

Eastern District of Pennsylvania Court First to Assess “Reasonableness” Under New Federal Evidence Rule

December 3, 2008

As reported in our September 22 eData LawFlash, “Newly Adopted Federal Rule Attempts to Address Privilege and Work Product Waiver Concerns,” Federal Rule of Evidence 502 was enacted on September 19, 2008 “to limit the consequences of inadvertent disclosure” and to codify the so-called middle-ground approach to waiver by providing that “[a]n inadvertent disclosure of privileged information¹ does not constitute a waiver as long as the holder took *reasonable steps* to prevent disclosure and acted promptly to retrieve the mistakenly disclosed information.” (Read the entire LawFlash at http://www.morganlewis.com/pubs/eData_LF_PrivilegeWorkProductWaiver_LF_22sept08.pdf.)

On November 14, the Eastern District of Pennsylvania became the first court in the land to address “reasonableness” under new Rule 502. See *Rhoads Industries, Inc. v. Building Materials Corp. of America*, 2008 WL 4916026 (E.D. Pa. Nov. 14, 2008).

Reasonableness became the focus of *Rhoads* after the plaintiff, its counsel, and its eDiscovery consultant attempted to substitute keyword searches for privilege review—with disastrous results. As described in detail in the court’s opinion, plaintiff began its discovery efforts with an initial run of search terms that yielded 210,635 unique email messages. Next, the consultant ran a “privilege word search”—based on the name of the client, its counsel, and a nontestifying expert retained by the client—against the emails that had been identified. When finished, the “privilege” search identified 2,000 emails that were then removed from the collection. These documents were not, for reasons not clear in the opinion, added to the plaintiff’s privilege log.

Counsel, still confronting a hefty number of emails (208,635), crafted yet another search term list that was then applied to the remaining data set. That search yielded 78,000 emails for production. Meanwhile, a junior associate conducted a separate, manual review of emails found in specific email mailboxes that had not been searched earlier. Documents identified as privileged by this manual process were logged, as were hard-copy records that were identified by the associate in a subsequent review of 22 boxes of paper. When finished, the plaintiff produced the 78,000 emails. Shortly thereafter, the plaintiff produced privilege logs that referenced the emails found via the associate’s manual search and the hard-copy documents that the associate had identified.

1. For purposes of this LawFlash, the terms “privilege” or “privileged” include materials and communications subject to the attorney-client privilege and work-product doctrine.

Less than a month after production, the defendant notified the plaintiff that some of the emails in the production contained privileged communications. Plaintiff responded immediately by email stating that if any privileged materials had been produced, their production was inadvertent. About three weeks after the defendants sent their notice, the junior associate reviewed the 78,000 emails that had been produced. As a result of this record-by-record review, she determined that 812 records should have been withheld but were not. Plaintiff's counsel created a privilege log for these emails and asked that they be sequestered pending resolution of their privilege status pursuant to Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure. In response, the defendants filed a motion to deem the privilege waived with respect to the 812 records, arguing that the plaintiff's consultant and counsel "were not sufficiently careful to review the software screening and to take steps to prevent disclosure when it appeared obvious that privileged materials had filtered through the screening procedure." *Rhoads*, 2008 WL 4916026 at *7.

An evidentiary hearing followed to address the privilege issues in which both the consultant and the associate testified. At its end, the court ordered the production of any documents withheld on account of privilege that had not been logged, absent a showing of exceptional circumstances. The plaintiff then re-examined the 2,000 unlogged emails and found that many were either duplicative (941) or nonresponsive (548). Of the remaining 511 unique, responsive emails, the plaintiff identified 335 as being subject to privilege. Because those documents had not been timely logged, the court ordered their production.

The court then turned its attention to the 812 documents that the plaintiff claimed had been inadvertently produced. The court began by stating that it would apply Rule 502 to the case, noting that although the case had commenced prior to enactment of the rule, "it would be just and practicable to apply [the rule] . . . because it sets a well-defined standard, consistent with existing mainstream legal principles on the topic of inadvertent waiver." *Id.* at *2. The court next turned to the question of whether the holder of the privilege "took reasonable steps to prevent disclosure," a question at the heart of the present matter. *Id.* In defining reasonableness in this context, the court determined that it would examine the plaintiff's actions in light of the following factors:

- The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production
- The number of inadvertent disclosures
- The extent of the disclosure
- Any delay in the measures taken to rectify the disclosure
- Whether the overriding interests of justice would or would not be served by relieving the party of its errors

The court found that the first four factors noted above weighed in favor of the defendant and against the plaintiff, who had produced the records at issue. The court stated:

The most significant factor . . . is that Rhoads failed to prepare for the segregation and review of privileged documents sufficiently far in advance of the inevitable production of a large volume of documents. Once this lawsuit seeking millions of dollars of damages was filed, Rhoads was under an obligation to put adequate resources to the task of preparing the documents, which was completely within Rhoads's control. An understandable desire to

minimize costs of litigation and to be frugal in spending the client's money cannot be an after-the-fact excuse for a failed screening of privileged documents.²

The court next considered the final factor: the overriding interests of justice. Here, the court found that the balance tipped significantly in favor of the plaintiff, noting that the “[l]oss of the attorney-client privilege in a high-stakes, hard-fought litigation is a severe sanction and can lead to serious prejudice.” The court also observed that no prejudice would befall the defendant, who was not otherwise entitled to 812 records, and who already received substantial discovery in this matter. With that, the court concluded that it would not find that the plaintiff had waived the privilege with respect to the 812 records that had been inadvertently produced.

The opinion in *Rhoads* is important because it establishes a method of analysis for cases arising under Federal Rule of Evidence 502(b) by engrafting readily available federal court decisions onto the statutory scheme of the new rule, as it pertains to the determination of “reasonableness” on the part of a producing party.³ It is also important because, like the *Victor Stanley* decision earlier this year, it highlights the perils associated with relying solely on keyword searches for privilege review.

Rhoads is also instructive in how *not* to manage junior attorneys who are conducting their first privilege review. And, although the matter ended in favor of the producing party this time, it is not at all clear that the “interests of justice” will always (or even usually) save the day for attorneys who have otherwise been found to fall short of the reasonableness standard imposed by the new rule.

Finally, *Rhoads* does not address the practical effects (i.e., “unringing the bell”) or the ethical dimensions of disclosing hundreds of privileged communications to an adversary. These, too, must be considered when assessing the “true” cost of conducting privilege review under the reasonableness standard established by Rule 502(b).

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2. *Rhoads*, 2008 WL 4916026, at *11. The court also observed that the plaintiff’s efforts fell short in a number of other areas, including: its failure to use a more fulsome search term list to identify potentially privileged materials; the failure of plaintiff’s counsel to oversee an inexperienced associate conducting her first privilege review; limiting the search that was run to only address “fields” in the emails and not running them in the text; the failure to test the comprehensiveness of the keyword search; the fact that the plaintiff had not noticed the error; and the delay in creating the privilege log for the 812 records at issue. *Id.* at *8–*10.

3. Indeed, this is the process that we had predicted would occur in our earlier LawFlash.

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