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Revisiting Alternatives to Traditional Privilege Logs: A Practical Review

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The sometimes-competing concepts of proportionality and burden have driven recent trends in e-discovery such as limiting scope of discovery and the focus on cooperation among the parties. While all aspects of discovery are subject to these principles, there is no better example of the tension between the two than when the privilege log of each document is withheld from production on the basis of privilege.

Privilege logs can undermine the discovery process because they often lead to lengthy and costly disputes. We look at some practical limits of the more common alternative approaches and provide suggestions on how to combine and present the alternatives in a way that requesting parties may find agreeable.

This issue is not new. One of the early and most comprehensive treatments on this topic was a 2009 article by Judge John Facciola and Jonathan Redgrave, who lamented the futility of traditional privilege logs especially as compounded by the growing volume and complexity of electronically stored information. The authors outlined several alternatives, including categories of documents that can be excluded from privilege analysis, categorical logs in which similarly situated documents are treated collectively, and objective indexes leveraging technology to provide document-specific metadata for withheld documents.

In the decade since then, experts, leading authorities, and courts have extensively addressed and explored alternative approaches to the document-by-document privilege log.

No Single Approach

Despite comprehensive treatment of this topic, it is often still difficult to get requesting parties to agree up front to certain alternative approaches and agreements that truly move the needle in reducing the burden. The most common alternative approaches only dispose of types of privilege claims that are not likely to be challenged anyway. These approaches do not cover the bulk of privilege log entries.

Other approaches, while effective for certain types of claims, are inadequate when applied broadly or universally. In the vast majority of cases, no single approach effectively accomplishes the dual goals of reducing the burden on the responding party while providing enough information to allow the requesting party to assess the privilege claim.

Conversely, combining various approaches, while potentially very effective, can result in an "alternative regime" that is perceived as so complex that it obscures, rather than illuminates, the claims of privilege. Even if unintentional, those advocating against alternatives view this attempt to "obscure" as nefarious.

As an initial matter, it is important to address the handling of privilege claims up front and not wait until there is an issue. In practical terms, these types of provisions should be determined early in the process. This allows the parties to negotiate provisions without any perceived bias (i.e., trying to "hide" bad documents) and also allows the parties to brief particular issues, if necessary, before engaging in costly review and logging.

Often, parties are now amenable to stipulating that certain types of direct communications with outside counsel on specific topics, or work product that is related to the instant litigation, be excluded from review and/or the privilege log exercise

altogether. These "exclusions" can be meaningful for the responding party, but may only modestly reduce the burden of discovery, as these types of documents do not typically make up the majority of the entries on a privilege log.

Indeed, several courts– such as the Southern and Eastern Districts of New York–have standard protocols that allow for such communications to be excluded from a privilege log, and it can be found in the Digital Information Model Privilege Case Management Order for the Seventh Circuit Electronic Discovery Pilot Program in the Northern District of Illinois.

As we move further up the scale of difficulty, agreement on categories of privilege documents to exclude becomes far more difficult, such as with direct communications with in-house counsel, where more nuanced issues of primary purpose or the nature of the advice being sought come into question.

Search Terms and Technology-Assisted Review

Technology is commonly used to assist in segregating potentially privileged documents. Most attorneys use some type of search for terms associated with privilege to identify and aid review of potentially privileged material. However, using search terms to exclude documents from review and logging and securing agreement from a requesting party is another matter.

In practice, search terms built on common legal terms such as "privilege," "legal," "lawyer," etc. are poor indicators of the actual presence of the underlying elements of privilege. Search terms that are derived from proper attorney names, firm names, and corresponding domain names will yield better results but still cannot account for elements of waiver or non-legal subject matter.

There is a growing chorus of voices advocating for technology-assisted review in lieu of manual review of privilege documents, and to alleviate the need to log documents individually. Predictive coding models designed to identify privilege can be effective and are used more frequently in pre-production quality control. However, we are nowhere near a situation where a requesting party would accept probability rankings generated by a predicative model designed to identify privilege content in lieu of well-crafted privilege descriptions.

However, reliance on TAR approaches to identify categories of privilege documents should become part of the narrative when responding parties advocate for alternative approaches. And, while neither search terms nor TAR can yet be the only tool used in support of privilege claims, both are important tools for identifying categories of documents best suited for other alternative approaches.

Objective Indexing: The Metadata Log

Objective indexing, or a "metadata log," is a document-by-document list of withheld documents that provides corresponding metadata for each, which usually includes the date, author, recipients, and other basic identifying information. These indexes are automatically generated from e-discovery platforms and require minimal manual effort in their creation. As an alternative to traditional privilege logs, this moves is a step further than stipulated exclusions, as it provides at least some information to aid in the assessment of the privilege claim.

Requesting parties are sometimes agreeable to this approach and responding parties favor the relative ease with which these indexes can be created from review platforms. For documents such as internal company communications authored by in-house counsel and sent to a limited number of employees, or communications sent directly to in-house counsel, a metadata index can sufficiently provide a level of comfort that there are no obvious issues of waiver.

Similarly, if document titles or subject lines are included in the index, it can offer assurance that the subject matter is consistent with topics that legal advice is commonly provided or sought for, although including such items will generally trigger the need for some privilege review.

Typically, parties agree to a metadata index and a subsequent process whereby the requesting party selects individual entries to be described in more detail. This approach can fall apart if the scope of the metadata index has not been carefully tailored for specific types of privilege claims. In practice, the metadata for an uncontroversial privilege call will often look exactly like the metadata for closer privilege calls. If receiving counsel is unable to discern between the two, they have little choice but to select both and every similar entry for further evaluation.

Additionally, certain claims of privilege or work product will always be candidates for selection for further evaluation because attorneys are usually not listed as authors or recipients or any other indicia of privilege in the index entry. What may unfold is an unfair and protracted game for both parties whereby the requesting party is making both over-inclusive and under-inclusive, ill-informed selections from the index to which the requesting party must respond.

The efficiencies that may have been gained by agreeing to a metadata index are marginalized and can be entirely wiped out by this process. Certain types of privileged documents can, through negotiation, be excluded from a metadata index or be part of an agreed upon follow-up review and logging process. It is important to build and maintain the trust between counsel, assuring that the producing counsel will properly use the metadata index and the receiving party will narrow questioning of log entries to those truly at issue.

Categorical Logs

Another popular alternative is a categorical log. This approach provides an aggregated basis for the claim and generally descriptive information for the requesting party to assess the privilege claim for categories of documents rather than individually. As stated in *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, "An agreement at the outset of litigation to log privilege documents by category … will reduce motion practice regarding log deficiencies and other procedural challenges that are becoming more common given the huge volume of ESI at issue."

While true, it is difficult to get requesting parties to agree unless there is bilateral production and equal, or nearly equal, burden associated with logging documents. More so than with other alternatives, the categorical log requires trust between the parties because the potential to obscure the privilege claim is often viewed as more likely with this approach. The required trust may not exist at early meet and confer meetings where agreement is being sought.

Ideally, the responding party would be able to articulate the types of categories their privilege designations would fall into and the level of specificity they could provide as to each. However, in practice these negotiations are happening at a time when the responding party may not have even finished collections, let alone conducted enough review to have the requisite level of knowledge about the types of privilege claims they will need to make.

Compounding the issue, there is no pre-set, generally accepted criteria for the categorical approach. Considering that literally thousands of withheld documents may fall under a single category, it would seem that a robust description would naturally accompany that. However, responding counsel, perhaps concerned about waiving the underlying privilege by being overly descriptive, often provides a more generic privilege description.

Admittedly, it is a difficult balance to strike and, as a result, there is some case law that has found categorical logs to be inadequate in certain circumstances. Neelon v. Krueger, Civ. No. 12-cv-11198-IT, 2015 BL 64281, at *2-*4 (D. Mass. Mar. 10, 2015) and Nationwide Mut. Fire Ins. Co. v. Kelt, Inc., No. 6:14-cv-749-Orl-41 TBS, 2015 BL 91266, at *5-7* (M.D. Fla. Mar. 31, 2015).

Still, a categorical log for certain types of claims is unquestionably the right approach. Prime examples are work product claims relating to litigation other than the instant litigation, or communications with counsel centered on a specific events or subject matter. The categorical log provides detail that cannot be found from other alternatives that are based on objective data such as metadata.

Combined Approach, Early Agreement

There is no prohibition against categorizing documents by means other than subject matter, but as a practical matter, given the nexus between subject matter and underlying claim of privilege, subject matter logs tend to be better received than categories based on date, document type, or other classifications. Lastly, combining a categorical approach with category-specific metadata index is often well-received.

The creation of the accompanying index requires little effort and allows the requesting party more individual detail on which to base their assessment. Further, willingness to provide evidence in the form of a declaration or affidavit to support the basis of privilege for each category often solidifies the claim and may move a requesting party toward agreement for this approach. Agreeing to provide a declaration up front and not wait until claims are disputed can proactively and effectively reduce challenges.

An important part of an effective alternative privilege log regime can be the document-by-document logging of select groups of documents that may not be best handled by other alternatives. Alternative approaches are designed to reduce burden, but the burden of a document by document log for select sets of documents can be far more modest. Further, a responding party's willingness to log certain documents in a traditional way can provide comfort to the requesting party and encourage cooperation.

The takeaway is that the best alternative to a document-by-document privilege log is highly case- specific, but a carefully crafted combination of these alternative approaches, which may include a certain subset of privilege claims being logged in a traditional way, can be effective.

This concept is consistent with principles set forth in the Facciola-Redgrave Framework articulated almost a decade ago. Most subsequent commentators acknowledge that multiple approaches may be required. The barriers preventing a wider acceptance of that principle are practical ones. The responding party may not be best positioned at early meet and confer sessions to clearly articulate a multifaceted approach with a level of detail and certainty that a requesting party will find agreeable.

Both responding and requesting parties underestimate the effort required during the meet and confer process to agree on an effective alternative strategies to the traditional log. Also, in unilateral discovery situations, a requesting party may be less incentivized to put forth that early effort. Lastly, there is a failure to acknowledge and address the practical limitations of each of the alternatives.

Unfortunately, in most situations the responding party falls back to a position that at best outlines a few categories of low-hanging fruit to exclude from the log process combined with a singular approach to the remainder of the privilege claims of either a categorical log or metadata index. Neither is likely capable of adequately treating the entirety of the remaining privilege claims, nor is it likely to be agreeable to a requesting party.

To get a better result, it might be best to start with the premise that the responding party may not have enough information to present a comprehensive plan at a Rule 26(f) conference, and the requesting party likely does not have enough information to evaluate it. Instead, look for common ground. For example, the parties can likely agree on some early uncontroversial categories of documents to exclude from the log, a meta-data index for certain categories of documents, and a document-by-document index for other categories.

Next steps could be to establish a framework for approaching others' categories that may include a variety of approaches and should necessarily establish a schedule of meetings designed to work through the process. Next, acknowledge the iterative nature of the process and that the parties will need to develop a meaningful plan.

Where categorical logs and metadata indexes are going to be used, consider exchanging samples early in the process to work through potential objections to form and content. In other words, shift the early focus to areas where agreement is possible, and establish a framework to reach agreement, step-by-step.