New York Law Journal

TUESDAY, JULY 25, 2006

LITIGATION REVIEW

Inadvertent Waiver of Privilege In the E-Age

BY KEVIN SCHLOSSER

Inadvertent disclosure of privileged materials has always been a vexing problem for litigators, even back in the stone age of hard copy document production. In the modern world of electronic discovery, the volume of information and the manner in which it is stored have not only complicated the litigator's task, but have spawned countless new issues for the courts to decide.[1]

State and federal courts on Long Island continue to resolve these thorny issues. Several recent cases have addressed interesting issues unique to electronic evidence, including the "delete does not really mean delete" phenomenon and the dilemma of those reoccurring "string" e-mails containing forwarded prior e-mails.

In *Atronic International, GMBH v. Sai Semispecialists of America, Inc.*, 232 F.R.D. 160, 161 (2005), a diversity contract dispute, Eastern District Court Judge Thomas C. Platt reviewed both the state and federal standards, noting that they were without a "meaningful difference."

As summarized in *Atronic*: "New York State law recognizes a waiver of the attorney-client privilege for the inadvertent production of documents unless: (1) the party asserting the privilege intended to maintain confidentiality and took reasonable steps to prevent its disclosure, (2) promptly sought to remedy the situation after learning of the disclosure, and (3) the party in possession of the materials will not suffer undue prejudice if a protective order is granted." (Citing *AFA Protective Sys., Inc. v. City of New York*, 13 A.D.3d 564, 565, 788 N.Y.S.2d 128, (2d Dep't 2004).)

Judge Platt continued that under federal law the courts in this jurisdiction balance four factors in determining whether a party has waived a privilege through inadvertent production: "(1) the reasonableness of the precautions taken by the producing party to prevent the inadvertent disclosure of privileged documents; (2) the volume of discovery versus the extent of the specific disclosure at issue; (3) the length of time taken by the producing party to rectify the disclosure; and (4) the overarching issues of fairness." (Citing *United States v. Rigas*, 281 F.Supp.2d 733, 738 (S.D.N.Y. 2003).

In *Atronic*, Judge Platt upheld the ruling of Magistrate Judge Michael L. Orenstein that two e-mails allegedly containing attorney-client privileged communications lost their privileged status because plaintiff's counsel neglected to take adequate steps to preserve the confidentiality of the e-mails by failing (i) timely to designate them as privileged and (ii) adequately to employ a reasonable procedure for separating confidential materials from non-privileged communications.

Specifically, although plaintiff's counsel did have an attorney review the documents to preserve any privileged communications, Magistrate Judge Orenstein noted that this review was "flawed because the attorney assigned to review these documents did not know the identity of plaintiff's prior legal counsel" with whom it had the privileged communications.

Magistrate Judge Orenstein concluded, therefore, that plaintiff's "'conduct was so careless as to suggest that it was not concerned with the protection of the asserted privilege.'"

He also noted that plaintiff's counsel did not seek to rectify its error until six days after discovering it, a factor the court found cutting against plaintiff's position.

Finally, he found that fairness dictated that the documents remain discoverable because both e-mails contained information that "go to the heart of this breach of contract litigation."

'Knitting Fever'

In *Knitting Fever, Inc. v. Coats Holding Ltd.*, 2005 WL 3050299 (E.D.N.Y.), another decision reviewing an order of Magistrate Judge Orenstein, the court focused on the duty of counsel to alert the adversary when apparently privileged documents have been obtained. In *Knitting Fever*, plaintiff produced certain redacted e-mails that contained communications between defendant and its counsel.

Upon discovering that plaintiff was in possession of these privileged documents, counsel for defendant immediately wrote to plaintiff's attorney and demanded an explanation as to how plaintiff obtained defendant's privileged documents and whether any other similar documents were in plaintiff's possession.

Plaintiff responded that defendant's representatives began furnishing documents to plaintiff before the litigation had even begun and then refused to identify the source of the disclosure or whether he had any other privileged documents of the defendant.

When the matter was presented to Magistrate Judge Orenstein for resolution, he referred counsel to the decision in *Rigas* and ordered them to reappear after a review of the decision. When plaintiff's counsel still insisted upon retaining the privileged documents, the magistrate judge ordered plaintiff's counsel to turn over the full, unredacted documents and to identify their source.

Kevin Schlosser *is a partner and chair of the Litigation Department at Meyer, Suozzi, English & Klein, P.C., Counselors at Law, Mineola, New York (516) 741-6565*

Plaintiff's attorney then still refused, leading Magistrate Judge Orenstein to order plaintiff's principal, who allegedly received the documents, to appear at the courthouse with his "laptop, his PDA, his cell phone, and all his desktops" so that defendant "could conduct a forensic search" for any of defendant's privileged documents.

The court also ordered plaintiff's counsel and principal to appear for depositions for the purpose of discovering how and when plaintiff and their counsel came into possession of the documents and to determine whether additional documents exist.

In upholding Magistrate Judge Orenstein's decision, Judge Denis R. Hurley concluded that plaintiff's counsel had an ethical responsibility to return the documents and determine whether any other privileged documents were in plaintiff's possession.

In another recent decision upholding Magistrate Judge Orenstein's ruling regarding waiver of privilege, *Curto v. Medical World Communications, Inc.*, 2006 WL 1318387 (E.D.N.Y.),[2] Judge Hurley determined that plaintiff in an employment discrimination case had not waived her attorney-client privilege by communicating with her counsel by e-mail using her employer's laptop computer, but via her own personal AOL account that was not linked to the employer's server. Even though plaintiff had deleted her personal e-mails prior to returning the laptops, the defendant-employer thereafter did a forensic inspection of the two laptops and was able to reconstruct the deleted e-mails.

Magistrate Judge Orenstein applied the four factors set forth in *Rigas*, concluding that plaintiff had taken reasonable precautions to prevent the inadvertent disclosure of the privileged e-mails, including what she thought was deleting them, had promptly sought to recover the disclosed material from defendant once identified, and that fairness dictated preserving the privilege under the circumstances.

In response to defendant's argument that plaintiff should have had no expectation of privacy over these personal e-mails because company policy prohibited personal use of the computers and warned employees that the employer had the right to inspect all e-mails, Magistrate Judge Orenstein found that the employer had not in practice enforced its computer usage policy, that many employees had personal e-mail accounts at work, and the employer thereby lulled employees into a "false sense of security" regarding their personal use of company-owned computers.

In upholding Magistrate Judge Orenstein's ruling, Judge Hurley rejected defendant's argument that Magistrate Judge Orenstein had thereby created a new, previously unrecognized, factor in determining inadvertent waiver, finding that this "sub-factor" was, indeed, a proper (albeit not dispositive) consideration, particularly in determining whether plaintiff had taken "reasonable precautions to prevent the inadvertent disclosure of the privileged documents."

In state court, Justice Ira B. Warshawsky of Nassau County Supreme Court, Commercial Division, recently rendered a decision upholding the privilege for "string" e-mails inadvertently produced in discovery.

In *Delta Financial Corporation v. Morrison*, 2006 WL 1233000 (N.Y. Sup.), NYLJ, June 9, 2006, defendants moved for an order directing plaintiff to return or destroy all copies of an allegedly privileged e-mail that it inadvertently produced, enjoining the use of the privileged document and directing that the privileged document and all references thereto be stricken from plaintiff's pending motion for leave to amend the complaint.

The court noted that although the document review process employed by defendants involved screening for privileged content, defendants nevertheless produced an e-mail "string" between the individual defendant and attorneys who represented the limited liability company defendant.

Defendants insisted that the production of the e-mail was inadvertent and that they intended the documents to remain privileged by virtue of the fact that two identical copies of the e-mail were entered in their privileged log.

Defendants learned of the mistake after they received plaintiff's motion to amend the complaint, to which the e-mail was attached as an exhibit. As soon as they discovered this inadvertent production, defendants immediately sought its return.

Justice Warshawsky stated that the court was satisfied "that the [privileged] document's production was inadvertent and not 'intentional'" because there were adequate screening procedures in place and that an error by a competent screener does not evidence a lack of precautions. He also noted that immediately upon discovering the mistake, defendant's attorney promptly objected to the disclosure. Even though the document was produced at least a year earlier, Justice Warshawsky noted that it was plaintiff's counsel who had an ethical obligation "at the very least, [to] notify defendants' counsel of the receipt of the document in order to give the LLC an opportunity to seek protective measures." (Citing ABA Formal Opinion 05-437) ("A lawyer who receives a document from opposing parties or their lawyers and knows or reasonably should know that the document was inadvertently sent should promptly notify the sender in order to permit the sender to take protective measures.").

Finally, Justice Warshawsky found that there would be no prejudice to plaintiff because the privileged e-mail had not been used in questioning of any witnesses.

Conclusion

As these recent cases show, counsel for both the producing and requesting party have important obligations when privileged material has been inadvertently produced. On the producing end, at the outset, counsel should employ reasonable precautions to review documents before they are produced for privileged material (including reviewing not only the main e-mail but all "forwarded" messages as well as reminding clients that pressing "delete" does not really delete e-mails) and, as soon as inadvertent production is discovered, take immediate steps to preserve the privilege, including promptly seeking an appropriate protective if necessary.

On the receiving end, counsel would be well advised to notify the adversary of apparently privileged documents produced.

Endnotes:

1. In federal courts, the new Federal Rule of Civil Procedure 26(b)(5)(B) (effective December 1, 2006) provides procedures for addressing inadvertent disclosure of privileged materials, without actually resolving the substantive issue as to what may constitute a waiver of any applicable privilege. See http://www.uscourts.gov/rules/EDiscovery_w_Notes.pdf. Moreover, at its June 22-23, 2006 meeting, the federal Committee on Rules of Practice and Procedure approved recommendations by the Advisory Committee on Evidence Rules to adopt a new Federal Rule of Evidence 502, pursuant to which inadvertent disclosure of privileged material would constitute a waiver of the privilege only if the producing party did not take reasonable precautions to prevent disclosure, including reasonable and prompt efforts to rectify the error.

2. Meyer, Suozzi, English & Klein acted as co-counsel for the plaintiff in this case.