

# E-DISCOVERY INVITES INADVERTENT WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE

## 7 STEPS CAN HELP YOU PROTECT PRIVILEGED ELECTRONIC COMMUNICATIONS

Responding to electronic discovery is itself a hugely daunting task – one that is particularly challenging when representing a client who has not risen to the challenge of addressing the management of electronic records in a sound business manner. The risks inherent in such representation are not limited by simply knowing the client's policies and technologies or knowing the questions to ask of the company's technologists – but ultimately require protecting the client within the bounds of the law from making potentially disastrous disclosures.

The complexity of one area of inadvertent disclosure – that of attorney-client privilege – is compounded multi-fold by the use of electronic records and by e-mail in particular, which represents the fastest-growing component of electronic records.<sup>1</sup> It has been estimated that six billion e-mails are sent out on a daily basis in North America and is expected to rise to 18 billion by 2005. A large institution may have to manage millions of e-mail communications each day. A large institution may have to manage millions of e-mail communications each day. The sheer number, then, of the records requiring review – to say nothing of the adventures one must undertake to find them in the bowels of the company's ever-burgeoning electronic records systems – is staggering. What makes this process even more complex is that the traditional hallmarks of the attorney-client privilege may be altogether missing.

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### THE CHALLENGES OF CULLING OUT CONFIDENTIAL RECORDS

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The claim of privilege must be made on a question-by-question or document-by-document basis,<sup>2</sup> thereby likely requiring attorney review of possibly millions of pages of electronic records. Such a task would be staggering enough in the paper world, where law-firm letterhead alone may significantly increase one's chances in locating and withholding attorney-client privileged communications.<sup>3</sup> Moreover, the more formal paper world would likely employ title or address information that sets off the fact that the recipient is an attorney. It is also likely the case that communications to or from a company's attorney would be duly limited to a discrete number of copies and maintained in a file, box or cabinet, making collection and review of the potentially privileged documents a fairly straightforward proposition.

Privileged communications and attachments sent via e-mail, however, rarely enjoy the benefit of these hallmarks. The more casual world of e-mail typically involves communications revealing only the name of the recipient and sender (without any reference to the attorney's title or business name). Making the lack of letterhead and title/address information even more dangerous is the fact that electronic records are rarely segregated into discrete files, much less into ones that signal their confidential nature.

The ease with which electronic records may be sent also enhances the likelihood of confidential communications' being disclosed. Instead of requiring the multi-step process involved in mailing

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a hard copy letter and/or enclosures, a communication in the electronic world can be completed in a matter of seconds and requires only a few keystrokes and clicks on the mouse to send a record to anyone with an attachment of any size. Also, it can take on a life of its own once transmitted – it is stored by the file server through which it is sent and will likely reside within the electronic files of the recipient and his or her file servers, physically residing in various places far away from each other. The communication cannot be “undone.”

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#### HIDDEN CODES CAN ALSO JEOPARDIZE PRIVILEGE

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Similarly, the various types of “hidden codes” (which may display edits to a document, show access by different drafters, routing information, etc.) retained within electronic documents may also present new and unique challenges by disclosing confidential information (such as the attorneys’ thought processes in making revisions), unwittingly sacrificing the attorney-client privilege and otherwise providing the thought processes that may not be available on the surface of the document. Unless specifically purged, many types of e-records, including documents created on popular word processing applications, store an on-going tally of the various changes to the contents of a document, among other things. In an October 20, 2000 *Wall Street Journal* article entitled, “*Beware, ‘Invisible Ink’ Inside Computer Files May Reveal Your Secrets: An Electronic Document Yields Clues to E-Mail Attacks on a Minnesota Politician,*” the hidden code of an e-missive was used to show that the alleged author of a smear campaign was the political opponent in a hotly-contested political race.

If e-records are produced in electronic form (which is allowed if not required in many jurisdictions) it may not be enough simply to review the face of the e-record. Rather it would be necessary to know what lurks beneath the surface and to ensure either that the hidden code is not produced or does not waive the privilege. Such potentially damaging realities of e-records simply do not have a paper world corollary where everything is literally contained within the “four corners” of the document.

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#### INADVERTENT DISCLOSURE MAY BECOME THE RULE

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Because of the sheer volume of electronic records involved, the lack of “privileged-communication” indicia and the “invisible” code within many e-documents, inadvertent disclosure of a privileged document is likely going to become the rule rather than the exception in litigation involving larger litigants with loads of e-records. How that disclosure will be treated depends on the jurisdiction in which the disclosure occurs. Some courts hold that nearly any disclosure of a privileged communication waives the privilege, while others hold that unintentional disclosure cannot waive the privilege or that the circumstances of the inadvertent disclosure must dictate whether a waiver of the privilege is found to have occurred.<sup>4</sup>

Companies will fare particularly poorly in jurisdictions where courts find waiver to have occurred without regard for the circumstances underlying the disclosure. This can lead to particular unfair treatment where a party has been required to produce possibly millions of pages of documents from numerous physical locations, some of which may have translation/conversion issues (as may occur when converting from one word-processing system to another), within a 30-day discovery period. Even in circumstances where the courts take into account the subjective intent of the disclosing party, some courts have indicated that they should not have to “devote such efforts to protect clients from their own errors or those of their counsel.”<sup>5</sup>

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While there are relatively few cases that have addressed the issue of waiver in the context of mass electronic records production, such challenges are likely to be more commonplace in the future. Courts have found that waiver occurred where 25,000 pages of documents had been produced<sup>6</sup> and where 50,000 pages of documents were reviewed with 12,000 pages produced.<sup>7</sup> Even though the Court in *Transamerica Corporation Co. v. International Bus. Mach. Corp.* found there was no waiver of privilege where 17 million documents were required to be produced in three months; the Court therein had expressly assured the parties that inadvertent disclosure would not be deemed a waiver of privilege.<sup>8</sup>

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#### 7 POSSIBLE WAYS TO PROTECT THE CLIENT AND YOURSELF

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Careful adherence to certain policies regarding electronic records can reduce the likelihood of your client's making an inadvertent disclosure. Specifically:

- 1) Obtain from your clients the names of all attorneys with whom it has been dealing during the relevant time period;
- 2) Perform full text searches for key terms including by attorney name (first and last) to ferret out potentially privileged communications;
- 3) Educate your clients on the proper use of privilege legends. Draft clear, highlighted "attorney-client" privilege legends and ensure that such legends appear on the first page of any privileged e-records or e-transmissions;
- 4) Make sure that privilege legends are not overused;
- 5) With respect to the production of any information provided in electronic form, special caution should be taken to ensure that any "hidden code" or meta data (data that manages the data) is not accessible and does not waive any privilege or otherwise disclose confidential information;
- 6) Try to reach agreement with opposing counsel prior to production as to: a) a proposed limit on the size of production; b) responsibility for cost and timing of production; and c) disclosure of a privileged document – that any such disclosure shall be deemed inadvertent, shall not waive the privilege and that any such inadvertently-disclosed documents will be promptly returned and cannot be copied or used; and
- 7) If you cannot reach agreement with opposing counsel prior to production, file a motion for a protective order prior to production, in which you educate the court on the volume of records involved and the complexity of the search, and in which you request a) such additional time as you think necessary to conduct a thorough search, b) a determination as to which party properly should bear the costs of production and c) a ruling that any mistaken disclosure of a document that is privileged will not waive the privilege and will be deemed inadvertent and inadmissible.

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#### CONCLUSION

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The world of electronic records poses daunting challenges to the practitioner in the arena of privileged documents especially. Attorneys must learn a new methodology for protecting against inadvertent disclosure of documents and must learn to take a proactive stance to insure against waiver of the attorney-client privilege.

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**ENDNOTES**

<sup>1</sup> InfoWorld, September 25, 2000, p. 22

<sup>2</sup> United States v. Lawless, 709 F.2d 485, 487 (7th Cir. 1983), citations omitted.

<sup>3</sup> Draus v. Healthtrust, Inc.-The Hospital Co., 172 F.R.D. 384, 388 (S.D. Ind. 1997) (“[t]he privileged character of the [attorney-client-privileged] letter is as open and obvious as can be imagined. On its face, the letter is on law office letterhead . . .”)

<sup>4</sup> Tokar v. City of Chicago, 1999 WL 138814 at 1 (N.D. Ill. 1999).

<sup>5</sup> Draus v. Healthtrust, Inc.-The Hospital Co., 172 F.R.D. 384, 388 (S.D. Ind. 1997).

<sup>6</sup> Harmony Gold U.S.A., Inc. v. FASA Corp., 169 F.R.D. 113, 116 (N.D. Ill. 1996).

<sup>7</sup> In re Recombinant DNA Technology Patent and Contract Litigation, MDL No. 912, slip op., 1994 WL 270712 (S.D. Ind. March 22, 1994).

<sup>8</sup> Transamerica Computer Co. v. IBM, 573 F.2d 646, 649-51 (9th Cir. 1978).

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A version of this report originally appeared in Digital Discovery and E-Evidence.  
Original authors were Randolph A. Kahn, ESQ and Diane L. Silverberg, ESQ.  
For more information email: [info@KahnConsultingInc.com](mailto:info@KahnConsultingInc.com)  
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157 LEONARD WOOD NORTH • HIGHLAND PARK IL • 60035  
PHONE: 847.266.0722 • FAX: 847.266.0734 • EMAIL: [INFO@KAHNCONSULTINGINC.COM](mailto:INFO@KAHNCONSULTINGINC.COM)