

The Dreaded Privilege Log: Rules and Practical Tips

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Federal Rule on Privilege Logs

- Since 1993, FRCP 26(b)(5) has included the following language: "When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party must:
 - 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
- The language of Rule 26(b)(5) is "commonly satisfied by filing a privilege log." *Wolk v. Green*, No. C06-5025 BZ, 2007 WL 3203050, at *1-2 (N.D. Cal. 2007)

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Development of FRCP 26(b)(5)

- While the federal rule developed for a variety of reasons, it was an attempt to balance principle of broad discovery vs. legitimate privilege – the court and parties must be able to evaluate nondisclosure and allegedly save time
- 1993 Committee Note to Rule 26(b)(5):
 - "[T]he court ultimately decides whether, if this claim is challenged, the privilege or protection applies."
 - "Providing information pertinent to the applicability of the privilege or protection should reduce the need for *in camera* examination of the documents."

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Development of FRCP 26(b)(5)

- Pre-1993, certain courts (SDNY, NDCA) had local rules governing privilege logs, but little consistency in application of the rules.
- Facciola & Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 2009 Fed. Cts. L. Rev. 4 (Nov. 2009): <http://www.fcir.org/fcifr/articles/>
 - *Litton Systems, Inc. v. AT&T*, 90 F.R.D. 410 (S.D.N.Y. 1981): finding waiver as to minimal number of unlogged litigation notes made by lawyers after commencement of case
 - *Fox v. Cal. Sierra Fin. Serv.*, 120 F.R.D. 520, 524 n.1 (N.D. Cal. 1988): no waiver, only monetary fine, for failure to prepare log

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Sparse Nebraska State Law

- No equivalent Nebraska version of Rule 26(b)(5)
- Preparation of logs is nevertheless reasonably common in state court litigation, and still makes sense
 - In NE, the party asserting privilege "must state with specificity, in a nonconclusory manner, how each element of privilege or doctrine is met, to the extent possible, without revealing the alleged protected information." *Greenwalt v. Wal-Mart Stores, Inc.* 567 N.W.2d 560, 567 (Neb. 1997).

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When do parties need to log?

- Any time client/counsel withholds documents on privilege grounds, subject to negotiated limitations on discovery or very unusual circumstances
 - e.g. the client itself is a privileged piece of information
 - If logging is truly an undue burden, Committee note contemplates filing for a protective order under Rule 26(c)

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When do parties need to log?

- Obligation To Prepare a Log Limited To Documents "Otherwise Discoverable"
 - 1993 Committee Note: "If a broad discovery request is made—for example, for all documents of a particular type during a twenty year period—and the responding party believes in good faith that production of documents for more than the past three years would be unduly burdensome, it should make its objection . . . and, with respect to the documents generated in that three year period, produce the unprivileged documents and describe those withheld. . . ."
- Be careful relying on this alone (pitfalls, *infra*).

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Privilege Log Content

- Content requirements are still jurisdiction-specific, and precise amount of detail open to debate
 - *Dorf & Stanton Commc'ns, Inc. v. Molson Breweries*, 100 F.3d 919, 923 (Fed. Cir. 1996) (finding waiver in part for failure to follow local rule)
 - *105 Street Assocs., LLC v. Greenwich Ins. Co.*, No. 05 Civ. 9938(VM)(DF), 2006 WL 3230292, at *3-4 (S.D.N.Y. Nov. 7, 2006) (suggesting waiver for "unjustified failure to list privileged documents on the required log of withheld documents in a timely and proper manner" in accordance with Local Rule 26.2).
- See *Protecting Confidential Legal Information A Handbook For Analyzing Issues Under The Attorney-client Privilege And The Work Product Doctrine*, PLI Order No. 18542797, PLI/Lit 225 (2009)

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Privilege Log Content

- Most logs should be document-by-document, but this approach is not mandatory
- 1993 Committee Note: 26(b)(5) "does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details 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." (emphasis added).

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Privilege Log Content

- *S.E.C. v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2007 WL 219966, at *9 (D. Colo. Jan. 25, 2007): SEC responded to a document request with log that did not list individual documents, but claimed work product from "2/6/02 to the present" for group of documents allegedly prepared during SEC's investigation
- SEC proffered affidavit re: the timing of its investigation and argued that "[t]he burden of locating and listing each document individually is outweighed by the lack of any corresponding benefit from listing additional information in determining whether the privileges apply."

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Privilege Log Content

- *S.E.C. v. Nacchio* (Continued):
 - "[I]n appropriate circumstances, the court may permit the holder of withheld documents to provide summaries of the documents by category or otherwise limit the extent of his disclosure. This would certainly be the case if (a) a document-by-document listing would be unduly burdensome and (b) the additional log would be of no material benefit to the discovering party in assessing whether the privilege claim is well-grounded." *Nacchio*, 2007 WL 219966 at *9-10 (*quoting SEC v. Thrasher*, 1996 WL 125661 (S.D.N.Y.1996)).

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Initial Progression Order (NE Fed. Ct.)

- Must not forget local rules/practice
- Initial Progression Orders in this district and others include a paragraph on privilege logs, including specific mention of privilege log content:
 - **Withholding Documents from Disclosure or Discovery.** If any document is withheld from production or disclosure on the grounds of privilege or work product, the producing party shall disclose the following information about each such document withheld: a description of the document withheld with as much specificity as is practicable without disclosing its contents, including . . . (next slide)

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Initial Progression Order (NE Fed. Ct.)

- (continued from previous slide). . . (a) the general nature of the document; (b) the identity and position of its author; (c) the date it was written; (d) the identity and position of its addressee; (e) the identities and positions of all persons who were given or have received copies of it and the dates copies were received by them; (f) the document's present location and the identity and position of its custodian; and (g) the specific reason or reasons why it has been withheld from production or disclosure. (emphasis added).
- Some version of the preceding language has been in use in this district since the 1990's
- <http://www.ned.uscourts.gov/internetDocs/forms/ipo.pdf>

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Initial Progression Order (NE Fed. Ct.)

- Current IPO form language is generally standard across each chambers, with the exception of perhaps Judge Strom, who does his own pretrial management
- Follow the district's recommendations to the extent you can
 - Logging the "position" of authors/recipients is a proxy for whether the person is a third-party, to whom disclosure would create a waiver problem
 - Reason and practicality should prevail: chances are, if you can defend your choices of content, this court is not going to act punitively

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Common Pitfalls

- #1 Pitfall: Failure to provide a log altogether
 - Biggest risk of waiver or significant sanction
 - Subset risk: failure to follow local rule on content
- #2 Pitfall: Omission of a particular item or items from an itemized description
 - Very fact-specific: why were the documents omitted? Any prejudice from omission?

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Common Pitfalls

- #3 Pitfall: Insufficient detail, especially as to e-mail communications
 - *Compare Muro v. Target Corp.*, 250 F.R.D. 350, 363 (N.D. Ill. 2007) (suggesting separate itemization of email string not necessary) with *In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 674 (D. Kan. 2005) ("the court strongly encourages counsel, in the preparation of future privilege logs, to list each email within a strand as a separate entry.")
 - "bcc" recipients notoriously hard to track -- must obtain from custodian "sent items" or direct from recipient

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Common Pitfalls

- #4 Pitfall: Insufficient detail as to reason why the document is immune from discovery
 - Odd log entries: "subrogation investigation"; "deliberative privilege"
 - *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992) (noting descriptions such as "letter re claim," "analysis of claim," or "report in anticipation of litigation" may be insufficient)

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Special Considerations involving ESI

- Electronically-stored Information raises vexing new challenges
 - Volume and Expense
 - Multiple custodians
 - Duplication across custodians
 - Metadata
 - Redaction impossible in certain formats
- More critical than ever for counsel to negotiate and cooperate on ESI issues, or raise with court

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Approaches to Inadequate Log

- From Facciola & Redgrave:
 - permit the party another chance to submit a more detailed log;
 - deem the inadequate log a waiver of the privilege;
 - in camera inspection of the withheld documents; or
 - in camera inspection of a select sample of the withheld documents

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Practical Considerations

- **Communicate** with opposing counsel early about expectations for privilege protection
 - Is ESI an issue? If so, what format and how best to accomplish discovery/redaction/withholding?
 - Outside date limitations – establish a reasonable date range, after which log entries need not be made, and if no agreement from opposing counsel, raise early in the rule 26(f) report or motion for protective order, and properly object to the lack of date limitations in any subsequent discovery requests
 - Use rule 502
 - Consider a clawback provision for inclusion in either Rule 26(f) report or stipulated protective order
 - By all means, if the parties can agree, get the court to “pass off” on the content of that agreement

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Practical Considerations

- Whatever you do, do some sort of privilege log if you withhold
- Follow the local rules and know how to log e-mails
 - If no jurisdiction guidance, get agreement in writing from opposing counsel
- Complete the log contemporaneous with review of the discovery documents and furnish simultaneous with initial disclosures and/or document production(s)
- If you cannot simultaneously supply a log, at least separate the documents that were withheld or redacted and follow-up promptly BEFORE a deposition, expert disclosure, or other important discovery event (a/k/a do not give opposing side a legitimate claim of prejudice)

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Practical Considerations

- Consider electronic storage of original documents which permits marking for privilege and the generation of bates-numbered production sets
- If you store and produce primarily in paper, make sure to keep (1) original set of documents; (2) bates-numbered “produced” documents; (3) pile of “withheld” documents that will be logged
- If you are truly producing “in the ordinary course” by supplying an entire file for review, consider bates-numbering entire set and then inserting privilege “placeholder” sheets for pulled documentation which will then be logged

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Practical Considerations

- Consider redaction, not wholesale withholding, especially as to e-mail strings. Normally, the author, recipients, and dates of e-mails are not privileged items, and redaction has at least two benefits. First, it preserves so-called “parent-child” relationships, and second, the face of the document provides most of what one would otherwise have to log, save for the nature of the privilege asserted
 - Redaction may or may not include the subject line
 - Many e-mail programs do not provide entire “header” content when printing, or may auto-stamp the date on the document, so need to be aware of these issues

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Practical Considerations

- If dealing with truly enormous volume, possibilities include:
 - Search term and custodian limitations in agreement between parties
 - Categorical restrictions by date or nature of document (e.g. every e-mail from in-house counsel presumptively privileged)
 - “sampling” protocols for compliance testing
 - Use of a special master in disputes
- See Facciola-Redgrave Framework Article

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