Relevancy Quick Peek Agreements in E-Discovery

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Relevancy Quick Peek

- How do the Federal Rules address such agreements?
- Case law update
- What is a Relevancy Quick Peek Agreement?
- Best practices for drafting and using quick peek agreements

What is a Relevancy Quick Peek Agreement?

FRCP 26(f)

Committee Notes:

> [A producing party] may agree that the responding party will provide certain requested materials for *initial examination without waiving any privilege or protection* … 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).

How do the Federal Rules address such agreements?

FRCP 16(b)

Court shall enter a scheduling order that *may* include:

(5) provisions for disclosure or discovery of ESI;

(6) any agreements the parties reach for asserting claims of privilege or of protection as trial preparation material after production

FRCP 16(b)

Committee Notes:

- Rule is designed to alert courts to the possible need to address ESI issues early
- Intended to authorize courts to enter orders adopting agreements between the parties to facilitate discovery by minimizing the risk of waiver of privilege or work product protection
  - Specifically contemplates “quick peek” and “claw back” notions
- Notes that courts do not have authority to enter order on these particular issues without party agreement

FRCP 26(f)

Conference of the Parties; Planning for Discovery

- *Timing*: When practical, but at least 21 days before scheduling conference or scheduling order is due

- *Topics*: Preserving discoverable information; developing discovery plan incorporating parties' proposals regarding, among other things:

  - Timing, form or requirement for Rule 26(a) disclosures
  - Subjects of discovery, whether phased or limited discovery is appropriate and timing for completion
  - Issues regarding disclosure of ESI, including the *format of production*
  - Issues relating to claims of privilege or work product protection, including *agreements that may be incorporated into a court order*

FRCP 26(f)

Committee Notes:

- Encourage agreement on procedures for asserting post-production privilege/work product claims
- Recognize need to avoid spending large amounts of time and money, and to avoid delays that result from, reviewing vast amounts of discoverable material to avoid waiving privilege
- Recognize that volume, storage, informality, embedded data and metadata are all factors that make it difficult to identify privilege
- Recognize that such agreements are not always appropriate

FRE 502: *The Highlights*

Attorney-Client Privilege and Work Product;
Limitations on Waiver

- Signed on September 19, 2008 by President Bush
- Response to lack of uniformity in subject matter waiver laws identified in *Hopson v. City of Baltimore*, 232 F.R.D. 228 (D. Md. 2005)
- Protects against forfeiture of privilege when a disclosure in discovery is the result of an innocent mistake or the parties' agreement
- Permits parties, and courts, to protect against the consequences of waiver by permitting disclosures of privileged information between the parties

FRE 502: *The Highlights*

- Disclosure in federal proceeding ≠ subject matter waiver, unless
  - intentional;
  - same subject matter as undisclosed communications; and
  - fairness requires further disclosure.

- Inadvertent disclosure in federal proceeding ≠ presumptive waiver if
  - reasonable steps were taken to prevent disclosure; and
  - producing party acted promptly to correct the error.

FRE 502: The Highlights

- Disclosure in state proceedings (if no court order re: waiver) ≠ federal court waiver if:
  - No waiver under FRE 502; or
  - No waiver under law of the state where the disclosure occurred.

FRE 502: *The Highlights*

- Court orders regarding privilege issues are enforceable downstream in both federal and state proceedings

- Agreements regarding disclosure are only binding on the parties to the agreement, unless incorporated into a court order

FRE 502: *The Highlights*

- If State court disclosure occurs first, federal court in subsequent case will apply the most protective law

- Rule applies only to communications/information covered by the attorney-client privilege or work product protection

Case law update

*Transamerica Computer v. IBM**

- 1978 anti-trust case where original waiver occurred after producing party ordered to produce 17 million pages for copying in 3 months

- After initial inadvertent production, producing party placed an "interceptor" in the room to inspect all documents selected for copying and withhold any privileged document

- Court found no waiver

- Court recognized "literally millions of ways for mistakes to be made in the screening process"
  - Mechanical steps
  - Visual or judgmental mistakes
    - Recognize a particular name out of a myriad names
    - Uncover few lines in long textual passage
    - Mistakes enhanced by long hours

*573 F.2d 646 (9th Cir. 1978)

*Murphy Oil USA, Inc. v. Fluor Daniel, Inc.**

- Facing review of email from backup tapes, Court gave producing party two options

- Protocol for option one (quick peek for relevance):
  - Parties agree to a backup tape for restoration
  - Reviewing party reviews email on an attorneys' eyes-only basis
  - Reviewing party provides to producing party bates number copies of email deemed relevant
  - Reviewing party to destroy any documents not produced to producing party
  - Producing party reviews the production and designates in the privilege log the documents into one of four categories: (1) proprietary; (2) attorney-client; (3) work product; or (4) discoverable.
  - Any document reviewing party agrees is proprietary is subject to Protective Order
  - Reviewing party destroys any document it agrees is privileged
  - Disputed documents are submitted for *in camera* review along with supporting memorandum from the parties
  - Parties authorized to revise the protocol and instructed to have a telephone conference to resolve any further procedures

*No. Civ. A. 99-3564, 2002 WL 246439 (E.D. La. Feb. 19, 2002)

*Hopson v. The Mayor and City Council of Baltimore**

- To the extent parties already are negotiating "non-waiver" agreements, they would be *unwise* to assume that such agreements will excuse them from undertaking any pre-production privilege review.

- District Courts called upon to "bless" production procedures with a court order should independently satisfy themselves that the procedures agreed to by counsel are in fact reasonable and that more could not be accomplished within the production period.

* 232 F.R.D. 238 (D. Md. 2005)

*Mancia v. Mayflower**

- There is nothing inherent in [adversary system] that precludes cooperation between the parties

- Cooperation enhances the adversary system by facilitating discovery of the facts needed to support the claims and defenses that have been raised

* 2008 WL 4595175 (D. Md. Oct. 15, 2008)

Sedona Cooperation Proclamation

- Cooperative discovery is consistent with zealous advocacy

- Cooperative discovery is required by the Rules of Civil Procedure

- Paradigm shift
  - Awareness
  - Commitment
  - Tools

Relevancy Quick Peek Agreements: Pros & Cons

Advantages

- Reduces delay before discovering party obtains access to documents*
- Reduces cost and burden of review and production for the producing party*
- Cooperation between parties facilitates narrowly tailored discovery
- Protects against spoliation allegations
- Reduces discovery on discovery
- Minimizes discovery abuses

*Report of the Civil Rules Advisory Committee

Advantages

"Because document requests are often very broad, and the responsive material is therefore often of no real interest to the party seeking production, undertaking the laborious task of reviewing all of this material before the other side gets to look at it is highly wasteful . . ."

Memorandum from Professor Rick Marcus
to the Advisory Comm. On Civil Rules

Disadvantages

- At odds with adversary system?
- Need for early and active judicial participation
- Must rely on the honesty and professionalism of opposing counsel
- Docket-conscious judges will hold attorneys to unreasonable time frames*

* Mary P. Gallager, Federal Courts Propose Rules for E-Discovery, N.J.L.J., Sept. 6, 2004

Disadvantages

- Waiver
  - Must still conduct a “reasonable” privilege review
  - Cannot un-ring the bell
  - In subsequent state litigation if original inadvertent production occurred in state court that does not follow the spirit of FRE 502
- Ethical duty to zealously advocate on behalf of your client
- Confidentiality
- Trade Secrets
- Privacy

Best practices for drafting and using quick peek agreements

Human Requirements

- Higher level of mutual trust and respect between counsel*
- Client open to alternative approach
- Special Master?
- Attorneys who are sophisticated on these issues and understand the technology

* Kenneth J. Withers, *Electronic Discovery Disputes: Decisional Guidance,* CIVIL ACTION

Plaintiffs' Starting Points

- Prior to requests, discuss defendant stores, maintains and accesses data
- Target the scope; broader is not always better
- Agree upon what is not requested, but reserve right to make a later request for that information, if needed
- Anticipate and schedule multiple quick peek productions (discovery phases)
- Set dates and deadlines for production, objection and hearing for each phase
- After each phase, discuss concerns with opposing counsel and ask the Court for modifications if necessary (or, if permitted, modify the plan by agreement)

Defendants' Starting Points

- Client buy-in
- Come to negotiations prepared. Know your key custodians, how information is kept, date ranges and potential search terms
- Create a privilege review protocol
- Have a strategy for depositions
- Ensure phased discovery includes limits on plaintiffs' ability to reopen discovery repeatedly
- Reach an agreement on preservation obligations
- Address data security during the first look phase

Terms of Quick Peek

- **Define Purpose and Function of Agreement**
  - Reviewing Party may search the documents only to determine relevancy
    - Review is attorneys' eyes only
    - Prohibited from taking notes or using documents in any way prior to production
  - Request that the Producing Party formally produce documents tagged as relevant

Terms of Quick Peek-Deadlines

- Producing Party to make first look production
- Reviewing Party to complete first look relevancy determination
- Producing Party objections
  - Place selected Document on a privilege log
  - Place selected Documents on a non-responsive log
- Producing Party production and privilege log
- Reviewing Party motion to compel

Additional Terms of Quick Peek

- **Security**
- **Reservation of Rights**
- **Phased Discovery**
  - ➢ Scope of potentially relevant information
    - Date range
    - Custodians
    - Search terms
    - Analytics
- **Privacy Issues**

Order of Court

- **Order of Court**
  - **Not just agreement between parties**
  - **FRE 502 protection**
  - **Claw back provisions**
  - **Protective order**

Sedona Conference

"[T]he court should enter an order that:

1) **indicates that the court is compelling the manner of production;**

2) **states such production does not result in an express or implied waiver of any privilege or protection for the produced documents or any other documents;**

3) **directs the reviewing party cannot discuss the contents of the documents or take any notes during the review process;**

4) **permits the reviewing party to select those documents that it believes relevant to the case; and**

5) **orders that for each selected document, the producing party either**
   a) **produces the selected document,**
   b) **places the selected document on a privilege log, or**
   c) **places the selected document on a non responsive log (i.e., regardless of the privileged status, the document is not relevant to the litigation)."**

The Sedona Conference, The Sedona Principles: Best Practices Recommendations & Principles for Addressing Electronic Document Production cmt. 10.d. (2d ed., 2007)