

Protecting Privileged Documents: Use of Keyword Technology, and “Quick Peek” and “Clawback” Agreements

August 9, 2012

In *Blythe v Bell*, defendants made two large productions of emails and attachments to plaintiffs. To create the productions, defendants did not review any documents for responsiveness or privilege.

Instead, the defendants relied on keyword search technology to create a set of responsive, non-privileged documents. When defendants discovered that their productions contained privileged communications, they sent plaintiffs an amended production and a privilege log, along with a demand for a return of the prior productions. Plaintiffs refused to return the earlier productions. On defendants’ motion to compel the return of privileged documents, the court sided with plaintiffs.

In deciding on the motion, the court applied the familiar five-factor test for inadvertent production from federal law. The court only needed to consider the first factor, “the reasonableness of the precautions taken,” to deny defendants’ motion. The “sheer volume” of the production substantially increased the likelihood of inadvertent production and “suggest[ed] the need for more than minimal efforts” to safeguard the defendants’ privileged communications. The court determined that the defendants’ complete reliance on technology was unreasonable under the circumstances. The court was quick to note that it was not adopting a bright-line rule requiring a privilege review in every case. It noted that circumstances could exist where expedited discovery would foreclose privilege review and suggested that “quick peek” or “clawback” agreements would be appropriate in such cases.

The circumstances of each case will determine whether “reasonable” efforts were taken to prevent production of privileged information. Counsel should consider (1) entering into an agreement with opposing counsel regarding the necessity and scope of privilege review and (2) negotiating an appropriate “quick peek” or “clawback” agreement. Under a “quick peek” agreement, the requesting party first examines the producing party's documents and designates what to produce. Then the producing party conducts a privilege review and asserts its privilege claims. Under a “clawback” agreement, the producing party conducts its privilege review prior to production and maintains the right to request the return of any inadvertently produced privileged communications. In federal court the agreement should be made part of a confidentiality order under F.R.E. 502(d) for maximum protection of the privilege in subsequent federal or state court proceedings.