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Montgomery County Paralegal Association

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## PRESIDENT'S MESSAGE by Nancy Piechota, Pa. C.P.

*As we start to look forward to the beginning of summer, vacations and days at the beach, let's first take the time to think of Memorial Day not as the beginning of summer but what it really stands for. Memorial Day is a day that we pay tribute to the many troops who did not make it home from war and gave the ultimate sacrifice for the United States of America. Let's take the time to put out a flag, big or small, in front of our homes and remember the many lives lost. We seem to have lost that in our world today.*



*I remember my grandparents calling it Decoration Day. This was the original name for the day after the Civil War. It later became an official federal holiday in 1971 known as Memorial Day. I remember going to the cemetery with my Mom and Grandma to visit my father's grave as well as my grandfather's. My father was in the Korean War. While he did not pass in the war, we did put a flag on his grave in remembrance of him serving for the United States. The cemetery would be filled with flags for all of the soldiers who have passed. How it touched my heart.*

*I asked someone probably in his 40's what Memorial Day was about and he told me that it was a day off of work and a day to go to the Jersey Shore and party. I felt a piece of my heart break knowing that so many people think this. I am going to bet that the younger generation would say the same thing. What a shame. Let's take the time on Memorial Day to stop and say a silent prayer for those that sacrificed their lives for us.*

*To those that served our country in the armed forces and never made it back to your families, "Thank you and Rest in Peace."*

# NEWS & ANNOUNCEMENTS

## NEW MEMBERS

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# CAUSES OF INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS AND STRATEGIES FOR PROTECTING PRIVILEGED DOCUMENTS

## PART II OF A III PART SERIES

Submitted by TASA

### Privileged Documents Leaking Reflected in Reported Cases

Bad review quality has been known since the network review model was used. I will discuss some leading cases revealing privilege disputes.

#### 1. Privileged document leaking happens frequently

Table 1. Privileged documents produced in a few real cases:

Now, it is fair to say that privilege document leaking is the most common disputes in e-discovery. Similar cases can be found overall on the internet. One should note that those cases are reported only because the parties actually litigated disputes.

Cases	Producing Parties	Doc. No or Page No.	Privileged Doc No.	Claimed Reasons
<u>Tampa Bay Water v. HDR Engineering, Inc.</u> , Case No. 8:08-CV-2446-T-27TBM. (M.D. Fl. November 2, 2012)	Tampa Bay Water		23,000	N/A
	HDR		Produced	"Computer error"
<u>J-M Manufacturing Company, Inc. v. McDermott Will &amp; Emery</u> , Case No. 2:11-cv-06666, (C.D. Cal.)	J-M Manufacturing		Produced 4,000 in 1 <sup>st</sup> round & 3,900 in 2 <sup>nd</sup> round.	"Human Errors." Classical example: reviewers are unable to correct errors
<u>Wise V. Washington County</u> , (W.D. Pa. Sept 10, 2013)	Washington County	Produced in another case	1 doc	Failed to file motion to claw back and failed to meet requirement under Rule 502.
<u>Rhoads Indus. v. Bldg. Materials Corp.</u> , 254 F.R.D. 216, 223 (E.D. Pa. 2008)	Rhoads Indus.	78,00 docs	812 docs	Relied on privilege keywords search, Rhoads thought no privileged docs.
<u>Cole's Wexford Hotel V. UPMC &amp; Highmark</u> , Civil No. 10-1609 (E.D. Pa. Feb. 8, 2016)	UPMC	Produced to DOJ	852 docs	Produced privileged docs are about 0.81% (not waived)
<u>B-Y Water Dist. v. City Yankton</u> , Civ 07-4142, 2008 WL 5188837 (D.S.D. Dec. 10, 2008)	B-Y Water	Unknown/3380	3 pages	B-Y Water had placed docs on its priv. pog, but vendor produced in unredacted form.
<u>Kumar v. Hilton Hotels Corp.</u> , No. 08-2689, 2009 WL 1683479 (W.D. Tenn. June 16, 2009)	Hilton Hotels		~60 pages	The legal assistant failed to redact privileged materials.
<u>Coburn Group v. Whitecap Advisors</u> , 640f. Supp. 2D 1032.	Whitecap	40,000 pages	2 docs of 16 pages ("facts")	The method could not keep those documents.
<u>Ergo Licensing, LLC, v. Carefusion 303</u> , No. 08-259-P-S, (D. Me. Dec. 14, 2009)	ERGO	540 pages	31 Pages	Privilege was not waived. Review three times: associate, the Black firm and associate.
<u>Mt. Hawley Ins. Co. v. Felman Prod., Inc.</u> , 271 F.R.D. 125 (S.D. W. Va. 2010).	Felman Production		337 email, finding the leaking several months later.	Court found protocol is not good.
<u>Baranski v. United States</u> , No. 4:11-CV-123 CAS, 2015 U.S. Dist. LEXIS 71584 (E.D. Mo. June 3, 2015)	U.S.		58 docs in 570 pages	Five months before asserting privilege resulted in waiver. (log produced 20 months later)
<u>Clarke v. J.P. Morgan Chase &amp; Co.</u> , No. 08 Civ. 02400, 2009 U.S. Dist. LEXIS 30719 (S.D.N.Y. Apr. 10, 2009)	J.P. MORGAN		Email (lack precautions in sending email)	The party's two-month delay in asserting privilege resulted in waiver.
<u>Luna Gaming v. Dorsey &amp; Whitney, LLP et al.</u> , No. 06cv2804 BTM (Wmc, January 13, 2010)	LUNA GAMING		4 docs (retainers and legal memos)	Luna did not object in a first use on August 2007, but tried to claw back in November 2007.
<u>Wise v. Wash. Cnty.</u> , No. 10-1677, 2015 LEXIS 50926 (W.D. Pa. Apr. 17, 2015)	Wash. Cnty		1 memo	One-and-a-half-year delay after being warned of the leaking resulted in waiver.
<u>Ardon v. City of Los Angeles</u> , Supreme Court case No. S223876, March 17, 2016.	City of Los Angeles	58 documents	3 docs that were on privilege log	Remanded.

Each time when privilege documents are produced, the producing parties have incentive to keep silence, hoping that receiving parties will not note them. This may frequently happen in large cases where a huge number of documents are produced. Most leaked documents are not known.

CONTINUED



# **CAUSES OF INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS AND STRATEGIES FOR PROTECTING PRIVILEGED DOCUMENTS**

## **PART II OF A III PART SERIES**

### **CONTINUED**

Those cases indicate that the impact of lost privileged documents is severe. As the court states: “loss of the attorney-client privilege in a high-stakes, hard-fought litigation is a severe sanction and can lead to serious prejudice.” Rhoads, 254 F.R.D. at 227. Some cases show that the receiving parties may immediately change their legal theories.

It is inherently a difficult task to keep privileged documents. In Ergo Licensing, Ergo reviewed documents three times: once by an associate, once by a law firm, and once more by an associate. They could not find the error until when leaked documents were used by the opposing party in a court filing. J-M Manufacturing indicates the same problem: even when the review was intended to capture leaked documents, the same error was made.

Those cases also show that using search keys are not reliable methods for keeping privileged documents. In Mt. Hawley Ins. Co., the court found the leaking party “failed to perform critical quality control sampling to determine whether their production was appropriate and neither over inclusive nor under-inclusive....” In Rhoads Indus, Rhoads relied upon search keys to exclude privilege. This kind of mistake has been made repeatedly, but should be avoided.

The most difficult task is identifying work product. In Coburn, the leaked documents concern “underlying facts regarding the residences of certain Whitecap investors.” The court in Coburn stated: “Unquestionably, reviewing documents for work product can be challenging because sometimes there are subtleties to the determination.” Nobody knows how to keep this class of documents. Law firms, in-house counsel, document processing companies can only hope that bad things will not happen. It did happen as in Coburn and J-M Manufacturing.

The leaking party generally has only one chance to get half a remedy. In Rhoads, upon being notified privileged documents, Rhoads re-reviewed 78,000 documents and identified 812 privileged documents on a new privilege log. The log was produced to defendants on June 30, 2008. The court states that any documents that are not placed into this review must be produced. The court essentially gave Rhoads only one chance. If it still missed privileged documents, there would be no more claw back. This rule seems to be very consistent among courts.

## **2. Adverse impacts of leaked privileged documents**

After privileged documents are produced, clawing back privileged documents will never undo all damages. The very acts of demanding for the return of privileged documents would alert of receiving parties of the need to examine the documents to be returned. This would allow the receiving party to take notes on the content of the documents. It can affect the receiving party's litigation strategies, resources allocations, and its focus in litigation. For example, the receiving party may try to establish the same facts suggested by the privileged documents by collecting factual elements from non-privileged documents. In addition, the privileged documents may serve a road map to guile the receiving party to take certain course of actions. Privileged documents may also be used as powerful information to discourage witnesses from making conflicting testimony.

## HIGHLIGHTS FROM THE MAY BOARD OF DIRECTORS MEETING

The MCPA Board of Directors met on May 7, 2019 at the offices of Mannion Prior, LLP located in King of Prussia. Items discussed were:

- ♦ *Mary Oliver, Dana Jorna and Tracey Barnes participated in a Paralegal Club event at Bucks County Community College on April 25, 2019, at the college. It was a small informal group meeting. The attendees asked questions and one attendee applied for membership with MCPA.*
- ♦ *Alderfer Auction and Karasch & Associates have renewed their sponsorships. Please check out MCPA's sponsors when needing support. Members should regularly check out NFPA's website for member benefits as well -- there are more than you think.*
- ♦ *Nancy Piechota, Pa.C.P. attended her first Keystone Alliance meeting in April and learned of all that Keystone is involved with besides just the Pa.C.P. program. Our own Dana Jorna was given great accolades by Bob Hrouda, Pa.C.P. at the Keystone meeting regarding her hard work regarding regulation.*
- ♦ *MCPA will be sponsoring a hole at the MBA Golf Outing and supplying golf tees. Golf Outing raffle tickets are available for purchase (contact Chris Gregg if interested).*
- ♦ *The Board will be changing its meeting night from the first Tuesday of the month to the first Thursday of the month starting in June.*

All members are invited to attend board meetings to express their opinions about issues affecting the Association. Meetings are held at Mannion Prior, LLP. Mannion Prior, LLP, 840 First Avenue Suite 100, King of Prussia the first Thursday of each month. For more information, contact Nancy Piechota at [NPiechota@mannonprior.com](mailto:NPiechota@mannonprior.com).



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# CAUSES OF INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS AND STRATEGIES FOR PROTECTING PRIVILEGED DOCUMENTS

## PART II OF A III PART SERIES

### 3. Producing party must take “reasonable steps” to avoid waiver

Where a party wants to get back privileged documents, Rule 26 must be considered in tandem with Federal Rule of Evidence 502(b), which provides that when a privileged document is accidentally disclosed, the disclosure will not act as a waiver of the privilege so long as the disclosure was “inadvertent” and the holder of the privilege “took reasonable steps” to prevent disclosure and to rectify the error. This rule applies only to attorney-client privilege and work product doctrine and not to other kinds of privileges. See Fed. R. Evid. 502(a).

Whether “reasonable steps” sufficient to avoid waiver have been taken is a highly fact-intensive inquiry that often leads to unpredictable outcomes. While a “reasonable steps” analysis is guided by the substantive law of the controlling jurisdiction, most jurisdictions follow the middle ground approach suggested by the committee notes to Rule 502(b). In deciding the waiver, the court considers many factors, including: (1) the “reasonableness” of the precautions taken to prevent inadvertent disclosure, (2) the number of inadvertent disclosures, (3) the extent of the disclosures, (4) any delay in measures taken to rectify the disclosure, and (5) the ever amorphous “overriding interests in justice” factor. See, e.g., *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 250 F.R.D. 251, 259 (D. Md. 2008).

The current network-based review model will effectively prevent the producing party from clawing back inadvertently produced documents for two reasons.

This review model, as it stands in the current use condition, can produce privileged documents as a matter course. After the model flaw is known since 2013, a producing party cannot keep using the same flawed review model on one hand, and then argues that it has taken reasonable steps to protect privileged documents on the other hand.

In other words, the common knowledge of the model problem and available solutions would effectively bar producing parties from clawing back.

However, the biggest problem is the delay in finding privileged documents. Most parties lost the right to claw back due to a long time delay in demanding for return of privileged documents. It is often difficult for document reviewers to determine privilege at the time of review. After the review is concluded, it is even more difficult for attorneys to see what is privileged. In those cited cases, it is a common scene that the attorneys for the producing parties could not know privileged documents until many months later, often when they were informed of such documents or when they saw such documents in court filings.

Such long delays are also caused by the review model. When documents are coded by a plurality of reviewers, each of who is coding documents by relying upon stories on the face and largely by guessing, they never know which privileged documents are produced and how many are produced. Search designed to cross-checking documents against privilege log is not effective.

CONTINUED

## **CAUSES OF INADVERTENT DISCLOSURE OF PRIVILEGED DOCUMENTS AND STRATEGIES FOR PROTECTING PRIVILEGED DOCUMENTS**

### **PART II OF A III PART SERIES**

### **CONTINUED**

For example, search would not determine (1) documents produced by scanned images, (2) documents containing restarted privileged substances, (3) privileged materials expressed in different terminologies or out of context, (4) documents with encoding problems in foreign languages, (5) documents containing paraphrased statements which could not be caught by search keys, and (6) documents containing non-text substance such as drawing, charts, and video representation. Poorly selected search keys and invalid search algorithms also create great uncertainty. A search method, which may be excellent in one case, may be completely unworkable in other cases.

**PART II OF THE III PART SERIES WILL APPEAR IN THE NEXT NEWSLETTER.**

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*Space is limited. All responses will be on a first come first serve basis. Please RSVP By Wednesday, June 5, 2019 to Jennifer Kuemmerle CRP, Pa C.P. at: [jekuemmerle@gmail.com](mailto:jekuemmerle@gmail.com)*

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# CONGRATULATIONS

## Christine Flynn!

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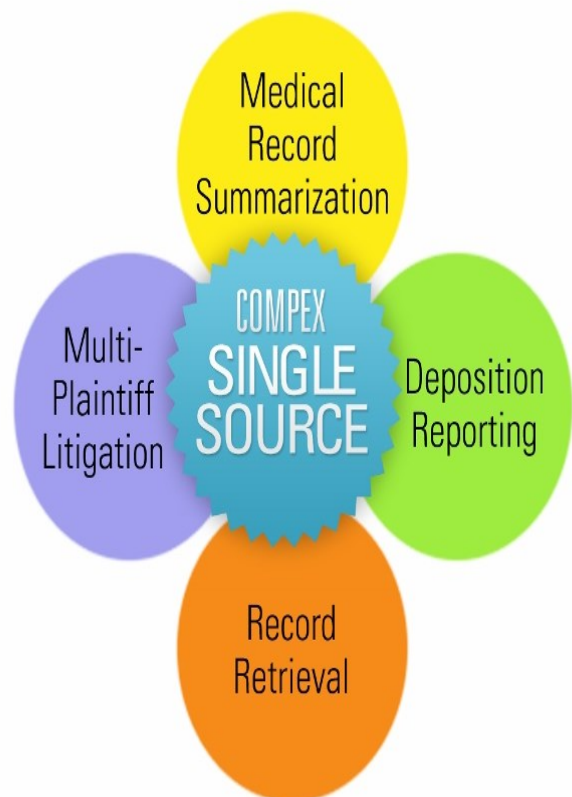
*The 2019 winner of the Paralegal of the Year, is Christine Flynn!*

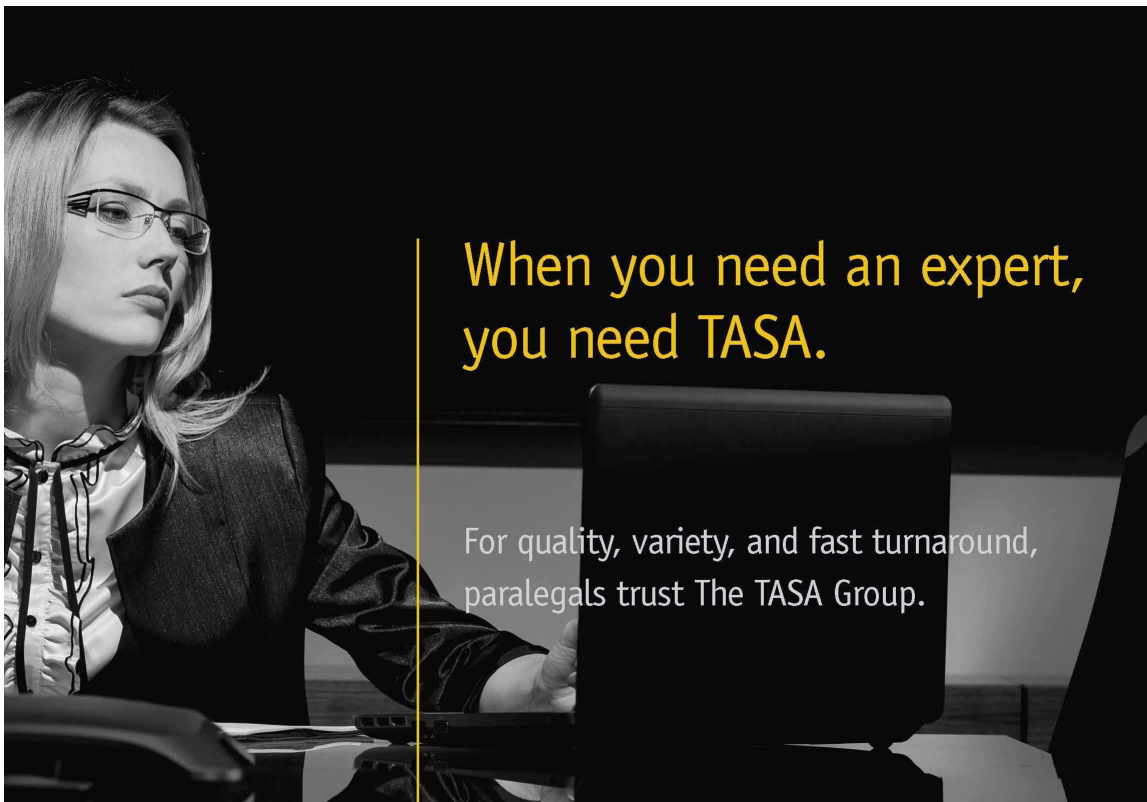
*Please congratulate Christine next time you see her!*

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*Nancy is a Paralegal at the law firm of Mannion Prior, LLP in King of Prussia. Nancy also sits on the Board of Directors and also serves as Chair of the Marketing Committee. She lives in Berks County with her husband, Joe and rescue dogs.*

***Kelly Lightcap, Pa.C.P. —Vice President***

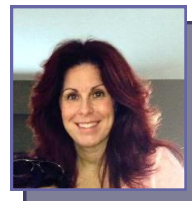
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*Kelly is a Paralegal at the law firm of Bennett, Bricklin & Saltzburg LLC in its Blue Bell office. She currently serves as the Association Vice President having served as its Treasurer since 2013. She lives in Phoenixville with her husband and cat, Emmett J.*

***Christopher Gregg—Treasurer***

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*Chris works for the law firm, Kane, Pugh, Knoell, Troy & Kramer as a Paralegal. He has been an active board member for the past 3 years and serves as its Social Media Committee Chair. Chris was born and raised in Willow Grove and still resides there with his family and their dachshund Queenie.*

***Jen Kuemmerle, CRP, Pa.C.P.—Secretary***

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*Jen is the Vice President of Finance at The Luther Woods Nursing & Rehabilitation located in Hatboro. She has served on the Association's Board of Directors and was recently elected to serve as its Secretary. She lives in Hatboro with her husband and two children.*



**BOARD OF DIRECTORS**

**Noreen Messmer, Pa. C.P.**  
(2017 - 2019)



Noreen is a Paralegal with the law firm of Ford & Buckman, P.C. in Blue Bell and has worked with Sarah Ford, Esquire for over 40 years. She has been a Board member since 2010 and also serves on the Hospitality/Planning Committee. Noreen lives in Blue Bell and is the mother of three and Nana to three granddaughters.

**Shari Weber Bradley, Pa. C.P.**  
(2016 - 2018)



Shari works at the firm at DeLuca Levine. A long time member of MCPA, she currently serves on the Board and is the Webmaster. Shari lives in Eagleville with her husband and has two grown sons and three grown stepsons.

**Dana Joana, Pa. C.P.**  
(2018 - 2020)



Dana has been an active member since 2013. Dana assists in the areas of Civil Defense Litigation, Medical Malpractice, Legal Malpractice and Personal Injury defense at the Kane Pugh Knoell Troy & Kramer, LLP law firm since 2013.

**Tracey L. Barnes, RP, Pa.C.P.**  
(2019 - 2021)



Tracey is an Estates Administration and Estate Planning Paralegal at the law firm of Dischell, Bartle & Dooley, PC. She attended Penn State University, completing the Paralegal Certificate Program in the Summer of 1992 and took the Paralegal Advanced Competency Exam, receiving her RP (PACE Registered Paralegal) credential in 2000. In 2008, she received her Pa.C.P. certification through the Keystone Alliance of Paralegal Associations and is currently its Credentialing Chair. She has been a member of the Montgomery County Paralegal Association since its inception in 1999 and has been a Board Member, Secretary, Treasurer and President. In 2017, she was appointed as the CLE-Associations Co-Coordinator for the National Federation of Paralegal Associations (NFPA).

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