

COMPLEX LITIGATION & *E - Discovery*

Reducing the Burden of Privilege Logs in ESI Productions

Getting the parties to agree
to the method is the trick

By Peter J. Pizzi

Privilege logs were never a fun part of business litigation. There are few tasks more tedious than logging individual pieces of correspondence by date, author, recipients, subject matter, reason withheld, etc. In the era of electronically stored information (ESI), the creation of a document-by-document privilege log has gone beyond mere tedium to become one of the more costly elements of an ESI burden that, by itself, may be dissuading businesses from pursuing commercial litigation at all. Something has to be done, say many, or else the burden of ESI discovery will foreclose litigation as an option for resolving modestly-sized disputes. The authors of a recent law

Pizzi is a partner the employment law and technology litigation practice groups of Connell Foley in Roseland. Joanna Rich, an associate at the firm, assisted in writing this article.

review article, building upon the work of The Sedona Conference, think they have a solution.

The Scope of the Problem

The digitization of communication has had a transformative effect upon the process of creating written business correspondence. Before e-mail, company executives dictated or handwrote letters, got a draft back from a secretary, edited it, got a new draft, edited it, and then put the document in final form, which was signed and then mailed, faxed, or sent by overnight courier. It would take a few days to get a response. The slow, multistep nature of business communication served to limit the frequency with which written correspondence was sent. More communication took place by telephone, and went undocumented. A dispute between two companies that was incubating for a year or two before flowering into a lawsuit might involve a few hundred discrete pieces of correspondence. The task of preparing the privilege log was a small part of the process of gathering relevant documents and preparing for production.

A handful of attorney hours might be consumed.

Today, the business world revolves around various forms of electronic communication, e-mail and texting being the most prominent. To say that e-mail has become ubiquitous does not quite do justice to the way in which it dominates the business day. As a result, most commercial disputes require the production of substantial ESI caches. The volume of electronic communication means that the average commercial case might involve many thousands or even millions of discrete ESI records. The privilege review, and the creation of a document-by-document privilege log, can consume weeks of attorney time. The log might contain thousands of entries. The log itself is often too vast to be printed on paper, and is presented to the adverse party in electronic format.

Obviously, anything that consumes weeks of attorney and paralegal time is, by definition, costly. In a litigation of any complexity, the privilege process might cost tens of thousands of dollars. The delivery of the privilege log, of course, is often just the beginning. If the adverse party disputes entries on the log, briefing and an in camera review may follow, costing still more. Though the digitization of business communication has been underway for over 25 years, jurisprudence in the area of e-discovery did not begin to develop until the late 1990s. See David

Isom, "Electronic Discovery: New Power, New Risks," 16 *UTAH B.J.* 8, 9, & 14 n.7 (2003) ("Until the late 1990s, electronic discovery issues in reported cases were scarce.").

Enter The Sedona Principles

The 1993 rules amendment to Rule 26(b)(5) noted that a document-by-document log may be unduly burdensome "when voluminous documents are claimed to be privileged or protected." The Sedona Conference, which developed a set of ESI best practices known as "The Sedona Principles," advocated that, where large ESI quantities are involved, what "parties may consider at the outset is to agree to accept privilege logs that will initially classify categories or groups of withheld documents." This passage, while prescient, also reveals a weakness: the parties must agree.

The Facciola-Redgrave Framework

Hon. John M. Facciola, a Magistrate Judge, and Jonathan M. Redgrave, have taken The Sedona Principles' logging by "category" proposal several steps further. They have developed an entire regime that would dispense with the document-by-document log for all but a small subset of ESI. Their article, "Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework," 4 *Fed. Ct. L. Rev.* 19 (2010), proposes that a categorical approach to privilege review will "maintain proportionality between stakes in a lawsuit and the resources a party must use to litigate those issues" by reducing the number of documents and ESI that are subject to privilege logging and by limiting the need for extensive in camera review of privileged documents. Facciola and Redgrave propose that by using categories and sampling to assert privilege rather than the traditional (and onerous) document-by-document approach, the cost of privilege logging can be reduced.

The Facciola-Redgrave Framework (FRF) requires cooperation and planning between parties. In the first step of the process, the parties discuss the anticipated vol-

ume and types of privilege claims and propose processes to identify and adjudicate privilege issues. The parties' agreement is then presented to the court at the Rule 16 conference and can be incorporated into the court's order.

The parties continue to work together by identifying categories of documents that are clearly privileged or protected. These documents are identified by category, but not logged or indexed. These clearly privileged documents are then reserved, in case a dispute later arises.

After the parties remove the clearly privileged documents from the general document population, they can then work together to identify strategies, such as the use of agreed-upon search terms, to locate presumptively privileged documents. The parties must also agree to what information will be supplied regarding the withheld documents.

The parties then categorize the withheld documents by basis for withholding and general subject matter. The purpose of categorization, say Facciola and Redgrave, "is to create a set of natural differentiations among the documents so that the parties can say, once again with confidence, what is true of the items within the category is true of the whole [category]." By creating categories, the parties can assert privilege claims as to entire categories, rather than as to individual documents, thereby lessening the burden of making and defending document-by-document claims.

Next, the parties identify which categories of documents should be indexed. Facciola and Redgrave caution, "this indexing is not a privilege log nor is it intended to be a substitute. Rather, it is a catalogue of information that is available without undue burden and can be shared regarding withheld documents." ESI management software may further lessen the burden of creating the index.

The FRF does not dispose of traditional logging entirely. The parties identify which documents, if any, should be logged. Documents can be logged individually or by category. Facciola and Redgrave suggest that courts can help the parties determine what information should be disclosed

in the log.

Even in the best of situations, parties will likely disagree on certain claims of privilege. The FRF enables parties to seek aid from the court to determine the validity of a claim of privilege. The parties' earlier categorization lessens the court's burden of in camera review as well. The court is empowered to review a sampling, random or specific, of documents within the category challenged. Review of a sample enables the court to determine whether (1) the categorization process is working (in other words, whether the sampled documents fit the category) and (2) if the process is working, the validity of the withholding party's claim of privilege as to the category. The court's ruling could encompass categories or single documents, or order a change in the parties' categorization process. In this way, the FRF provides the court with considerable latitude to structure its rulings to fairly and efficiently resolve the dispute.

Facciola and Redgrave propose that the benefit of a streamlined privilege process leading to more adjudications on the merits, rather than outcomes determined by litigation budgets, outweighs the risk of increased cheating and bad faith. Overall, Facciola and Redgrave believe their process will "return the focus of litigation to the merits of claim rather than the discovery and privilege logging process" by limiting the number of documents and ESI subject to document-by-document review.

The key to implementing FRF is cooperation between the parties coupled with strong support from the courts. Getting the parties to agree to the method for logging privilege is the trick. Magistrate-Judges should make it a point to suggest the FRF method so that the technique becomes the norm. In order for the FRF to become the norm, recalcitrant litigants who insist upon document-by-document logging have to be perceived as outliers. The approach is best suited to federal courts because magistrate-judges are available to supervise all phases of discovery. It seems less likely to flourish in state court actions given that the parties do not ordinarily go before a state court judge until a dispute emerges. ■