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Electronic Discovery &amp; Records Management

## Tip of the Month



### Using E-discovery Tools to Reduce the Burden and Cost of Privilege Logs

#### Scenario

Two large companies are at the discovery stage of a breach of contract dispute pending in federal court. There was a great deal of negotiation leading up to the drafting of the contract by in house and outside counsel for both sides. As a result, a significant portion of the potentially responsive documents are protected under the attorney client privilege or the attorney work product doctrine. The general counsel of one of the litigants wants to know how to reduce the burden and cost of producing what is likely to be a massive privilege log.

#### Production of Privilege Logs

It is no secret that the cost of litigation is rising, nor is it a secret that electronic discovery is, in large part, the major culprit. The burden and cost associated with preserving, collecting, reviewing and producing Electronically Stored Information (ESI) can be daunting. Indeed, a survey conducted by the American College of Trial Lawyers revealed that over 87 percent of respondents "indicated that e-discovery increases the costs of litigation" and that over 75 percent "agreed that discovery costs, as a share of total litigation costs, have increased disproportionately due to the advent of e-discovery." One aspect of discovery, and e-discovery in particular, that contributes significantly to discovery costs is the privilege log. There are, however, ways that litigants can minimize the burden and costs that result from creating and defending privilege logs.

The Federal Rules of Civil Procedure require a party wishing to withhold information based on privilege to provide, in a privilege log, sufficient detail to enable the other party and the court to assess the applicability of the claim. Failure to provide sufficient detail has, in some cases, led courts to hold that the privilege is waived.

A typical privilege log, at a minimum, should include:

- The type of document being withheld;
- The date it was created or last modified;
- The document's creator (i.e., the "author");
- Where the document was found (i.e., the custodian);
- The documents' subject or title;
- To whom the document was sent to (e.g., to, cc and bcc); and

- A description and justification of the privilege being asserted.

When you consider that it is not unusual, in information-intensive cases, to have hundreds, if not thousands, of emails and other communications to assert privilege over, reviewing and manually entering each of these fields in to a log can be tedious, time-consuming and expensive. And while Federal Rule of Evidence 502 was enacted in 2008, in part, to address the fact that litigants were incurring these costs to simply protect against the inadvertent waiver of attorney-client and work product privileges, courts are generally not receptive to arguments that the burden of a privilege review should justify limiting discovery.

### **Reducing the Burden and Cost of Privilege Logs**

There are other ways, however, that parties can minimize the burdens and costs associated with conducting a privilege review and preparing a privilege log when large volumes of data are involved. These options include the creative use of the meet and confer process and the creative use of technology. For instance, parties should consider using the meet and confer process to:

- Limit the types of communications that must be included on a privilege log—e.g., agreeing that communications with outside counsel need not be logged or that privileged communications after the filing of the complaint need not be logged;
- Limit the universe of documents subject to full logging to a restricted set of custodians and producing only basic information—i.e., the type of information that can be electronically generated from most electronic document review tools today—for all other privileged documents;
- Agree to logging email chains as one document;
- Agree to logging only one instance of each document, with the understanding that exact duplicates do not need to be logged;
- Agree to withhold partially privileged emails in their entirety rather than incurring the costs of redacting the privileged portions; and
- Agree to describe general categories of privileged documents, (for example, time period, names of individuals on communications, or general description of type of content of communications), with sufficient information for the parties to determine whether a more detailed log would be necessary for categories that may be in dispute.

The creative use of technology can also help to reduce the cost and burden of privilege review and privilege log preparation. Most e-discovery vendors have robust search and email thread logic tools that allow parties to quickly find relevant documents. The same tools can be applied to search for potentially privileged materials, including the names of attorneys and the domain names of law firms, or emails with the words “attorney client” or “privileged” in the subject line. In addition, some e-discovery tools can identify “near duplicates” or use concept searching to identify potentially privileged documents that may not be captured using search terms.

Once these documents are collected, many e-discovery tools can electronically create a draft privilege log. By using the document’s metadata, the e-discovery tool can export basic information about a potentially privileged document to an Excel spreadsheet, including the document’s sender, recipient, subject, etc. If the reviewers also code certain fields during the review, either indicating the type of privilege, or putting in descriptions or attorney names, that can also be exported to an Excel spreadsheet. This can help to limit the amount of review for any given document in that the

document may only need to be reviewed once in order to determine privilege and prepare the privilege log. While any electronically created privilege log must be reviewed and revised to meet the needs of a particular case or rules of a specific jurisdiction, having the privilege log created automatically saves a huge amount of time and resources over the manual process of adding one document at a time to a spreadsheet.

While these options may not entirely eliminate the cost of creating a privilege log for any given case, they can certainly decrease cost and increase efficiency.

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