Challenging Privilege Assertions

The Use and Abuse of Privilege in Class Action and Complex Litigation

by Eric Marcy

Complex class action litigation involving major corporations can involve class periods going back years, with the potential for hundreds of thousands, or even millions of documents. Commonly included in such a document discovery base are materials involving in-house counsel or outside consultants working on business and/or marketing issues. These documents may be material to claims in the case, yet unrelated to any anticipated or active litigation at the time the documents were created. Such communications, memoranda and minutes of meetings may include the participation of counsel or were copied to counsel. Additionally, such documents may have been distributed to or involved the participation of third parties such as industry associations, vendors and potential consultants.

Not all communications involving attorneys or outside consultants are protected by the attorney-client privilege and work-product privileges. The courts take an expansive view of discovery,[1] disfavor the withholding of material evidence based upon privilege, and will narrowly construe the attorney-client, work-product and other asserted privileges.[2] The party asserting the privilege and withholding discovery bears the burden of proof regarding the applicability of the privilege.[3]

This article examines issues and problems that commonly arise in connection with the assertion of privilege in the context of modern class action and complex litigation.

Voluminous Discovery and Privilege Assertions in Complex Multi-district Litigation

In class actions, as in other complex, multi-party, multi-district litigation involving voluminous discovery, the attorney-client, work-product and common-interest privileges are often over-asserted or improperly asserted. A good case example of the type of issues and concerns presented in complex multi-district litigation, including class action litigation, was raised in the multi-district litigation (MDL) *In Re Vioxx Products Liability Litigation*.[4] The case involved the assertion of "attorney-client privilege as to approximately 30,000 documents" where the court conducted an initial individualized review of "every single" document.[5] The documents involved 81 boxes, 500,000 pages that "were not categorized or grouped together in any logical or organized fashion."[6]

After an interlocutory appeal to the Fifth Circuit Court of Appeals, the matter was remanded for a "detailed expert analysis of a representative sample" to hopefully "put an end to a time consuming and expensive saga" that "spiraled out of control" in that case.[7] The Fifth Circuit accepted Merck's offer at oral argument to produce 2,000 representative documents for examination under a "new protocol."[8] The trial court appointed highly qualified special master and special counsel to review the attorney-client privilege and other privilege assertions.[9] The costs of resolving the privilege dispute were staggering: "over $400,000.00 in fees and expenses in reviewing approximately 2,500 representative documents over the course of three months."[10]

In practice, the assertion of privilege may be over-inclusive for a variety of reasons. Documents may be reviewed by individuals not well qualified to determine whether the privilege applies to the document, or who do not understand the issues and facts underlying the claims in the case, or there may be "disconnects" due to the documents being assembled by a "discovery committee."[11] Those reviewing the documents for production have an ever-present institutional fear of releasing an important document, and little accountability for being over-inclusive in the assertion of privilege. In the real world, the default is to assert the privilege on any document that reflects an attorney's involvement; in practice, over-inclusiveness is frequently the rule, not the exception.

The problem presented for counsel and for the courts is establishing a balance between the cost in time and money of individual logging and a meaningful discovery plan in which privileges are not being abused to conceal discoverable information.[12] Establishing that balance requires the good faith cooperation of counsel, the involvement and guidance of the court, the potential for sanctions for bad faith conduct,[13] and protocols to facilitate good faith conduct by all parties at the earliest stages of litigation.[14]

Blurring of the Attorney-client and Work-product Privileges—Involvement of In-house Counsel and/or Consultants

Class actions, by their nature, often involve extensive discovery from large corporate entities. Over the course of years, such entities may have a variety of counsel or consultants involved in meetings and/or communications regarding general business advice and/or for potential anticipated or existing litigation.

In order to determine the application of the privilege to company meetings and/or communications involving counsel it is important to identify the attorneys involved with the document at issue, and to determine the role and scope of each attorney's participation.[15] The involvement of in-house counsel should always be scrutinized carefully, because their involvement may be limited to business issues, without the provision of legal advice. Where in-house counsel has not provided legal advice, the content of documents reflecting communications shared with in-house counsel will not be protected by attorney-client or work-product privileges.[16] The routine copying of counsel on business communications does not automatically render the communication privileged.[17] Moreover, a careful review of the distribution of documents is critical to the proper application of the privilege. Even records that might otherwise be considered privileged can lose the protection of the privilege once they are distributed to third parties that do not share the privilege.[18]

From a more cynical perspective, a party may deliberately involve counsel at business meetings, not only to participate in general business decisions but also to allow for assertion of privilege regarding the meetings at a later time. Counsel is sometimes routinely copied on general business communications irrespective of any intention to seek legal advice regarding anticipated or existing litigation. It is quite common for memoranda, minutes of meetings, and especially emails to have a distribution beyond the scope of a true attorney-client communication.[19] Just because an attorney is copied on a listserv email or memorandum does not mean a privilege has been established.[20]

The purpose of communications with consultants may also be ambiguous. The question of who retains the consultant and for what purpose is pivotal to a determination of privilege. If the consultant is providing services in a business capacity, the privilege should not stand. On the other hand, if the consultant is retained to provide assistance and guidance to counsel in anticipation of litigation, the privilege should prevail.[21]

Documenting the consultant(s)' role from the outset is critical to establishing valid privilege.[22] Discovery regarding who retained the consultant and the terms under which the consultant was originally retained may well clarify whether the consultant was retained for general business purposes or to assist counsel in anticipated or pending litigation.[23]

Emails, Attachments and Distribution to Third Parties—The Digital Brave New World

The digital age presents new challenges in the examination of documents for privilege assertions.[24] Email threads or chains (a series of email messages) may include distributions to third parties that may waive the privilege, or particular emails within the chain may include privileged information that is appropriate for privilege protection. Courts have suggested that when there are email threads, each communication (each thread) should be identified by a separate bates number.[25] While bates numbering each thread may be preferable, in practice it may be burdensome, time consuming and costly to implement.[26]

The logging of emails presents a unique problem. Frequently an email chain will contain multiple dates, multiple authors and multiple recipients, and counsel may be copied on some but not all of the emails in the chain. Additionally, counsel may have injected protected legal advice at some stage of the chain, and subsequent distribution may involve people outside the scope of the privilege. In order to evaluate whether all or part of the email is privileged, sufficient information must be provided to determine whether counsel's participation qualifies as attorney-client communication and/or attorney work product.[27] Even if the communication is privileged, the privilege may be waived by distribution to third parties who did not share the privilege.[28]

Attachments to emails also present a separate challenge. Each attachment must be evaluated to determine whether privilege applies. Simply because an attachment may be part of an email or email thread that involves counsel or a legitimate attorney-client privilege does not automatically render the attachment privileged.[29] Courts will scrutinize attachments to determine if a privilege attaches independent of any email communication it may be attached to, and attachments should have a separate bates stamp to independently identify them.[30]

The distribution of minutes of meetings, PowerPoint presentations, Six Sigma corporate projects, or emails to

third parties may result in a waiver of a privilege.[31] It is also not uncommon for a party to assert privilege on subsequent documents relating to the initial meeting, email or communication, even if no attorney is involved in the subsequent documents and no legal advice is sought or rendered.

With the importance of protecting confidential and privileged communications, it is remarkable that even emails, memoranda or reports that are clearly prepared in anticipation or as part of litigation are frequently not labeled as attorney-client, work-product or common interest privileged. Counsel involved in privileged communications or the preparation of work-product material on behalf of a client would be well served to document the assertion of privilege in the subject matter section of emails and/or in the headers of memoranda contemporaneously with the preparation of the document. While contemporaneous marking of a document as privileged can support a later assertion of privilege, merely marking documents as confidential or privileged will not, by itself, support the assertion of privilege.[32] Regardless of such designations on documents, courts will look to the underlying circumstances of the creation of the document to determine if the privilege will apply.[33] The expressed expectation of confidentiality in the document itself, at the time of preparation, is a factor, along with the information about the purpose and distribution of the document that may be used to support a claim of privilege.[34]

Abuse in the Privilege Log Process

Privilege logs can also be a source of abuse. The law requires that a privilege log must contain sufficient meaningful information to assess whether privilege has been properly asserted.[35] The log, at a minimum, should include, for each document for which the privilege is asserted, the date(s) of the document, the author(s) of the document, the name(s) of all recipient(s), the subject of the document, and an identification of the privilege(s) asserted.[36]

Whether intentional or not, the party logging purportedly privileged documents may benefit by providing a log that provides little substantive information. The logging party may initially have little to lose and everything to gain by obfuscating the contents of its log. That being said, in extreme cases courts have not hesitated to punish counsel who engage in transparent delay and obfuscation, including monetary sanctions and/or releasing the documents and finding a waiver of privilege.[37]

Providing inadequate log information makes it impossible to assess, on the face of the log, whether a valid privilege has been asserted. This can occur by: 1) insufficient identification of the participants to the communication; 2) failure to identify all the recipients; 3) inadequate description of the document; 4) inadequate description of the subject matter of the document; 5) failure to identify the affiliation of the participants; 6) failure to identify the attorneys involved and their capacity; 7) failure to identify the corporate positions of the participants; and 8) the use of 'canned' or rote privilege assertions. Simply identifying names of the individuals involved in the preparation or distribution of a document is insufficient to determine if the asserted privilege has been waived through distribution to individuals to whom the privilege does not apply.[38] In many instances, it is necessary to have an index of individuals listed in the logs, identifying their positions and affiliations, in order to make the log useful to determine whether there has been a waiver or valid exercise of privilege.[39] The identification of all counsel, department, and/or entity with which a participant to the communication is affiliated is necessary to evaluate whether counsel's or a third party's involvement supports an assertion of privilege.

The obfuscating log may inure to the benefit of the party submitting the log by preventing or delaying the production of discovery, at least in the short term. However, improperly prepared privilege logs usually result in discovery motion practice. Notwithstanding that there may be a legitimate privilege claim for the listed document, unclear, incomplete, or delayed log entries may put privileged documents at risk for disclosure.[40] Unnecessary and protracted disputes over privilege issues cause all parties to incur additional counsel fees and expenses.

Preventing Abuse—Facilitating Complete, Accurate and Useful Privilege Logs

Anticipating potential privilege disputes should be done at the earliest stages of discovery to prevent and/or minimize unnecessary litigation. Addressing potential privilege disputes at the Rule 26(f) party conference, prior to the Rule 16[41] conference in federal cases, or with the managing judge in complex state court cases,[42] is the most effective way to resolve issues before it becomes necessary to involve the court or engage in motion practice. Both the federal and state procedural rules anticipate and require the proper and complete disclosure of information necessary to evaluate an assertion of privilege.[43] If counsel engage in an early and cooperative effort to resolve potential disputes, and establish a clear and efficient protocol for resolving disputes, unnecessary litigation may be avoided.

With advance planning, it is possible to combat privilege log abuses, or at least minimize disputes arising from assertions of privilege. It is mutually beneficial to negotiate and agree upon a proper privilege log format in advance. If that is not possible, counsel should seek the court's intervention to establish a meaningful privilege log format that

contains: 1) the date(s) of communication or document; 2) a complete listing of distribution of the communication or document; 3) a complete identification of the parties and their affiliations (within the log or as a separate key for the log); 4) the identification of the author(s); 5) the identification of all recipients; 6) a complete description of the document; and 7) a clear identification of the privilege asserted.

In order to minimize problems presented by inadequate logs, the parties should agree, or the court should require, sufficient specificity in the logs and a dispute resolution protocol that requires the proponent of the log to certify that each entry satisfies the requirements for the assertion of the privilege.[44] From the beginning stages of discovery, the court should make it absolutely clear to the parties that failure to comply in good faith or the submission of voluminous and inadequate log entries may result in a waiver of privilege or other sanctions.[45]

By requiring complete, accurate, and meaningful privilege logs, adversaries, the court, or a special master will be able to determine the key issues pertaining to the assertion of the privilege. These issues include: 1) whether the document was prepared in anticipation of litigation; 2) whether it was intended to be confidential; and 3) whether the privilege has been waived by its disclosure.[46] The submission of disorganized, ambiguous, incomplete information and boilerplate privilege designations fail to provide the adversary or the court with sufficient information to determine the privilege assertion which, in turn, will result in discovery disputes and additional expense.[47]

Such disputes may inevitably involve the court and/or require the appointment of a special master to determine whether privilege has been appropriately asserted. If the logs are voluminous and numerous entries are challenged, a protocol will be needed so the court or special master can sample the voluminous challenged entries on a random basis,[48] without having to review each document—a time consuming, costly and unnecessary process.

Federal Rule of Evidence 502 Order or the Use of Redaction of Privileged Sections of Documents

Two alternatives may be employed at the early stages to address the problem of email chains and other documents that contain both privileged and non-privileged information. The parties may negotiate the entry of a consent order under Federal Rule of Evidence 502, providing for the production of documents under certain limitations preserving the privilege. In the alternative, the parties may agree to redact privileged portions of documents containing both privileged and non-privileged information, and produce redacted documents.

Properly employed, a 502 consent order may substantially reduce the number of challenges to privilege assertions and save the parties and court resources. Documents released subject to a Federal Rule of Evidence 502[49] consent order should be produced without any redactions.

While the use of redaction might be an efficient way to reduce disputes, the party producing the redacted documents should still provide sufficient information on its privilege log to establish that the redaction is justified. This should include: the participants to the communication; the date(s); the subject matter; and why, on its face, the redacted text is privileged and, therefore, not subject to production.[50] In at least one case, the deliberate use of redaction as a tool to prevent discovery, combined with other serious intentional violations of court discovery orders, has resulted in the imposition of extreme sanctions of the entry of default judgment and the certification of the class.[51]

These options should be discussed and agreed upon by counsel as a means of resolving disputes short of involving the court. Such options should be considered and negotiated between the parties as possible additional and alternative methods of production, with the goal to eliminate the need for court intervention and to minimize the expense associated with discovery for all parties.

Resolving Privilege Disputes—Special Masters, Logs and the Sampling of Documents

In order to minimize costs and facilitate the efficient resolution of any disputes, it is helpful for the parties to agree upon a protocol that provides a reviewing court and/or special master a clear and efficient way to conduct its review. The ultimate goal of having a proper and useful privilege log protocol in place early is to keep both parties honest in listing privileged documents. A proper exchange of privilege logs with a mutually agreed protocol for review will minimize discovery disputes, minimize court involvement, and minimize costs. Engaging in this process may also focus both counsel on whether privilege should be asserted and what documents really need to be challenged.

Such logs can be problematic and confusing, depending on the number of documents identified as privileged and the number of privilege entries challenged. With lengthy logs, counsel might consider requesting the proponent of the log provide the log in Microsoft Word format (in addition to a read-only pdf format). This will enable the party challenging the entries to enter objections directly onto the individual entries. However challenges are presented, they must be in a format that allows the court or special master to easily compare the asserted privilege against the challenge. Cross-referencing a privilege log against a separate document challenging the log entries can be confusing

for counsel and the court. Confusion in the review process and/or in the determinations made, may result in incomplete and/or unclear opinions by the special master or the court. When dealing with a large volume of challenged documents, clarity is critical. Resolution of disputes prior to involving the court is in the interest of both parties, and reduces unnecessary litigation and costs.

Courts have little time, and less patience, for resolving privilege log disputes unless the questioned documents are limited in number.[52] What is to be done when the parties are having disputes over hundreds or thousands of documents? What if log entries appear incomplete or repeat boilerplate entries over and over, failing to provide any basis to determine if the privilege assertion is legitimate?

First, counsel must confer with the adversary and identify the log inadequacies.[53] Counsel may then be able to work out a resolution of the disputes with either a Federal Rule of Evidence 502 consent order or an agreement that a redacted version be produced. Counsel may agree to supplement the logs so a fair assessment may be made, or additional documents may be released. If the dispute cannot be resolved, the parties should bring the discovery dispute to the attention of the court under the terms of an existing case management order and/or as directed by the United States magistrate judge or the state court managing judge. If a party has not been acting in good faith, the threat of review by the court will likely result in corrective action, whether by the disclosure of additional documents or the revision of the logs.

If the parties cannot resolve the dispute and the amount of documents challenged is voluminous, it is likely the court will direct the matter to a special master for resolution. If the logs are voluminous, there will be a need to establish a protocol for selecting documents for *in camera* review.[54] Even a special master appointed by the court—and paid an hourly rate by the parties—will chafe at having to review hundreds or thousands of documents *in camera*. There will be pressure to winnow down the list so the review is manageable. If any entries are clearly deficient on their face, these should be listed for *in camera* review. If there are ambiguous entries, these should be subject to an agreed protocol, a manageable system of random sampling, to permit the court or special master to determine if the logs are fair and accurate, and to test whether the privileges are being asserted in good faith.[55]

Candor and Fair Dealing—Discovery Abuses, Sanctions under Federal Rules of Civil Procedure 26 (g) and 37

In cases involving an abusive privilege log, the Federal Rules of Civil Procedure provide a mechanism for recovering attorneys' fees for discovery abuses and unnecessary litigation. Pursuant to the inherent power of the court to preserve the integrity of the judicial process, the Rules of Professional Conduct,[56] and the Federal Rules of Civil Procedure,[57] the court may award fees, sanctions, and/or other relief.[58] Where courts find egregious and pervasive discovery violations, including deficiencies in the privilege logs, they will punish the offending party, including economic sanctions, the waiver of privilege, and release of records.[59] In assessing whether a discovery abuse has risen to a level to justify sanctions, the court considers the extent of the parties' personal involvement, the prejudice caused by the discovery violation, the history of other discovery abuses during the litigation, the presence or absence of willful conduct or bad faith, the availability of other sanctions, and whether there were legitimate explanations for the conduct.[60] The courts have broad authority to fashion penalties, from imposing fines to ordering the waiver of privilege, production of documents and entry of default.[61]

Conclusion

The preservation of the attorney-client, work-product, or other privileges is a primary and legitimate concern of counsel. Engaging in cooperative discussion early in the discovery process, establishing a working protocol for resolving potential disputes and challenges, is in the parties' and the court's interest. The efficient resolution of privilege issues is particularly important in class action and/or mass tort litigation, which typically involve the production of hundreds of thousands of documents.

How privilege logs are created and presented can result in a fair assessment of non-disclosure by counsel, or may result in discovery disputes that can be wasteful, time consuming, and costly. Understanding the process by which documents are reviewed, designated and logged as privileged can assist counsel in determining if, and when, to challenge such logs. There may very well be good faith and legitimate assertions of privilege, but if the assertions are inadequately logged the result may well be needless litigation and expense. More importantly, privilege assertions should not be misused as a mechanism to conceal otherwise discoverable documents. Cooperatively engaging in the proper disclosure in the logging of documents, coupled with enforcement by the court and the potential for real sanctions, will streamline discovery, minimize the temptation to bury discoverable documents and save all parties unnecessary litigation. While these considerations are important in all civil litigation, they become exponentially important in class action and mass tort litigation, because of the huge volume of documents involved in such cases. ⚖

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ENDNOTES

1. *Herbert v. Lando,* 441 U.S. 153, 175 (1979); *Wei v. Bodner*, 127 F.R.D. 91, 96 (D.N.J. 1989); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1345 (5th Cir. 1978), *reh'g. denied,* 578 F.2d 871 (5th Cir. 1978); Fed. R. Civ. P. 26, 34, 37.
2. *Id. Lady Liberty Transp. Co. v. Civil Phila. Parking Auth.*, 2007 U.S. Dist. LEXIS 14899, at *6-10 (E.D. Pa. March 1, 2007)(example of a court's *in camera* review of documents to determine whether privileges were validly asserted).
3. *Scott Paper Co. v. United States*, 943 F. Supp. 489, 499-500 (E.D. Pa. 1996); *see also Thompson v. Glenmede Trust Co.*, 1995 U.S. Dist. LEXIS 18780, at *13 (E.D. Pa. Dec. 18, 1995). *Doe v. Mercy Health Corp.*, 1993 U.S. Dist. LEXIS 13347, at *16-18 (E.D. Pa. Sept. 13, 1993).
4. *In re Vioxx Prods. Liab. Litig.*, Case 2:05-md-01657-EEF-DEK, Document 12161, filed 08/14/2007, at *2 (This multi-district litigation consolidated "thousands of individual suits and numerous class actions" filed against Merck, a New Jersey Corporation, regarding the research, manufacturing and marketing of its pain and inflammation relieving drug "Vioxx, known generically as Rofecoxib").
5. *Id.* at *1.
6. *Id.* at *4.
7. *Id.* at *2.
8. *In re Vioxx Prods. Liab. Litig.* 2006 U.S. App. LEXIS 27587, ** 8-10 (5th Cir. May 26, 2006).
9. *In re Vioxx Prods. Liab. Litig.,* Case 2:05-md-01657, Document 12161*, supra,* at **5-7.
10. *Id.* at *40.
11. *Id.* at *39.
12. *See generally,* Hon. John M. Facciola and Jonathan M. Redgrave, Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework, 4 *The Federal Courts Law Review*, Issue 1 (2009), (A thoughtful and thorough review of the problems associated with voluminous productions in complex litigation and setting forth a variety of options for narrowing the necessity of individual logging, while seeking to preserve the integrity of the assertion of privilege and the challenge process).
13. *Id.* at 53. ("The best method for deterring misbehavior is to impose harsh sanctions, both monetary and in terms of waiver, for parties who conduct discovery in bad faith."); Fed. R. Civ. P. 26(g); Fed. R. Civ. P. 37.
14. *Id.* at 36, 44, 52-53 ("Without a process framework and agreements at the outset of the case, the court is left with the frustrating problem of untangling the ball of yarn in the midst of the case and usually near the end of the discovery period.").
15. One option is to identify such counsel and a relevant time period that the parties could agree counsel would be acting in a capacity to provide legal advice in anticipation of or as part of litigation. Such attorneys might, upon agreement of the parties, be categorized to be excluded from the requirement of being a 'data custodian,' thus obviating the need for logging counsel(s)' communications. Establishing such exclusion should be supported by a certification confirming the attorney's role and purpose in providing advice. While this is an option, excluding such counsel does not address situations where attorney-client communications were disclosed to third parties and thus waived, or where counsel may have been involved in the distribution of attachments that are not within any privilege. Such exclusions or categorizations have been suggested as being placed in 'sequestered buckets,' which may be located and isolated through the use of metadata, and challenges would only be made when there is a triggering event. Fuchs, Hughes, and Schultz, Hanging by a Thread: Save Your Litigation Budget and Privilege, Association of Corporate Counsel, ACC Docket Vol. 27 No. 8 (Oct. 2009); *see also* Timkovich and O'Donnell, Alternative Privilege Log Techniques in an e-Discovery World, 10 *Commercial and Business Litigation*, Number 2, p. 10 (Winter 2009)(Proposing that the exchange of privilege logs at a minimum be based strictly upon existing meta-data in the electronically stored information, with allowing for 'quick peeks' or further review.).
16. *Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship*), Bankruptcy No. 01-12295DWS, Adversary No. 04-1012, 2005 Bankr. LEXIS 2373, **6-8 (E.D. Pa. Bankruptcy Court, Nov. 17, 2005)("Simply describing these individuals as 'in-house counsel' on the privilege log will be insufficient given their dual roles unless the document establishes the involvement of legal counsel....only communications made for the express purpose of obtaining or giving legal advice are protected."); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 94 (3d Cir. 1992) ("A party seeking the protection of the work product privilege must show that the materials were prepared in 'the course of preparation for possible litigation,'") *quoting Hickman v. Taylor*, 329 U.S. 495, 505 (1947).
17. *Kravco Co. v. Valley Forge Center Assoc.*, 1992 U.S. Dist. LEXIS 9170, at *5-6 (E.D. Pa. July 1, 1992).
18. *Id.* *5-6, 14.
19. *In re Vioxx Prods. Liab. Litig.,* Case 2:05-md-01657, Document 12161*, supra,* at 13-14, *quoting* Paul R. Rice, 1 *Attorney-Client Privilege in the United States*, § 7:2, pp. 24-25 (Thomson West 2d ed. 1999)("Many courts fear that businesses will immunize internal communications from discovery by placing legal counsel in strategic corporate positions and funneling documents through counsel...As a result, courts require a clear showing that the attorney was acting in his professional legal capacity before cloaking documents in the privilege's protection.").
20. *Haines v. Liggett Group, Inc.*, *supra*, 975 F.2d at 94 (In the context of the assertion of a joint defense privilege the party advancing the privilege must show that the privilege has not been waived.); *Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc.*, 707 F. Supp. 1429, 1448-49 (D. Del. 1989) ("[D]ocuments are not privileged simply because they involve an attorney" and "purely technical documents are not privileged."); *Hercules, Inc. v. Exxon Corp.,* 434 F. Supp. 136, 144, 147 (D. Del. 1977)(Setting forth the elements required for application of the attorney-client privilege); *In re Vioxx Prods. Liab. Litig.* 2006 U.S. App. LEXIS 27587, *supra* at **16-17 ("Additionally, persons with law degrees do not necessarily act as lawyers in respect to all their communications, actions, and advice."), *citing* Wright and Miller, *Federal Practice and Procedure* §§ 5480-5486.
21. *See generally, United States v. Kovel*, 296 F.2d 918, 920-923 (2d Cir. 1961*); Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc.*, *supra*, 707 F. Supp. at 1446, n. 24.
22. Counsel would be well served at the outset of the retention of the expert to define the scope of the consultant(s)' services, confirmation that the services are being provided assist counsel in anticipation of or for litigation and that the attorney-client work-product and/or attorney-client privileges apply. Such letters are commonly referred to as 'Kovel' letters and may be useful in excluding categories of documents from having to be logged or disputed. *Id.*
23. *Id.* Again, one option is to identify such consultant(s) and a relevant time period that the parties could agree the consultant was acting in a capacity to support counsel and producing work-product in anticipation of or as part of litigation. Such consultant(s) might, upon agreement of the parties, be categorized to be excluded from the requirement of being a 'data custodian,' thus obviating the need for logging the consultant(s)' communications. Establishing such exclusion should be supported by a certification confirming the consultant(s)'s role and purpose in providing expert support services. While this is an option, excluding such consultant(s) does not address situations where the consultant(s)' communications were disclosed to third parties and thus waived, or where consultant(s) may have been in involved in the distribution of attachments that are not

within any privilege.

24. The digital age has presented an 'exponential' increase of potential discovery, including the potential for the transmission and redistribution of emails and attachments to numerous individuals, creating costs, issues, and complexity in resolving privilege disputes. Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, *supra*, at 22, 36-37.

25. *In re Vioxx Prods. Liab. Litig.*, Case 2:05-md-01657, Document 12161, Filed 08/14/2007, at *35; *Rhoads Indus., Inc. v. Building Materials Corp. of Am.*, 254 F.R.D. 238, 240-241 (E.D. Pa. 2008).

26. Naturally, counsel whose clients have voluminous emails chafe at the requirement of having to bates number each email thread, arguing that such a "requirement would impose needless and sweeping burdens and costs on litigants and their counsel." Fuchs, Hughes, and Schultz, *Hanging by a Thread: Save Your Litigation Budget and Privilege*, *supra*, at 94.

27. Fed. R. Civ. P. 26(b)(3), (4), (5); Fed. R. Civ. P. 26(b)(5)(A)(ii) (description must be sufficient so as to "enable other parties to assess the claim").

28. *Kravco Co. v. Valley Forge Center Assoc.*, *supra,* 1992 U.S. Dist. LEXIS 9170, at ** 5, 14 .

29. *Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship)*, 2005 Bankr. LEXIS 2373, *supra*, * 19 (E.D. Pa. Bankruptcy Court, Nov. 17, 2005); *Sneider v. Kimberly-Clark Corp.*, 91 F.R.D. 1, 4 (N.D. Ill. 1980); *accord, O'Connor v. Boeing North American, Inc.,* 185 F.R.D. 272, 280 (C.D. Cal. 1999); *Leonen v. Johns-Manville,* 135 F.R.D. 94, 98 (D. N.J. 1990); Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, *supra*, at 39-40.

30. *Id.*; *see generally*, *In re Vioxx Prods. Liab. Litig.*, Case 2:05-md-01657, Document 12161, Filed 08/14/2007, at *35; *Rhoads Indus., Inc. v. Building Materials Corp. of Am.*, 254 F.R.D. 238 (E.D. Pa. 2008), (Use of separate bates numbers for individual documents).

31. *In re Vioxx Prods. Liab. Litig.*, Case 2:05-md-01657, Document 12161, Filed 08/14/2007, at*17 ("A communication could be to several lawyers and one non-lawyer and lose its primary legal purpose gloss if the non-lawyer were sent the communication for non-legal purposes."). *But see, Thompson v. Glenmede Trust Co.*, *supra*, 1995 U.S. Dist. LEXIS 18780, at *15-16 (Distribution to third parties who may legitimately fall within "common interest" rule may defeat a challenge to privilege assertion); *O'Boyle v. Borough of Longport*, 218 N.J. 168, 190-195 (2014)(A detailed analysis of the "common interest doctrine," confirming that New Jersey recognizes that the doctrine may apply to communications that are shared beyond the attorney and client and thus such communications require an evaluation of the nature of the disclosure).

32. *Asousa P'ship v. Smithfield Foods, Inc. (In re Asousa P'ship)*, 2005 Bankr. LEXIS 2373, *supra*, ** 10, 20-21, 24 ("The fact that the document is marked 'Privileged and Confidential Attorney work-product,' without more, does not establish that it is protected as such.").

33. *Id.*

34. For a valid assertion of the attorney-client privilege, the communication must have been made in confidence, as part of "professional capacity," for "securing legal service or advice." N.J.R.E. 504; N.J.S.A. 2A:84A-20. The intent of parties to establish that confidential relationship will be evaluated by the individual facts presented and documentation within a communication of privilege, will be one factor to argue for the application of the privilege. Moreover, when a privilege log is being submitted, boilerplate assertions of privilege are not sufficient. Fed. R. Civ. P. 26(b)(5)(A). As part of the privilege log, an indication that the document itself has been marked, at the time of creation, as "attorney-client," "work-product," "common interest" privileged, may provide some support for the assertion that the document was intended to be and is privileged.

35. Fed R. Civ. P. 26(b)(5)(A); N.J. Court Rule 4:10-2(e)(1)(Claims of Privilege or Protection of Trial Preparation Materials); Lite, N.J. Federal Practice Rules, Comment 4, Specificity for Claim of Privilege, to L. Civ. R. 33.1 (Interrogatories); Comment 2, Specificity for Claim of Privilege, to L. Civ. R. 34.1 (Production of Documents) (GANN).

36. *Torres v. Kuzniasz*, 936 F. Supp. 1201, 1208-09 (D.N.J. 1996)(Burden resides with the party asserting the privilege); *Shanks v. Plumb-Town, Inc.,* 1996 U.S. Dist. LEXIS 3069, at *4-5 (E.D. Pa. Mar. 11, 1996); *Thompson v. Glenmede Trust Co.*, *supra,* 1995 U.S. Dist. LEXIS 18780, at *13; *Doe v. Mercy Health Corp.*, *supra,* 1993 U.S. Dist. LEXIS 13347, at *16-18; *Brown v. Smythe*, 1991 U.S. Dist. LEXIS 18498, at * 3-6 (E.D. Pa. Dec. 17, 1991); *Wei v. Bodner*, *supra*, 127 *F.R.D.* at 96; *Jaroslawicz v. Engelhard Corp.,* 115 F.R.D. 515, 516 (D.N.J. 1987); *International Paper Co. v. Fibreboard Corp.*, 63 F.R.D. 88, 93-94 (D. Del. 1974)("[A]n improperly asserted claim of privilege is no claim at all.").

37. Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation, supra,* at 24-27, 53; *Wachtel v. Health Net, Inc.*, 239 F.R.D. 81, 106-111 (D.N.J. 2006)(Example of severe sanctions for pervasive discovery abuse, including imposing the sanction of waiver of privilege and discussing the imposition of costs and fines).

38. Lite, N.J. Federal Practice Rules, Comment 4, Specificity for Claim of Privilege, to L.Civ.R. 33.1 (Interrogatories); Comment 2, Specificity for Claim of Privilege, to L. Civ. R. 34.1 (Production of Documents) (GANN); *See generally*, *Scott Paper Co. v. United States*, 943 F. Supp. 489, 500, n.10 (E.D. Pa. 1996); Fed R. Civ. P. 26(b)(5)(A); N.J. Court Rule 4:10-2(e)(1).

39. *Id.*

40. *In re Fannie Mae Sec. Litig.* 552 F.3d 814, 816 (D.C. 2009); *see generally*, Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation, supra.* at 26-27, 29, 53. ("The best method for deterring misbehavior is to impose harsh sanctions, both monetary and in terms of waiver, for parties who conduct discovery in bad faith....[a]t the end of the day, there is a certain amount of cheating and bad faith that has to be expected from parties in order to attempt to avoid 'just' outcomes, and the system must acknowledge that not everyone will be caught." *Id.* at 53).

41. Fed. R. Civ. P. 26(f)(3)(C) and (D), Conference of the Parties; Planning for Discovery specifically requires a discovery plan that includes how electronically stored information is to be produced and how the procedure for managing privilege claims; *see also* Fed. R. Civ. P. 16, Pretrial Conferences; Scheduling; Management is specifically intended to establish "early and continuing control" and to discourage "wasteful pretrial activities." The parameters and requirements for the contents of privilege logs should be resolved at this point so all parties on agree what the logs should contain and how challenges should be handled.

42. In complex state cases, assigned to Track IV, the issue should be raised to the managing judge at the earliest reasonable opportunity. If it is anticipated that privilege assertions may be substantial and contentious, the managing judge may choose, if consented to by the parties or if extraordinary circumstances warrant it, to appoint a special master to manage all anticipated discovery disputes, including privilege disputes, to minimize discovery motion practice. N.J. Court Rule 4:41-1, *et. seq*.

43. Fed R. Civ. P. 26(b)(5)(A); N.J. Court Rule. 4:10-2(e)(1).

44. Fed. R. Civ. P. 11 (An attorney "certifies to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances" that the representation to the

court that the submissions "are warranted" and "not presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."); *see also*, Fed. R. Civ. P. 26(g).

45. Fed. R. Civ. P. 37(b)(2); *Willemijn Houdstermaatschaapij BV v. Apollo Computer, Inc.*, *supra,* 707 F. Supp. at 1443 (In the face of "facially insufficient" log entries "[t]he Court must therefore decide whether to hold plaintiff to the representations made in its list or permit it to modify them in response to defendant's motion."); *Shanks v. Plumb-Town, Inc., supra,* 1996 U.S. Dist. LEXIS 3069, at *5) ("[A]n improperly asserted claim of privilege is no claim at all"), quoting *International Paper Co. v. Fibreboard Corp., supra*, 63 F.R.D. at 93-94; *Brown v. Smythe*, *supra*, 1991 U.S. Dist. LEXIS 18498, at * 6 (*also quoting International Paper*).

46. *Wei v. Bodner*, *supra*, 127 F.R.D. at 96; *Jaroslawicz v. Engelhard Corp., supra,* 115 F.R.D. at 516 (Providing a sample privilege log.); *International Paper Co v. Fibreboard Corp*, 63 F.R.D., *supra*, at 93-94.

47. *In re Vioxx Prods. Liab. Litig.*, Case 2:05-md-01657, Document 12161, filed 08/14/2007, at *2; *In re Vioxx Prods. Liab. Litig.* 2006 U.S. App. LEXIS 27587, *supra* at *15-17.

48. *Id.*; *see generally*, Hon. John M. Facciola and Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, *supra*, at 50-54.

49. Rule 502. Attorney-Client Privilege and Work Product; Limitations on Waiver...

    (d) Controlling Effect of a Court Order. A federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other federal or state proceeding.

    (e) Controlling Effect of a Party Agreement. An agreement on the effect of disclosure in a federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order.

    It should be noted that a party "seeking a protective order for purportedly privileged documents must demonstrate that a particularized harm is likely to occur if the disputed documents are disclosed." *Torres v. Kuzniasz*, *supra,* 936 F. Supp. at 1209.

50. Fed. R. Civ. P. 26(b)(5)(A)(ii) (description must be sufficient to "enable other parties to assess the claim"); N.J. Court Rule 4:10-2(e)(1). At least one court has criticized the use of redaction as an option concluding: "[i]f parties were required to redact out the privileged material from the non-privileged material, this could exponentially add to the amount of time and expense spzent in preparing a document production and privilege log. Redaction may be difficult where it is unclear where the attorney's response starts and the non-privileged email message's text stops." *Rhoads Indus. v. Bldg. Materials Corp. of Am.*, *supra*, 254 F.R.D. at 239, n. 1. Redaction will likely only be efficient in those circumstances where counsel agree to its use and are cooperative in resolving issues related to specific redactions. For a sample case management order that provides a protocol for redaction of attorney-client-privileged communications in "mixed purpose emails" as well as a good explanation of the scope of the attorney work-product privilege, *see In Re Actos Products Liability Litigation*, MDL Docket No. 6:11-MD-2299, ** 3-4, 9-11 (W.D. La., July 10, 2012); lawd.uscourts.gov/sites/default/files/UPLOADS/11-md-2299.071012.CMO-AssertionsofAttorney-ClientPrivilegeandWorkProductDoctrine-0.pdf.

51. *Hester v. Vision Airlines, Inc.*, 687 F.3d 1162, 116zzz7-1169, 1172 (9th Cir. 2012)(Due to pervasive and intentional violation of discovery orders, including withholding discovery in "bad faith" and a "failure to produce a privilege log for the redacted material," the Ninth Circuit upheld the district court's imposition of the severe sanctions of striking defendant's answer, entering default judgment, and granting class certification). Not surprisingly, preliminary approval of settlement was subsequently entered for $1,700,000. This "Settlement Fund represents nearly the entire amount of the $1,811,251.00 judgment owed the Class" and "represents nearly a 94% recovery for the Class." *Hester v. Vision Airlines, Inc.*, 2014 U.S. Dist. LEXIS 48360 *12 (D. Nev. April 7, 2014).

52. *In re Vioxx Prods. Liab. Litig.* 2006 U.S. App. LEXIS 27587, *supra* at *15-17; *Kelchner v. International Playtex, Inc.*, 116 F.R.D. 469, 472 (M.D. Pa. 1987) ("it would strain patience and reason to ask the court or its delegate to examine and rule under the circumstances and volume of documentation present in this case").

53. Fed. R. Civ. P. 37(a)(1); Lite, N.J. Federal Practice Rules, Comment 2, L. Civ. R. 37.1(a)(1) (GANN).

54. *See generally*, *In re Vioxx Prods. Liab. Litig.* 2006 U.S. App. LEXIS 27587, *supra* at *15-17; *In re Vioxx Prods. Liab. Litig.*, Case 2:05-md-01657, Document 12161, filed 08/14/2007, at*10.

55. *In re Vioxx Prods. Liab. Litig. 2006 U.S. App. LEXIS 27587, supra* at ** 6-10; *In re Vioxx Prods. Liab. Litig.*, Case 2:05-md-01657, Document 12161, filed 08/14/2007, at *5.

56. New Jersey Rules of Professional Conduct, 3.3 (Candor Toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel) both provisions made applicable in the District of New Jersey by L . Civ . R. 103.1(a); ABA Model Rules of Professional Conduct, 3.3, 3.4.

57. Fed. R. Civ. P. 37(b)(2); Fed. R. Civ. P. 26(g)(3).

58. *Ali v. Sims*, 788 F.2d 954, 957 (3d Cir. 1986) (Confirming court's discretion to impose sanctions for violation of discovery orders and listing factors to be considered in determining Rule 37(b) sanctions.); *Poulis v. State Farm Fire & Casualty Co.*, 747 F.2d 863, 867-69 (3d Cir. 1984)(Addressing the factors considered for the extreme sanction of dismissal for the violation of a discovery order). No single factor predominates and not all these factors have to be present for sanctions to be imposed. *Hicks v. Feeney*, 850 F.2d 152, 156 (3d Cir. 1988), *cert. denied*, 488 *U.S.* 1005 (1989); *Wachtel v. Health Net, Inc.*, 239 F.R.D., *supra* at 109-111.

59. *Id.*

60. *Id.*

61. Hon. John M. Facciola and Jonathan M. Redgrave, Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework, 4 *The Federal Courts Law Review, Issue* 1, *supra* at 23, 25, 37, 39 (The courts have "broad powers...to issue protective and production order relating to certain documents which brought the sanctions of Rule 37(b) 'directly into play'"); *Hester v. Vision Airlines, Inc.*, 687 F.3d *supra*, at 1167-1169, 1172.

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