



The Sedona Conference Commentary on Privilege Logs (May 2024)

The Sedona Conference Commentary on Privilege Logs (Commentary) offers tools and strategies for both responding and requesting parties to mitigate the considerable burdens and competing interests that can be associated with privilege logs.

When a party withholds otherwise discoverable information based on attorney-client privilege, work-product doctrine, or some other protection, Federal Rule of Civil Procedure 26(b)(5)(A) requires that the party must (1) “expressly make the claim” and (2) describe the nature of the information in such a way that allows the receiving party to assess the claim. The Rule does not, however, specify *how* the responding party must satisfy its obligation.

The most common tool parties have used is a “traditional” privilege log, which is arguably the most detailed and thorough method of expressly describing the bases for withholding documents as privileged. Determining the Privilege Asserted and crafting a custom Privilege Narrative/Description requires analysis for each document and, depending on the complexity of the document, can take significant time to draft a defensible custom privilege description. The proliferation of ESI in discovery can result in the responding party withholding thousands of documents based on claims of privilege, and the time and cost incurred in the effort to form descriptive sentences for each entry on these voluminous logs can be burdensome. This *Commentary* provides options for how responding parties can reduce the burden of satisfying their obligations and how parties can engage in constructive discussions to minimize disputes.

The privilege logging process can also raise issues for the requesting party (i.e., the party receiving the privilege log). These issues typically relate to the amount and nature of information on the privilege log. Specifically, a privilege log with fewer details can impair the requesting party’s ability to understand the assertion of privilege, leaving the party to guess as to whether (or not) privilege properly attaches to the withheld documents.

Not surprisingly, the competing interests—and countervailing burdens and rights—of requesting and responding parties in discovery can lead to disputes about how and when a responding party will substantiate its assertions of privilege, and if a privilege log is used, whether the form and content of that privilege log are sufficient.

This *Commentary* outlines how parties and, if necessary, the courts can cooperatively address the burdens associated with privilege logs. The primary conclusions and recommendations are as follows:

- The parties should address privilege log format, timing, and anticipated issues, as well as contemplate procedures for seeking court assistance in resolving any privilege disputes, early in their case to help reduce costly discovery disputes later.



- Parties should discuss whether certain categories of documents, such as communications between a client and its outside litigation counsel about the litigation after a complaint has been filed, can be excluded from a privilege log in the first instance.
- Parties should discuss whether a “metadata plus topic log,” or another alternative format, should be employed in their case. This *Commentary* takes the position that a “metadata plus topic log” is a preferred format over the traditional privilege log because it generally is more effective in satisfying the requirements of Rule 26(b)(5) while also mitigating the burdens associated with narrative descriptions.
- Acknowledging that practical burdens exist in the privilege logging process does not mean that the responding party’s legal burden of supporting its privilege claims should shift to the requesting party. Consistent with the Federal Rules, the onus is on the responding party to satisfy the requirements of Rule 26(b)(5) and not on the requesting party to justify why those requirements should be met.
- In keeping with *The Sedona Principles, Third Edition*, proportionality should be considered and applied to all aspects of discovery, including the preparation of privilege logs.

The *Commentary’s* appendices include examples of various privilege log formats along with sample documents that appear on the logs. The exemplar documents are useful tools for helping to understand terminology and illustrate different types of privilege logs, as well as provide a visual representation of the strengths and weaknesses of each type of privilege log.

The full text of *The Sedona Conference Commentary on Privilege Logs* is available free for individual download from The Sedona Conference website at

https://thesedonaconference.org/publication/Commentary_on_Privilege_Logs.

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