Separate Links or Whole Chain: Emails and Privilege Logs

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For anyone who has put together a privilege log since the proliferation of email, the "forward" and "reply" buttons likely have caused many headaches. Email chains containing multiple emails present an immense challenge for attorneys who are responsible for reviewing emails for privilege and deciding which emails to withhold and list on a privilege log.[1] The intersecting issues of email strings, privilege and privilege logs can be confounding. As one court succinctly put it, "[e]mail strands present unique problems."[2] Email strings may span over days, involve multiple and differing recipients and senders and mix privileged legal communications with non-legal, factual communications.

When creating a privilege log, one question dominates: whether to log the email string as a single document or to log each email in the string as a single document.[3] Courts, litigants and experts have been divided over the answer to this question from the start.[4] Recently, however, the trend among courts has been moving overwhelmingly in one direction – requiring litigants to log separately each email in a chain.

From the Split to the Modern Trend

When a litigant withholds discoverable material on privilege grounds, a privilege log necessarily must follow. Rule 26(b)(5) of the Federal Rules of Civil Procedure governs the content and production of privilege logs. The rule provides that a privilege log must "describe the nature of the documents, communications, or tangible things not produced or disclosed – and do so in a manner that . . . will enable other parties to assess the [privilege] claim."[5] For the privilege log drafter, the rule begs the question: is listing an email chain as a single document sufficient to allow the opposing party and the court to assess the privilege claim, or must each email in the chain stand on its own and therefore be listed separately?

Advocates of the single-entry school of thought often analogize email strings to group conversations with an attorney.[6] Their reasoning is that an email string is a continuing conversation involving multiple participants that is shared with an attorney, so it should be afforded the same privilege considerations as if the group conversation was held in a room where an attorney was present and the conversation was memorialized in writing. This analogy has received scant approval from courts. In fact, even the most often-cited case in support of the single-entry concept – *United States v. ChevronTexaco Corp.* – offers neither much discussion of the privilege log issue nor an endorsement of the analogy.[7]

A number of courts, however, have expressly rejected the analogy.[8] The court in *In re Universal Service Fund* identified three key differences between an email chain and a group conversation with an attorney: (1) the temporal span of an email chain can be days and even weeks; (2) the cast of senders and recipients in a chain often vary which results in inconsistencies concerning who received what parts of the chain; and (3) some emails in a chain that the attorney receives or sends may seek or render legal advice while others may contain purely factual or business information that is non-privileged.[9] Due to these differences the court "strongly encourage[d] counsel, in the preparation of future privilege logs, to list each e-mail within a strand as a separate entry."[10] The court recognized that separately logging emails in a chain is a laborious task that is done at great expense to clients,[11] but stated logging emails separately "is essential to ensuring that privilege is asserted only where necessary to achieve its purpose."[12]

Over the years, a number of courts have followed the lead of *In re Universal Service Fund* and required that each email in a chain be logged separately.[13] Courts reason that requiring separate entries prevents against parties trying to shield non-privileged communications from future discovery by having a policy of copying counsel on emails or forwarding to counsel email

chains.[14] More importantly, to these courts, a litigant's ability to evaluate and challenge an opposing party's privilege claims for numerous emails in the chain would be severely hampered if email chains were allowed to be logged as single documents.[15]

A Middle Ground Lost

In 2007, an Illinois district court established a middle ground, but it was short lived. In *Muro v. Target Corp.,* the magistrate judge ruled that the "failure to individually itemize emails made [Target's privilege] log inadequate because this defect violated Rule 26(b)(5)'s requirement that a log include enough information that an opposing party can assess the applicability of privilege."[16] The district court sustained Target's objection to the magistrate's ruling,[17] relying heavily on the U.S. Supreme Court's holding in *Upjohn Co. v. United States* that "the fact that non-privileged information was communicated to an attorney may be privileged, even if the underlying information remains unprotected."[18] For the purposes of email discovery and privilege logs, the *Muro* court understood "*Upjohn* to mean that even though one e-mail is not privileged, a second e-mail which forwards that prior e-mail to counsel might be privileged in its entirety."[19] Therefore, while the underlying emails may not be privileged, the act of forwarding those emails to counsel for the purpose of seeking legal advice triggers privilege that protects the entire chain. Otherwise, the court recognized, a diligent opposing counsel could penetrate a party's attorney-client privilege by using a privilege log and produced material to determine the content of the communications and materials that the party forwarded to counsel.[20]

There is one small and easily missed key to the *Muro* court ruling that swings it from the single-entry concept back to the middle. Under the court's ruling, a litigant can log an email chain as a single document only if the non-privileged emails of the chain are otherwise disclosed.[21] This significant prerequisite ensures that litigants are not able to bury non-privileged communications in email chains that are sent to an attorney, while also protecting the privileged act of forwarding emails to an attorney for the purpose of seeking legal advice.

Rhoads

In 2008, a Pennsylvania district court seemed to embrace *Muro*, but in the end turned the decision on its head. In *Rhoads Industries,* the court seemingly praised the *Muro* court's reasoning and "sound interpretation" of *Upjohn*.[22] Yet the court concluded that *Muro*'s approach

> require[s] that each version of an email string (*i.e.* a forward or reply of a previous email message) must be considered as a separate, unique document . . . [and therefore] each message of the string which is privileged must be separately logged in order to claim privilege in that particular document.[23]

This conclusion directly conflicts with the language and intent of *Muro*.[24]

The *Rhoads* court attempted to establish a distinction between emails with an attorney intended to obtain legal advice versus those that are part of routine business affairs and are eventually forwarded to an attorney as part of a chain.[25] To do so, the court adopted the much-criticized email chain-conversation analogy,[26] but it is a distinction of no effect because the court held that both categories of emails must be separately logged if the party is relying on a privilege claim to withhold them. According to the court, the failure to separately log the emails is cause for the sanction of compelled production.[27]

Better Safe Than Sanction

To date, there is still little clarity regarding how email chains are to be logged. In light of *Rhoads, In re Universal Service Fund* and similarly-leaning cases, the safe practice is to log each email in a chain separately. There are, of course, other factors that will influence this decision, such as financial resources, cost considerations, discovery deadlines and concerns about tipping

opponents to the substance of attorney-client communications. Yet, in weighing these factors and making the final decision, litigants need to be aware that failure to log each email may result in sanctions that may include the compelled production of privileged emails.

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[1] When referring to emails, the terms "chains," "strings" and "threads" are used interchangeably in this article.

[2] *Thompson v. Chertoff,* No. 06-cv-00004, at *2 (N.D. Ind. Nov. 15, 2007).

[3] There are, of course, many other important preceding privilege issues when reviewing emails, such as does the email involving an attorney reflect a legal or business purpose? This article concerns the drafting of a privilege log *after* the privilege determinations have been made.

[4] *Compare United States v. ChevronTexaco Corp.,* 241 F. Supp. 2d 1065, 1074 n.6 (N.D. Cal. 2002) ("With respect to each series of emails for which Chevron asserts protection under the privilege, Chevron breaks the series down into each discrete e-mail message. In our view, such a representation of the document is misleading. Each e-mail/communication consists of the text of the sender's message *as well as all of the prior e-mails that are attached to it.* Therefore, Chevron's assertion that each separate e-mail stands as an independent communication is inaccurate.") (emphasis in original) *with In re Universal. Serv. Fund Tel. Billing Practices Litig.,* 232 F.R.D. 669, 674 (D. Kan. 2005) ("the court strongly encourages counsel, in the preparation of future privilege logs, to list each e-mail within a strand as a separate entry").

[5] Fed. R. Civ. P. 26(b)(5)(A)(ii).

[6] *See, e.g., In re Universal Service Fund,* 232 F.R.D. at 672; *see also, Rhoads Indus., Inc. v. Bldg. Materials Corp. of Am.,* No. 07-4756, 2008 BL 264050 (E.D. Pa. Nov. 26, 2008) ("An email string may be analogous to a meeting that takes place in a conference room between attorney and client for the purpose of seeking legal advice.").

[7] 241 F. Supp. at 1074 n.6 (N.D. Cal. 2002) ("With respect to each series of emails for which Chevron asserts protection under the privilege, Chevron breaks the series down into each discrete e-mail message. In our view, such a representation of the document is misleading. Each e-mail/communication consists of the text of the sender's message *as well as all of the prior e-mails that are attached to it.* Therefore, Chevron's assertion that each separate e-mail stands as an independent communication is inaccurate.") (emphasis in original).

[8] *In re Universal Service Fund,* 232 F.R.D. at 673.

[9] *Id.*

[10] *Id.* at 674.

[11] *Id.*

[12] *Id.*

[13] *Chemtech Royalty Assocs., L.P. v. United States,* Nos. 05-cv-00944, 06-cv-00258, 07-cv-00405, at *3 (M.D. La. Mar. 30, 2009) ("Asserting privilege for an entire e-mail thread in the privilege log, but only describing the last message in the thread is deficient."); *Baxter Healthcare Corp. v. Fresenius Med. Care Holding, Inc.,* No. 07-cv-01359, 2008 BL 229777, at *1 (N.D. Cal. Oct. 10, 2008) (ordering defendants to produce a privilege log that "separately identifies the author, recipient(s), copyee(s), and blind carbon copyee(s) for each logged email communication regardless of whether the communication is part of an email string"); *Thompson,* 2007 WL 4125770, at *2 ("each individual email in a string must be analyzed separately"); *In re Vioxx Prods. Liab. Litig.,* 501 F. Supp. 2d 789, 812 (E.D. La. 2007) ("E-mail threads (a series of e-mail messages) in which attorneys were ultimately involved were usually inappropriately listed on the privilege log as one message."); *C.T. v. Liberal Sch. Dist.,*Nos. 06-cv-02093, 06-cv-02360, 06-cv-02359, 2007 BL 21826, at *5 (D. Kan. May 24, 2007) (ordering plaintiff to submit an amended privilege log that listed each email in a string as a separate entry); *see also Se. Pa. Transp. Auth. v. CaremarkPCS Health, L.P.,* 254 F.R.D. 253, 264-65 (E.D. Pa. 2008) (analyzing emails in chain separately to rule on defendant's privilege claims).

[14] *Baxter Healthcare Corp.,* 2008 BL 229777, at *1 ("Each email is a separate communication, for which a privilege may or may not be applicable. Defendants cannot justify aggregating authors and recipients for all emails in a string and then claiming privilege for the aggregated emails."); *Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc.,* Nos. Civ. A. 03-1496, Civ. A. 03-1664, at *20 (E.D. La. June 4, 2004) ("A document sent from one corporate officer to another is not privileged simply because a copy is sent to counsel.").

[15] *See In re Universal Service Fund,* 232 F.R.D. at 673 ("Obviously, a sufficient (*i.e.*, reasonably detailed) privilege log is vital if litigants and judges are to determine whether documents have been properly withheld from discovery."); *In re Vioxx,* 501 F. Supp. 2d at 812 ("Simply because technology has made it possible to physically link these separate communications (which in the past would have been separate memoranda) does not justify treating them as one communication and denying the demanding party a fair opportunity to evaluate privilege claims raised by the producing party.").

[16] 250 F.R.D. 350, 362 (N.D. Ill. 2007).

[17] *Id.* at 362-63.

[18] *Id.* at 363 (citing *Upjohn*, 449 U.S. 383, 395-96 (1981)).

[19] *Id.*

[20] *Id.*

[21] *Id.* ("A party can therefore legitimately withhold an entire e-mail *forwarding* prior materials to counsel, while also disclosing those prior materials themselves."); *see also Apsley v. Boeing Co.,* No. 05-cv-01368, 2008 BL 12035, at *1 (D. Kan. Jan. 22, 2008) ("Although Boeing listed [on its privilege log] entire e-mail strings, it redacted only the portion of the string that contained legal communications.").

[22] 254 F.R.D. at 240-41.

[23] *Id.* (internal footnote and citation omitted).

[24] 250 F.R.D at 363 ("Therefore, the court sustains Target's objection to the Magistrate Judge's ruling that its privilege log was inadequate for failure to separately itemize each individual e-mail quoted in an e-mail string.").

[25] 254 F.R.D. at 241.

[26] *Id.* at 241 n.5 ("In the world of electronic communications, a series of email messages, among people employed by the client but working in different locations, can replace the meeting [with an attorney] and subsequent letter.").

[27] *Id.* at 241.