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Commentary: Tips for successful privilege review setup

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Kicking off a managed document review requires many steps, from the drafting of the review protocol to setting up the coding panel for review. Attorneys who have set up managed review projects are familiar with many of the components that make up the "readiness factor" for review kickoff. When your review encompasses privilege, that is by far one of the most important elements of your review and by that, also of your setup. So, what is the best way to get this setup?

When trying to get a review project off the ground and running in a short amount of time, the tendency is to compile a single list of legal names, terms, or domains that create—or make—privilege. However, looking only as far as these "Privilege Makers" begets problems down the road. A much better approach—one that saves time, money, and sanity for all—is to develop two additional lists at the outset of a review. One is a list of "Privilege Breakers", or names/terms/domains that would render an otherwise privileged document not privileged. The other is a list of 3rd Party Consultants whose communications might land somewhere in the middle of Privilege Makers and Breakers.

Privilege Makers

We always encourage clients to be as inclusive as possible when putting together a list of legal names, terms, entities, and domains that may trigger a privilege claim. We also encourage reviewers to immediately notify us of any newly identified legal names they discover during their review work, so the master list can be updated with those names. This list of legal names, terms, entities, domains and more makes up the set of potential Privilege Makers and are an integral part of the review process because they help identify documents that may be privileged. The more comprehensive that list, the more effective it will be in facilitating both the initial and 2nd level privilege review processes.

Privilege Breakers

Privilege "Breakers" are just as crucial to the privilege review as the Privilege Makers. Breakers are names, entities, domains, or terms that can make an otherwise privileged document or email thread no longer privileged. For example, an email with a law firm and attorney in the top of an email thread may make that email privileged, but if that email also includes a third party, such as opposing counsel, that clearly breaks the privilege. Typically, there are a number of Privilege Breakers, including 3rd party

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business partners, vendors, and even the opposing party or opposing party's counsel. All of these can be identified and utilized during a privilege review to quickly, efficiently, and unquestionably downgrade a document that would have otherwise been privileged.

3rd Party Consultants

Now that we've provided a brief overview of Privilege Makers and Breakers, let's discuss the 3rd party consultants and the role they play in a privilege review. A 3rd party consultant falls somewhere in the middle of the Privilege Makers and Breakers. Again, this can be a name, entity, term, or domain that does not create privilege on its own, but if present in an otherwise privileged document, might not break privilege either. An example of this may be a document, such as an email, where an attorney is discussing financial information in a case with an accountant. Although the communication between them may not be considered a direct attorney-client communication, the existence of the accountant alone, even as a 3rd party consultant, would not necessarily break privilege either. When a 3rd party consultant is present (in this case, the accountant), the privilege can extend to the 3rd party consultant. In such cases, the question then focuses on the purpose and overall intent of the document. Provided that the communication involves a privileged topic, the document would still be privileged, even though it involves a 3rd party consultant. By identifying such 3rd party consultants in advance (and throughout the review), you can help ensure that privileged 3rd party communications get identified for careful review and not considered Privilege Breakers by default. In addition, a 3rd party consultants list will help your reviewers determine which terms would be considered actual Privilege Breakers.

I hope that this provides attorneys with some helpful insight on what to consider when setting up the privilege portion of a managed document review project. Establishing these three separate categories of privilege terms at the beginning of a managed review will help the review and privilege log setup, improve coding accuracy, reduce QC hours, and minimize back-and-forth discussion with outside counsel about each new potential privilege term that pops up along the way. For a smoother, more efficient, and less costly managed review experience, attorneys should consider identifying and utilizing Privilege Makers, Breakers, and 3rd Party Consultant lists in their review setup process – and keep them updated as the review progresses. Even small adjustments to these lists of terms can make a big difference in correct privilege determination and overall success of your project.

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