



# Hang ing by a Thre ad

Save Your Litigation  
Budget and Privilege

**D**iscovery costs companies hundreds of millions of dollars every year. As a result, they are looking to make each step in the process more efficient and cost-effective or, where possible, to eliminate the step entirely. One of the most costly aspects of discovery is shielding the company from the release of documents that are protected under the attorney-client privilege or work-product doctrine, because it involves both professional review and costly technology. Reviewing documents for privilege and work-product protection is a step well-known to any seasoned trial lawyer. Scores of attorneys typically pour over ever-increasing volumes of documents, seeking out the privileged ones.

Once found, paralegals and clerical assistants populate privilege logs with entries corresponding to time-worn formats. Advancing document review platforms and automated privilege log creation software have eased the task in recent years. But the basic process and assumptions have remained unchanged for decades — even as the volume of material subject to privilege review has exploded and the percentage of companies' litigation budgets devoted to discovery and document review has skyrocketed.

The price tag of discovery and privilege review processes alone may be difficult for companies to justify under the current poor economic conditions. But the cost is also affecting the basic fairness of the judicial process. It is

beyond dispute that discovery of electronically stored information (ESI) — and accompanying detailed privilege reviews — has burdened litigants with discovery costs that threaten to deprive them of their day in court on the merits of the case. It has also become a tool that many opposing counsel use as a weapon to escalate litigation costs for companies responding to discovery requests.

As one solution to these problems, we believe it is time for a new approach to privilege review. Rather than spend the substantial resources required to examine and log individual privileged documents, parties should agree — with or without judicial assistance — on the search tools and methodologies they will use to cull documents for privilege at the onset of the case. The parties should thereafter consider the documents gathered under this approach presumptively privileged and set them aside as “off limits,” subject to an agreement about what developments could trigger additional attention to them.

Documents not caught in the agreed-upon privilege screen may, of course, still be privileged. With respect to these, the parties should agree that any production does not waive privilege and should spell out clawback procedures that provide for the return of these documents. Such a paradigm shift in the handling of privileged documents would allow parties to focus their discovery and other efforts on the merits of the dispute, while protecting both their litigation budget and their privilege claims.



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## The Current Approach

Consider the time and expense involved with the typical privilege review and logging process. Document custodians are identified and potentially responsive documents are collected. These documents — which can easily measure in the hundreds of gigabytes, representing millions of pages of text — are processed by third-party service providers before being loaded into a document review platform. Initially, documents may be narrowed by applying certain restrictions or by excluding file types that are unlikely to contain responsive content (such as operating system or similar files). After these restrictions are applied, litigants typically subject the winnowed documents to a series of keyword or other searches to determine which documents are potentially relevant to the issues in the lawsuit, and which of those potentially relevant documents may require special handling on the basis of possible privilege. Typically, review teams then code likely relevant documents, while dedicated quality control and privilege teams examine and log potentially privileged material.

Once privileged documents have been identified and either redacted or fully withheld, they become subject to Federal Rule of Civil Procedure 26(b)(5), which requires a party to provide sufficient information about the documents to enable others to assess the claim of privilege. For years, this legal standard was met by the production of privilege logs. In the current age of ESI, parties can easily spend hundreds of hours preparing logs. For example, privileged attachments to email must be identified with the email that transmitted them. Although basic biographical data such as the sender and recipients of email can often be extracted electronically from source documents, it is not necessarily in an easily readable form, or it may be incomplete or inaccurate. Privilege log descriptions also require careful scrutiny so as not to run afoul of Rule 26(b)(5)'s competing requirement that the document's description not reveal "information itself [that is] privileged or protected."

All of this adds up to real time and expense for litigants. Typical review rates are almost always slower for privilege review than for standard first pass review, which increases attorneys' fees. The attorney and clerical time required to create, edit and finalize traditional privilege



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logs can be substantial. Additionally, the traditional process is not risk-free. Notwithstanding the care with which any review is undertaken, privileged documents will inevitably be produced inadvertently, making the need for clawback or other protective agreements more important than ever, especially as data volumes increase. There must be a better way and we believe that there is.

## A New Approach

Rather than engaging in the time-consuming and costly process of reviewing privileged documents described above, we advocate instead for a "sequestered bucket" approach to the treatment of privileged documents. Under this approach, time is spent reaching agreement with opponents about the conditions under which certain documents will flow into the privilege "bucket," with the resulting collection of documents presumptively removed from further review and production, absent certain triggering events. In addition, because the documents that flow into the bucket are removed from production, no privilege log is needed. Meeting the requirements of Rule 26(b)(5) are accomplished not with a traditional log, but with transparency about the conditions under which documents flowed into the sequestered privilege bucket in the first place.

The new approach does require more dialogue, cooperation and ultimately agreement with your opponents regarding the inputs to the sequestered bucket of privileged documents. This is not a radical suggestion — Federal Rule of Civil Procedure 26(f) already requires parties to "confer as soon as practicable" about a number of discovery-related issues,

including "any issues about disclosure or discovery of electronically stored information" and "any issues about claims of privilege or of protection as trial-preparation materials."<sup>1</sup> Recent survey results and a final report from the American College of Trial Lawyers make it clear that "discovery can cost far too much and can become an end in itself," leading the college to propose 29 principles, many of which urge parties to seek detailed early agreements concerning discovery generally and electronic discovery particularly.<sup>2</sup> Developing case law shows that judges are increasingly willing to assist

parties in controlling discovery-related costs by endorsing principles like proportionality and techniques like phased discovery.<sup>3</sup> And the Sedona Conference (one of the leading ediscovery think tanks in the country) has, for nearly the past year and with the endorsement of many state and federal judges, been working to promote its Cooperation Proclamation, which recognizes that the “costs associated with adversarial conduct in pre-trial discovery have become a serious burden to the American judicial system” (and, we add, to clients), with the goal that the Cooperation Proclamation and the related work of the Sedona Conference can help “to promote open and forthright information sharing, dialogue (internal and external), training and the development of practical tools to facilitate cooperative, collaborative, transparent discovery.”<sup>4</sup>

What would such cooperation look like under the sequestered bucket approach to privilege review? As part of the mandatory ediscovery meet and confer sessions contemplated by Rule 26(f), parties could agree that email and other documents sent to or from certain custodians should be considered presumptively privileged, and hence sequestered in the privilege bucket without further review or production. All documents in the possession of some custodians (such as certain in-house legal officers) may be so likely to be privileged that they too should be held as privileged without further review or production. Combining these limitations with date restrictions or keyword searches may also assist with locating documents that should be considered off-limits as privileged (absent, of course, any previously agreed upon triggering events). Iterative sampling of the documents flowing into the bucket — in order to identify and reduce false positives — would be important to the overall integrity of the process and to developing the kind of trust required to make the sequestered bucket approach work. This approach envisions that the parties agree upon a sampling protocol that each will apply to their respective documents. It also envisions that the parties will make appropriate representations that the screen is functioning as intended. Additionally, the parties could agree upon a sampling protocol to be applied by a designated third-party. Ultimately, the conditions under which documents flow into this sequestered bucket would become the functional equivalent of each party’s respective privilege log, all of which will have been the subject of transparent discussion and agreement as part of the Rule 26(f) process.

The most **fundamental savings** are the **costs of manual, document-by-document privilege review**; production of redacted documents; **creation of privilege logs**; **defending challenges** to the sufficiency of a traditional log; and **defending the documents** posted to it.

To achieve the fee and cost-savings contemplated by this new approach, the parties will need to resist the urge to take the sequestered bucket off the shelf and demand traditional review and logging of documents. This underlines the importance of the dialogue and agreements serving as the basis for the inputs to the sequestered document collection. That said, there will be times when litigants have a legitimate need to test certain documents within the collection, with possible redacted documents being produced. They should anticipate and plan for such eventualities with as much detail and advance agreement as possible, including limiting the testing of documents to certain custodians, certain timeframes and keyword searching limited to certain events, together with additional sampling designed to test the effectiveness of the targeted searches. Allowing parties the option to trigger further review of the presumptively privileged documents likewise builds the trust required to make the sequestered bucket approach a viable option.

### **The New Approach Protects Your Budget**

As described above, the savings inherent in the sequestered bucket approach should be immediately apparent. The most fundamental savings are the costs of manual, document-by-document privilege review; production of redacted documents; creation of privilege logs; defending challenges to the sufficiency of a traditional log; and defending the documents posted to it. In the best, and not entirely unrealistic scenario, the agreed-upon privilege protocol functions acceptably without modification or additional attention. When a case settles early, neither side has reason nor incentive to revisit the protocol. When the case proceeds, the protocol should weather reasonably well. If fact witness testimony, produced documents and expert and other investigations do not suggest that important, unprivileged documents are trapped in the bucket and are worth pursuing, there is no need to revisit the protocol.

Thus, in this best scenario, no information disclosed or uncovered in discovery or ensuing investigations causes either side to believe that documents they care about (and believe they are entitled to) have been withheld from them by virtue of the sequestered approach. Put differently, the information obtained in discovery and investigation provides reasonable assurance to each side that the negotiated and agreed privilege screening is functioning appropriately and that, in any event, there is insufficient basis to believe the likely benefits of shaking documents loose from the bucket justify the costs.

Moreover, in this ideal scenario, there are no letter writing campaigns; meet and confer sessions; motions or cross-motions; affidavits; amended or supplemental privilege logs; documents submitted for *in camera* review; oral argument; discovery delays pending orders on motions; onerous deadlines to comply with orders; motions for reconsideration; or costs or sanctions assessed against the losing party. Given all this, the point becomes clear: The bottom line cost savings of this proposal is both quantifiable and significant. In this best case scenario, parties will curtail privilege review costs early in the litigation process via a thoughtfully planned and bold agreement.

But, what are the costs if either side believes that the unprivileged documents it cares about are caught in the bucket or otherwise questions whether the protocol is functioning satisfactorily? The short answer is that both sides will still be ahead in their efforts to conserve the litigation budget. For one, the parties agreed to the search and sequestering protocol, presumably with court blessing. Accordingly, they have a record of cooperation and a mutual goal upon which to build. Allegations of misconduct and the divisive, diversionary and costly motion practice that accompany such allegations are not an issue. One party or both have determined that the protocol may be functioning to their disadvantage; one party or both may want the protocol revisited and the documents contained in the sequestered bucket subjected to additional scrutiny. This can be done, however, in cost-effective ways that the parties will have contemplated and provided for in their earlier agreement.

Therefore, under the sequestered bucket approach, even if litigants eventually agree to some form of document-by-document privilege review with or without the creation of traditional privilege logs, the review at issue should be a reasonably manageable, materially smaller subset of the review that the parties would have been obligated to undertake anyway. Also, a challenge to the documents posted to any resulting log may be deterred because documents that are related by specific criteria and are manageable in number will have more indications of privilege or work product protection that can be provided to the opposing side.

Of course, if the parties can't resolve concerns that relevant, unprivileged documents lurk within the bucket, they also save costs by bringing the matter to the court in a much more thoughtful manner — one that is almost guaranteed to garner the appreciation of the bench. Against the backdrop of a collaborative process and the parties' respective proofs of the costs and likely efficacy of the privilege review requested, the court should be much more likely to fashion an order proportionate to the amount at issue in the litigation or entertain cost-shifting, as appropriate. This may be especially important in asymmetrical litigation matters, in which one party is in possession of large volumes of data to be reviewed, while the other has relatively small volumes. For example, in most class action cases involving product liability, shareholder suits or antitrust violations, one representative class plaintiff is named. Document requests and depositions of these representatives frequently demonstrate that the class representative has little knowledge of the case and rarely has any documents other than the transactional documents that evidence the purchase of (for example) the product or shares of stock at issue. In such cases, corporate defendants have a much greater burden of review and production, and early assistance from the court either in connection with the parties' own efforts under Rule 26(f), or via the protective provisions of Rule 26(b)(2)(C), may prove helpful.

## When a **case settles** early, neither side has reason nor incentive to **revisit the protocol**.

### The New Approach Protects Your Privilege

Having proved to be protective of your company's litigation budget, does the sequestered bucket approach safeguard privileged and work product protected documents? The answer is yes. In fact, this approach is potentially *more* protective of privilege than the traditional privilege review and production protocols currently employed by litigants. And it is certainly more protective than the blanket production of documents without any privilege review contemplated by "quick peek" or Federal Rule of Evidence 502 approaches.<sup>5</sup> Importantly, under the sequestered bucket approach, presumptively privileged documents are not produced without a triggering event. Any documents reviewed as a result of that triggering event would be a discreet and smaller subset of all those in the bucket, thereby helping to ensure an attentive review.

The most fundamental protection, however, is the agreed-upon protocol or "input criteria" that is used to justify placing documents in the sequestered bucket. The

mutually-defined protocol protects against inadvertent disclosure *and* any argument that disclosure constitutes waiver, because the agreement reflects thoughtful attention to the latest search technology, is tested and its results sampled, and is explainable, defensible and approved by the court. With this protocol, the parties have agreed upon a reasonable standard of care to be applied to their efforts to prevent disclosure of privileged documents. Some privileged documents will inevitably evade the screen and may even elude subsequent review procedures, just as they evade current screens and review procedures. Unlike the current situation — where litigants facing waiver allegations must demonstrate that they took reasonable steps to prevent disclosure — the protocol establishes that reasonable steps were taken from the very beginning of the process.

Separate from the search protocol and as part of the negotiated agreement, the parties will need to address the clawback of privileged documents. While the protocol will establish that the litigants took reasonable steps to prevent disclosure, a clawback agreement will define the

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parties’ obligations for documents that are inadvertently disclosed. Consistent with the desire to reduce meaningfully the portion of the litigation budget consumed by privilege review while also protecting privilege, the parties’ agreement should broadly provide for the return of privileged documents, without imposing extensive procedural hurdles or burdens of proof. To do otherwise threatens to undermine the efficiencies and cost savings inherent in the sequestered bucket approach.

### **Shake Documents Loose, Produce a Log**

There may come a time, even under this new approach, when a document-by-document privilege review becomes necessary, followed by the production of a traditional privilege log. This may occur, for example, because one of the negotiated triggering events is invoked by a party (thereby allowing that party to “shake documents loose” from the bucket), or because documents

that were not sequestered are later affirmatively reviewed or encountered during the course of first pass relevancy review. What kind of agreement should parties seek regarding the form of such a log?

Ordinarily, traditional privilege logs contain standard “biographical information” about privileged documents so that parties can assess the claim of privilege or work product protection at issue. To that end, logs often contain columns for production numbers; the date, author and recipients of the documents; the privilege claimed (often with an indication of whether a given document has been redacted or fully withheld); and a brief description of the document that, ideally, is detailed enough to be helpful in assessing the claim of privilege, but not so detailed that privileged content is revealed.

This kind of biographical information is, for the most part, fairly straightforward to provide for standalone, non-email documents. Due to the nature of its formatting, email (and other similar communication forms, such as instant messaging transcripts) can be more challenging to log. Dates, authors and recipients often shift over the course of a typical email exchange (or “thread”), with privileged portions of text appearing and reappearing over the course of the entire communication. Fortunately, most email threads that implicate privilege involve the same general theme or topic, which has allowed attorneys over the years to log the gist of the entire email thread, rather than surgically logging only those portions of the thread that are privileged. To do otherwise would require unified email threads to be broken into their individual component parts (or discussions), which would then need to be reviewed and coded separately by document review teams for privilege purposes. This would have the practical effect of multiplying many times over the already huge document volumes at issue in even modest civil litigation matters, and third party service providers would have to change fundamentally the way email documents are processed and “served up” for review by document review teams.


At least one recent memorandum order clarifying a prior discovery ruling concerning the logging of privileged email notes seems to require this extra work. In the *Rhoads* case,<sup>6</sup> the court clarified that entire email threads could *not* properly be listed as a single entry on a privilege log, but rather in order to preserve individual instances of privilege, each independently privileged component of a larger email thread must be listed separately on the log. We believe such a requirement should *not* be agreed to by parties as part of their negotiations concerning privilege review, as such a requirement would impose needless and sweeping burdens and costs on litigants and their counsel. Rather, as with the sequestered bucket approach itself, par-

ties should proceed with common sense and cost containment in mind. For example, a privilege clawback agreement should be put in place, allowing the parties to request the return and destruction of any documents that slip through either the sequestered bucket process or triggering event reviews. Redaction should be preferred over the full withholding of privileged documents, so that the privileged portions of documents can be reviewed in the context of earlier email discussions within a single email thread. And agreements can be reached for listing the author and recipients of email threads (including, for example, agreeing that the names of people from the top-most email thread will appear on the log, with the names of any attorneys or other legal agents appearing below the top-most thread indicated appropriately).

Finally, as suggested before, do not be afraid to bring thoughtful, early disagreements to the bench for resolution. Often overlooked, Federal Rule of Civil Procedure 1

makes clear that all the rules — including those governing discovery and privilege — should “be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding.” Judges have an obligation to assist parties with such worthy goals. Although late filed or “back end” motions over discovery disputes or sanctions are often met with disfavor, getting judges involved early with the blessing of discovery and privilege protocols or the resolution of issues surrounding proportional or phased discovery — either at Rule 16 conferences or before — are much more likely to elicit favorable responses from the court. This is especially true when the parties are able to show that they have engaged in good faith, collaborative efforts to preserve clients’ financial and legal resources.

### Protecting Privilege

Times are changing rapidly and the same technology that is making business more efficient is also costing companies more in litigation, both in actual monetary terms and in their ability to maintain rights for fair litigation and proportional discovery. In addition, data volumes continue to increase, and litigants and the courts are becoming increasingly weary of allowing “discovery for discovery’s sake” to eclipse the merits of cases. By entertaining and using techniques like the sequestered bucket approach to privilege, parties to civil litigation matters can protect their budgets and their privilege while refocusing their efforts toward resolving cases on the merits. This can only be a positive development for litigants and the civil justice system as a whole. 

Have a comment on this article? Email [editorinchief@acc.com](mailto:editorinchief@acc.com).

### NOTES

- 1 Fed. R. Civ. Proc. 26(f)(3)(C) and (D).
- 2 “Final Report on the Joint Project of the American College of Trial Lawyers Task Force on Discovery and the Institute for the Advancement of the American Legal System” at 2, 12 (Rev. Apr. 2009), available at [www.actl.com](http://www.actl.com).
- 3 *See, e.g., Spieker v. Quest Cherokee, LLC*, No. 07-1225-EFM, 2008 WL 4758604 (D. Kan. Oct. 30, 2008) (discussing proportionality and phased discovery and noting the disproportionate costs associated with review for both relevance and privilege).
- 4 The Sedona Conference “Cooperation Proclamation” at 1 (July, 2008), available at [www.thesedonaconference.org](http://www.thesedonaconference.org).
- 5 Rule 502 allows courts to enter orders limiting privilege waiver in current and future federal and state proceedings. Although seen as offering protection for quick peek arrangements, it is impossible to claw back from opponents the knowledge gained by review of privileged documents, leaving a place for more protective methods such as the sequestered bucket approach.
- 6 *Rhoads Indus., Inc. v. Building Materials Corp. of Am.*, 254 F.R.D. 238 (E.D. Pa. 2008).

## ACC Extras on . . . Reducing Ediscovery Cost

### ACC Docket

- *Corporate Strategies for Reducing Ediscovery Costs (Jan/Feb. 2008)*. In-house attorneys figure out ways to balance compliance with the cost of thorough reviews and create strategies that save the legal department money in the process.  
[www.acc.com/docket/edcosts\\_jan08](http://www.acc.com/docket/edcosts_jan08)
- *Streamlining Ediscovery Costs (July/Aug. 2005)*. A guide that helps you reduce ediscovery costs.  
[www.acc.com/docket/edcosts\\_jul05](http://www.acc.com/docket/edcosts_jul05)

### Program Materials

- *Proactively Managing Electronic Discovery: Challenges for Small Law Departments (Oct. 2008)*. Explore how a small law department can determine the best records retention and management policy in order to efficiently respond to inevitable ediscovery requests. [www.acc.com/sl原因w/ed\\_oct08](http://www.acc.com/sl原因w/ed_oct08)
- *904 – 10 Tips for Reducing the Costs of Litigation (March 2006)*. In-house litigation experts share their top 10 ways for doing more with less and achieving successful results for your client.  
[www.acc.com/904/10tipslit\\_mar06](http://www.acc.com/904/10tipslit_mar06)

ACC has more material on this subject on our website. Visit [www.acc.com](http://www.acc.com), where you can browse our resources by practice area or use our search to find documents by keyword.

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