THE ATTORNEY-CLIENT PRIVILEGE AND DISCOVERY OF ELECTRONICALLY-STORED INFORMATION

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ABSTRACT

The attorney-client privilege is the most sacred and important privilege in our legal system. Despite being at the center of daily practice, the privilege still remains a mystery for many lawyers. This is primarily because the privilege is not absolute, and there are certain actions or non-actions that may waive it.

The application of the privilege is further complicated by electronic discovery, which has both benefits and drawbacks. On one hand, it has made the practice of law more efficient. On the other hand, it has made it easier to inadvertently waive the attorney-client privilege in response to a discovery request. This iBrief examines attorney-client privilege issues that may arise during e-discovery, and provides practical guidelines for attorneys responding to e-discovery requests.

INTRODUCTION

¶1 The rapid computerization of the 1990s has altered the litigation landscape.[2] Most businesses have moved away from storing documents in file cabinets and warehouses as documents are increasingly stored electronically.[3] Consequently, litigators must increasingly respond to subpoena requests for electronically stored information (ESI). These requests will continue to increase as experts estimate that nearly one-third of electronically stored documents remains solely in digital form.[4]

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[2] Vlaid Vainberg, *When Should Discovery Come with a Bill? Assessing Cost Shifting for Electronic Discovery*, 158 U. PA. L. REV. 1523, 1532 (2010).

[3] *Id.*

[4] Corinne L. Giacobbe, Note, *Allocating Discovery Costs in the Computer Age: Deciding Who Should Bear the Costs of Discovery of Electronically Stored Data*, 57 WASH. & LEE L. REV. 257, 259 (2000).

¶2 To non-attorneys, responding to a subpoena request for ESI simply involves inserting a thumb drive into a USB port and copying the requested files. However, document production entails more than just copying hard drives and e-mails and sending those copies to opposing counsel. Attorneys must exercise extreme care in producing ESI because an inadvertent disclosure of any document may waive attorney-client privilege. This iBrief aims to balance a theoretical and practical approach to attorney-client issues that may arise during e-discovery.

¶3 Part I of this iBrief provides an overview of the attorney-client privilege. Part II discusses the rise of e-discovery. Part III discusses attorney-client issues that may arise during e-discovery. Part IV provides practical guidelines for attorneys responding to e-discovery requests.

I. OVERVIEW OF THE ATTORNEY-CLIENT PRIVILEGE

¶4 The attorney-client privilege is one of the oldest recognized privileges for confidential communications.[5] Most states codify the privilege in a statute or rule;[6] others still rely on common law.[7] Courts have articulated the elements of the privilege in different ways. The attorney-client privilege applies only if

> (1) the asserted holder of the privilege is or sought to become a client;
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> (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
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> (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
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> (4) the privilege has been (a) claimed and (b) not waived by the client.[8]

¶5 The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote

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[5] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). *See also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) ("[Privilege] is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure.").
[6] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 68 cmt. d (2000).
[7] *Id.*
[8] United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982) (quoting United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950)).

broader public interests in the observance of law and administration of justice."[9] The privilege "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out."[10]

¶6 The privilege is not absolute and must be narrowly construed since it impedes full and free discovery of the truth. The Supreme Court notes that

> testimonial exclusionary rules and privileges contravene the fundamental principle that "'the public . . . has a right to every man's evidence." As such, [the privilege] must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."[11]

¶7 The privilege belongs to the client.[12] The attorney must properly assert the privilege on the client's behalf and take care to not waive it.[13]

¶8 At first glance, application of the attorney-client privilege seems very simple. However, federal courts are not in agreement on the contours of the privilege. Different circuits analyze the privilege using different factors. Thus, attorney-client privilege analysis is far from a settled area of law, especially when it involves ESI.[14]

II. THE RISE OF E-DISCOVERY

¶9 E-discovery is the discovery of electronically stored information (ESI). Some estimates show that more than ninety percent of all information is created in an electronic format.[15] As a result, ESI has become the primary source of evidence in litigation.[16] This development has increased the

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[9] *Upjohn Co.*, 449 U.S. at 389.
[10] Trammel v. United States, 445 U.S. 40, 51 (1980).
[11] *Id.* (quotations omitted).
[12] *In re* Vargas, 723 F.2d 1461, 1466 (10th Cir. 1983); Commonwealth v. Edwards, 370 S.E.2d 296, 301 (Va. 1988).
[13] RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 86 (2000).
[14] As a result, the Supreme Court has held that the privilege's applicability should be determined on a case-by-case basis. *See generally Trammel,* 445 U.S. at 47 (referring to legislative history for Federal Rules of Evidence regarding privilege).
[15] THE SEDONA CONFERENCE WORKING GROUP ON BEST PRACTICES FOR ELECTRONIC DOCUMENT RETENTION & PRODUCTION, THE SEDONA PRINCIPLES FOR ELEC. DOCUMENT PROD. 1 (2004) [hereinafter SEDONA PRINCIPLES], *available at* http://www.thesedonaconference.org/dltForm?did=SedonaPrinciples200401.pdf.
[16] *See generally id*.

overall cost of responding to discovery requests. According to the authors of the 2008 Socha-Gelbmann Electronic Discovery Report, litigants spent $2.7 billion on e-discovery in 2007, an increase of 43% from 2006.[17] This expenditure is expected to grow by 21%, 20%, and 15% in 2008, 2009, and 2010 respectively.[18]

¶10 E-discovery requires attorneys to alter their typical response to discovery lest they inadvertently disclose privileged information. This is because in today's electronic age, it is fairly easy to mistakenly send information to opposing counsel due to the sheer volume of information that Attorneys' must read during discovery. Attorneys' responses should change because there are significant differences between conventional document and electronic document production.[19]

¶11 Differences between conventional and electronic discovery exist in degree, kind, and cost.[20] The "volume, number of locations, and data volatility" is significantly greater in e-discovery than in conventional discovery.[21] For example,

> [a] floppy disk, with 1.44 megabytes, is the equivalent of 720 typewritten pages of plain text. A CD-ROM, with 650 megabytes, can hold up to 325,000 typewritten pages. One gigabyte is the equivalent of 500,000 typewritten pages. Large corporate computer networks create backup data measured in terabytes or 1,000,000 megabytes: each terabyte represents the equivalent of 500 [m]illion typewritten pages of plain text.[22]

¶12 One article estimates that a company with one hundred employees sending an average of 25 e-mails daily produces about 625,000 e-mails yearly.[23] Another study showed that

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[17] George Socha & Tom Gelbman, *A Look at the 2008 Socha-Gelbmann Survey*, L. TECH. NEWS (Aug. 11, 2008), http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202423646479.

[18] *Id.*

[19] Richard Van Duizend, *Conference of Chief Justices: Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, NAT'L CENTER FOR ST. CTS., vi (Aug. 2006), http://www.ncsconline.org/images/EDiscCCJGuidelinesFinal.pdf.

[20] *Id.* at v, vi.

[21] *Id.* at v.

[22] *Id.* (citations omitted).

[23] *Id.* Many of the statistics in the Conference of Chief Justices Guidelines are condensed directly from a presentation on electronic discovery by Ken Withers, former Senior Judicial Education Attorney at the Federal Judicial Center, to the National Workshop for United States Magistrate Judges on June 12, 2002.

> [i]n 1998, the U.S. Postal Service processed approximately 1.98 billion pieces of mail. That year, there were approximately 47 million e-mail users in the United States who sent an estimated 500 million e-mail messages per day, for a total of approximately 182.5 billion e-mail messages per year—more than 90 times as many messages as the U.S. Postal Service handled the same year.[24]

¶13 The e-discovery process, already burdening attorneys with a voluminous number of e-mails to sift through, is further complicated when discoverable e-mails are automatically deleted by the hosting e-mail servers.[25] And most complicated of all, deleted data is not necessarily deleted. Rather, the computer has been instructed to ignore the data marked deleted and overwrite it only if space is needed.[26]

¶14 It is therefore possible that deleted data exists and is retrievable, unbeknownst to its custodian.[27] Consequently, many attorneys now request that opposing counsel turn over all e-mails, including deleted e-mails. Some attorneys go a step further, requiring forensic computer experts to examine the hard drives in search of deleted e-mails. This has caused the e-discovery process to become increasingly burdensome and costly.

¶15 Another contributing factor to the burdensome nature of e-discovery is the existence of metadata. Metadata is information embedded in an electronic file about that file, including author and date of creation.[28] It is increasingly common for attorneys to request that information in discovery. Complying with this request presents a variety of problems.[29]

¶16 The final and most important difference between conventional and electronic discovery is the cost. Because attorneys increasingly hire computer forensic experts to sort through the ESI, the cost of litigation has increased astronomically. One client reportedly spent about $6.2 million to restore ninety-three backup tapes.[30] Cost is arguably the most litigated e-discovery issue. And although not extensively explored in this iBrief, a brief discussion of the leading federal case on cost—*Zubulake v. UBS Warburg*[31]—is necessary; as it clarifies the difference between conventional discovery and e-discovery.

¶17 *Zubulake* establishes three considerations for determining which party should bear the cost of discovery: (1) accessibility, (2) less costly

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[24] SEDONA PRINCIPLES, *supra* note 15, at 3.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] *Id.*
[29] *See generally id*. at 4.
[30] Van Duizend, *supra* note 19, at vi.
[31] 216 F.R.D. 280 (S.D.N.Y. 2003).

means of obtaining the information requested, and (3) cost-benefit analysis based on the facts of the case. *Zubulake*, among other cases, prompted the 2006 amendments to the Federal Rules of Civil Procedure. Under the previous rules, the costs of complying with the discovery request were presumed to be borne by the responding party.[32] Under the post-*Zubulake* amendments, "[a] party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost."[33] However, a court may still order discovery upon a showing of good cause.[34] Some commentators have opined that the new rules do not help courts decide who should bear the burden of costs.[35] Nevertheless, the amendments underscore that e-discovery is different from traditional discovery.

¶18 As discussed above, e-discovery goes beyond the mere copying and saving of data. Parties responding to e-discovery requests must review the data, ensuring that only relevant and non-privileged information is sent to opposing counsel. Due to the burdensome nature of sorting through all electronic data, most attorneys outsource this task to companies who specialize in e-discovery. These companies use sophisticated software to collect, filter, process, and review the data. Some companies go a step beyond merely collecting data, sorting it by key words such as attorney and client names. However, this does not eliminate attorneys' responsibility to review documents to ensure that no privileged information is inadvertently sent to opposing parties.

III. ATTORNEY-CLIENT PRIVILEGE & E-DISCOVERY

¶19 Although attorney-client privilege belongs solely to clients, attorneys have an ethical duty to assert the privilege on their clients' behalf.[36] As technology has made responding to discovery requests easier, it has also become easier to waive the attorney-client privilege without intending to do so.[37] This error is particularly common because there is no consensus among the circuits as to when inadvertent disclosure automatically results in waiver of privilege.

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[32] *See id.* (citing Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978) (discussing FED. R. CIV. P. 26(b)(2) prior to 2006 amendments)).
[33] FED. R. CIV. P. 26(b)(2)(B).
[34] Zubulake, 216 F.R.D. at 283.
[35] *See generally* Duizend, *supra* note 19, at 7.
[36] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 86 (2000).
[37] *See* John T. Hundley, *Waiver of Evidentiary Privilege by Inadvertent Disclosure–Federal Law*, 159 A.L.R. FED. 153 (2000).

A. Varying Approaches to the Inadvertent Disclosure Problem

¶20 Whether an inadvertent disclosure of ESI waives attorney-client privilege has engendered three different schools of thought. The first treats inadvertent disclosure as an automatic waiver. The second holds that an inadvertent disclosure never results in an automatic waiver. The third takes a middle-ground, using a multi-factor test to determine whether the privilege has been waived.

1. Jurisdictions in Which Inadvertent Disclosure Automatically Waives Attorney-Client Privilege

¶21 Courts subscribing to the first school of thought—that any involuntary disclosure of privilege automatically waives the privilege[38]—take an objective view of inadvertent disclosure, holding the privilege waived irrespective of the number of documents disclosed. For example, in *In re Sealed Case*,[39] the D.C. Circuit held that the disclosure, although inadvertent, automatically waived the attorney-client privilege:

> Although the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived. The courts will grant no greater protection to those who assert the privilege than their own precautions warrant. We therefore agree with those courts which have held that the privilege is lost "even if the disclosure is inadvertent."[40]

¶22 Generally, courts that follow this rule do not consider the number of documents waived or whether immediate steps were taken to correct the error. Once a document has been mistakenly turned over, attorney-client privilege is considered waived. Thus, the privilege is waived in these jurisdictions even when "immediate steps were taken to correct the error [of inadvertent disclosure]."[41] The court elaborated on this point:

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[38] FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482 (E.D. Va. 1991). *Cf.* Standard Chartered Bank PLC v. Ayala Int'l Holdings (U.S.) Inc., 111 F.R.D. 76, 85 (S.D.N.Y. 1986) (addressing case law that does not involve claims of inadvertent disclosure and suggesting that an instance of inadvertent disclosure can be so insignificant as to not constitute a waiver); Georgetown Manor, Inc. v. Ethan Allen, Inc., 753 F. Supp. 936, 937 (S.D. Fla. 1991) (acknowledging that federal courts are split on the issue of whether privilege is waived in the event of an inadvertent disclosure).

[39] *In re* Sealed Case, 877 F.2d 976 (D.C. Cir. 1989).

[40] *Id*. at 980 (citation omitted).

[41] Wichita Land & Cattle Co. v. Am. Fed. Bank, F.S.B., 148 F.R.D. 456, 461 (D.D.C. 1992).

> To find waiver in these circumstances may seem a harsh result . . . . There is a tension between the principle of unfettered judicial access to all relevant evidence on the one hand, and on the other, the policy supporting evidentiary privileges, which encourage complete candor between client and lawyer, as well as thorough case preparation that is essential to the adversary system. Liberal application of waiver discourages organizations from broadly labeling materials "privileged." The more documents that are so labeled, the greater the likelihood of an inadvertent disclosure that will render all related communications discoverable. "[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crowned jewels."[42]

¶23 In the eyes of this court, once the document has been seen, the privilege is considered waived. Attorneys who frequently find themselves in forums like the D.C. Circuit, which follow the automatic waiver rule, should take extra care to prevent inadvertent disclosure; for inadvertent disclosures will always waive the attorney-client privilege in these jurisdictions. Practical tips to avoid inadvertent disclosure are discussed in Part IV of this iBrief.[43]

2. Jurisdictions in Which Inadvertent Disclosure Never Waives Attorney-Client Privilege

¶24 As mentioned above, courts are not consistent in finding waiver of attorney-client privilege. While some courts find automatic waiver, others adhere to the "no waiver rule," holding that the attorney-client privilege can never be waived in e-discovery through inadvertent disclosure of privileged documents. These courts often presume that negligence of counsel during discovery cannot constitute waiver because the privilege belongs to the client, and only the client can waive it. In these jurisdictions, not even an attorney's negligence in failing to review documents will waive the privilege.[44]

¶25 In *Mendenhall v. Barber-Greene Co.*,[45] the U.S. District Court for the Northern District of Illinois held that an attorney's inadvertent production of privileged letters in a patent infringement action did not constitute waiver of the attorney-client privilege.[46] The court stated that attorneys are "taught from first year law school that waiver imports the

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[42] *Id.* at 461–62 (alteration in original) (citations omitted).
[43] *See* discussion *infra* Part IV.
[44] *See, e.g.*, Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co., 109 F.R.D. 12, 21 (D. Neb. 1983) (finding that, while negligence on an attorney's part is unacceptable, it is not necessary to impose sanctions)).
[45] Mendenhall v. Barber-Greene Co., 531 F. Supp. 951 (N.D. Ill. 1982).
[46] *Id.* at 955.

'intentional relinquishment or abandonment of a known right.'"[47] The court reasoned that "[i]nadvertent production is the antithesis of that concept."[48] While the court agreed that counsel might have been negligent in failing to go through the letters before production, the court nevertheless refused to find waiver of privilege, affirming that courts should require more than mere negligence of counsel before finding waiver.[49] Attorneys who find themselves in such a forum can consider themselves lucky: waiver will never be found so long as it is the attorneys' or their agents' (usually an e-discovery company) negligence that results in the inadvertent disclosure. However, just because attorneys find themselves in such a forum does not mean they should fail to review documents before handing them over to opposing counsel. As discussed in Part IV of this iBrief, this behavior may result in some ethical violations of an attorney's duty to represent clients diligently.

3. Jurisdictions Employing a Multi-Factor Analysis to Determine if Attorney-Client Privilege is Waived by Inadvertent Disclosures

¶26 The third and final school of thought adheres to a middle-ground approach. This approach, known as the *Lois Sportswear* rule, uses a fact-intensive analysis to determine the outcome of privileged cases.[50] Some of the factors considered in evaluating whether an inadvertent disclosure constitutes a waiver include: (1) reasonableness of the precautions taken to prevent inadvertent disclosures, (2) the time taken to rectify the error, (3) the scope of discovery, (4) the extent of the disclosure, and (5) the overriding issue of fairness.[51] No one factor is determinative, but, as one court opines, "perhaps the most important circumstance is the number of documents involved. As the number of documents grows, so too must the level of effort increase to avoid an inadvertent disclosure."[52]

¶27 The Fourth Circuit has subscribed to this middle-ground approach.[53] In *FDIC v. Marine Midland Realty Credit Corp.*, a United States District

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[47] *Id.* (citation omitted).
[48] *Id.*
[49] *Id.*
[50] Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985).
[51] FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 482 (E.D. Va. 1991) (citing *Lois Sportswear*, 104 F.R.D. at 105); *see also* Tri-County Paving, Inc. v. Ashe Cnty., No. 5:99-CV-105, 2000 WL 1811606, at *3–4 (W.D.N.C. Oct. 5, 2000)); Kan. City Power & Light Co. v. Pittsburg & Midway Coal Mining Co., 133 F.R.D. 171, 172 (D. Kan. 1989).
[52] FDIC v. Marine Midland Realty Credit Corp., 138 F.R.D. 479, 483 (E.D. Va. 1991).
[53] *See id.* at 482; *see also* McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 167 (D. Md. 1998).

Court in Virginia court opted for a factor-based test. The court found that both the automatic and no-waiver rules were too extreme. The court reasoned that

> inadvertent disclosure is a species of waiver and must be analyzed in that light. Waivers must typically be intentional or knowing acts. Inadvertent disclosures are, by definition, unintentional acts, but disclosures may occur under circumstances of such extreme or gross negligence as to warrant deeming the act of disclosure to be intentional.[54] Put another way, "[i]t is not too much to insist that if a client wishes to preserve the privilege under such circumstances, he must take some affirmative action to preserve confidentiality. . . [t]aking or failing to take precautions may be considered as bearing on intent."[55]

¶28 The court opted for a fact-intensive analysis by looking at the facts in the case and how they influenced the five factors mentioned above.

¶29 In *Scott v. Glickman*,[56] the United States District Court for the Eastern District of North Carolina held that the attorney-client privilege was waived because of a party's failure to put measures in place to prevent inadvertent disclosures. The court based its conclusion on several facts: document production was not very onerous; there were no time constraints impacting the document production; the attorney did not spend an extensive amount of time trying to prevent inadvertent production of privileged materials; and no special efforts were made to ensure confidentiality.[57]

¶30 An earlier case, *Parkway Gallery Furniture v. Kittinger Pennsylvania House Group, Inc.*,[58] held that the defendant waived the attorney-client privilege for failing to take precautions that would have prevented disclosure. The court reasoned that "[a] large number of inadvertent disclosures in comparison to [only a small] number of documents reviewed shows lax, careless, and inadequate procedures."[59] However, the court limited the scope of the privilege, holding that an inadvertent disclosure of documents did not require further disclosure of other privileged documents relating to the same subject matter:

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[54] *Marine Midland*, 138 F.R.D. at 482 (quoting *In re* Grand Jury Proceedings 727 F.2d 1352, 1352 (4th Cir. 1984).
[55] *Id*.
[56] 199 F.R.D. 174 (E.D.N.C. 2001).
[57] *Id*.; s*ee also* O'Leary v. Purcell Co., 108 F.R.D. 641 (M.D.N.C. 1985) (holding attorney-client privilege waived because the attorney had made no special efforts to ensure confidentiality).
[58] 116 F.R.D. 46 (M.D.N.C. 1987).
[59] *Id*. at 51 (citing Eigenheim Bank v. Halpern, 598 F. Supp. 988, 991 (S.D.N.Y. 1984)).

> The general rule that a disclosure waives not only the specific communication but also the subject matter of it in other communications is not appropriate in the case of inadvertent disclosure. In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue. This ruling limits the risk to parties in major discovery cases and still makes them, and not the Court, accountable for maintaining confidentiality.[60]

¶31 The middle-ground approach appears to be the most reasonable and appealing analysis of the three mentioned herein. The Supreme Court appears to agree; it has repeatedly held—albeit not in this context—that privilege issues should be decided on a case-by-case basis.[61] The Court stated in *Upjohn Co. v. United States* that "[w]hile such a 'case-by-case' basis may to some slight extent undermine desirable certainty in the boundaries of the attorney-client privilege, it obeys the spirit of the Rules."[62] And because attorney-client privilege issues are presented in various forms, a factor-based test would ensure that the spirit of the rules—which is to encourage frank communications between attorneys and their clients—will be upheld.

¶32 Several states have realized that the case law on e-discovery is not consistent. Consequently, the Conference of Chief Justices has published guidelines to assist courts in considering issues related to e-discovery.[63] The guidelines state that judges should consider the following factors in an inadvertent disclosure case: the total volume of information produced by the responding party, the amount of privileged information disclosed, the reasonableness of the precautions taken to prevent inadvertent disclosure of privileged information, the promptness of the actions taken to notify the receiving party and otherwise remedy the error, and the reasonable expectations and agreements of counsel.[64] These factors mirror the *Lois Sportswear* factor test. Their goal is the same: to determine waiver of attorney-client privilege on a case-by-case basis.

B. Inadvertent Disclosure of Metadata

¶33 Metadata is "information describing the history, tracking, or management of an electronic document."[65] It is information about documents that is recorded by a user's computer to assist the computer in

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[60] *Id.* at 52.
[61] *See* Trammel v. United States, 445 U.S. 40, 47 (1980); *see also* United States v. Gillock, 445 U.S. 360, 367 (1980).
[62] Upjohn Co. v. United States, 449 U.S. 383, 396–97 (1981).
[63] *See generally* Duizend, *supra* note 19.
[64] *Id*. at 8.
[65] FED. R. CIV. P. 26(f).

retrieving the document at a later date.[66] Metadata is often hidden, invisible, and normally inaccessible by the computer's user.[67] Examples of metadata include comments, edit dates and history, authorship, dates sent and received, et cetera.[68] Metadata is simply "data about data."[69]

¶34 Metadata is increasingly the subject of litigation. In a case stemming from a city police officer's employment discrimination suit against the city, the Arizona Supreme Court held that a police officer's public record requests of electronically formatted records included the entire electronic record, even its metadata.[70] In that case, the police officer's requested his supervisor's notes, which documented his work performance.[71] After reviewing the paper documents, the police officer requested the metadata because he suspected the documents were backdated, which the City of Phoenix denied.[72] The court held that a public entity that maintains a public record in electronic format must disclose all information in response to a public records request, including embedded metadata.[73]

¶35 But does this mean that metadata is to be treated the same as ordinary data in the attorney-client privilege context? In other words, what happens to metadata if it is inadvertently sent to opposing counsel in a discovery request? Does this mean the attorney-client privilege is waived?

¶36 The ABA Standing Committee on Ethics and Professional Responsibility has held that attorneys may mine for metadata embedded in responses to discovery requests.[74] Instead of limiting its holding to inadvertent disclosures, the committee only limited its holding's scope to metadata that was not obtained in a "fraudulent, deceitful, or otherwise improper" manner.[75] As a result, an attorney who inadvertently receives metadata embedded in privileged electronic documents can argue that the privilege has been waived.

¶37 Contrary to the ABA's decision, some state bars have required attorneys to return privileged metadata transmitted inadvertently.[76] These

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[66] *See generally* SEDONA PRINCIPLES, *supra* note 15, at 4.
[67] *Id.*
[68] *Id.*
[69] Ned T. Himmelrich, *Metadata: Data About Data*, MD. B.J., May–June 2010, at 34, 36.
[70] Lake v. City of Phoenix, 218 P.3d 1004, 1008 (Ariz. 2009).
[71] *Id.* at 1004–05.
[72] *Id.* at 1004.
[73] *Id.*
[74] ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-422 (2006).
[75] *Id.*
[76] *See* Himmelrich, *supra* note 69, at 36.

states base their rules primarily on the 2006 amendments to Federal Rules of Civil Procedure. Rule 26(b)(5)(B) provides that

> [i]f information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; [and] must not use or disclose the information until the claim is resolved.[77]

¶38 In the District of Columbia—one of the jurisdictions that does not follow the ABA's decision—attorneys may not mine for metadata if the attorney has actual knowledge that the data was sent inadvertently.[78] New York goes one step further, not requiring actual knowledge—just inadvertent submission—to prohibit an attorney's use of privileged metadata.[79] Attorneys should check their respective bar rules to ensure that they are in compliance with all ethical requirements regarding mining and use of metadata.

IV. PRACTICAL TIPS TO AVOID INADVERTENTLY WAIVING THE ATTORNEY-CLIENT PRIVILEGE

A. Claw-Back Clause or Quick Peek Agreements

¶39 Attorneys should enter into claw-back agreements prior to the commencement of e-discovery. Claw-back agreements are formal agreements that prevent the attorney-client privilege from being waived by an inadvertent disclosure of privileged information.[80] Rather the receiving party must return the privileged material to the responding party.

¶40 Quick peek agreements allow attorneys to look at each party's entire data before production. Attorneys then designate items that are responsive to the discovery request and items that are privileged.[81] Attorneys should ensure that such agreements address electronic documents in general and metadata specifically.

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[77] FED. R. CIV. P. 26(b)(5).
[78] D.C. Legal Ethics Comm., Formal Op. 341, *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion341.cfm.
[79] NYCLA Comm. on Prof'l Ethics, Formal Op. 738 (2008), *available at* http://nyclamail.org/siteFiles/Publications/Publications1154_0.pdf.
[80] Van Duizend, *supra* note 19, at 9. *See generally* Murphy Oil USA, Inc. v. Fluor Daniel, Inc., No. Civ. A. 99-3564, 2002 WL 246439, at *7 (E.D. La. Feb. 19, 2002) (noting that court cannot compel the disclosure of privileged communications in claw-back arrangement).
[81] FED. R. CIV. P. 26(b)(5)(B).

¶41 Claw-back clauses and quick peek agreements might not necessarily guarantee protection against claims of waiver. For example, opposing counsel may renege on a claw-back agreement and argue that privilege is waived because opposing counsel has already seen the documents, and thus they would no longer uphold any claw-back provisions.[82] Attorneys should enter these agreements knowing that while most courts would uphold them, some might make an exception when counsel has already seen the alleged confidential information.

¶42 Also, some legal experts have said that claw-back agreements violate the fundamental premise of an attorney's duty to represent clients zealously.[83] By voluntarily entering into such agreements, attorneys are tying their hands, so to speak. The prudent measure may be to seek clients' consent before entering into such agreements.

B. Discovery Hearing or Pre-Trial Conference

¶43 Federal Rule of Civil Procedure 26(f) requires parties to confer early in litigation to attempt to develop a discovery plan.[84] Attorneys should take advantage of such pre-trial conferences to address potential disputes over electronic discovery.

¶44 Some commentators have opined that attorneys should voluntarily submit to a pre-trial conference to determine the disclosure of ESI, the manner of disclosure, and a specific schedule with a timeline.[85] Unlike claw-back clauses, in which attorneys voluntarily enter into agreements, pre-trial conferences are more formal and take place before a judge. A judge's involvement in the pre-trial conference may provide legitimacy to the agreement should a dispute arise concerning its validity.

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[82] *See generally In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (nearly any disclosure of the communication or document, even inadvertent, waives the privilege).

[83] SEDONA PRINCIPLES, *supra* note 15, at 37 ("[C]ounsel has an ethical duty to zealously guard the confidences and secrets of the client. It is possible that questions could arise as to whether voluntarily entering into a 'clawback' production could constitute a violation of Model Rules of Professional Conduct 1.1 (requiring a lawyer to use diligence and care in representation) or Model Rules of Professional Conduct 1.6 (protection of client secrets and confidences) if the manner of the production results in later waivers of privileges and protections. While this result may seem remote, it has already arisen in the content of inadvertent productions." (citing D.C. Bar Ethics Op. No. 256 (1995) (examining whether actions of producing counsel violated standard), *available at* http://www.dcbar.org/for_lawyers/ethics/legal_ethics/opinions/opinion256.cfm)).

[84] *See id.* (citations omitted).

[85] *Id*.

¶45 Prior to attending a pre-trial conference, attorneys should consult with their clients' technology departments regarding data preservation.[86] In particular, attorneys should ask IT personnel how much time and resources are needed to retrieve data. Having this information available prepares attorneys to better discuss the issue of cost allocation when it arises during pre-trial conferences.

¶46 Attorneys attending a pre-trial conference should also be prepared to discuss the manner of production. For example, the parties might discuss whether the data would be copied to disks; the steps to take to ensure that ESI is not negligently destroyed; the procedures to be followed in the event ESI is inadvertently disclosed; the list of persons most knowledgeable about each party's computer systems, cost allocation, and any other pertinent information that may affect the discovery response may be discussed.[87]

¶47 Lastly, attorneys should keep privilege logs documenting each privileged document and a brief description of each document. Keeping a privilege log allows attorneys to be prepared to address inadvertent disclosure of privileged information. Others have suggested counsel have documents ready for *in camera* inspection during a pre-trial conference.[88] Either way, it is better to be prepared to discuss inadvertent disclosure early in the discovery process, rather than catching up later in the midst of trial.

C. Third-Party Protective Orders

¶48 As discussed above, attorneys may outsource data retrieval to e-discovery companies.[89] It is possible that the staff may unintentionally include privileged information in the data sent to requesting counsel. The parties should therefore agree that attorney-client privilege is not waived when information is inadvertently disclosed by human error, especially when a third-party is conducting the review of ESI.

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[86] *Id*. (citing Keir v. Unumprovident Corp., No. 02 Civ. 8781, 2003 WL 21997747, at *12 (S.D.N.Y. Aug. 22, 2003) (noting counsel's failure to inform court of burdens and technological issues regarding preservation order)); *see also* Landmark Legal Found. v. EPA, 272 F. Supp. 2d 70, 77–79 (D.D.C. 2003) (reciting failures of agency's attorneys to properly communicate preservation order to agency and holding that agency committed contempt of court by reformatting hard drives and erasing e-mail backup tapes after it received notice of the order).

[87] *See generally* SEDONA PRINCIPLES, *supra* note 15, at 9.

[88] *Id*.

[89] *See* discussion *supra* Part II.

D. Remove Metadata

¶49 In a recent publication, the ABA recommended attorneys remove metadata before e-mailing files.[90] Attorneys can also use a third-party tool such as Metadata Assistant to reduce accidental exposure.[91] Microsoft also offers a free "Remove Hidden Data" utility.[92] One way to remove metadata in Word is to go to the Office button, choose "Prepare" and then "Inspect Document" to check for metadata.[93] All comments and edits in word documents should be deleted and avoid using the redlining function in word processing documents as much as possible.[94] Attorneys should also delete comments and disable the undo/redo options in WordPerfect documents.[95]

¶50 Attorneys should note that they are ethically prohibited from altering documents that have potential evidentiary value.[96] They should check their respective ethical rules to ensure compliance with the rules governing removal of metadata.

E. Attorney Review

¶51 The most effective way to prevent inadvertent disclosure is for attorneys to review all electronic documents before sending them to opposing counsel. This is an obvious recommendation, but so often attorneys do not review the documents because the data's sheer size is intimidating. It is imperative that attorneys spend time and effort reviewing these documents before production. As stated earlier, one factor courts consider in determining waiver is the reasonableness of the precautions taken to prevent inadvertent disclosures.[97] Whether the precautions taken were sufficient to prevent inadvertent disclosures depends on the time and effort expended by the attorneys. Thus, it is important that attorneys spend the time required to review the documents, no matter how tedious or uninteresting the process may be.

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[90] *11 Steps to Protect Client Data*, YOUR ABA (June 2010), http://www.abanet.org/media/youraba/201006/article02.html.
[91] Donna Payne, *Metadata - Are you Protected?*, http://www.payneconsulting.com/pub_books/articles/pdf/MidwestBarAssociationConferenceMetadataHandout.pdf.
[92] *Id*.
[93] *Id*.
[94] *Id*.
[95] *Id.*
[96] *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-442, at 5 (2006). *See also* MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2006) ("A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value.").
[97] *See* discussion *supra* Part III, Section A.

CONCLUSION

¶52 As e-discovery continues to pervade modern litigation, attorneys should better prepare themselves to handle attorney-client privilege issues that emerge out of our society's increasing reliance on technology. Attorneys have plenty of resources and tools to assist them in ensuring that their clients' confidences are kept. Technological ignorance is not a viable excuse.