Protecting Privilege in Document-Intensive Cases

Addressing the Increasing Challenge of Keeping Attorney-Client Communications Confidential

April 13th, 2016
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Gene Albert Bio

○ CEO of Lexbe LC, a provider of cloud-based litigation processing, review and document management software & eDiscovery services

○ Frequent speaker/author on eDiscovery and legal technology issues

○ Planning Committee, Electronic Discovery Institute, State Bar of Texas

○ eDiscovery consultant & expert

○ Education
  MBA, University of Texas
  JD, Southern Methodist University
  BA, University of Texas

Gene Albert
512-686-3460
gene@lexbe.com
https://www.linkedin.com/pub/gene-albert/0/88/ba1

Protecting Privilege in Document Intensive Cases - Keeping Attorney-Client Communications Confidential | April 13, 2016
Protecting Privilege

Agenda

- Data Growth and Increasing Risks of Protecting Privilege
- Ethical Requirements
- Privilege Logging Requirements; Email Headaches
- Use of FRE 502(d) Orders; Clawbacks
- Optimized Workflow & Automatic Logging
- Better Search; NearDup Analysis
- Categorical logging
- Checklist of recommendations
The amount of digital information predicted to grow from 3 zettabytes (2014) to 40 zettabytes (2020)

The total amount of data being captured and stored by industry doubles every 1.2 years

Case budgets and timelines are not increasing at this rate

* 1 Zettabyte = 1 Trillion Gigabytes
Protecting Privilege

Increasing Risks/Problems in Privilege Review

- More ESI means more documents to review for privilege and work-product (Privilege).
- Use of keyword search and technology assisted review instead of linear review for productions.
- Possible use of outside reviewers with less case and organizational knowledge; or training and skill.
- Typical existence of many duplicates or near duplicates of privileged documents.
- Heavy use of email means that privileged communications are documented more than ever.
- Email chains raise thorny issues of what to log and how to log.
ABA Model Rule of Professional Conduct 1.6(a)

- “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) [identified specific exceptions].”

ABA Model Rule of Professional Conduct 1.6(c)

- “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client."
ABA Model Rule of Professional Conduct 1.1

● “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

● “A lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” (comment)

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● “Litigants should use appropriate information search and retrieval methods leveraging processes and technology to improve quality and efficiency in protecting privilege during the discovery process.”

See: Sedona Conference "Commentary on Protection of Privileged ESI" (11/2014) for suggestions on proper use of technology to protect privilege.
ABA Model Rule of Professional Conduct 3.2

- “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

FRCP 1

- “These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”
Protecting Privilege

Federal Requirements

**General**

- State or Federal if subject matter or diversity jurisdiction.

**FRE 502 (a)**

- Inadvertent waiver will not lead to broad subject matter waiver.
- Limits scope of waiver for voluntary disclosures.

**FRE 502 (d)**

- One federal court can bind other proceedings - state and federal.
- Enables parties to establish discovery protocols.
- Examples: Clawback agreements, "quick peeks" privilege log protocols, protocols regarding privilege review, categorical logging, scope of ESI preservation, phased discovery,
- May be part of parties agreement or court may order sua sponte
The federal law is based on FRCP 26(b):

“When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) **describe the nature** of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”

- Does not address even the traditional elements of the log (date, time, sender, subject), much less the more complicated issue of how to handle email chains, etc.
Courts Traditionally Require Specific Logging

“The producing party shall disclose the following information about each such document withheld: a description of the document withheld with as much specificity as is practicable without disclosing its contents, including:

(a) the general nature of the document;
(b) the identity and position of its author;
(c) the date it was written;
(d) the identity and position of its addressee;
(e) the identities and positions of all persons who were given or have received copies of it and the dates copies were received by them;
(f) the document's present location and the identity and position of its custodian; and
(g) the specific reason or reasons why it has been withheld from production or disclosure.

Courts have often held that an incomplete privilege log can result in waiver:

“General, conclusory assertions” that some documents were privileged, without including specific reference to the opinion letters in the privilege log, were insufficient under Rule 26(b)(5) and resulted in waiver. . .”


Draconian result makes complex privilege issues difficult to resolve.

Contra:
"Finding a waiver for an inadequate log is disfavored."
Email Bodies and Attachments

- Email body may be privileged and attachments not, or visa versa.
- Complications of separating emails and attachments when generally they should be viewed together.
- It’s possible to break (separate) email families, but usually not best as it can cause review and production questions and problems.
- If attachments have been separately produced then withholding in privileged email families may be acceptable.
- Redacting out privileged information in email families can be a good solution.
- May be addressed specifically in an ESI Order / Agreement.
An email body contains multiple emails nested or embedded in text (aka ‘Email String’).

Danger of hiding non-privileged information with minor privileged component. Opposite concern of disclosing privileged communications indirectly or in pieces.

Portions of string may contain different parties, dates, subjects, etc. Often change mid-stream.

Some courts suggest separate logging but that is time-consuming and difficult.

Redaction of privileged portions is often the best solution.
19. Inadvertent Production of Privileged Materials (“Claw-back”). In the event that a producing party claims that it inadvertently failed to designate any production materials or other information as privileged or work-product materials, it shall promptly notify all parties to whom such privileged material was produced or disclosed of the producing party’s intent to assert a claim of privilege or work-product over such materials. Upon such notice, the receiving party, if it intends to challenge the designation of the document(s), shall immediately sequester all copies of the document(s), pending Court resolution of the challenge and shall view and use the document(s) at issue only to the extent necessary to challenge the privilege claim. The document(s) that the receiving party intends to challenge shall only be submitted to the Court under seal for an in camera review. If the receiving party does not intend to challenge the designation of the document(s), the receiving party shall promptly refrain from further copying or distribution of the subject materials, and return or destroy all copies of the subject materials. Where the

20. Receipt of Privileged Information. Nothing in this Order shall relieve counsel for any receiving party of any existing duty or obligation, whether established by case law, rule of court, regulation or other source, to return, and not to review, any privileged or work-product materials without being requested by the producing party to do so. Rather, in the event a receiving party becomes aware that it is in possession of what appears to be an inadvertently produced privileged document, then counsel for the receiving party shall immediately: (i) cease any further review of that document; and (ii) notify the producing party of the apparent inadvertent production, requesting whether the producing party intended for the document to be produced. In the event the producing party confirms the inadvertent production of the privileged document, the receiving party shall promptly return or destroy all copies of the inadvertantly produced privileged document in its possession and take reasonable steps to retrieve all copies of the inadvertently produced privileged documents distributed to other counsel or non-parties.
Proper Use of Search to Protect Privilege

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- Anticipate the need to explain and substantiate search and retrieval methodology, including reasons for the specific choice of search and retrieval methods, the credentials of those who helped design the strategy and searches that were conducted, and the overall process.

- Establish quality control measures for assessing the reliability and accuracy of results.

- Provide evidence that search results were tested and verified, including through statistically valid sampling techniques.

See: Sedona Conference "Commentary on Protection of Privileged ESI" (11/2014) for requirements for search methodology.
Solutions - Easily View Multiple Doc Versions

- **Hits** - Highlighted from search
- **Original** - Native if available
- **HTML** - Extracted text from Native
- **Page** - One page at a time
- **PDF** - Viewing & access
- **Text** - OCR of images
- **Redacted** - Confidentiality
- **Translated** - For foreign
- **Annotated** - For depositions
Protecting Privilege

Solutions - Search Options

Search Requirements

Basics
- Accurate
- Fully indexed
- Easy to Use

Better
- Many search options
- Concept
- Fuzzy & stemming
- Boolean
- Keyword highlighting

Best
- Very fast (returns in seconds on large cases)
- Dual indexing of natives/paginated
- Translations integrated

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testimony 2 days ago, a number of our witnesses today who are members of the corporate leadership team at Enron who must bear the greatest weight for its collapse. Four of the witnesses here today will appear only briefly. Mr. Fastow, Kopper, Causey and Buy will

the workings of these entities and associated schemes, such as Chewco, LJM1, LJM2, the Raptor transactions, and JEDI, be come clearer, they also become more disturbing. In Dean Powers’ words, “What we have found is nothing short of appalling.” Mr. Fastow,
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Solutions - Workflow Options for Coding

Coding in Doc Viewer
- Code 1 Doc at time
- See Email Families
- Auto-code families

Mass Coding
- Code Many at Once
- Multi-Doc Edit
- From Search/Filters

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With a Dual-Index approach, the search engine indexes both text extracted from Native files (email, attachments, spreadsheets, etc.) and imaged file OCR text (TIFF, JPG or PDF).

Most comprehensive approach minimizes potential for lost and unsearchable data, and finds more privileged documents.

Benefits of Dual Index Approach

<table>
<thead>
<tr>
<th>Index Method</th>
<th>Captures Embedded Text</th>
<th>Captures Text Excluded From Print</th>
<th>Captures Hidden Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>Imaged/OCR</td>
<td>Yes</td>
<td>No</td>
<td>No</td>
</tr>
<tr>
<td>Native Extraction</td>
<td>No</td>
<td>Yes</td>
<td>Yes</td>
</tr>
<tr>
<td>Dual Index</td>
<td>Yes</td>
<td>Yes</td>
<td>Yes</td>
</tr>
</tbody>
</table>
Privilege Log Auto-Creation
-Metadata extracted from natives
-Email date/time, sender, receiver, subject
-Privilege and Work Product coding used
-Privilege log automatically generated for review
New York state rule (Rule 11-b) specifically addresses email chains and requires single extended logging and may be influential elsewhere.

“[E]ach uninterrupted e-mail chain shall constitute a single entry” which is required to include in the log:
- An indication that the e-mails “represent an uninterrupted dialogue”
- Beginning and ending dates and times of the dialogue
- The number of emails within the dialogue
- The names of all authors and recipients
- Information sufficient to identify each person such as name of employer, job title, and role in the case to allow for a considered assessment of the privilege claim.

22 NYCRR §202.70(g)

http://www.nycourts.gov/rules/trialcourts/202.shtml#70

Implement with a 502(d) Order or Agreement in Federal Court
Protecting Privilege

Solutions - Categorical Designations

Practice of separating privileged documents into categories and not separately logging some that are clearly privileged.

- Comments to the FRCP 26 (1993) refer to categorical logging (document-by-document logging “may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories”).

- Rule in NY State matters
  Memorandum from the New York State Bar Association Commercial and Federal Litigation Section to the Office of Court Administration (May 14, 2014)

- Recommended by Sedona Conference (2015)
  “In lieu of logging at least some portion of the privileged documents, parties would identify categories for privileged documents, provide sufficient information about the privilege claim as well as the general subject matter of the category and then agree or not agree that such categories should be formally logged.”
Columns (Fields)

- Date Range
- Document Type
- Sender(s)/Recipient(s)/Copyee(s)
- Category Description
- Privilege Justification
- Total Documents Withheld

Examples of Categories

- Communications with outside counsel regarding the matter
- Communications with inside counsel regarding the matter, requesting or reflecting legal advice regarding the matter
- Work-product communications between non-lawyers containing information prepared by or on behalf of an attorney in preparation of litigation (work product)
- Communications with counsel containing information prepared in anticipation of litigation regarding pending litigation
## Protecting Privilege

### Solutions - Categorical Designations

<table>
<thead>
<tr>
<th>Category No.</th>
<th>Date Range</th>
<th>Type</th>
<th>Sender(s)/Recipient(s)/Copyee(s)</th>
<th>Category Description</th>
<th>Privilege Justification</th>
<th>Documents Withheld (Total Documents:)</th>
<th>Documents Withheld, Including Families</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>3/11/2012 - 6/30/2012</td>
<td>Email, PDF</td>
<td><strong>Attorneys:</strong> K. Currie, Esq. S. Salem, Esq. E. Mendola, Esq. J. Driscoll, Esq. T. Duxbury K. Currie, Esq.</td>
<td>Communications with outside counsel providing, requesting or reflecting legal advice regarding easement and operating agreement negotiations with Heights Building Ltd.</td>
<td>Attorney-Client Privilege; Attorney Work Product</td>
<td>325</td>
<td>415</td>
</tr>
</tbody>
</table>

*Source: New York City Bar, Committee on State Courts of Superior Jurisdiction, Guidance and a Model for Categorical Privilege Logs (2014)*
Solutions - Near Duplicate Detection

What is It?

- Near Duplicate Detection, or ‘NearDupe’, technology automatically recognizes similar documents within an eDiscovery document collection.
- Examples: Separately scanned documents; multiple versions of a Word document that are slightly different due to minor edits, reformatting, etc.; an original document and one with handwritten notes on it; emails continue a conversational ‘chain’ or ‘thread’.
Protecting Privilege

Solutions - Near Duplicate Detection

Example
Similar versions of a Privileged Document are shown in the Document Viewer

Benefits
- Follow the trail from one privileged document to others
- Identify privileged documents from that might otherwise be missed
### Benefit

Find privileged documents with text similarity that can be easily missed otherwise.

### Example

Linear review found privileged documents found 9 out 10 times, but one missed.
Protecting Privilege

Solutions - Watching Out For Redaction Traps

- Privileged and sensitive information may be redacted prior to production.
- If native docs are produced, the original natives should be withheld as they can’t be directly redacted.
- Redaction is done on TIFF, other imaged, or PDF converted versions. For TIFFs, text must be re-OCRred. PDFs must have text layer re-OCRred.
- Container files (e.g., MSG, ZIP) including redacted data should be withheld.
- Dual-Indexing search can help catch.
- Build in time for QC procedures.
Communicate with Opposing Counsel Early and Document Efforts --Rule 26 Meet & confer subject

Negotiate a FRE 502/Rule 26 Clawback --Avoid inadvertent waiver

Make Use of a Modern e-Discovery Review Tool --Quality search, fast, dual-indexing, auto-privilege logging, redaction, privilege logic

Determine if categorical logging can be done, include in 502 order --Get specific agreement or order to avoid waiver risk

Deliver log contemporaneous with production --If cannot at least do before depos to avoid prejudice to opposition

Consider redaction of email strings and attachments rather than wholesale withholding --Maintain a separate ‘Redacted for Privilege’ to supplement privilege log

Allow extra time for Production QC --Particularly check redactions, natives

Negotiate specific provisions in ESI agreements/orders if possible

Consider using NearDupe technology as a safeguard, double-check
Thank You For Attending

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- MP3 podcast
- Webinar slide-deck

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Please contact us with any questions:

Speaker
Gene Albert  
512-686-3460  
gene@lexbe.com  

Moderator
Christian Detrude  
800-401-7809 x55  
cdetrude@lexbe.com
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