LITIGATION NEWS

ABA Litigation Section

TOP STORY

Accidental Misuse of Privileged Metadata Results in Sanctions

By Andrea L. McDonald – June 23, 2023

Even unintentional misuse of privileged information might warrant sanctions. An appellate court considered whether an attorney's use of privileged information inadvertently disclosed through unredacted metadata merited disqualification. Although the court determined that disqualification was unnecessary, it did not foreclose the future possibility, noting that attorneys' duty of competence extends to computer technology. To avoid harsh sanctions, ABA Litigation Section leaders encourage all attorneys to understand their ethical obligations related electronic discovery and to protect privileged information.

Innocent Disqualification?

In *Hur v. Lloyd & Williams, LLC*, the petitioner challenged a trial court's denial of a motion to disqualify opposing counsel for misconduct in retaining and using privileged material to support a summary judgment motion. In the underlying contract dispute, the petitioner electronically produced its emails with a notice that privileged information had been redacted. However, the redaction was only partially successful, failing to scrub embedded text.

Opposing counsel found matches to keyword searches despite apparent efforts to black out the text. Rather than notifying the producing attorney, as required by Washington Rule of Professional Conduct 4.4(b), respondent's counsel included the embedded text in a summary judgment motion. The petitioner's attorney recognized the privileged email fragments and promptly moved for opposing counsel's disqualification.

Under the deferential review standard, the Washington Court of Appeals affirmed the trial court's decision not to impose the "drastic sanction" of disqualification. Nonetheless, the court recognized that the respondent's counsel violated both the rules of civil procedure and professional conduct when she failed to take corrective action. The court considered the resulting prejudice to the producing party, the fault of the receiving attorney, the receiving attorney's knowledge of the privilege, and the availability of lesser sanctions.

Critically, there was little to no prejudice to the petitioner. Even if the respondent's counsel had followed the rules, she would have challenged the claimed privilege and disclosed the information to the trial court for in camera review. Further, respondent's counsel did not

intentionally seek out privileged metadata. Her keyword searches appeared motivated only by her client's version of the facts.

On the issue of knowledge, the court of appeals deferred to the trial court's determination. The respondent's counsel testified that she was unaware that her keyword search had exposed privileged information. Emphasizing the drastic nature of disqualification, essentially a penalty to the party for its counsel's misconduct, the court found destruction of the files and an order in limine was appropriate.

Know Your ESI (or Know Someone Who Does)

The *Hur* court did not question the counsel's claimed unfamiliarity with metadata. It acknowledged that even a "sophisticated computer user" may have been confused when the search results did not match the visible text. Nonetheless, someone "familiar with metadata" would realize the discrepancy was attributable to insufficient redaction. Unequivocally, the court specified that a lawyer's duty of competence requires an understanding of metadata.

Litigation Section leaders agree that this opinion serves as yet another reminder that attorneys' obligations extend beyond just knowledge of the law. "[Competence] means not only understanding the types of documents and ESI that must be collected, processed, reviewed, and produced, but also the software that is utilized as a part of the process," asserts Joseph V. Schaeffer, Pittsburgh, PA, cochair of the Section's Pretrial Practice & Discovery Committee.

"It isn't absolutely necessary for every litigator to have a vast understanding of metadata," clarifies Andrew D. Tharp, Nashville, TN, cochair of the Section's Mass Torts Litigation Committee. "However, they must have processes in place to protect against inadvertent disclosure, such as having a member on the team with a higher level of technical expertise or using a third-party vendor to assist," Tharp notes. On this point, Tharp, Schaeffer, and the courts agree: Counsel must understand modern technology or associate with someone who does.

No-Fault Is No Protection

Generally, attorneys can guard against finding themselves the subject of a motion to disqualify. "When a receiving attorney comes across what objectively appears to be privileged information or an attorney-client communication, that attorney should reach out to the producing attorney," Tharp counsels. "Obligations in the case of inadvertent disclosure can vary state by state," adds Schaeffer. In states like Washington "where ethical rules only require receiving counsel to notify disclosing counsel—not necessarily to return, destroy, or sequester—the

disclosing counsel may have an ethical obligation to clawback the disclosure when discovered," he illustrates.

While rare, disqualification may be imposed against an innocent receiving attorney. The *Hur* court cautioned that, in the context of a conflict of interest, mere access to privileged information may result in mandatory disqualification. "The strongest case for a no-fault disqualification would likely be where the inadvertent disclosure was truly material and the prejudicial effect of the disclosure could not be undone by a liminal order," Schaeffer opines.

"Attorneys should work together to cordially and professionally address these situations before they become a hotly contested issue," Tharp suggests. "Whether to produce metadata should be part of every initial discovery conference, and attorneys on both sides should know whether metadata is being collected and produced," advises Schaeffer. In *Hur*, he adds, "Had counsel determined before production whether metadata would be included with the productions, this unfortunate incident might have been avoided."

Andrea L. McDonald is a contributing editor for Litigation News.

Related Resources

- ABA Model Rule of Professional Conduct 1.1, cmt. 8: Competence – Comment.
- ABA Model Rule of Professional Conduct 4.4(b): Respect for Rights of Third Persons.
- Catherine M. Chiccine, "Attorney Error Results in Massive Leak of Privileged Client Data," *Litigation News* (Jan. 22, 2018).
- Paul W Grimm, Charles Samuel Fax, and Paul Mark Sandler, *Discovery Problems and their Solutions*, Fourth Ed. (ABA 2020).