35, which sets forth the parties' report to the court concerning their proposed discovery plan, has also been amended to allow for the inclusion of any agreement regarding claims of privilege or of protection as trial-preparation material. *See id*. at C-40.
4. *Id*. at C-27 (new subdivision (b)(6) of Rule 16 provides that the scheduling order may include "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after production[.]"). In the event that no agreement is reached, the amended rules provide a procedure for asserting post-production claims of privilege or work-product protection with respect to inadvertently produced materials. *See id*. at C-54 to C-60 (setting forth and discussing Fed. R. Civ. P. 26(b)(5)(B)).
5. *Id*. at C-36.
6. *Id*.
7. *Id*.
8. *See Hopson v. Mayor and City Council of Baltimore*, 232 F.R.D. 228, 244 at n. 39 (D. Md. 2005).
9. Pub. L. No. 100-702, Title IV, § 401, 102 Stat. 4642, 4649 (1988), codified at 28 U.S.C. § 2074.
10. 28 U.S.C. § 2074(b).
11. 2005 Committee Report, *supra* n.1, at C-54 and C-58. Although this commentary appears in connection with the addition of Rule 26(b)(5)(B), which sets forth the procedure for asserting post-production claims of privilege or work-product protection in the absence of a clawback agreement, the commentary notes that Rule 26(b)(5)(B) and Rule 26(f) work in tandem with each other. *Id*. at C-58.
12. *Hopson*, 232 F.R.D. at 233-234.
13. *See id*. at 235-236 (describing the three distinct positions taken by the courts on this issue as: the "strict accountability" approach, which invariably finds waiver since the disclosure destroys the confidential nature of the documents; the lenient "to err is human" approach, which finds waiver only in cases of gross negligence; and the "balancing test" approach, which focuses on factors such as the reasonableness of the precautions taken in determining the question of waiver); *see also* J. Villa, "Inadvertent Disclosure of Privilege Material: What is the Effect on the Privilege and the Duty of Receiving Counsel?" 22 No. 9 *ACC Docket* 108 (October 2004).
14. *Compare Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003) (approving use of clawback agreement in "document-intensive litigation" as a means of enabling the producing party to forego the cost of privilege review with the promise of the receiving party to forego any claim of waiver and to return any inadvertently produced privileged documents), *with Koch Materials Co. v. Shore Slurry Seal Inc.*, 208 F.R.D. 109, 118 (D. N.J. 2002) (refusing to recognized that non-waiver agreement precluded a finding of waiver). Moreover, since state privilege law applies in diversity actions, *see* Fed. R. Evid. 501, while federal privilege law applies in actions involving both federal and state claims, it is possible that in an action in federal court "both federal and state privilege standards could be applicable, which could result in the paradoxical situation in which a producing party's conduct could constitute waiver . . . for the federal claims, but not for the state claims." *Hopson*, 232 F.R.D. at 237, n. 27.
15. *Hopson*, 232 F.R.D. at 235.
16. *Hopson*, 232 F.R.D. at 234. In order to resolve disputes on the issue of waiver and to provide for a more uniform standard, the Advisory Committee on Evidence Rules has proposed a new federal rule of evidence, Rule 502, which has recently been released for public comment. *See* Judicial Conference of the United States, Committee on Rules of Practice and Procedure, "Report of the Advisory Committee on Evidence Rules (May 15, 2006; revised June 30, 2006), located at *www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf#page=4*.
17. *Hopson*, 232 F.R.D. at 240.
18. *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996).
19. *Hopson*, 232 F.R.D. at 240.
20. *Id*. at 241.
21. *See, e.g., Transamerica Computer Co. v. IBM*, 573 F.2d 646 (9th Cir. 1978).
22. *Hopson*, 232 F.R.D. at 242.
23. *See* Andrew Rhys Davies, "A Shield that Doesn't Protect: Courts Are Reluctant to Recognize Deals Intended to Prevent the Accidental Waiver of Privilege," 7/17/2006 *Nat'l L. J.* S1 (Col. 2).