CONDUCTING A PRIVILEGE AND CONFIDENTIALITY REVIEW DURING E-DISCOVERY[1]

Marie-Andrée Vermette
WeirFoulds LLP

PART I -- PRIVILEGE REVIEW

In the United States, the cost of conducting a privilege review is said to be the greatest of all the costs associated with electronic discovery. In addition to the fact that no technology can make a privilege decision, this has been explained as follows:

> The tremendous cost of privilege screening is a function of the volume of electronically stored information that may need to be screened, but also the nature of that information, particularly email. Email is informal in nature and tends to be circulated widely, creating many copies and versions of the same message with different senders and recipients. In addition, email messages tend to be strung together in "threads," making it difficult to parse out the privileged messages from the non-privileged ones. Perhaps the most significant contributor to the cost of privilege screening, however, is fear. In many jurisdictions, the inadvertent production of a document over which a privilege objection should have been raised serves to waive that privilege as applied to that document, or possibly over that category of documents or then subject matter of the document. Even if the jurisdiction in which the litigation is taking place does not recognize this "privilege waiver" doctrine, there is fear that the inadvertent production of a privileged document in one litigation may serve as a waiver in other jurisdictions in which the party has litigation. This uncertainty results in extremely cautious behavior on the part of counsel, which drives costs up.[2]

In order to reduce the costs of reviewing electronic documents for privilege before production, practitioners in the United States started entering into non-waiver agreements to better manage the production process and contain the potential damage caused by error. Further, guidelines were developed on the issue of how to protect privileged information, and new *Federal Rules of Civil Procedure* were adopted, as well as a new *Federal Rule of Evidence*.[3]

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[1] This paper will be part of a chapter of a pending book on E-Discovery published by Canada Law Book.
[2] K.J. Withers, "Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure" (2006) 4 Nw. J. Tech. & Intell. Prop. 171 at p. 185. See also K.C. James, "Comment: Electronic Discovery: Substantially Increasing the Risk of Inadvertent Disclosure and the Costs of Privilege Review – Do the Proposed Amendments to the Federal Rules of Civil Procedure Help?" (2006) 52 Loy. L. Rev. 839 at pp. 848-849.
[3] Withers, *ibid.* at p. 201.

The issue of privilege review in Canada has not received the same level of attention as in the United States. This is in large part due to the fact that, as discussed further below, the law regarding waiver of privilege has developed differently in Canada, which should be kept in mind when referring to U.S. guidelines, rules and case law on the issue. Nevertheless, Canadian guidelines on e-discovery do address the issue of privilege review in a manner which is similar to their U.S. counterparts. Further, there appears to be increasing interest in non-waiver agreements and orders in Canada.[4]

A. Applicable Principles and Guidelines

Principle 12 of the *Ontario Guidelines* states that, "[w]here appropriate during the discovery process, parties should agree to measures to protect privileges and other objections to production of electronic documents."[5] The Commentary that accompanies Principle 12 does not shed any light as to the "measures to protect privileges" that parties should agree to, but it clearly contemplates a review for privilege, even in cases involving a large volume of electronic documents.[6] It provides:

> E-discovery does, in some circumstances, involve a heightened or special risk of inadvertent or unintended disclosure of privileged information. Examples cited in the literature and anecdotally include:
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> - production of large volumes of electronic documents, for electronic searching, such as a computer hard-drive or back-up tape; and
> - an Anton Pillar injunction, search warrant, or other order for immediate production of documents to an adverse party, without prior review for privilege.
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> Again, however, as these examples suggest, the problems of inadvertent or unintended disclosure of privileged information are not necessarily different in kind for e-discovery as opposed to production of hard copies. Rather, the risk of occurrence may be greater in an e-discovery context, simply due to the volume of information involved, or to the difficulty and potential delay in identifying the privileged subject matter (where for example it takes the form of privileged meta-data or attachments associated with an otherwise non-privileged document.) That

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[4] *The Sedona Canada Principles: Addressing Electronic Discovery*, January 2008 (Sedona, Arizona: The Sedona Conference, 2008), at p. 33, available at www.thesedonaconference.org.

[5] *Guidelines for the Discovery of Electronic Documents in Ontario*, at p. 16, available at http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf.

[6] *Ibid.* See also *ibid.* at p. 2.

> increased risk is significant, because the consequences of inadvertent or unintended disclosure are serious, potentially for both parties, including disqualification of counsel.
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> Counsel should discuss how to protect privileged documents at the outset of litigation.
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> Counsel should also recognize that, given a large volume of electronic documents, review for privilege will take time. Counsel should agree on measures to prioritize review, and streamline production of non-privileged material, without loss of privilege.
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> Special issues may arise with any request to inspect hardware media such as computer hard drives. Parties should consider how to guard against any release of proprietary, confidential information and protected personal data if such media are to be inspected.[7]

The wording of Principle 12 of the *Ontario Guidelines* is similar to the wording of Principle 10 of the *Sedona Principles*, which also recommends the adoption of procedures to protect privileges and objections in connection with the production of electronic documents.[8] Unlike the *Ontario Guidelines*, however, the *Sedona Principles* specifically discuss certain measures that have been adopted to protect privileges, including the use of special masters and court-appointed experts, and two types of non-waiver agreements, i.e. "clawback" and "quick peek" agreements.[9]

Clawback and quick peek agreements are examples of non-waiver agreements that were developed in the United States. Although they are sometimes referred to interchangeably, they are two different concepts. Under a "clawback" agreement, parties agree that: (1) production without intent to waive privilege or protection should not be a waiver so long as the producing party identifies the documents mistakenly produced in a timely manner after production; (2) the documents should be returned by the receiving party under those

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[7] *Ibid.* at p. 16.

[8] *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 2nd ed., June 2007 (Sedona, Arizona: The Sedona Conference, 2007), at p. 51, available at www.thesedonaconference.org. Principle 10 of the *Sedona Principles* reads: "A responding party should follow reasonable procedures to protect privileges and objections in connection with the production of electronically stored information." It is important to note that the comments contained in the *Sedona Principles* with respect to non-waiver orders precede the adoption of the new Rule 502 of the *Federal Rules of Evidence* (discussed below), and that some of these comments would likely change in light of the new Rule.

[9] *Ibid.* at pp. 51-55. For an example of a court-appointed "reviewer", see *Flagg v. City of Detroit*, 2008 U.S. Dist. LEXIS 21814 (E.D. Mich. 2008), where the Court appointed two Magistrate Judges to conduct a review of text messages.

circumstances; and (3) if there is a disagreement, the documents will be placed on a privilege log for review by the court at an appropriate time.[10]

Under a "quick peek" agreement, the parties agree that the producing party will provide certain requested materials for initial examination before being reviewed for privilege and confidentiality, but without waiving any privilege or protection. The requesting party then designates the documents it wishes to have actually produced, and the producing party responds in the usual course, screening only those documents actually requested for formal production and asserting any privilege claims with respect to this set of documents.[11]

Comment 10.a of the *Sedona Principles* states that parties should consider entering into agreements outlining the procedures to be followed to protect against any waiver of privileges or work product protection due to the inadvertent production of documents and data. It further states that such agreements may include clawback arrangements which allow the producing party to "claw back" or "undo" the production. The *Sedona Principles* recommend that counsel discuss the need for a non-waiver agreement at the outset of litigation and that they approach the court for entry of an appropriate non-waiver order, which should provide: (a) that the inadvertent disclosure of a privileged document does not constitute a waiver of privilege; (b) that the privileged document will be returned, or that there will be a certification that the privileged document has been deleted; and (c) that any notes or copies will be destroyed or deleted. Comment 10.a notes, however, that the validity and impact of non-waiver agreements as to non-parties may vary greatly among jurisdictions, and so may counsel's ethical obligations.[12]

Comment 10.d of the *Sedona Principles* addresses the issue of quick peek agreements. It states that a quick peek procedure or order should not be lightly entered, and should have the consent of the producing party. It further states that while a quick peek

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[10] *Sedona Principles*, *ibid.* at p. 51; *Report of the Advisory Committee on Civil Rules*, July 2005, available at www.uscourts.gov/rules/supct1105/Excerpt_CV_Report.pdf, at p. 27; Withers, *supra*, footnote 2, at pp. 201-202; *Manual for Complex Litigation*, 4th ed. (Federal Judicial Center, 2004), § 22.62, available at http://www.fjc.gov/public/pdf.nsf/lookup/mcl4.pdf/$file/mcl4.pdf.

[11] *Sedona Principles*, *ibid.* at p. 54; *Report of the Advisory Committee on Civil rules*, *ibid.*; *Manual for Complex Litigation*, *ibid.* at §§ 22.62-22.63.

[12] *Sedona Principles*, *ibid.* at p. 51. See also the model order found in the *Manual for Complex Litigation*, *ibid.* at § 22.76.

procedure has the advantage of reducing the costs of review for privilege and confidentiality prior to production, one should carefully consider the potential risks and problems associated with quick peek procedures before agreeing to use such a procedure. The "potential risks and problems" identified in the *Sedona Principles* are the following:

> (1) the voluntary production of privileged and confidential documents to one's adversary, even in a restricted setting, is inconsistent with tenets of privilege law that require the producing party to guard meticulously against the loss of secrecy for such documents;
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> (2) there is no effective way to extend the scope of the order to restrict non-parties from seeking the production of privileged materials that have been produced under a quick peek order;
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> (3) counsel has an ethical duty to guard his or her client's confidences and secrets zealously;
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> (4) the disclosure of privileged or protected documents to the opposing party can adversely affect the client's interest, despite non-waiver provisions, because "the genie cannot be put back in the lamp"; and
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> (5) there are issues regarding the possible rights of employees and third parties (e.g. privacy) that may be implicated in a voluntary quick peek production.[13]

In light of the foregoing, the *Sedona Principles* conclude that "[e]ven when large volumes of electronic documents are involved, parties are well-advised to search for privileged documents."[14] Despite this warning against quick peek procedures, the *Sedona Principles* do provide suggestions as to the contents of a quick peek order for those very limited circumstances where such an order would be appropriate. According to the *Sedona Principles*, a quick peek order should: (1) state that the court is compelling the manner of production; (2) provide that the production does not result in an express or implied waiver of any privilege or protection for the produced documents or any other documents; (3) order the reviewing party not to discuss the contents of the documents or take any notes during the review process; (4) allow the reviewing party to select those documents that it believes are relevant to the case; and (5) direct that for

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[13] *Sedona Principles, ibid.* at p. 54. See also *Manual for Complex Litigation, ibid.* at §§ 22.62-22.63.
[14] *Sedona Principles, ibid.*

each selected document, the producing party either produce the selected document, place the selected document on a privilege log, or place the selected document on a non-responsive log.[15]

Like Principle 12 of the *Ontario Guidelines*, Principle 9 of the *Sedona Canada Principles* is also inspired from the *Sedona Principles*. It provides:

> During the discovery process parties should agree to or, if necessary, seek judicial direction on measures to protect privileges, privacy, trade secrets and other confidential information relating to the production of electronic documents and data.[16]

However, contrary to the *Ontario Guidelines*, but similar to the *Sedona Principles*, the *Sedona Canada Principles* address the issue of protective measures. Comment 9.a states:

> With the extremely large numbers of electronic documents involved in litigation matters, conducting a "privilege and/or confidentiality review" of the relevant electronic documents can be very costly and time consuming. Parties must employ reasonable good faith efforts to detect and prevent the production of privileged or potentially privileged materials. Good faith efforts will vary from case to case, but could range from a manual page-by-page review for a small data set, to an electronic search for "privileged terms" where the data set is larger. In many cases, a combination of the two is appropriate.
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> Parties should consider entering into an agreement to protect against inadvertent disclosure, while recognizing the limitations in the local forum as well as in other jurisdictions of such an agreement vis à vis courts and third parties. Court approval of the agreement should be obtained. The agreement or order would typically provide that the inadvertent disclosure of a privileged document does not constitute a waiver of privilege. The privileged communication or document should be returned, or an affidavit sworn that the documents have been deleted or otherwise destroyed. The agreement should provide that any notes or copies will be destroyed or deleted and any dispute will be submitted to the court. It is preferable that any such agreement or order be obtained before any production.[17]

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[15] *Ibid.* at p. 55. See also the model order for a quick peek production found in the *Manual for Complex Litigation, supra*, footnote 279, at § 22.77.

[16] *The Sedona Canada Principles: Addressing Electronic Discovery*, January 2008 (Sedona, Arizona: The Sedona Conference, 2008), at p. 32, available at www.thesedonaconference.org.

[17] *Ibid.*

Two measures to protect privilege are also specifically discussed in the *Sedona Canada Principles*: Comment 9.c discusses the use of court-appointed experts, [18] and Comment 9.d refers to a "modified claw-back production".[19] The concept of a "modified claw-back production", which appears to be a mixture of the quick peek and claw-back concepts, is unique to the *Sedona Canada Principles* as it is not found in the *Sedona Principles* or in the other principles or guidelines. Comment 9.d explains what a "modified claw-back production" is:

> Given the expense and time required for pre-production reviews for privilege and confidentiality, there is increasing interest in various methodologies that can reduce the cost and expense, such as production subject to a modified "claw-back" agreement. A modified "claw-back" agreement would allow the parties to forego an initial manual privilege review in favour of an agreement to return inadvertently produced privileged documents. While ethical rules govern the conduct of counsel in situations in which privileged communications are inadvertently received, counsel may cautiously consider entering into claw-back agreements. In order for the claw-back agreement to be enforceable, the court would likely require prior agreement between the parties that the search methodology would remove from the production set those documents that are potentially privileged. If the search methodology is reasonably thorough, the removal may allow the production of privileged documents to be deemed "inadvertent" by the courts, and therefore be returned without the loss of privilege. Parties should exercise caution when relying on claw-back agreements because such agreements may not eliminate counsel's obligation to use reasonable good faith efforts to exclude privileged documents prior to initial disclosure. A claw-back agreement may not be enforceable against a party who is not a signatory to the agreement.
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> There is a growing body of evidence from the Information Science field that the use of technologically based search tools may be more efficient and more accurate than manual searches. Courts should be urged to consider this body of evidence in assessing whether reasonable steps were taken. The searching can be done using keywords or search terms (such as "privileged", the names of internal and external counsel, "lawsuit", etc.).

Two observations must be made with respect to the *Sedona Canada Principles*' suggestion that parties agree to a "modified claw-back production". First, the consent of all

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[18] *Ibid.* at p. 33. For an example of an expert appointed by the court to perform the review of potentially privileged documents, see *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, 2005 CanLII 30317 (Ont. S.C.J.). See also Rule 14.12(3) of Nova Scotia's *Civil Procedure Rules*, available at http://www.courts.ns.ca/rules_revision/revised_rules_feb_08.htm, which provides that a judge who orders a person to provide access to an original source of relevant electronic information may include in the order protective measures, including the appointment of an independent person to exercise the access and the appointment of a lawyer to advise the independent person and supervise access.

[19] *Sedona Canada Principles, ibid.*

parties would be necessary to have such a production because this way to proceed would not, according to Nordheimer J. in *Air Canada v. WestJet Airlines Ltd.*, "lift the normal burden that rests on parties and their counsel to ensure that privileged material is not produced."[20] Second, it is unlikely that the statement in the second paragraph of Comment 9.d that "the use of technologically based search tools may be more efficient and more accurate than manual searches" applies to privilege review. The American authority referred to in support of this statement relates to search and retrieval methods, i.e. data culling, not to the review of the documents identified as a result of the application of the culling techniques. Further, the American article referred to expressly recognizes the importance of performing a manual review of the search results for relevance and privilege.[21]

Another guideline worth mentioning is Standard 32 of the American Bar Association's *Civil Discovery Standards* which deals with privilege and work product concerns attendant to the production of electronic data.[22] This Standard sets forth three methods to decrease the risk of waiver, each of which to be implemented by entry of a stipulated court order. One method is the appointment by the court of a mutually-agreed IT consultant as a special master, referee or other officer of the court to extract and review data. Another method -- very similar to the first one -- is the use of an agreed-upon third-party consultant, but that consultant is not appointed as an officer of the court. The last method is the review of the extracted data pursuant to a quick peek or a claw-back approach. However, Standard 32 cautions that an order implementing the quick peek method may not protect the producing party's ability to maintain privilege or work-product protection as against third parties not subject to the order.

B. New U.S. *Federal Rules of Civil Procedure*

The amendments to the U.S. *Federal Rules of Civil Procedure* that came into force on December 1, 2006 reflect in part the guidelines referred to above and the practice

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[20] *Air Canada v. WestJet Airlines Ltd.* (2006), 267 D.L.R. (4th) 483 (Ont. S.C.J.), at para. 20. For further discussion of this issue see below under the heading "Law regarding the disclosure of privileged information".

[21] J.R. Baron, D.D. Lewis & D.W. Oard, "TREC-2006 Legal Track Overview" at p. 2, available at http://trec.nist.gov/pubs/trec15/t15_proceedings.html. See also K.J. Withers, "Electronically Stored Information: The December 2006 Amendments to the Federal Rules of Civil Procedure" (2006) 4 Nw. J. Tech. & Intell. Prop. 171 at 201.

[22] American Bar Association's *Civil Discovery Standards*, August 2004, available at http://www.abanet.org/litigation/discoverystandards/2004civildiscoverystandards.pdf, at pp. 71-75.

followed by many parties of entering into agreements regarding the assertion of claims of privilege after production. The highlights of the amendments are the following:

- Rule 16(b)(3) provides that the scheduling order to be entered into by the judge may include "any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced"; however, the rule does not provide the court with authority to enter such a case-management order or other order without party agreement;[23] and

- Rule 26(f)(3) states that the parties must confer to develop a proposed discovery plan that indicates the parties' views and proposals concerning, among others, "any issues about claims of privilege or of protection as trial-preparation materials, including -- if the parties agree on a procedure to assert these claims after production -- whether to ask the court to include their agreement in an order".

The Advisory Committee Note under the new Rule 26(f) sets out the reasons underlying the amendments and, among other things, refers to clawback and quick peek agreements:

> Rule 26(f) is also amended to provide that the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach. The Committee has repeatedly been advised about the discovery difficulties that can result from efforts to guard against waiver of privilege and work-product protection. Frequently parties find it necessary to spend large amounts of time reviewing materials requested through discovery to avoid waiving privilege. These efforts are necessary because materials subject to a claim of privilege or protection are often difficult to identify. A failure to withhold even one such item may result in an argument that there has been a waiver of privilege as to all other privileged materials on that subject matter. Efforts to avoid the risk of waiver can impose substantial costs on the party

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[23] Advisory Committee Note to Rule 16(b), at p. 4, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf.

producing the material and the time required for the privilege review can substantially delay access for the party seeking discovery.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends the use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comment, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26(f) conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection – sometimes known as "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26(b)(5)(A). On other occasions, parties enter agreements – sometimes called "clawback agreements" – that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they 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. A case-management or other

order including such agreements may further facilitate the discovery process. [...][24]

In addition, the new Rule 26(b)(5)(B) provides a procedure for a party to assert a claim of privilege or work-product protection after information is produced and, if the claim is contested, to present the matter to the court for resolution. However, Rule 26(b)(5)(B) does not address the substantive question of whether the privilege was waived by the production: it only provides a procedure for presenting and addressing this issue, which must be determined by the court. If the parties have reached an agreement that adopts a procedure different from the one set out in Rule 26(b)(5)(B), the procedure set out in the agreement ordinarily controls.[25] Rule 45(d)(2)(B) contains a similar procedure with respect to information produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material.

Despite their apparent endorsement of clawback and quick peek agreements, the new *Federal Rules of Civil Procedure* must be read in their proper context. As discussed further below, the new *Rules* did not change the substantive law on waiver of privilege. As a result, courts may refuse to include in an order a non-waiver agreement entered into by the parties as described in the *Rules*, and waiver of privilege may still be found to have occurred in cases where the parties have entered into such an agreement. In contrast, the new Rule 502 of the *Federal Rules of Evidence*, which was signed into law by the President on September 19, 2008, did change the substantive law of privilege. This Rule is discussed in the next section.

C. Law Regarding the Disclosure of Privileged Information

(i) In Canada

It is generally accepted in Canada that inadvertent disclosure of privileged information does not automatically waive solicitor-client privilege. To determine whether privilege has been waived, the courts consider the particular circumstances of the case and the following three factors: (1) whether the error was in fact inadvertent and thus excusable; (2) whether an immediate attempt was made to retrieve the documents; and (3) whether preservation of the privilege in the circumstances would cause unfairness to the receiving party. In cases

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[24] Advisory Committee Note to Rule 26, at pp. 23-26, available at http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. See also Advisory Committee Note to Rule 16(b), *ibid.* at pp. 3-4.

[25] Advisory Committee Note to Rule 26, *ibid.* at pp. 18-19.

involving a large number of documents, it is likely that a court would find that the disclosure of privileged information was the result of an inadvertent and excusable error if the court was satisfied that measures had been taken to eliminate to the degree reasonably possible the inadvertent production of privileged documents.[26]

In light of the protection against waiver in cases of inadvertent disclosure in Canadian law, it appears that a non-waiver agreement or order would only be necessary in Canada in cases where parties do not intend to conduct a privilege review or where they intend to conduct a limited one that would not be deemed sufficient to eliminate, to the extent possible, the risk of inadvertent production of privileged documents. The issue of non-waiver orders was discussed by Nordheimer J. in *Air Canada v. WestJet*. In that case, Air Canada had used search terms to search its electronic database for relevant documents, and had then subjected the documents thus identified to an electronic filter intended to flag privileged documents. Air Canada was proposing to produce the resulting electronic documents without any further review for relevance or privilege, except for a sample review of less than 5% of the documents, the purpose of which was to ensure that the electronic search was effective. Nordheimer J. refused to endorse Air Canada's proposed review process because he was of the view that it had, on its face, a very large potential for the disclosure of privileged material. In his opinion, solicitor-client privilege was a very important principle that should not readily be sacrificed to the interests of expediency or economics. Nordheimer J. stated the following with respect to non-waiver orders:

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[26] *The Sedona Canada Principles: Addressing Electronic Discovery*, January 2008 (Sedona, Arizona: The Sedona Conference, 2008), at p. 32, available at www.thesedonaconference.org; Rule 14.06(2) of Nova Scotia's *Civil Procedure Rules*, available at http://www.courts.ns.ca/rules_revision/revised_rules_feb_08.htm; J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999) at p. 767; *Chan v. Dynasty Executive Suites Ltd.*, 2006 CanLII 23950 (Ont. S.C.J.), at paras. 30-31, 39-40; *Air Canada v. WestJet Airlines Ltd.* (2006), 267 D.L.R. (4th) 483 (Ont. S.C.J.), at para. 20; *Dublin v. Montessori Jewish Day School of Toronto*, [2006] O.J. No. 974 (QL) (S.C.J.), at paras. 23-24; *Guelph (City) v. Super Blue Box Recycling Corp.*, [2004] O.J. No. 4468 (QL) (S.C.J.), at para. 81. However, see paras. 33 and 34 of the Supreme Court of Canada's decision in *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] 2 S.C.R. 189 where Binnie J. appears to suggest that the notion of "inadvertence" is almost irrelevant ("Whether through advertence or inadvertence the problem is that solicitor-client information has wound up in the wrong hands.") It is important to note, however, that this comment was made in the context of: (1) a discussion of the remedy to be granted following the disclosure of privileged information, which assumes that the information disclosed was privileged and that there had been no waiver; and (2) an *Anton Piller* order, where the inadvertence was on the part of the receiving party, not the producing party.

> Air Canada also relies on authorities from the United States, chiefly "The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production, July 2005", for its contention that an order addressing the inadvertent production of privileged material ought to be made. [...]
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> In response I would first note that it is not clear whether courts in the United States have held, as have courts in this country, that inadvertent disclosure of a privileged document does not *per se* constitute a waiver of privilege. Nonetheless, given that the state of the law in Canada may not be entirely free from doubt on this point, I do not disagree with the general proposition that courts should consider entering such orders in appropriate circumstances. Before doing so, however, one would hope that there would be a consensus among the parties that such an order is necessary. Failing such a consensus, the court would have to be satisfied that the processes adopted by the parties, by which documents are to be produced, would eliminate to the degree reasonably possible the inadvertent production of privileged documents. Absent being so satisfied, the court ought not to lift the normal burden that rests on parties and their counsel to ensure that privileged material is not produced. I will say that I would not consider a process that relied almost entirely on electronic searches and a less than 5% manual review (or a 40% manual review as counsel for Air Canada said at the hearing had now been done) to be satisfactory for this purpose. Rather, such a process appears to be much closer to what is discussed in commentary 10.d to Sedona Principle #10, as "clawback" or "quick peek" production – a practice that is characterized as "ill-advised" in the same commentary.[27]

Another point to consider in relation to non-waiver agreements is that such agreements typically focus on the issue of waiver of privilege and the protection to be afforded to the producing party against waiver. However, it is important to keep in mind that the consequences of the disclosure of privileged documents are potentially serious for both parties. As referred to in the *Ontario Guidelines*, when a law firm comes into possession of documents belonging to the opposing side that are protected by solicitor-client privilege, it can result in the disqualification of the law firm or in the imposition of another remedy.[28] In fact, prejudice is presumed to flow from an opponent's access to relevant solicitor-client confidences, whether this access was obtained through advertence or inadvertence, and possession of solicitor-client

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[27] *Air Canada v. WestJet Airlines Ltd.*, *ibid.* at paras. 18, 20. It should be noted that Nordheimer J. is referring to the July 2005 version of the *Sedona Principles*, not the most current June 2007 version. In the July 2005 version, no distinction was drawn between clawback and quick peek agreements, but the concept being referred to was the concept of a quick peek agreement.

[28] *Guidelines for the Discovery of Electronic Documents in Ontario*, at p. 16, available at http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf. See also Comment 9.b of *The Sedona Canada Principles*, *supra*, footnote 26, at p. 32.

confidences by the opposing party is said to create a serious risk to the integrity of the administration of justice.[29] The Supreme Court of Canada recently listed a number of factors to be considered in determining whether solicitors should be removed: (1) how the documents came into possession of the party or its counsel; (2) what the party and its counsel did upon recognition that the documents were potentially subject to solicitor-client privilege; (3) the extent of review made of the privileged material; (4) the contents of the solicitor-client communications and the degree to which they are prejudicial; (5) the stage of the litigation; and (6) the potential effectiveness of a firewall or other precautionary steps to avoid mischief.[30] Although the existence of a non-waiver agreement between the parties would be a relevant consideration in this analysis, it does not appear that it would necessarily be determinative with respect to the disqualification issue and, therefore, the disqualification of counsel would still be a possibility in cases where serious prejudice could be established.

Aside from the issue of disqualification, the practical reality of the disclosure of privileged documents is that it creates a difficult situation for the receiving party. Farley J. made the following observations with respect to cases where privileged documents have been inadvertently disclosed:

> I think it fair to observe that cases where privileged documents have been inadvertently disclosed to the other side in a dispute are always fraught with difficulty. Part of that difficulty arises from the fact that the recipient is not expecting the material and therefore is caught off guard even after coming to the appreciation (after some review as there is no light blinking and horn sounding a warning on the "cover" that the contents are privileged, at least in the "usual" situation). After appreciating that the material is or may be privileged, then the recipient is required to do something – namely the right thing. One must keep in mind that this problem is (fortunately) not an everyday one. The completely unexpected has thrust a difficult and complex problem upon someone.[31]

Thus, before entering into a non-waiver agreement, all the risks associated with such an agreement should be considered, especially if the proposed agreement does not provide for a privilege review that is designed to eliminate to the degree reasonably possible the

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[29] *Celanese Canada Inc. v. Murray Demolition Corp.*, *supra*, footnote 26, at paras. 3, 34, 48.
[30] *Ibid.* at para. 59.
[31] *Nova Growth Corp. v. Kepinski*, [2001] O.J. No. 5993 (QL) (S.C.J.), at para. 13.

inadvertent production of privileged documents. Counsel should consult with their clients and obtain their informed written consent before entering into a non-waiver agreement.

(ii) In the United States

Given that the United States is generally ahead of Canada in the area of e-discovery, Canadian courts and Canadian litigants often refer to U.S. guidelines and cases for guidance. As a result, it is necessary to review briefly the law regarding the disclosure of privileged information in the United States so that the applicability of U.S. authorities can be assessed in light of the similarities and the differences in the substantive law of privilege in Canada and the United States.

As stated above, a new Federal Rule of Evidence modifying the federal law of privilege came into force in September 2008. It is important to review the state of the law of privilege at the time it came into force, however, in order to understand this new Rule and the law that remains applicable to proceedings outside the purview of the *Federal Rules of Evidence*.

The following three approaches have been adopted by American courts and tribunals in different jurisdictions for determining whether a waiver of privilege has occurred as a result of an inadvertent disclosure:

1. The privilege can only be waived by the client's intentional and knowing relinquishment. This is the "lenient" approach, which is the minority approach.

2. The privilege is lost if a privileged document is produced. This is the "strict" approach.

3. Five factors are considered to determine whether there has been a waiver of privilege: (a) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (b) the number of inadvertent disclosures; (c) the extent of the disclosures; (d) the promptness of measures taken to rectify the disclosure; and (e) whether the overriding interest of justice would be served by relieving the

party of its error. This is the "middle-ground", "balancing" or "moderate" approach.[32]

Under all three approaches, there is a risk that the inadvertent disclosure of privileged information could result in a waiver of privilege, whether or not the parties have entered into a non-waiver agreement. As explained by one author:

> Any disclosure of privileged information will result in waiver of privilege in a jurisdiction that follows the strict approach. In jurisdictions following the moderate approach, one could argue that inadvertent disclosure constitutes a waiver of privilege, even under the pretense of a clawback or quick-peek agreement, if the precautions taken by the producing party to prevent disclosure are not reasonable. This argument is especially convincing when the parties have entered into a quick-peek agreement since the producing party has not taken any precautions to review the information before disclosing it to the requesting party. Moreover, a party's disclosure of privileged information under either a clawback or quick-peek agreement may be considered voluntary; thus, even in a jurisdiction that follows the lenient approach, disclosure under either of these agreements may constitute waiver of privilege.[33]

The amendments to the *Federal Rules of Civil Procedure* discussed above did not change the state of the law on waiver. Although the new *Rules* recognize the use of non-waiver agreements and provide a default procedure for the assertion and resolution of a claim for privilege or work-product protection after information is produced, they do not address the substantive issue of whether the privilege has been waived as a result of the production. In other words, while the *Federal Rules of Civil Procedure* provide a procedure for presenting and addressing the issue of waiver, the issue of waiver itself must be determined by the court in accordance with the existing law of privilege and waiver. As discussed below, not all courts have approved non-waiver agreements. Thus, the new *Rules* have been said to provide a "false sense of security" to lawyers because a superficial reading could lead counsel to conclude that a

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[32] M.D. Fielding, "You Need To Know This: Bankruptcy and Attorney-Client Privilege in the Electronic Age" (2006) 25-10 A.B.I.J. 1 at 64; K.S. Broun & D.J. Capra, "Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502" (2006) 58 S.C.L.Rev. 211 at pp. 220-224; K.C. James, "Comment: Electronic Discovery: Substantially Increasing the Risk of Inadvertent Disclosure and the Costs of Privilege Review – Do the Proposed Amendments to the Federal Rules of Civil Procedure Help?" (2006) 52 Loy. L. Rev. 839 at pp. 857-859; *Koch Materials Co. v. Shore Slurry Seal, Inc.*, 208 F.R.D. 109 (D.N.J. 2002), at pp. 117-118; L.C. Daniel, "Note: The Dubious Origins and Dangers of Clawback and Quick-Peek Agreements: An Argument Against their Codifications in the Federal Rules of Civil Procedure" (2005) 47 Wm. and Mary L. Rev. 663 at pp. 674-680; *Hopson v. The Mayor and City Council of Baltimore*, 232 F.R.D. 228 (D. Md. 2005), at pp. 235-236.

[33] James, *ibid.* at p. 859. See also *Hopson v. The Mayor and City Council of Baltimore*, *ibid.* at p. 244.

reasonable pre-production privilege review is not required as long as the parties have entered into a non-waiver agreement.[34] One judge expressed the following criticism:

> Thus, after nearly ten years of extensive study of the discovery rules by the Advisory Committee on the Federal Rules of Civil Procedure, the procedures proposed to address the burdens of privilege review associated with production of electronically stored information surely would ameliorate them, but at the price of risking waiver or forfeiture of privilege/work product protection, depending on the substantive law in which litigation was pending. Absent a definitive ruling on the waiver issue, no prudent party would agree to follow the procedures recommended in the proposed rule. And, as already noted, parties, with the apparent encouragement of courts, have been using these procedures even in advance of the adoption of rule changes authorizing them.[35]

In an opinion that has been widely referred to, the same judge also stated in *Hopson v. The Mayor and City Council of Baltimore* that parties would be unwise to assume that negotiated non-waiver agreements would excuse them from undertaking any pre-production privilege review or from doing less of a pre-production privilege review than is reasonable under the circumstances. The better approach, in his view, was to assume that complete pre-production privilege review was required, unless the parties could demonstrate with particularity that it would be unduly burdensome or expensive to do so.[36] Grimm J. held that parties to non-waiver agreements could only avoid subsequent claims by third parties that the disclosure of privileged information waived privilege if the following conditions were met: (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 (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 information 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. Grimm J. stated that the court should independently satisfy itself that:

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[34] James, *ibid.* at pp. 856-857; *Hopson v. The Mayor and City Council of Baltimore, ibid.*
[35] *Hopson v. The Mayor and City Council of Baltimore, ibid.* at pp. 233-234.
[36] *Ibid.* at p. 244.

(i) full privilege review cannot reasonably be accomplished within the amount of time allowed for the production; and (ii) the procedures agreed upon by counsel regarding privilege review are in fact reasonable and that more could not be accomplished within the production period given the scope of production. According to Grimm J., this approach provides a way to meet the goals of the new *Federal Rules of Civil Procedure* on the issue of preservation of privilege claims while respecting the existing substantive privilege law, which the *Rules* cannot trump.[37]

In order to deal with the problems related to the issue of waiver, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States recommended that Congress adopt a new Federal Rule of Evidence providing certain protections against waiver of privilege or work product. As stated above, the new Rule 502 was signed into law by the President on September 19, 2008. Rule 502 includes the following protections:

- it provides that an inadvertent disclosure of privileged or protected information made at the federal level does not operate as a waiver if the holder: (a) took reasonable steps to prevent such a disclosure; and (b) employed reasonably prompt measures to retrieve the mistakenly disclosed information. Thus, Rule 502 adopts the "middle ground" approach to waiver of privilege;

- Rule 502 also provides that if a waiver is found, it applies only to the information disclosed, unless a broader waiver, i.e. a subject matter waiver, is made necessary by the privilege holder's intentional and misleading use of privileged or protected information; and

- it states that if a federal court enters an order providing that a disclosure of privileged or protected information does not constitute a waiver, that order is enforceable against all persons in any federal or state proceeding. Rule 502 also clarifies that agreements entered into by parties that provide for mutual protection

[37] *Ibid.* at pp. 242, 244.

against waiver are not binding on non-parties unless they are incorporated into a court order.[38]

The problems that Rule 502 was meant to address were described as follows in the Report of the Committee on Rules of Practice and Procedure to Congress:

> In drafting the proposed Rule, the Advisory Committee concluded that the current law on waiver of privilege and work product is responsible in large part for the rising costs of discovery, especially discovery of electronic information. In complex litigation the lawyers spend significant amounts of time and effort to preserve the privilege and work product. The reason is that if a protected document is produced, there is a risk that a court will find a subject matter waiver that will apply not only to the instant case and document but to other cases and documents as well. Moreover, an enormous amount of expense is put into document production in order to protect against inadvertent disclosure of privileged information, because the producing party risks a ruling that even a mistaken disclosure can result in a subject matter waiver. Advisory Committee members also expressed the view that the fear of waiver leads to extravagant claims of privilege. Members concluded that if there were a way to produce documents in discovery without risking subject matter waiver, the discovery process could be made much less expensive. The Advisory Committee noted that the existing law on the effect of inadvertent disclosures and on the scope of waiver is far from consistent or certain. It also noted that agreements between parties with regard to the effect of disclosure on privilege are common, but are unlikely to decrease the costs of discovery due to the ineffectiveness of such agreements as to persons not party to them.[39]

Under Rule 502, unless the court (presumably at the request of the parties) agrees to issue an order endorsing a quick peek production or another type of production involving a less than complete privilege review, the parties would still have the obligation to take reasonable steps to prevent disclosure in order to avoid a finding of waiver of privilege. Thus, the extent to which Rule 502 will achieve its objective, i.e. to reduce the time spent on and the costs associated with conducting a privilege review, remains to be seen, especially since it is difficult to predict what a court would find "reasonable steps" to be in a particular case. It also remains to be seen whether, under Rule 502, courts would agree to "bless" the production procedures agreed upon by counsel with a court order without inquiring into their reasonableness or whether, as set

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[38] *Report to Congress Transmitting Evidence Rule 502*, September 26, 2007, at pp. 3-4, available at http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf. See also text of Rule 502 and Explanatory Note also included in the *Report to Congress Transmitting Evidence Rule 502*.

[39] *Ibid.* at p. 3.

out in the *Hopson* case, courts would want to independently satisfy themselves that the procedures agreed upon by counsel are reasonable and that, for instance, a fuller privilege review could not be accomplished in the circumstances.

It is important to remember that the *Federal Rules of Evidence* apply to federal proceedings and that, as a result, Rule 502 would not apply to a disclosure made in a state proceeding when the disclosed information is subsequently offered or used in another state proceeding.[40] However, the approach to the issue of waiver of privilege reflected in the *Guidelines for State Trial Courts Regarding Discovery Of Electronically-Stored Information* is similar to the approach put forward in Rule 502. The *Guidelines* also adopt the middle-ground approach and provide that the following factors should be considered in determining whether a party has waived solicitor-client privilege because of an inadvertent disclosure of a privileged document: (a) the total volume of information produced by the responding party; (b) the amount of privileged information disclosed; (c) the reasonableness of the precautions taken to prevent inadvertent disclosure of privileged information; (d) the promptness of the actions taken to notify the receiving party and otherwise remedy the error; and (e) the reasonable expectations and agreements of counsel.[41] However, the *Guidelines* are just guidelines and do not provide, like Rule 502, that a non-waiver order is enforceable against all persons in other proceedings. It will be interesting to see whether states will adopt rules of evidence similar to Rule 502.

The foregoing calls the effectiveness of non-waiver agreements (and orders) into question, as well as the wisdom of entering into one. Non-waiver agreements are not a meaningful option for every litigant. First, many parties may wish to maintain the confidentiality of the privileged information. Further, as set out in the *Hopson* case, non-waiver agreements may not always be upheld by the courts.[42] Finally, as discussed above, non-waiver agreements may not always shield parties from the risks of waiver because they may not be effective against

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[40] *Ibid.* at p. 5.

[41] Conference of Chief Justices, *Guidelines for State Trial Courts Regarding Discovery Of Electronically-Stored Information* (Approved August 2006), at p. 8, available at http://www.ncsconline.org/WC/Publications/CS_ElDiscCCJGuidelines.pdf (May 27, 2008).

[42] M.R. Arkfeld, *Arkfeld on Electronic Discovery and Evidence*, 2nd ed. (Phoenix: Law Partner Publishing, 2008) at p. 7-110. See, e.g., *Koch Materials Co. v. Shore Slurry Seal, Inc.*, *supra*, footnote 32, at p. 118.

third parties. This final point is particularly relevant to litigants who are frequently sued and have a presence in different jurisdictions.[43]

Non-waiver agreements such as clawback and quick peek agreements are seen by some as being "bandaids that minimize injury rather than a way of avoiding injury in the first place."[44] Again, non-waiver agreements do not eliminate the risk that third parties in some jurisdictions may be able to successfully demand production of the same privileged documents on the ground that they have been previously produced. In addition, and perhaps more importantly, the inadvertent production of privileged documents may provide the opposing party with insight into how its opponent values the dispute in significance or in settlement value, and non-waiver agreements cannot undo this or "claw back" this insight.[45] One author put it this way:

> The vast majority of federal cases settle rather than going to trial. Thus, the key issue regarding inadvertently disclosed materials is not whether they are admissible but rather the impact that the disclosure has on the dynamics of the settlement negotiations. The number one rule in a negotiation is to get as much information as possible. This allows a party to leverage the negotiation and to obtain a more favorable result. When an inadvertent disclosure occurs, the disclosing party has significantly weakened itself by providing key information to the other side. Even if a protective agreement exists among the parties regarding inadvertent disclosure, the damage is often incurable because a party who has received the privileged material generally does not realize its confidential nature until it has been reviewed. And even if the disclosing party obtains a court order to return and/or destroy the privileged material, its contents cannot be erased from the mind of the opposing party. Thus, the bottom line is that an inadvertent disclosure can be costly for the client in terms of the ultimate settlement amount.[46]

Given the state of the law on the issue of inadvertent disclosure of privileged material and the uncertainties associated with non-waiver agreements, many believe that the best strategy for preserving privilege remains reducing the frequency with which parties inadvertently

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[43] K.C. James, "Comment: Electronic Discovery: Substantially Increasing the Risk of Inadvertent Disclosure and the Costs of Privilege Review – Do the Proposed Amendments to the Federal Rules of Civil Procedure Help?" (2006) 52 Loy. L. Rev. 839 at pp. 851-852.

[44] C.J. Jacoby, "Minimize Inadvertent Disclosure of Privileged Materials: Use Traditional and Technological Approaches in Tandem to Significantly Reduce the Risk of Accidentally Disclosing Privileged Documents in Discovery" (2006) 6 E-Discovery Advisor 3, available at http://e-discoveryadvisor.com/doc/18527.

[45] *Ibid.*

[46] M.D. Fielding, "You Need To Know This: Bankruptcy and Attorney-Client Privilege in the Electronic Age" (2006) 25-10 A.B.I.J. 1 at p. 64. See also James, *supra*, footnote 43, at p. 862.

produce privileged information in the first place.[47] It has been suggested that parties should complete a traditional privilege review, but still have the court issue an order that an inadvertent disclosure of a privileged document will not constitute a waiver of privilege.[48]

In light of the foregoing, an issue that will come up in the majority of cases in the United States involving the issue of waiver of privilege is whether reasonable steps were taken to prevent the disclosure of privileged documents. This is a fact-specific inquiry that will depend on the particular circumstances of the case. The following are two examples of cases where this issue was considered.

In *Williams v. Sprint/United Management Co.*, it was found that the defendant's efforts to prevent inadvertent disclosure were reasonable. Such efforts included the review of the documents on the computer screen by attorneys, and the implementation of a document production software to label as "privileged" all privileged documents and to earmark such documents for inclusion within the privilege log.[49] Given these measures, the hundreds of thousands of pages of documents produced by the defendant in the case and other factors, the court held that the inadvertent disclosure of certain privileged documents did not constitute a waiver of privilege.[50]

In contrast, the court in *Hernandez v. Esso Standard Oil Co.* held that the inadvertent disclosure of privileged documents resulted in a waiver of privilege in circumstances where an "errant mouse click" unintentionally merged two files, one containing the documents to be produced and one containing documents not to be produced, including privileged documents. The court was of the view that a quick inspection of the disks to be produced to the plaintiffs would have ensured that only the proper documents had been copied, and that the failure to do so meant that the defendant had not taken adequate precautions to guard against inadvertent disclosure.[51]

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[47] Fielding, *ibid.*
[48] Arkfeld, *supra*, footnote 42, at p. 7-98.
[49] 2006 WL 1867478 (D.Kan. 2006), at p. 9.
[50] *Ibid.* at pp. 9-10.
[51] 2006 U.S. Dist. LEXIS 47738 (D. P.R. 2006), at p. 12-17.

One practice that can be part of the reasonable measures adopted to prevent the disclosure of privileged documents is the use of search technology to assist in isolating documents that require further privilege analysis.

D. Use of search terms

As suggested in the *Sedona Canada Principles*, using search terms may help in locating privileged documents.[52] However, developing a list of search terms for this purpose may be challenging. The set of search terms should be derived from terms, names and e-mail addresses that might indicate privileged status. Further, efforts should be made to search for advice rendered by a lawyer without reference to the lawyer's name. For instance, it is not uncommon to find expressions such as "our counsel advised us" or "based on legal advice" in documents written by executives or managers when issuing instructions.[53]

In order to develop an effective list of search terms and an effective privilege review process, it might help to take the following steps.

First, a list of lawyers, paralegals and outside law firms who may have worked with the party should be developed. It is important that the list of lawyer contact information be comprehensive. For example, the list should include all the e-mail addresses that could have potentially been used by the lawyers, such as private e-mail addresses (e.g. yahoo or hotmail) used by lawyers from home.[54]

Second, a list of individuals who were authorized to communicate with lawyers or who might have worked with lawyers on the matter at issue should also be prepared. These two lists may make it possible to designate large portions of the document collection as being highly unlikely to contain privileged information, although it should be kept in mind that documents are

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[52] *The Sedona Canada Principles: Addressing Electronic Discovery*, January 2008 (Sedona, Arizona: The Sedona Conference, 2008), at pp. 31, 32, available at www.thesedonaconference.org.

[53] L.J. Thorpe, "Defensible Filtering of Electronic Documents", 2005, at pp. 2, 3, 4, available at http://www.dminfo.com/whitepapers.html.

[54] C.J. Jacoby, "Minimize Inadvertent Disclosure of Privileged Materials: Use Traditional and Technological Approaches in Tandem to Significantly Reduce the Risk of Accidentally Disclosing Privileged Documents in Discovery" (2006) 6 E-Discovery Advisor 3, available at http://e-discoveryadvisor.com/doc/18527.

easily forwarded or copied to unexpected locations. This type of analysis can assist in determining review assignments and priorities.[55]

Third, one should try to identify the times and ways in which legal advice or work product have been communicated. For instance, documents relating to management meetings where legal exposure or advice could have been discussed should be carefully reviewed for privilege, even though the documents do not contain obvious indicators like the words "lawyers" or "lawsuit".[56]

Fourth, a search should be performed using words or combination of words that suggest a privileged communication. However, such a search has its limitations:

> While this process sounds like it should capture the vast majority of privileged communications, searching for obvious terms like "attorney," "litigation," "lawsuit," and "privilege" are simultaneously over- and under-inclusive. As more than one document review team has discovered, routine messages from eBay contain the word "fraud" in their standard disclaimer language. Including this term in an automated privilege search can misidentify thousands of harvested e-mail messages as potentially privileged.
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> More significantly (and more difficult to resolve), privileged communications may not use common trigger words to discuss important issues. A specific matter may be referred to by the names of fact witnesses involved, by an insurance claim number, or any number of descriptive words that have specific meaning to the writer and intended recipient of a document. A crucial part of successfully using keyword search is to identify the vocabulary that an organization is using to describe legal matters. Often, you can only partially derive such information from the documents themselves; interviews must fill in the gaps. In addition, each time you identify a new search term, it may be necessary to re-screen the entire collection – including materials previously reviewed – for this word. Computers have made it much easier to circle back and close such loopholes, but it remains an additional effort you can easily overlook in the frenzy of a time-sensitive document review.[57]

If search terms are used to identify privileged documents, it is crucial to document the process followed and to be prepared to show its reasonableness in court. This is illustrated by *Victor Stanley, Inc. v. Creative Pipe, Inc.*[58] where Grimm J. found that the defendants had

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[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] 250 F.R.D. 251 (D. Md. 2008).

failed to prove that their conduct was reasonable for purposes of assessing whether they had waived solicitor-client privileged by producing 165 allegedly privileged documents to the plaintiff. Grimm J. stated the following:

> Use of search and information retrieval methodology, for the purpose of identifying and withholding privileged or work-product protected information from production, requires the utmost care in selecting methodology that is appropriate for the task because the consequence of failing to do so, as in this case, may be the disclosure of privileged/protected information to an adverse party, resulting in a determination by the court that the privilege/protection has been waived. Selection of the appropriate search and information retrieval technique requires careful advance planning by persons qualified to design effective search methodology. The implementation of the methodology selected should be tested for quality assurance; and the party selecting the methodology must be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented. [...]
>
> In this case, the Defendants have failed to demonstrate that the keyword search they performed on the text-searchable ESI was reasonable. Defendants neither identified the keywords selected nor the qualifications of the persons who selected them to design a proper search; they failed to demonstrate that there was quality-assurance testing; and when their production was challenged by the Plaintiff, they failed to carry their burden of explaining what they had done and why it was sufficient.[59]

It is clear from the foregoing that search technology can only supplement, rather than replace, human analysis. It remains essential to use traditional privilege-identification strategies such as interviews and the review of organizational charts. Further, most commentators agree that it is still necessary to perform a manual review.[60] However, using traditional and technological approaches in tandem will help identify many privileged documents

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[59] *Ibid.* at p. 262.

[60] See, however, the Explanatory Note to Rule 502(b) of the *Federal Rules of Evidence* which states the following on the issue of waiver: "Depending on the circumstances, a party that uses advanced analytical software applications and linguistic tools in screening for privilege and work product may be found to have taken 'reasonable steps' to prevent inadvertent disclosure. The implementation of an efficient system of records management before litigation may also be relevant": *Report to Congress Transmitting Evidence Rule 502*, September 26, 2007, available at http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

in a fraction of the time that a traditional manual review would require, and will significantly reduce the risk of inadvertent disclosure of privileged information.[61]

E. Redaction

Redacting a document is the practice of removing information from it before it is produced. The most common bases for redaction are the protection of privileged information, and the irrelevant nature of the information. While the process of redacting a paper record is easy – it usually involves using a black marker, white-out or white redaction tape and then producing a photocopy of the redacted document, the redaction of electronic documents raises more complex issues and demands different methods to ensure the removal of privileged and other information from producible documents.[62]

U.S. officials in Iraq learned about the importance of properly redacting electronic documents the hard way. In 2005, they issued a classified report in PDF format to journalists. They believed that they had redacted out classified names, dates and facts. However, by simply opening the document in Adobe's free Acrobat Reader, hitting the "select text" button, copying and then pasting the text into a word processor, any reader was able to see the classified information found beneath the redactions. One journalist used this technique and uncovered the classified information, which ultimately was posted on the internet.[63]

Thus, simply obscuring text on the image layer of a document, such as a document file in PDF format, does nothing to conceal the same text in the file's data layer. Any method employed to redact electronic documents must delete the redacted data from all source data, including: (1) MIME/UU/BASE64 encoded attachments (to ensure that attachments which contain privileged information cannot be decoded if the text of the e-mail to which they were

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[61] Jacoby, *supra*, footnote 54; K.J. Withers, "Electronic Discovery Disputes: Decisional Guidance" (2004) 3:2 Civil Action 4 at p. 5; L.H. Rosenthal, "Privilege Review", December 3, 2006, available at http://thepocketpart.org/2006/12/3/rosenthal.html; K.C. James, "Comment: Electronic Discovery: Substantially Increasing the Risk of Inadvertent Disclosure and the Costs of Privilege Review – Do the Proposed Amendments to the Federal Rules of Civil Procedure Help?" (2006) 52 Loy. L. Rev. 839 at pp. 852-853; M.R. Arkfeld, *Arkfeld on Electronic Discovery and Evidence*, 2nd ed. (Phoenix: Law Partner Publishing, 2008) at p. 6-26.

[62] C. Ball, "Discovery of E-Mail: The Path to Production", in C. Ball, *Five Articles on Electronic Data Discovery*, 2006, at p. 10, available at http://www.craigball.com/Five%20on%20EDD-August%202006.pdf; K. Nimsger, "Redaction Tips for Electronic Documents" (July 2005) Digital Discovery & e-Evidence 9 at p. 9, available at http://www.krollontrack.com/publications/EDDDNimsger.pdf.

[63] Nimsger, *ibid.*

attached is produced); (2) data layer of document image files such as TIFF and PDF; and (3) all copied and forwarded counterparts, including blind copied transmittals.[64]

Most review applications developed by service providers include features that allow for the redaction of the images that will ultimately be produced to opposing counsel. Although some limited redaction features have recently become available for native word processing files, this is not the norm today. It is crucial to understand how the service provider handles redacted documents to ensure that a reviewer will not be able to see the text behind the redactions, and that redacted text is properly removed from all sources, including image, text and metadata files, if applicable, prior to production.[65]

PART II -- CONFIDENTIALITY REVIEW

Trade secrets and other confidential information are often commingled with other business information, and protecting such information from disclosure during electronic discovery may present problems. Since there is no absolute privilege for confidential information or trade secrets in litigation, the protection of this information is often achieved through a confidentiality agreement or order. The courts have discretion in how to fashion an order limiting access to confidential information.[66]

Most of the guidelines or principles pertaining to the protection of privileged documents also refer to confidential documents. Principle 9 of the *Sedona Canada Principle* expressly refer to "measures to protect privileges, privacy, trade secrets and other confidential information". Comments 9.f and 9.g deal with confidentiality and privacy issues:

> **Comment 9.f. Protection of Confidential Information**
>
> Confidentiality concerns can arise when there is sensitive or proprietary business information that may be disclosed through electronic discovery. The confidentiality concerns are greatest where an opposing party seeks access to the other party's computer systems for the purpose of conducting searches or analysis. This should not be permitted where the computer contains information that is privileged, subject to public interest immunity, confidential or commercially

[64] Ball, *supra*, footnote 62, at pp. 10-11.
[65] Electronic Discovery Reference Model Evergreen, "Selecting a Service Provider", available at http://edrm.net/wiki2/index.php/EDRM_Evergreen/Review/Selecting_a_Service_Provider; Nimsger, *supra*, footnote 62, at pp. 9-10.
[66] Arkfeld, *supra*, footnote 61, at pp. 7-100 – 7-102.

sensitive, or clearly not relevant to the litigation. The parties should explore an alternative method of gaining access to the information without breaching confidentiality. One such alternate method would involve the appointment of a neutral person or monitor to review the confidential material.

Comment 9.g. Privacy Issues

Canada and its provinces, to varying extents, have comprehensive privacy legislation governing the collection, use and disclosure of personal information in both the public and private sectors that may impact on the discovery process. The courts have not been sympathetic to objections to production of records or answering questions based on privacy legislation.

Confidentiality orders, common law or civil procedure rules may limit the extent to which commercially sensitive or personal information must be disclosed, offering solutions to the protection of private or commercially sensitive information.[67]

Similarly, the *Sedona Principles* contain a specific comment on "Privacy, trade secret, and other confidentiality concerns",[68] and generally deal with the protection of both confidential and privileged information in Principle 10.[69] The issue of confidentiality is also referred to in the Commentary to Principle 12 in the *Ontario Guidelines*, which deals with the issue of privilege, in relation to the inspection of hardware media such as computer hard drives. It is recommended that parties consider how to guard against any release of proprietary, confidential information and protected personal data in this type of situation.[70]

The planning and conduct of a confidentiality review will vary according to the specific terms of the confidentiality order or agreement. For instance, are there different categories or levels of confidentiality providing for different treatment depending on the category in which the document falls? Can the confidential information be redacted? How are the documents to be identified as confidential and/or as belonging to a particular level of confidentiality?

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[67] *The Sedona Canada Principles: Addressing Electronic Discovery*, January 2008 (Sedona, Arizona: The Sedona Conference, 2008), at pp. 32, 34, available at www.thesedonaconference.org.

[68] Comment 10.e of *The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production*, 2nd ed., June 2007 (Sedona, Arizona: The Sedona Conference, 2007), at p. 56, available at www.thesedonaconference.org.

[69] *Ibid.* at pp. 51-56.

[70] *Guidelines for the Discovery of Electronic Documents in Ontario*, at p. 16, available at http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf.

Confidentiality orders often provide that certain categories of confidential information can only be disclosed to outside counsel for the parties and to independent experts, and sometimes to a limited number of representatives of the parties. Thus, confidentiality designations under this type of orders can impose serious restrictions on a party's ability to know the case against it, and on counsel's ability to obtain the advice of his or her client regarding the opposing party's documents and the conduct of the litigation. In these circumstances, and in order to make a *bona fide* claim of confidentiality, it appears necessary to perform a manual review of the documents in order to ensure that a confidentiality claim is only made with respect to documents the contents of which are confidential and, in certain cases, in order to determine what the appropriate confidentiality level is.[71] As for privileged information, agreements between the parties to protect confidential information may be useful, and search terms may be used to assist in locating confidential information.

[71] See *Air Canada v. WestJet Airlines Ltd.* (2006), 267 D.L.R. (4th) 483 (Ont. S.C.J.), at para. 10.