

Streamlining the Privilege Log Process Without Destroying Privilege Logs: The “Privilege Log Three-Step”

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I. INTRODUCTION

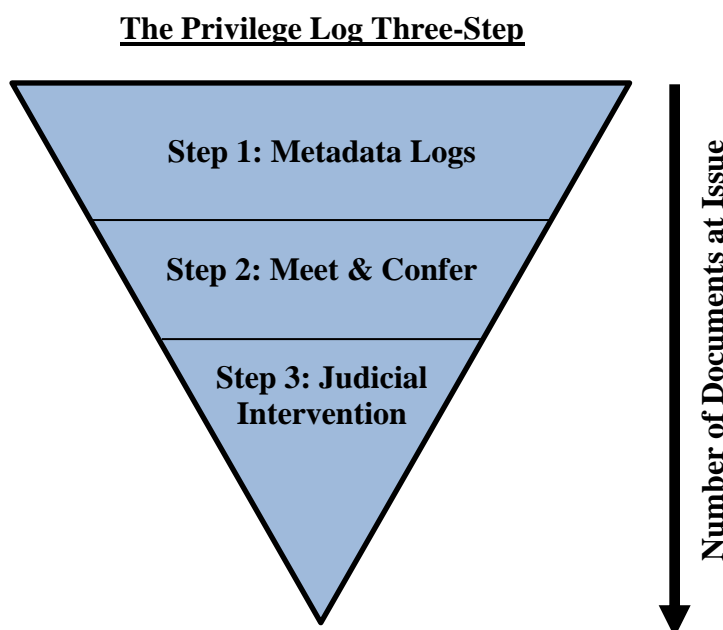
The Federal Rules of Civil Procedure require a party withholding documents as privileged to “describe the nature of the documents . . . in a manner that . . . will enable other parties to assess the claim” of privilege. Fed. R. Civ. P. 26(b)(5)(A). The producing party has the burden of establishing the privilege, and generally speaking, parties to the litigation attempt to meet their obligations under the Rules by making privilege logs that contain the required information.

In order to reduce and expedite privilege disputes the parties should agree to use available technology to both reduce the burden on the producing party and provide the receiving party with sufficient information to assess the basis for withholding otherwise discoverable information. We believe that the proposal we outline below—the “Privilege Log Three-Step”—accomplishes those goals.

II. PROPOSAL

The “Privilege Log Three-Step” streamlines the privilege log process in order to “secure the just, speedy, and inexpensive determination” of litigation. *See* Fed. R. Civ. P. 1. By structuring the privilege log process in the way set forth herein, it is our hope that parties and the courts can reduce “motion practice, overreaching, obstruction, and extensive, but unproductive discovery disputes” so as to “refocus litigation toward the substantive resolution of legal disputes.” The Sedona Conference, *Cooperation Proclamation* (2008).

The Privilege Log Three-Step reduces the burden of assembling a privilege log, expedites the time in which a requesting party can expect to receive initial privilege logs, and streamlines the issues that might need to be presented to the court for resolution. It accomplishes this by enabling the parties to “funnel” their questions to those documents that are truly in dispute, with increasing disclosures over a reduced number of documents at each step. The Privilege Log Three-Step is shown in the below graphic and is described in greater detail below.



A. Step 1: Metadata Logs

The first step of the Privilege Log Three Step is the production of rolling metadata logs.

1. Fields that Should be Provided

The metadata logs should contain at least the following metadata fields:

Attachment Count	DateCreated	FileName	Subject
Attachment Name	DateMod	From	Thread Index
Author	DateRecieved	HashValue	TimeSent
BCC	DateSent	LogicalPath	Title
CC	DocExt	RecieveTime	To
Custodian	Email Thread ID	Redacted ¹	

In addition, the metadata logs should contain a field for the privilege(s) asserted and a short description of the basis of the privilege. Because these manually populated fields are coded during the privilege review, they can easily be exported via the review platform as part of the metadata log. A notation in the privilege log (such as the use of bolding or asterisks) should be used to identify attorneys who appear on the log, and full email addresses, with domains, should be provided.

2. Exclusion of Certain Categories from Metadata Logs

The parties should endeavor to reach an agreement to not log certain categories of documents. Potential categories of documents include communications post-dating the filing of the lawsuit with outside counsel for the relevant litigation and potentially with in-house counsel if in-house counsel's role in the organization is limited to strictly legal advice rather than also including a role in business decisions.

3. Timing and Format of Logs

In addition, the metadata logs should be produced on a rolling basis, concurrent with, or shortly after each production. This will enable the producing and receiving parties to identify the 'types' of documents most likely to be in dispute, in the early stages of the litigation. The logs should be produced in a format, such as excel, where the entries can be searched and sorted in order to allow an efficient evaluation of the log entries.

4. What Should be Avoided

The metadata logs should list each document withheld in whole or in part separately. That is, the Privilege Log Three Step does *not* envision email thread suppression or categorical logs

¹ This field would be tagged "Yes" for any document that contains redactions so as to enable the receiving party to quickly filter the metadata log to show documents that have been redacted versus withheld entirely.

because there is no meaningful additional burden in separately logging each document or email that is withheld if the above-described process is employed.

As to “categories” of documents, the producing party could use the same privilege justification for multiple documents, as appropriate, during the privilege review process within the review platform and then export those justifications for each document into the log. This allows the receiving party to view the documents that fall within the same category together or within the context of date or sender or other relevant metadata fields. Moreover, it is our experience that categorical logs lead to more disputes and a greater risk that the court finds waiver due to the inherent deficiencies in categorical privilege logs.

As to the logging of email threads, these threads often span over a length of time and vary in participants. If metadata for only the last in time email, or the most inclusive emails, are used as the basis for the log, there is a significant risk that the privilege log entry would not accurately represent the dates in which communications were made, who participated in each portion of the communication, and who specifically authored each communication. Each withheld email is a separate communication that stands on its own and not each email in the chain may be subject to the same privilege, or any privilege at all. However, if an earlier in time communication that was not separately collected or does not fall within the search parameters, it does not need to be separately logged.² This way, the fields in the log can still be based on the metadata of the document and not manually created. If an attachment to an email is withheld, this too should be logged separately but with the ability to tie to the document to the parent email.

B. Step 2: Meet & Confer

Upon receipt of the metadata logs, the receiving party should promptly review the entries and determine the documents where additional information is required in order to assess the claim of privilege. After the receiving party determines which entries, if any, require additional information, the receiving party would request that the producing party provide the types of information they believe they need to better assess the assertion of privilege.

C. Step 3: Judicial Resolution

After the receiving party reviews the log(s) and meets and confers with the producing party regarding any entries over which they have questions, the last and final “step” would be to seek judicial review on a sampling of a discreet population or resolution over any entries the receiving party intends to challenge. At this point, the parties should have narrowed the documents at issue to a fraction of what was contained on the initial metadata log, such that the number of documents subject to judicial review would be limited.

D. Interplay with Federal Rule of Evidence 502(d) and 502(b)

Our proposal envisions that the parties would enter into a 502(d) order to further streamline the privilege log review process. Federal Rule of Evidence 502(d) enables the parties to more expeditiously produce documents in the case by permitting a producing party to “claw back” a

² This would not apply if email thread suppression is used as a search parameter.

produced privileged document (or metadata) without the risk of waiving privilege. Any associated 502(d) order would, however, need to be clear that the production need not be inadvertent and also provide that Federal Rule of Evidence 502(b) would apply in certain circumstances, such as where a party or its expert relies on a document in a pleading or the document is used in a deposition and the producing party does not promptly claw it back. As to the former, clarifying that a production need not be “inadvertent” for a Rule 502(d) order to apply allows the producing party to expedite its privilege review by, for instance, limiting it to documents hit on certain search terms or emails or flagged by a TAR or AI tool. As to the latter, these limitations avoid any potential prejudice to the parties and the Court that rely on a document that is later claimed to be privileged.

III. CONCLUSION

It is imperative that any proposal to streamline the privilege log process still provide the parties and the Court with the information required by Rule 26 to both support the claim of privilege and accurately and quickly assess the assertion. We believe that the Privilege Log Three Step accomplishes this and avoids the serious pitfalls of other streamlining proposals.