



PRIVILEGE LOGS: MITIGATING THE BURDEN OF PRIVILEGE LOGGING WHILE IMPROVING USEFULNESS

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The attorney-client privilege has recently received an upsurge of attention with the U.S. Supreme Court's grant of certiorari in *In re Grand Jury*¹ to address a circuit split regarding the standard for determining whether dual-purpose communications—i.e., for both legal and business purposes—are subject to privilege protection. Although the Court abruptly withdrew its grant of certiorari and dismissed the case following oral argument, leaving the circuit split unresolved, it would not have in any event addressed the most pressing problem in litigation involving privilege: the enormous burden of preparing traditional document-by-document privilege logs in cases involving large volumes of electronically stored information (ESI).

Privilege logging, as The Sedona Conference® has aptly stated, “is arguably the most burdensome and time-consuming task a litigant faces during the document production process.”² Moreover, as one court observed, boilerplate privilege descriptions—which can be necessitated by the challenges of reviewing and logging large volumes of documents—result in “the modern privilege log being as expensive to produce as it is useless.”³ Nevertheless, being cognizant of the leverage that can be garnered from requiring producing parties to prepare burdensome and expensive traditional privilege logs, plaintiffs in asymmetrical litigation (such as class actions) almost without fail not only insist upon traditional privilege logs, but also insist upon their most burdensome variations, such as separately logging every email in every string that has a privilege redaction.

The burden and costs of preparing document-by-document privilege logs have always been onerous. But they have been magnified substantially by the explosion in document volumes associated with the discovery of ESI. Privilege log entries must satisfy the requirement of Federal Rule of Civil Procedure 26(b)(5)(A)(ii) that sufficient information must be provided to assess each privilege claim. Where the information in a privilege log is insufficient (or claimed to be insufficient), it often results in time-consuming and expensive meet and confers, motion practice, redoing the privilege log, or—worse—the loss or waiver of privilege claims, resulting in the production of privileged information.

Alternative logging methods may reduce the burden of privilege logging while at the same time improving the quality and usefulness of privilege logs. After providing information regarding the applicable federal rules and proposed amendments of those rules that may facilitate alternative logging methodologies, this Legal Backgrounder discusses various alternative methodologies that may reduce the burden of privilege logging while making privilege logs more useful and meaningful.

Applicable Federal Rules And Proposed Amendments

The primary federal rule covering privilege logging, Fed. R. Civ. P. 26(b)(5)(A), was added in 1993. A party must notify other parties if it is withholding information based on privilege. Importantly, Rule 26(b)(5)(A)(ii) provides that the disclosure must describe the nature of the privileged information “in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim” of privilege.

¹ U.S. Supreme Court Case No. 12-1397.

² See The Sedona Conference Commentary on Protection of Privileged ESI, 17 SEDONA CONF. J. 95, at 155 (2016).

³ *Chevron Corp. v. Weinberg Group*, 286 F.R.D. 95, 99 (D.D.C. 2012).

With respect to this requirement, the Advisory Committee Note to the 1993 rule amendments states that “[t]o withhold materials without such notice is contrary to the rule, subjects the party to sanctions under Rule 37(b)(2), and may be viewed as a waiver of the privilege or protection.”⁴

While litigants generally interpret the rule as requiring document-by-document privilege logs, neither the language of the rule nor the Advisory Committee Note to the 1993 amendments expressly states that such a format is required. Indeed, the Note recognizes that parties may appropriately provide less detailed information where privileged documents are voluminous, stating that “[d]etails 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 category.”⁵

The Advisory Committee on Civil Rules is currently considering proposed amendments to Rules 26(f) and 16(b), along with proposed committee notes, that if adopted should facilitate more flexibility in privilege logging. A proposed amendment to Rule 26(f)(3)(D) would provide that, in the discovery plan that the parties are required to develop in the Rule 26(f) early meeting of counsel, the parties must address “the timing for and method to be used to comply with” the privilege disclosures requirement of Rule 26(b)(5)(A).⁶ The proposed amendment is accompanied by proposed Advisory Committee Note language that would emphasize both addressing privilege log issues early in the case and allowing flexibility in the form and content of privilege logs.⁷

The proposed amendment to 16(b)(3)(B)(iv), which relates to the scheduling order that the court issues following the Rule 26(f) early meeting of counsel, would similarly encourage the court to address in the scheduling order the timing and method for complying with the privilege disclosures requirement of Rule 26(b)(5)(A).⁸ The Committee Note proposed to accompany the amendment states that while the court usually gives deference to the parties’ proposals, “the court’s order prescribing the method for complying with Rule 26(b)(5)(A) does not depend on party agreement.”⁹ The Committee Note would therefore encourage courts to enter an order making the privilege logging process more efficient and fairer, even if the parties themselves were not able to reach an agreement regarding the process.

The proposed amendments and proposed Committee Note therefore would be meaningful steps that would encourage litigants and the courts to mitigate the burdens of logging and to use alternative methodologies where appropriate. Nevertheless, even if the proposed rule amendments and Committee Note are not adopted, litigants can today seek to employ a number of alternative privilege logging methodologies to reduce the burdens and to improve the effectiveness of privilege logging, because Rule 26(b)(5)(A) and analogous state rules as currently written do not require a traditional document-by-document privilege log.

Alternative Logging Methodologies

Parties can negotiate alternatives to traditional document-by-document logs or, if the parties are unable to agree, the producing party can seek a court-ordered alternative. While parties are not prohibited from unilaterally employing an alternative logging methodology, by doing so without the consent of the opposing party or the approval of the court, parties risk having to redo the privilege log (or worse), particularly given the widespread and erroneous belief that the rules require a traditional privilege log. The following are examples of alternative logging methodologies. An alternative logging methodology may be employed alone or together with other alternative methodologies.

1. Excluding Certain Categories of Privilege Claims from Logging

Specific categories of privileged communications may be excluded from logging—for example, based on the nature of the communication and the persons who are parties to the communication. It is customary to

⁴ See FED. R. CIV. P. 26(b)(5), advisory committee’s note to 1993 amendments.

⁵ *Id.*

⁶ See Committee on Rules of Practice and Procedure, Agenda Book, January 4, 2023 (Appendix – Rules for Publication, Proposed Amendments to Federal Rules of Civil Procedure, Rule 26(f)(3)(D)) at 264, https://www.uscourts.gov/sites/default/files/2023-01-standing_committee_meeting_agenda_book_final_0.pdf.

⁷ See *id.* at 265-68.

⁸ See *id.* at 261.

⁹ *Id.* at 263.

exclude all communications between outside trial counsel and in-house corporate counsel about the case after filing or service of the complaint. Similarly, post-commencement internal communications with in-house counsel and attorney work product regarding the litigation are also routinely exempted. If necessary, metadata logs may be used to confirm that the communication and associated privileged materials are within the exclusion, but parties usually trust each other that this exclusion will be implemented accurately and in good faith.

2. The Metadata-Only Log

A metadata-only log is less burdensome to prepare than a traditional privilege log, as it is comprised of data extracted from agreed-upon metadata fields. It does not require the producing party to manually prepare a customized description of each document and the reasons for the assertion of privilege. Metadata fields subject to extraction and disclosure on the log usually are subject to negotiation. Commonly used fields included in a metadata log are date, author, recipients, document type or file extension (e.g., .doc), and title or subject line (or file name).

A metadata log does not entirely eliminate manual work, as it will likely be necessary to review the title or subject field to ensure that the title or subject does not reveal privileged information. Doing so, however, should be significantly less work than manually drafting a document description for each entry. Additionally, parties and counsel must ensure that metadata is not modified in the extraction process. For example, the “document created” date may be changed when a file is extracted for possible production from its storage location. Technical knowledge or assistance is important in creating a metadata log because doing so requires detailed knowledge of applications used to create, store, and extract files and their metadata.

Metadata logs may be a standalone solution, or they may be part of an iterative logging process—providing that, for example, the receiving party may request additional information about certain entries, or traditional logging of items for which metadata alone may not be well suited (such as privilege redactions).

3. The Categorical Log

Logging by category designations, in what is known as a categorical log, can be highly efficient and effective. A categorical log will include in one entry all documents or material withheld based on common characteristics—for example, multiple communications with outside counsel or with in-house counsel regarding a common subject. Identifying an appropriate set of categories, however, can be a challenging task.

Categorical logs must be considered and structured carefully to realize their benefits. The producing party must identify categories into which the withheld documents can be arranged. Each category should have a common general basis for withholding the documents as privileged. Categories based on the identity of participants in the communication may be preferable to topical or subject-matter categories, but not always. On the one hand, communications within organizations among a common set of senders and recipients, such as email strings, may regularly pertain to multiple subjects in the same string, which could result in the same documents being placed in multiple subject-matter categories or in having to engage a difficult and imprecise task of determining the principal subject matter of a string. On the other hand, depending on the nature of the business, there may be common and repeated requests for legal advice from in-house or outside counsel on a particular subject, such as contract or advertising review.

Before moving forward with a categorical log, producing parties should assess whether the process for categorizing documents will in fact be less burdensome than employing a traditional, document-by-document log. If metadata for ESI can be used to categorize the documents, categorical logs are likely to be substantially less burdensome and costly. If human review is necessary to categorize a substantial portion of the documents, however, a categorical log may be as or more costly and time intensive as a traditional log.

In developing an agreed-upon protocol for a categorical log, the parties should consider a reasonable sampling procedure to employ if categories of privilege claims are challenged. Additionally, the protocol should include a provision that precludes the court from overruling claims for all documents in a category based merely upon a review of a sample from the category. For example, if the sample reveals a material issue with the privilege claims, the provision could permit courts instead to order the producing party to re-review each document in the

category and prepare a document-by-document log for the documents in the category that it continues to claim are privileged.

4. Excluding Privilege Redactions from Logging

An additional approach that makes a lot of sense, but is not yet widely employed, is to initially exclude privilege redactions from logging. In the case of privilege redactions, the receiving party can usually see the date, sender, recipients, and textual context of the portion of the communication that is redacted. This may be sufficient information to determine whether to challenge the privilege claim. Moreover, it may be possible from the context to assess the importance of the communication and whether it is sufficiently material to justify a challenge or a request for traditional logging of the redacted material.

5. Reducing the Burden of Logging Email and Chat Strings

Advances in communications technology have led to forms of communication that prove difficult and burdensome to log. The most common examples are email and chat strings. It can be enormously burdensome to separately log every email or chat containing privileged communications in a string. Where a number of individuals are copied on a string, which is common, different iterations of that string at different times (i.e., many different “snapshots” of the string) may be collected not only from the mailbox of one participant but from several. Consequently, the number of emails or chats requiring traditional logging can proliferate enormously, resulting in an extremely time consuming and expensive privilege logging process.

A technological solution—threading of emails or chats—may help alleviate the burden by eliminating partial and duplicative emails or chats in the string. But threading often is not possible either because of technology limitations or for other reasons (e.g., where the producing party did not think of threading before making its productions). Even with threading, email and chat strings may branch off in different directions, still resulting in numerous related communications that may require logging.

An effective solution can be to log only the top-most email or chat, but to list all senders and recipients of the string and to describe generally in the log entry the communications in the string that are being withheld or redacted. It is important to consider this need early on. It is particularly important to avoid agreeing to a logging protocol that requires separate logging of each email or chat in a string, as it may prove difficult to get out of that agreement upon later realizing the enormous burden and expense that such separate logging involves.

6. Using AI to Reduce Privilege Review Costs

Privilege review costs can increasingly be reduced by using machine learning to identify potentially privileged communications in large document populations. Such tools can dramatically reduce the number of documents subject to a more detailed review, and they can do so more effectively than search terms. The model could require substantial training, however, to reliably identify potentially privileged communications. Moreover, such determinations can be highly complex and, as with manual human review, some privileged communications will inevitably be missed. Hence, entry of a clawback order—for example, pursuant to Federal Rule of Evidence 502(d)—is important to prevent waiver or the burden of having to prove that the production of privileged documents was inadvertent (a condition often required unless a Rule 502(d) clawback order is in place).

7. Cost Shifting

Cost shifting can incentivize parties to “play fair” with respect to claiming privilege and in challenging privilege claims. For example, the costs of bringing and resolving privilege challenges can be assessed on to the losing party on a proportional basis. Such cost shifting motivates receiving parties to bring only legitimate privilege challenges, and further motivates claimants to make only defensible claims of privilege.

Conclusion

Preparing the traditional document-by-document privilege log is more often than not highly burdensome and expensive. But litigants have alternatives to the traditional privilege log that reduce the burden and can improve the quality of the log. Reasonable alternatives are limited only by the parties’ willingness to cooperate, the creativity of the parties and courts, and rigorous and ongoing court involvement and guidance in the privilege logging process.