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Client Alert

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The Importance of *Victor Stanley v. Creative Pipe, Inc.* for Electronic Discovery

On May 29, 2008, Judge Paul Grimm, a magistrate judge for the District of Maryland, issued a discovery order that raises interesting and perhaps controversial issues surrounding privilege waiver in the context of electronic discovery.[1] In *Victor Stanley, Inc. v. Creative Pipe, Inc.*, the court ruled that 165 documents that the defendants argued were inadvertently produced privileged documents were subject to discovery because the privilege was waived by their "voluntary" production.[2] The court held that the voluntary production of attorney-client privileged documents waived the privilege where the producing party did not agree on a privilege search protocol with the opposing party, failed to seek the court's approval of a "clawback" agreement, and was unable to prove that the search protocol used to identify privileged documents was reasonable.

Litigants may argue that the court's order highlights the importance of building in protections to electronic search and production protocols in cases where large volumes of electronic data are produced. This *Client Alert* reviews the order and provides practical pointers for protecting against privilege waiver in cases involving discovery of electronically stored information (ESI).

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Background

In *Victor Stanley, Inc.*, the court ordered the parties and their computer forensic experts to meet and confer and jointly agree on a search methodology for retrieving electronic documents that might be responsive to the plaintiff's Rule 34 document requests.[3] The parties jointly developed a keyword and phrase search protocol, which the defendants employed to identify a potentially responsive collection.[4]

The defendants realized at the outset that an individualized privilege review of the potentially responsive collection would be costly and time-consuming.[5] The defendants approached the court and requested approval of a "clawback" agreement which would have required the defendants to produce the documents subject to a defined search methodology without waiving privilege in case of inadvertent disclosure.[6] The court requested briefing on the defendants' request for a clawback order, but the defendants voluntarily abandoned their request after the court extended the production deadline by four months.[7] The defendants also informed the court at that time that they would undertake a document-by-document privilege review.[8]

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Ultimately, the defendants decided not to undertake a document-by-document privilege review.[9] Instead, without conferring with the plaintiff, the defendants decided to employ a search methodology to identify potentially privileged documents within the population of potentially responsive documents.[10] The defendants and their lawyers developed a list of keywords to locate potentially privileged documents.[11] Prior to running the keyword privilege search, the defendants' forensic computer expert realized that only some of their documents were text-searchable.[12] The defendants ran a 70-keyword search on the text-searchable documents and turned them over to the plaintiff, apparently without reviewing them first, later claiming that they did not have enough time to review them.[13] The defendants manually reviewed the documents that were not text-searchable.[14] In the interest of time, the defendants opted to review only the documents' titles rather than conduct a page-turn review of the non-text-searchable documents.[15]

The plaintiff discovered that the defendants had produced privileged documents and notified the defendants each time that a privileged document was discovered.[16] Ultimately, 165 such documents were found in the production. The defendants asserted the privilege over all of the 165 documents and the plaintiffs challenged the designation.[17]

Voluntary Production Without Reasonable Precautions Waives Privilege

In applying the law to the document production at hand, the court noted that:

> courts have taken three different approaches when deciding whether the inadvertent production to an adversary of attorney client privileged or work-product protected materials constitutes a waiver. Under the most lenient approach there is no waiver because there has not been a knowing and intentional relinquishment of the privilege/protection; under the most strict approach, there is a waiver because once disclosed, there can no longer be any expectation of confidentiality; and under the intermediate one the court balances a number of factors to determine whether the producing party exercised reasonable care under the circumstances to prevent against disclosure of privileged and protected information, and if so, there is no waiver.[18]

The court concluded that under either the strict approach or the intermediate approach, the defendants' production waived the attorney-client and work-product privileges.[19] Applying the intermediate test, the court balanced the following factors to determine whether the inadvertent production of attorney-client privileged materials waived the privilege: "(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."[20] Specifically, the court found that the first factor, "reasonableness of precautions taken to prevent inadvertent disclosure," weighed strongly in favor of a finding of waiver.[21]

With respect to the reasonableness of precautions taken, the court questioned the defendants' search methodologies. Specifically, the defendants failed to provide the court with information regarding: "the keywords used; the rationale for their selection; the qualifications of M. Pappas [defendant] and his attorneys to design an effective and reliable search and information retrieval method; whether the search was a simple keyword search, or a more sophisticated one, such as one employing Boolean proximity operators;

or whether they analyzed the results of the search to assess its reliability, appropriateness for the task, and the quality of its implementation."[22]

Search Methodology

In evaluating the reasonableness of the defendants' methodology, the court was critical of the fact that the keyword search terms were selected by the party and its attorneys and were not disclosed to the court, noting that, "while it is universally acknowledged that keyword searches are useful tools for search and retrieval of ESI, all keyword searches are not created equal."[23] The court suggested that proper selection of keywords involves "technical, if not scientific knowledge."[24] The court further cautioned that the choice of terms is important because "simple keyword searches end up being both over- and under-inclusive in light of the inherent malleability and ambiguity of spoken and written English (as well as all other languages)."[25] The court also noted that the defendants did not assert that any sampling was done of the text-searchable ESI files that were determined not to contain privileged information on the basis of the keyword search to see if the search results were reliable.[26] The court's order suggests that sampling is a prudent way to test the reliability of keyword searches and verify that the searches are neither over-inclusive nor under-inclusive.

Practice Pointers

It remains to be seen whether other jurisdictions will follow the V*ictor Stanley, Inc.* opinion. Nevertheless, given the volume of today's electronic discovery productions, and the number of litigants opting to rely on filtering and searching when producing documents, we present the following issues as practices to consider when analyzing the risk of privilege waiver disputes in the event of inadvertent disclosure:

1) Meet and Confer with the Opposing Party Regarding Search Terms

The court order in *Victor Stanley, Inc.* emphasizes the importance of agreeing on search terms for a privilege review as well as search terms for a responsiveness review. The court's order is in accord with the best practice recommendations of the influential Sedona Conference, which suggests that "[p]arties should make a good faith attempt to collaborate on the use of particular search and information retrieval methods, tools and protocols (including as to keywords, concepts, and other types of search parameters)."[27]

2) Determine Whether to Ask the Court for a Discovery Order Compelling Production

Even where the parties agree on privilege review search terms, the producing party may further benefit in some jurisdictions from seeking a court order approving the selected search methodology and compelling production of the documents.[28] In *Hopson v. Mayor of Baltimore*, Judge Grimm cautioned that a "non-waiver" agreement is "not risk-free."[29] At the time, the amendments to Federal Rules of Civil Procedure 16 and 26 had not been approved and Judge Grimm noted that a prudent party should ask the court to compel production and to approve its proposed, objectively reasonable search protocol to protect the privilege.[30]

In *Victor Stanley, Inc.*, Judge Grimm notes that the amendments to the Rules do not change the substantive law of privilege waiver and he suggests that the procedures outlined in *Hopson* "are the only ones that provide a possible means of avoiding waiver in those jurisdictions that have not recognized the intermediate approach to waiver by inadvertent production …."[31] Thus, at least some courts may require a court order if the parties intend to rely on a "clawback" agreement in the event that the selected search methodology proves less than 100 percent effective.

3) Be Prepared to Defend the Search Methodologies

In the event that the parties are unable to agree on privilege search terms and the court is unwilling to enter a discovery order, a producing party should be prepared to explain its search methodology if a dispute over privilege later arises. As the Sedona Conference notes, "[p]arties should expect that their choice of search methodology will need to be explained, either formally or informally, in subsequent legal contexts (including in depositions, evidentiary proceedings, and trials)."[32]

In *Victor Stanley, Inc.*, the court advises the parties to take the following steps prior to making an independent production: 1) engage in "careful advance planning by persons qualified to design effective search methodology"; 2) test the data for quality assurance; and 3) "be prepared to explain the rationale for the method chosen to the court, demonstrate that it is appropriate for the task, and show that it was properly implemented."[33] In some instances, this might require the producing party to engage an expert to design, sample and ultimately justify the search methodology.

The court reasons that the parties should be prepared to "back up their positions with respect to a dispute involving the appropriateness of ESI search and information retrieval methodology … with reliable information from someone with the qualifications to provide helpful opinions, not conclusory argument by counsel."[34] Each party "need[s] to be aware of literature describing the strengths and weaknesses of various methodologies … and select the one that they believe is most appropriate for its intended task."[35] If the selected methodology is later challenged by an adversary, the party should be prepared "to support their position with affidavits or other equivalent information from persons with the requisite qualifications and experience, based on sufficient facts or data and using reliable principles or methodology."[36]

Endnotes

[1] *Victor Stanley, Inc. v. Creative Pipe, Inc.*, No. MJG-06-2662, 2008 U.S. Dist. LEXIS 42025 (D. Md. May 29, 2008).

[2] *Id.* at *4.

[3] *Id.* at *7.

[4] *Id.*

[5] *Id.* at *8.

[6] *Id.* at *8-9.

[7] *Id.*

[8] *Id.* at *9.

[9] *Id.* at *11-13.

[10] *Id.* at *12.

[11] *Id.* at *12-13.

[12] *Id.*

[13] *Id.* at *13-17.

[14] *Id.* at *13.

[15] *Id.*

[16] *Id.* at *11.

[17] *Id.* at *2-3.

[18] *Id.* at *19 (citing *Hopson v. Mayor of Baltimore*, 232 F.R.D. 228, 235-38 (D. Md. 2005)).

[19] *Id.* at *20.

[20] *Id.* at *25 (citing *McCafferty's, Inc., v. Bank of Glen Burnie*, 179 F.R.D. 163, 167 (D. Md. 1998)).

[21] *Id.* at *25-26.

[22] *Id.* at *26.

[23] *Id.* at *15.

[24] *Id.* at *27.

[25] *Id.* at *28 (quoting 8 SEDONA CONF. J. 189, 194-95 (2007)).

[26] *Id.* at *16.

[27] *Id.* at *38.

[28] *Hopson*, 232 F.R.D. at 240.

[29] *Id.* at 235.

[30] *Id.* at 240.

[31] *Victor Stanley, Inc.*, 2008 U.S. Dist. LEXIS 42025 at *21-22 n.5.

[32] 8 SEDONA CONF. J. 189, 194-95 (2007).

[33] *Victor Stanley, Inc.*, 2008 U.S. Dist. LEXIS 42025 at *40.

[34] *Id.* at *34, n.10.

[35] *Id.* at *35 n.10.

[36] *Id.* at 36 n.10.

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