



Webinar: Mastering Privilege Protection in Document Intensive Cases

*How to overcome the growing challenge of keeping attorney-client
communications confidential*

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- CEO of Lexbe LC, a provider of cloud-based litigation processing, review and document management software & eDiscovery services
- Frequent speaker/author on eDiscovery and legal technology issues
- Planning Committee, Electronic Discovery Institute, State Bar of Texas
- eDiscovery consultant & expert
- Education
MBA, University of Texas
JD, Southern Methodist University
BA, University of Texas



Gene Albert

512-686-3460

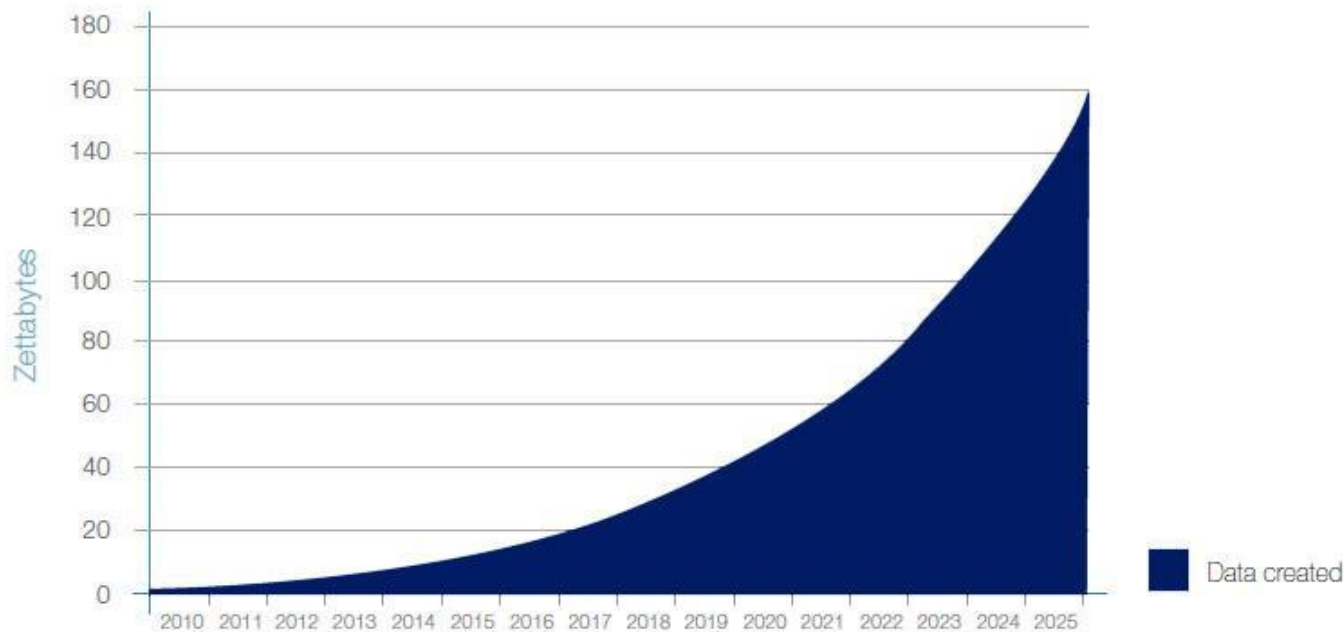
gene@lexbe.com

<https://www.linkedin.com/in/gene-albert>

Mastering Privilege Protection in Document Intensive Cases

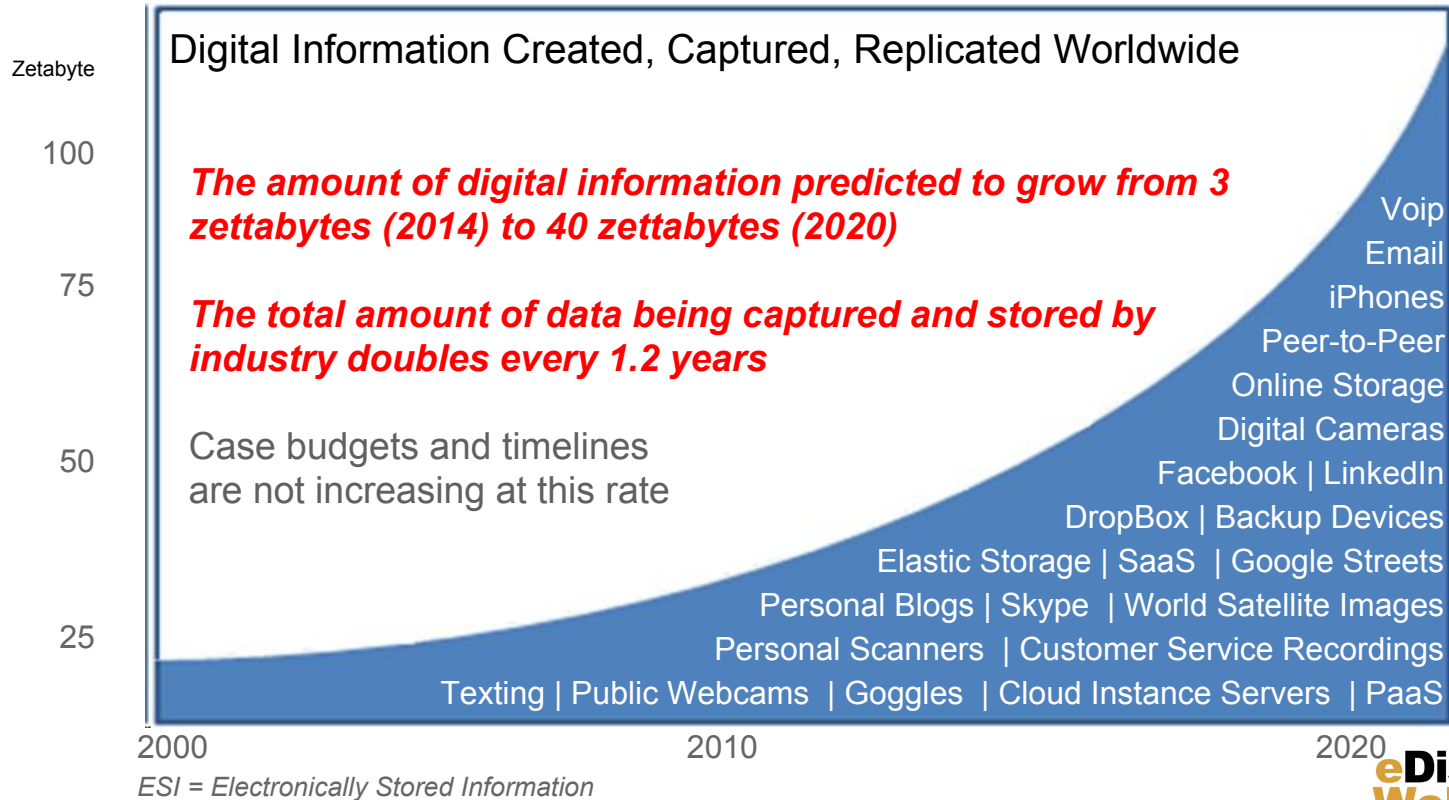
- Causes of Inadvertent Privilege Waiver
- Legal Requirements
- Optimized Workflow & Automatic Logging
- Email Threading Headaches and Solutions
- NearDupe Analysis to Catch all Versions
- Categorical Logging to the Rescue
- Tips and Best Practices

Massive Growth of Electronically Stored Information



Source: IDC's Data Age 2025 study, sponsored by Seagate, April 2017

Growth in Data Means More Privilege in Claims



- More ESI means more documents to review for privilege and work-product.
- Use of keyword search and technology assisted review instead of linear review for productions.
- Possible use of outside reviewers with less case and organizational knowledge; or training and skill.
- Typical existence of many duplicates or near duplicates of privileged documents.
- Heavy use of email means that privileged communications are documented more than ever.
- Email chains raise thorny issues of what to log and how to log.

ABA Model Rule of Professional Conduct 1.6(a)

- “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) [identified specific exceptions].”

ABA Model Rule of Professional Conduct 1.6(c)

- “A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA Model Rule of Professional Conduct 1.1

- “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- “A lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology.” (comment)

Sedona Conference

- “Litigants should use appropriate information search and retrieval methods leveraging processes and technology to improve quality and efficiency in protecting privilege during the discovery process.”

See: Sedona Conference "Commentary on Protection of Privileged ESI" (11/2014) for suggestions on proper use of technology to protect privilege

ABA Model Rule of Professional Conduct 3.2

- “A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.”

FRCP 1

- “These rules govern the procedure in all civil actions and proceedings in the United States district courts, except as stated in Rule 81. They should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.”

General

- State or Federal if subject matter or diversity jurisdiction.

FRE 502 (a)

- Inadvertent waiver will not lead to broad subject matter waiver.
- Limits scope of waiver for voluntary disclosures.

FRE 502 (d)

- One federal court can bind other proceedings - state and federal.
- Enables parties to establish discovery protocols.
- Examples: Clawback agreements, “quick peeks” privilege log protocols, protocols regarding privilege review, categorical logging, scope of ESI preservation, phased discovery.
- May be part of parties agreement or court may order sua sponte.

FRCP Not Specific to Privilege Log Requirements

- The federal law is based on FRCP 26(b):

“When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”
- Does not address even the traditional elements of the log (date, time, sender, subject), much less the more complicated issue of how to handle email chains, etc.

Courts Traditionally Require Specific Logging

“The producing party shall disclose the following information about each such document withheld: a description of the document withheld with as much specificity as is practicable without disclosing its contents, including:

- (a) the general nature of the document;
- (b) the identity and position of its author;
- (c) the date it was written;
- (d) the identity and position of its addressee;
- (e) the identities and positions of all persons who were given or have receive copies of it and the dates copies were received by them;
- (f) the document's present location and the identity and position of its custodian; and
- (g) the specific reason or reasons why it has been withheld from production or disclosure.

S.E.C. v. Nacchio, 2007 WL 219966 (D. Colo. Jan. 25, 2007)

Use It or Lose It

Courts have often held that an incomplete privilege log can result in waiver:

“General, conclusory assertions” that some documents were privileged, without including specific reference to the opinion letters in the privilege log, were insufficient under Rule 26(b)(5) and resulted in waiver. . .”

In Nordock Inc. v. Systems Inc., No. 11-C-118 (E.D. Wis. Oct. 5, 2012)

- Draconian result makes complex privilege issues difficult to resolve.
- Contra:
"Finding a waiver for an inadequate log is disfavored."
Facciola & Redgrave, Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola Redgrave Framework, 2009 Fed.Cts.L.Rev. 4 (Nov. 2009).

<http://www.fclr.org/fclr/articles/html/2009/facciolaredgrave.pdf>

Special Issues

- Corporate Communications. When your client is a corporation, special issues arise in defining the “client” for attorney-client privilege purposes. Courts apply two tests: Subject matter and more restrictive control group.
- Legal vs. Business Advice. In-house counsel often serve a “dual role of legal and business advisor.” Assess “whether a particular communication was made for the purpose of securing legal advice (as opposed to business advice).” *United States v. ChevronTexaco*, 241 F. Supp. 2d 1065, 1073 (N.D. Cal. 2002).
- Joint Defense/Common Interest privilege. Exception to the rule that a party waives privilege by disclosing confidential information to third parties. Applies where the parties share a common interest but is limited to communications related to legal advice in pending or reasonably anticipated litigation. *Ambac Assurance v. Countrywide Home Loans*, 27 N.Y.3d 616, 628 (2016).

Email Bodies and Attachments

- Email body may be privileged and attachments not, or visa versa.
- Complications of separating emails and attachments.
- It's possible to break (separate) email families, but usually not best as it can cause review and production questions and problems.
- If attachments have been produced separately, then withholding duplicates in privileged email families may be acceptable.
- Redacting privileged information in email families can be a good solution. Maintain a separate redacted for privilege.
- May be addressed specifically in an ESI Order / Agreement.

Email Strings

- An email body contains multiple emails nested or embedded in text (aka 'Email String').
- Danger of hiding non-privileged information with minor privileged component. Opposite concern of disclosing privileged communications indirectly or in pieces.
- Portions of string may contain different parties, dates, subjects, etc. Often change mid-stream.
- Some courts suggest separate logging but that is time-consuming and difficult.
- Redaction of privileged portions is often the best solution.

From Lexbe Sample ESI Order (available at website or on-request)

19. Inadvertent Production of Privileged Materials (“Claw-back”). In the event that a producing party claims that it inadvertently failed to designate any production materials or other information as privileged or work-product materials, it shall promptly notify all parties to whom such privileged material was produced or disclosed of the producing party’s intent to assert a claim of privilege or work-product over such materials. Upon such notice, the receiving party, if it intends to challenge the designation of the document(s), shall immediately sequester all copies of the document(s), pending Court resolution of the challenge and shall view and use the document(s) at issue only to the extent necessary to challenge the privilege claim. The document(s) that the receiving party intends to challenge shall only be submitted to the Court under seal for an in camera review. If the receiving party does not intend to challenge the designation of the document(s), the receiving party shall promptly refrain from further copying or distribution of the subject materials, and return or destroy all copies of the subject materials. Where the

20. Receipt of Privileged Information. Nothing in this Order shall relieve counsel for any receiving party of any existing duty or obligation, whether established by case law, rule of court, regulation or other source, to return, and not to review, any privileged or work-product materials without being requested by the producing party to do so. Rather, in the event a receiving party becomes aware that it is in possession of what appears to be an inadvertently produced privileged document, then counsel for the receiving party shall immediately: (i) cease any further review of that document; and (ii) notify the producing party of the apparent inadvertent production, requesting whether the producing party intended for the document to be produced. In the event the producing party confirms the inadvertent production of the privileged document, the receiving party shall promptly return or destroy all copies of the inadvertently produced privileged document in its possession and take reasonable steps to retrieve all copies of the inadvertently produced privileged documents distributed to other counsel or non-parties.

Sedona Conference

- Anticipate the need to explain and substantiate search and retrieval methodology, including reasons for the specific choice of search and retrieval methods, the credentials of those who helped design the strategy and searches that were conducted, and the overall process.
- Establish quality control measures for assessing the reliability and accuracy of results.
- Provide evidence that search results were tested and verified, including through statistically valid sampling techniques.

See: Sedona Conference "Commentary on Protection of Privileged ESI" (12/2015) for requirements for search methodology.

HITS ORIGINAL HTML PAGE PDF TEXT PRODUCED TRANSLATED REDACTED ANNOTATED

Full Html View

From:
Jo Ann Hill/ENRON@enronXgate

To:
"Carolyn Cooney/Corp/Enron@ENRON"

CC:
"Linda Robertson/NA/Enron@ENRON";
"Richard Shapiro/NA/Enron@Enron"

- **Hits** - Highlighted from search
- **Original** - Native if available
- **HTML** - Extracted text
- **Page** - One page at a time
- **PDF** - Viewing & access
- **Text** - OCR of images
- **Redacted** - Confidentiality
- **Translated** - For foreign
- **Annotated** - For depositions

Cooney AND Shapiro
Search Total: 13

Total Hits: 7

9A5228-3822-4DF4-AA87-2FA17FFC03C8 17F11296-7ABA-48C3-972D-2100C086DDFF58B47687-83FC-4C
Peter (Peter.Styles@Enron.com) Sent: Wednesday, November 28, 2001 1:46:30 AM To: Dernehl Ginger
) Cc: Shapiro Richard (Richard.Shapiro@ENRON.com) Bcc: Subject: RE: Global Government Affairs Depa
-----Original Message----- From: Dernehl, Ginger Sent: 27 November 2001 15:58 To: Alamo, Joseph; Alleg
gio; Assaf, Lisa; Aussenhus, Kara; Barnes, Lynnette; Bellas, Kirsten; Bestard, Jose; Binns, Darran; Bolton,
; Burns, Stephen; Canovas, Guillermo; Cantrell, Rebecca W.; Comnes, Alan; Connor, Joe; Cooney, Carol
Jeff; Davies, Philip; Dawson, Paul; Decker, Larry; Dernehl, Ginger; Dressler, Jean; Elms, Nick; Fitzgibbon
Howard; Fulton, Donna; Gottfredson, Bryan; Grimes, Michael; Guerrero, Janel; Haizmann, Jan; Hamilton

Full Text View

From: Styles Peter (Peter.Styles@Enron.com)
Sent: Wednesday, November 28, 2001 1:46:30 AM
To: Dernehl Ginger (Ginger.Dernehl@ENRON.com)
Cc: <Shapiro> Richard (Richard.<Shapiro>@ENRON.com)
Bcc:

Search Requirements

Basics

- Accurate
- Fully indexed
- Easy to use

Better

- Many search options
- Concept
- Fuzzy & Stemming
- Boolean
- Keyword highlighting

Best

- Very fast (returns in seconds on large cases)
- UberIndex of natives/paginated
- Translations integrated

shapiro

Search Total: 421

Select	Title	Rank	Ext	Responsive	Privilege	Work
<input type="checkbox"/>	2001-11-28 02:59:36AM - -Untitled- ...972D-2100C086DDFF58B47687-83FC-4C69-9E7F-A45F64AA130F Froi	100	.msg			

HITS ORIGINAL HTML PAGE PDF TEXT

Total Hits: 62

Page: 1
[Text](#) [Page](#)
 we'll see over the next few weeks.I like Chris alot, even more now, knowing he initiated this on his own. -----Original Message----- From: Thome, Jennifer Sent: Wednesday, September 12, 2001 11:02 AM To: Shapiro, Richard Subject: Portland Rick: I understand that Chris Calger called you the other day. Between you and me, I wanted to let you know that neither my husband nor I was aware that he was going to call you. I hope it did not put you in an awkward position. Thanks, Jennifer ----- Inline attachment follows ----- From: </O=ENRON/OU=NA/CN=RECIPIENTS/CN=SNORD> To: Shapiro, Richard </O=ENRON/OU=NA/CN=RECIPIENTS/CN=Rshapiro> Date: Wednesday, September 12, 2001 2:28:29 GMT Subject: Hi Rick, Thanks for your kind note. I know I really appreciated it, and I'm sure everyone else does, too

Page: 2
[Text](#) [Page](#)
 love to have Ben and Jo From: Shapiro, Richard Rodriguez, Andy; Gottfr

All 421 documents in list have been selected.

shapiro

Search Total: 421

Responsive

EDIT FIELD TO FIELD

Edit: Responsive

Note: Update Documents action might affect numerous documents and cannot be undone.

UPDATE 421 DOCS CANCEL

Auto Advance Propagate Coding

Document Id

Doc Id: 5146d4f5-c04f-49a4-b2c3-6d98827e8fc8
 Control Number: 0
 Bates Prefix: VCP
 Bates Start: 45
 Doc Source: 2014-10-01 Doc Source
 Custodian: Meyers, Bert
 Source File Path: Bert Meyers\SRFC822.eml

General

Coding

Not Specified
 Responsive
 Non-Responsive
 Needs Further Review
 Confidential
 Custom Designation
 Attorney-Client Privilege
 Attorney Work Product

DISC DOC NOTES FACTS RELATED

Email Family

Bert Meyers.msg
 SRFC822.eml

Exact Duplicates

Near Duplicates

Attorney-Client Privilege

EDIT FIELD TO FIELD

Edit: Privilege

Note: Update Documents action might affect numerous documents and cannot be

UPDATE 25 DOCS

Coding in Doc Viewer

- Code 1 Doc at time
- See Email Families
- Auto-code families

Mass Coding

- Code Many at Once
- Multi-Doc Edit
- From Search/Filters

- With the UberIndex approach the search engine indexes both text extracted from Native files (email, attachments, spreadsheets, etc.) and imaged file OCR text (TIFF, JPG, or PDF).
- Most comprehensive approach minimizes potential for lost and unsearchable data, and finds more privileged documents.

Benefits of UberIndex Approach

Index Method	Captures Embedded Text	Captures Text Excluded From Print	Captures Hidden Text
Imaged/OCR	Yes	No	No
Native Extraction	No	Yes	Yes
UberIndex	Yes	Yes	Yes

From: Lon Stanton <Lon Stanton>
Sent: Wednesday, November 15, 2000 9:06:00 PM
To:
Subject: Re: States Investigation of UCU Gas Purchasing
Attachments: NICK SCHWARTZ DEPOSITION.PDF

Metadata

Title: 2000-11-15 09:06:00PM - Re: States Investigation of UC
Master Date: 11/15/2000 9:06:00 PM
Date Sent: 11/15/2000 9:06:00 PM
Date Received: 11/15/2000 9:06:00 PM
Date Created: 11/1/2000 1:50:40 PM
Date Last Mod:
From: Lon Stanton-Lon Stanton >
To:
Cc:
Bcc:
Subject: Re: States Investigation of UCU Gas Purchasing
Author:
Last Modified by:
Doc Type:

Privilege Log Auto-Creation with Metadata

- Metadata extracted from natives
- Email date/time, sender, receiver, subject
- Privilege and Work Product coding used
- Privilege log automatically generated for review

Discovery | Privilege Log

Doc	Title	Ext	Date Sent	Bates	Privilege	From	Attachment
VIEW	2000-11-15 09:06:00PM - Re: States Investigation of UCU Gas Purchasing	.msg	11/15/2000 9:06:00 PM	LEXBE 0000001	✓	Lon Stanton-Lon Stanton >	

- New York state rule (Rule 11-b) specifically addresses email chains and requires single extended logging and may be influential elsewhere.

"[E]ach uninterrupted e-mail chain shall constitute a single entry" which is required to include in the log:

- An indication that the e-mails "represent an uninterrupted dialogue"
- Beginning and ending dates and times of the dialogue
- The number of emails within the dialogue
- The names of all authors and recipients
- Information sufficient to identify each person such as name of employer, job title, and role in the case

to allow for a considered assessment of the privilege claim.

22 NYCRR §202.70(g)

<http://www.nycourts.gov/rules/trialcourts/202.shtml#70>

- Implement with a 502(d) Order or Agreement in Federal Court

Practice of separating privileged documents into categories and not separately logging some that are clearly privileged.

- Comments to the FRCP 26 (1993) refer to categorical logging (document-by-document logging “may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories”.
- Rule in NY State matters
Memorandum from the New York State Bar Association Commercial and Federal Litigation Section to the Office of Court Administration (May 14, 2014)
- Recommended by Sedona Conference (2015)
“In lieu of logging at least some portion of the privileged documents, parties would identify categories for privileged documents, provide sufficient information about the privilege claim as well as the general subject matter of the category and then agree or not agree that such categories should be formally logged.”

Columns (Fields)

- Date Range
- Document Type
- Sender(s)/Recipient(s)/Copyee(s)
- Category Description
- Privilege Justification
- Total Documents Withheld

Examples of Categories

- Communications with outside counsel regarding the matter.
- Communications with inside counsel regarding the matter, requesting or reflecting legal advice regarding the matter.
- Work-product communications between non-lawyers containing information prepared by or on behalf of an attorney in preparation of litigation (work product).
- Communications with counsel containing information prepared in anticipation of litigation regarding pending litigation.

Category No.	Date Range	Type	Sender(s)/ Recipient(s)/ Copyee(s)	Category Description	Privilege Justification	Documents Withheld (Total Documents:	Documents Withheld, Including Families
1	3/11/2012 - 6/30/2012	Email, PDF	Attorneys: K. Currie, Esq. S. Salem, Esq. E. Mendola, Esq. J. Driscoll, Esq. T. Duxbury K. Currie, Esq.	Communications with outside counsel providing, requesting or reflecting legal advice regarding easement and operating agreement negotiations with Heights Building Ltd.	Attorney-Client Privilege; Attorney Work Product	325	415

Source: New York City Bar, Committee on State Courts of Superior Jurisdiction, Guidance and a Model for Categorical Privilege Logs (2014)

What is It?

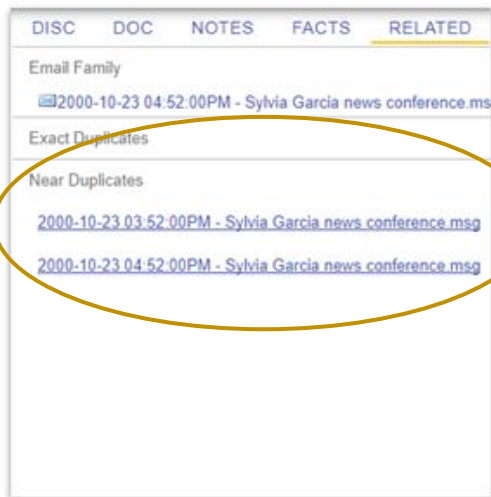
- Near Duplicate Detection, or 'NearDup', technology automatically recognizes similar documents within an eDiscovery document collection
- Examples: Separately scanned documents; multiple versions of a Word document that are slightly different due to minor edits, reformatting, etc.; an original document and one with handwritten notes on it; emails continue a conversational 'chain' or 'thread'.

Unstructured Documents Groupings



NearDup





Benefits

- Follow the trail from one privileged document to others
- Identify privileged documents that might otherwise be missed

Example

Similar versions of a Privileged Document are shown in the Document Viewer

Filter Applied: Text Group Id =1606

Browse Total: 3

Select	Title	Responsive	Privilege	Work Product	Confidential	Near Dup Group
<input type="checkbox"/>	2000-09-22 08:12:00AM - Re: Vice President Recommendation	Responsive	✓		✓	1606
<input type="checkbox"/>	2000-09-25 09:45:00AM - Re: Vice President Recommendation	Responsive	✓		✓	1606
<input type="checkbox"/>	2000-11-06 12:54:00PM - Re: Recommendation of Carol Hensley	Responsive				1606

Benefit

Find privileged documents with text similarity that can be easily missed otherwise

Example

Linear review found privileged documents 2 out of 3 times, but one was missed

- Privileged and sensitive information may be redacted prior to production.
- If native docs are produced, the original natives should be withheld as they cannot be directly redacted.
- Redaction is done on TIFF, other imaged, or PDF converted versions. For TIFFs, text must be re-OCRed. PDFs must have text layer re-OCRed.
- Container files (e.g., MSG, ZIP) including redacted data should be withheld.
- UberIndex search can help catch.
- Build in time for QC procedures.

- Communicate with Opposing Counsel Early and Document Efforts
--Rule 26 Meet & confer subject
- Negotiate a FRE 502/Rule 26 Clawback *--Avoid inadvertent waiver*
- Make Use of a Modern e-Discovery Review Tool
--Quality search, fast, comprehensive index, auto-privilege logging, redaction, privilege logic
- Determine if categorical logging can be done, include in 502 order
--Get specific agreement or order to avoid waiver risk
- Determine log delivery timing and build in review procedure
--Contemporaneous with production, before depositions, or other specified time
- Consider redaction of email strings and attachments rather than wholesale withholding
--Maintain a separate 'Redacted for Privilege' to supplement privilege log
- Allow extra time for Production QC *--Particularly check redactions, natives*
- Negotiate specific provisions in ESI agreements/orders if possible
- Consider using NearDupe technology as a safeguard, double-check

The Lexbe Solution

Leveraging technology to meet the needs of patent litigation

- **UberIndex**
The only way to ensure all data has been combed for privilege is with a multi-index solution
- **NearDupe**
Catch hidden data, such as in nested emails, that linear review might miss
- **Flexible workflow option**
Mass coding can be a huge timesaver when a privileged term or individual is identified

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Presenter:

Gene Albert
gene@lexbe.com
(512) 686-3460

Moderator:

Jeff Fugitt
jfugitt@lexbe.com
(512) 653-8295

Webinar Questions:

webinars@lexbe.com