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Inadvertent Disclosure

What you should (and shouldn't) know

Protecting Against

Waiver of Attorney-Client Privilege or Work-Product Protection

Due to Inadvertent Disclosure

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Modern discovery practice can be a burdensome and expensive endeavor for any litigant. The sheer volume of unorganized electronic information and embedded metadata involved in modern document productions increases the risk that attorney-client communications or attorney work product will be inadvertently produced to opposing counsel during discovery. Due to the risk of the possibility of a subject matter waiver arising from such inadvertent disclosure, the burden and expense of discovery are often enormously increased by the countless hours spent by attorneys and paralegals diligently screening potentially responsive documents and electronic information for privileged or protected communications. The "claw-back" agreement has made its way in to recent discovery practice as a means of easing the burden and expense of privilege screening.

Under a claw-back agreement, the parties agree that documents will be produced without any intent to waive privilege or other protections. A typical agreement will provide that if a privileged or protected document is inadvertently produced, the producing party informs the receiving party, who is obliged to return the document and prohibited from using it in the litigation. Parties will commonly present the agreement to the court in the form of a stipulated protective order or case management order.

The new Federal Rules of Civil Procedure 16(b) and 26(f) encourage parties and courts to address privilege issues early in litigation. Federal Rule of

Civil Procedure 26(b)(5)(B) now sets forth procedures for recalling privileged or protected information that is produced in discovery; and the advisory committee note specifically endorses the use of claw-back agreements.[1] On May 15, 2007, the Federal Advisory Committee on Evidence Rules proposed to the Judicial Conference of the United States a new Federal Rule of Evidence 502, which will create a uniform federal law with respect to privilege waiver, and allow for parties to enter into agreements regarding the effect of disclosure of attorney-client privilege or work-product information that would be binding on the parties and non-parties, provided the agreement is incorporated into a federal court order.

Use of claw-back agreements is not without risk. Claw-back agreements do not vitiate the argument that inadvertently produced information was not privileged or protected in the first place, or that waiver occurred due to some reason other than inadvertent production. In addition, an agreement between parties in one proceeding may not apply to third parties or different proceedings, making any privileged information inadvertently produced off-limits in one court, but fair game in another. Before entering into such agreements, counsel should be fully aware of these risks and prepare accordingly.

Attorney-Client Privilege

The attorney-client privilege protects from disclosure confidential communications between a client and her attorney in which the client is seeking or receiving legal advice. In Washington the privilege is codified at RCW 5.60.060(2)(a): "An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment."

The privilege promotes open, honest interaction and encourages parties to seek advice from counsel so that they can act responsibly and within the confines of the law. The United States Supreme Court articulated these principles in *Upjohn v. United States*, stating that the purpose of the privilege is to "encourage full and frank communication between attorneys and their clients and thereby promote the broader public interests in the observance of law and the administration of justice. The privilege recognizes that sound legal advice or advocacy depends on the lawyer's being fully informed by the client."[2] Washington courts have articulated similar purposes for the privilege: "[T]he attorney-client privilege . . . protects confidential attorney-client communications from discovery so clients will not hesitate to fully inform their attorneys of all relevant facts."[3] Indeed, in both the criminal and civil contexts, the attorney-client privilege is closely connected to the constitutional right to effective assistance of counsel.[4]

Attorney Work-Product Doctrine

The attorney work-product doctrine "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."[5] The doctrine is often referred to as a qualified privilege or qualified immunity, because it does not completely protect the subject information. Factual information that has been gathered by an attorney can be obtained upon a showing of substantial need for one's case, and the inability to obtain the information from another source.[6] The attorney's mental impressions, research, opinions, and legal conclusions are more closely aligned with the attorney-client privilege and enjoy "nearly absolute immunity."[7]

The United States Supreme Court recognized that protection of attorneys' thoughts, impressions, conclusions, and legal theories is integral to their ability to adequately prepare their clients' cases. In *Hickman v. Taylor*, the court observed that disclosure of such information would have detrimental effects:

> [M]uch of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.[8]

Thus, the attorney work-product doctrine serves essentially the same public policy as that of the attorney-client privilege: protecting client confidences, allowing the free flow of information between attorneys and clients, and fair administration of justice.

Waiver of Attorney-Client Privilege or Work Product

The attorney-client privilege and the attorney work-product doctrine are at odds with the public's interest of a full disclosure of facts, because application of these principles often results in the exclusion of relevant and material evidence.[9] Therefore, they are narrowly construed and, in the view of one court, must be protected "like jewels — if not crown jewels."[10] It is generally held that the voluntary disclosure of attorney-client communications or attorney work product to an opposing party constitutes a waiver of the privilege or protection.[11]

The scope of waiver varies by jurisdiction and by the circumstances of the disclosure. Where a party has voluntarily disclosed selected privileged information in an attempt to gain advantage, or to use the information for its own purposes, fairness dictates that full disclosure be made to protect against a misleading presentation of evidence. As such, courts may order that all protected information related to the subject matter of the voluntarily waived information be disclosed.[12] On the other hand, where the disclosure of privileged or protected information is accidental or inadvertent, the scope of waiver will often be limited to only the specific information that was disclosed.[13] Some courts (including the 9th Circuit) have held, however, that inadvertent disclosure will result in subject matter waiver.[14]

Inadvertent Disclosure of Privileged or Protected Information

Across the country courts have adopted three different views as to whether an inadvertent disclosure constitutes a waiver of the attorney-client privilege or attorney work-product protection: waiver always occurs; waiver never occurs; or the court must balance several factors to determine if waiver has occurred. While there is some indication that Washington courts would employ the balancing test, no state appellate court appears to have directly addressed the issue of inadvertent disclosure.

Under the so-called strict liability standard, all disclosures to third parties of privileged or protected information constitute waiver.[15] The underlying rationale for the strict liability standard is based on the fact that "the whole basis of the privilege is to maintain the confidentiality of the document. It cannot be doubted that

the confidentiality of the document has been destroyed by the 'inadvertent' disclosure no less than if the disclosure had been purposeful."[16] Likewise, courts that adopt this approach express reluctance to serve as a backstop for those who, in the courts' view, take less care in preserving the privilege than others.[17] This inflexible approach has drawn criticism, however, as "too harsh in light of the vast volume of documents disclosed in modern litigation."[18] It also may have a chilling effect on the free flow of information that the attorney-client privilege and work-product doctrine are meant to protect. Clients will be less likely to openly communicate and attorneys will be less likely to record their thoughts and impressions when even the slightest mistake will open up their confidences to the world.

At the other side of the spectrum are courts that hold that inadvertent disclosure does not waive the attorney-client privilege.[19] These courts base their holdings on the principle that waiver requires a party to intentionally relinquish a known right. Accordingly, waiver by inadvertent or accidental production is inherently contradictory. In addition, the privilege belongs to the client, and more than mere negligence by counsel should be required before the client is deemed to have abandoned the privilege.[20] Such reasoning has been criticized, however, as substituting "semantics for analysis."[21] Implied and inadvertent waivers are frequently recognized in the law. So, too, clients' rights are deemed forfeited by attorney negligence when the attorney fails to file a lawsuit before the statute of limitations runs, or if counsel fails to properly serve a motion. The "no waiver" rule is also criticized, because it does not encourage attorneys and clients to appropriately guard confidential communications and information.

Most courts, including those in the 9th Circuit, take an approach to inadvertent disclosure that requires the balancing of five factors: (a) the reasonableness of the steps taken to prevent inadvertent disclosure; (b) the time taken to rectify the error; (c) the scope of discovery; (d) the extent of the disclosure; and (e) the overreaching issue of fairness.[22] This middle-ground approach looks at whether a party acted reasonably under the circumstances of a particular privilege review. The most obvious circumstance to consider is the volume of information involved in the review.[23] Another significant circumstance is the amount of time that the party has to conduct the review. For instance, it is not reasonable (and often impractical) for a party to conduct a second or third review of millions of documents or computer files in a relatively short time frame.[24] Thus, the balancing test approach seeks to accommodate the rationale underlying both the strict liability approach and the more lenient approach of non-waiver by imposing reasonable burdens on counsel to implement steps to protect the information, but acknowledging the realities of modern-day privilege review where millions of documents or files may need to be screened.[25]

Commentators have indicated Washington has adopted the strict liability approach to inadvertent waiver.[26] The basis for this assertion, however, is *State v. Thorne*,[27] a case involving the marital privilege where a husband confessed to his wife in the presence of the arresting officers (not inadvertently), that he had committed a crime. The court held that because the conversation was overheard, the communication was not confidential, and could not be privileged. Washington has not squarely addressed the issue of inadvertent disclosure of attorney-client privileged communications or attorney work product, though Chief Justice Alexander argued for the application of the balancing test in his dissent in *Harris v. Drake*.[28]

Harris arose out of an automobile collision. Prior to the commencement of the lawsuit, plaintiff filed a personal-injury protection claim with his insurance company. The insurance company required plaintiff to undergo an independent medical examination, and the insurer's expert wrote two reports regarding his examination of the plaintiff. During discovery, the insurer, who was not a party to the lawsuit, apparently produced the reports to the defendant. After defendant attempted to use the reports and call the doctor as a witness, plaintiff claimed that the doctor was actually his consulting expert, and that the reports were protected as the work product of his insurance company. The insurance company was consulted and stated that it would not take a position adverse to plaintiff, and refused to consent to the doctor being called as defendant's witness. The trial court granted plaintiff's motion to exclude the doctor's testimony.[29] The Washington State Supreme Court affirmed the holding that the reports were work product and that plaintiff had the authority to assert the protection.[30]

Chief Justice Alexander dissented, arguing that the majority overlooked that the reports were inadvertently disclosed by the insurance company. Justice Alexander felt that the majority should have engaged in an analysis of waiver in the context of inadvertent disclosure. In the absence of any applicable Washington law, the Chief Justice advocated for the adoption of the balancing test, under which he would have found that the work-product protection was waived.[31] It is important to note that *Harris* involved only the work-product doctrine, not attorney-client privilege. Thus, the law in Washington is unsettled as to the effect of waiver in the context of

inadvertently disclosed information that is protected by the attorney-client privilege or attorney work-product doctrine.

Utilizing Claw-Back Agreements

Due to the unsettled law in the state of Washington, claw-back agreements may offer some protection against an inadvertent disclosure resulting in a waiver of the attorney-client privilege or the work-product protection. In fact, RPC 1.6 (Confidentiality of Information) arguably dictates an obligation on the part of counsel to enter into claw-back agreements when engaging in large document productions or electronic discovery. Comment [16] to RPC 1.6 advises that "A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure . . . ." Comment [23] further advises: "A lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of avoidable disclosure."[32] Accordingly, parties should use their best efforts to enter into claw-back agreements and present them to the court as a stipulated protective order or case-management order. Courts in Washington have broad discretion to control discovery;[33] thus, once the agreement is entered as an order it should be enforceable between the parties. Courts in other jurisdictions have not only endorsed, but actually encouraged, parties to enter into claw-back agreements.[34]

Even if the claw-back agreement is incorporated into a protective order or case-management order, the use of such agreements is not without risk. Some commentators have expressed skepticism that claw-back agreements protect parties from waiver.[35] And, even if the parties to the agreement are protected, the claw-back is probably not enforceable with respect to third parties.[36]

Claw-back agreements are not a license to entirely forego a privilege review. Under even the most lenient analysis of inadvertent disclosure, an attorney's gross negligence in failing to protect the privilege will result in a waiver. Indeed, a claw-back agreement protects against inadvertent disclosure — failing to undertake even a modest privilege review before production could be considered tantamount to a voluntary waiver.[37]

Possible Protection in Federal Court

In December 2006, the Federal Rules of Civil Procedure 16 and 26 were amended and now impose obligations on the parties and the court to address electronic discovery early in the litigation process. Under the new Rule 16(b)(5), courts have the discretion to enter orders encompassing "any agreement the parties reach for asserting claims of privilege or protections after production." Although nothing in the old rules prevented a court from entering such an order, the new rules increase awareness of the court's ability to address privilege issues early in the case. Rule 26(f) now also mandates that the parties address privilege and work-product issues at their initial pre-discovery conference.

The amendments to Rule 26(b)(5)(B) provide that a party who has inadvertently produced privileged information must notify the recipient and assert the basis for the claim of privilege. The recipient is obligated to "promptly return, sequester, or destroy" the purportedly privileged materials. The parties are permitted to file the information under seal with the court and move for a ruling if the claim of privilege is disputed. It is important to note that Rule 26(b)(5)(B) is not limited to electronically stored information, and it also does not address whether a privilege or protection has been waived by inadvertent production, which is governed by the substantive law of the jurisdiction.

In an attempt to create a uniform standard in the federal courts with respect to the effect of inadvertent disclosure, the Federal Advisory Committee on Evidence Rules has proposed Federal Rule of Evidence 502. If enacted by Congress in its present form, waiver would occur only if the disclosure occurred due to inadvertence, the party's failure to take reasonable steps to preserve the privilege or protection, and the party's failure to make a timely attempt to rectify the error. The proposed rule makes clear that subject-matter waiver would only occur in the case of intentional disclosure. Finally, the proposed rule would allow courts to incorporate claw-back agreements into court orders that would "apply to all entities in federal and state proceedings, whether or not they were parties to the federal litigation."

Conclusion

Chief Justice Alexander's dissent in *Harris* is currently the only substantive discus-

sion of inadvertent production under Washington law, and it is limited to the work-product doctrine, not attorney-client privilege (or even the work product of an attorney). As noted above, because evidentiary privileges result in the exclusion of relevant and material evidence, and Washington courts narrowly construe privilege issues, the courts may ultimately decide to apply the "strict liability" approach to inadvertent production. Thus, while the utilization of claw-back agreements is not without risks, they appear to offer the best protection against waiver due to inadvertent disclosure. Once an agreement is in place, it is less likely that opposing counsel will dispute a request for the return of inadvertently produced privileged or protected information. (Counsel may, however, challenge whether the documents are really privileged or protected.) Moreover, a court that has adopted the parties' claw-back agreement as a stipulated protective order is not likely to employ the strict liability standard if inadvertent production occurs. Finally, while practitioners are obliged not to reveal confidences, the sheer volume of information and embedded metadata in electronic productions makes it impractical and nearly impossible to screen for every single bit of data that may contain attorney-client communications or attorney work-product protection. Claw-back agreements are an additional useful tool to assist counsel in fulfilling their ethical duties of protecting client confidences.

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NOTES

1. FED. R. CIV. P. 26(b)(5)(B); FED. R. CIV. P. 26(f) advisory committee's note.
2. *Upjohn v. United States*, 449 U.S. 383, 389 (1981). *See also, Fisher v. United States*, 425 U.S. 391, 403 (1976) ("The purpose of the privilege is to encourage clients to make full disclosure to their attorneys . . . . [I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.").
3. *Barry v. USAA*, 98 Wn. App. 199, 204, 989 P.2d 1172 (1999).
4. *Martin v. Lauer*, 686 F.2d 24, 32-33 (D.C. Cir. 1982) (observing that litigants' "interest in speaking freely with their attorneys is interwoven with their right to effective assistance of counsel"); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1118 (5th Cir. 1980) (finding that in both civil and criminal cases "the right to counsel is one of constitutional dimensions and should thus be freely exercised without impingement" and that the need for attorney-client communication is essential in any case); *Odone v. Croda Int'l PLC*, 170 F.R.D. 66, 69-70 (D.D.C. 1997).
5. *United States v. Nobles*, 422 U.S. 225, 238 (1975).

6. CR 26(b)(4); *Harris v. Drake*, 152 Wn.2d 480, 485-86, 99 P.3d 872 (2004); *Heidebrink v. Moriwaki*, 104 Wn.2d 392, 396, 706 P.2d 212 (1985).
7. *Soter v. Cowles Publ'g Co.*, 131 Wn. App. 882, 894, 130 P.3d 840 (2006); *see also* CR 26(b)(4).
8. *Hickman v. Taylor*, 329 U.S. 495, 511 (1947).
9. *Dietz v. Doe*, 131 Wn.2d 835, 843, 935 P.2d 611 (1997); *Versuslaw, Inc. v. Stoel Rives, LLP*, 127 Wn. App. 309, 332, 11 P.3d 866 (2005).
10. *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989).
11. *Limstrom v. Ladenburg*, 110 Wn. App. 133, 145, 39 P.3d 351 (2002) (in an absence of Washington case law, the court held that generally "[i]f a party discloses documents to other persons with the intention that an adversary can see the documents, waiver generally results"); *Halffman v. Halffman*, 113 Wash. 320, 325, 194 P. 371 (1920) (only communication that is intended to be confidential, falls under the protection of the attorney-client privilege).
12. *Martin v. Shaen*, 22 Wn.2d 505, 513, 156 P.2d 681 (1945); *Weil v. Inv./Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 24 (9th Cir. 1981); *In re Sealed Case*, 877 F.2d 976, 980-81 (D.C. Cir. 1989).
13. *In re Martin Marrietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988) (finding no subject matter waiver with regard to work product); *In re Hechinger Inc. Co. of Del.*, 303 B.R. 18, 26 (D. Del. 2003); *In re United Mine Workers of Am. Employee Benefit Plans Litig.*, 159 F.R.D. 307, 312 (D. D.C. 1994) (finding no subject matter waiver with regard to work product); *Golden Valley Microwave Foods, Inc. v. Weaver Popcorn Co.*, 132 F.R.D. 204, 208 (N.D. Ill. 1990); *Int'l Digital Sys. Corp. v. Digital Equip. Corp.*, 120 F.R.D. 445, 446. (D. Mass. 1988) (no subject matter waiver despite application of "strict liability" waiver rule); *Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 52 (M.D.N.C. 1987) ("In a proper case of inadvertent disclosure, the waiver should cover only the specific document in issue.").
14. *Weil*, 647 F.2d at 25; *but see Amgen, Inc. v. Hoechst Marion Roussel, Inc.*, 190 F.R.D. 287, 293 (D. Mass. 2000) (court considers, and determines it will express no opinion on subject matter waiver because of potentially far-reaching consequences, and for failure of party to address).
15. *Harmony Gold U.S.A. Inc. v. FASA Corp.*, 169 F.R.D. 113, 118 (N.D. Ill. 1996); *Lifewise Master Funding v. Telebank.*, 206 F.R.D. 298, 303-04 (D. Utah 2002).
16. *Int'l Digital Sys. Corp.*, 120 F.R.D. at 449 (emphasis in original).
17. *In re Sealed Case*, 877 F.2d at 980 ("Although the attorney-client privilege is of ancient lineage and continuing importance, the confidentiality

of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived.").

18. *F.D.I.C. v. Marine Midland Realty Corp.*, 138 F.R.D. 479, 481 (E.D. Va. 1991).
19. *See, e.g., Georgetown Manor, Inc. v. Ethan Allen, Inc.*, 753 F. Supp. 936 (S.D. Fla. 1991).
20. *Mendenhall v. Barber-Greene Co.*, 531 F. Supp. 951, 955 (N.D. Ill. 1982); *see also Helman v. Murry Steaks, Inc.*, 728 F. Supp. 1099, 1104 (D. Del. 1990); *In re Sealed Case*, 120 F.R.D. 66, 72 (N.D. Ill. 1988); *Kansas-Nebraska Natural Gas v. Marathon Oil Co.*, 109 F.R.D. 12, 21 (D. Neb. 1985).
21. *Bank Brussels Lambert v. Credit Lyonnais (Suisse) S.A.*, 160 F.R.D. 437, 442 (S.D.N.Y. 1995).
22. *United States ex rel Bagley v. TRW, Inc.*, 204 F.R.D. 170, 177 (D. Cal. 2001); *see also Transamerica Computer Co. v. Int'l Bus. Mach. Corp.*, 573 F.2d 646 (9th Cir. 1978); *Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (S.D.N.Y. 1985).
23. *Transamerica Computer Co.*, 573 F.2d at 652 (17 million pages screened in three months); *Marine Midland Realty Corp.*, 138 F.R.D. at 483; *Lois Sportswear*, 104 F.R.D. at 105 (16,000 pages screened); *Kansas-Nebraska Nat. Gas. Co.*, 109 F.R.D. at 21 (75,000 documents produced).
24. *F.H. Chase, Inc. v. Clark/Gilford*, 341 F. Supp. 2d 562, 563-65 (D. Md. 2004) (finding that time constraints of review weighed against finding waiver despite party producing 569 pages of privileged information out of 7,155 documents produced); *Kansas City Power & Light Co. v. Pittsburg & Midway Coal Mining Co.*, 133 F.R.D. 171, 174 (D. Kan. 1989) (finding no waiver where procedures employed, including screening, were adequate to prevent inadvertent disclosures given the scope of discovery).
25. *Alldread v. Grenada*, 988 F.2d 1425, 1434 (5th Cir. 1993) (stating that the "circumstances surrounding a disclosure" should be examined to determine if waiver has occurred); *Kansas City Power & Light Co.*, 133 F.R.D. at 172 (refusing to "conceive of further precautions that might have prevented an inadvertent disclosure" and analyzing only the particular circumstances involved in the review).
26. Dennis R. Kiker, *Waiving the Privilege in a Storm of Data: An Argument for Uniformity and Rationality in Dealing with the Inadvertent Production of Privileged Materials in the Age of Electronically Stored Information*, 12 RICH. J.L. & TECH. 15, 25 (2006); John T. Hundley, Annotation, *Waiver of Evidentiary Privilege by Inadvertent Disclosure — State Law*, 51 A.L.R. 5th 603 (2004).
27. *State v. Thorne*, 43 Wn.2d 47, 260 P.2d 331 (1953).
28. *Harris v. Drake*, 152 Wn.2d 480, 99 P.3d 872 (2004).
29. *Id.* at 485.
30. *Id.* at 492.
31. *Id.* at 494-97.
32. RPC 1.6 cmt. 23.
33. *O'Connor v. Dep't of Soc. & Health Servs.*, 143 Wn.2d 895, 905, 25 P.3d 426 (2001); *Soter*, 131 Wn. App. at 892-93.
34. *In re Delphi Corp. Secs.*, No. 05-md-1725, 2007 U.S. Dist. LEXIS 10408 at *26 (D. Mich. Feb. 15, 2007); *Hopson v. Mayor & City Council of Baltimore*, 232 F.R.D. 228, 246 (D. Md. 2005); *Zubulake v. UBS Warburg LLC*, 216 F.R.D. 280, 290 (S.D.N.Y. 2003).
35. 24 Charles Allen Wright & Kenneth W. Graham, Federal Rules of Evidence § 5507 (1986).
36. *Hopson*, 232 F.R.D. at 235 (citing *Westinghouse Elec. Corp. v. Republic of the Philippines*, 951 F.2d 1414, 1426-27 (3d Cir. 1991) (holding agreement between litigant and DOJ that documents produced in response to investigation would not waive privilege does not preserve privilege against different entity in unrelated civil proceeding); *Bowne v. AmBase Corp.*, 150 F.R.D. 465, 478-79 (S.D.N.Y. 1993) (non-waiver agreement between producing party in one case is not applicable to third party in another civil case).
37. *But see Zubulake*, 216 F.R.D. at 290 ("'claw-back' agreements . . . allow the parties to forego privilege review altogether. . . .").