Discovery Lapse Could Result in Loss of Privilege

Redacted Notes of Attorneys' Investigation Ordered Disclosed

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Six months into defending a complex case, your client informs you that its plan for the preservation of electronically stored information (ESI) failed, resulting in thousands of responsive emails being inadvertently destroyed. What are the risks faced if you conduct an investigation prior to disclosing your client's situation to opposing counsel and the court?

In one recent decision, a party's voluntary actions taken to explain its own discovery lapses resulted in a partial waiver of privilege. *In Re Intel Corp. Microprocessor Antitrust Litig.* Intel's admitted failure to preserve certain ESI in an antitrust case led a federal district court to order the production of redacted notes taken by its attorneys during interviews of 1,023 Intel employees regarding their document preservation efforts.

In the fall of 2006, during what may have been the "largest electronic production in history" of documents "somewhere in the neighborhood of a pile 137 miles high," Intel discovered some lapses in its preservation of ESI. Intel had imposed a litigation hold. However, it did not turn off the "auto delete" function that eliminated older email, believing that its hold instructions and other fail-safe processes were sufficient. This proved to be an error. It subsequently hired outside attorneys to begin an undisclosed process of interviewing 1,023 custodians "for the purpose of determining their e-mail preservation habits and their level of compliance with Intel's litigation hold notices/instructions." Then, in early February 2007, it notified the court and the opposing litigant of the discovery lapses. Intel contended that the problems were "inadvertent mistakes" and that its "investigation revealed no instance of deliberate deception. . . ."

In addition to other criticisms, the requesting party asserted that Intel failed to give clear litigation hold instructions and failed to adequately monitor compliance of its in-house preservation efforts. During "culpability discovery," Intel agreed to provide the "best information gathered after reasonable investigation," without referring to privilege. Intel disclosed 400 pages of summaries, "which drew upon thousands of pages of attorney notes." However, Intel asserted that this disclosure was not a work-product waiver, relying in part on its "general objection" to the document request to preserve its assertion of privilege.

Nevertheless, the court held that providing the summaries of those interviews, coupled with an assertion that its investigation revealed no deliberate deception, waived Intel's protection of all but core work product. The court ordered production of Intel's attorneys' notes to the extent that those notes revealed the substance of custodian statements that were already voluntarily disclosed through summaries by Intel's counsel. The court held that Intel's opponent was not compelled to rely on Intel's description of what those custodians reported, but instead could review the actual attorneys' interview notes.

Balancing the need to make appropriate disclosure to the court and opposing counsel in these situations with the need to maintain confidentiality is not easy to do. Parties should be allowed a mechanism for critical self-study, free of the specter of privilege waiver and disclosure, says Andrew S. Pollis, Cleveland, cochair of the ABA Section of Litigation's Ethics and Professionalism Committee.

Given the complexity of ESI, a litigant discovering a lapse such as Intel's is faced with the dilemma of a potential waiver versus responding without knowing the facts, Pollis says. "If there is reason to pursue discovery to unearth the facts, work product and attorney-client privilege should still be protected except in unusual circumstances," he adds.

"It is conceivable that a broad interpretation of this decision could have a real impact on the attorney-client relationship," says Robert J. Scheffel, Washington, D.C., Chair of the Attorney-Client Privilege Subcommittee of the Section's Pretrial Practice and Discovery Committee. "If a party believes that any investigation is discoverable, that party is unlikely to undertake such an investigation, or discuss the details with its counsel. This would seem to be at odds with one of the key purposes of the attorney-client privilege—encouraging frank communications between attorneys and their clients," Scheffel notes.

While sharing summaries of an internal investigation with the court and opposing counsel may be necessary during what some have called "discovery about discovery," it may result in a waiver of privilege—even when a party is simply trying to explain its own mistakes. The impact of *Intel* may extend beyond the ESI context. Litigators are cautioned to realize that any selective disclosure of privileged materials could be considered a waiver of work product, or other, protection.

RESOURCES

- *In Re* Intel Corp. Microprocessor Antitrust Litig., 2008 WL 2310288 (D. Del. June 4, 2008).