

The Sedona Conference WG1 Privilege Logs Drafting Team Executive Summary

Drafting Team Members

Toni Baker	Travis Bustamante
MaryBeth Gibson	Nathaniel Giddings
David Nolte	Jennifer Scullion
Hon. Thomas Vanaskie (ret.)	Margot Want

Team Leaders

Adam Gajadharsingh	Meghan Podolny
--------------------	----------------

Steering Committee Liaisons

Rebekah Bailey	Andrea D'Ambra
Sandra Metallo-Barragan	Claudia Morgan

Copyright 2021, The Sedona Conference. All rights reserved.



This working draft document was created for discussion purposes only for the 2021 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to dbl@sedonaconference.org.

SEDONA WG1 PRIVILEGE LOGS DRAFTING TEAM **EXECUTIVE SUMMARY**

The WG1 Privilege Logs Drafting Team was tasked with generating a working outline for an eventual Commentary on the privilege logging process. The goal was to explain the primary rules relevant to the process, identify principal issues with how logs are generated, recommend methodologies for mitigating common privilege log issues, suggest reasonable methods for challenging log entries, and recommend ways to move the law forward based on the Federal Rules of Civil Procedure and parties' interests in obtaining discoverable evidence.

The Drafting Team ("DT") was only given eight weeks to generate a substantive outline but opted to go a step further and produced a working draft of the Commentary itself. The DT wants to be clear, however, that its work product is still very much a "live" document in need of further revision, research, and discussion. Additionally, by the time the Annual Meeting occurs, the Advisory Committee for Civil Rules will have met again to discuss privilege log rules, and that direction will need to be incorporated. While the DT was able to prepare a full Commentary draft, various sections are still under active discussion with the DT at large and do not reflect consensus by the DT at this time as to all sections. To this end, the DT requests feedback from participants at the Annual Meeting to further inform the DT's determination of whether consensus can be reached on various aspects of the Commentary. The following is a summary of the issues that have generated the most discussion, as well as some specific questions for your consideration and feedback:

Burden Issue #1: Is the Privilege Logging Process Burdensome?

- To what extent is there even a burden in the process and does this need to be explained in more detail?
 - If there is a burden, what specific steps or portions of the privilege logging process are burdensome?
 - If the burden is anecdotal, as opposed to being based on published studies, will it still be beneficial to provide additional detail and anecdotal references on how traditional privilege logging is burdensome?
- Some DT members consider the sheer volume of ESI and the process of generating a document-by-document privilege log to be unduly burdensome in particular cases.

Proportionality.

- In *The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production*, 19 SEDONA CONF. J. 1, 67 (2018), Comment 2.b. suggests that "[p]roportionality should be considered and applied by the court and parties to all aspects of the discovery and production of ESI including . . . preparation of privilege logs."
- The Brainstorming Group and Drafting Team engaged in significant discussions as to whether and to what extent the concept of proportionality should apply to privilege logs. Some participants view Rule 26(b)(1) as having no application whatsoever, while a larger percentage of participants agreed that it does.

This working draft document was created for discussion purposes only for the 2021 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to dbl@sedonaconference.org.

- For the participants advocating for application of proportionality factors to the privilege logging process, the position is that the level of detail provided on the log, and negotiation of certain exclusions, should be considered by both parties in the context of the proportionality factors of Rule 26(b)(1), and the requesting party should move to compel if the parties cannot agree on the anticipated format of the log. However, the party providing the log must be able to establish why its proposal for a privilege log satisfies the proportionality factors.
- For the participants advocating that proportionality factors do not apply, the position is that the test should still be one of undue burden or cost, which must be brought by a motion for protective order if the parties cannot agree. The burden remains on the party providing the log to establish why the requesting party's expectations on logging detail, or refusal to exclude documents, is unduly burdensome.
- Note, however, that despite the diverging opinions expressed above, both approaches affirm the consensus of the DT that there is no requirement that the party seeking discovery demonstrate that producing a sufficient privilege log is proportional before the discovery is produced—the burden remains on the party resisting discovery.
- A significant issue related to proportionality is the distinction between applying the concept to document requests (scope of discovery) versus the subsequent logging of privileged documents. Some contend that proportionality only applies to the former.
- An analysis of the case law regarding proportionality, especially after the 2015 Amendments to Rule 26, produced interesting results but no dispositive answers.

Federal Rule of Evidence 502.

- The DT will add discussion of Rule 502 to the discussion of potential subject matter waiver in the next draft of the Commentary.
- In the dispute resolution section, the DT will reference Rule 502(d) quick peeks for emails of interest to requesting parties but have no real content (*e.g.*, email from in-house counsel to CEO re: the lawsuit but the entire content of the communication is that an answer to the complaint was filed yesterday).

Resolutions.

- The DT did reach consensus that a “metadata plus topic” log would provide the best way forward to leverage technology advances with more specificity to meet the requirements of Rule 26(b)(5) and narrow the areas of dispute, and was preferable to a document-by-document, categorical or metadata only log.
- The DT also reached consensus that, generally speaking, two ways to reduce burdens associated with privilege logging are for parties to exclude certain types of communications unlikely to raise concerns (*e.g.*, post-complaint communications with litigation counsel) and to exclude redacted documents from the log where the metadata is visible and a specific privilege/doctrine (ACP/WP) is asserted.

We welcome the Membership's feedback and views on these topics/questions, in particular, or as to any other aspect of the draft Commentary. The DT will continue to revise and build consensus taking your comments into account where possible. To the extent that you are aware

This working draft document was created for discussion purposes only for the 2021 Annual Meeting of The Sedona Conference Working Group on Electronic Document Retention and Production (WG1). It is not intended for distribution beyond members of the Sedona Working Group Series. Comments are welcome and may be sent by email to dbl@sedonaconference.org.

of any specific case decisions, publications, or alternative ideas to consider, we welcome your participation.

DRAFT