**EDRM Streamlined Privilege Log Protocol**

*Introduction*

Federal Rule of Civil Procedure 26(b)(1) establishes a distinction between "privilege" and "nonprivileged" matters and permits a party to obtain discovery only of "*nonprivileged* matters . . . relevant to any party's claim or defense." Rule 26(b)(5) states:

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

Accordingly, Rule 26 does not specify the form of "privilege logs," beyond the requirement of enabling other parties to assess privilege. The burden is on the producing party to support their claims of privilege, but the rule provides wide leeway to determine the optimal means of privilege logging. This has given rise to debates regarding the format and scope of privilege logs. While there is no national consensus, some courts have recognized this issue and established local rules or guidelines that set forth certain parameters for privilege logs.

Current practices for privilege logging are not optimal for many cases. In cases with large productions and a significant number of privileged documents, the traditional preparation of privilege logs is burdensome, time consuming, and frequently not particularly useful for requesting parties to evaluate the privilege claims. Some earlier ideas to streamline the logging process, such as the creation of "group logs" or "category logs," may work for some cases, but may suffer from some of the same problems identified above, including the potential for disputes about what information should be included, time consuming preparations, and insufficient data for requesting parties to fully evaluate privilege claims.

Accordingly, a committee was created under the auspices of EDRM to try to devise potential alternatives to traditional privilege logging. The committee includes lawyers who most often represent producing parties, lawyers who most often represent requesting parties, technical specialists and other professionals at law firms and service providers who regularly deal with privilege issues and privilege logs. The result was this EDRM Streamlined Privilege Protocol.

The below 15-step protocol will help lead to "the just, speedy, and inexpensive determination" of disputes, in accordance with FRCP 1, through streamlined privilege logging. It

leverages enhanced communications, readily-available technology and the science of statistical sampling, to bring five important improvements to the privilege logging and assessment process:

1.  Setting up more communications and transparency between parties, to address privilege issues up front, and then providing tools for requesting parties to better evaluate privilege logs and claims;

2.  Allowing producing parties to use metadata privilege logs in the first instance, to reduce the time and expense of logging and to allow requesting parties to obtain privilege logs more quickly;

3.  Allowing requesting parties to obtain more detailed information about a sample of documents they select, to better test privilege decisions that are being made. This sampling methodology takes a fraction of the time required to prepare and assess privilege through traditional detailed logs, and yields additional information about the sampled documents, which can then be considered when assessing whether privilege claims generally are or are not well-founded.

4.  Providing greater incentives for parties to make careful and correct privilege determinations and privilege challenges in the first instance. Incorrect privilege claims or frivolous privilege challenges are more likely to be exposed in the aforementioned sampling process.  Any inability to justify privilege claims or challenges could forfeit the time and cost savings that this streamlined logging system otherwise yields; and

5.  Reducing the likelihood of privilege disputes or the need for courts or special masters to resolve such disputes because of the increased communication and transparency and the incentives for making correct privilege decisions in the first instance.

It is anticipated that parties, judges, special masters and/or other dispute resolution tribunals may choose to adopt this protocol in its existing form, or with appropriate modifications, for particular cases.

### *Traditional Format of Privilege Logs: Document-by-Document*

In order to more fully understand why the traditional method of creating privilege logs may need improvements, this section discusses the process and components of a traditional privilege log in more depth. A privilege log is a table of those documents or other items which have been withheld from production or redacted based on attorney-client privilege or work product.  The table generally contains the type of information listed below:

a.  Bates range of each document withheld or redacted
b.  Filename of the document
c.  Type of Document (letter, memo, report, handwritten note)
d.  Date of document
e.  Subject of the document
f.  Author /From
g.  To/cc/ bcc/recipients

h.  Custodian
i.  Withheld or redacted
j.  Privilege Type (e.g., attorney-client or work product)
k.  Privilege description

The traditional method of privilege logging is to log every single document that is withheld for privilege with objective information (author, date, etc.) about the document as well as the basis for the privilege claim. Notably, requirements were nationally articulated in the 1993 amendment of the Federal Rules of Civil Procedure with the language of 26(b)(5) which specified logging requirements.

Typically, there will be a privilege log layout in the review platform to assist reviewers in reviewing the documents slated to be withheld for privilege. This layout will contain all of the fields that will appear in the final privilege log. When preparing a privilege log, attorneys will search for documents that have been tagged within the document review platform's database[1] as entirely privileged and partially privileged . They will create QC searches to ensure that privileged documents are properly withheld from production and logged. Such searches will check for things like whether the documents fall within the relevant time period of "anticipation of litigation" in order to claim Work Product and that families are coded consistently (if required), etc. Then, the metadata fields for the documents retrieved in the search for the documents to be withheld for privilege are typically exported to an application such as Excel where name normalization and formatting consistency is achieved via macros, find and replace, etc. Some projects are sophisticated in the use of concatenation to automate the description field as much as possible. Still, it is traditionally a labor-intensive process.

Name normalization is a pain point

Though reviewers can use the metadata from Sender[2] and Recipient[3] fields to assist in privilege log creation, the data as it exists in the fields may need to be cleaned up for formatting consistency and name normalization. For example, the field data may contain:

● Jane Doe <jane.doe@clientco.com>
● Jane Doe </O=CLIENTCO/OU=HR/CN=RECIPIENTS/CN=BB1JDOE>
● Jane Doe (jdoe@gmail.com)<jdoe@gmail.com>

All of the above represent the same person and may be normalized to Doe, Jane or Jane Doe for production on the privilege log.

Creation of the narrative/description is a pain point

Creation of the narrative or description field on a privilege log involves parsing of various required elements. The document needs to be identified and the claim of privilege must be

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[1] Also referred to as a workspace or repository.
[2] Also referred to as the From field.
[3] This includes the fields: To, CC, and BCC.

substantiated. This information must be provided in a manner that will allow, without divulging the privileged material, opposing counsel and/or the court to evaluate the claim of privilege.

Below are some narrative examples.

- Document seeking advice of in-house litigation manager re: *** development.
- Document reflecting advice of in-house litigation manager regarding *** litigation.
- Email chain containing advice of counsel regarding settlement agreement negotiations.
- Redacted text containing information provided by in-house litigation manager regarding litigation costs.
- Slide prepared for comment by in-house litigation regarding underlying patent litigations.

See Exhibits A and B for detailed examples that show how costly, laborious, and time-intensive the preparation of privilege logs can be using traditional methods. For those reasons, this committee considered alternative formats for privilege logs.

### *Alternative Privilege Log Formats*

Technology has assisted legal practitioners in developing efficiencies in the process. Unfortunately, these efficiencies may come at the expense of efficacy.

Non-traditional privilege logs typically have a couple of things in common. First, they seek to avoid a document-by-document accounting of the privileged records being withheld. A categorical log is one type of non-traditional privilege log. A party identifies categories of privileged documents by subject-matter, a custodian limitation or some other objective grouping and discloses the total number of documents being withheld for a given category. The categorical log appeals for its simplicity, but there is very little visibility into the privilege claims, which inhibits  the requesting party's ability to assess or test the producing party's privilege claims.

Second, if a producing party is required to provide a document-by document log, avoiding the manual, narrative description of each record is important. The metadata log is an export, in table format, of the objective metadata for each document being withheld for privilege. This includes basic date and bibliographic metadata (author/recipient/date/subject/file type). However, exporting metadata to generate a privilege log does not account for non-electronic, scanned documents. In such instances, the producing party must resort to manual logging methods.

### *Producing Parties' Burden to Support its Claims of Privilege via a Privilege Log*

In litigation, the producing party has the burden to satisfy Federal Rule 26.  As the amount of information collected, produced and withheld as privileged has increased over the years, many different methods have been used to create a privilege log.  This committee suggests the proposed metadata log streamlines the process for the producing party, and offers the requesting party useful information to assess the privilege claim.  This section discusses the burden on the producing party following some of the more common approaches and the benefits of a metadata log.

A. Data Entry

The data entry component of a privilege log involves capturing information, found within the privileged document, that is informative about the document's origin(s) and creation."

Examples: From, Author, TO, CC, BCC and Date.

    a. Historically two different approaches have been used to take the information from these fields and add it to the privilege log.
        i. Databases used to host documents can extract these fields for emails and non-email documents (where applicable).  For emails this typically includes the Date, From, TO, CC, BCC of the most recent in time email only.  The information is then formatted to be consistently displayed.  This formatting process can be time consuming.
        ii. Many times, the privilege log agreement requires a date range for an email thread and/or all names in the thread to be listed on the log.  This may require reviewers to expend more time-per-document searching for dates and typing in names.  Technology exists to extract the names and can be used to speed up this process, but the formatting process is still time consuming.
    b. For either of the above approaches the producing party ends up spending a large amount of time looking for information to add in these fields when they are blank or incomplete.
    c. Depending on the complexity of the approach used and technology used, the data entry process can be a time-consuming part of the process.
    d. This committee recommends a metadata log approach, which is simply extracting a document's metadata and including it on the privilege log as-is, with no manipulation.  This process is quick and can be beneficial to both parties.  Part of the burdensome work with the historical approaches include formatting names for consistency.

B. Description or Category

Often the most time-consuming step when creating a privilege log is the description.  The description references the withheld privileged information without revealing the substance of the information itself. Its purpose is to support the privilege asserted.

    a. Historical approach:  The description typically includes: 1) something describing the type of document (spreadsheet, email or etc.) 2) a description of the legal action (reflecting counsel's legal advice) and 3) the subject matter of the document (standard operating procedures or government investigation).  The description can be typed out by a reviewer or created using fields that have pre-populated choices.  Yet both approaches are limited in that the descriptions are canned and do not accurately describe the document(s).

b. Categorical Privilege Log.   Categorical privilege logs group documents into several agreed upon categories to reduce the need to write individual descriptions for each document.  Typically, these categories are broad and provide the requesting party with little or no added value as compared to individual descriptions.

c. The description or categorical step can be a substantial component of the overall work required to complete a privilege log.

d. Metadata Log Approach: Our committee recommends that eliminating the description and instead including the email subject and/or document title available as an export from a database on a privilege log may be an alternative to traditional logging.  The producing party would have the option to redact the email subject and/or document title if it reveals privileged information, but this should be an extremely rare occurrence.  The information in the email subject and/or document title will likely be more useful for the requesting party when assessing the claim of privilege than the historical description or category.

C.  Name and Party Information

Historically, many different approaches have been used to identify privileged names, third parties and in rare occurrences all parties on a privilege log.

a. A common approach is to put a qualifier such as an * or ^ next to a privileged name.  Parties may also agree to use a similar but different qualifier for third parties.  Adding this information can be very time consuming.  Technology is available to make this process more automated but with the automation typically comes formatting which removes other helpful information.

b. Another approach that is used is to provide a list of the privilege names contained in the documents.  This approach requires a check to verify which attorneys appear in the documents on the privilege log.

c. Personnel List.  Sometimes the requesting party requests a list of all people and titles that appear on a privilege log.  This is rarely agreed to as it can double the cost of creating a privilege log.  Additionally, in large document reviews employees change roles and responsibilities quite regularly and these lists are rarely as useful as the requesting party anticipates.

Metadata Log Approach: This committee recommends the producing party provide the requesting party with the list of privilege names the team used when reviewing the logged documents.  Most, if not all, producing parties maintain large lists for their clients.  This list could be shared very easily.  The requesting party benefits because they are notified of all the potential privilege actors that may appear on the privilege log.  The producing party can update the list as new privileged names are identified in a large and ongoing litigation.

*The Protocol*

1.      Parties need not include on privilege logs any documents that meet the criteria for privilege or work product protection, prepared after inception of litigation, such as the date suit was filed.

2.      Parties need not include on privilege logs any documents that are produced in partially redacted form with the redactions clearly marked.

3.      Parties will agree to the entry of a privilege non-waiver order that provides broad non-waiver protection under FRE 502(d) and any analogous state laws.

4.      As part of pre-discovery conferences, parties should discuss the timing of the production of privilege logs—including whether they should be produced on a rolling basis, at the end of all productions, or at specific intervals.

5.      Once parties start reviewing documents for responsiveness and privilege, they should each notify opposing parties of any unique or "gray area" issues that could be resolved up front to reduce the likelihood of later disputes and/or having to re-do logs later. Such issues may include:

>       a.      when in-house counsel are acting in a non-lawyer capacity;

>       b.      whether there are particular third parties that the producing party considers not to be "privilege breakers" because of their relationship to the client or counsel;

>       c.      the applicability of any privileges beyond traditional attorney-client and/or work product protection;

>       d.      the applicability of any privilege waiver issues, such as subject matter waiver or where a party intends to invoke an advice of counsel defense;

>       e.      any claim by requesting parties that any non-opinion work product should be produced because the requesting party has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means (see, e.g., FRCP 26(b)(3)(A) and analogous state rules); and

>       f.      any other issues that could streamline the privilege evaluation process or help avoid future privilege disputes if raised early in the matter.

5.      Parties need not include on privilege logs any partially privileged documents that are produced in redacted form, with the redactions clearly indicated. The unredacted portions of such documents generally include most of what is typically logged (plus more) and usually provide sufficient information to understand the privilege claim. Requesting parties may, however, request more information about such redacted documents as part of the sampling process set forth in paragraph 10 below.

6.      In lieu of traditional privilege logs, producing parties may initially produce metadata privilege logs.  Such logs shall include: (i) unique identification numbers for each included document; (ii) the date the document was prepared, last modified and/or sent; (iii) file types; (iv) authors; (v) recipients (including addressees, copyees, and blind copyees); (vi) email address domain names for those authors and recipients; (vii) the document title or subject (which may be edited to remove privileged content); (viii) attachment indicators; and (ix) the nature of privilege claimed (attorney-client, work product, or both). Suggested privilege log composition and a sample metadata privilege log are attached as Exhibit C and D respectively.

*7.*      Most of the above fields are easily generated from the metadata and known attorney and client name lists, with the nature of the privilege added based upon coding that can be recorded at the time privilege is assessed.  However, for the initial metadata log there is no requirement that the producing party otherwise edit or enhance the log—for example to research or list the identity or affiliation of all names or aliases that may be included in name metadata, or to expand document titles that may not be fully descriptive.  Traditional privilege log entries must still be provided for withheld hard copy documents.

8.      Together with the production of its metadata log, the producing party must also produce a list of known in-house and outside attorneys, law firms, or others in a legal role (e.g. non-lawyer professionals acting under the direction of attorneys and alleged to be part of a privileged relationship with the producing party). The list should include the name of the person and law firm or other employer. However, inadvertent failure to include any particular individuals, firms, or current employers on those lists, shall not waive any privilege.

9.      The producing party shall also produce other readily available lists or documentation helpful in assessing privilege claims, such as the domains of law firms that have represented the withholding party, lists of persons included under commonly used email aliases, and/or other readily-available non-privileged lists used by the producing party in making the privilege determinations.

10.      Once any privilege log is produced[4], the requesting party shall notify the producing party, within 30 days, whether it would like to meet and confer to discuss the initial log.  The requesting party has discretion to select a sample of log entries to further inquire about. For example, the requesting party could focus on documents that are more difficult to assess because of a lack of clarity about the identity of all recipients or the subject matter of the documents. However, for each privilege log produced where there are more than 100 logged documents, this initial sampling should not include more than the lesser of 10% of the withheld documents (including partially redacted documents produced in the associated production) or a maximum of 300 documents.

11.      The producing party will then, within 30 days, produce additional information sought by the requesting party.  Such requested information could relate to, for example, the identity and/or roles of individuals authoring, receiving or mentioned in the documents; more detail about the

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[4] In the case of rolling production of logs, this may be an iterative process. However, by discussing many of the "gray-area" issues up-front, parties will hopefully be able to address and alleviate most concerns at an early stage.

subject matter of the documents (without revealing privileged information); and/or reasons for the claimed privilege or other protection.

12. After the requesting party has 15 days to review the additional information, it will notify the producing party if it has any remaining issues relating to the privilege claims.

13.      If issues remain that the parties cannot successfully resolve through negotiation, they may need to seek court intervention. To the extent that the resolution may require the review of any documents in camera or other use of scarce court resources, the parties and/or the court should consider retaining the assistance of a Special Master. At the discretion of the court, the associated costs of the Special Master may be apportioned based on whether the privilege claims and challenges are substantially justified or not substantially justified by the actual review.

14.      If a party is found to have made unsubstantiated privilege claims or challenges, then appropriate remedies may be granted, including:

    a.      a determination that the producing party reassess privilege in regard to some or all other withheld documents and/or provide additional detail to justify privilege claims made as to some or all of them; and/or

    b.      an order for further in-camera review by the court or Special Master;

    c.      a determination that the offending party shall defray some or all reasonable costs (including attorneys' fees) of the privilege dispute process; and

    d.      in extreme cases, such as where a producing party has intentionally attempted to conceal important non-privileged information, or where a requesting party has repeatedly lodged unfounded privilege challenges, the court may order privilege waiver, objection waiver, and/or other appropriate remedies.

15.      In cases where a determination has been made by a Special Master, parties must either abide by the decisions of the Special Master or take exceptions to the court and be governed by the resulting ruling.

### *Conclusion*

        The privilege logging process is time-consuming and expensive, and the end product often does not provide enough information for the requesting party to assess the validity of the privilege claims. The goal of this protocol is to provide a framework for parties to cooperatively and collaboratively address privilege assertions in the most efficient way possible. The Committee recognizes that this protocol may need to be customized to fit particular cases. The protocol aims to provide instructive alternatives to lessen the burden on the producing party and to provide the requesting party with a useful mechanism to evaluate privilege claims.

APPENDIX:  Selected Authorities Related to Privilege Logging Alternatives

        **Federal Rule 26(b)(5)** – Claiming Privilege or Protecting Trial-Preparation Materials – Committee Notes, "The rule does not attempt to define for each case what information must be

provided when a party asserts a claim of privilege or work product protection. _Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories_. A party can seek relief through a protective order under subdivision (c) if compliance with the requirement for providing this information would be an unreasonable burden." (emphasis added)

_Williams v. City of Albany_, No. 1:18-CV-1446 (N.D.N.Y. Aug. 28, 2019): …"[C]onsidering the unlimited nature of what is requested by the interrogatory, a detailed privilege log would be unduly burdensome and unwarranted." Court noted that other courts have found it sufficient for the objecting counsel to identify the area of privilege without a specific statement by statement log. "[A] categorical privilege log is adequate if it provides information about the nature of the withheld documents sufficient to enable the requesting party to make an intelligent determination about the validity of the assertion of the privilege." (internal citations omitted)

_Saniefar v. Moore,_ No. 1:17-cv-00823-LJO-BAM (E.D. Cal. Apr. 23, 2019) "A document-by-document privilege log is both appropriate and reasonable under the facts presented with respect to the e-mails at issue."

_Fresenius Med. Care Holdings, Inc. v. Hood,_ 269 So. 3d 36 (Miss. 2018): Supreme Court of Mississippi noted that there is not a "bright line, one-size-fits-all logging method that is appropriate in every case." Acknowledging that courts have found that treating an email string as a single conversation and indexing, or logging, the "last in time" email in the string is an accepted approach. _Muro v. Target Corporation_, 250 F.R.D. 350 (N.D. Ill. Nov. 2, 2007). While also noting that other courts have conversely ruled that each email in a strand must be listed on a privilege log separately. _In re Universal Service Fund Telephone Billing Practices Litigation_, 232 F.R.D. 669 (D. Kan. 2005):

Exhibit A: Sample Privilege Log Guidance Used by a Project Manager for an Actual Matter in which the Traditional Document-by-Document Logging Method was Used[5]

This exhibit is provided to show the amount of time-intensive detail that is often required in a traditional document-by-document logging method. The method in this exhibit is not recommended by this committee, but rather is provided for illustrative purposes to show why this committee is recommending the alternative approach of a metadata log.

1. The Privilege Description or Narrative

Example descriptions for Attorney/Client documents:

- Attorney-client communications concerning [inventory reserves/ . . . ].
- Attorney memo/notes concerning [inventory reserves/ . . . ].

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[5] This illustrates how much effort goes into training a privilege log team and keeping their work consistent.

- Attorney research concerning [inventory reserves/ . . . ].

Example descriptions for Work Product documents:

- Attorney work product prepared/compiled in response to [subpoena/litigation].
- Work product prepared/compiled by non-attorney at the request of counsel in response to [subpoena/litigation].

2. <u>Mechanics [in a particular document review platform]:</u>

1. Enter/edit the Privilege Description in the Text view so it can be done document-by-document without propagation across the family (which it will do in Quick Edit).
2. Ensure you are in the Privilege Description field and not the Attorney Notes field. It is the top field in text view (and Quick Edit).
3. When you have completed a privilege description on a document, check the "Privilege log Description Complete" tag.
4. If you use a copy/paste method, please be careful that your template material is correct and has no typos. I would suggest that you do not copy and paste. Read the existing privilege descriptions carefully; they have many typos and truncations, etc. due to poor copy/paste methods used previously.

3. <u>Formatting/Language for Consistency</u>

**Please clean up existing privilege descriptions that have any of the following problems.

- For the purpose of consistency across reviewers, please:

  o Begin each privilege log description with a capital letter.
  o End each privilege log description with a period.
  o For the phrase "attorney-client" as in "attorney-client communications", please include the hyphen.
  o Please do not use abbreviations; do not use e.g., atty. or [xxx] or even [ABCD]--just spell things out on the privilege log description.

- The privilege description should match the coding; i.e., Work Product language for documents coded Work Product and Attorney/Client language for documents coded Attorney/Client.
- While we are not limited to the examples provided or even the issue tags that were used, keep the topic part brief to 2-3 words; it is fine to say "shrink reserves" or "used inventory reserves," but you don't need to specify that the document pertained to a reserve *calculation* or something more specific. Likewise, you need not say the [xxxx] was *in [xxxx]* etc. "Less is more" in a privilege log. [Law Firm] prefers more general descriptions.
- You need not specify the file type as "spreadsheet" or "presentation"; we will export the file extension for the privilege log.
- Finally, for draft SEC filings/statements: just use the document title as the brief insert for the type of document as "10-K" or "10-Q" or "press release" or "earnings release" rather than

other variations like "SEC filings" or "Statement filings." Per [attorney name deleted]: "draft filings should be described as such, and not using one specific issue tag as a description. For example, I have seen several draft 10-Qs described as communications related to "[xxxx]." Though this may be the topic that made the document responsive, we should describe it in more general terms because of the breadth of topics covered in the document."

- Likewise, you need not specify who the attorney is or who the client is in "attorney-client" communications; i.e., do not say "attorney-client communications with [law firm]."
- Likewise, the appropriate Work Product phrasing (depending on whether an attorney or non-attorney prepared it) re: that a document was prepared *in response to the subpoena/litigation* is sufficient to describe a document that is re: the litigation hold or document collection or document production etc. (We should not have these in this set of documents.) You need not specify that it was re: a collection or production or the date of production, etc.
- For Work Product, we don't need to specify the topic of the work product that has been prepared [e.g., [xxxx]], merely that it has been "prepared in response to a subpoena", or "in response to litigation", etc. Plus, we would have already provided the general topic in the parent email description.
- Clearly claim Attorney Client or Work Product. Make a specific claim to Attorney Client or Work Product per document. It is not so important which choice of language is used (as long as it is coded for that), but the language should be a little precise in describing each document as a communication/research/memo/notes rather than just using "communications" across the entire family.
- Do not convolute the Attorney Client language of "concerning [x topic]" with the Work Product language of "in response to [x]" and vice versa. That is--"Attorney Client ... in response to subpoena" and "Work Product ... concerning [xxxx]" etc.
- Do not convolute attorney versus non-attorney work on Work Product descriptions. That is, do not say "attorney work product prepared by non-attorney" instead of just "work product prepared by non-attorney at the request . . ." Clean up entries that have this mix up.
- Do not use language that you may have used on other projects but that is not under the parameters of the language expected on this project. E.g., do not use language such as "Email *involving counsel reflecting legal advice*" OR "*Email involving counsel requesting legal advice* " OR "Email *involving counsel facilitating legal advice* "). Please clean up existing descriptions that do not follow the expected language.

4. Specific Issues

*Child documents:*

The Privilege Log Description for the child(ren) should be similar to that of the parent, e.g., Spreadsheet concerning [xxxx] for a child whose parent is described as Attorney-client communications concerning [xxxx].

--all child documents should also begin with an explicit claim to Attorney/Client or Work Product and not merely "Spreadsheet concerning [xxxx]."

*Redacted documents:*
The phrasing is the same for wholly privileged or withheld documents.

*Documents that are both Work Product and Attorney/Client Privileged:*

You need not have two sentences or a combination of Attorney/Client and Work Product in one sentence.  One or the other is cleaner. It usually works best to use the Attorney Client language for the parent and Work Product language for the children.

*Document that is Responsive only by virtue of a Responsive family:*

- You can write a privilege description that is appropriate for the subject matter that a given document deals with.  For example, if a child is Not Responsive on its face and is Responsive only by virtue of its family status, then write a privilege description that is appropriate to the subject matter on the face of the child--e.g.,

    o  the description for the parent could be: "Attorney-client communications concerning financial information."
    o  the child could be: " . . . concerning acquisition of [xxx]."

The topic of the child need not be that of the parent if it deals with something else.

## 1.  Compiling the Log in Excel from Metadata Fields Exported from Review Platform

| Begnum (BATES No.) | Privilege d | Privilege Asserted (Privilege Reason) | Privilege Description | Privilege Log | Privilege Comments /Issues | PrivLog Custodian | PrivLog Author | PrivLog LeadDate | PrivLog Sender | PrivLog Recipients (addressee/To) | PrivLog Seat CC (Copied TO) | PrivLo Seat BC |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| e.g., [FIRST 3 LETTERS OF CUSTODIAN + e or p (electronic or paper) + 7 or more digits | Yes | --Attorney-Client Privilege<br>--Attorney Work Product<br>--Attorney-Client Privilege; Attorney Work Product<br>--Attorney-Client Privilege; Attorney Work Product; Common Interest Doctrine<br>--Attorney-Client Privilege; Common Interest Doctrine<br>--Attorney Work Product; Common Interest Doctrine | See 'Priv Desc' sheet; basically: Type of doc + seeking/giving + legal advice from + inhouse/outside counsel + re:_____. | --After [X] Date<br>--Categorical Privilege Log | | [Last Name, First Name] | in the first draft of the priv log it may be metadata (e.g., email username) that may not be regular name format AND final version may be properly formatted name (first name last name) with an asterisk if an attorney | | --initially can take form of [first name] [last name] <username@co.com>; [first name] [last name] <first.last@co.com> etc.--after cleanup it will be [first name] [last name] with an asterisk for an attorney<br>--OR [last name], [first name] [mid init.] <username@co.com><br>--OR [Exchange Resource] <username@co.com><br>--x.500 address in legacyExchangeDN attribute in Active Directory e.g., [mailbox username] </O=ORGANIZATION/ OU=ADMINISTRATIVE GROUP/ CN= RECIPIENTS/ CN=USERNAME> | multiple entries exported in the 1 field, separated by a semicolon--initially can take form of [first name] [last name] <first.last@co.com>; [first name] [last name] <first.last@co.com> etc.--after cleanup it will be [first name] [last name] with an asterisk for an attorney<br>--OR [Exchange Resource] <username@co.com><br>--x.500 address in legacyExchangeDN attribute in Active Directory e.g., [mailbox username] </O=ORGANIZATION/ OU=ADMINISTRATIVE GROUP/ CN= RECIPIENTS/ CN=USERNAME> | multiple entries exported in the 1 field, separated by a semicolon--can take form of [first name] [last name] <first.last@co.com>; [first name] [last name] <first.last@co.com> etc.--after cleanup it will be [first name] [last name] with an asterisk for an attorney<br>--OR [last name], [first name] [mid init.] <username@co.com><br>--OR username@co.com<br>--OR [Exchange Resource] <username@co.com><br>--x.500 address in legacyExchangeDN attribute in Active Directory e.g., [mailbox username] </O=ORGANIZATION/ OU=ADMINISTRATIVE GROUP/ CN= RECIPIENTS/ CN=USERNAME> | |

**Privilege log Library**: For corporations that have different matters involving same custodians over time, use of hash value to identify privileged files from other matters and add to privilege log in new matter. For example, if privilege documents were logged in matter "x" and the same custodian collected for matter "y," use hash value to add privileged documents from matter "x" to matter "y" log without additional review work.

## 2.  Creating the Narrative Column for the Privilege log: Parsing out the Elements

*Note some example entries that begin with "house" should read "in-house."

| Attorney/Client Priv | attached | draft | Redacted | pleading/letter/document/spreadsheet/presentation/article/MD&A/memo/news release/securities filing/license agreemeent | requesting/seeking/responding to request for/reflecting/providing/containing/containing request for | legal advice of/mental impressions in anticipation of litigaiton | oustide/in house | counsel/litigation manager(s) | re: | ____ |
|---|---|---|---|---|---|---|---|---|---|---|
| Attorney/Client Priv | | | | chain/cover email attaching [draft] [doc type]/email with attachment | prepared by/prepared at direction of | | | | | |
| Attorney/Client Priv | | | | correspondence/discussion/draft text/email chain/information from [or provided by]/text | prepared for the purposes of obtaining | | | | | |
| Attorney/Client Priv | | | | | sent to [counsel] seeking/transmitted for the purpose of obtaining | | | | | |
| Attorney/Client Priv | | | | | provided to counsel for purposes of obtaining | | | | | |
| Work Product | | | | | prepared in anticipation of litigation | | | | | |
| Work Product | | | | | reflecting mental impressions | | | | | litigation strategy/settlement agreements/patent infringment/draft securities filing/litigation costs/legal budget/contract |
| | | | | | | | | | | |
| Examples: | | | | Letter from outside counsel providing trial-preparation materials to consulting expert. | | | | | | |
| | | | | house litigation manager regarding financial disclosure obligations. | | | | | | |
| | | | | house litigation managers regarding financial disclosure obligations | | | | | | |
| | | | | E-mail seeking advice of in-house litigation manager re: annual report. | | | | | | |
| | | | | Litigation status chart prepared at the direction of in-house counsel. | | | | | | |
| | | | | Memorandum reflecting advice of in-house litigation manager regarding litigation status. | | | | | | |
| | | | | securities filings that show previously provided legal advice. | | | | | | |
| | | | | Non-responsive cover e-mail between in-house counsel attaching securities filing. | | | | | | |
| | | | | cases and insurance policy and information provided by in-house litigation manager regarding legal expenses used to obtain legal advice rendered in connection with the underlying litigations and various legal matters. | | | | | | |
| | | | | house litigation manager regarding settlement agreement disclosure | | | | | | |

Exhibit C: Suggested Metadata Privilege Log Composition

**Format & Process**

1.  Logs should be produced in Excel format that allows for text searching, sorting, and organization of data, and shall be produced either: (a) in a cumulative manner, so that each subsequent privilege log includes all privilege claims from prior logs; or (b) in installments using a consistent format so that the installments can be merged into a cumulative Excel spreadsheet by the requesting parties.

3     Bates Number and/or Unique Identifying Number.

4.     From (or Author), To, CC, and BCC from electronically generated metadata associated with the document, to the extent applicable and reasonably available (for email chains, parties will provide information gathered from the metadata for the most recent email in the chain).

5     Date from electronically generated metadata associated with the document.

6.  Subject, Document Title, or similar category from electronically generated metadata associated with the document.


Exhibit D: Sample Metadata Log [*separate attachment]

| | | |
|---|---|---|
| _____<br><br>**IN RE: [INSERT]**<br><br>_____ | :<br>:<br>:<br>:<br>:<br>:<br>: | **NO. [INSERT]**<br><br>**Master Docket No. [INSERT]**<br><br><br>**JUDGE [INSERT]** |

**CASE MANAGEMENT ORDER NO. __**
(Protocol for Treatment of Privileged and Work Product Materials)

This Order shall govern the treatment of all privileged or work-product materials in this action. This Order applies equally to all parties, who for the purposes of below shall be designated as either the "Producing Party" or the "Requesting Party."

1. **Definitions**

   a. The term "Producing Party" shall mean any Party or nonparty to this Litigation, including its counsel, retained experts, directors, officers, employees, and/or agents, who designates any discovery material produced in this Litigation pursuant to this Confidentiality Order.

   b. The term "Requesting Party" shall mean any Party, including its counsel, retained experts, directors, officers, employees, or agents, who receives any discovery material in this Litigation.

   c. When used in this Order, the word "document" encompasses, but is not limited to, any type of document or testimony, including all documents or things described in Federal Rule of Civil Procedure 34 and Federal Rule of Evidence 1001.

   d. As used in this Order, "discovery material" refers to all items or information, regardless of the medium or manner generated, stored, or maintained, including, among other things, documents, testimony, interrogatory responses, transcripts, depositions and deposition exhibits, responses to requests to admit, recorded or graphic matter, electronically stored information, tangible things, and/or other

information produced, given, exchanged by, or obtained from any Party or non-party during discovery in this Litigation.

2. **General Principles.** Privilege logs shall comply with Federal Rule of Civil Procedure 26(b)(5), which requires a party to:

   a. Expressly identify the privilege asserted; and

   b. "[D]escribe the nature of the documents, communications, or tangible things not produced or disclosed . . . in a manner that, without revealing information itself privileged or protected, will enable other parties to assess this claim." *See* FED. R. CIV. P. 26(b)(5).

   c. In order to avoid unnecessary cost, once parties start reviewing documents for responsiveness and privilege, parties will meet and confer to identify any "gray area" issues which could be resolved up front to reduce the likelihood of later disputes and/or having to re-do logs later. If the issues cannot be resolved by the parties up front, they may be raised with the court for a determination prior to preparing the privilege log.

3. **Specific Principles.**

   a. The Producing Party bears the burden of establishing that any document, communication, information, or other content that is withheld from discovery in whole or part on the basis of an asserted privilege is in fact privileged and/or otherwise properly withheld. None of the following shifts or changes this burden.

   b. Pursuant to the Federal Rule of Civil Procedure, all documents entirely withheld from production on the grounds of attorney-client privilege, work product protection, or similar grounds (each encompassed by the term "privilege" as used hereafter), must be logged. Partially privileged documents must be produced with redactions but need not be logged [INSERT and Logged].

   c. Parties need not include on privilege logs any documents, otherwise meeting the criteria for privilege or work product protection, that were prepared by or sent to counsel for parties in the litigation, after inception of litigation [INSERT inception date].

   d. Privilege logs of documents identified or reviewed prior to productions and withheld from such productions based on privilege grounds shall be served ninety (30) days following any such productions. [OR INSERT A Privilege log of documents reviewed and withheld from productions based on privilege grounds shall be served 30 days after the completion of the review.]

   e. Privilege Logs shall be produced in Excel format that allows for text searching, sorting, and organization of data, and shall be produced either: (a) in a cumulative manner, so that each subsequent privilege log includes all privilege claims from prior logs; or (b) in

installments using a consistent format so that the installments can be merged into a cumulative Excel spreadsheet by the requesting parties.

f. For documents withheld on the basis of privilege or work product, the Producing Party shall provide a separate entry for each document as to which the Producing Party asserts a privilege. Where a most inclusive email thread withheld for privilege [INSERT or redacted for privileged], the Producing Party need only include the most inclusive email thread on a privilege log and need not produce or log the prior or lesser-included emails within the same thread.

    i. Metadata Logs for ESI Documents: In lieu of traditional privilege logs, producing parties may initially produce privilege logs for withheld electronically stored information automatically generated from ESI metadata.

    Such logs shall include:

        1. unique identification numbers for each included document,

    and to the extent provided by the metadata,

        2. the date the document was prepared,

        3. last modified and/or sent,

        4. file type(s),

        5. author(s),

        6. recipient(s) (including addressees, copyees, and blind copies), including email address domain names for those authors and recipients,

        7. the document title or subject (which may be edited to remove privileged content),

        8. attachment indicators,

        9. and the nature of privilege claimed (attorney-client, work product, or both).

    ii. Traditional Logs for hard copy (non ESI) documents: Traditional privilege log entries must still be provided for hard copy documents.

    Such logs shall include:

        1. unique identification numbers for each included document,

    and to the extent reasonably available,

2. the date the document was prepared,

3. author(s),

4. recipient(s) (including addressees, copyees, and blind copies), including email address domain names for those authors and recipients,

5. a short description describing the general nature of the legal advice requested or provided or an explanation of the work-product claim that, without revealing information itself privileged or protected, will enable other parties to assess the claim

6. attachment indicators,

7. and the nature of privilege claimed (attorney-client, work product, or both).

d. Together with the production of the privilege log, the producing party must also produce a list of known in-house and outside attorneys, law firms, or others in a legal role (*e.g.* non-lawyer professionals acting under the direction of attorneys and alleged to be part of a privileged relationship with the producing party). The list should include the name of the person and law firm or other employer. However, inadvertent failure to include any particular individuals, firms, or current employers on those lists, shall not waive any privilege.

e. The producing party shall also produce other readily available lists or documentation helpful in assessing privilege claims, such as the domains of law firms that have represented the withholding party, lists of persons included under commonly used email aliases, lists of organizational acronyms, or other reference materials used in making the privilege determinations.

f. Metadata Log and sampling process:

i. Once any metadata privilege log is produced, the requesting party shall notify the producing party, within 30 days, whether they would like to "meet and confer" to discuss the initial log. This will be an opportunity for the requesting party to ask questions that may emanate from review of the initial metadata log and to ask for enhanced information about a sampling of documents from the log to more completely justify the privilege claim. The requesting party has discretion to select a random or targeted sample or some mixture. For example, the requesting party could focus more on documents that are more difficult to assess because of a lack of clarity about the identity of all recipients or the subject matter of the documents. However, for each privilege log produced where there are more than 100 logged documents, this initial sampling should not include more than the lesser of 10% of the withheld documents (including partially redacted

documents produced in the associated production) or a maximum of 300 documents.

   ii. The producing party will then, within 30 days, produce additional information sought by the requesting party. Such requested information could relate to, for example, the identity and/or roles of individuals authoring, receiving or mentioned in the documents, more detail about the subject matter of the documents (without revealing privileged information) and/or reasons for the claimed privilege or other protection.

   iii. After the requesting party has 15 days to review the additional information, it will notify the producing party if it has any remaining issues relating to the privilege claims.

   iv. Parties will then meet and confer to attempt to resolve remaining issues. If such issues cannot amicably be resolved by the parties, parties may elect to seek court intervention.

3. **Challenges to Privilege and/or Work Product Claims.**

   a. Traditional and Metadata privilege log entries: If the Requesting Party seeks to challenge a claim of privilege, parties shall meet and confer in an attempt to resolve the issue(s) prior to submitting a challenge to the court.

   b. To the extent that the resolution may require the review of any documents in camera or other use of scarce court resources, the parties and/or the court should consider retaining the assistance of a Special Master.

   c. The Producing Party shall have the opportunity, at the court or Special Master's discretion, to provide affidavits, argument, and/or *in camera* explanations of the privileged nature of the documents at issue to ensure that the court has complete information upon which to base its privilege determinations. The Requesting Party shall have the opportunity to respond and/or reply to any such affidavits, argument, and/or *in camera* explanations.

   d. If a party is found to have made unsubstantiated privilege claims or challenges, then appropriate remedies may be granted, including:

      i. a determination that the producing party reassess privilege in regard to some or all other withheld documents and/or provide additional detail to justify privilege claims made as to some or all of them; and/or

      ii. an order for further in-camera review by the court or Special Master;

      iii.     a determination that the offending party shall defray some or all reasonable costs (including attorneys' fees) of the privilege dispute process; and

      iv.     in extreme cases, such as where a producing party has intentionally attempted to conceal important non-privileged information, or where a requesting party has repeatedly lodged unfounded privilege challenges, the court may order privilege waiver, objection waiver, and/or other appropriate remedies.

e.   In cases where a determination has been made by a Special Master, parties must either abide by the decisions of the Special Master or take exceptions to the court and be governed by the resulting ruling.

_____

HON. [INSERT]