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Claiming Privilege in Discovery

Litigation and Dispute Resolution

What happens when discovery requests call for information that is protected by privilege? This issue has been the subject of increasing litigation in recent years. Accordingly, it is important for both in-house and outside counsel to understand their obligations.

Fed.R.Civ.P. 26(b)(5)(A) states as follows:

> *When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.*

Many states have adopted similar rules. Not so long ago, it was common to receive a discovery response that simply stated: "Objection. Calls for privileged information." Such a response is clearly unacceptable. The use of the word "expressly" in the rule contemplates that specific information will be provided. A party cannot simply determine by itself that material is exempt for production and discovery because of a privilege and fail to inform the other party that it is withholding specific information. [See, e.g., *Daigle v. City of Portsmouth* 131 N.H. 319 (1988).]

Where material otherwise responsive to a discovery request is withheld on the basis of the claim of privilege, sufficient information must be provided to the other side so that counsel can determine whether to challenge the applicability of the privilege. In the event of a challenge, the information in the privilege log should reduce or avoid the need for an in-camera review of the withheld documents. The best way to comply with the requirements of the rule and avoid the heavy sanction of privilege waiver is to submit a privilege log. The level of specificity required in the privilege log may vary depending on local rules, the complexity of the case and the number of documents at issue. In general, however, a privilege log should include: the date of each document, its author, the addressees, description of the type of document (e.g., email, memo, letter, etc.), a general description of the subject matter and identification of the privilege claimed with respect to that document.

When the documents at issue are electronic (e.g., emails), courts that have considered the issue have generally required that the privilege log list each recipient rather than identifying an email distribution list.

In the age of electronic discovery, huge volumes of documentation may be responsive to a discovery request. In most of these cases, a categorical privilege log, rather than a document-by-document log, is appropriate and sufficient. Identifying categories of document is likely to save time and expense. As noted by the Federal Rules Advisory Committee, "[d]etails concerning time, persons, general subject matter etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories." Fed.R.Civ.P. 26(b)(5) Advisory Committee's Notes (1993).

In *S.E.C. v. Thrasher* No. 92-CV-06987, 1996 WL 125661 (S.D.N.Y. Mar. 20 1996), the Southern District of New York held that category logs are acceptable if a document-by-document listing would be unduly burdensome, and a more detailed description would be of no material benefit in assessing the claim of privilege. Many courts have since adopted the *Thrasher* approach. The key analysis of categorical privilege logs is found in an article written by Judge John M. Facciola and Jonathan M. Redgrave, "Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave

Framework", 4 Fed. Cts. L. Rev 19, 34 (2010).

The "Facciola-Redgrave" article includes practical tips for preparing categorical logs and negotiating the parameters of such discovery between counsel. Taking the concept a step further, authors Joe Howle and John Martin have proposed a model for "quasi-categorical" privilege logs, in which the producing party uses technology to generate lists of potentially privileged documents without actually examining each document. [See "Reducing Privilege Log Costs and Delays: Negotiating a Quasi-Categorical Approach", 4 E.D.D.E. Journal 2 (2013).] Although the categorical and quasi-categorical approaches offer attractive cost-saving features, counsel should be mindful that there is risk in avoiding review of all potentially discoverable documents. It is important to incorporate quality-control techniques when using this approach.

The bottom line in preparing a privilege log is that counsel must provide information sufficient for opposing counsel and the court to evaluate the claim of privilege or protection. If counsel disputes whether a document-by-document privilege log is necessary, as opposed to a categorical privilege log, the issue can be negotiated at the meet and confer, and hopefully resolved without court involvement. Of course, a stipulation for court approval is recommended. Paying attention to issues of privilege in discovery is an important task for in-house counsel. To the extent possible, resist the urge to delegate. The stakes are high. The sanction for failure to comply may be that the court will deem the privilege waived.

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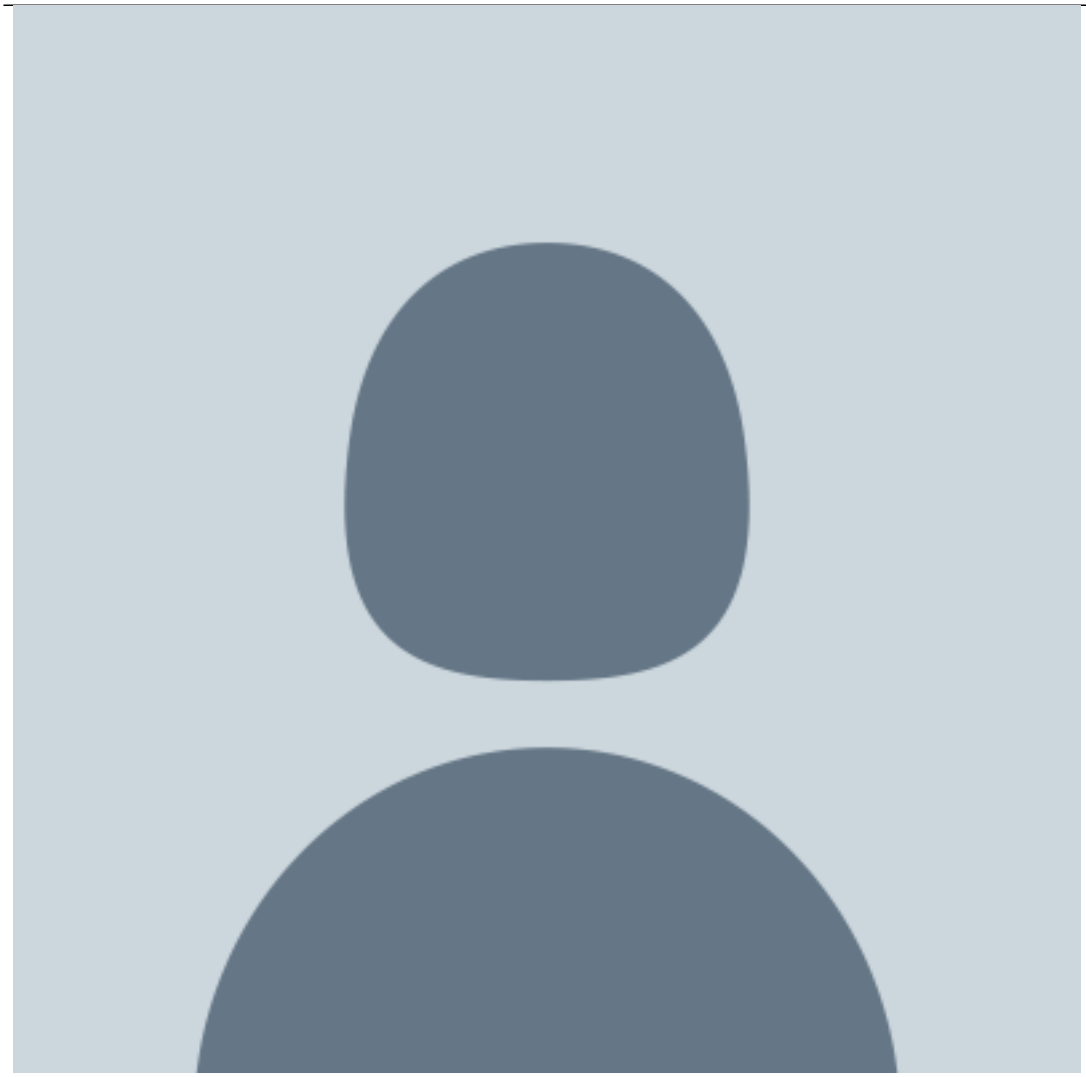

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