

Product Liability & Toxic Torts

Requirements for a Proper Privilege Log

The significance of these often overlooked rules

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It is especially true in complex product liability and toxic tort litigation that cases are won or lost in the trenches of discovery. One of the more mundane aspects of discovery involves the privilege log. Invariably, a significant portion of the plaintiff's most compelling trial exhibits likely reside somewhere in the depths of the defendant's privilege log. Conversely, the defendant must take care to draft an adequate and defensible privilege log in order to preserve its asserted privilege.

Notwithstanding the significance of the privilege log's crucial role in document-intensive litigation, the parties are generally content with the usual, pro forma privilege log chart. The customary chart contains tight vertical columns for

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Bates numbers, operative dates, authoring parties, receiving parties, description and type of privilege claimed. As the document count on the privilege log rises, the preparing party often becomes less concerned with the completeness of the thousands of entries on the privilege log. Equally daunting is the receiving party, unable to grapple with the extensive and impenetrable log.

Many times, both parties are content with a generic description of the type of document referenced, the general privilege claimed and the fact that the document was created around the time of the litigation or was copied to an attorney at some point. Thus, the parties simply resign themselves to the inevitable and, at times, unpredictable judgment of the in camera review by a court or special master. Aside from the time and expense involved, proceeding prematurely to this final step could result in documents that were improperly designated as privileged never seeing the light of day, or documents that would be properly designated as privileged losing their protection.

Such outcomes can be avoided through adherence to New Jersey's frequently overlooked, but very straightforward, standards applicable to the form

and content required of privilege logs. Generally, a party will seek to resist producing documents based on the attorney-client privilege (N.J.S.A. 2A:84A-20(3); N.J.R.E. 504) or the work product doctrine (R. 4:10-2 (c)). The procedure for claiming privilege is set forth at R. 4:10-2(e) (which follows verbatim its federal analog, Fed.R.Civ.P. 26(b)(5)):

Claims of Privilege or Protection of Trial Preparation Materials.

(1) Information Withheld. 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.

The standards by which privilege logs are judged are plainly set forth by

the New Jersey Supreme Court in *Seacoast Builders Corp. v. Rutgers*, 358 N.J. Super. 524 (App. Div. 2003). In *Seacoast*, the party preparing the privilege log produced the familiar form of log:

The privilege logs list each document under headings entitled: 'DATE, RECIPIENT, CC'S, AUTHOR, DESCRIPTION [and] PRIVILEGE [asserted].' The persons are not identified other than by name, the descriptions are extremely limited, and the privilege asserted is indicated by simply stating, without explanation, either 'attorney-client,' 'work-product,' or both.

The *Seacoast* court outlined the burden to be borne by the party preparing the privilege log in providing "a specific explanation of why each document is privileged or immune from discovery," as well as the manner in which "each element of the privilege is met as to that document." See also *Rivard v. American Home Products*, 391 N.J. Super. 129, 152-153 (App. Div. 2007). In so doing, the *Seacoast* court reviewed the defendant's privilege log, supplemental privilege log and subsequent attempt at more comprehensive document descriptions, and found that the pro forma privilege logs and general descriptions contained "less information than many courts require with respect to privilege logs and less information than is demanded by R. 4:10-2(e)." Most significantly, the *Seacoast* court considered the defendant's counsel's service of an improper and unsupported privilege log as an element of the many factors that contributed to the court's conclusion that several documents be disclosed as a sanction for attorney misconduct.

These standards were most recently reiterated by the Appellate Division in the unpublished case of *Allstate N.J. Ins. Co. v. Humphrey*, 2008 N.J. Super. LEXIS 142 (App. Div. Feb. 28, 2008). In *Humphrey*,

the court was again confronted by the customary, vague privilege log, which, though universally employed, is simply insufficient under the controlling standards:

Finally, we regard Allstate's privilege logs as inadequate to perform the function that they are designed to serve. At a minimum, the log must state for any document deemed privileged, its date, author, recipients, a description of its contents sufficient to apprise defense counsel of its potential relevance to the litigation, any privilege cited, and a specific statement as to why the document as a whole, or a part thereof, is deemed privileged. As *Seacoast Builders* reminds us, it is Allstate's burden to overcome the strong presumption of access that exists in this case, and that burden cannot be met with bland document descriptions and blanket assertions of privilege.

Moreover, the *Humphrey* court found that "[t]he mere designation of a document as 'correspondence' does not meet this requirement, because it does not sufficiently apprise counsel of its content to permit a challenge premised upon relevance and the absence of a valid privilege."

It is clear that the New Jersey courts reject the inscrutable chart that is traditionally served in the place of a proper privilege log. However, it is sometimes lost in the preparation and review of these pro forma privilege logs that the preparer must describe each document and respective assertion of privilege in detail, sufficient to apprise the reviewer of both the content of the document and the applicability of the privilege.

For example, with regard to the attorney-client privilege, it is manifest that the privilege log must specifically disclose all of the individuals that had access to the document, to permit a determination of whether

the privilege was waived. Further, it must be clear that the document arose in the course of the relationship between attorney and client, and that the document was created for the purpose of retaining the attorney or to secure legal services or advice. Similarly, with regard to the work product doctrine, the privilege log must specifically disclose all of the individuals that had access to the document. The log must also set forth sufficient detail to demonstrate that the preparation of the document was in anticipation of potential litigation, the prospect for which was objectively reasonable. A chart that merely sets forth a bare description and generic account of the genesis of the document is simply not enough. Yet, such a privilege log is usually provided and accepted with little comment, based on the enormity of the undertaking to draft or review the log, as well as the inescapable eventuality of in camera review to sort out the privilege issues.

However, practitioners must be cognizant of the standards governing the requirements for a proper privilege log, and wary of the possible penalties for failing to adhere to those standards or demand their implementation. Though it can be an onerous and time-consuming task to review and properly log all the documents at issue in a complex matter, such as a mass tort, care must be taken to create a proper privilege log. Providing an indeterminate log can result in the preparer's being forced to produce genuinely privileged documents, whether through sanction or through erroneous impression of the document reflected in the log. Similarly, not demanding that the preparing party furnish a proper privilege log can result in the failure to obtain essential documents in a timely manner, if at all.

Finally, it is true that some measure of in camera review of the privilege log and documents at issue is, in most complex cases, inevitable. However, a proper privilege log is critical to avoiding wasted time and resources, as well as any potentially misinformed rulings on privilege log entries at issue. ■