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FEDERAL E-DISCOVERY

Litigants Fail to Heed Lessons of 'Victor Stanley'

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Magistrate Judge Paul Grimm of the U.S. District Court for the District of Maryland, a heavyweight in e-discovery circles, cautioned litigants in *Victor Stanley Inc. v. Creative Pipe Inc.*, 250 F.R.D. 251 (2008), that a poorly conceived or cursory privilege review risks waiver when privileged documents are inadvertently produced.[1]

In *Victor Stanley*, the defendants conducted their privilege review using about 70 different keyword search terms. Defendants manually reviewed those documents returned in the keyword search. As to the remainder of the documents, however, defendants took no steps to assess whether the searches had captured all privileged documents. The result was that defendants inadvertently produced 165 privileged electronic documents.

As defendants were unable to defend the validity of the methodology they had adopted to identify privileged documents and failed to conduct any tests of its reliability, Magistrate Judge Grimm unsurprisingly found that defendants had not taken reasonable precautions to prevent inadvertent disclosure and found the privilege to have been waived.

Much has changed since Magistrate Judge Grimm penned that opinion, but—as shown in *Mt. Hawley Insurance Co. v. Felman Production Inc.*, 2010 WL 1990555 (S.D. W. Va. May 18, 2010)—much remains the same.

BIGSTOCK

Among the principal changes since *Mt. Hawley* is the enactment of Federal Rule of Evidence 502 in September 2008. In an effort to reign in the spiraling costs of discovery (and e-discovery in particular), Rule 502 enables litigants to enter into "quick peek" and "claw back" agreements that, if approved by the court, enable the parties to dramatically limit the need for pre-production review of electronically stored information (ESI).[2]

What has not changed, however, is that in the absence of such a court-approved agreement, courts will continue to assess the reasonableness of the precautions taken by the producing party in deciding whether an inadvertent production of privileged materials constitutes a waiver. See Rule 502(b) (codifying the majority view that inadvertent disclosure of privileged documents does not constitute a waiver if the producing party took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the error).

In *Mt. Hawley*, Magistrate Judge Mary Stanley of the Southern District of West Virginia was faced with a situation reminiscent of *Victor Stanley*. The plaintiff in *Mt. Hawley* sought to recover privileged documents that had been inadvertently produced in a high-volume ESI production. Unlike the situation in *Victor Stanley*, the parties in *Mt. Hawley* had executed an ESI stipulation with a provision permitting them to recover inadvertently disclosed documents, but the stipulation nowhere provided that an inadvertent production would not be deemed a waiver of the privilege.

To the contrary, the stipulation expressly stated that the receiving party's return of an inadvertently produced document would not preclude that party from contesting the privilege claim. Moreover, the parties' stipulation was never incorporated into a court order.

Magistrate Judge Stanley's decision in *Mt. Hawley* demonstrates that parties who do not avail themselves of the option of entering into court-approved "quick peek" or "claw back" agreements still must demonstrate that they took reasonable precautions to guard against inadvertent production of privileged materials.

The decision also illustrates that the standard for establishing such "reasonable precautions" may be higher than some counsel expect, and that even the technological failures of established outside vendors will not excuse counsel's failure to implement such precautions.

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At issue in *Mt. Hawley* was a May 14, 2008, e-mail that suggested plaintiff had asked its clients to falsify business records in support of plaintiff's insurance claims against defendants. Plaintiff produced the e-mail among roughly 1 million pages of documents (346 GB of data) in December 2009, about five months after defendants' discovery requests were served.

Plaintiff realized that the May 14 e-mail had been inadvertently produced only after defendants attached it to a motion, dated March 11, 2010, that sought to amend their answer to add counterclaims for fraud and breach of contract.

By letter dated March 15, plaintiff demanded return of the May 14 e-mail. In response to this request, defendants conducted a search of plaintiff's production and identified 980 additional documents that contained attorney-client communications. Plaintiff ultimately requested the recall of 376 of these documents pursuant to the parties' ESI stipulation.

Most, but not all, of the documents plaintiff sought to recall—including another version of the May 14 e-mail—had been listed on plaintiff's privilege log. Although the defendants' motion requested protection only with respect to the May 14 e-mail, the arguments made during briefing appear to apply equally to all of the documents plaintiff sought to recall.

Plaintiff's inadvertent production of most, but not all, of the privileged documents (including the May 14 e-mail) occurred because of a technical problem. Namely, to enable plaintiff's counsel to apply privilege search terms, an outside vendor uploaded the results generated from plaintiff's relevance search onto 13 Concordance database files on a secure Web site.[3]

Plaintiff then applied the privilege search terms to these Concordance files. Plaintiff later discovered, however, for reasons still unclear to them and Concordance's manufacturer, that one of the Concordance files inexplicably built an incomplete index of materials. The vast majority of the documents plaintiff sought to recall (328 of the 377) originated from the faulty Concordance file.

Unreasonable Precautions

Federal Rule of Evidence 502 was adopted, among other reasons, to provide uniform standards for when disclosure of privileged information results in waiver. Rule 502(b) specifically addresses waiver arising from inadvertent production.

Magistrate Judge Stanley quickly determined that the plaintiff had satisfied Rule 502(b)(1), which requires that the privilege holder's disclosure was inadvertent, and Rule 502(b)(3), which requires that the privilege holder promptly take reasonable steps to rectify the erroneous disclosure.

In particular, she found that plaintiff had satisfied Rule 502(b)(3) with respect to the May 14 e-mail because the parties' ESI stipulation states that compliance with the stipulation's prescribed procedures for seeking to recover an inadvertently produced document shall be deemed to satisfy the requirements of Rule 502(b)(3), "notwithstanding any argument to the contrary."

As such, Magistrate Judge Stanley's decision turned on whether plaintiff had satisfied Rule 502(b)(2) by taking "reasonable steps to prevent disclosure."

For the benefit of those counsel who missed the warning in 'Victor Stanley' concerning the need to conduct quality control sampling on their keyword search terms, 'Mt. Hawley' states it loud and clear.

In making this evaluation, Magistrate Judge Stanley applied the five-factor test set forth in *Victor Stanley* and referenced in the Advisory Committee's Explanatory Note to Rule 502(b).

The five factors are:

(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the number of inadvertent disclosures; (3) the extent of the disclosures; (4) any delay in measures taken to rectify the disclosure; and (5) overriding interests in justice.

Magistrate Judge Stanley found that the steps counsel had taken in collecting and producing plaintiff's ESI, while attempting to safeguard against the disclosure of privileged material, included:

- Negotiating the ESI stipulation with defendants.
- Hiring an outside vendor to collect and manage ESI.
- Discussing plaintiff's network structure with its IT department.
- Visiting plaintiff's plant to coordinate and oversee ESI production.
- Choosing search terms for responsiveness review after testing them twice on plaintiff's e-mail documents.
- Choosing search terms for privilege review after testing them once against plaintiff's e-mail documents.
- Conducting a document-by-document relevance and privilege review on the documents retrieved by these search terms.
- Hiring a different outside vendor to complete the processing of e-mails marked for production.

After taking into account defendants' arguments, Magistrate Judge Stanley applied the five-factor test and determined that plaintiff's conduct in preventing inadvertent disclosure was unreasonable notwithstanding the procedures mentioned above. Her decision particularly emphasizes the test's first, second, and fourth factors.

Although the magistrate judge recognized that the first and second factors are in theory distinct, she noted that the 377 inadvertently produced documents were twice the number of inadvertently produced documents at issue in *Victor Stanley*, which "underscores the lack of care taken in the review process."

She also observed that plaintiff took five months to make its production, so it seemed unlikely that time constraints could excuse plaintiff's lack of care, especially considering that plaintiff had "pressed for quick resolution of this litigation and repeatedly complained that Defendants were unduly delaying the proceedings."

The most significant factor to Magistrate Judge Stanley, however, was that plaintiff's counsel "failed to perform critical quality control sampling to determine whether their production was appropriate and neither over-inclusive nor under-inclusive."

As a result, the magistrate judge noted that 30 percent (14.3 GB) of plaintiff's production was irrelevant to the litigation. She also pointedly observed that plaintiff's counsel was Venable, which served as counsel for the party that was found to have waived privilege in *Victor Stanley*.

Although Magistrate Judge Stanley recognized that Venable had joined the *Victor Stanley* litigation only after the events that

were the subject of the waiver decision, she evidently found it relevant that the firm had a front-row seat to those proceedings. She thus concluded that plaintiff's counsel should have been particularly mindful of Magistrate Judge Grimm's warning about the importance of conducting quality control tests on keyword searches.

Plaintiff cited two major facts in their favor: (i) the inclusion of the May 14 e-mail, and most of the inadvertently produced documents, in its privilege log, and (ii) the fact that most of the inadvertent production arose from an inexplicable technical glitch that afflicted services supplied by outside vendors.

Magistrate Judge Stanley questioned the significance of plaintiff's privilege log, however, given that the log listed many documents plaintiff never sought to recall and omitted documents plaintiff tried to get back. As to the technical problem, although the magistrate judge accepted that many of the inadvertently produced documents—including the May 14 e-mail—came from the faulty Concordance file, she observed that many others did not.

Lessons Learned

Magistrate Judge Stanley's opinion is notable for several reasons. First, although she evidently accepted that the inadvertent production of the May 14 e-mail (and most of the other privileged documents) was caused, at least in part, by a technical problem with a commonly used database program, this did not absolve counsel of responsibility for protecting against the production of privileged materials.

The facts of *Mt. Hawley* therefore present a warning to counsel concerning over-reliance on the technical expertise of outside vendors and software manufacturers. Given that courts may hold parties and their counsel responsible for the failures of such vendors, counsel must be vigilant in conducting oversight of all processes crucial to ESI production and particularly any privilege screening processes.

Second, although defendants' motion sought a protective order only with respect to the May 14 e-mail, it is clear that in evaluating whether plaintiff had waived privilege over that document, Magistrate Judge Stanley considered plaintiff's conduct with respect to its entire production.

As such, she found plaintiff's failure to take reasonable precautions with respect to other inadvertently produced documents to be relevant. Such conduct included plaintiff's failure promptly to follow up on defendants' initial revelation of the May 14 e-mail with a simple keyword search of its production and plaintiff's reliance on its adversaries to notify it of the full scope of the problem.

Third, and perhaps most notable, is that although Magistrate Judge Stanley cited a number of factors that contributed to her ultimate determination that plaintiff's precautions were unreasonable, she emphasized the warning in *Victor Stanley* that "the failure to test the reliability of keyword searches by appropriate sampling is imprudent."[4]

Magistrate Judge Stanley's emphasis of this factor may seem striking, given that it is not entirely clear that such sampling would have enabled plaintiff to detect the technical error responsible for the disclosure of most of the documents at issue, including the crucial May 14 e-mail. For sampling to have succeeded, the sample would have to have included one of the 377 privileged documents (out of a universe of at least 443,000 produced documents) that were included in the faulty Concordance database file.

Further, the personnel conducting the quality control tests would likely have focused on whether their keyword search terms were "over- [or] under-inclusive in light of the inherent malleability and ambiguity of… all languages,"[5] and would not necessarily suspect a sui generis technical problem entirely unrelated to the construction of the search terms.

On the other hand, given the inability of either plaintiff's outside vendor or Concordance's manufacturer to explain adequately how the technical problem could have occurred, Magistrate Judge Stanley arguably was justified in concluding that plaintiff should be held accountable for its overall failure to adhere to best practices and for the attendant risk of inadvertent production.

Finally, it is worth noting that all of plaintiff's problems in this case might have been avoided had the parties entered into a court-approved "quick peek" or "claw back" agreement. Rule 502(d) was expressly intended to allow parties to avoid the need for extensive pre-production privilege review. As the Explanatory Note to Rule 502(d) makes clear, a confidentiality order "may provide for return of documents without waiver irrespective of the care taken by the disclosing party."

The parties' ESI stipulation in *Mt. Hawley* did not contain the requisite "non-waiver" language, nor had it been court-approved. As a result, plaintiff was forced to defend the reasonableness of the precautions it had taken and proved unable to do so.

Conclusion

For the benefit of those counsel who missed Magistrate Judge Grimm's warning in *Victor Stanley* concerning the need to conduct quality control sampling on their keyword search terms, *Mt. Hawley* states it loud and clear: counsel who fail to apply such quality controls when conducting ESI production and privilege screening invite the risk of involuntarily waiving privilege.

Mt. Hawley further warns counsel engaged in ESI production not to let down their guard and rely too heavily on the technical expertise of outside vendors. Absent a court-approved agreement pursuant to Rule 502(d) that inadvertent production shall not constitute a waiver of privilege, counsel's best defense against involuntary waiver always consists of diligently adhering to ESI discovery best practices.

1. See H. Christopher Boehning and Daniel J. Toal, "Poorly Executed Privilege Review Can Lead to Waiver," NYLJ (June 17, 2008).

2. For a fuller discussion of the purposes of Rule 502, see H. Christopher Boehning and Daniel J. Toal, "Kansas Case Casts Doubt on Usefulness of Rule 502," NYLJ (Oct. 27, 2009).

3. Concordance is a database platform manufactured by LexisNexis that is commonly used by legal practitioners.

4. 2010 WL 1990555, at *13 (citing *Victor Stanley*, 250 F.R.D. at 257).

5. *Victor Stanley*, 250 F.R.D. at 261 (quoting The Sedona Conference Best Practices Commentary on the Use of Search & Information Retrieval Methods in E-Discovery, 8 Sedona Conf. J. 189, 194-95 (2007)).