Hidden in Plain Sight

You need to know the most common types of privilege asserted, what information should be included in the privilege log, and how to challenge the improper withholding of documents early in discovery.

Privilege Logs
Start With the Basics

By || **Jonathan A. Knoll**

any of us have dealt with defendants that improperly withhold hundreds or thousands of documents via a privilege log. These documents often provide a treasure trove of information vital to your client's case, so it's critical to have a solid game plan to counter any baseless assertions of privilege.

Review the privilege log first to see whether the identifying information is sufficient: Can you or the court determine whether the type of withheld documents and the circumstances surrounding their creation truly lend to privilege protection?[1]

Early on, request that the court enter an order laying out all the specific categories of information that must be included in a privilege log. This helps save time that otherwise might be wasted on challenging the sufficiency of the log itself and allows you to focus on the assertions of privilege for the withheld documents.

Examples of categories that should be in a log include: the custodian from whose file the communication or document was retrieved; beginning and ending Bates numbers; the document's date (such as the date an email was sent or the date a memo was created); the author or sender and recipients of the document; whether an author, sender, or recipient is in-house or outside counsel for the defendant corporation; the document's subject matter; the document type (email, email chain, attachment, hard copy document, notebook); the document's page length; and a detailed explanation of why the document is privileged (not just the privilege being asserted).[2]

Setting out these requisite categories at the start helps avoid situations in which a defendant simply omits certain information or makes blanket assertions of privilege. For example, courts have held that cursory descriptions such as "attorney communication" are inadequate to uphold a claim of privilege.[3] In circumstances when a party produces an inadequate privilege log, the withholding party may be subject to sanctions, including a finding that the party withholding the documents has waived any claim of privilege.[4]

Because several people often appear on any given communication, if the defendant will not agree to do so, also ask the court to require the defendant to provide a separate list identifying each person by name who appears on the log, along with respective job title and whether each person is an employee of the defendant or a third party.

Having the defendant list any document attachments separate from the primary email correspondence they were tied to is another good idea. This helps you ascertain whether the attachments, apart from the email itself, are privileged.[5]

Because reviewing assertions of privilege is fact-intensive, I suggest requesting that the defendant produce a document-by-document privilege log that identifies specific information about each withheld document so you have all the information necessary to assess the defendant's privilege claims.[6]

A defendant can object to producing a document-by-document privilege log if it can show that doing so would create an undue burden.[7] Even so, defendants still should provide a privilege log on an aggregate or categorical basis.[8]

Information for a categorical privilege log includes an aggregate listing of the withheld documents, the time periods encompassed by the withheld documents, a listing of the senders or recipients on the documents, and the privileges asserted by the defendant.[9]

No matter whether a court requires a document-by-document or a categorical privilege log, a defendant still must provide enough information to enable you and the court to determine whether the claimed privilege actually applies.[10]

The most common privileges that defendants assert are attorney-client privilege, which prohibits the discovery of confidential communications between an attorney and a client for the purpose of seeking legal advice, and the work product doctrine.

Attorney-Client Privilege

Courts narrowly construe this privilege because it runs contrary to the disclosure of discoverable information.[11] Most important, the privilege does not shield the disclosure of the underlying facts. For example, the privilege does not shield facts that are available from other sources (such as a company's financial information) just because they were communicated to a lawyer.[12]

Common communications ripe for attorney-client privilege challenges are communications involving in-house

counsel, communications involving non-attorneys, communications with third parties, drafts of documents, and public communications.

In-house counsel. The fact that an employee handling business matters also happens to be an attorney does not automatically shield his or her communications from discovery. Attorney-client privilege protects communications between corporate officers and in-house counsel, but it does not apply when in-house counsel performs "nonlegal work."[13] Examples include business communications involving business negotiations, product development, financial consultations, marketing, and business strategy or advice.[14]

However, communications "intended to keep the attorney apprised of business matters may be privileged if they embody an implied request for legal advice based thereon."[15] But in-house counsel can wear many hats within a company—even when communications involve both a business and a legal evaluation—so courts have held that "the business aspects of the decision are not protected simply because legal considerations are also involved."[16]

In assessing whether in-house counsel communicated in a legal capacity, it is important to determine "whether the task could have been readily performed by a non-lawyer—as when facts are gathered for business decisions" and "whether the function that the attorney is performing is a lawyer-related task such as: applying law to a set of facts; reviewing client conduct based upon the effective laws or regulations; or advising the client about status or trends in the law."[17] Carefully scrutinize documents involving counsel who hold other titles or nonlegal positions within a corporation, such as a president or vice president.[18]

A company cannot automatically hide documents or routine business discussions among business officers and employees from disclosure simply by copying or "CC"ing in-house counsel on a communication.[19] Otherwise, a corporation would regularly include an attorney on every email, document, or communication, granting it a runaround to the disclosure requirements.[20]

Have the defendant list any document attachments separate from the primary email correspondence they were tied to.

Non-attorneys. Courts have found that a claim of privilege cannot be sustained over a document when no evidence exists that an attorney was involved in the document's creation.[21] If a communication between non-attorneys does not transmit confidential communications between the client and an attorney undertaken for the purpose of obtaining legal advice, the communication is not privileged.[22]

Third parties. Correspondence that involves third parties cannot be withheld even if attorneys are copied on the communications. Sharing otherwise privileged information with a third party generally waives all claims of privilege.[23]

Document drafts. The mere drafting of documents, by itself, is not enough to warrant attorney-client privilege. For example, if counsel was merely acting as a "scrivener" rather than giving legal advice, the privilege does not attach to the document.[24] If a draft contains information that is business related or for some other nonlegal purpose, the document is likely discoverable.[25] For example, documents that are potentially discoverable include business-related draft bylaws or tax information and preliminary drafts of published data.[26]

Public information. Documents that contain public information should not be privileged.[27] Types of documents that should be produced are responses to news articles and media stories, since those are likely to contain a defendant's public or potentially public communications.[28] For example, public relations documents (such as draft press releases) may not be privileged because "handling publicity and dealing with the media are typically business concerns."[29]

Work Product Doctrine

For the work product doctrine to apply, the material in question must be a document that was prepared "in anticipation of litigation" or a trial by or for a party, or by or for a representative of the party.[30]

To satisfy the anticipation of litigation requirement, the party asserting privilege must establish that it reasonably believed that a lawsuit was likely to occur.[31] However, "simply the prospect of future litigation" does not grant work product protection.[32] It naturally follows then that materials assembled in the ordinary course of business are excluded under the doctrine.[33] For example, summaries of business transactions that were not specifically prepared in anticipation of litigation are not protected by the doctrine.[34]

Even when documents are protected by the doctrine, you can overcome the protection if you demonstrate a substantial need for the materials and an inability to obtain "equivalent

information without undue hardship."[35] Substantial need includes information essential to your case that you cannot obtain from another source, such as "test results that cannot be duplicated," "photographs taken immediately after an accident when the accident scene has since changed," and "contemporaneous statements taken from, or made by, parties or witnesses."[36]

The work product doctrine encompasses fact and opinion work product. Since opinion work product consists of an attorney's impressions or strategies, it can be "virtually undiscoverable," whereas fact work product is more likely to be discoverable.[37] The rationale is that "the work product doctrine is intended only to guard against divulging the attorney's strategies and legal impressions, [and] it does not protect facts concerning the creation of work product or facts contained within work product."[38] For example, the work product doctrine would not "preclude inquiry into the mere fact of an investigation."[39]

The Challenge Process

With limited time and resources to conduct discovery, engage in the privilege log review process as early as possible to ensure timely challenges and court rulings.

When you anticipate that a defendant will produce a privilege log containing thousands of entries, ask the court to enter a protocol to streamline the process for challenging privilege log entries. This will expedite the process, ensuring that the court has ample time to review and rule on the challenges and that you receive the improperly withheld documents as quickly as possible.

In one litigation I handled, for example, a defendant provided a privilege log with thousands of entries. The trial court initially required the parties to identify a small sampling of log entries that it would review. Following the ruling, the court appointed a special master to review and provide an initial ruling on challenged entries, and we could appeal the rulings to the trial judge.

Requesting a special master allowed us to engage in several rounds of privilege challenges without protracted meet and confers and briefing schedules. For each round, the special master reviewed a certain number of entries we submitted, with counsel for each party present at the review sessions (plaintiff counsel was excluded from the room when the special master reviewed the documents). The parties could make arguments and answer questions for the special master in real time, thereby allowing for quick rulings that could apply to similar entries and that would help us decide which entries to challenge or not to challenge in future rounds of review. When we successfully challenged claims of privilege, this process also sped up the time for withheld documents to be produced.

Request a special master to engage in privilege challenges without protracted meet and confers and briefing schedules.

Discovery can be time-consuming and contentious—understanding the fundamentals of privilege logs goes a long way toward streamlining the process.

Jonathan A. Knoll *is a partner at Cohen & Malad in Indianapolis and can be reached at jknoll@cohenandmalad.com.*

Notes

1. Fed. R. Civ. P. 26(b)(5) requires a party asserting privilege to "(i) expressly make the claim; and (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."
2. *See, e.g.*, *Novelty, Inc. v. Mountain View Mktg., Inc.*, 265 F.R.D. 370, 380 (S.D. Ind. 2009), *clarified on den. of recons.*, 2010 WL 11561280 (S.D. Ind. Jan. 29, 2010); *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 673 (D. Kan. 2005); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84, 88 (N.D. Ill. 1992).
3. *See, e.g.*, *United States v. Constr. Prods. Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996) (finding privilege log was deficient as it contained "a cursory description of each document, the date, author, recipient, and 'comments'"); *Felham Enters. (Cayman) Ltd. v. Certain Underwriters at Lloyd's*, 2004 WL 2360159, at *3 (E.D. La. Oct. 19, 2004) (finding simple descriptions such as "attorney report," "client inquiry," "payment," and "attorney communication" were not sufficient to support a claim of privilege).
4. *See, e.g.*, *Pueblo of Jemez v. United States*, 2018 WL 4773357, at *5 (D.N.M. Oct. 3, 2018); *Novelty, Inc.*, 265 F.R.D. at 381–82; *see also Stempler v. Collect Am., Ltd.*, 2000 WL 288377, at *2 (E.D. La. Mar. 15, 2000).
5. *See Am.'s Growth Capital, LLC v. PFIP, LLC*, 2014 WL 1207128, at *3 (D. Mass. Mar. 24, 2014) ("[A]ttachments which do not, by their content, fall within the realm of the privilege cannot be privileged by merely attaching them to a communication with the attorney.") (internal citation omitted).
6. *See, e.g.*, *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 71 (1st Cir. 2011); *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000); *Novelty, Inc.*, 265 F.R.D. at 380.
7. *See* Fed. R. Civ. P. 26(b)(5) 1993 Advisory Comm. Notes ("Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome

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