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Asserting and Defending Privilege

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In my experience, I have found that most lawyers (myself sometimes included) do not follow the correct procedure for asserting and defending privilege. Recently, I was asked for a privilege log and found myself reminded of some of the nuances involved in asserting and defending privilege. Here are some reminders that I hope are helpful as you encounter privilege issues in your practice.

Withhold the Privileged Information or Material: The first obvious step in order to protect the privilege is to ensure that you withhold any privileged information or material from your production.

Assert the Privilege: If you withhold privileged information or material, comply with TEXAS RULE OF CIVIL PROCEDURE 193.3(a). This means serve a withholding statement (either in your discovery response or in a separate document), which (1) states that information or material responsive to the discovery request is being withheld, (2) identifies the request to which the information or material relates, and (3) identifies the privilege(s) asserted. Remember that you do not have to follow this procedure for materials created by or for attorneys for the litigation or for communications to or from an attorney or attorney's representative regarding the litigation. TEX. R. CIV. P. 193.3(c).

Request a Privilege Log: If you represent the requesting party and you are served with a withholding statement, request a privilege log. To do so, you need only request in writing that the withholding party identify the information or material withheld. TEX. R. CIV. P. 193.3(b).

Prepare and Serve a Privilege Log: If you receive a request for a privilege log, you have 15 days within which to serve a response, and the response must (1) describe the information or material withheld and (2) assert a specific privilege for each item or group of items withheld. TEX. R. CIV. P. 193.3(b). The tricky part here is to identify the information or material withheld "without revealing the privileged information itself or otherwise waiving the privilege." TEX. R. CIV. P. 193.3(b)(1). The detail provided will depend on the content of the information or material withheld, but generally, you should provide enough information to enable the other party to assess the applicability of the privilege. *Id.*

Have a Hearing: Either party may request a hearing to have the court decide a privilege issue. TEX. R. CIV. P. 193.4(a). At the hearing, the "party making the objection or asserting the privilege must present any evidence necessary to support the objection or privilege." *Id.* Such evidence may either be live testimony or affidavits served at least 7 days before the hearing. *Id.* The court is permitted to perform an *in camera* review of some or all of the information or material in order to rule on the objection or claim of privilege. *Id.*

Comply with the Ruling: If the court overrules the objection or claim of privilege, the responding party must produce the requested information or material either within 30 days after the court's ruling or at such time as the court orders. TEX. R. CIV. P. 193.4(b).

Do Not Use Information or Material Withheld: If you withhold information or material, do not attempt to use that information or material at any hearing or at trial. If you plan to do so, remember to amend or supplement your discovery responses and produce any information or material to be introduced. TEX. R. CIV. P. 193.4(c).

Use the Snap-Back Provision: Because some cases involve thousands of documents, sometimes privileged information or material is inadvertently produced. Although there is no way for an opposing lawyer to un-see a document, the TEXAS RULES OF CIVIL PROCEDURE have a snap-back provision for damage control. After you realize that privileged information or material has been produced, you generally have 10 days within which to amend the discovery response and/or withholding statement, which should identify the information or material produced and state the privilege(s) asserted. TEX. R. CIV. P. 193.3(d). The requesting party must then promptly return the specified information or material and any copies. *Id.* Return of the information or material is mandatory even if the requesting party intends to contest the objection or claim of privilege. *Id.* Once the information or material is returned, then the requesting party can set a hearing to have the court consider the objection or claim of privilege. *Id.*; TEX. R. CIV. P. 193.4.

Considering reviewing the following cases for additional insight into this process: *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218 (Tex. 2004); *In re Texas Health Res.*, 05-15-00813-CV, 2015 WL 5029272 (Tex. App.—Dallas Aug. 26, 2015, no. pet. h.) (discussing the application of the attorney-client privilege); *In re Monsanto Co.*, 998 S.W.2d 917 (Tex. App.—Waco 1999, no pet.).

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