Privilege Considerations in Second Requests

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The process of collecting, reviewing, and producing documents in response to a Second Request can be time consuming and resource-intensive. Of the many challenges involved, balancing the need to quickly and accurately review huge volumes of data while also correctly identifying and cataloging privileged documents, particularly the truly critical or sensitive communications that keep attorneys up at night, has traditionally been one of the most difficult.1

Achieving this goal is complicated by the pressure under which attorneys must operate. While a Second Request’s eDiscovery obligations alone impose an immense burden, attorneys are often simultaneously handling myriad other related tasks that make it even more difficult to focus their time and attention on these issues. Advances in technology-assisted review systems are helpful in this regard, but have typically proven more useful as a means of reducing the size of data sets, discarding non-responsive data, or quickly identifying and prioritizing potentially responsive content. Identifying privileged documents often entails a more labor-intensive combination of technology and human judgment.

Heightened Agency Focus on Privilege

With the antitrust agencies’ increased focus on timeliness and accuracy, exemplified by the release of the Department of Justice’s updated Model Timing Agreement in December 2018 and its accompanying comments, these challenges have become even more acute.2 Through its Model Timing Agreement, the DOJ has further increased incentives to expedite document productions, stating explicitly that it expects “faster and earlier productions of documents” in return for reducing burdens on parties in other areas, such as limiting the number of custodians, seeking fewer depositions, and shortening the timeframe from substantial compliance to a decision.3 At the same time, concerned with what it perceives as “gamesmanship on privilege issues,” the DOJ has included a number of provisions that necessitate even greater accuracy and efficiency in making privilege determinations if parties wish to avoid delays.4

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1 The term “privilege” as used in this article refers broadly to any legal principle, such as attorney-client privilege or work product protection, which entitles a producing party to withhold documents from production. See Fed. R. Evid. 502(g) (defining attorney-client privilege as “the protection that applicable law provides for confidential attorney-client communications” and work-product protection as “the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.”).

2 U.S. Dept’ of Justice, Antitrust Div., Division Update Spring 2019—Merger Review Reviewed, www.justice.gov/atr/division-operations/division-update-spring-2019/merger-review-reviewed. In March 2020, in response to the COVID-19 pandemic and in anticipation of additional time that may be needed to review transactions, the DOJ published an updated Model Timing Agreement that gives the DOJ additional 30 days for review after compliance with a Second Request (for a total of 90 days instead of the 60 days in the December 2018 model). This change does not affect the provisions related to document productions and privilege logs discussed here.

3 Id.

4 The DOJ also stated in recent comments that it “will soon announce a standard privilege protocol for all parties producing documents.” See id. As of the publication of this article, these guidelines have not yet been finalized and it is not clear which topics will be covered.
Under the DOJ’s updated Model Timing Agreement, a party cannot certify compliance for 30 or 45 days (depending on the review process employed and the custodian priority grouping) from the date of its final document production. There is an exception for “de-privileged” documents that were initially withheld and then later determined to not be privileged, which can be produced up to ten or twenty-five days before the compliance date. However, if a subsequent production of such documents for a given custodian accounts for more than five percent of the total documents produced for that custodian across all productions, a party must then wait thirty or forty-five days from the date of that follow-on production to certify compliance (essentially, adding an additional twenty days to the compliance timeline). 

The recently updated Federal Trade Commission Model Timing Agreement is less explicit regarding similar topics and is not radically different from prior versions, but does still highlight the importance of managing privilege effectively from the outset of a matter. In short, parties face pressure to be both faster and more accurate than before. The DOJ has explained its rationale for implementing the new provisions as follows:

The Division is committed to eliminating gamesmanship on privilege issues. The Division respects the attorney-client privilege and the work product doctrine, but too often parties game the process, withholding large numbers of documents as privileged, only to de-privilege and produce many of these documents much later in the process, often on the eve of a particular deposition. In the Division’s experience, while some of the de-privileged documents might be close calls, most never should have been withheld in the first place. The new model timing agreement endeavors to protect the Division from this practice of over-withholding. This will require parties to be pro-active, organized, and diligent in their review of potentially privileged materials.

Context of the 5 Percent Threshold: Culture of Caution

The DOJ likely assumes that if a party makes a good-faith attempt from the outset to accurately identify and withhold privileged documents, there will be fewer documents later reclassified and the 5 percent barrier will not be crossed. However, it may be much easier to exceed this threshold than the DOJ assumes, especially as the new provisions only require one custodian to exceed the limit to trigger the penalties.

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6 The FTC Model Timing Agreement requires parties to “produce substantially complete document productions” for priority custodians at least thirty days before certifying substantial compliance. Notably, the model agreement does not provide much clarity as to when document productions for a given custodian would be considered “substantially complete.” While the FTC language indicates that only a limited number of documents can be produced inside of the thirty day window, parties must rely on a combination of discussions with FTC staff and past experience to determine where these boundaries lie. Fed. Trade Comm’n, Model Timing Agreement (2018), https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_2-27-19_0.pdf.


8 In other words, delay penalties would technically be triggered if a producing party is in compliance for 19 out of 20 custodians and exceeds the 5% threshold by only a handful of documents for the 20th custodian. As a practical matter, it may not be DOJ’s intent to enforce every minor breach. However, it may be difficult to receive such assurances via written modifications given the DOJ’s guidance in this area: “The Division considers the provisions in the model to be standard provisions, and does not intend to deviate from them under most circumstances. Extended negotiations over deviations also would run counter to the Division’s goal of streamlining and shortening the negotiations over timing agreements. The Division recognizes, however, that the individual circumstances of a transaction may warrant deviation in some cases. Parties should be aware, however, that substantial deviation will require approval from the Deputy AAG in charge of the investigation.” Id. at 5.
More than simply needing to reduce “gamesmanship” to meet these guidelines, parties may find it necessary to revamp their approach to eDiscovery. It is therefore worth re-examining traditional workflows and approaches to better understand where inefficiencies exist and how privilege review and logging can be improved. While this is particularly important when operating under the terms of the DOJ’s Model Timing Agreement, doing so will yield benefits in any Second Request.

Given resource and cost constraints, many law firms rely on large numbers of junior attorneys or external providers to review and produce documents. To avoid mistakenly producing privileged documents and to make sure productions can be completed quickly, these less-experienced reviewers are frequently instructed to take a broad view of privilege, with more experienced attorneys then finalizing these decisions after the non-privileged documents have been produced. In essence, the strategy is to “kick the can down the road” and deal with potentially privileged documents at a later time, often in parallel with the completion of a privilege log.9

In a vacuum, this approach may make sense on any given document. For an individual attorney deciding whether to mark a particular document as privileged, the negative consequences of making the wrong call on that document far outweigh the risk of over-designating.10 As the DOJ has noted, when played out across all reviewers and the full collection of “potentially privileged” documents, this phenomenon can result in large document productions consisting of de-privileged documents being completed just prior to the parties’ certifying substantial compliance.11 Moreover, these less precise approaches can lead to challenges to privilege logs or questions regarding the sufficiency of previous productions, all of which can further increase delays and tie up valuable law firm resources.

This is even more pronounced where a custodian has a low number of responsive, non-privileged documents, in which case a relatively small number of de-privileged documents may exceed 5 percent of the total produced documents for that custodian. This is particularly common for (1) custodians who occupied a role for only a small portion of the Second Request date range and simply do not have a large number of documents to collect or (2) attorney custodians who have a lower number of non-privileged documents to produce.

Lastly, the manner in which many eDiscovery workflows are structured in Second Requests adds to the likelihood of the new delay penalties. Attorneys often initially withhold entire document families from production if any single document contains privileged content, producing these families only after the individual privilege assessments are finalized and logged. This approach is helpful in terms of avoiding both claw backs and messy overlay productions, as the disposition of the entire family is decided at the same time. The subsequent production of these non-privileged family members, never thought to be privileged in the first place, can often on its own exceed the 5 percent threshold.12

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9 Although every firm may not necessarily follow this exact approach, and many will implement firm-specific processes, this is a commonly followed approach.

10 As one court has noted, “There is no reward for doing a good privilege log. It’s painful. It results in these huge documents. No one has any incentive to be responsible [on] a privilege log as opposed to [being] overinclusive. Junior associates or paralegals get tasked with it. They screw up if they don’t log a document, not if they come to the partner and say, ‘Really, this one shouldn’t be logged.’” Klig v. Deloitte LLP, Civ. A. No. 4993-VCL, 2010 WL 3489735, at *5 (Del. Ch. Sept. 7, 2010).

11 See DOJ, Voluntary Requests and Timing Agreements, supra note 7, at 4.

12 Assume, for example, a data set in which (1) 10% of responsive documents are privileged; (2) privileged documents and their non-privileged family members are initially withheld from production; and (3) roughly one-third of these withheld families consist of non-privileged documents that will ultimately be produced, all of which are reasonable assumptions. Even if every single privilege decision was later confirmed as correct, the production of the non-privileged family members alone would exceed the 5% threshold and trigger delays.
Impact on Behavior

I am aware of no publicly available data regarding the extent to which the DOJ's Model Timing Agreement is being used or its impact on parties' behavior, including whether the penalties discussed here are potentially discouraging its use. However, there has been an enhanced focus on privilege issues from the agencies in general (including greater post-production scrutiny on privilege logs), as well as a preference to stick to the form language of the model agreement when it is used.

As a result, it is increasingly important for antitrust counsel to fully understand both the added burden involved in meeting these updated requirements and the potential costs to their clients for failing to do so, when determining whether to enter into a timing agreement (especially in matters before the DOJ). Parties may find that the typical cost/benefit analysis has shifted and decline to enter into a timing agreement in situations where they formerly would have. Conversely, if parties do enter into one that incorporates the new provisions, they will need to understand how best to meet these requirements.

A Way Forward

Even with the advent of new technologies that can substantially reduce data populations, it is likely not an option for most law firms to completely eliminate their reliance on those junior associates or external vendors that do much of the heavy lifting. Nor is the culture of caution surrounding privilege likely to drastically change anytime soon, especially in the context of high-stakes Second Requests.

Instead, tackling this problem and meeting heightened expectations requires practitioners to develop better methods of identifying potentially privileged documents and then correctly reviewing and logging them in a compressed timeframe. These tasks can then be allocated to more skilled or experienced attorneys who, trained on the specific privilege concepts inherent to Second Requests and armed with more useful insight into the data sets under review, are able to make final, accurate decisions earlier in the process. The remaining team members are then freed up to focus on other tasks, thus maintaining productivity while minimizing the risk of over-designation.

Understanding Privilege in Second Requests

Implementing these improvements requires in-depth knowledge of eDiscovery workflows as well as a nuanced understanding of how to approach privilege in the context of Second Requests. Communications relating to both the merger itself and the merger clearance process often involve a multitude of parties (acquirer, target, M&A counsel, antitrust counsel, economists, bankers, deal advisors, PR firms, etc.) that present privilege issues not found in other contexts. In addition to implicating joint defense, common interest, and attorney work product privileges, the decision of whether privilege applies can change based on the date of the communication, the changing role of each party involved, the combination of parties involved, and the document's subject matter.

Developing a comprehensive understanding of the different parties that affect privilege decisions, including the role each plays and how privilege will be applied in different situations, prior to beginning the document review process becomes incredibly important. Doing so enables attorneys to better identify the most likely privileged documents in advance and make more informed decisions during review, facilitating a quicker and more accurate eDiscovery process. This is especially helpful in a situation where it is not an option to simply classify everything as privileged and try to clean up the mess later on.
Most attorneys supervising a document review understand this at some level. They will often create a list of law firms, in-house counsel, and economists for their teams and cover some basics relating to the different types of privilege during training. They may also run some basic search terms in an effort to pre-identify potentially privileged documents. This is likely sufficient in a typical document review. However, this approach can fail to account for scenarios that occur in many Second Requests and require more upfront planning and coordination.

The following describes a few of the most common of these situations. Understanding and addressing each can be crucial to a party’s ability to correctly identify privileged materials, limit the extent of over-designation, and adhere to expedited production schedules.

It is important to note that case law regarding privilege is sparse and/or unsettled in many of the areas discussed here. Parties will need to reach their own conclusions on where the dividing line is found in each. The key point is that these scenarios are common to Second Requests and should ideally be identified and discussed in advance to ensure some level of accuracy and consistency.

- **Board Members.** Emails relating to a pending transaction and touching on potentially privileged topics will often involve members of a company’s board of directors, who frequently use their primary company or personal email address for these communications. In such instances, it is common for attorneys to come across seemingly unrelated third-party email domains and quickly assume a document is not privileged.

  Practitioners should seek to compile the necessary background information on the company’s board in advance and educate reviewers on how to approach situations in which they may be involved. In addition, once this information is known, various analytical tools can be used to pre-identify communications involving these individuals and assign them to more experienced resources.

- **M&A versus Antitrust Counsel.** The distinction among different practice groups can be used to structure more efficient workflows and enable quicker and more accurate decisions. This is particularly true where the same law firm provides both M&A and antitrust counsel to a party and blanket rules cannot be created for the disposition of documents based solely on the firm involved. While documents involving antitrust counsel will be presumptively privileged in most situations, the analysis of documents involving M&A counsel can be much more nuanced. Although internal communications between counsel and client are very likely to be privileged, reviewers will also come across a large number of documents between M&A counsel for both parties in which they discuss the terms of the transaction or share draft merger agreements, many of which are non-privileged arm’s-length negotiations. M&A counsel for the two parties may also be involved in communications regarding antitrust issues or other topics that fall under the terms of a Joint Defense Agreement or otherwise fit under the common interest rule.

  In addition to generally being aware of each of these situations, practitioners can reduce errors and inconsistency by using information relating to an attorney’s role, the participants in the communication, and the date it took place to more accurately identify and categorize these documents. Further, mapping out each of these scenarios in advance and creating baseline rules for how to approach different situations can significantly improve reviewer efficiency and accuracy.

- **Documents Prepared at the Request of Counsel.** When antitrust attorneys ask clients to prepare certain information or analyses to assist in their advocacy, they’ll typically recommend that in-house counsel stay involved in these efforts and that any communications or documents are clearly identified as being prepared at the request of counsel. In practice, many of these tasks
are delegated to non-attorneys who forget to include counsel on their communications or fail to label these documents correctly. To an unaware reviewer, these can easily look like ordinary course business communications, especially when they are mixed in with large volumes of day-to-day non-privileged communications involving the same employees.

Attorneys can take a few steps to address this challenge. One is to make sure they more strongly emphasize to clients the importance of including attorneys on these communications and then labeling them properly. Ideally, this can minimize the number of documents that are likely to be missed in the first place. Knowing that some number of documents will still slip through the cracks, counsel should work with their clients to understand who else might have helped in these efforts. Reviewers can then be trained on how to spot these communications and use the collected information to better search for and flag relevant documents during the applicable time period.

Without this, reviewers will almost surely take an all-or-nothing approach—either assuming privilege is waived in all instances in which a third party is involved or taking an overly cautious approach and blindly treating all documents with counsel as privileged.

- **Discussions Between Merging Parties.** The merging parties and their law firms will communicate on a host of different topics both before and after the signing date. Some of these communications will be arm’s-length negotiations relating to the transaction. Others will relate to fairly clear-cut joint defense/common interest topics and are easily identified as privileged. There are then a number of other topics that fall into a grey area.

  For example, parties may communicate regarding draft press releases or public statements, post-signing integration plans, or non-antitrust regulatory filings, each of which requires additional consideration prior to beginning the review. Counsel should think through these issues, specifically which types of party-to-party communications are likely to be privileged and, early in the process, establish ground rules regarding how to approach them. Without doing so, it can prove very difficult to maintain consistency across different decision-makers.

- **Non-Attorney Advisors.** It is common for merger-related communications to involve other external advisors, such as economists, bankers, public relations firms, accountants, or M&A consultants, in addition to outside counsel. Depending on the circumstances, the role of those advisors, and the subject matter of the document, privilege may or may not be waived by their presence. While each law firm may take a slightly different approach to these decisions, it is important to identify these companies upfront, ascertain the role they played, and establish some baseline rules to follow in terms of when documents will be privileged. Without this, reviewers will almost surely take an all-or-nothing approach—either assuming privilege is waived in all instances in which a third party is involved or taking an overly cautious approach and blindly treating all documents with counsel as privileged. In addition to establishing advanced guidance, this information can also be used as a quality control input, verifying that no documents involving these advisors are mistakenly overlooked.

- **Privilege in Non-U.S. Jurisdictions.** Many non-U.S. jurisdictions apply a more narrow form of the attorney-client privilege, and in some cases (in particular, in Europe) exclude communications from in-house counsel to the business from the scope of privilege.13 As a result, parties in cross-border merger investigations may be compelled to produce evidence to a non-U.S. agency that would qualify as privileged under U.S. law. Thankfully, the FTC and DOJ have stated that such disclosures would likely not be considered “voluntary” and therefore do not constitute a waiver of the attorney-client privilege, preventing the U.S. agencies from obtaining information that

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13 See Case C-550/07-P, Akzo Chemicals Ltd v. Comm’n, 2010 E.C.R. I-8301 (holding that in-house counsel are not independent from their employers to the extent required for legal professional privilege to apply in EU competition law proceedings).
would otherwise be protected. However, guidance from FTC/DOJ suggests that to prevent waiver or the accidental sharing of privileged information among agencies, parties should identify and mark all such materials as privileged under U.S. law when producing them in another jurisdiction.

This step can add another layer of complexity to privilege review in cross-border investigations. In these situations, it may be more efficient to begin flagging such documents during the Second Request process, rather than revisiting the subject later. One approach that can work particularly well is to focus on identifying documents involving outside counsel that would typically be privileged in non-U.S. jurisdictions, as these often comprise a smaller portion of all privileged documents and can be more easily identified via analytical tools. The inverse of this set of documents could then be produced outside the United States with the appropriate identifiers. While the best approach will depend on the parties’ specific circumstances, including the jurisdictions involved, painstaking and duplicative work can be avoided if these issues are considered at the outset of the eDiscovery process.

- Corporate Structures and Prior M&A Activity. Parties faced with a Second Request often have complicated corporate structures and are regularly involved in M&A activity. In many situations, an acquired company will continue to operate under its original name or use its existing email domains while IT systems are being integrated. This can present difficult privilege scenarios. If reviewers are unaware of these corporate relationships, they may mistakenly assume they are coming across unrelated third parties that waive privilege. Simply knowing about these corporate relationships and past acquisitions may not be enough. If the transactions occurred during the Second Request date range, the data set under review may contain a mix of pre- and post-merger communications between the two companies. Although ordinary course pre-merger communications between two independent companies are likely not privileged, those relating to the transaction may implicate some of the issues discussed above, while post-merger the acquired company would now be viewed as the “client” for purposes of privilege.

Working with a client to understand its past transaction history can make it significantly easier for reviewers to understand these corporate relationships and to sort through these issues ahead of time. Once this information is known, rules can then be established for how to approach privilege decisions involving related entities.

While this list is not exhaustive, it is indicative of the types of issues that arise on many Second Requests. Understanding the nuances of each is therefore key is to establishing clear and workable rules that can ensure privilege is protected while minimizing the number of de-privileged documents.

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Building a Better Framework

While the situations outlined here can make privilege determinations more complex, they become especially problematic if not planned for in advance. Fortunately, many of these issues are common across Second Requests, regardless of industry or company size, and standard eDiscovery processes can be created to address them.

As a starting point, it can be beneficial to brief eDiscovery providers on substantive issues and overall strategy in greater detail. Their personnel often have the technical or process expertise to address these challenges, but their effectiveness may be limited if they lack a complete understanding of counsel’s strategies and objectives. For example, while minimizing over-designation or late productions is important for every custodian, counsel may understand that there are certain custodians, such as likely deponents, for which the agencies will expect particularly clean productions and be less tolerant of mistakes. By understanding these nuances, eDiscovery providers can adjust their own approaches or develop strategies to better align with counsel’s objectives.

Further, practitioners should seek to do the following at the outset of each Second Request when preparing for eDiscovery:

- Identify and compile the information, including companies, law firms, dates, attorney names, and key events, that will affect privilege determinations in the areas discussed here. Ideally, standardized information sheets and methods of collecting this data can be created to streamline this process and ensure thoroughness.
- Determine how each of these situations should be handled and the factors that will affect privilege decisions, including when questions should be escalated to more senior attorneys. Without proper guidance, attorneys will take different positions on the applicability of privilege, especially as there are not always clear-cut answers to be found in existing case law. Thinking through these issues beforehand and creating a process will help ensure consistency and prevent over-designation.
- Leverage eDiscovery technology to identify documents that are likely to implicate these privilege issues and assign them to a dedicated team that is well-versed in these areas. If the issues are understood and the necessary information has been collected, a relatively well-designed combination of domain analysis, date filters, text searches, and other analytical tools can often be used to locate the most critical documents in a data set.
- Provide comprehensive training to the individuals conducting the document review on these privilege scenarios and how to use the information provided to make more informed decisions. Without proper guidance, it is very likely attorneys will take an overly cautious approach in each of these areas and struggle to maintain consistency with one another.
- Track, on a daily basis, the privilege percentages for each custodian to identify any trends or red flags. While this is essential when operating under a DOJ Timing Agreement and the 5 percent threshold is in danger of being approached, it is critical to ensuring an efficient privilege review on any Second Request. By closely tracking this information, parties can quickly adapt to changing circumstances, including rearranging workflows to complete privilege assessments for certain custodians, and in particular those that have been identified as likely deponents, at an earlier point in time and avoid delays in certifying compliance.

Conclusion

With data volumes growing at an exponential rate, and increased expectations from the antitrust agencies regarding the eDiscovery process, managing privilege in Second Requests is an
increasingly challenging task. Approaches that were effective (but inefficient) in the past may no longer be viable options. By following the steps outlined here and creating a framework for addressing the privilege situations common to Second Requests, practitioners can better allocate resources and more confidently identify privileged materials earlier on, even when faced with extremely large volumes of data or utilizing high numbers of less experienced attorneys. In addition to the obvious benefits of accuracy and consistency, this also enables parties to expedite productions while avoiding delay penalties or post-compliance challenges.