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Challenging Privileges in Large Document Production Cases

BY GREG ZIEGLER AND TY VESSELS

Navigating the process for asserting and challenging privileges under the Texas Rule of Civil Procedure requires careful attention. This is particularly true in cases involving voluminous, rolling document productions. Practical approaches exist to avoid pitfalls.

Objections Prohibited

Although Rule 193.3 is titled “Asserting a Privilege,” the process for privilege assertion begins at Rule 193.2(f), titled “No Objection to Preserve Privilege.” Parties should not object to discovery requests on privilege grounds. Instead, parties must comply with the protocol outlined in Rule 193.3. Objecting will not waive the privilege but compliance with 193.3’s procedure must occur when the requesting party points out the erroneously lodged objection.

Withholding Statement

Per Rule 193.3(a), in lieu of objecting, a party who “claims” responsive material is privileged may withhold the material but must state in the response or in a separate document:

1. Responsive material has been withheld;
2. The request to which the withheld material relates; and
3. The privilege asserted, e.g., “work product” or “allied litigant” privilege.

Privilege Log

In accordance with Rule 193.3(b), after receiving a withholding statement, the requesting party can serve a written request that the withheld material be identified suffi-

ciently to enable assessment of the privilege. The responding party must, within 15 days of the request, describe in writing:

1. The withheld material, without revealing privileged information; and
2. The privilege asserted for each document or group.

Exemption

Under Rule 193.3(c), a party can withhold without identifying in the privilege log attorney-client communications and attorney work product material created for the purpose of and concerning the ongoing litigation.

Premature Privilege Log Request

The right to request a privilege log does not exist until the responding party provides a withholding statement. Triggering the 15-day timeframe to provide a privilege log will not occur until a withholding statement is provided.

Consequences of Untimely Privilege Logs

Rule 193.3 does not provide consequences for failing to timely and properly respond to a proper privilege log request. However, the requesting party may move to compel and request other relief when a privilege log is not provided as required.

Practical Tips Ensuring Privilege Preservation

1. **Avoid Prophylactic Objections/Issue Withholding Statement:** Do not lodge

blanket privilege objections in response to discovery requests before reviewing responsive material for privilege. As soon as privileged responsive material is identified, supplement the response with a withholding statement. For large or rolling document productions, do not wait to issue withholding statements until the end of production. Do so at the time each tranche is produced. Do not state that a withholding statement will be provided once all documents have been produced. An email stating material is being withheld on privilege grounds can be construed as a withholding statement. Once a withholding statement is issued, be prepared to timely respond to a request for a privilege log.

2. **Privilege Log Request Prior to a Withholding Statement:** If a privilege log request is received prior to a privilege determination and before making a withholding statement, respond within 15 days that currently no documents are being withheld. Stating a privilege log will be produced later or at the end of production may be construed as an admission that documents are currently being withheld and may be construed as waiving the privilege.
3. **Do Not Wait until the End of Production to Produce a Privilege Log:** Waiting to provide a privilege log until the end of a production after receipt of an appropriate request for a privilege log is improper. Provide any privilege log covering the documents withheld from the production tranche within 15 days of the request. Supplement the privilege log as documents are withheld from subsequent productions.

Practical Tips for Challenging Privilege Assertions

1. **Request a Withholding Statement:** If a response to a discovery request is unclear about whether material is being withheld as privileged, ask for a withholding statement. A response to discovery requests that material will be produced “subject to” prophylactic objections does not qualify as a withholding statement. A privilege log request based solely on such a response may be premature.
2. **Move to Compel:** If the responding party fails to respond to requests for a withholding statement or privilege log, move to compel compliance with Rule 193.3. If claimed privileged material is being withheld, the responding party bears the burden of proving the privilege with an affidavit seven days before the hearing or live testimony at the hearing. The responding party may present a privilege log and submit responsive material for in camera inspection.

Conclusion

Successful navigation of the path to asserting or challenging privileges depends on strict compliance with Rules 193.2 and 193.3. Non-compliance can not only thwart the requesting party’s discovery of relevant information, but also lead to court intervention and consequences against the non-compliant party. **HN**

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