

Privilege Logs are More than a Mere Privilege – They are Required

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Have you been providing privilege logs with your state court responses to requests for production? Are you repeatedly having to specifically request privilege logs from opposing counsel? Have you heard that privilege logs are only required in Federal Court? Uniform Superior Court Rule 5.5 is for you.

Since 1993, the Federal Rules of Civil Procedure has required identification of “the nature of documents, communications, or tangible things not produced or disclosed” by claim of privilege in order to allow other parties to assess the claim of privilege. Fed. R. Civ. P. 26(b)(5). This is commonly satisfied by a privilege log. Privilege logs tend to be an afterthought and often overlooked in Georgia State and Superior Court litigation. Frequently, privilege logs are only produced after a demand (or multiple demands) from another party. Largely unnoticed were the recent additions to the Uniform Superior Court Rules¹ which require the same identification of privileged items as the Federal Rules of Civil Procedure. Essentially, Georgia now requires privilege logs. See Uniform Superior Court Rule 5.5 (1).

The proposed addition of Rule 5.5 was approved in July 30, 2014 at the business meeting of the Council of Superior Court Judges. Rule 5.5 became effective June 4, 2015.

Georgia Uniform Superior Court Rule 5.5 (1) – Privilege states:

(1) Information withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial preparation material, the party shall:

- a. Expressly make the claim; and
- b. 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 such claim.

This language largely tracks the Federal Rule on the requirement for identifying what was withheld on the basis of privilege. While neither rule explicitly requires a privilege log, it is commonly accepted as the most expedient means of satisfying this requirement.

Why are privilege logs important? Quite simply, they aid in the protection of items claimed to be privileged. The burden is on the producing party to establish the claim of privilege, and the privilege log is intended to aid in supporting that the items withheld are privileged. See Ga. Cash Am., Inc. v. Strong, 286 Ga. App. 405, 412-13 (2007). Protecting privileged documents

¹ The Uniform Superior Court Rules of Georgia have been adopted by and apply to the State Courts of Georgia as well.

is necessary in litigation, and logging them into a privilege log aids in protecting the privilege. Privileges may be waived by a failure to timely assert them in discovery.

Privilege logs also serve to attempt to make discovery less burdensome (outside of the burden of drafting the logs themselves). Privilege logs are designed to save parties and the court's time to more easily evaluate nondisclosure and reduce the need for more exhaustive *in camera* examination of the items. A party can easily question blanket objections and it may spur a never-ending cycle of discovery when a party is not satisfied that all of the relevant documents have been identified – by production and by identification on a privilege log. While identification in the privilege log cannot thoroughly and exhaustively cite all of the bases for the claimed privilege, it should at a glance allow a party to determine whether further inquiry is warranted, and save parties from frustrating attempts to leave “no stone unturned” in discovery.

Privilege logs themselves can take a variety of formats. Generally, to satisfy the identification requirements, it is accepted that: the type of document/item, date of the document, author/recipients, a general description of the subject matter/content to demonstrate the privilege, and the privilege asserted must be disclosed. A general description is of course, sufficiently vague to allow all sorts of interpretations. None of which have, to date, been expressly addressed by Georgia courts. As Rule 5.5(1) tracks the Federal Rule however, Federal Courts have addressed these issues and provided guidance. Certain types and categories of items may require more substantive information. Again, the goal is to allow opposing counsel and the Court to easily review the privilege log and make an initial determination if the claim of privilege is supported.

Understandably, privilege logs are often viewed as not worth the time they require to create. With the ever-increasing amount of data and documents produced in litigation, a line-by-line, document-by-document identification of privileged documents withheld can be extremely onerous. A trend towards categorical privilege logs and/or staged discovery has appeared to address such issues, if discussed and agreed to by the parties in advance. For example, if the parties discuss and agree in advance, certain categories of documents such as communications exclusively between a party and litigation counsel, may not need to be logged in the privilege log. There is no Georgia precedent on point, so communication between counsel is key. The Superior Court Rules also provide that an early planning conference may be ordered by the judge or requested by the parties. Uniform Superior Court Rule 5.4.

Redactions could also be judiciously used more frequently, to produce redacted rather than wholly withheld documents and limit the exhaustive recitation information for privilege logs. For emails in particular, the author, recipients and dates are not usually privileged. Redacting the content and producing the email itself allows a more abbreviated entry in the privilege log, as the document provides most of what would be required in the log, other than the privilege asserted.

To aid in the protection of privilege, Superior Court Rule 5.5(2) also governs inadvertent disclosure of privileged materials in litigation, with language substantially similar to the Federal Rules of Civil Procedure. With larger productions, the risk for inadvertent disclosure increases

and litigators should become familiar with Rule 5.5(2) in order to try and prevent any waiver of privilege due to inadvertent disclosure.

Uniform Superior Court Rule 5.5(2) – Privilege provides:

(2) Information produced. If information produced in discovery is subject to a claim of privilege or of protection as trial preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. The producing party shall preserve the information until the claim is resolved. After being notified, a party:

- a. Shall promptly return, sequester, or destroy the specified information and any copies thereof;
- b. Shall not use or disclose the information until the claim is resolved;
- c. Shall take reasonable steps to retrieve the information if the party disclosed it before being notified; and
- d. May promptly present the information to the court for an in camera review for determination of the claim.

Hopefully, with Rule 5.5, the back and forth discovery arguments over privilege logs, and motions to compel the same, should be reduced if not cease altogether. Privilege should also be more easily retained through early assertion in privilege logs and the protections provided for inadvertent disclosure.

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