THE UPDATE

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San Diego Defense Lawyers Association

In This Issue

The Privilege Log: Protecting Privileges in Mass Tort Litigation

by Rana M. Siam

In mass tort litigation, document production is a task that may take years to complete. In the course of a lawsuit, a client company may produce millions of pages of documents. Yet, courts may not allow the parties a great deal of time to review and produce their documents; they may order expedited discovery. Therefore, a systematic procedure must be in place to collect the documents from the client, have them reviewed by attorneys, and subsequently produce them to opposing counsel while simultaneously ensuring preservation of privileges.

The keystone of a systematic procedure for preserving privilege is a "privilege log." It is a listing and short description of all documents that need to be protected from discovery because they are privileged, along with the names of individuals who have already seen each document. The preparation and management of such a log is an important duty of any defense attorney involved in complex mass tort litigation. The author describes an effective approach to privilege logs in this article, and provides a sample privilege log at the end of this series.

Preliminary Considerations

Preliminary review of the client company's documents usually focuses on relevancy and privilege review. Once a document is identified as relevant, then a determination is made whether it is privileged and should be withheld from production. Often, segregation of documents and privilege review is performed by young lawyers, and it is crucial that they be adequately instructed on the relevant law and identities of the key personnel at the company.

The determination that a document is privileged usually hinges on the relationships between the parties in the correspondence. This task has become more difficult with the advent of e-mail, since it may not be as apparent that the correspondence is taking place between lawyers and their clients as it would be if the documents were on firm letterhead. Thus, document reviewers must be familiar with the names of the attorneys and other legal personnel from the company in order to quickly and accurately identify and segregate potentially privileged documents. Finally, once the document is identified as privileged, the preparation of the privilege log to preserve those privileges begins.

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When Perry Mason Reruns Aren't Enough...

by Glynn Bedington

Millions of witnesses prepare to go to trial each year; most have never before stepped foot in a courtroom. Otherwise confident professionals often feel they have no power and less control as they experience an unfamiliar language and protocol. Information they see as significant is often dismissed in favor of other seemingly less consequential matters. The biggest challenge for most witnesses is overcoming the fears that consume their attention and keep them from providing the confident, believable and honest testimony their attorneys hope for. The well-meaning attorney often tries to help by counseling, "Just relax and tell the truth." However, as simple as such advice may sound, moving from just relax to tell the truth involves a complex set of practical (and sometimes brutally honest) insights. While good attorneys devote substantial time to witness preparation, this type of preparation alone may be more for the attorney - advising the client to make certain legally significant points - than for the client who also needs to understand his/her role in the courtroom drama.

Not all witnesses need specialized preparation but those who do are often so hampered by fear, anger or both that their testimony is ineffective - in essence, they've become their own worst enemy. In such cases, preparation for deposition or trial must include a specialized approach. An approach that seeks out the unique qualities of this human being and the set of circumstances that set this case apart. Let me illustrate by example.

A man blinded by his doctor, a man so angry and filled with rage that merely sitting in his presence was painful. Although his attorney had been sympathetic, the client hadn't felt he'd been understood. Pain had armored his body. Using the hands-on Alexander Technique, I helped him release the armor and with it anger. I encouraged him to express his sadness and pain through words and stories. His stories became the basis for our preparation of his trial testimony. When he felt he'd been heard he began to trust me. I told him what to expect at trial and explained how the trial experience frames the jurors' mind-set. He began to understand that while anger was seductive, it was his ability to feel (and show) the pain that lay beneath the anger that would win the jurors support.

A medical doctor, an internist, who at the height of his unblemished career was sued by the children of an aged patient who had died under his care. He felt outrage at the attention the patient's children

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Ins and Outs

- Deuprey & Associates, LLP is pleased to announce that Kimberly Huang Lakin has joined the firm as an associate. Ms. Lakin divided her undergraduate years between Duke University and University of Southern California's Marshall School of Business, where she graduated in 1995 with a specialization in Marketing. In 1998, she received her Juris Doctor from University of San Diego School of Law, where she was selected to be a member of the National Mock Trial Team. Ms. Lakin is active in Southern California charities benefiting breast cancer research and Children's Hospital. She is also active in the Taiwanese-American community and will be speaking on the Economics and Politics panel at USC during a national intercollegiate conference this April. Ms. Lakin previously worked in Los Angeles as a business litigation/plaintiff's attorney and in San Diego for a medical malpractice defense firm. Ms. Lakin is a member of SDCBA, LACBA, Lawyers Club, Southern California Chinese Lawyers Association and San Diego Defense Lawyers.
- Shawn Morris, formerly with Wingert, Grebing, Brubaker & Ryan opened the firm of Morris, Sullivan& Vivoli with Michael Sullivan and Michael Vivoli. Sullivan was also previously with the Wingert firm and Vivoli joined from Duckor, Spradling & Metzger. The firm has two associates, Chris Roberts and Will Lemkul.

President's Message

By: John R. Clifford Drath, Clifford, Murphy, Wennerholm & Hagen

San Diego Defense Lawyers is off and running with its 18th year of service to the civil defense bar in San Diego County. As usual, the installation dinner gave us a strong start, which was enhanced when Mayor Dick Murphy presented a proclamation to San Diego Defense Lawyers and announced January 26, 2002, as "San Diego Defense Lawyers Day" in San Diego. Reflecting upon the events of that evening causes me to think about the goals of this organization and the presentation of the Inaugural SDDL "Lawyer of the Year" Award.

The award this year was presented to Thomas M. Dymott and will be presented annually to a member of SDDL in recognition of that member's outstanding contribution and service to the civil defense bar of San Diego. It will honor an SDDL member who epitomizes the purpose of our organization, which is to promote cordial relations amongst its members, to provide a forum for education and to promote improved public perception of our membership by maintaining standards of professional conduct.

These are the goals that each of us as lawyers should strive for in our daily lives and in juggling our busy professional responsibilities with our lives outside the office. It is my sincere desire that SDDL can assist the busy defense lawyer in reaching those goals. To do so, SDDL will continue to provide to its members quality educational seminars for the benefit of our clients and to maintain our professional standards, social events and a forum to share thoughts and concerns. We have scheduled 14 units of continuing legal education which will involve both 2 hour seminars and "brown bag" lunches, together with a joint educational program with the San Diego Chapter of RIMS. These educational seminars are a wonderful opportunity for both the young and old lawyer to stay abreast of current developments in the law and to learn new and different approaches to handling ever changing issues in our practices. Projected seminars will address diverse topics including an evidence workshop, the effective use of computers and graphics in trial, to issues involving insurer retained defense attorneys duties and obligations to their clients. Not all of the seminar topics are set and I would strongly encourage you to submit topics and volunteer to assist us in these events.

On the social front, SDDL is currently researching the sponsorship of a golf tournament to be held this Fall. This is always a great opportunity to get out of the office and mingle with your colleagues. We will also continue to hold cocktail receptions in conjunction with the seminars. I would be interested to hear any ideas you may have to further the social endeavors of our organization.

All of these programs and events bring us back to the essential purpose of our organization. To maintain professionalism and a commitment to justice. Contrary to public perception, that does not mean winning at all costs. Rather, the goal of our members should be to provide vigorous advocacy for our clients in a professional manner.

I and the Board of Directors look forward to working with our members to fulfill the goals of the San Diego Defense Lawyers.

March Brown Bag

"An Overview of the Revised Rules of Court Appellate Law Rules 1 - 18"

The Thursday, March 14, 2002, meeting of the San Diego Defense Lawyers was held at the offices of Peterson & Associates and featured Robert H. Lynn as the program presenter. Mr. Lynn discussed recent changes to the Rules of Court governing appellate practice and provided his insights on appellate practice.

The Judicial Council has revised Appellate Rules 1 to 18 as part of an eighteen month long process of review and revision. The new Rules 1 to 18 became effective on January 1, 2002. Rules 19 to 29 dealing with "Hearing and Determination of Appeal" are currently under review.

Mr. Lynn noted that Rule 3 dealing with extensions of the time for filing a notice of appeal has been extensively modified. Since this filing is a jurisdictional issue he recommended that close attention should be paid to this rule. Rules 4, 5 and 5.1 dealing with reporter's transcripts, clerk's transcripts and appendices have changes that should be carefully reviewed. Among the changes is a provision that compliance dates are measured from the date of mailing vice the date of receipt. Also Mr. Lynn noted that the 50 page limit has been replaced with a 14,000 word limit and a certification requirement that the word processor count of words is less than the limit.

With regard to appellate practice, Mr. Lynn made several points, a few of which are mentioned here. First, an understanding of the three main standards of judicial review is critical to understanding what the court looks for in the appellate review process. The bottom line in winning on appeal is showing that the trial court made an error of law and that error was prejudicial. Second, the doctrine of waiver is fatal to many cases. Trial counsel must firmly ensure that objections and specific rulings get on the record, particularly in summary judgment cases. Third, the appeal should focus on specific issues of law that you can win on, not on the whole trial below. One suggestion he made was to include an appellate lawyer in your trial team so he can focus on possible appellate issues while you worry about the broader trial issues. Finally, for an appeal court view of appellate lawyers Mr. Lynn recommends a reading of *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 408-411.

17th Annual Installation Dinner Recap

By: Peter S. Doody
Higgs, Fletcher & Mack

On January 26, 2002, San Diego Defense Lawyers held its annual installation dinner at the Hyatt Regency honoring Judge J. Michael Bollman and defense attorney Thomas M. Dymott. Mayor Dick Murphy, a long-time friend of Judge Bollman, presented the award. Judge Bollman, who with Mayor Murphy took the bench in 1985, was honored for his dedication and years of hard work, particularly as a settlement conference judge. On a good day, as the designated civil litigation settlement conference judge, Judge Bollman will settle as many as ten cases. Accompanying Judge Bollman at the dinner was his wife, Susan, and their children Carolyn and Thomas.

Tom Dymott of Neil, Dymott, Perkins, Brown & Frank was also honored and recognized for his years of service to the legal community and the San Diego Defense Lawyers, particularly in the education and training of young trial lawyers. Despite his battles with physical hardship, Tom has always given back to the defense bar. In his speech, Tom expressed personal gratitude to his physician who also attended the event. Tom's partner, Mike Neil, presented Mrs. Dymott with a large bouquet of red roses as Tom accepted his award.

Past president, Ray Artiano, was recognized by current president John Clifford, for his hard work this past year. One of the hallmarks of Ray's tenure as president has been upgrading our now-state-of-the-art web site. Also receiving awards were outgoing board members, secretary Jeff Joseph and treasurer Dennis Fredrickson.

The youthful and accomplished rock band "Left For Dead," composed of several SDDL members, played music through the night for the SDDL partygoers.

Perry Mason...

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brought to the suit when, in fact, he felt their own negligence had been responsible for the woman's demise. His anger made him appear callous and uncaring. We discussed his reasons for selected internal medicine as his specialty. With time and the honesty of video feedback, he became willing to let go of the outrage in favor of true emotion. At that point we developed compassionate testimony using language the jury would understand.

After a week helping criminal lawyers understand the need to focus on their clients during initial interviews, I saw a lawyer risk the precious moments she was allowed to speak to her jailed client and bravely listened instead. A cohesive, believable explanation followed giving the attorney something concrete to present to the judge. Courtroom testimony stands apart from other forms of communication in many significant ways. Whatever the size or seeming importance of the trial, presentation goals remain the same: clear testimony, supportive courtroom demeanor, and a positive connection with the jurors. To accomplish all, the witness must know her role. She must present what the jury needs to see and hear in order for them to believe. She must have the confidence to embody all she says she is - facing fear, anxiety and worry to be that person in the courtroom.

Since 1979, through her service Presentation Consultants, Glynn Bedington has employed the skills of the 'acting world' to dramatically enhance the presentation skills of the 'real world.' She has been on the faculty of the New York State Defender Institute's Basic Trial Skills Program since its inception in 1987. She has been a featured speaker for such organizations as; The American Bar Association, The California Trial Lawyers Association, The New Jersey Trial Lawyers Association, The California Trial Lawyers Association, The San Diego Trial Lawyers Association, The Dallas District Attorney's Office, and The New York State Defenders Association.

Glynn has authored and directed Full Court Communications' CLE-accredited ACT Video Series; What Every Female Litigator Should Know, Preparing the Expert Witness for Trial, Preparing the Lay Witness for Trial, Opening Statement, Elements of Voir Dire, Direct and Cross Examination, and Closing Argument. Her book, Who Do You Want to Be? - The Art of Presenting Yourself with Ease is published by SilverCat.

Glynn's formal education is in theatre, (MA University of Colorado). Additionally she has studied in England at the University of London and the Royal Academy of Dramatic Arts. For ten years Ms Bedington was Artistic Director for Ensemble Arts Theatre in San Diego (1989-1999) producing almost exclusively new work and touring nationally and internationally both to produce as well and locate new world theatre.

Ins and Outs

- Dan Groszkruger, JD, MPH has joined DiCaro, Coppo & Popcke in Carlsbad, CA, in the role Of Counsel. He serves as Chair of the 2002 Advocacy and Regulatory Affairs Task Force, of the American Society for Healthcare Risk Management (a division of the American Hospital Association). Later this year, he takes over as President of the Health Policy and Management Alumni Association, of the UCLA School of Public Health.
- Campbell, Souhrada & Volk, has added attorneys Douglas Cafarel and Christine Parsley to it's associate staff in it's San Diego office, and attorneys Eileen Luttrell and Scott Stonehocker as an associates in it's Las Vegas office.
- Kerry F. Kawamura and Christopher J. Workman have been admitted as Partners to Bacalski, Byrne & Koska.
- Patrick J. Shipley has joined the firm of White, Noon & Oliver as an associate.
- Billie J. Jaroszek has joined the firm of Fredrickson, Mazeika & Grant as partner. Additionally, it was recently announced by Robin L. Tharp of Tharp & Associates and the Fredrickson firm that they have merged. This new firm will continue to known as Fredrickson, Mazeika & Grant.

The Bottom Line

The Bottom Line is a column that lists favorable defense results at trial and/or arbitration. If your firm has had such results since April 1, 2002, and wishes to be listed in the next edition of THE UPDATE, please provide that information to:

Clark R. Hudson at Neil, Dymott, Perkins, Brown & Frank, 1010 Second Avenue, Suite 2500, San Diego, CA 92101.
Phone: 619- 238-1712,
Fax: 619- 238-1562,
E-mail: chudson@neildymott.com.

Rafelina Gallucci, an incompetent, by and through Frank Gallucci, her Guardian ad Litem vs. Mission Hills Health Care, Inc., San Hsieh, M.D., and San Hsieh, M.D., Inc.

- Case No.: GIC 749689
- Judge: Honorable Sheridan Reed
- Plaintiff Counsel: Norman M. Finkelstein, Esq. , Finkelstein & Finkelstein
- Defense Counsel: Michael I. Neil, Esq., Neil, Dymott, Perkins, Brown & Frank
- Type of Incident: Medical malpractice for wrongful death
- Settlement Demand: Plaintiffs served a 998 offer in the amount of $249,999.99
- Settlement Offer: None
- Verdict: Defense (9/3)
- Trial Length: 5 Days
- Jury Out: 1-1/2 Days

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The Privilege Log

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Two important issues raised by producing documents in several different jurisdictions include choice of law and the potential for inconsistent rulings on the status of privileged documents. For example, if a privileged document is inadvertently produced in one jurisdiction and that jurisdiction finds that the owner of the document has waived its privilege, opposing counsel in other jurisdictions will likely argue that the document becomes subject to production everywhere. In addition, issues arise concerning which jurisdiction's law of privilege applies to the communications. Absent agreement by the parties, these issues are usually resolved by the courts.

The document reviewing attorney should keep in mind the myriad of issues that arise with mass document production and privilege review in multiple jurisdictions. Although there are no easy answers to these issues, being aware of them goes a long way towards finding an acceptable resolution.

Inadvertent Disclosure

In complex litigation involving mass document production, privileged documents are often produced by mistake. In order to prevent waiver of the privilege not to disclose these documents, the parties should consider stipulating or obtaining a court order that provides that inadvertent production of the privileged document should not be considered a waiver of privilege. See, e.g., *In re Diet Drugs Phentermine/Fenfluramine/Dexfenfluramine Products Liability Litigation*, MDL Docket No. 1203, PTO No. 41 (E.D.Pa. 22 Apr. 1998) (court order delineating procedures for inadvertently disclosed documents). Rule 193.3(d) of the Texas Rules of Civil Procedure provides that "a party who produces material or information without intending to waive a claim of privilege does not waive that claim," if the producing party promptly discovers the disclosure (within 10 days or less), and amends its responses to discovery asserting the appropriate privilege. See also, *Manual for Complex Litigation, Third* §21.431 (1995). The receiving party should be required to return the documents promptly without copying or using the documents and any information contained within them. Through use of these procedures, inadvertent disclosure may be avoided, or quickly remedied.

The Privileges

Non-specific, "blanket" claims of privilege are insufficient to block discovery of any document. Instead, privilege claims must be asserted specifically and expressly, document by document. As a result, prior to asserting a privilege as a reason for refusing to produce, the withholding party must be familiar with all of the privileges recognized by the law.

The most common bases for asserting an exemption to discovery are the attorney-client privilege and the work product doctrine. Other privileges that could justify refusal to produce include the consulting expert privilege, the joint defense privilege, the common interest privilege, the self-critical analysis privilege, professional privileges (e.g., physician-patient, clergy, accountant-client, psychotherapist-patient), and, in certain cases, the Fifth Amendment privilege.

The federal law of privilege is governed by the generalized provisions of Rule 501of the Federal Rules of Evidence. However, state law is especially important in this area. For instance, many of the professional privileges are not recognized by either federal statute or federal common law. Thus, in diversity and other cases governed by state law, be sure to look to the relevant state's law on professional privileges.

The following is a brief description of the privileges that are likely most relevant to mass tort litigation. Bear in mind that not all privileges are recognized in all jurisdictions. Therefore, careful research must be performed to determine the application of the specific protection in your jurisdiction.

Attorney-Client Privilege

Generally, to invoke the attorney-client privilege, a party must demonstrate: 1) a communication between client and counsel; 2) which was intended to be and was in fact kept confidential; and 3) was made for the purpose of obtaining or providing legal advice. *Fisher v. United States,* 425 U.S. 391, 403 (1976). If the communication concerns business matters not connected to legal advice, the privilege does not apply. *Bowne of New York City, Inc. v. AmBase Corp.*, 150 F.R.D. 465, 471 (S.D.N.Y. 1993); *Teltron, Inc. v. Alexander*, 132 F.R.D. 394, 396 (E.D.Pa. 1990) ("the [attorney-client] privilege is limited to confidential communications with an attorney acting in his professional legal capacity 'for the express purpose of seeking legal advice.' . . . ordinary business advice is not protected").

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Thank You

San Diego Defense Lawyers would like to thank
Brenda Peterson
of Peterson & Associates
for sponsoring our March 14th Brown Bag Luncheon program which was held in her offices at:

530 "B" Street · Suite 350
San Diego · CA · 92101 · 619.260.1069

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The privilege protects communications between the attorney and client, as well as among their representatives. Specifically, communications between the following persons are protected: 1) the client or its representative, with the lawyer, or his or her representative; 2) the lawyer, with the lawyer's representative; 3) the client or its lawyer, with a lawyer representing the client on another matter of common interest; 4) the client, with a representative of the client; 5) communications between representatives of the client; and 6) communications between lawyers representing the client. See *In re Bieter Co.*, 16 F.3d 929, 935 (8th Cir. 1994). Finally, the attorney-client privilege belongs to the client, but may be claimed on the client's behalf by the attorney. *United States v. Fisher*, 692 F.Supp. 488, 495 (E.D.Pa. 1988).

With respect to corporations, the attorney-client privilege protects communications by any corporate employee, regardless of position, when the communications concern matters within the scope of the employee's corporate duties and the employee is aware the information is being furnished to provide legal advice to the corporation. *Upjohn Co. v. United States,* 449 U.S. 383, 394 (1981). This analysis is commonly called the "subject matter" test, as opposed to the "control group" test rejected by the United States Supreme Court in Upjohn. It focuses on the content of the communications, not the rank of the employee. The attorney-client privilege also extends to former employees possessing privileged information.

An exception to the attorney-client privilege is the crime/fraud exception, which allows the disclosure of attorney-client communications that solicit or offer advice for the commission of a fraud or crime. *Clark v. United States,* 289 U.S. 1, 15 (1933); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996). See also, *United States v. Zolin*, 491 U.S. 554 (1989) (discussing *in camera* review to prove the crime/fraud exception). Of course, the party asserting privilege must be allowed an opportunity to show that the exception does not apply. See *Moore's Federal Practice*, §26.49[6] (3d ed.).

Work Product Doctrine

Rule 26(b)(3) of the Federal Rules of Civil Procedure protects attorney work product from discovery. The work product doctrine is not a "privilege" *per se*, but a qualified immunity that protects from discovery certain documents and tangible things prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative. The privilege can be defeated, however, if there is a showing by the party seeking discovery that 1) there is a substantial need for the materials in preparation of the party's case; and 2) the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering the discovery of such materials, the court shall protect against disclosure of the mental impressions, conclusions, opinions, and legal theories of an attorney or other representative of a party concerning the litigation. See also, *Hickman v. Taylor,* 329 U.S. 495, 510 (1947). Again, the work product protection does not extend to documents prepared in the regular course of business. *Martin v. Bally's Park Place Hotel & Casino*, 983 F.2d 1252, 1260 (3d Cir. 1993).

Application of the work product doctrine hinges on the purpose behind creating the document, which must be in anticipation of litigation. Therefore, opinion work product receives almost absolute protection from discovery, while ordinary work product receives qualified protection and may be discoverable upon a showing of substantial need or undue hardship. See Fed.R.Civ.P. 26(b)(3); *In re Chrysler Motors Corp. Overnight Evaluation Program Litigation*, 860 F.2d 844, 846 (8th Cir. 1988).

Unlike the attorney-client privilege, the work product protection belongs to both the attorney and the client and either may assert it. *In re Grand Jury Proceedings*, 43 F.3d 966, 972 (5th Cir. 1994). Thus, the client's waiver will not waive the attorney work product immunity, and vice versa. Also, the burden to establish the application of the work product doctrine rests upon the party claiming its protection. Once the party claiming immunity has made a showing that the discovery is protected, the burden shifts to the party seeking discovery to show substantial need or undue hardship.

Joint Defense Privilege

Some courts recognize a privilege that preserves the confidentiality of communications and information exchanged between two or more parties and their counsel who are engaged in a joint defense effort. *Metro Wastewater Reclamation District v. Continental Casualty Co.,* 142 F.R.D. 471, 478 (D.Colo. 1992). The joint defense privilege does not confer any independent privileged status upon documents or information. Instead, it is an extension of the attorney-client privilege and work product doctrine. *Id.* Thus, in order to apply the privilege, the documents must fall within the scope of either the attorney-client privilege or the work product doctrine. See *In re Grand Jury Subpoenas*, 902 F.2d 244, 250 (4th Cir. 1990). Generally, parties relying on the joint defense privilege must establish that 1) there was existing litigation or a strong possibility of future litigation, and 2) the materials were provided for mounting a common defense. *Metro Wastewater, supra,* 142 F.R.D. at 479.

Common Interest Doctrine

The common interest doctrine provides that parties with shared interests in actual or potential litigation against a common adversary may share privileged information without waiving their right to assert the privilege. *Duplan Corp. v. Deering*

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The Bottom Line

Carla Janet Mexia, a minor by and through her Guardian, Juan Mexia vs. Jorge Del Agulia, M.D.

- Case No.: GIS 004678
- Judge: Hon Luis R. Vargas
- Plaintiff Counsel: Frank DeSantis, Law Office of Frank DeSantis
- Defense Counsel: Clark Hudson, Esq., Neil, Dymott, Perkins, Brown & Frank
- Type of Incident: Alleged medical malpractice, birth injuries following difficult delivery - shoulder dystocia.
- Settlement Demand: None
- Settlement Offer: None
- Verdict: Defense (12/0)
- Trial Length: 8 days
- Jury Out: 1hour

Jeffrey Conte vs. Girard Orthopedic Surgeons & Medical Group, et.al.

- Case No.: GIN 007273
- Judge: Hon Michael B. Orfield
- Plaintiff Counsel: Steven Root, Esq., Law Office of Steven Root
- Defense Counsel: Clark Hudson, Esq., Neil, Dymott, Perkins, Brown & Frank
- Type of Incident: Alleged Medical Malpractice and Medical Battery, Inability to repair glenoid fracture
- Settlement Demand: $150,000
- Settlement Offer: Waiver of Costs
- Verdict: Defense (11/1)
- Nonsuit was granted on the battery claim on March 13, 2002
- Trial Length: 7 Days
- Jury Out: 5 hours

The Bottom Line

Murphy, et al. vs. Bisbee, et al.

- Case No.: GIC 755928
- Judge: Honorable John S. Meyer
- Plaintiff Counsel: Peter J. Stark, Esq.
- Defense Counsel: Hugh A. McCabe, Esq., Neil, Dymott, Perkins, Brown & Frank
- Type of Incident: Breach of Contract (Marlin Fishing Tournament in Cabo San Lucas, Mexico)
- Settlement Demand: $300,000
- Settlement Offer: None
- Trial Type: Judge
- Trial Length: Two Days
- Verdict: Dismissal

Paralegal MCLE

SDDL can help your paralegals meet their continuing education requirements

Every two years paralegals must complete mandatory continuing education in either general law, or a specialized area of law. (Business and Professions Code Section 6450(4)(d)).

To help members of the San Diego Defense Lawyers, paralegals are now invited to attend the educational seminars offered by SDDL. Brown Bag Seminars are $10.00 and the two-hour seminars are $20.00.

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Milliken, Inc., 397 F.Supp. 1146, 1172 (D.S.C. 1974); *In re United Mine Workers of America Employee Benefit Plans Litigation*, 159 F.R.D. 307, 313 (D.D.C. 1994). The key consideration is that the nature of the interests be "identical, not similar, and be legal, not solely commercial." *Katz v. AT&T Corp.,* 191 F.R.D. 433, 437 (E.D.Pa. 2000). The common interest doctrine is also recognized by the American Law Institute and is defined as follows: "If two or more clients with a common interest in a litigated or nonlitigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged . . . that relates to the matter is privileged as against third persons." *Restatement (Third) of the Law Governing Lawyers*, §76.

The common interest doctrine is important because communications protected under this privilege are not limited to sharing information during actual litigation; it also extends to communications made prior to the commencement of litigation. *In re Regents of the University of California,* 101 F.3d 1386, 1390-91 (Fed.Cir. 1996). In this regard, the common interest doctrine gives greater protection and is distinguishable from the joint defense privilege, which is limited to the sharing of confidential information relating to a joint defense in existing or impending litigation.

Self-Critical Analysis Privilege

Some courts recognize a qualified privilege that allows individuals or businesses to evaluate their compliance with regulatory and legal requirements without risking that the evidence will be used against them in future litigation. This privilege is also known as the self-evaluation privilege, or self-evaluative privilege. *In re Kaiser Aluminum & Chemical Co.,* 214 F.3d 586, 593 n.20 (5th Cir. 2000) (declining to recognize the privilege in the Fifth Circuit under the circumstances). The public policy behind this privilege is that self-critical analysis fosters the public interest that businesses and individuals comply with the law, as well as encouraging institutional self-analysis and improvement. See Note, "The Privilege of Self-Critical Analysis," 96 Harv.L.Rev. 1083 (1983). Generally, the privilege protects investigations, assessments, and evaluations conducted on an institution-wide or department-wide basis. *Id.* See also, *Torres v. Kuzniasz*, 936 F.Supp. 1201, 1214 (D.N.J. 1996). Generally, three criteria must be met to qualify for protection: 1) the information must result from a self-critical analysis undertaken by the party seeking protection; 2) the public must have a strong interest in preserving the free flow of the type of information sought; and 3) the information must be of the type whose flow would be curtailed if discovery were allowed. *Torres, supra*, at 1215. Of course, the exemption is not absolute because the privilege only protects evaluative opinions, not the facts disclosed in the course of self-evaluation. *Id.*

Procedure for Asserting Privileges

Rule 26(b)(5) governs the procedure for asserting privilege claims or for protecting trial preparation materials when a party withholds otherwise discoverable information. Specifically, the rule requires that the withholding 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." See Fed.R.Civ.P. 26, 1993 Notes of Advisory Committee ¶34. At a minimum, the rule requires the withholding party to specifically claim the privilege and describe the information withheld with sufficient detail to allow the court to determine the applicability of the privilege claim. *Id.*

Notably, the rule does not specify the precise level of detail required for an express claim of privilege. According to ¶35 of the Advisory Committee Notes, this omission was intentional in order to allow the trial court discretion to evaluate the necessary level of information on a case-by-case basis. See also, Cochran, "Evaluating Federal Rule of Civil Procedure 26(b)(5) as a Response to Silent and Functionally Silent Privilege Claims," 13 Rev.Litig. 219, 224 (Spring 1994).

In conjunction with asserting privilege claims, the court may mandate that the withholding party submit a detailed privilege log identifying each individual document and the privileges claimed. See *United States v. Construction Products Research, Inc.,* 73 F.3d 464, 473 (2d Cir. 1996); *Krenning v. Hunter Health Clinic, Inc.,* 166 F.R.D. 33, 35 (D.Kan. 1996). However, the Advisory Committee Notes leave discretion with the district court to excuse parties from providing certain descriptive information if it is unduly burdensome as a result of a voluminous number of privileged documents withheld, "particularly if the items can be described by categories." See Fed.R.Civ.P. 26, 1993 Notes of Advisory Committee ¶35. Local rules of courts may offer guidance to the parties concerning the necessity of preparing a privilege log, as well as to describe the specific preparation requirements of the court. See Local Civil Rule 26.2, United States District Courts for the Southern and Eastern Districts of New York; Local Rule 7.1(d)(7), United States District Court for the Northern District of New York. The level of detail demanded varies from jurisdiction to jurisdiction. Failure to follow the procedures set forth in the rule may result in waiver of the privilege and subject the withholding party to sanctions.

Another key consideration in protecting privileged information is the timing of the privilege objections. Presumably, because the privilege rule's application is triggered by Rule 26(a)'s mandatory pre-trial disclosures requirement, by

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Rule 26(e)'s duty to supplement, and by propounding discovery requests subsequent to initial disclosure, privilege claims should be asserted at the time that disclosures or discovery responses are due. See *Burns v. Imagine Films Entertainment, Inc.,* 164 F.R.D. 589, 593 (W.D.N.Y. 1996) (finding that blanket assertions of privilege in discovery responses are insufficient to sustain privilege claims absent a detailed privilege log tendered at the time disclosures are due and prior to the court's ruling on the motion to compel). See also, Local Rule 26.2, S.D.N.Y. and E.D.N.Y. ("[w]here a claim of privilege is asserted in response to discovery or disclosure other than a deposition, and the information is not provided on the basis of such assertion, the information set forth . . . shall be furnished in writing at the time of the response to such discovery or disclosure, unless otherwise ordered by the court."); *Bowne of New York City, Inc. v. AmBase Corp.,* 150 F.R.D. 465, 473 (S.D.N.Y. 1993) (noting that local rules require that the party withholding documents on the basis of privilege must prepare and submit a privilege log prior to the filing of any discovery motions); Cochran, *supra,* 13 Rev.Litig. at 222. Though there is not a simple standard of timeliness for assertion of privilege claims or production of privilege logs, the safest way to ensure the preservation of privileges is to assert claims at the time discovery responses are due (and before a motion to compel is filed) and/or in large document production cases to enter into a written enforceable agreement with opposing counsel dictating a reasonable schedule for the production of a privilege log. See generally, Tyler, "Analyzing New Protections for Intangible Work Product and Harmonizing that Protection with the Use of Privilege Logs," 64 U.M.K.C. L. Rev. 743, 751-52 (1996).

Waiver of Privilege

Every attorney's worst fears include (or should include) either inadvertently turning over privileged documents in a large document production, waiving privilege through an incorrect or improper assertion of privilege, or waiving privileges by failing to timely object to discovery responses. These mistakes or accidents may result in a range of consequences, from waiving the privilege as to the specific document, to subject matter waiver of related documents and information.

A thorough discussion of the waiver of the privilege not to disclose information is beyond the scope of this article. However, waiver is a topic to be constantly considered and must be mentioned because the essence of creating privilege logs is to preserve privileges. Thankfully, waiver can be avoided by: 1) preparing an adequately detailed privilege log with specific objections for each document, not mere blanket assertions; 2) asserting all of the applicable privileges at the time of submission of the privilege log; and 3) entering into a pretrial agreement with opposing counsel to return any inadvertently disclosed documents, if your jurisdiction does not have a rule governing inadvertent disclosure.

Preparing the Privilege Log

Components of the Log

Although Rule 26(b)(5) of the Federal Rules of Civil Procedure governs the procedure for asserting privilege claims, it does not set forth the precise format for an adequate privilege log. However, several federal courts and federal district court local rules offer guidance on some of the elements that may be required to sustain a privilege claim. Also, "details concerning time, persons, subject matter, etc. may be appropriate." See Fed.R.Civ.P. 26, 1993 Notes of Advisory Committee ¶35. The federal courts for the Southern and Eastern Districts of New York have a rule that delineates the factual contents of a privilege claim for documents. Local Rule 26.2(a)(2)(A) provides that the contents include:

- the type of document, e.g., letter, memorandum, e-mail, etc.;
- the general subject matter of the document;
- the date of the document; and
- such other information sufficient to identify the document for a subpoena *duces tecum,* including where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and where not apparent, the relationship of the author, addressees, and recipients to each other.
- The New York federal courts' local rule also requires the withholding party to disclose the nature of the privilege claimed, and if the privilege is governed under state law, the state privilege rule being invoked. Of course, not all local rules specify the level of detail as precisely as these New York rules. Instead, some federal courts simply require specific objections for each document, without specifying what factual support is necessary. See also, D.Mass. Local Rule 34.1(e); D.Hawaii Local Rule 26.2(d).

Cases interpreting Rule 26(b)(5)'s privilege requirements are consistent with the local rules set

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forth above with respect to the level of specificity demanded in a detailed privilege log. See *Torres v. Kuzniasz, supra,* 936 F.Supp. at 1208 ("[a] proper privilege log must include for each withheld document, the date of the document, the name of its author, the name of its recipient, the names of all people given copies of the document, the subject of the document, and the privilege or privileges asserted."). An "adequate" privilege log is one that will identify each document and the individuals who were parties to the communications. It will provide sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure. Other required information includes relationships between the individuals listed in the log and the litigating parties, the maintenance of confidentiality and the reasons for any disclosures of the document to individuals not ordinarily within the privileged relationship. *Bowne v. AmBase, supra,* 150 F.R.D. at 474. See also, *In re Grand Jury Investigations*, 974 F.2d 1068, 1070-71 (9th Cir. 1992); *Burns v. Imagine Films, supra*, 164 F.R.D. at 594.

Rule 26(b)(5), the local rules described above, and cases interpreting these rules illustrate the courts' reluctance to shift the burden of proper document review onto the courts. Thus, when preparing a privilege log, the more factual information that can be supplied (without disclosing privileged information) that traces the elements of the privileges claimed, the more likely the withholding party will be able to preserve its privileges.

Drafting Privilege Log Entries

The premise behind Rule 26(b)(5)'s requirement to expressly assert privilege claims is to create a balance between disclosure of discoverable information and preservation of privileged information. This concept is reflected in the language of the rule which states that when a party withholds otherwise discoverable information on the basis of privilege it must reveal enough information to enable the opposing party to assess the applicability of the privilege "without revealing information itself privileged or protected." Fed.R.Civ.P. 26(b)(5). The standard enunciated by some courts to judge the adequacy of a privilege log is "whether, as to each document, it sets forth specific facts that, if credited, would suffice to establish each element of the privilege or immunity that is claimed. The focus is on the *specific descriptive portion of the log*, and not on the conclusory invocations of the privilege." *Bowne,* 150 F.R.D. at 474 (emphasis added). Further, a detailed privilege log must be utilized in conjunction with evidentiary submissions, such as affidavits, to fill in any factual gaps. *Id.* In order to assess the adequacy of privilege log entries, relevant federal case law offers some guidance and is discussed below.

Enough information to support the withholding party's privilege claim document-by-document must be provided. One court found that a privilege log that contained—or more accurately that lacked certain specificities—was "plainly inadequate" to sustain the withholding party's privilege claims. *Bowne,* at 474-76. Specifically, the privilege log: 1) had "very skeletal" descriptions of the subject matter of the documents; 2) lacked complete identification of privileges claimed; 3) failed to state whether the documents claimed as attorney-client privileged contained legal advice or were prepared to elicit legal advice from others; 4) failed to indicate whether the documents claimed as attorney-client privileged were intended to be kept confidential and whether they were in fact held confidential; 5) did not identify the individuals listed, or their relationships; and 6) omitted any indication that documents claimed under the work product exemption were prepared in anticipation of litigation or for any other reason. *Id*. Similarly, the Second Circuit held that a privilege log containing "cursory" descriptions and general allegations of privilege without any factual support simply did not provide enough information to support a privilege claim, particularly in the "glaring absence of supporting affidavits or other documentation." See *U.S. v. Construction Products, supra,* 73 F.3d at 473. Essentially, in both *Bowne* and *Construction Products*, the withholding party's privilege log entries failed to provide the court with any clues as to the basis of its privilege assertions.

For an example of a satisfactorily detailed privilege log, see *In re Grand Jury Investigations*, where the Ninth Circuit sustained the withholding party's privilege claims based upon their submission of a detailed privilege log. 974 F.2d at 1071. For each document, the withholding party's log identified: 1) the attorney and client; 2) the nature of the document; 3) all persons or entities shown on the document to have received or sent the document; 4) all persons or entities known to have furnished the document or informed of its substance; 5) the date the document was prepared, generated, or dated; and 6) information on the subject matter of each document. *Id.* In conjunction with its privilege log submission, the withholding party supplied the court with affidavits of attorneys responsible for preparing the documents to resolve any open questions or factual gaps. *Id.* Therefore, the withholding party's diligence in the preparation of its privilege log entries and the level of detail described above was sufficient to sustain a claim of privilege.

For each privileged document, the log contains all of the information that would be required in most jurisdictions in order to protect the document from discovery by opposing counsel. It follows, of course, that each privilege log must be tailored to the specific requirements of each jurisdiction.

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To be continued. . .