

PRACTICE TIP SHEET

Preparing Privilege Logs

Did you know that the phrase “privilege log” is nowhere to be found in the Federal Rules of Civil Procedure?

A **privilege log is a procedural convention**, commonly accepted by courts, that serves as a handy way to comply with statutes requiring parties to substantiate their claims of privilege as the ground for withholding from production specific documents or categories of documents requested in discovery.

In federal court, the basis for preparing a privilege log is Fed. R. Civ. P. 26 (b)(5)(A), stating that when a party withholds discoverable information on the basis of privilege or work product protection, the party must describe the documents or communications being withheld to enable everyone to evaluate the privilege claim, without revealing the actual privileged information.

See? No reference to “privilege log” *per se*; however logs are the most common means used by parties *and required by judges* to identify the privileged materials being withheld from production.

In California, the basis for preparing a privilege log is Code Civ. Proc. §2031.240(c), stating that a party objecting to any request for production on the grounds of privilege or work product protection must identify with particularity any document or thing for which the claim of privilege or protection is being made, and provide enough information for other parties to evaluate the privilege claim “including, if necessary, a privilege log.”

Of course, even if federal or other state statutes don't specifically mention privilege logs, local rules or judges' standing orders may, and as always, need to be consulted.

Attorney Agreement. In light of the volume of electronically stored information produced in discovery these days, it is more important than ever to reach an agreement among counsel prior to beginning the work of logging privileged documents. Topics to negotiate might include the format the log will take, any limitations to the data being logged, and how emails and attachments will be handled, if applicable.

Log Format. In the past, a document by document log has been the standard. Here, the log will typically include a document identifier, the document date, the author, the recipients, the document's subject matter, and the privilege basis. While much of this information can be generated electronically from the database housing the documents, the task of manually describing the subject matter of each document can be burdensome when the volume is large.

Many jurisdictions are paving the way for cost-effective alternatives such as categorical logs, where specific categories of withheld documents are identified on the privilege log instead of identifying each document. Here the parties might agree to supply only a limited subset of data, electronically generated, for each withheld document falling under the category.

A knowledge of the case law, local rules, and standing orders on this issue is essential when making an agreement with counsel as to what sort of log will be used.

Emails. Email comprises a significant percentage of data produced in discovery. Accordingly, email constitutes a significant portion of material withheld based on privilege and included on a privilege log. Therefore, making an agreement with counsel can save time and effort. For example, parties might agree to log only the most inclusive email of any privileged email string, or that post-complaint communications with counsel need not be logged.

Craft your privilege log carefully. When drafting a privilege log, get detailed instructions from your supervising attorney. There are a lot of judgment calls to be made which will require careful consideration. Prepare a draft log template and get the format approved before you begin. Ask whether your attorney wants a detailed description of each document, or a series of more general descriptors from which to select. Ask how to log privileged attachments and privileged email strings.

A carefully crafted privilege log can avoid motion practice, sanctions, and privilege waiver. Pay attention to agreements with counsel and any standing orders or requirements from your jurisdiction or judge. Word your log in such a way that the privilege basis is clear. Provide your privilege log in a timely manner. The goal is to protect privileged information while meeting the statutory requirements for identifying documents withheld due to privilege.