Best Practices to Protect Privileged Documents

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Catalyst Consulting
Catalyst Consulting

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Supported by Catalyst Project Managers, Database Administrators, Application Support Technicians, Engineers and Developers.
What is Privileged?

Attorney-Client Privilege

• Communication between attorney and client
• For the purpose of obtaining or providing legal advice
• Intended to be kept confidential
• Reasonable measures are taken to preserve confidentiality

Other privileges include work product, accountant, doctor, etc.
Waiving Privilege

- Including 3rd parties in the communication
- Communication with no expectation of privacy
- Sending privileged information to 3rd parties
- Producing a privileged document

Subject-Matter Waiver  Inadvertent Disclosure
Victor Stanley v. Creative Pipe

- Motion to declare privilege waived for 165 documents
- Privileged documents found in production
- Plaintiffs identify and segregate
- Defendants claim inadvertent production
- Plaintiffs argue waiver
- No claw-back provision in place

250 F.R.D. 251, 70 Fed.R.Serv.3d 1052 (May 2008)
While keyword searches have long been recognized as appropriate and helpful for ESI search and retrieval, there are well-known limitations and risks associated with them, and proper selection and implementation obviously involves technical, if not scientific knowledge.

Given this complexity, for lawyers and judges to dare opine that a certain search term or terms would be more likely to produce information than the terms that were used is truly to go where angels fear to tread.”

250 F.R.D. 251, 70 Fed.R.Serv.3d 1052 (May 2008)
Victor Stanley v. Creative Pipe

In this case, the Defendants have failed to demonstrate that the keyword search they performed on the text-searchable ESI was reasonable.

- Defendants neither identified the keywords selected nor the qualifications of the persons who selected them to design a proper search;
- They failed to demonstrate that there was quality-assurance testing;
- And when their production was challenged by the Plaintiff, they failed to carry their burden of explaining what they had done and why it was sufficient.

250 F.R.D. 251, 70 Fed.R.Serv.3d 1052 (May 2008)
Wm Gross Const v. American Mfgrs Mut Ins. Co

This Opinion should serve as a wake-up call to the Bar about the need for careful thought, quality control, testing, and cooperation with opposing counsel in designing search terms or “keywords” to be used to produce emails or other electronically stored information (“ESI”).

This case is just the latest example of lawyers designing keyword searches in the dark, by the seat of the pants, without adequate (indeed, here, apparently without any) discussion with those who wrote the emails.

256 F.R.D. 134, 135 (S.D.N.Y. March 2009)
Rule 502 and FRCP 26(b)(5)

- Rule 502(a) Subject matter waiver
- Rule 502(b) Inadvertent disclosure
- Rule 502(d) Federal Court orders control state waiver
- Rule 502(e) Non-waiver agreements binding if approved by court
- FRCP 26(b)(5) Return procedures
Rule 502 and FRCP 26(b)(5)

FRE 502 (a)

Waiver in a Federal proceeding is not a subject matter waiver unless:
- The waiver is intentional;
- Documents involve the same subject matter; and
- The materials in fairness should be considered together.
Rule 502 and FRCP 26(b)(5)

FRE 502 (b)

[T]he disclosure does not operate as a waiver in a Federal or State proceeding if:

- The disclosure is inadvertent;
- The holder of the privilege or protection took reasonable steps to prevent disclosure; and
- The holder promptly took reasonable steps to rectify the error
Rule 502 and FRCP 26(b)(5)

FRCP 26(b)(5)

If information produced in discovery is subject to a claim of privilege, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved;
Tools to Perform Privilege Filtering

Initial Searching Methods:
- Key custodians
- Key privilege terms
- Law firm and emails
- Clustering
- Sampling

“Correlation Navigators”:
- Field navigators (emails and domains from metadata)
- Text extractors
- Key concepts
- “More Like This”
Catalyst “Refine Results”

<table>
<thead>
<tr>
<th>Open</th>
<th>BegControl</th>
<th>EndControl</th>
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<th>Author Recipient</th>
<th>Description</th>
<th>Comments</th>
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<td>DOI Indiana Investigation: Privileged &amp; Confidential</td>
<td>This comment was created by a macro.</td>
</tr>
<tr>
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<td></td>
<td></td>
<td>05/08/2001</td>
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<td>Alison never was!</td>
<td></td>
</tr>
<tr>
<td>3</td>
<td></td>
<td></td>
<td>10/11/2001</td>
<td><a href="mailto:mailer@lists.smarterliving.com">mailer@lists.smarterliving.com</a>, <a href="mailto:membersa@smarterliving.com">membersa@smarterliving.com</a></td>
<td>Smarter Living Deal Alert!</td>
<td></td>
</tr>
</tbody>
</table>
Catalyst “Correlation Navigators”
Four Typical Types of Review

Privilege Reviews:
• Litigation – Producing party reviews potentially responsive documents
• Government Investigation (SEC, DOJ) – Often review only for privilege and produce the rest

No Privilege Review
• Internal Investigation
• Litigation – Reviewing other side’s produced documents
Searches for Potentially Privileged Documents

• Law firm names and email domains
• Attorney names and email addresses (specific email addresses)
• Words commonly found in privileged documents

Mass batch searching made possible through Search Utility
Law Firm Names And Domains

- Include names and email domains of previous counsel
- Use the smallest number of significant names (and leave off the LLP)

Skadden, Arps, Slate, Meagher & Flom LLP

Will find more than
Search Strategies for Attorney Names and Emails

• Proximity search for non-unique names
  Eg.: ((First name OR nicknames OR first initial) NEAR/2 (last name or lastname2)) OR (email addresses)

• Integrate nicknames into search:
  “Charles”, “Charlie” and “Chuck”

• Unique last name by itself

• Unique first and last name: search for each individually
Search Strategies for Attorney Names and Emails

- Unique first name: search for first name by itself OR first initial near last names OR email addresses
- Include accents & other nuances for foreign language name
- O’Hara OR OHara – With and without the space/apostrophe
- If you don’t have actual email addresses, create them with first initial and last name OR last name and first initial. Eg. *ebrockovich*
- Make effort to obtain maiden names, nick names and emails
## Legal Words for Your Search

<table>
<thead>
<tr>
<th>Search</th>
<th>Privileged Count</th>
<th>Not Priv Count</th>
<th>Priv Review Count</th>
<th>% Priv</th>
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<td>0</td>
<td>0</td>
<td></td>
</tr>
<tr>
<td>doctext co Wherefor</td>
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<td>0</td>
<td>1</td>
<td>100.0%</td>
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<td>doctext co litigator</td>
<td>5</td>
<td>1</td>
<td>6</td>
<td>83.3%</td>
</tr>
<tr>
<td>doctext co workproduct</td>
<td>5</td>
<td>1</td>
<td>6</td>
<td>83.3%</td>
</tr>
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<td>2</td>
<td>11</td>
<td>81.8%</td>
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<td>1</td>
<td>3</td>
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<tr>
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<td>85</td>
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<tr>
<td>doctext co deposes</td>
<td>34</td>
<td>26</td>
<td>60</td>
<td>56.7%</td>
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<tr>
<td>doctext co Summary judgment</td>
<td>40</td>
<td>31</td>
<td>71</td>
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<td>doctext co deposition</td>
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<td>69</td>
<td>157</td>
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<tr>
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<td>995</td>
<td>808</td>
<td>1803</td>
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<td>doctext co request* for production</td>
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<td>6</td>
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<td>53.8%</td>
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<tr>
<td>doctext co (avoiding penalt* OR avoid penalt*)</td>
<td>459</td>
<td>415</td>
<td>874</td>
<td>52.5%</td>
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<tr>
<td>doctext co (interrogatory or interrogatories)</td>
<td>220</td>
<td>210</td>
<td>430</td>
<td>51.2%</td>
</tr>
<tr>
<td>doctext co Comes now</td>
<td>2</td>
<td>2</td>
<td>4</td>
<td>50.0%</td>
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<tr>
<td>doctext co (F 3rd or F 3d)</td>
<td>66</td>
<td>68</td>
<td>134</td>
<td>49.3%</td>
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<tr>
<td>doctext co esq</td>
<td>631</td>
<td>670</td>
<td>1301</td>
<td>48.5%</td>
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**Legal Words Yielding More “False Positives”**

<table>
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<tr>
<th>Term</th>
<th>2013</th>
<th>2014</th>
<th>2015</th>
<th>2016</th>
<th>Percentage</th>
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<td>doctext co intended recipient</td>
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<td>7970</td>
<td>10302</td>
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<tr>
<td>doctext co court</td>
<td>2893</td>
<td>11448</td>
<td>14341</td>
<td>20.2%</td>
<td></td>
</tr>
<tr>
<td>doctext co deposing</td>
<td>1</td>
<td>4</td>
<td>5</td>
<td>20.0%</td>
<td></td>
</tr>
<tr>
<td>doctext co transmission in error</td>
<td>241</td>
<td>1096</td>
<td>1337</td>
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<tr>
<td>doctext co sued</td>
<td>60</td>
<td>300</td>
<td>360</td>
<td>16.7%</td>
<td></td>
</tr>
<tr>
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<td>13</td>
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<tr>
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<td>7</td>
<td>8</td>
<td>12.5%</td>
<td></td>
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<tr>
<td>doctext co patented</td>
<td>29</td>
<td>203</td>
<td>232</td>
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<td></td>
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<tr>
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<td>8</td>
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<td></td>
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<tr>
<td>doctext co violated federal</td>
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<td>8</td>
<td>12.5%</td>
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<tr>
<td>doctext co S Ct</td>
<td>23</td>
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<td>208</td>
<td>11.1%</td>
<td></td>
</tr>
<tr>
<td>doctext co suing</td>
<td>10</td>
<td>95</td>
<td>105</td>
<td>9.5%</td>
<td></td>
</tr>
<tr>
<td>doctext co (counselor or counselor)</td>
<td>8</td>
<td>82</td>
<td>90</td>
<td>8.9%</td>
<td></td>
</tr>
<tr>
<td>doctext co sues</td>
<td>17</td>
<td>189</td>
<td>206</td>
<td>8.3%</td>
<td></td>
</tr>
<tr>
<td>doctext co law suit</td>
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<td>46</td>
<td>50</td>
<td>8.0%</td>
<td></td>
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<tr>
<td>doctext co respondent*</td>
<td>63</td>
<td>775</td>
<td>838</td>
<td>7.5%</td>
<td></td>
</tr>
<tr>
<td>doctext co Now comes</td>
<td>2</td>
<td>27</td>
<td>29</td>
<td>6.9%</td>
<td></td>
</tr>
<tr>
<td>doctext co litigating</td>
<td>1</td>
<td>15</td>
<td>16</td>
<td>6.3%</td>
<td></td>
</tr>
<tr>
<td>doctext co law suits</td>
<td>2</td>
<td>33</td>
<td>35</td>
<td>5.7%</td>
<td></td>
</tr>
<tr>
<td>doctext co TRO</td>
<td>14</td>
<td>458</td>
<td>472</td>
<td>3.0%</td>
<td></td>
</tr>
</tbody>
</table>
Topical Clustering

- Machine driven technology to identify and place “unique” similar documents into folders.
- Uses Non-Negative Matrix Factorization
- Cluster “Potentially Privileged” results.
- Utility to Find:
  - Irrelevant Documents: Personal, Newsletters, HR, mass emails, etc.
  - Privileged Documents: Term sheets, deals, trial preparation, etc.
Analysis of Document Relationships

• Quickly and efficiently identify privilege
• Identify privileged documents without review
• Remove documents that are highly unlikely to be privileged from your privilege review
• Speed up review by grouping like documents together
Analysis of Document Relationships

Opposing Party

Client

Opposing Party Communications

Counsel

Client / Counsel Communications

Search | Analyze | Review
Analysis of Document Relationships

- **How it works**

<table>
<thead>
<tr>
<th>Author</th>
<th>Subject</th>
<th>Recipient</th>
<th>CC</th>
</tr>
</thead>
<tbody>
<tr>
<td><a href="mailto:matt.harris@enron.com">matt.harris@enron.com</a></td>
<td>Re: Cross-sell opportunity</td>
<td><a href="mailto:jennifer.medcalf@enron.com">jennifer.medcalf@enron.com</a></td>
<td><a href="mailto:dorothy.woster@enron.com">dorothy.woster@enron.com</a></td>
</tr>
<tr>
<td></td>
<td>Continental/Enron meeting, December 12th, 1:30 - 2:30 PM.</td>
<td></td>
<td></td>
</tr>
<tr>
<td><a href="mailto:sarah-joy.hunte@enron.com">sarah-joy.hunte@enron.com</a></td>
<td>Experience Enron trading floor tour 2:30-3:00 PM</td>
<td><a href="mailto:tracy.ramsey@enron.com">tracy.ramsey@enron.com</a></td>
<td><a href="mailto:jennifer.medcalf@enron.com">jennifer.medcalf@enron.com</a></td>
</tr>
<tr>
<td><a href="mailto:colleen.koenig@enron.com">colleen.koenig@enron.com</a></td>
<td>change in date/time for Compaq`s Experience ENRON</td>
<td><a href="mailto:carrie.robert@enron.com">carrie.robert@enron.com</a></td>
<td><a href="mailto:jennifer.stewart@enron.com">jennifer.stewart@enron.com</a></td>
</tr>
<tr>
<td><a href="mailto:jeff.youngflesh@enron.com">jeff.youngflesh@enron.com</a></td>
<td>Bristol Babcock/Pagosa Energy - Well Master/Enron meeting notes</td>
<td><a href="mailto:rebende@earthlink.net">rebende@earthlink.net</a></td>
<td><a href="mailto:anthony.gilmore@enron.com">anthony.gilmore@enron.com</a></td>
</tr>
<tr>
<td><a href="mailto:jeff.youngflesh@enron.com">jeff.youngflesh@enron.com</a></td>
<td></td>
<td><a href="mailto:jimgriffeth@compuserve.com">jimgriffeth@compuserve.com</a></td>
<td><a href="mailto:roy.hartstein@enron.com">roy.hartstein@enron.com</a></td>
</tr>
<tr>
<td><a href="mailto:jeff.youngflesh@enron.com">jeff.youngflesh@enron.com</a></td>
<td></td>
<td><a href="mailto:kevinfinnan@compuserve.com">kevinfinnan@compuserve.com</a></td>
<td><a href="mailto:jennifer.medcalf@enron.com">jennifer.medcalf@enron.com</a></td>
</tr>
<tr>
<td><a href="mailto:jean.mrha@enron.com">jean.mrha@enron.com</a></td>
<td>Outsourcing Deals</td>
<td><a href="mailto:john.arnold@enron.com">john.arnold@enron.com</a></td>
<td><a href="mailto:john.lavorato@enron.com">john.lavorato@enron.com</a></td>
</tr>
<tr>
<td><a href="mailto:michael.kushner@enron.com">michael.kushner@enron.com</a></td>
<td>Enron`s P-Card Program</td>
<td><a href="mailto:lisa.herman@citicorp.com">lisa.herman@citicorp.com</a></td>
<td><a href="mailto:barry.proud@enron.com">barry.proud@enron.com</a></td>
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<tr>
<td></td>
<td></td>
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<td><a href="mailto:peter.goebel@enron.com">peter.goebel@enron.com</a></td>
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<td></td>
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<tr>
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<td></td>
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<td><a href="mailto:bruce.martin@enron.com">bruce.martin@enron.com</a></td>
</tr>
</tbody>
</table>
Analysis of Document Relationships

• Targeting potentially privileged documents through author / recipient analysis

1. Counsel
2. Company Employees
3. In-House Counsel
4. Opposing Party
5. Opposing Counsel
6. Vendors
7. Support Staff

• Document reduction:
  →250,000 documents to 51,000 parent documents—80.6%
**Analysis : Review Reporting**

- **Keep track of your production**

<table>
<thead>
<tr>
<th>Custodian</th>
<th>Not Reviewed</th>
<th>Reviewed</th>
<th>Responsive</th>
<th>Privileged</th>
<th>Produced</th>
<th>Produced Pot. Priv</th>
<th>Produced Priv</th>
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</thead>
<tbody>
<tr>
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<td>182</td>
<td>0</td>
<td>0</td>
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<td>21833</td>
<td>9</td>
<td>816</td>
<td>12</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td>Custodian 3</td>
<td>5</td>
<td>10441</td>
<td>577</td>
<td>10</td>
<td>127</td>
<td>0</td>
<td>0</td>
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<tr>
<td>Custodian 4</td>
<td>9</td>
<td>4119</td>
<td>0</td>
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<td>0</td>
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<td>7737</td>
<td>1082</td>
<td>88</td>
<td>360</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>
Suggested Practices for Documenting Privilege

- Review each document (post coding & QC)
- Careful assessment of attorney in non-legal setting (i.e., sales)
- Make effort to identify unknown authors and recipients
- Seek approval with client & counsel to build consensus
- If questionable, err on side of privilege for first pass
Quality Assurance and Control Strategies

• Conduct privilege search during case assessment
• Integrate protocol to address privilege within review strategy
• Segregate “potentially privileged” for additional review
• Assess and circulate privilege documents to counsel
• QC includes iterative search efforts and sampling before production
Sampling for Privilege Before Production

- Privilege assessment conducted by counsel on sample set—effective use of time and resources.
- Verify initial coding decisions by “first pass” reviewers
- Integral part of QA plan
- Provides a “birds eye view”
- Sedona Conference reference
- Ability to apply sampling in any search scenario including Privilege
Privilege Identification

Custom forms for privilege review:

- Privilege Review (“Yes/No”)
- Privilege Status (“Produce”, “Redact”, “Withhold”, “Non-Responsive”)
- Date Sent, Log Date, Author & Recipients
- Description Starter (multi-field menu)
- Description End (comment field)
- Privilege Reason (“AC”, “AWP”, or “AC/AWP”)
- Review Status (“Rev’d”, “Not Reviewed”, “Require Review”)
- Case Specific Information (Hot, Issues, Confidential)
Best Practices to Protect Privileged Documents

November 6, 2009

Catalyst Consulting