

LITIGATION

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What documents do you hide and what documents do you provide? A basis for hiding is the attorney-client communication privilege and the related attorney work-product doctrine. Attorneys, and people who use attorneys, need to know that everything the attorney sees is not automatically protected from disclosure. The conflict is between finding the truth (revealing) and encouraging confidential use of a protection (concealing). When attorneys are involved, protection is afforded by the attorney-client privilege and the work-product doctrine.

The attorney-client communication privilege provides nearly absolute protection against disclosure. The work product doctrine is a qualified immunity providing protection “in anticipation of litigation” that reveals “a lawyer’s opinions and mental impressions”. The purpose here is to prevent an adversary from exploiting the opposing party’s preparation.

Many times documents are concealed and globally (even haphazardly) listed on a privilege log. Many times the log is never challenged, precision is not obtained, and overbroad concealing is not revealed or challenged.

ALERT. As we have seen in a current large dispute, the privilege log may be quite overbroad, may not provide needed data, and may involve routine business procedures. Legal advice may be neither sought nor given. Accordingly we challenged the withholding of the documents by the other side.



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To "Go Green", our firm uses recyclable paper or ceramic cups and no longer uses Styrofoam cups. In addition, we have adopted a less-paper office environment.

We hope that these changes make big differences in the future.

Well done is better than well said.

- Benjamin Franklin



After performing an in camera inspection of hundreds of documents the tribunal decided that many or even most of the documents were improperly on the privilege log, were improperly concealed, and were to be produced. This involved those to and from a "consulting expert" as well as documents including emails to and from general counsel for the withholding party. It appears that both individuals were performing business functions rather than focusing on litigation anticipation. Detailed explanation from the tribunal was not given so rationales were not provided but the privilege log was challenged and many of the documents were revealed.

The concealed document may be in whole or in large part producible. Under such circumstances the tribunal may swing towards broad production. A party is well advised to properly list and to redact protected portions and produce the redacted document. The privilege log deserves thoughtful and detailed preparation with a view towards scrutiny by the opponent and the tribunal.

As we have found, procuring and studying documents is very important in the litigation process as well as the trial process. There is a major focus on concealing, where concealing may be proper but is often overbroad. Indeed, the in camera inspection is often in and of itself important. Overbroad use of withholding and a privilege log can be very damaging.

The goal of a lawsuit is for the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding. Proper use of a privilege log and when necessary challenging a privilege log is vitally important.

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