



EDRM PRIVILEGE LOG PROTOCOL

Version 2.0

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1. Parties will consider agreeing to the entry of a privilege non-waiver order that provides non-waiver protection under FRE 502(d) and any analogous state laws.
2. 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 designated intervals.
3. Parties will consider whether there is information that need not be included on privilege logs, for example, privileged or work product (collectively, “privileged”) documents or other information prepared after litigation commenced. The appropriate scope of a proposed exclusion will depend on the facts and circumstances of the case and it may be necessary to exchange information, such as the scope of representation of outside litigation counsel, the roles of in-house counsel, and the identities of control persons who may have communicated with outside counsel about the litigation for the parties to come to an agreement.
4. Once parties start reviewing documents for responsiveness and privilege, they shall promptly notify opposing parties of any unique or “gray area” issues that could be resolved up front to reduce the likelihood of later disputes 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, intentional waiver under Federal Rule of Evidence 502(a), 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 will consider whether to forgo the need to include on privilege logs some or all partially privileged documents that are produced in redacted form, with the redactions clearly indicated. The unredacted portions of such documents may include most of what is typically logged (plus more) depending on the nature of the redactions, are produced with the metadata (except metadata fields found to be privileged) and may, depending on the nature of the document, provide enough information to understand the privilege claim. The producing party will produce a field in the load file (or other agreed upon method) so that the requesting party can readily identify redacted documents. If parties agree that redacted documents need not be logged, requesting parties may need, and will be provided upon request, more information about redacted documents when little metadata is available or is unhelpful in assessing the claim of privilege, or the redactions are not implemented in a way that provides enough information as to the basis for privilege.

6. Instead of traditional privilege logs, producing parties will consider initially producing metadata (when it exists and is kept in the usual course of business) and other fields that provide information to assess the claim. Such “metadata-plus privilege logs” may include the following information:
 - a. unique identification numbers for each included document (which can be the original Bates number or a newly created unique ID number);
 - b. the date the document was created;
 - c. the date the document was last modified;
 - d. the date the document was sent;
 - e. file extension;
 - f. author (populated with author field for documents and sent from field for email);
 - g. recipients (including, where applicable, separate fields for addressees, copyees, and blind copyees) which will include the email address domain names for those authors and recipients (where included in the metadata);
 - h. the document title;
 - i. file name;
 - j. email subject;
 - k. file path(s);

- l. last edited by;
- m. custodian(s)/duplicate custodians;
- n. attachment indicators with attachments logged, if they are privileged and withheld, sequentially after the parent;
- o. whether the document has redactions; and
- p. the basis of the privilege claimed (attorney-client, work product, or both).

See Exhibit D for a sample metadata-plus privilege log. In the instances where metadata reflects privilege, the privileged metadata field(s) may be manually edited or redacted so long as the edits or redactions are shown.

Most of the above fields are easily generated from the metadata and known attorney and client name lists, with the basis of the privilege added from coding that can be recorded when privilege is assessed. But, for the initial metadata-plus log there is no other requirement that the producing party otherwise edit or enhance the log—for example to expand document titles that may not be fully descriptive.

If the parties cannot agree on a metadata-plus privilege log but still want to forgo the need for a full description in the initial privilege log, they may also consider agreeing to produce another field with more detailed information about the privilege asserted. This field may contain a list of items that can easily be chosen in the review platform when assessing the privilege during the document review. Some examples are as follows:

- Contains counsel's legal opinion
- Requests counsel's legal opinion
- Prepared in anticipation of litigation

The receiving party can seek additional information about withheld documents they select in accordance with sections 10-11 below.

7. Traditional privilege log entries must still be provided for withheld hard copy documents.

8. Logs should be produced in spreadsheet format (ex. Microsoft Excel) that allows for text searching, sorting, and organization of data, and will be produced either:
 - a. in a cumulative manner, so that each subsequent privilege log includes all privilege claims from prior logs, with means of identifying which entries were previously produced and so that entries previously reviewed by the receiving party can be identified; or
 - b. in installments using a consistent format so that the installments can be merged into a cumulative spreadsheet by the requesting parties.
9. Together with the production of its metadata-plus log, the producing party shall also produce the following materials that the producing party used when making privilege determinations in the instant litigation:
 - a. list(s) of known in-house and outside attorneys, law firms, or others in a legal role (e.g. nonlawyer professionals acting under the direction of attorneys and alleged to be part of a privileged relationship with the producing party);
 - b. a list of third parties identified on the privilege log where the third party's organization is not evident by the email domain name;
 - c. a list of third party organizations that the producing party asserts has a relationship that is not a "privilege-breaker"; and
 - d. any other lists or charts that the producing party systematically used when making privileged determinations and may be useful to the requesting party to understand or evaluate the privilege log entries.

If parties have included attorney notes on such lists that reflect their thought processes or strategy, those may be removed before production. 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. Once any privilege log is produced¹, the requesting party shall within 30 days (or a reasonable period agreed upon by the parties), inform the producing party whether it would like to meet and confer to discuss the initial log. The requesting party may select a reasonable number of log entries to 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. The requesting party may be well served by including a selection

¹In the case of rolling production of logs, this may be an iterative process. However, by discussing many of the "gray-area" issues promptly, parties will hopefully be able to address and alleviate most concerns at an early stage.

of entries that are representative of common questions on the privilege log that will allow the parties to efficiently address issues that may ultimately lead to global resolutions or hone in on more specific areas of dispute that may require court intervention. The intent of this provision is to provide an efficient way to identify deficiencies that may exist within the larger population of entries, which would then be remedied by the producing party providing more information or a more descriptive log for similar types of entries.

11. The producing party shall, within thirty (30) days of any meet and confer under section 10 above (or a reasonable period agreed upon by the parties), produce additional information as agreed in the meet and confer. Such requested information could relate to, for example, the identity or roles of individuals authoring, receiving or mentioned in the documents; more detail about the subject matter of the documents (without revealing privileged information); or reasons for the claimed privilege or other protection.
12. The requesting party shall, within fifteen (15) days following receipt of such new information (or a reasonable period agreed upon by the parties), review the new information and 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 seek court intervention (which may involve the assistance of a Special Master or other court approved neutral).
14. Throughout the foregoing, the parties should keep in mind the consequences for abusing the privilege log process, intentionally concealing non-privileged information, repeatedly lodging unfounded privilege challenges, or not making a reasonable effort to perform the privilege process in good faith. These consequences may include, but are not limited to, the following:
 - a. a determination that the producing party reassess privilege in regard to some or all of the withheld documents and/or provide additional detail to justify privilege claims made as to some or all of them;
 - 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;
 - d. a finding of privilege waiver, objection waiver, and/or other appropriate remedies; or
 - e. other sanctions under Federal Rules 37, 26(g) or the courts' inherent authority (or applicable state laws).

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