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The Privilege Log Problem
(No One-Size-Fits-All Solution)

By: Hon. Catherine Peek McEwen

The Bankruptcy Court for the Middle District of Florida does not have a local rule or suggested format for privilege logs. The Tampa Bay Bankruptcy Bar Association's quarterly liaison meetings with the Tampa judges produced a suggestion that we think about adopting one. The issue is not as easy as it may seem and, indeed, has garnered much debate on a national scale.

One of the committees of the Judicial Conference of the United States (JCUS), which sets policy for and administers the federal judiciary, is the Committee on Rules of Practice and Procedure ("Standing Committee"). That committee, in turn, is informed by five advisory committees, including the Advisory Committee on Civil Rules ("Civil Rules") and the Advisory Committee on Bankruptcy Rules. The advisory committees are charged with drafting proposed rule amendments.

Civil Rules has been studying the so-called "privilege log problem" for several years through its Discovery Subcommittee. (As a member of the Advisory Committee on Bankruptcy Rules, I attend Civil Rules meetings as my committee's liaison.) At the Civil Rules meeting in October 2022, the Discovery Subcommittee proposed to the full committee that Civil Rules recommend to the Standing Committee that it publish for comment two simple proposed amendments to Rules 25(f)(3) (on disclosure duties) and 16(b)(3) (on pretrial conferences).

Civil Rules agreed with the proposal and referred the recommendation to the Standing Committee. The Civil Rules report, including the background of the privilege log issue, may be found here (see p. 2, line 38 through p. 9, line 268): advisory_committee_on_civil_rules_december_2022_0.pdf (uscourts.gov). According to Civil Rules' report to the Standing Committee,

> The proposed amendments would call for early identification of a method to comply with Rule 26(b)(5)(A)'s requirement that producing parties describe materials withheld on grounds of privilege or as trial-preparation materials. Specifically, the proposed amendment to Rule 26(f)(3)(D) would require the parties to address in their discovery plan the timing and method for complying with Rule 26(b)(5)(A). The proposed amendment to Rule 16(b) would provide that the court may address the timing and method of such compliance in its scheduling order.

The Standing Committee approved the recommendation unanimously at its June 2023 meeting and will publish the proposed amendments for comment beginning this August. The text of the proposed amendments and Committee Notes may be viewed here (see pp. 828-830 and 846-849): 2023-06_standing_committee_agenda_book_final_updated_5-30-23_0.pdf (uscourts.gov). The comment period will end sometime in February 2024 (depending on the schedule of the Office of the Federal Register). After the comment period closes, Civil Rules can consider all comments and either go back to the drawing board or recommend to the Standing Committee that the proposed amendments be submitted for adoption by the JCUS and the Supreme Court. If you care to comment, watch for the publication notice here: Proposed Amendments Published for Public Comment | United States Courts (uscourts.gov).

The meeting agenda books for the March 2022, and October 2022, meetings of Civil Rules shed light on why the Discovery Subcommittee opted to keep the proposal simple and not to try to craft a one-size-fits-all solution with scripted disclosures. The materials are public, available at these links: 2022-03_civil_rules_agenda_book_final.pdf (uscourts.gov) and civil_agenda_book_october_2022_final.pdf (uscourts.gov) (and the commentary is fascinating if you are a discovery rules geek).

You will see discussion at p. 274 of the March 2022 meeting book that the gap between the two sides — "requester" and "responder" — is not easily bridged:

> The meeting began with the thought that the Subcommittee had received substantial input from a variety of sources with a variety of perspectives. Throughout, it appeared that there is a considerable divide between what might be called the "requester" and the "responder" parties from whom the Subcommittee has heard.
>
> Many on the "requester" side urge that detailed and specific privilege logs are key to enabling an effective check on over-designation.

> To some extent, it may be that this over-designation is a result of heightened worries about waiver of privilege. To some extent, it may also result from inadequate appreciation of when privilege or work product protections actually apply. And to some extent it may result from assignment of the initial screening function to inexperienced and little-trained "contract attorneys."
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> Those on the "responder" side emphasize the often very high cost of document-by-document logging, and also the many judicial statements that current privilege log practice often fails to achieve the goal of Rule 26(b)(5)(A) -- making clear the ground for the claim of privilege. Meanwhile, the cost of preparing these documents -- even using "contract attorneys" -- can be very high.
>
> One thing that does stand out is that there seems to be little coalescence on specifics between the two "sides."

What resulted was agreement against micro-managing the scope, as can be seen in the discussion at pp. 142-3 of the October 2022 meeting book:

> Perhaps the most pertinent point was that one size would not fit all cases. Some cases involved only a limited number of withheld documents; for those cases a "traditional" document-by-document privilege log might work fine. Depending on the nature of the privileges likely to be asserted, the specifics necessary in one case might have little to do with the specifics important in another case. Often the type of materials involved and the manner of storage of those materials could bear on the information needed to evaluate a privilege claim.
>
> Taking account of these aspects of the information it obtained through its outreach, the Subcommittee concluded that trying to amend Rule 26(b)(5)(A) and prescribe an all-purpose solution to the variegated problems of claiming privileges with regard to variegated materials would not work.
>
> Instead, what emerged was a consensus that the most beneficial rule amendment would be one that would make the parties focus carefully at the outset of litigation on the best method for compliance for their case and also that they apprise the court of their proposed method for complying with the rule, and also focus on the timing of that activity. None of this interaction will solve all problems that claims of privilege present, but the Subcommittee is convinced that these small additions

> to Rules 26(f) and 16(f) promise to significantly reduce difficulties that have occurred due to the requirements of Rule 26(b)(5)(A).

So, what are the take-aways from the Civil Rules dialogue and proposals?

1. Approach the privilege log issue with the opposing party very earlier in the discovery phase of the case.

2. Try to agree on the extent of a privilege log.

3. Involve the judge early on to assist in resolving conflict.

As for FLMB's part in creating a proposed rule or format of a privilege log, I cannot speak for my independent and co-equal judicial colleagues, but to me it appears that — given the extensive and thoughtful consideration of many views by Civil Rules — local rule-making or form-making makes little sense.

That said, here is a log format (use columns) that I have directed in a pending case warranting such disclosures:

If a party claims a privilege(s), the privilege log shall include, with respect to each communication, (i) the date, (ii) the identities of the sender(s) and recipient(s), (iii) the form of the communication (email, text message, letter, agreement, invoice, etc.), (iv) a summary of the content sufficient to allow the Court to determine whether the privilege and/or an exception to the privilege might apply, and (v) a designation of the privilege(s) asserted.

You might also look at this paper (and search the 'net for others like it) for suggestions: Practical Advice on Privilege Logs | ABA Law Practice Today.

Bottom line: It's up to practitioners, using their best professionalism skills, to try to reach a consensus on proportionality and scope of the level of disclosure of withheld material. Then, only as a last resort, involve the trial judge.