

Over the next several weeks the E-Discovery Alert will focus on the strategy and tactics for handling sixteen specific ESI issues throughout pretrial discovery. Whether it is a "meet and confer" or request for production these are the critical issues to focus in requesting or producing ESI. The legal issue excerpts will be derived from the *Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics* (2008-2009). The Guide is cross-referenced and hyperlinked with the *Arkfeld on Electronic Discovery and Evidence* (2nd ed.) treatise and is part of the CD-ROM.

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**ISSUE:** DOES THE RETRIEVAL PROCEDURE UNDER FRCP 26(B)(5)(B) PROVIDE FOR RETRIEVAL OF PROTECTED ESI THAT IS INADVERTENTLY DISCLOSED?

**ANSWER:** YES

***Best Practices Guide for ESI Pretrial Discovery - Strategy and Tactics (2008-2009)***

### **3.11 WORK-PRODUCT, PRIVILEGED ESI, NONWAIVER AGREEMENT AND RETRIEVAL PROCEDURE**

- A. Work Product or Trial-Preparation Materials
- B. Attorney-Client Privilege
- C. Trade Secrets
- D. Inadvertent Disclosure Court Approaches
- E. Inadvertent Disclosure Nonwaiver Agreement
- F. Inadvertent Disclosure Retrieval Procedure Rule 26(b)(5)(B)

**A. Work Product or Trial-Preparation Materials**

- 1. Overview
- 2. Requesting Party Strategy

3. Producing Party Strategy
4. Litigation Support Databases
5. Checklist

1. Overview

Rule 26(b)(3) essentially provides that documents and tangible things prepared in anticipation of litigation are discoverable upon a showing of:

- Substantial need; and
- Inability (without undue hardship) to obtain the material elsewhere.
- However, mental impressions, conclusions, opinions and legal theories are always protected.

The work product doctrine distinguishes between fact work product and opinion work product. The courts afford greater protection to opinion work product as opposed to factual work product.

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### *B.□□ Attorney-Client Privilege*

1. Overview

The attorney-client privilege protects confidential communications by a client to an attorney made in order to obtain his legal assistance in the capacity of legal advisor. The general principles of the attorney-client privilege are: (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived. *United States v. Evans*, 113 F.3d 1457, 1461 (7th Cir. 1997) (Citing to Professor Wigmore).

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### *C. Trade Secrets*

### 1. Overview

Fed. R. Civ. P. 26(c) specifically provides that a court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following . . . [require] that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a designated way . . . . .

### *D. Inadvertent Disclosure Court Approaches*

Substantively, the courts have addressed the inadvertent waiver issue by using one of three tests to determine if the privilege has been waived. These approaches include: (1) the strict liability test; (2) the client intent test; and (3) the case-specific test.

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### *E. Inadvertent Disclosure Nonwaiver Agreement*

1. Overview
2. Clawback and Quick-Peek Agreements
3. Requesting Party Strategy
4. Producing Party Strategy
5. Checklist

### 1. Overview

Whether you are seeking or defending against a request for electronic information, both sides should consider the use of a protective order and/or confidentiality agreement to ensure nonwaiver of privileged material. Disclosure of confidential material can often waive its privileged protection.

The parties can enter into an agreement regarding nonwaiver of privileged information that can

differ from the procedure set out in Rule 26(b)(5)(B).

In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

### 2. Clawback and Quick-Peek Agreements

To limit the cost of reviewing the significant volumes of electronic information and try to prevent the waiver of inadvertent disclosure of privileged information, parties have entered into nonwaiver agreements commonly termed clawback or quick-peek.

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### *F. Inadvertent Disclosure Retrieval Procedure Rule 26(b)(5)(B)*

#### 1. Overview

As a result of the substantial volume of ESI, delaying discovery and the risk of producing privileged information, Rule 26(b)(5)(B) was added to provide a procedure, in the absence of an agreement, for a party to assert a claim of privilege or trial-preparation material protection after privileged information is inadvertently produced during discovery. If the claim is then contested by the receiving party, a procedure is set forth to have the court resolve the substantive dispute.

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