

Managing Costs: E-Mail Chains and Preparation of Privilege Logs

By Peter Pfeiffer, Esq.



In today's business world, e-mail is taken for granted as a quick and efficient means of communicating with one or many individuals simultaneously. E-mail chains can become so prolific in the ordinary course of business that when preparing privilege logs, costs can quickly become staggering.

Most federal and local rules regarding the requirements for privilege logs evolved at a time when hardcopy letters, notes, and memoranda were the most common method of communication. But e-mails are now probably the prime method for corporate employees to communicate.

For example, in one case a party performed keyword searches and determined that 208,653 e-mails were responsive, and its counsel initially determined that about 130,000 were privileged.¹

Employees, consultants and business partners are able to coordinate their work worldwide, across national and international jurisdictional lines, by use of electronic communication and electronic documents. Employees may also back up their hard drives containing e-mails using a thumb drive. All of this electronic stored information, or ESI, will be a target for production in discovery.²

It is imperative to develop streamlined and efficient review processes in order to reduce

review costs; the privilege log, in particular, will require considerable attention.

IS AN 'E-MAIL CHAIN' ONE OR MANY COMMUNICATIONS?

Before determining which documents must be identified on the privilege log, it is important to understand what a "document" is. E-mail servers treat e-mail chains as single documents, and e-mail chains are kept in the ordinary course of business as single electronic documents. Certain jurisdictions may be receptive to e-mail chains' being logged as a single entry on the privilege log in certain circumstances.³

However, some courts have favored logging individual links within an e-mail chain separately.⁴ "[E]ach e-mail is a separate communication for which a privilege may or may not be applicable," the court held in *Baxter Healthcare Corp. v. Fresenius Medical Care*. "Defendants cannot justify aggregating authors and recipients for all e-mails in a string and then claiming privilege for the aggregated e-mails."⁵

Similarly, the court in *In re Vioxx Product Liability Litigation*, observed that e-mail

If the judge in your case takes the position that each link in the e-mail chain must be separately logged, a typical e-mail chain that is forwarded five times will probably add tenfold to the time required to create the privilege log. This extra effort is caused by the additional steps required to manually create the privilege log.

PROACTIVE COST SAVINGS

Some cost-saving areas to consider even before litigation is anticipated may include the handling of electronic stored information, document retention and, of course, the proper use of e-mail by employees.

The costs of storing many gigabytes or terabytes of ESI is small when compared with the costs a client may incur if all ESI sources must be reviewed in litigation. Consider whether your company's document/records retention policy in the ordinary course of business is up to date. When is the last time you reviewed your company's document destruction policy in light of current case law regarding litigation holds?

Have company employees been instructed regarding the proper etiquette for e-mail?

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"threads" (a series of e-mail messages) "in which attorneys were ultimately involved were usually inappropriately listed on the privilege log as one message."⁶

The courts are still wrestling with the issue of whether an e-mail chain is one communication or many separate communications for the purposes of managing large-scale privilege logs. Certainly, arguments exist for and against both propositions. While the courts continue to sort it out, and while new rulings and local rules evolve, the issue facing you will be how to manage costs.

Give specific and careful instructions regarding e-mail communications when in litigation or when litigation is anticipated. Furnish instructions to all relevant personnel regarding who gets copied on e-mails and who receives e-mails and relevant documents.

Inform employees that as far as possible, business and legal questions should not be mixed in e-mails. Advise them regarding the perils of forwarding e-mails and the problems of logging e-mail chains when in litigation. Consider instructing employees to state the purpose of their e-mails upfront.

Instructing employees on proper e-mail use before a lawsuit is filed can save money later during discovery.

Companies should:

- Furnish instructions to all relevant personnel regarding who gets copied on e-mails and who receives e-mails and relevant documents.
- Tell employees that as far as possible, business and legal questions should not be mixed in e-mails.
- Advise employees regarding the perils of forwarding e-mails and the problems of logging e-mail chains when in litigation.
- Instruct employees to state the purpose of their e-mails upfront.
- Instruct employees not to blind-copy attorneys if they are seeking legal advice.
- Consider using “do not forward” instructions.

For example, “I am writing to seek legal advice regarding...” lays the foundation for an attorney-client privilege claim, while “I am writing to provide the information you requested regarding *ABC v. XYZ* litigation...” can lay the foundation for a work product protection claim.

Instruct employees not to blind-copy attorneys if they are seeking legal advice. Lawyers who are later preparing a privilege log may not know the e-mail went to an attorney. Moreover blind-copying an attorney may bring into question whether the sender intended to seek legal advice in the first place. For a communication to be privileged, it must be clear that the sender intended to seek legal advice.

Last, consider using “do not forward” instructions. Keep in mind, however, that an e-mail/document with a “do not forward” designation that is unnecessarily forwarded may actually weaken the claim for privilege.

EFFICIENCY DURING THE PRETRIAL CONFERENCE PHASE

The pretrial conference is crucial to laying the foundation for the review process. You should try to identify cost-saving measures in this early phase of discovery. The more time and consideration that goes into this process, the more time and money you may be able to save in the privilege-log preparation phase.

One way to try to contain expense is by agreeing with your adversary to limit, modify or even eliminate privilege logs. For example, consider limiting the types of documents that actually get logged. It is possible to identify entire categories of documents as privileged by word searches, custodian or other methods.

Work with your opponent to identify people or files that are recognized as privileged, such as legal department files, that you can

under certain circumstances, such as when there is an attorney on every link in the e-mail chain or where an e-mail chain discusses only one issue and doesn’t change.

They may agree to use a single entry when a non-attorney has gathered information at counsel’s request for the purpose of rendering legal advice in the litigation (and thus using the “work product compilation rule” whereby otherwise non-privileged documents themselves may through their collection and/or organization reveal counsel’s thoughts and impressions of litigation or legal strategies).

When there is an agreement to log e-mail chains as a single entry, you may consider adding a column in the privilege log for the control range numbers (or Bates range numbers) so your opponent will know the length of each document, particularly e-mail

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both agree do not need to be added to the privilege log. You should memorialize in writing any agreement and consider taking the extra step of having the agreement entered into a court order.

Another modified form of privilege log may be to agree with your opponent to disclose only basic metadata from electronic documents (“date/to/from/cc/bcc” information for an e-mail, letter, memo, etc.) and thus avoid the labor-intensive process of describing the privileged material.

This method does have limitations:

- Most review programs do not extract the metadata for each individual link in an e-mail chain, but only from the most recent e-mail; and
- You could not use this method when making a claim for work product under the compilation rule (as the metadata may in fact be part of the work product you seek to protect).

The parties may agree to log all e-mail chains or certain specified types of e-mail chains as single entries. For example, parties may agree to log e-mail chains as a single entry

chains. Also consider adding a column on the privilege log for “other names” to list every recipient of the e-mail chain who is not included in the most recent e-mail of a chain. It is important to discuss these issues before commencing your privilege review to ensure consistency in process.

Cooperate with your opponent in the pretrial conference context. Try to agree in advance on protocol, production and cost-efficiency issues. Remember, discovery disputes occur long before trial, but they can be expensive.

PROCESS EFFICIENCIES DURING PREPARATION OF THE PRIVILEGE LOG

Before describing efficiency of process it is first necessary to describe why logging e-mail chains has inherent inefficiencies. Most review programs are not structured to enable a reviewer to make multiple privilege calls on a single document. Moreover, most document-review software treats e-mail chains as a single document.

For example, one e-mail chain may consist of three e-mail links on a single page of paper. Most review programs automatically

generate one control number per page, so one control number may apply to all three e-mails within the e-mail chain.

One way to itemize each link in an e-mail chain as a single entry on the privilege log is to separate each e-mail link by two vertical lines: “||”. The purpose of using the “vertical line” method is to prevent multiple privilege entries from having the same control number on the privilege log.

A privilege log typically has the following headings at the top of each page: date, from, to, cc, blind copy, other names and privilege description. For example, if an e-mail chain has three links, the date column would read something like “11/11/2009 || 12/02/2009 || 01/03/2010.” This process would be repeated on the same entry for each e-mail link for the “from, to, cc, blind copy, other names and privilege description” information.

This type of privilege log and privilege review is one of the most difficult to manage logistically in the discovery and quality-control process. Since privilege determinations are performed manually by lawyers, it can become quite expensive because of the many steps involved.

A privilege log that itemizes each individual link utilizing two vertical lines (“||”) can be difficult and cumbersome for opposing counsel to read (as entries tend to run together on the page like the stripes of many zebras running across the plains).

Today the software commonly used for document review does not allow control numbers to be assigned to individual links of e-mail chains. Therefore this task must be performed manually.

For example, three e-mails on a single page of paper with one assigned control number, 1001, may be manually changed to 1001A, 1001B and 1001C, respectively. If this process is performed, each e-mail link may be given a separate entry on the privilege log because each link has its own control number.

This process is mostly not performed in general practice. It is time-consuming and cumbersome to match each e-mail link with its relevant control number on the privilege log for quality-control purposes, especially with high-volume e-mail chains.

The emphasis should be on streamlining the process as much as possible because the more steps that are involved, the more time will be spent completing the project.

Consider retaining the services of review counsel who has the facilities and staff to manage large-scale reviews and understands the technical complications of the privilege-log preparation process. You will also need to know your vendor’s software capabilities before considering the most efficient processes to create your privilege log.

Federal and local rules generally require privilege logs to contain certain minimum information, including basis for the privilege, type of document, date and general subject matter of the document. While most information is basic (to, from, cc, date, document type, etc.), the description of the privileged document must be given careful consideration.

There are some process efficiencies to consider, provided that requirements for federal and/or local rules are satisfied. Since privilege calls are fact-specific, consider utilizing the lawyers who reviewed the documents for responsiveness. They know the facts.

Consider using “drop-down” options with pre-drafted generic privilege descriptions combined with a free-text field that enables attorneys to articulate the privilege issue for the relevant document.⁷

Alternatively, use the “copy and paste” method, which involves circulating a memorandum containing about 40 or so generic privilege descriptions that attorneys may copy and paste into the review program’s privilege description value. The descriptions may be tailored to suit each document in question.

CONSEQUENCES OF NOT PREPARING AN ADEQUATE PRIVILEGE LOG

A party withholding documents from production on the basis of privilege and/or work product is required to account for them under Federal Rule of Civil Procedure 26(b) (5) or under its state analogs, such as local rule 26.2 in the Southern District of New York. The standard is generally good faith. So be reasonable with your opposing counsel in working out the scope of production and privilege log preparation.

Parties that do not act in good faith may find themselves subject to certain sanctions, such as an order to produce privileged documents. Although in most cases waiver of privilege for technical defaults in a privilege log that is created in good faith is unduly harsh,

this sanction is appropriate if the party who authored the privilege log displayed willfulness, bad faith or fault.⁸ A party may be subjected to payment of opposing counsel’s fees for egregious cases.

If privilege is challenged, the courts may conduct an *in camera* review of documents claimed to be privileged which can be expensive. However, where the court finds the privilege log sufficient to describe the privilege, the court may decide not to conduct an *in camera* review of the documents.

The goal should be to avoid motions for sanctions, *in camera* review and other expensive procedures. Remember, a well-written privilege log may obviate the need for an *in camera* review. Being a reasonable litigant should be demonstrated to the court in your efforts and dealings with your opponent and most importantly in the processes you implement for creating your privilege log. Being reasonable is one of the best ways to control costs. **WJ**

NOTES

¹ *Rhoads Indus. v. Bldg. Materials Corp.*, 254 F.R.D. 216, 222 (E.D. Pa. 2008).

² This article is not intended to address the mechanics and privacy issues related to litigation holds and the collection of potentially responsive documents.

³ See, e.g., *Muro v. Target Corp.*, 250 F.R.D. 350, 363 (N.D. Ill. 2007).

⁴ “Link(s)” in this article means individual e-mails that are part of an e-mail chain. An “e-mail chain” is an aggregate of e-mails that have been replied to or forwarded among multiple people.

⁵ 2008 WL 4547190, at *1-2 (N.D. Cal Oct. 10, 2008). See also *C.T. v. Liberal Sch. Dist.*, 2007 WL 1536806 at *1 (D. Kan. May 24, 2007); *In re Universal Serv. Fund Telephone Billing Practices Litig.*, 232 FRD 669, 673 (D. Kan. 2005).

⁶ *In re Vioxx Prod. Liab. Litig.*, 501 F. Supp. 2d 789, 812 (E.D. La. 2007).

⁷ “Free text” refers to the privilege description value on a vendor’s review program that enables a lawyer to describe the basis for the claim for privilege.

⁸ See, 8 Wright Miller & Marcus, *Federal Practice and Procedure* § 2016.1 (2d ed. 1994 & Supp. 2007); *Am. Nat’l Bank & Trust Co. of Chicago v. Equitable Life Assurance Soc’y*, 406 F. 3d 876, 877 (7th Cir. 2005); *Rhoads*, 254 F.R.D. at 238, 241-42.

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