**EDRM PRIVILEGE LOG 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 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***.***

3. 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.

4. 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 (which can be the original Bates number or a newly created unique ID number); (ii) the date the document was prepared, last modified and/or sent; (iii) file types; (iv) authors; (v) recipients (including, where applicable, addressees, copyees, and blind copyees); (vi) email address domain names for those authors and recipients (where applicable); (vii) the document title or subject (which may be redacted if it reveals privileged information or the producing party may instead create a non-privileged description); (viii) attachment indicators; and (ix) the nature of privilege claimed (attorney-client, work product, or both). See Exhibit C for a sample metadata privilege log.

***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. 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.

9. Together with the production of its metadata log, the producing party shall also produce any non-privileged list(s) 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) that the producing party used when making privilege determinations in the instant litigation. The list(s) may be supplemented, as appropriate. However, inadvertent failure to include any particular individuals, firms, or current employers on those lists shall not waive any privilege.

10. 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 in the instant litigation.

11. Once any privilege log is produced[[1]](#footnote-1), 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[[2]](#footnote-2) 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.

12. The producing party shall, 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.

13. After receiving the additional information, the requesting party has fifteen (15) days to review the additional information and to notify the producing party if it has any remaining issues relating to the privilege claims.

14. 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.

15. If a party is found to have made unsubstantiated privilege claims or challenges, then appropriate remedies may be granted, including, but not limited to:

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.

16. 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.

1. 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. [↑](#footnote-ref-1)
2. There may be individual circumstances where additional sampling may be agreed to or requested. However, since those circumstances are likely to be case-specific, no attempt has been made in this protocol to detail the process. [↑](#footnote-ref-2)