Is There a Better Way to Create Privilege Logs?

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Complex litigations typically involve huge numbers of documents, including ones concerning the parties and claims such as those related to correspondences, corporate structures, negotiations, and sales and marketing. In addition, there are also voluminous documents related to the specialized issues unique to each complex litigation. For example, in patent cases, there are documents related to the prosecution of the patents, products of the patentee and accused infringer, and other litigations or license negotiations involving the patents or similar technology. Not only may there be more types of documents in complex litigations, but the documents generally span many different custodians and lengthy periods of time.

Accordingly, one of the many logistical problems in complex litigations is how to properly identify and log privileged material out of all of these documents. The obligation to log privileged documents can cause considerable difficulty in complex litigations, particularly because of the large amounts of responsive privileged documents. Using a patent case as an example, types of responsive privileged documents could include materials related to prosecution of the patent-in-suit, opinions of counsel, investigations into infringement and validity, and prior litigations and negotiations of the patents. Traditionally, privilege logs are generated manually on a document-by-document basis. This article explores whether there is a better way to create privilege logs.

The Requirements for Privilege Logs

Federal Rule of Civil Procedure 26(b)(5) states that a party withholding otherwise discoverable material under a claim that it is privileged must describe the nature of the documents in a manner that, without revealing information that is itself privileged, will enable other parties to assess the claim. To comply with Rule 26(b)(5), a privilege log typically describes basic information about each document including the date, author and all recipients (along with their capacities), subject matter, and an explanation for why it is privileged.1

Overly vague descriptions on a privilege log may not meet the burden to establish privilege. That is, if the "'general description' of the subject matter [was] so vague and oblique as to be meaningless," then no privilege is established.2 For example, in Brooks v. General Casualty Co. of Wisconsin, the Court found the following descriptions insufficient to meet the party's burden of establishing privilege:

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2. Brooks v. General Casualty Co. of Wisconsin.
• letter re claim;
• analysis of claim; and
• report in anticipation of litigation.³

How much detail is needed in describing a document depends both on the types of documents being withheld and the jurisdiction where the case is pending. There is a fine line between an overly vague privilege log and an adequate one. For example, in one patent case, vague descriptions which contained "slight variations" of the phrase "confidential communications made for the purposes of providing legal advice in anticipation of litigation, not regarding the [patent-in-suit]" were held insufficient to establish privilege.⁴ In a different patent case, a privilege log was held adequate, however, because it "generally" described the documents as "relating to patent applications and legal advice provided by counsel . . . in anticipation of litigation."⁵ The distinction appears to be that the former described the document in the negative, i.e., it could by any type of document other than relating to the patent-in-suit, while the latter at least described the documents as relating to patent applications.

Indeed, the judge who found the privilege log to be adequate in the patent case mentioned above, also found all of the following entries on a privilege log to be adequate even though they have minimal description:

• Legal advice re: issued '822 patent;
• Re: issue fee and legal advice re: a continuation application in design case;
• Re: design application and seeking information for Office Action to patent application that issued as '822 patent;
• Legal advice re: foreign filing of patent application;
• Legal advice and enclosing copy of application filed with Patent Office;
• Re: enclosure of drawings re: motor configuration as follow-up to request for legal advice re: application;
• Internal memo re: issue fee for continuation of application;
• Re: drawings from FT Industries;
• Legal advice re: patent application and claim amendments;
• Re: and enclosing cease and desist letter sent to J. Perella; and
• Re: enclosure of correspondence from Supreme including nondisclosure agreement signed in 9/97.⁶

Hence, while some detail is needed to properly log privileged documents, these examples show that the requisite level of detail may not be especially high.

**Alternatives to Traditional Privilege Logs**

A privilege log is traditionally generated by manually reviewing each document and then describing its contents on a log. Traditional logging of documents may be preferred when a careful review of each document can be conducted. Drawbacks of a traditional privilege log, though, are that it can be highly burdensome, time consuming, and expensive, especially in complex litigations with such large numbers of documents.
"Category logs" are now being used as an alternative to traditional privilege logs. Instead of having a separate entry on a privilege log for each withheld document, a category log has a single entry that corresponds to several documents that relate to some subject matter category or have the same type of information. For example, a category log may have an entry such as "communications with attorneys and documents reflecting legal advice regarding license negotiations with Company X" or "communications with attorneys and documents reflecting legal advice regarding pre-filing investigation." Each entry in the category log would then correspond to all documents with the same subject matter. This alternative can significantly reduce the time and cost spent when dealing with a high volume of documents, as found in most complex litigations, while still providing the requisite level of detail for privilege to be assessed.

Although some may be skeptical about whether a court would accept a category log, several courts have found category privilege logs to be adequate. For example, in SEC v. Thrasher, the Southern District of New York held that category logs are appropriate if a document-by-document listing would be unduly burdensome and a more detailed description would be of no material benefit in assessing whether the privilege claim is well grounded. Although a category log may minimize the number of entries on a privilege log, it still must identify the time period encompassed by the withheld documents, a list of the individuals who were authors or recipients, and the basis of the privilege. Since Thrasher, other courts have also allowed the use of category logs.

Category logs are a logical fit for complex litigation where many of the privileged documents can be categorized together by subject matter. For example, in Caliper Technology Corp. v. Molecular Devices Corp., a patent case, the plaintiff argued in response to a motion to compel that it would be unduly burdensome to individually log privileged documents prepared in anticipation of the litigation regarding patentability and that producing such a log may reveal privileged information. Instead, plaintiff offered to provide a category log, which the court accepted. Therefore, under the right circumstances, category logs can be used to reduce the burden of generating privilege logs.

Modern electronic document review tools can also be used in combination with category logs to further save time and cost. Electronic key word search terms can potentially help generate category descriptions for groups of documents that share a common basis of privilege. For example, if a company had retained an attorney for a specific task, one could electronically search documents with key words relating to the specific task or the attorney name. A category log can then be automatically generated from hits on those key words with entries such as "Communications between [attorney name] and client containing legal advice regarding [electronic keyword search term]." In addition to key word searching, a similar technique can be used based on electronic metadata such as date, author, and recipients (and possibly even their capacities). The downside to such automated logging is that it runs the risk of incorrectly identifying information, so it is important for litigators to take sufficient quality control measures.

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As with any litigation strategy, these techniques must be assessed on a case-by-case basis. Since litigators are constantly looking for ways to run discovery in complex litigations more efficiently, category privilege logs and automatic generations should be considered to help accomplish this goal.

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3 Brooks, 2007 BL 251091 at *3.
8 Id.
10 Caliper, 213 F.R.D. at 563.
11 Id.