

Ideas to Improve the Privilege Log Process

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First, reduce the number of records the producing party potentially may need to log. Use technology to reduce the number of records to potentially log for privilege. At the outset of the review, use email threading to suppress non-inclusive emails + families and inclusive, duplicate emails + families from review and potential production. This approach also cuts down on the amount of privilege quality control needed to address inconsistent privilege coding and inconsistent redactions for partial privilege across emails in the same thread that inevitably occurs when reviewing all inclusive and non-inclusive emails (and thereby potentially reduce the time and costs associated with claw backs).

Additionally, agree not to produce or log any communications between the client and counsel regarding the litigation once the litigation has commenced (or other date as agreed upon) on the basis of attorney-client privilege and work-product protection.

Second, utilize a name normalization tool. In addition to the ease of a person's name appearing the same way each time it appears on the log, associating all name and email variations present in the data set to a single name saved to a single field allows for an email participant field that lists all senders and recipients in an email thread, including those on lesser included email segments not traditionally captured in the top level email metadata.

Third, create an automated metadata privilege log. Log all records where privilege is claimed, but only create privilege descriptions for specific categories of documents where there are arguably no indicia of privilege in the metadata and tend to be the focus of disputes over a privilege claim, including:

- Privilege claim with no attorneys listed in sender/recipient.
- Privilege claim with a third party listed in the sender/recipient fields.
- Privilege claim of an internal corporate communication with an attorney listed as a sender/recipient, but there are numerous other internal recipients.
- As agreed upon by the parties.

To aid in the efficiency of the creation of these privilege creations, agree to categorical descriptions attorney reviewers can select with a single mouse click versus drafting manual descriptions in a text box in a review platform. If possible, counsel should have these descriptions ready and part of the coding layout during the review team's quality control privilege screens so they can select a privilege description while confirming the privilege assertion to avoid another review of these documents solely to select a privilege description.

Produce redacted records where there is a claim for partial privilege and log these partially privileged records, but without a privilege description. Redact the privilege content only and not the metadata and signature blocks to allow the receiving party to better evaluate the claim for privilege.

Include the following fields in the metadata privilege log for the requesting party to access the claim of privilege:

- Document identifier
- Bates number if it's a produced document that was partially redacted for privilege
- Sender
- Recipients
- Email Thread Participants (every sender and recipient from all email segments in the inclusive email)

- Domains (from all email segments in the inclusive email)
- File Type
- Email Subject
- File Name
- Date Sent
- Privilege Type (attorney-client, work product, etc.)
- Privilege Description

Lastly, in conjunction with the metadata privilege log, provide a legend that lists the players that arguably trigger privilege in the matter, including attorney names (outside counsel and inhouse counsel), law firms, and other names of qualified agents of counsel or the client the producing party claims does not constitute a waiver of privilege.

As needed, the receiving party can make a request for a privilege description on discrete log entries where a description was not initially provided where they question the assertion of privilege.

My idea moves the law forward in a reasoned and just way because it reduces the need to log (and for the receiving party to evaluate) redundant privileged content using email suppression and further reduces the number of log entries that require a privilege description to only those tranches of documents where there is no indicia of a privilege claim on the basis of the metadata of the document. At the same time, this log provides all the same useful information to evaluate a claim of privilege that other, more traditional logs provide.

My ideas align with the FRCP 1's mandate to "secure the just, speedy, and inexpensive determination" of every case as it leverages technology to reduce the number of records to review and log and allows for more transparent assessment of privilege by the receiving party by including email thread participant and domain fields in the privilege log so one can quickly see if there is a third party that may break privilege in all email segments in the thread (and quality control on the producing party's side to even include the record on the privilege in the first instance). Such methodologies result in fewer privilege log entries for the producing party to create and for the receiving party to evaluate. This approach may also reduce the inadvertent disclosure of privileged material—reviewing and logging the entire email thread at once should reduce inconsistent coding for privilege and partial privilege redactions.

My proposed privilege log process is suited for any matter large enough to be loaded into an electronic review platform and to run email threading across. All tools proposed are present in all major electronic review platforms and analytics tools available on the market today.