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The Keys To A Better Privilege Logging Paradigm

By **Kevin Brady, Charles Ragan and Ted Hiser** (September 22, 2020, 12:50 PM EDT)

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Several BigLaw alums sat in a pub after an Inns of Court meeting, reminiscing and wondering why so much time and money is spent on discovery fights with opposing counsel. "It wasn't always this way," they mused.

One noted that Chief Justice John Roberts said several years ago that the "pretrial process must provide parties with efficient access to what is needed to prove a claim or defense but eliminate unnecessary or wasteful discovery" and that most lawyers would readily agree they have an obligation "to avoid antagonistic tactics, wasteful procedural maneuvers, and teetering brinksmanship."[1]

"Sure," quipped another litigation vet sarcastically, "that precisely defines our recent privilege logging experience."

"But," added the third, "does it have to be that way? Given the impact of COVID-19, companies are clamoring for cost-cutting measures. Can we move to a new paradigm?"

What follows is how the rest of that conversation might have unfolded.

The Rules Did Not Contemplate the Weaponizing of Privilege Logs, but ...

One score and seven years ago, in 1993, Rule 26 of the Federal Rules of Civil Procedure was amended to add subdivision (b)(5), requiring a producing party to "notify other parties if it is withholding material otherwise subject to disclosure under the rule or pursuant to a discovery request because it was asserting a claim of privilege or work product protection."

The advisory committee notes observed that the purpose of the amendment was to provide an opposing party with information to "evaluate the applicability of the claim [of privilege]" and, assuming the notification provided information pertinent to the applicability of privilege or protection, to "reduce the need for in camera inspection of the documents."

The rule, however, did not define what information should be provided or the form the notification should take. Rather, the 1993 advisory committee notes stated:

> Details concerning time, persons, general subject matter, etc. 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.

The 1993 references to "few" and "voluminous" must be understood in context, i.e., a predominantly paper-based society, years before the explosion of electronically stored information, or ESI, in discovery. Now, discovery includes not only email, but Facebook, Twitter and Instagram posts, instant messages, and thousands of other information-generating applications that were not imagined until the 21st century. The rule's notification provision has not been amended since 1993.

In today's world, with ESI exploding and discovery accelerated through such devices as rocket dockets and the recent mandatory disclosure pilot programs, privilege logging pressures have increased dramatically. This situation often results in mass-production logging techniques and less-than-optimal narrative descriptions.

Challenges with motion practice then occur; courts may find a log is useless for its intended purpose, requiring a relogging process. If the do-over is unsatisfactory, the court may find privilege waiver.[2] The question is: How do we end this spiral into costly satellite litigation that detracts from the intended focus of discovery of information — to prove a claim or defense and ensure a just, speedy and inexpensive determination of every action?

Causes Contributing to the Breakdown of the Privilege Logging System

Many factors are contributing to the current morass, including the following:

- Privilege review staffing may be creating inherent problems: Due to the sheer volume of ESI and the variety of sources where privileged information may be found, many privilege reviews are performed, at least initially, by junior attorneys, contract reviewers or paralegals.
- Making mistakes can be costly: If a privileged document is missed in a review and produced, an opponent may gain valuable information. This knowledge cannot be eliminated through a clawback and can trigger arguments about waiver. These possibilities induce fear of case- or career-changing consequences, which result in overprivileging, notwithstanding the adoptions of Federal Rule of Evidence 502(d) and Federal Rule of Civil Procedure 26(b)(5)(B) and the hopes that these adoptions would quell fears and reduce costs and delay.
- Even small mistakes may lead to disputes: The potential adverse consequences available for an incorrect call on privilege begs for gamesmanship. The volume of ESI being logged increases the odds of finding grist for the gaming mill.
- Assuming knowledge of privilege is risky: Comprehensive knowledge and proper instruction on the law regarding privilege and work product for the jurisdiction(s) at issue are essential, especially when employing junior reviewers, but not always established.
- Applying the law of privilege is not an exact science: Very experienced attorneys, acting in good faith, can disagree about a privilege claim on a document. That a judge ultimately agrees with one view does not make the other view actionable or made in bad faith.
- Context is king, and contextualization is challenging: A nonprivileged-looking document can be privileged when placed in the correct context. That fact may result in inconsistent calls for document reviewers and even the court in its in-camera review unless the context is provided.
- Trying to comply can be a slippery slope: Describing the nature of a privileged document itself is challenging, as one must provide sufficient detail to enable other parties to assess the claim, but not too much information as might disclose the privileged information or waive the claim.

Finding a Way Out of the Vortex

Practitioners who regularly engage in privilege log battles will tell you that the core problem is trust — or rather the lack of it in many cases: One side does not trust that the other side is doing the right thing. As a result, that side feels key documents are being withheld from production under the guise of privilege. So how do we reestablish trust at the bar?

The very existence of the attorney-client relationship and ethical obligations of each attorney should raise the presumption that each attorney — on both sides of the v — is acting in good faith in handling their client's affairs and operating with candor toward courts and adversaries.[3] Additional tools — perhaps underutilized — exist.

In a case, just as in major construction projects, trust-building efforts should start at the beginning. For litigators, that means trust building starts with the meet-and-confer sessions required by Federal Rule of Civil Procedure 26(f) or a state equivalent. The rules require the discussion of ESI topics, including privilege, at the conference,[4] and ethical rules since 2012 have required that counsel have a fundamental competence with technology issues or obtain it by association.

If the parties and their counsel bring that competence to the conference, it should be apparent — consistent with Principle 6 of the Sedona Principles, Third Edition[5] — that the producing parties are better situated to evaluate procedures, methodologies and technologies appropriate for the identification of both relevant ESI and what should be withheld from production on the basis of privilege.

If the producing party's counsel is not so well-informed, the requesting party may have legitimate concerns or distrust, which it may overcome through skillful negotiation or with the assistance of the court at a Rule 16(b) conference.

Even if the parties do not establish a trusting relationship at the initial meet-and-confer, other opportunities exist to avoid the burden and expense associated with addressing privileged communications. One option to obviate the need to engage in the logging process would be to demonstrate that the producing party understands the law of privilege and work product and takes seriously its obligation to produce relevant nonprivileged information.

This could be addressed by having the producing party proactively provide information about the training it provides on the substantive law of privilege and work product to those doing the first-level and second-level privilege review. This approach can be analogized to the policies, procedures and presumptions embedded in the business judgment rule.

The business judgment rule relates to the corporate duty of care officers and directors owe to their companies. The duty requires that officers and directors make decisions they believe in good faith and based on appropriate research and due diligence inquiries to be in the best interests of their companies.

The rule protects officers and directors from liability where a corporate decision is made demonstrably on those bases — even if different decisions were available or their decisions turn out to be poor or unwise. But the protection is conditioned on good faith and due diligence and presumes disclosure sufficient to show compliance. How might these concepts be applied to privilege determinations? Let us count the ways.

1. Initiate a categorical log meeting of the parties.

Once the producing party has conducted its privilege analysis and if it determines the volume of ESI to be claimed as privileged or protected is voluminous, it would be prudent to initiate a meeting of the parties to discuss how it proposes to address the notification requirement. This discussion would include whether certain categories need not be logged at all and whether and how other categories may be treated.

If agreement on categories is achieved through this process, a court could resolve a later challenge by sampling documents within the agreed-upon categories. If agreement cannot be reached, the producing party may request the court's assistance in defining a reasonable, cost-efficient approach proportional to the needs of the case.

2. Conduct a Rule 26(b)(5) privilege review certification.

To reduce the fear factor described above that may lead to overprivilege designating, and before the privilege logging exercise begins, the senior lawyers in the case, including senior local counsel if applicable, could provide to reviewers document guidance about the law of privilege applicable to the dispute at issue. That would include guidance about:

- Standards for asserting privileges and protections identified in the producing party's assessment;
- Protocols for determining documents warranting second-level review; and
- Quality controls to ensure protocols are followed.

Producing those guidance materials to opposing parties, if requested, would help establish the good faith and diligence of the senior lawyers for the producing party. Those senior lawyers also owe a duty of supervision to ensure the guidance is followed.[6]

To that end, they should take reasonable steps to ensure that privilege has been asserted only in accordance with a good faith reading of the law of the applicable jurisdiction and that there has not been systematic overdesignation. The provision of such information establishes reasonable grounds to preclude the necessity of a privilege log.

In some cases and where the court is willing, the parties might seek guidance from the court informally or more formally through an in-camera examination of exemplar documents to obtain rulings that could be applied further to the populations.

The final step in establishing this "privilege judgment rule" might be for a senior lawyer for the producing party to prepare and file with the court a Rule 26(b)(5) certification, stating that the attorney had taken reasonable steps to confirm that the privilege assertion process had been conducted with integrity, in accordance with good faith readings of the laws of the applicable jurisdictions, and with due diligence in applying the protocols shared or agreed to with the requesting party.

Critically, this would not be a certification that every withheld document is unequivocally privileged, but one requiring reasonableness, like the Rule 26(g) certification lawyers complete with each discovery response.

Once that certification is filed with the court, there would be a presumption that the producing party had acted in good faith in evaluating privileges and protections and the producing party, unless otherwise agreed, would not need to produce a privilege log and that the requesting party would not be permitted to engage in discovery about the certification.

As with the business judgment rule, the protection is conditioned on good faith and due diligence and presumes disclosure sufficient to show good

faith and reasonable diligence in applying the process to identify withheld privileged and protected materials. To overcome these presumptions, a challenger would need to show evidence of a systematic failure on the part of the producing party to exercise oversight or that the producing party had acted in bad faith.

3. Remove waiver as a punishment.

If a privilege log is required — because the requesting party refuses to allow the certification process, a court requires a log, or the requesting party succeeds in overcoming the above presumptions — clarity is needed about the amount of information permitted without adverse consequences.

The current rule requires parties to describe the document being withheld "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim," as set forth in Rule 26(b)(5)(A)(ii). In practice, a description rarely reveals the substance of a privileged communication or protected information.

Indeed, the advisory committee note states that information affecting applicability of a privilege claim that itself is privileged need not be disclosed. Further, Rule 26(b)(5)(B), added in 2006, provides a mechanism for reclaiming privileged information produced in discovery, and a Federal Rule of Evidence 502(d) order, if one is in place, provides that disclosure of privileged information in discovery is not a waiver.

That being the case, parties preparing privilege logs should be free to provide as much information about a claim of privilege regarding documents without trying to hit the elusive Goldilocks zone — not too much, not too little, just right without worrying about a claim of waiver as a result of logging itself.

Conclusion

As the bartender yelled "last call," one of the trio said, "Well, this idea may not please the trial lawyers on either side of the v, but it might get the attention of some general counsel and in-house counsel looking to shave litigation budgets in these difficult times."

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[1] 2015 Year-End Report on the Federal Judiciary, The Supreme Court Of The United States (2015) (hereafter "Report"), at 6-7. 11, https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf.

[2] See, e.g., Meade v. General Motors LLC, 250 F. Supp. 3d 1387, 1396 (N.D. Ga.2017) (waiver found where court ruled "Defendant's conduct in this case in asserting an overly broad claim of attorney-client privilege and failing to produce a proper privilege log after twice being ordered by the Court to do so was improper, obstructive, and undertaken in bad faith in order to avoid its discovery obligations.").

[3] See FED R. CIV. P. Rule 26(g)(1)) and ABA Model Rules 3.3 and 3.4. If there is evidence of improper discovery conduct, sanctioning rules kick in. See FED R. CIV. P. Rule 26(g)(3).

[4] See FED R. CIV. P. Rule 26(f)(3)(D).

[5] The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 SEDONA CONF. J. 1, Principle 6 (2018).

[6] See ABA Model Rules of Professional Conduct 5.1 and 5.3.
