

February 22, 2007

Via Email: Rules_Comments@ao.uscourts.gov

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Thurgood Marshall Federal Judicial Building
Washington, D.C. 20544

Re: Statement in Support of Proposed Federal Rule of Evidence 502

Dear Mr. McCabe:

We respectfully submit this written submission summarizing our testimony on January 29, 2007, before the Evidence Rules Advisory Committee. As noted at the beginning of our testimony, Anne Kershaw is an attorney and litigator with a litigation management consulting firm, working primarily with in-house counsel to realize efficiencies and improve litigation processes. Patrick Oot is the Director of Electronic Discovery and Senior Litigation Counsel at Verizon.

Privilege Review during litigation and regulatory filings presents a tremendous cost to all parties. In the current era of electronic discovery and electronically stored information, parties often place heavy burdens on their adversaries by making large document productions. Moreover, opponents now often request that documents be produced in native format. Technical obstacles aside, the review of native files creates significant problems associated with the location and redaction of privileged information. For example, in a recent matter, Verizon's outside counsel inadvertently produced (and later raked back) fifty two native PowerPoint presentations to an opponent that contained privileged information in the speaker notes of the file. Speaker notes do not appear in a plain review of the document and require deep burrowing to uncover the content. Speaker notes, audience hand-outs, hidden cells, sticky-notes in PC applications such as Microsoft Excel and Microsoft PowerPoint, have become potential data landmines for litigants. The drafters of the old rules could never have anticipated the volumes and types of data parties must review.

Enclosed please find a printed copy of the slides we presented during our testimony on January 29, 2007. In our presentation, we described the electronic discovery process used by Verizon in 2005 to locate documents responsive to a

Department of Justice Second Request subpoena in connection with Verizon's acquisition of MCI. During our testimony, we demonstrated how litigants could avoid the tremendous costs associated with an elaborate privilege review process if all courts adhere to Proposed Federal Rule of Evidence (FRE) 502.

As we stated in our testimony, Verizon collected about 2.4 million documents that amounted to 1.3 terabytes of data from 83 employees in 10 states. Verizon hired two law firms to manage and complete the review process. Outside attorneys reviewed every document for relevancy and privilege. One firm conducted relevancy review, the second conducted privilege review. Verizon divided the documents between the two law firms by the use of keyword search terms that identified documents as "potentially privileged." If documents contained attorney names or law firm domain names, Verizon attorneys directed the workflow to the "Privilege Review Team."¹ Verizon attorneys directed the documents that did not contain privileged keyword search terms to a second law firm, hereinafter the "Relevance Review Team." It should be noted that both teams conducted relevancy and privilege review.²

The Privilege Review Team consisted of one hundred and fifteen contract attorneys conducting first-tier review in addition to the staff attorneys, associates, counsel, and partners that worked directly for the law firm. The Privilege Review Team received over one million documents that Verizon identified as potentially privileged by using the privilege search terms. Contract attorneys made initial privilege and relevancy assessments; law firm attorneys made final privilege calls. Both groups worked to prepare the privilege log. The cost of the Privilege Review Team was \$7,775,998.21.³

The Relevance Review Team consisted of one hundred and ten contract attorneys conducting first-tier review in addition to the staff attorneys, associates, counsel, and partners that worked directly for the law firm. Although the Relevance Review Team's primary purpose was relevance review on the documents not marked as potentially privileged, the team also assessed privilege on any document that did not contain a keyword search term indicating potential privilege. The cost of the Relevance Review Team was \$5,822,874.40.⁴

¹ Verizon used over five thousand keyword search terms to identify potentially privileged documents. Examples of the unique keyword search terms include law firm domain names, attorney names, attorney e-mail addresses. Verizon also used general keyword search terms. Examples of the general keyword search terms include attorney, privilege, client, work-product, work product, legal, lawyer, approval, regulatory, antitrust

² The Relevancy Review Team directed relevant documents that the team deemed as privileged but did not contain privilege keyword search terms to the Privilege Review Team for final privilege calls and to record the document in the privilege log.

³ For the Privilege Review Team, Verizon paid \$2,295,144.21 for first-tier reviewers and \$5,480,854 for law firm billable hours.

⁴ For the Relevance Review Team Verizon paid \$1,748,240.00 for first-tier reviewers and \$4,074,634.40 for law firm billable hours

Law firms and a contract attorney staffing agency billed Verizon \$13,598,872.61; a result of over 225 attorneys working twelve to sixteen hour work days, seven day work-weeks, over four months.⁵ We provided the committee with this example to display the cost that litigants can bear to conduct privilege review for just one case, and in just one year. Verizon incurred this cost because Verizon's attorneys advised that, regardless of any non-waiver agreement with the DOJ, to do anything less than a full scale review would present a risk of privilege waiver in cases involving third parties, which in some jurisdictions would constitute a waiver as to the entire subject matter of the document.

Federal Rules of Evidence 502 (a), (b), (d) and (e), in essence, would allow litigants to do less than a full scale review and contain privilege waiver risks, provided an appropriate non-waiver agreement is in place. Specifically, the proposed FRE 502 protections and limitations allow for the creation of reasonable review processes that incorporate electronic document assessment tools that dramatically speed the process and reduce costs. However, we would like to emphasize that these benefits can be obtained *only* if FRE 502 is applicable in both State and Federal proceedings. The continued presence of any jurisdiction with low waiver thresholds mandates elaborate privilege reviews for all cases – regardless of FRE 502 - since organizations are routinely sued in state as well as federal court.

One reasonable approach would allow litigants to immediately remove all electronic documents containing the names of inside lawyers or those associated with the domain name of law firms working for Verizon. Although this will admittedly include documents that are not privileged, this will allow litigants to swiftly produce other documents for their opponents review, because the chances of a privileged document not being associated with the domain name of a law firm is very slim. The stated keyword search-term strategy also requires an appropriate agreement between the litigants. In the case of an inadvertent disclosure, the document would be returned. After the adversary reviews the produced material and more clearly defines a document request, the producing party can go back to the retained materials and conduct a more thorough review for documents that meet the newfound criteria. In sum, litigants could produce documents faster and target discovery needs more directly.

The advanced electronic search and review tools available today also allow litigants to conduct more reasonable review processes, such as the tool used in our testimony presentation. For example, such technologies give reviewers the ability to identify all documents that are similar to a single document, thus permitting the reviewer to electronically organize or cluster related documents around the first identified document. In the case of privilege review, a reasonable process might include an

⁵ Verizon employed 225 contract attorneys. This figure does not include law firm attorneys that work on the matter.

agreement that all electronically identified similar documents may be marked as potentially privileged and not reviewed or produced until such time as the adversary has reviewed the production in chief and provided targeted discovery demands based on the main production.

Thus, by developing intelligent and well-thought out heuristics, one could determine electronic documents to identify communications that are potentially privileged, and set them aside. Indeed, when we compare the traditional model of two hundred fifteen different lawyers engaging in the human document review, separated by time and space, these attorneys could not plausibly identify the fifty documents that the search technology identified as similar in a matter of seconds.

Furthermore, if a litigant uses an advance search and retrieval strategy to identify privileged communications, the strategy should be deemed a reasonable precaution to protect privileged communication. Again, such strategies permit immense savings in time, cost, and effort.

Using an advanced search and retrieval review process would significantly reduce litigants' privilege and relevancy review costs. The Proposed Federal Rules of Evidence 502 (a), (b), (d) and (e) would provide limitations and protections that allow corporations to negotiate reasonable, less expensive, and less time-consuming review processes.

Jointly Submitted,



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