EDRM Streamlined Privilege Log Protocol Background

# **I. *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.

# **II. *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 protection. The table generally contains the type of information listed below:

* 1. Bates range of each document withheld or redacted
  2. Filename of the document
  3. Type of Document (letter, memo, report, handwritten note)
  4. Date of document
  5. Subject of the document
  6. Author /From
  7. To/recipients/cc/ bcc/
  8. Custodian
  9. Withheld or redacted
  10. Privilege Type (e.g., attorney-client or work product)
  11. Privilege description

The traditional method of privilege logging is to log every single document that has been 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]](#footnote-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 protection 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 teams use a process that combines multiple fields from metadata[[2]](#footnote-2) to automate the description field as much as possible. Still, it traditionally is a labor-intensive process.

A. Name normalization is a pain point

Though reviewers can use the metadata from Sender[[3]](#footnote-3) and Recipient[[4]](#footnote-4) 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.

B. 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 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.

# **III. *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.

# **IV. *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.

1. 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.

* 1. Historically two different approaches have been used to take the information from these fields and add it to the privilege log.
     1. 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.
     2. 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.
  2. 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.
  3. Depending on the complexity of the approach used and technology used, the data entry process can be a time-consuming part of the process.
  4. 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.

1. 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.

* 1. Historical approach: The description typically includes: 1) a description of 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 by a reviewer or created using fields that have pre-populated choices. Yet both approaches are limited in that the descriptions are canned and may not accurately describe the document(s).
  2. 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.
  3. The description or categorical step can be a substantial component of the overall work required to complete a privilege log.
  4. Metadata Log Approach: Our committee recommends using the email subject and/or document title, available as an export from metadata, to avoid any need to create a separate description for the privilege log. The information in the email subject and/or document title is often more useful for the requesting party than a manual description when assessing the claim of privilege. The producing party may redact the email subject and/or document title if it reveals privileged information, but this should be an extremely rare occurrence, and in those instances the producing party has the option to instead create a non-privileged description.

1. 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.

* 1. 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.
  2. 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.
  3. 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.

D. Metadata Log Approach

This committee recommends the producing party provide the requesting party any list(s) 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.

# **V. *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 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[[5]](#footnote-5), 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[[6]](#footnote-6) 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.

# **VI. *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.

1. Also referred to as a workspace or repository. [↑](#footnote-ref-1)
2. Also known as concatenation. [↑](#footnote-ref-2)
3. Also referred to as the From field. [↑](#footnote-ref-3)
4. This includes the fields: To, CC, and BCC. [↑](#footnote-ref-4)
5. 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-5)
6. 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-6)