CHAPTER 1

Introduction

Chapter Contents

---

§ 1.01 Introduction

The law of privilege protects certain kinds of information from forced disclosure. The law may also offer different or more limited forms of protection from disclosure to other forms of confidential information that are not granted the protection of a defined privilege. This work explores the protections available for both privileged and

confidential material, emphasizing information that has particular relevance to corporations and to lawyers who advise corporations. Sources of privilege that are generally inapplicable in a corporate setting, such as spousal privilege and priest-penitent privilege, are left to other sources.

This work is neither strictly about traditional rules regarding privileged communications, nor is all of the discussion applicable only to corporations. The work addresses privileges of general applicability, such as the attorney-client privilege, work product protection, and the joint defense privilege, discussing both the basic elements and issues involved and the particular concerns associated with the assertion of such privileges by a corporation. Non-traditional sources of confidentiality are also explored, such as rules restricting the dissemination of information disclosed by corporations to government agencies.[1] The work also addresses sources of confidentiality nominally unavailable to a corporation, such as the privilege against self-incrimination,[2] exploring the extent to which such sources may actually be applicable in the corporate context. In addition, the work includes a discussion of the deliberative process privilege.[3]

The focus of this work, however, is upon these issues as they arise in a corporate context. When the party seeking to prevent disclosure is a corporation, the law of privilege is particularly complex. Corporations are artificial entities that represent the disparate interests of shareholders yet act through individuals. As creatures of statute, they are subject to complex regulation and extensive disclosure requirements. Finally, attorneys in corporations carry out a variety of tasks and may hold many different positions. Accordingly, issues arise that might never need be to addressed in the case of individuals, including who has the authority to assert or waive privileges belonging to the corporate entity,[4] the matters as to which a corporation may preserve confidentiality,[5] and how to draw the line between business and legal functions.[6] Such issues may complicate privilege analysis.

---

[1] See Chapter 9 *infra*.

[2] See Chapter 5 *infra*.

[3] The deliberative process privilege does not protect corporate information, but is often invoked by the government in refusing to provide information sought by corporations. Accordingly, it has been included here for convenience and ready reference. See Chapter 14 *infra*.

[4] See, e.g.: §§ 2.03 (Who Controls the Attorney-Corporate Client Privilege), 2.04 (Extent of the [Attorney-Corporate Client] Privilege); 3.02[5] (Who Can Assert the [Work Product] Privilege) *infra*.

[5] See, e.g.: Chapter 6 (Self-Evaluation Privilege), Chapter 8 (Trade Secrets), and Chapter 9 (Confidential Submissions To Government Agencies) *infra*.

[6] See, e.g.: §§ 2.05[2] (determining the boundaries of "legal services" for purposes of the attorney-client privilege) and 3.03 (determining when material is prepared "in anticipation of litigation" for purposes of the work product privilege) *infra*.

It should be borne in mind that aspects of the law of privilege vary dramatically from state to state,[7] and from federal circuit to federal circuit.[8] Accordingly, approaching privilege law as if it were simple or monolithic is ill-advised for both the practitioner and corporate client. Instead, this work is intended to introduce the reader to the breadth of legal sources for preserving confidentiality, to instruct the reader regarding the common or conflicting approaches taken by courts in different jurisdictions, and to provide a source of authorities for these varying approaches.

---

[7] The response of different states to the Supreme Court's rejection of the "control group" test for defining the corporate "client" is a case in point. See: § 2.04[3] *infra*; Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). Some states adopted the Supreme Court's position by amending their Rules of Evidence, others retained "control group" language in their Rules of Evidence, and still others adopted additional statutes specifically addressing the question of attorney-corporate client privilege. As another example, New Jersey holds that the attorney-client privilege may be overcome where a party meets three conditions: "(1) there must be a legitimate need for the evidence; (2) the evidence must be relevant and material to the issue before the court; and (3) by a fair preponderance of the evidence, the party must show that the information cannot be secured from any less intrusive source." See Kinsella v. Kinsella, 696 A.2d 556, 568 (N.J. 1997). See also, § 2.02[2] *infra*.

[8] For example, the circuit courts vary considerably in their conceptions of the degree of common interest necessary to support a claim of joint defense privilege. See § 4.02[2] *infra*.

§ 1.02 Finding the Law of Privilege for Corporations

The sources of privilege law with respect to corporations are, for the most part, the same sources as those with respect to any other entity. This section provides a brief introduction to the process of finding the law of privilege and to the various sources of authority that come into play in identifying protections against disclosure. Many of the topics introduced in this section are discussed in greater detail in the chapters that follow.

[1]—Privilege in the Federal Courts

The fundamental statement of federal law on privileges is found in Federal Rules of Evidence Rule 501, which provides:

> "The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision."[1]

In adopting Rule 501, Congress rejected the approach proposed by the Supreme Court[2] which, beyond those protections established by the Constitution, Acts of Congress or rules of the Supreme Court,

---

[1] Fed. R. Evid. 501. The Federal Rules of Evidence were restyled as of December 2011.

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

[2] The version of the Federal Rules of Evidence that was developed by the Advisory Committee of the Judicial Conference and the Standing Committee on Rules of Practice and Procedure, and adopted in the Supreme Court in 1972, was substantially altered by Congress in its enactment of the Federal Rules of Evidence in 1975. See S. Rep. No. 93-1277, reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7077. In common usage, and throughout this work, the rules proposed by the Supreme Court are referred to as "Supreme Court Standards."

would have restricted privilege under the Rules of Evidence to nine defined, non-constitutional privileges.[3] Instead, Rule 501 reflects the intention of Congress "not to freeze the law of privilege" but rather to "provide the courts with the flexibility to develop rules of privilege on a case-by-case basis."[4]

Although Rule 501 grants courts the freedom to "continue the evolutionary development of testimonial privileges,"[5] courts do so carefully and with reluctance. The federal courts will not recognize an evidentiary privilege "unless it 'promotes sufficiently important interests to outweigh the need for probative evidence.'"[6] Whether newly established or commonly accepted, "[t]estimonial exclusionary rules and privileges contravene the fundamental principle that 'the public . . . has a right to every man's evidence,'" and all such privileges will "be strictly construed."[7]

---

[3] See S. Rep. No. 93-1277, reprinted in 1974 U.S. Code Cong. & Admin. News 7051, 7082. The nine privileges proposed were lawyer-client privilege, a required reports privilege, psychotherapist-patient privilege, husband-wife privilege, a privilege for communications to clergy, a privilege against disclosing votes, trade secrets privilege, a privilege for state secrets, and a privilege protecting the identity of informers. See Supreme Court Standards 502-510.

[4] Trammel v. United States, 445 U.S. 40, 47, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980) (quoting legislative history).

[5] *Id*.

[6] University of Pennsylvania v. Equal Employment Opportunity Commission, 493 U.S. 182, 189, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990) (quoting *Trammel v. United States*, N. 4 *supra*, 445 U.S. at 51). Courts considering newly asserted privileges will often apply four conditions identified by Professor Wigmore as necessary to the establishment of a privilege against disclosure: (1) the communication must be one made in the belief that it will not be disclosed; (2) confidentiality must be essential to the maintenance of the relationship between the parties; (3) the relationship must be one that society considers worth fostering; and (4) the injury to the relationship incurred by disclosure must be greater than the benefit gained in the correct disposal of litigation. See 8 *Wigmore on Evidence* § 2285 (1961); see also, § 6.02[1] *infra* (discussing application of Wigmore's conditions to claims of a self-evaluation privilege).

More recently, the Supreme Court applied four different principles for evaluating a claim of common law privilege: (1) the court must consider the private interests involved and determine whether dissemination of the information will chill the "frank and complete disclosure of facts" shared in an "atmosphere of confidence and trust"; (2) the court must consider the "public interests" furthered by the proposed privilege; (3) the court should consider the "likely evidentiary benefit that would result from the denial of the privilege"; and (4) the court may consider the extent to which the privilege has been recognized by state courts and legislatures. See In re Air Crash Near Cali, Colombia on December 20, 1995, 959 F. Supp. 1529, 1533-1535 (S.D. Fla. 1997) (summarizing principles identified in Jaffee v. Redmond, 518 U.S. 1, 10-15, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996)).

[7] See *Trammel v. United States*, N. 4 *supra*, 445 U.S. at 50 (quoting United States v. Bryan, 339 U.S. 323, 331, 70 S.Ct. 724, 94 L.Ed. 884 (1950)).

[2]—Privilege in the States

Determining the law of privilege in a given state may be necessary in federal as well as state court. Federal Rule of Evidence 501 requires that, where state law provides the rule of decision in a civil case brought in federal court, questions of privilege are to be determined in accordance with state law.[8]

---

[8] Fed. R. Evid. 501. The reference to "state law" is generally considered to include state conflict of laws rules such that in a civil action in which state law provides the rule of decision, a federal court sitting in diversity will apply rules of privilege as would a court of the state in which it sits. See:

First Circuit: Gill v. Gulfstream Park Racing Ass'n, 399 F.3d 391, 401 (1st Cir. 2005) ("Since this case is a diversity suit involving only state-law claims, [the claim is] governed by state law under Fed. R. Evid. 501."); Gargiulo v. Baystate Health, Inc., 2011 WL 3627549 at *2 (D. Mass. July 15, 2011) ("With diversity jurisdiction, courts usually apply state privilege law to all state claims.") (citing *Gill v. Gulfstream Park Racing Ass'n., Inc*., N. 8 *supra*, 399 F.3d at 401).

Second Circuit: Riddell Sports, Inc. v. Brooks, 158 F.R.D. 555, 560 (S.D.N.Y. 1994) ("state privilege principles would apply" where "the privilege question appears to relate to substantive claims that will be decided under New York law"); Detroit Coke Corp. v. NKK Chemical USA, Inc., 1993 WL 367060 at *2 (W.D.N.Y. Sept. 13, 1993) ("The '[s]tate law' referred to in [Rule 501] is the law of the forum state . . . including conflict of laws principles.").

Third Circuit: Samuelson v. Susen, 576 F.2d 546, 549 (3d Cir. 1978) ("We believe Rule 501 requires a district court exercising diversity jurisdiction to apply the law of privilege which would be applied by the courts of the state in which it sits.").

Fourth Circuit: Cain v. Liberty Mutual Insurance Co., 2011 WL 1833096 at *4 (N.D. W. Va. May 13, 2011) ("In terms of claiming privilege, in diversity cases such as this one, the Court applies state law to issues concerning attorney client privilege . . . .") (citing Nicholas v. Bituminous Casualty Co., 235 F.R.D. 325, 329 n.2 (N.D. W. Va. 2006)); Hatfill v. New York Times Co., 459 F. Supp.2d 462, 465 (E.D. Va. 2006) ("In diversity cases, privileges are determined according to the state law that supplies the rule of decision.").

Fifth Circuit: Miller v. Transamerican Press Inc., 621 F.2d 721, 724 (5th Cir. 1980) ("Under Fed. R. Evid. 501, the availability of a privilege in a diversity case is governed by the law of the forum state.").

Sixth Circuit: Zep Inc. v. Midwest Motor Supply Co., 2010 WL 2105365 at *5 (S.D. Ohio May 25, 2010) (applying forum choice-of-law rules to determine that North Carolina law governed both the case's fraud claims and, under Rule 501, the related privilege issues).

Seventh Circuit: Tucker v. John R. Steele & Associates, Inc., No. 93 C 1268, 1994 WL 127246 at *2 (N.D. Ill. April 12, 1994) ("The majority of courts follow the general rule that federal courts apply the law of the forum, including conflict of law rules.").

Eighth Circuit: Union County v. Piper Jaffray & Co., 525 F.3d 643, 646 (8th Cir. 2008) (in a diversity case, under Rule 501, "the determination of whether attorney-client privilege applies is governed by state law"); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 281 n.4 (8th Cir. 1984), *cert. dismissed* 472 U.S. 1022 (1985) (under Rule 501, a federal court sitting in diversity must determine privileges in accordance with the forum's conflict of laws rules).

Ninth Circuit: Star Editorial, Inc. v. United States District Court for the Central District of California, 7 F.3d 856, 859 (9th Cir. 1993) ("Federal Rule of Evidence

States vary considerably in their approach to privilege law, presenting a complex mixture of statutory and common law protections. The Uniform Rules of Evidence, which essentially mirror the version of the Federal Rules proposed by the Supreme Court, have been adopted with varying degrees of fidelity in thirty-eight states and Puerto Rico, and provide a useful starting point for finding the state law of privilege.[9] For the most part, however, researching state privilege law requires careful research of both state common law and statutes.

[3]—Constitutional Protections Applied to Corporations

Perhaps the area of greatest disparity between the treatment of individuals and corporations is in the application of constitutional protections. Because corporations are created and granted special privileges by government, they do not enjoy the same level of constitutional protections afforded individuals.[10] Thus, corporations

---

501 provides that when a federal court hears a civil action in which state law provides the rule of decision, 'the privilege of a witness, . . . shall be determined in accordance with State law.'"); Dawe v. Corrections USA, 263 F.R.D. 613, 620 n.11 (E.D. Cal. 2009) ("Federal courts sitting in diversity look to the law of the forum state in making a choice of law determination, ... including privileges for which state law supplies an element of a claim or defense...." [internal citations omitted]); *accord,* Bible v. Rio Properties, Inc., 246 F.R.D. 614, 617 (C.D. Cal. 2007).

Tenth Circuit: Valencia v. Colorado Casualty Insurance Co., 2007 WL 5685148 at *11 (D.N.M. Dec. 6, 2007) ("it is proper to follow the *Klaxon v. Stentor Electric Manufacturing Co*. method and apply the choice-of-law rules of the forum state" when determining the applicable state law concerning attorney-client privilege).

Eleventh Circuit: Preferred Care Partners Holding Corp. v. Humana, Inc., 258 F.R.D. 684, 689 (S.D. Fla. 2009) ("In a diversity action such as this one, state law governs the scope of the attorney-client privilege."); Whatley v. Merit Distribution Services, 191 F.R.D. 655, 659 (S.D. Ala. 2000) (following "most federal courts" in applying the forum state's choice-of-law doctrine when deciding the applicable state privilege law under Rule 501).

This was so even prior to Fed. R. Evid. 501. See Klaxon Co. v. Stentor Electric Manufacturing Co., 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941) (in diversity cases, the substantive law of the forum state, including the state's conflict of laws rules, applies).

[9] See § 2.04[3] *infra* for a discussion of variations among states in the treatment of Uniform Rule 502, which governs the attorney-client privilege.

One area in which there is significant variation among the adopting states is the role left to the common law in developing state privilege rules. For example, Arizona, Colorado, Michigan, North Carolina, Ohio and Tennessee adopted the approach of the Federal Rules of Evidence, leaving the way open for privilege to develop under the common law. See Annot. ULA Unif. R. Evid. 501 (2004). The states that follow the ULA version of Rule 501 limit the development of privileges to those provided by constitution, statutes, or rules promulgated by the highest state court. See *id*.

[10] See, e.g., United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 726, 64 S.Ct. 805, 88 L.Ed. 1024 (1944) ("[The corporation's] creator, the State, may examine into its records to see whether or not the privileges have been abused.").

have been denied protection against self-incrimination under the Fifth Amendment to the United States Constitution as well as its counterparts in state constitutions.[11] Similarly, corporations do not enjoy a right of privacy under the Fourth Amendment and its state counterparts to the same degree as individuals do.[12]

---

[11] See: § 5.02[1][a] *infra* (discussing inapplicability of federal Fifth Amendment privilege to corporations); § 5.03 *infra* (discussing availability to corporations and corporate custodians of privilege against self-incrimination under state law).

[12] See generally, United States v. Morton Salt Co., 338 U.S. 632, 652, 70 S.Ct. 357, 94 L.Ed. 401 (1950) ("While they may and should have protection from unlawful demands made in the name of public investigation . . . corporations can claim no equality with individuals in the enjoyment of a right to privacy. [Citations omitted.]"). See also: §§ 10.02[1] and 10.03[1] *infra* (discussing privacy rights of corporations with respect to bank records under the federal and state constitutions, respectively).

§ 1.03 Asserting and Supporting a Claim of Privilege

The immunity from disclosure afforded by evidentiary privileges is not self-executing. Rather, "the burden is on the party asserting a privilege to do so in a timely and proper manner and to establish the existence and applicability of the privilege."[1] Failure to comply with

---

[1] See, e.g.:

First Circuit: Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 12 (1st Cir. 1991).

Second Circuit: In re Grand Jury Subpoenas Dated March 19, 2002 and August 2, 2002, 318 F.3d 379, 384 (2d Cir. 2003) (collecting Second Circuit cases establishing that "the party invoking a privilege bears the burden of establishing its applicability to the case at hand").

Fourth Circuit: N.L.R.B. v. Interbake Foods, LLC, 637 F.3d 492, 501 (4th Cir. 2011) ("A party asserting privilege has the burden of demonstrating its applicability.").

Fifth Circuit: Enron Corp. Savings Plan v. Hewitt Associates, LLC, 258 F.R.D. 149, 160 (S.D. Tex. 2009) ("The parties resisting discovery by asserting any privilege bear the burden of proof sufficient to substantiate their privilege claims and cannot rely merely on a blanket assertion of privilege.") (citing Coldwell Banker Real Estate Corp. v. Danette O'Neal, 2006 WL 3845011 at *1 (E.D. La. Dec. 29, 2006)).

Sixth Circuit: SPX Corp. v. Bartec USA, LLC, 247 F.R.D. 516, 527 (E.D. Mich. 2008) ("The burden of establishing the existence of a privilege rests with the party asserting it").

Seventh Circuit: Binks Manufacturing Co. v. National Presto Industries, Inc., 709 F.2d 1109, 1119 (7th Cir. 1983) ("the party seeking to assert the work product privilege has the burden of proving that 'at the very least some articulable claim, likely to lead to litigation, [has] arisen'") (quoting Coastal States Gas Corp. v. Department of Energy, 617 F.2d 854, 865 (D.C. Cir. 1980)); Snedeker v. Snedeker, 2011 WL 3555650 at *3 (S.D. Ind. Aug. 11, 2011) ("It is the burden of the party seeking to oppose production of the documents to demonstrate that the work product privilege shields the documents at issue from discovery."). (Citation omitted.)

Eighth Circuit: PepsiCo, Inc. v. Baird, Kurtz & Dobson LLP, 305 F.3d 813, 817 (8th Cir. 2002) ("In order to protect work product, the party seeking protection must show the materials were prepared in anticipation of litigation, i.e., because of the prospect of litigation.").

Ninth Circuit: United States v. Ruehle, 583 F.3d 600, 607 (9th Cir. 2009) ("[a] party asserting the attorney-client privilege has the burden of establishing the relationship *and* the privileged nature of the communication"). (Citations omitted.) (Emphasis in original.)

Tenth Circuit: Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 542 (10th Cir. 1984), *cert. dismissed* 469 U.S. 1199 (1985) ("A party seeking to assert the privilege must make a clear showing that it applies. Failure to do so is not excused because the document is later shown to be one which would have been privileged if a timely showing had been made."); Barclays American Corp. v. Kane, 746 F.2d 653, 656 (10th Cir. 1984) ("the party seeking to assert the attorney-client privilege or the work product doctrine as a bar to discovery has the burden of establishing that either or both is applicable").

Eleventh Circuit: Bridgewater v. Carnival Corp., 2011 WL 4383312 at *1 (S.D. Fla. Sept. 20, 2011) ("The party claiming a privilege has the burden of proving its applicability. Federal courts have consistently recognized the 'well settled proposition that 'the party seeking the privilege has the burden of establishing all of its essential elements.'") (quoting In re Air Crash Near Cali, Colombia, 959 F. Supp. 1529, 1532 (S.D. Fla. 1997)). (Internal citation omitted.)

the steps required by the Federal Rules of Civil Procedure, applicable state rules, or local court rules may result in a waiver of the privilege.[2] This section outlines the basic procedures by which a party may prevent disclosure of privileged materials or information.

[1]—Asserting Privilege under the Federal Rules of Civil Procedure

Under the Federal Rules of Civil Procedure the scope of discovery includes any matter, not privileged, that is relevant to the claim or defense of any party.[3] The two crucial elements for successfully asserting a privilege are that the objection must be asserted in a timely manner and with particularity.[4] One should be aware that the basic

(Text continued on page 1-9)

---

[2] For example, under the Federal Rules of Criminal Procedure, one can make a motion to quash a subpoena *duces tecum* on the grounds of privilege. See Fed. R. Crim. Proc. 17(c). The timing for such a motion is governed by Federal Rules of Criminal Procedure Rule 45, and an untimely motion may result in waiver.

[3] Fed. R. Civ. Proc. 26(b)(1) (2007).

[4] See Wright, Miller and Marcus, 8 *Federal Practice and Procedure*, § 2016.1 (1994).

requirements established under the Federal Rules of Civil Procedure may be expanded, narrowed or otherwise altered by local court rules, and should closely examine the particular rules of the applicable court and judge.

[a]—Document Requests

Rules 34(b) and 26(b)(5) of the Federal Rules of Civil Procedure govern the procedure for asserting privilege by objecting to a request for document production. Under Rule 34(b), the party receiving a document request must serve a written response, generally within thirty days, that responds to each request and, if objecting, states the reasons for the objection.[5] The Rule further provides that if objection is made to part of an item or category, that part must be specified and inspection must be permitted of the remaining parts.[6] Without leave from the court, failure to object to the request on privilege grounds within the thirty-day period may waive the privilege.[7]

---

[5] Fed. R. Civ. Proc. 34(b)(2) provides in pertinent part:

"(A) *Time to Respond*. The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

"(B) *Responding to Each Item*. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection to the request, including the reasons."

[6] See Fed. R. Civ. Proc. 34(b)(2)(C).

[7] See, e.g.:

First Circuit: Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 12-13 (1st Cir. 1991) (faulting plaintiff for failure to assert privilege within 30 days from discovery request and upholding district court decision to dismiss plaintiff's case as a sanction for nonetheless withholding documents and for repeated stalling tactics).

Second Circuit: Land Ocean Logistics, Inc. v. Aqua Gulf Corp., 181 F.R.D. 229, 237 (W.D.N.Y. 1998) (a party who did not respond to a discovery request for ninety days had waived any privilege by failing to comply with Rule 34(b)).

Fifth Circuit: Leboeuf v. JAG Construction Services, Inc., 2001 WL 1298693 at *1 (E.D. La. Oct. 24, 2001) (applying waiver where party delayed responding and filed largely meritless objections).

Sixth Circuit: Jagielo v. Van Dyke Public Schools, 2010 WL 259053 at *2 (E.D. Mich. Jan. 20, 2010) ("Plaintiff has waived any claim of privilege as the result of her failure to timely assert a privilege-based objection to the Defendants' document request.").

Seventh Circuit: Anderson v. Hale, 202 F.R.D. 548, 553 (N.D. Ill. 2001) ("[f]ailure to follow [Rule 34(b) and Rule 26(b)(5)] may result in waiver of work product protection" [citations omitted]).

Eleventh Circuit: U.S. Fidelity & Guaranty Co. v. Liberty Surplus Insurance Corp., 630 F. Supp.2d 1332, 1340 (M.D. Fla. 2007) ("As a general rule, a responding party's failure to make a timely and specific objection to a discovery request waives any objection based on privilege." [citation omitted]).

When an objection to a document request is based on an assertion of privilege or the work product doctrine, it must satisfy the stricter requirements of Rule 26(b)(5). Added to the Federal Rules of Civil Procedure in 1993, Rule 26(b)(5)(A) provides that:

> "When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must: (i) expressly make the claim; and (ii) 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 the claim."[8]

Because the provisions of Rule 26(b)(5) define the content of a Rule 34(b) objection, the information required under Rule 26(b)(5) must be provided within the time prescribed by Rule 34(b).[9]

The drafters of Rule 26(b)(5) did not define the information that must be provided to support an objection based on privilege, and the legislative history suggests that the drafters intended to allow a certain amount of flexibility depending on the volume of documents involved.[10] However, a number of courts have read Rule 26(b)(5) as

---

But see:

Ninth Circuit: Burlington Northern & Santa Fe Railway Co. v. United States District Court for District of Montana, 408 F.3d 1142, 1149 (9th Cir. 2005) ("[W]e . . . reject a *per se* waiver rule that deems a privilege waived if a privilege log is not produced within *Rule 34*'s 30-day time limit. Instead, using the 30-day period as a default guideline, a district court should make a case-by-case determination. . . .").

[8] Fed. R. Civ. Proc. 26(b)(5)(A).

[9] See: Anderson v. Hale, 202 F.R.D. 548, 552 (N.D. Ill. 2001); First Savings Bank, F.S.B. v. First Bank System, Inc., 902 F. Supp. 1356, 1360 (D. Kan. 1995), *rev'd on other grounds* 101 F.3d 645 (10th Cir. 1996) ("[R]eading Rules 26(b)(5) and 34(b) together, the producing party must provide the Rule 26(b)(5) notice and information at the time it was otherwise required to produce the documents under Rule 34.").

[10] See Fed. R. Civ. Proc. 26(b)(5) Advisory Committee Notes (1993 Amendments): "The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the documents can be described by categories." See, e.g., Imperial Corp. of America v. Shields, 174 F.R.D. 475, 478-79 (S.D. Cal. 1997) (where "hundreds of thousands, if not millions, of documents" are potentially privileged, "[t]o force the creation of a document-by-document privilege log . . . is unreasonable and overly burdensome"). See also: Orbit One Communications, Inc. v. Numerex Corp., 255 F.R.D. 98, 109 (S.D.N.Y. 2008) permitting the use of a categorical rather than an itemized privilege log "where (a) a document-by-document listing would be unduly burdensome and (b) the additional

requiring that a privilege log be prepared to support any claim of privilege.[11] What is clear is that claims of privilege in response to

---

information to be gleaned from a more detailed log would be of no material benefit . . . ") (quoting In re Rivastigmine Patent Litigation, 237 F.R.D. 69, 87 (S.D.N.Y. 2006)); SEC v. Thrasher, 1996 WL 125661 at *1 (S.D.N.Y. March 20, 1996) (refusing to compel production of a detailed privilege log where the request "[o]n its face . . . seeks wholesale production of documents that are ordinarily covered by the work-product rule," "are extremely voluminous," and where "a document-by-document listing would be a long and fairly expensive project for counsel to undertake").

[11] See, e.g.:

Second Circuit: Burns v. Imagine Films Entertainment, Inc., 164 F.R.D. 589, 594 (W.D.N.Y. 1996) ("Rule 26(b)(5) requires that the party asserting the privilege or protection must specifically identify each document or communication, and the type of privilege or protection being asserted, in a privilege log.").

Fourth Circuit: Cappetta v. GC Services Limited Partnership, 2008 WL 5377934 at *4 (E.D. Va. Dec. 24, 2008) (recognizing the need for an "adequate privilege log" and setting forth the characteristics thereof).

Fifth Circuit: Williams Land Co. v. Bellsouth Telecommunications, Inc., 2004 WL 2496220 at *9 (E.D. La. Nov. 1, 2004) (requiring production of privilege log); Haensel v. Chrysler Corp., 1997 WL 537687 at *4 (E.D. La. Aug. 22, 1997) (a privilege log is necessary whenever a privilege is asserted).

Seventh Circuit: Krause v. GE Capital Mortgage Services, Inc., 1998 WL 409395 at *2 (N.D. Ill. July 14, 1998) ("The accepted means of complying with [Rule 26(b)(5)] is the preparation of a document index or privilege log.").

Ninth Circuit: Heath v. F/V Zolotoi, 221 F.R.D. 545, 552 (W.D. Wash. 2004) ("The rules place an absolute and unequivocal duty on the party withholding discovery to produce a privilege log.").

Tenth Circuit: Moses v. Halstead, 236 F.R.D. 667, 676 (D. Kan. 2006) ("Based on Rule 26(b)(5), this Court has held that the party asserting work product protection must 'describe in detail' the documents or information sought to be protected and provide 'precise reasons' for the objection to discovery." [citations omitted]); Atteberry v. Longmont United Hospital, 221 F.R.D. 644, 648-649 (D. Col. 2004) ("A blanket claim of privilege will not suffice. The failure to produce a privilege log or production of an inadequate privilege log may be deemed a waiver of the privilege asserted."); Starlight International, Inc. v. Herlihy, 1998 WL 329268 (D. Kan. June 16, 1998) ("Rule 26(b)(5) instructs parties to provide explanatory information, i.e., a privilege log, when a party 'withholds information.'"); In re RFD, Inc., 211 B.R. 403, 408 (Bankr. D. Kan. 1999) ("[T]he legislative history under Rule 26(b)(5) suggests that withholding discovery materials without producing a privilege log could subject a party either to sanctions or to waiver of a privilege claim.").

But see:

First Circuit: Public Service Co. of New Hampshire v. Portland Natural Gas, 218 F.R.D. 361, 364 n.3 (D.N.H. 2003) ("[A] party may offer a categorical description of privileged documents in lieu of a privilege log if a document by document description would be unduly burdensome.").

District of Columbia Circuit: In re Sealed Case (Medical Records), 381 F.3d 1205, 1218 (D.C. Cir. 2004) (acknowledging the district court's authority under Rule 26(b)(5) to fashion its own mechanism for ascertaining whether an assertion of privilege is merited, and suggesting that proceeding directly with *in camera* review, without requiring a privilege log, may be appropriate).

For a discussion of privilege logs, see § 1.03[3][a] *infra*.

document requests must be made with particularity, and that "blanket" claims of privilege are not sufficient.[12]

Courts generally hold that waiver of a privilege is not an automatic result of failure to comply with Rules 34(b) and 26(b)(5), but rather

---

[12] See:

First Circuit: Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 12 (1st Cir. 1991) (the assertion of privilege must "be accompanied by sufficient information to allow the court to rule intelligently on the privilege claim").

Second Circuit: United States v. Construction Products Research, Inc., 73 F.3d 464, 473 (2d Cir. 1996), *cert. denied* 519 U.S. 927 (1996) ("general allegations of privilege" not supported by the descriptive information provided were insufficient to support a claim of privilege); Land Ocean Logistics, Inc. v. Aqua Gulf Corp., 181 F.R.D. 229, 237 (W.D.N.Y. 1998) ("In the case of a privilege, the party claiming the privilege must supply opposing counsel with sufficient information to assess the applicability of the privilege.").

Third Circuit: Torres v. Kuzniasz, 936 F. Supp. 1201, 1208-1209 (D.N.J. 1996) (rejecting "broadside invocations of privilege" that fail to particularize the specific documents or file to which the claim of privilege applies).

Fourth Circuit: Tustin v. Motorists Mutual Insurance Co., 2009 U.S. Dist. LEXIS 4853, at *10-*11 (N.D. W. Va. Jan., 23, 2009) ("waiver of privilege is appropriate" where objections to the discovery request are "boiler plate" and therefore fail to comply with Rule 26(b)(5)).

Fifth Circuit: Haensel v. Chrysler Corp., 1997 WL 537687 at *4 (E.D. La. Aug. 22, 1997) ("The party [claiming the privilege must] supply the court with sufficient information to assess whether a privilege exists.").

Sixth Circuit: Shields v. Unum Provident Corp., No. 2:05-CV-744, 2007 WL 764298 at *9 (S.D. Ohio March 9, 2007) (the party invoking protection "must also provide information sufficient to enable the court to determine whether each element of the asserted objection is satisfied"[citation omitted]).

Ninth Circuit: Burlington Northern & Sante Fe Railway Co. v. United States District Court for District of Montana, 408 F.3d 1142, 1149 (9th Cir.), *cert. denied* 546 U.S. 939 (2005) ("[B]oilerplate objections or blanket refusals inserted into a response to a Rule 34 request for production of documents are insufficient to assert a privilege.").

Tenth Circuit: Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540, 542 (10th Cir. 1984), *cert. dismissed* 469 U.S. 1199 (1985) (a general objection based on privilege claims to unspecified documents was an insufficient showing that the attorney-client privilege applied); Sonnino v. University of Kansas Hospital Authority, 221 F.R.D. 661, 668 (D. Kan. 2004) ("A 'blanket claim' as to the applicability of the privilege/work product doctrine does not satisfy the burden of proof."); Jones v. Boeing Co., 163 F.R.D. 15, 17 (D. Kan. 1995) ("Blanket claims of privilege or confidentiality are clearly insufficient to protect materials from disclosure.") (quoting Kelling v. Bridgestone/Firestone, Inc., 157 F.R.D. 496, 497 (D. Kan. 1994)).

Court of International Trade: United States v. Optrex America, Inc., No. 02-00646, 2004 WL 1490419 at *2 (Ct. Int'l Trade July 1, 2004) ("blanket objects are universally considered 'improper'").

In addition, the local rules of some District Courts forbid generalized claims of privilege. See U.S. Dist. Ct. Rule S.D.N.Y. & E.D.N.Y., Civ. R. 26.2 (requiring an attorney asserting a privilege to identify the nature of the privilege and provide certain specific information regarding the document or oral communication at issue).

must be decided on a case-by-case basis.[13] Some courts have decided against waiver (1) when there have been minor procedural violations, good faith attempts at complying, and some notice to the opposing party of the privilege objections; (2) when a party accidentally fails to list a privileged document in a case involving voluminous documents; and (3) in other cases involving non-flagrant discovery violations in which the requested documents are plainly protected by a privilege.[14]

---

[13] See:

Second Circuit: In re Grand Jury Proceedings, 219 F.3d 175, 183 (2d Cir. 2000) ("Whether fairness requires disclosure has been decided by the courts on a case-by-case basis, and depends primarily on the specific context in which the privilege is asserted.").

Fifth Circuit: Lucky Stevens v. Omega Protein, Inc., 2002 U.S. Dist. LEXIS 9657 (E.D. La. May 15, 2002) (rather than impose waiver of a privilege objection, the court gave plaintiff another opportunity to comply with Rule 26(b)(5) by providing a privilege log).

Seventh Circuit: Anderson v. Hale, 202 F.R.D. 548, 553 (N.D. Ill. 2001) ("In the end, the determination of waiver must be made on a case-by-case basis."); Applied Systems, Inc. v. Northern Insurance Co. of New York, 1997 WL 639235 at *2 (N.D. Ill. Oct. 7, 1997) ("The discovery rules do not automatically require waiver upon a party's failure to object. Rather, waiver of a privilege is a serious sanction reserved for cases of unjustified delay, inexcusable conduct, bad faith, or other flagrant violations.").

Eight Circuit: Rakes v. Life Investors Insurance Co. of America, 2008 WL 429060 at *4 (N.D. Iowa Feb. 14, 2008) ("[W]aiver of a privilege is a serious sanction most suitable for cases of unjustified delay, inexcusable conduct, and bad faith.") (quoting First Savings Bank, F.S.B. v. First Bank System, Inc., 902 F. Supp. 1356, 1361 (D. Kan. 1995)).

Ninth Circuit: Burlington Northern & Sante Fe Railway Co. v. United States District Court for District of Montana, 408 F.3d 1142, 1149 (9th Cir.), *cert. denied* 546 U.S. 939 (2005) ("[W]e . . . reject a per se waiver rule that deems a privilege waived if a privilege log isn't produced within Rule 34's 30-day time limit. Instead, using the 30-day period as a default guideline, a district court should make a case-by-case determination. . . ."); Jumping Turtle Bar and Grill v. City of San Marcos, 2010 U.S. Dist. LEXIS 119390, at *5-*13 (S.D. Cal. Nov. 10, 2010) (applying a "holistic reasonableness analysis" in accordance with *Burlington Northern*, and deciding that defendant's initial assertion of mere boiler plate objections did not merit waiver where an adequate privilege log was subsequently provided).

Tenth Circuit: In re Motor Fuel Temperature Sales Practices Litigation, 2009 WL 959491 at *3 n.14 (D. Kan. April 3, 2009) ("Although a party's failure to timely object to a request for production on the basis of privilege may constitute a waiver of the privilege, a court may excuse the failure for good cause shown."); First Savings Bank, F.S.B. v. First Bank System, Inc., 902 F. Supp. 1356, 1363-1366 (D. Kan. 1995), *rev'd on other grounds* 101 F.3d 645 (10th Cir. 1996) (sufficient mitigating factors existed to avoid waiver); Queen's University at Kingston v. Kinedyne Corp., 161 F.R.D. 443, 447 (D. Kan. 1995) ("Waiver is not the automatic result of failure to comply with Rule 26(b)(5).").

[14] See Applied Systems, Inc. v. Northern Insurance Co. of New York, 1997 WL 639235 at *2 (N.D. Ill. Oct. 7, 1997) (presenting an overview of bases for avoiding waiver upon a violation of discovery rules).

[b]—Subpoenas (and Standing to Object)

Under Federal Rule of Civil Procedure 45, a party or a non-party to an action may be compelled to give testimony or to produce documents or other tangible things; non-compliance is punishable as contempt.[15]

The recipient of a subpoena may assert a claim of privilege in two ways: (1) by responding to the subpoena with an objection,[16] or (2) by filing a motion to quash or modify the subpoena.[17]

To object to a subpoena, the recipient must serve a written objection on the other party within fourteen days after service of the subpoena or before the time specified for compliance, whichever is earlier.[18] Once an objection is made, the party serving the subpoena will not be entitled to obtain the materials sought and must move for an order to compel production.[19] Ordinarily, failure to make an objection within the time provided in Rule 45(c)(2)(B) will constitute a waiver of any such objection, but such a waiver may be avoided under unusual circumstances if good cause is shown.[20]

---

[15] See Fed. R. Civ. Proc. 45(e).

[16] See Fed. R. Civ. Proc. 45(c)(2)(B).

[17] See Fed. R. Civ. Proc. 45(c)(3)(A)(iii).

[18] See Fed. R. Civ. Proc. 45(c)(2)(B).

[19] See *id*.: "If an objection is made, the following rules apply: (i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection. . . ."

[20] See:

First Circuit: Krewson v. City of Quincy, 120 F.R.D. 6, 7 (D. Mass. 1988) (refusing to compel compliance even though no timely objection was made when particular request far exceeded bounds of fair discovery).

Second Circuit: Paralikas v. Mercedes Benz, LLC, 2008 WL 111186 at *1 (E.D.N.Y. Jan. 9, 2008) ("In cases where, as here, no good cause has been shown for the late responses, a finding of waiver is appropriate."); Concord Boat Corp. v. Brunswick Corp., 169 F.R.D. 44, 48 (S.D.N.Y. 1996) (court finds grounds for avoiding a waiver where (1) a subpoena is overbroad on its face and exceeds the bounds of fair discovery; (2) the witness is a non-party acting in good faith; and (3) counsel for witness and counsel for subpoenaing party were in contact concerning the witness' compliance prior to the time the witness challenged the subpoena).

Third Circuit: Celanese Corp. v. E.I. duPont de Nemours & Co., 58 F.R.D. 606, 609-610 (D. Del. 1973) (no waiver when the volume of documents sought was great, the time for production brief, and counsel were negotiating the scope of production).

Fourth Circuit: In re Motorsports Merchandise Antitrust Litigation, 186 F.R.D. 344, 349 (W.D. Va. 1999) ("In unusual circumstances and for good cause . . . the failure to [make timely objection] will not bar consideration of objections.").

Fifth Circuit: Enron Corp. Savings Plan v. Hewitt Associates, 258 F.R.D. 149, 156 (S.D. Tex. 2009) ("[W]aiver is not automatic; this Court has discretion to determine whether good cause exists to preclude waiver. One factor frequently considered is whether the party that failed to object timely to the request for production of documents acted in bad faith."); RE/MAX International, Inc. v. Trendsetter Realty, LLC,

The recipient of a subpoena may instead "on timely motion" to the issuing court seek to have it quashed or modified on the ground that it requires disclosure of privileged or other protected matters and no exception or waiver applies.[21] The term "on timely motion" is undefined in Rule 45, but has been interpreted to permit service of a motion to quash at any time prior to the return date indicated on the subpoena.[22]

In addition to these requirements, opposition to a subpoena based on a claim of privilege or work product protection is subject to the requirements of specificity established under Rule 45(d)(2), which provides:

> "A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents, communications, or tangible

---

2008 WL 2036816 at *5 (S.D. Tex. May 9, 2008) (setting forth criteria that courts consider in deciding whether to excuse a failure to file a timely response).

Sixth Circuit: Anwalt Energy Holdings, LLC v. Falor Companies, Inc., 2008 WL 2268316 at *1 (S.D. Ohio June 2, 2008) (listing "unusual circumstances" that can lead a court to excuse a failure to act timely); Zamorano v. Wayne State University, 2008 WL 597224 at *1-*2 (E.D. Mich. March 3, 2008) (objections were not waived where plaintiff was a non-party, was not personally served, and made a good-faith attempt to object timely); American Electric Power Co. v. United States, 191 F.R.D. 132, 137 (S.D. Ohio 1999) (concluding objection not waived by an otherwise cooperative non-party to the case).

Ninth Circuit: McCoy v. Southwest Airlines Co., 211 F.R.D. 381, 385 (C.D. Cal. 2002) (in rare situations, late objections to Rule 45 subpoenas are not barred).

Tenth Circuit: Premier Election Solutions, Inc. v. Systest Labs Inc., 2009 WL 3075597 at *5 (D. Col. Sept. 22, 2009) ("In this case, largely because of the overwhelming prejudice which would accrue to iBeta by a strict application of the timing provision in Rule 45, this court finds that unusual circumstances do exist, and that failure of this court to consider iBeta's objections filed one day out of time would result in manifest injustice.").

[21] See Fed. R. Civ. Proc. 45(c)(3)(A): "On timely motion, the issuing court must quash or modify a subpoena that . . . (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies."

[22] See Nova Biomedical Corp. v. i-STAT Corp., 182 F.R.D. 419, 422 (S.D.N.Y 1998). The *Nova Biomedical* court noted that the term "timely" was added in 1991 amendments to the Federal Rules and replaced the phrase "promptly and in any event at or before the time specified in the subpoena for compliance therewith." *Id*. The amendments made clear that the revision was to enlarge the protections afforded to persons required to give evidence. See *id*. (citing Fed. R. Civ. Proc., Rule 45 Advisory Committee Notes (1991 Amendment)). The court concluded that, in so amending the Rules, the drafters did not intend to set an earlier deadline for a motion to quash. See *id*. See also, City of St. Petersburg v. Total Containment, Inc., 2008 WL 1995298 at *2 (E.D. Pa. May 5, 2008) (timeliness means within the specified compliance period, so long as that period is of reasonable duration).

things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim."[23]

Rule 45(d)(2) does not establish a time limit for providing the required information, leaving open the question of whether objections premised on a claim of privilege are exempt from the fourteen-day deadline of Rule 45(c)(2)(B). A number of courts have held that Rule 45(d)(2) permits the assertion of the privilege at the time of compliance with the subpoena regardless of whether an objection or motion to quash has been filed within the fourteen-day period.[24] The more

---

[23] Fed. R. Civ. Proc. 45(d)(2)(A). As in the case of Rule 26(b)(5), this provision has been interpreted to require a full privilege log to support a claim of privilege. See:

First Circuit: In re Grand Jury Subpoena, 274 F.3d 563, 575-77 (1st Cir. 2001) (party waived privilege by failing to submit privilege log).

Fifth Circuit: Peacock v. Merrill, 2008 WL 687195 at *3 (M.D. La. March 10, 2008) ("A privilege log produced pursuant to Fed.R.Civ.P. 45(d)(2) should not only identify the date, the author, and all recipients of each document listed therein, but should also describe the document's subject matter, purpose for its production, and specific explanation of why the document is privileged or immune from discovery."). (Citation omitted.)

Eighth Circuit: Baranski v. United States, 2012 WL 425007 at *5 (E.D. Mo. Feb. 9, 2012) ("The Court cannot evaluate a claim of privilege where a subpoenaed party fails to produce a privilege log under Rule 45, and the party therefore fails to meet its burden to establish that the privilege applies."); Garrett v. Albright, 2008 WL 681766 at *3 n.6 (W.D. Mo. March 6, 2008) (refusing to consider claims of privilege until defendant produced a privilege log).

District of Columbia Circuit: Walker v. Center for Food Safety, 2009 WL 3673033 at *4 (D.D.C. Nov. 5, 2009) ("The [parties], had numerous opportunities to assert their claims of privileges and produce an adequate privilege log before the Court entered its order compelling production, and they failed to do so. Thus, they have waived their claims to privilege.").

Federal Circuit: Dorf & Stanton Communications, Inc. v. Molson Breweries, 100 F.3d 919, 923 (Fed. Cir. 1996), *cert. denied* 520 U.S. 1275 (1997) (party's failure to provide a complete privilege log demonstrated sufficient grounds for waiving privilege).

[24] Courts have found a basis for exempting claims of privilege from the fourteen-day deadline in the inclusion in Rule 45(c)(2)(B) of the phrase "Subject to paragraph (d)(2) of this rule." However, this phrase is no longer included in Rule 45(c)(2)(B). *Compare*, Winchester Capital Management Co. v. Manufacturers Hanover Trust Co., 144 F.R.D. 170, 176 (D. Mass 1992) ("the rule as amended appears to permit assertion of the attorney-client privilege or work-product protection at the time for compliance with the subpoena regardless of whether an objection or motion to quash has been filed prior to the time set for compliance"), *with* In re Dep't of Justice Subpoenas to ABC, 2009 WL 3818596 at * 3 (D. Mass. Nov. 13, 2009) ("While Fed. R. Civ. P. 45 is not crystal clear on the timing of the assertion of privilege, the better view seems to be that the objection must be made within fourteen days of service, although the privilege log may follow within a reasonable time.").

See also:

Seventh Circuit: Ventre v. Datronic Rental Corp., 1995 WL 42345 at *4 (N.D. Ill. Feb. 2, 1995) (the fourteen-day period "is expressly made 'subject to paragraph

reasonable view, however, appears to be that a party objecting to a subpoena based on privilege or work product protection must do so within the fourteen-day period, while the detailed information required by Rule 45(d)(2) may follow at some later time so long as it is provided prior to the date for compliance with the subpoena.[25]

Although a person that fails to comply with Rule 45(d)(2) risks waiving the privilege,[26] such waiver is not automatic. Instead, a party that fails to comply with Rule 45(d)(2) in a timely manner may avoid waiver of the privilege for good cause shown.[27]

One issue which may arise regarding a corporation's privilege is whether the corporation has standing to object to or to move to quash a subpoena served on a third party, but implicating a privilege belonging to the corporation. Although a motion to quash or modify a subpoena generally may be made only by the party to whom the subpoena is directed, an exception exists where the party seeking to challenge the subpoena has a personal right or privilege with respect

---

(d)(2) of this rule' and, as such, is not applicable to objections based upon privilege advanced under Rule 45(d)(2) [quoting Fed. R. Civ. Proc. 45(c)(2)(B)]").

District of Columbia Circuit: Tuite v. Henry, 98 F.3d 1411, 1416 (D.C. Cir. 1996) (citing cases in which the court allowed an assertion of privilege regardless of whether an objection or motion to quash was made within the fourteen day time period).

[25] See:

Second Circuit: In re DG Acquisition Corp., 151 F.3d 75, 81 (2d Cir. 1998) ("a person responding to a subpoena should at least assert any privileges within the fourteen days provided in Rule 45(c)(2)(B)", with a full privilege log following "'within a reasonable time.'" (quoting Tuite v. Henry, 98 F.3d 1411, 1416 (D.C. Cir. 1996)); S.N. Phelps & Co. v. Circle K Corp. (In re Circle K Corp.), 1996 WL 529399 at *6 (Bankr. S.D.N.Y. May 30, 1996) (a recipient may file an objection based on undue burden and then, following modification of the subpoena, produce a privilege log).

Sixth Circuit: Sanford v. Steward, 2012 WL 5271692 at *3 (N.D. Ohio Oct. 24, 2012) ("Rule 45 contemplates assertion of all objections to document production within 14 days.") (quoting In re DG Acquisition, 151 F.3d 75, 81 (2d Cir. 1998)).

Ninth Circuit: Schwartz v. TRW, Inc., 211 F.R.D. 388, 392 (C.D. Cal. 2002) (an objection on the basis of privilege must be filed within the time period prescribed by Rule 45(c)(2)(B)).

District of Columbia Circuit: Tuite v. Henry, 98 F.3d 1411, 1416 (D.C. Cir. 1996) (a party objecting to a subpoena on the basis of privilege must object and state the claim of privilege within fourteen days of service of the subpoena, and details in support of the claim of privilege, required under Rule 45(d)(2), must be furnished within a reasonable time).

[26] See Fed. R. Civ. Proc. 45 Advisory Committee Notes (1991 Amendment).

[27] See, e.g., Ventre v. Datronic Rental Corp., 1995 WL 42345 at *5 (N.D. Ill. Feb. 2, 1995) (privilege not waived despite failure to provide privilege log until after subpoena compliance date based on finding that (1) parties had agreed to proceed with production without a privilege log's having been served; (2) delay resulted from a mistaken belief the log had already been served; and (3) three week delay was not so unreasonable given that respondent was attempting to comply).

to the materials sought by the subpoena.[28] An objection to or motion to quash a subpoena served upon a third party must be filed in a timely manner to avoid waiver.[29]

---

[28] See:

Second Circuit: Langford v. Dodge, Inc., 513 F.2d 1121, 1126 (2d Cir. 1975) ("In the absence of a claim of privilege a party usually does not have standing to object to a subpoena directed to a non-party witness."); United States v. Nachamie, 91 F. Supp.2d 552, 558 (S.D.N.Y. 2000) ("A party generally lacks standing to challenge a subpoena issued to a third party absent a claim of privilege or a proprietary interest in the subpoenaed matter.").

Third Circuit: Davis v. General Accident Insurance Co. of America, 1999 WL 228944 at *3 (E.D. Pa. April 15, 1999) (sufficient interest where movants claimed subpoenas would require the production of documents protected by attorney-client privilege).

Fourth Circuit: Corsair Special Situations Fund, L.P. v. Engineered Framing Systems, Inc., 2011 WL 3651821 at *2 (D. Md. Aug. 17, 2011) (while "[o]rdinarily, a party does not have standing to challenge a subpoena issued to a non-party," an exception exists where "the party claims some personal right or privilege in the information sought by the subpoena.") (quoting United States v. Idema, 118 Fed. Appx. 740, 744 (4th Cir. 2005)); United States v. Beckford, 964 F. Supp. 1010, 1023, 1024 n.12 (E.D. Va. 1997) ("[T]he opposing party in a criminal case will lack standing to challenge a subpoena issued to a third party because of the absence of a claim of privilege, or the absence of a proprietary interest in the subpoenaed material or of some other interest in the subpoenaed documents.").

Fifth Circuit: Weatherly v. State Farm Fire & Casualty Insurance Co., 2009 WL 1507353 at *2 (E.D. La. May 28, 2009) (a party is required to demonstrate "some personal right or privilege" in the documents sought by the subpoena). See also, Brown v. Braddick, 595 F.2d 961, 967 (5th Cir. 1979) (movants who had not asserted valid privilege claim lacked standing to seek to quash subpoena *duces tecum* directed to third party).

Sixth Circuit: Zino v. Whirlpool Corp., 2012 WL 5197377 at *5 (N.D. Ohio Oct. 19, 2012) ("A motion to quash or modify a subpoena duces tecum may only be made by the party to whom the subpoena is directed, unless the party seeking to challenge the subpoena holds a personal right or privilege with respect to the subject matter requested.") (citing Smith v. Midland Brake, Inc., N. 28 *supra*, 162 F.R.D. at 685).

Seventh Circuit: Hunt International Resources Corp. v. Binstein, 98 F.R.D. 689, 690 (N.D. Ill. 1983) ("Unless a party can demonstrate a personal right or privilege . . . the party to the action lacks standing to halt the deposition.").

Ninth Circuit: Kohler v. Flava Enterprises, Inc., 2011 WL 2600727 at *1 (S.D. Cal. June 30, 2011) ("Courts have taken the position that while a motion to quash a subpoena is normally to be made by the person or entity to which the subpoena is directed an exception applies 'where the party seeking to challenge the subpoena has a personal right or privilege with respect to the subject matter requested in the subpoena.'") (quoting Smith v. Midland Brake, Inc., 162 F.R.D. 683, 685 (D. Kan. 1995)).

Tenth Circuit: Greig v. Botros, 2010 WL 3270102 at *3 (D. Kan. Aug. 12, 2010) ("Objections to a business records subpoena 'may only be made by the party to whom the subpoena is drected except where the party seeking to challenge the subpoena has a personal right or privilege with respect to the subject matter requested in the subpoena.'"); *Smith v. Midland Brake, Inc*., N. 28 *supra*, 162 F.R.D. at 685.

Eleventh Circuit: Stevenson v. Stanley Bostitch, Inc., 201 F.R.D. 551, 555 n.3 (N.D. Ga. 2001) ("[I]t appears to be the general rule of the federal courts that a party

[c]—Interrogatories

A party seeking to assert privilege in response to an interrogatory must do so in the form of an objection in accordance with Federal Rule of Civil Procedure 33, under which the party served must serve a copy of the answers, along with any objections, within thirty days or within such other time as is directed by the court or agreed to in writing by the parties.[30] All grounds for an objection to an interrogatory must be stated with specificity, and any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.[31]

It is clear that generalized or blanket claims of privilege in response to an interrogatory are insufficient.[32] Beyond this, it appears that the detailed submission requirements of Rule 26(b)(5)[33] apply where an objection to an interrogatory is based on a claim of privilege or work product protection.[34]

---

has standing to challenge a subpoena when she alleges a 'personal right or privilege with respect to the materials subpoenaed.'") (quoting Brown v. Braddick, 595 F.2d 961, 967 (5th Cir. 1979)). But see, Mancuso v. Florida Metropolitan University, Inc., 2001 WL 310726 at *1-*2 (S.D. Fla. Jan. 28, 2011) (recognizing that many courts hold "that parties have a personal interest in their financial and telephone records sufficient to confer standing to challenge a subpoena directed to a third party," and one district court "held that an individual had standing to challenge a subpoena issued to social networking websites.").

[29] See Broadcort Capital Corp. v. Flagler Securities, Inc., 149 F.R.D. 626, 628 (D. Col. 1993) ("Plaintiff correctly notes that a person served with a subpoena must object within fourteen days. Fed. R. Civ. Proc. 45(c)(2)(B). That does not apply to a non-served party or non-party, provided that any objection to the subpoena is timely filed.").

[30] Fed. R. Civ. Proc. 33(b)(2).

[31] Fed. R. Civ. Proc. 33(b)(4).

[32] See, e.g.:

Third Circuit: Momah v. Albert Einstein Medical Center, 164 F.R.D. 412, 417 (E.D. Pa. 1996) ("Mere recitation of the familiar litany that an interrogatory or a document production request is 'overly broad, burdensome, oppressive and irrelevant' will not suffice.") (quoting Josephs v. Harris Corp., 677 F.2d 985, 992 (3d Cir. 1982)).

Eighth Circuit: Johnson v. Neiman, 2010 WL 3283560 at *2 (E.D. Mo. Aug. 16, 2010) (striking plaintiff's "unsubstantiated, boilerplate objections," including assertions of privilege, and ordering plaintiff to answer all interrogatories).

Tenth Circuit: Starlight International, Inc. v. Herlihy, 181 F.R.D. 494, 497 (D. Kan. 1998) (the response that defendants "object to all interrogatories [and requests] to the extent the information which is subject to the attorney/client privilege or which is [defendant's] work product is sought" was not a proper assertion of privilege); Cotracom Commodity Trading Co. v. Seaboard Corp., 1998 WL 231135 at *1 (D. Kan. May 6, 1998) (characterizing twelve paragraphs of general objections as "worthless" except to delay discovery).

[33] See § 1.03[1][a] *supra*.

[34] See Fed. R. Civ. Proc. 33 Advisory Committee Notes (1993 Amendment): "Paragraph (4) is added to make clear that objections must be specifically justified, and that unstated or untimely grounds for objection ordinarily are waived. Note also

[d]—Depositions

The procedure for asserting a privilege in the course of a deposition upon oral examination is governed by Federal Rule of Civil Procedure 30. For most objections, the procedure is to raise the objection at the time of the deposition but to go forward and give the evidence subject to the objection.[35] However, Rule 30(c)(2) creates exceptions to this rule, and a party may instruct a deponent not to answer a question when such refusal is necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion to cease or limit the scope and manner of the deposition under Rule 30(d)(3).[36] Rule 30(c)(2) requires that objections be "stated concisely in a non-argumentative and non-suggestive manner."[37] If the objection is made on the basis of privilege, the asserting party must state on the record "a fact-specific basis for any claim of privilege sufficient to permit the Court to determine the validity of the claim."[38] The privilege may be waived if a party fails to assert it.[39]

---

the provisions of revised Rule 26(b)(5), which require a responding party to indicate when it is withholding information under a claim of privilege or as trial preparation materials." See also:

Fifth Circuit: Alliance General Insurance Co. v. Louisiana Sheriff's Automobile Risk Program, 1996 WL 626329 at *1 (E.D. La. Oct. 24, 1996) ("If any information responsive to the foregoing interrogatories is withheld on grounds of privilege, defendant must comply with Fed. R. Civ. Proc. 26(b)(5). . . . Failure to do so will result in waiver of the privilege.").

Tenth Circuit: Mike v. Dymon, Inc., 1996 WL 674007 at *9 (D. Kan. Nov. 14, 1996) (applying Rule 26(b)(5) to an objection to an interrogatory).

[35] See 8A Wright, Miller & Marcus, *Federal Practice and Procedure* § 2113 n.12 (1994) (citing cases on taking evidence subject to an objection). Not all objections must be made during the deposition in order to preserve the objection.

> "While objections may, under the revised rule, be made during a deposition, they ordinarily should be limited to those that under Rule 32(d)(3) might be waived if not made at that time, i.e., objections on grounds that might be immediately obviated, removed, or cured, such as to the form of a question or the responsiveness of an answer. Under Rule 32(b), other objections can, even without the so-called 'usual stipulation' preserving objections, be raised for the first time at trial and therefore should be kept to a minimum during a deposition." Fed. R. Civ. Proc. 30 Advisory Committee Notes (1993 Amendments).

[36] Fed. R. Civ. Proc. 30(c)(2).

[37] Fed. R. Civ. Proc. 30(c)(2).

[38] See In re One Bancorp Securities Litigation, 134 F.R.D. 4, 8 (D. Me. 1991).

[39] See Fed. R. Civ. Proc. 32(d)(3)(B): "An objection to an error or irregularity at an oral examination is waived if: (i) it relates to the manner of taking the deposition, the form of a question or answer, the oath or affirmation, a party's conduct, or other matters that might have been corrected at that time; and (ii) it is not timely made during the deposition."

Prior to 1993, Rule 30 did not provide for instructing a witness not to answer when necessary to preserve a privilege. Although at least one court has continued to hold that an attorney instructing a deponent not to answer on the basis of privilege must immediately seek a protective order,[40] this position appears to be based on the pre-1993 version of Rule 30. A court interpreting the current Rule would likely conclude that a party instructing a witness not to answer may either move for a protective order or wait for the questioning party to file a motion to compel. In either case, the party resisting discovery will bear the burden of supporting its position.[41]

In addition to oral depositions, a party may take the testimony of any person, party or non-party, in the form of a deposition on written questions under Rule 31.[42] In the case of a deposition on written questions, any objection will be waived unless served in writing upon the issuing party within the time allowed for the succeeding cross or other questions[43] and within seven days after service of the last questions authorized.[44]

---

[40] *Compare,* Furniture World, Inc. v. D.A.V. Thrift Stores, Inc., 168 F.R.D. 61, 63 (D.N.M. 1996) (where an attorney instructs the deponent to refuse to answer pursuant to Rule 30(d)(1), "the party opposing the questioning must promptly file a motion for protective order" and citing pre-1993 cases) *with* Mashburn v. Albuquerque Police Dept., 2004 WL 3426419 at *4 (D.N.M. April 1, 2004) ("The Court will not adopt a rule that obligates the defendants to immediately suspend the deposition, file for a protective order, and delay the discovery process.").

Rule 30 was amended in 2000 to provide that the same limitations that apply when a "party" instructs a witness not to answer a question during a deposition will now also apply to "*anyone* who might purport to instruct a witness not to answer a question." (Emphasis added.) Fed. R. Civ. Proc. 30 Advisory Committee Notes (2000 Amendment) (clarifying that the rule "is not intended to confer new authority on non-parties . . . [but to] make[] it clear that, whatever the legitimacy of giving such instructions, the nonparty is subject to the same limitations as the parties").

[41] See Riddell Sports, Inc. v. Brooks, 158 F.R.D. 555, 558 (S.D.N.Y. 1994) ("Rule 37(a)(2)(B) specifically contemplates a motion to compel when a deponent refuses to answer a question, thus suggesting that it is acceptable for the witness to decline to answer and then wait to defend such a motion," but observing that "[t]here is . . . little functional difference between . . . [seeking a protective order or awaiting a motion to compel] since in both cases the party resisting discovery has the burden of supporting its position.").

[42] See Fed. R. Civ. Proc. 31(a)(1): "A party may, by written questions, depose any person, including a party, without leave of court except as provided in Rule 31(a)(2)."

[43] Under Fed. R. Civ. Proc. 31(a)(5), unless the court orders otherwise the first cross questions may be served (and, thus, any objections to the original questions also may be served) within fourteen days after the notice and written questions are served. The deadline (unless the court orders otherwise) for redirect questions and objections to cross questions is seven days following service of cross questions. See *id*. The deadline (unless the court orders otherwise) for recross questions and objections to redirect questions is seven days following service of redirect questions. See *id*.

[e]—Protective Orders

Beyond the avenues provided for asserting privilege discussed above, a party or non-party may assert a claim of privilege in civil discovery by seeking a protective order pursuant to Federal Rule of Civil Procedure 26(c).[45] Rule 26(c) grants the federal courts broad authority to "issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."[46] To obtain a protective order, the movant must certify to having made a good faith effort to resolve the disputed issue without court action and must

---

[44] See Fed. R. Civ. Proc. 32(d)(3)(C). The Rule provides only for objections to the form of the question, but a limited body of case law suggests that objections on the ground of privilege should be asserted in the same manner. See, e.g.:

Third Circuit: Mamman v. Chao, 2009 WL 313332 at *2 (D.N.J. Feb. 6, 2009) (upholding magistrate judge's finding that defendant properly asserted attorney-client and work product privilege in answer to seven questions presented in a deposition on written questions).

Fourth Circuit: Gatoil, Inc. v. Forest Hill State Bank, 104 F.R.D. 580, 582 (D. Md. 1985) (ordering deponent of a deposition on written questions to assert the privilege against self incrimination "separately . . . with regard to each question" and to "set forth in writing the specific respect in which the question calls for an answer that is privileged," and ordering also that these assertions of privilege be submitted by a court-ordered deadline with the answers to other deposition questions).

See also:

Eleventh Circuit: McCarty v. Bankers Insurance Co., 195 F.R.D. 39, 48 (N.D. Fla. 1998) (granting motion to quash a subpoena for deposition on written questions based on movant's valid assertion of a journalist's privilege).

[45] A protective order may be sought either by a party or by the person from whom discovery is sought. A person may obtain a protective order regarding information sought from a third party only if the movant believes its own interests would be jeopardized by such discovery. See 8 Wright, Miller & Marcus, *Federal Practice and Procedure* § 2035 (1994).

[46] Fed. R. Civ. Proc. 26(c) enumerates eight specific types of protective orders as being included within the court's broad authority: "(A) forbidding the disclosure or discovery; (B) specifying terms, including time and place, for the disclosure or discovery; (C) prescribing a discovery method other than the one selected by the party seeking discovery; (D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters; (E) designating the persons who may be present while the discovery is conducted; (F) requiring that a deposition be sealed and opened only on court order; (G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and (H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs." This list is not, however, exhaustive. See 8 Wright, Miller & Marcus, *Federal Practice and Procedure* § 2036 (1994): "It is impossible to set out in a rule all of the circumstances that may require limitations on discovery or the kinds of limitations that may be needed. The rules, instead, permit the broadest scope of discovery and leave it to the enlightened discretion of the district court to decide what restrictions may be necessary in a particular case."

demonstrate good cause.[47] Further, although not explicitly provided for in Rule 26(c), courts have held that such a motion must be made in a "timely" manner.[48] An untimely motion may constitute a waiver of the objection, unless the court finds good cause for the delay.[49]

Courts have held that the required "good cause" must be established by the moving party with particularity, including a specific demonstration of facts in support of the request, as opposed to a conclusory statement regarding the need for a protective order and the harm that would be suffered without one.[50] The required demonstration

---

[47] Fed R. Civ. Proc. 26(c) provides that a protective order is to be granted "for good cause."

[48] See:

Second Circuit: Bove v. The Allied Group, 2004 U.S. Dist. LEXIS 21940, at *3 (W.D.N.Y. Oct. 28, 2004); United States v. International Business Machines, 79 F.R.D. 412, 414 (S.D.N.Y. 1978) (motion for protective order untimely when first made in argument on request to consider order compelling production).

Fourth Circuit: Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc., 200 F.R.D. 255, 259 (M.D.N.C. 2001) ("A motion for a protective order is timely if made prior to the date set for producing the discovery.").

Tenth Circuit: In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 669 F.2d 620, 622 n.2 (10th Cir. 1982) ("a motion under Fed. R. Civ. P. 26(c) for protection from a subpoena is timely filed if made before the date set for production").

[49] See 8 Wright, Miller & Marcus, *Federal Practice and Procedure*, § 2035 (1994).

[50] See:

Second Circuit: Twentieth Century Fox Film Corp. v. Marvel Enterprises Group, Inc., 220 F. Supp.2d 289 (S.D.N.Y. 2002) (defendant's conclusory statement that disclosure of its insurance coverage would give plaintiff an unfair competitive advantage found not to be a specific enough showing of "good cause" to warrant issuance of a protective order).

Third Circuit: Fidelity & Deposit Co. of Maryland v. McCulloch, 168 F.R.D. 516, 522 (E.D. Pa. 1996) (attorney-client privilege constituted sufficient "good cause" to grant a protective order following inadvertent disclosures of privileged material).

Fourth Circuit: Drexel Heritage Furnishings, Inc. v. Furniture USA, Inc., 200 F.R.D. 255, 259-261 (M.D.N.C. 2001) (defendants made sufficient showing to obtain protective order where information was confidential, defendants would be harmed by release, and non-parties could be harmed as well); Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 412 (M.D.N.C. 1991) (requirement of a specific demonstration of facts establishing good cause "furthers the goal that the Court only grant as narrow a protective order as is necessary under the facts").

Fifth Circuit: Blanchard & Co. v. Barrick Gold Corp., 2004 U.S. Dist. LEXIS 5719, at *12-*13 (E.D. La. April 5, 2004) ("Broad allegations of harm, unsubstantiated by specific examples, do not support a showing of good cause" necessary for the issuance of a protective order.).

Eighth Circuit: Rolscreen Co. v. Pella Products of St. Louis, Inc., 145 F.R.D. 92, 96 (S.D. Iowa 1992) (party requesting protective order must make specific demonstration of facts in support of request, as opposed to conclusory or speculative statements about the need for protective order and the harm which will be suffered without one).

of facts is "preferably made by affidavits from knowledgeable persons and may include in camera submissions or in camera proceedings attended by opposing counsel."[51]

In some cases, the burden of individually specifying materials to be withheld may justify the issuance of a protective order.[52] Often, however, the decision to seek a protective order rather than to pursue other avenues for asserting privilege, such as objecting to a discovery request, is largely a matter of strategy. For example, parties may choose to negotiate the terms of a protective order in advance of discovery, avoiding conflicts later in the proceeding.[53] A protective order

---

District of Columbia Circuit: Jennings v. Family Management, 201 F.R.D. 272, 275 (D.D.C. 2001) ("[t]he moving party has a heavy burden of showing extraordinary circumstances based on specific facts that would justify such an order" [internal punctuation omitted]).

See also, 8 Wright, Miller & Marcus, *Federal Practice and Procedure*, § 2035 n.30 (1994) (citing cases).

[51] Brittain v. Stroh Brewery Co., 136 F.R.D. 408, 413 (M.D.N.C. 1991) (citing cases).

[52] See 8 Wright, Miller & Marcus, *Federal Practice and Procedure*, § 2016.1 (1994). See also:

Fourth Circuit: Parkway Gallery Furniture, Inc. v Kittinger/Pennsylvania House Group, Inc., 121 F.R.D. 264, 267-268 (M.D.N.C. 1988) ("Blanket or umbrella protective orders are becoming increasingly common as large scale litigation involves more massive document exchanges.").

Tenth Circuit: Biax Corp. v. Nvidia Corp., 2009 WL 3202367 at *2 (D. Col. Oct. 5, 2009) ("The agreement of all parties is not required for the entry of a blanket protective order, however, so long as certain conditions are met. First, a party must make a threshold showing of good cause to believe that discovery will involve confidential or protected information, which may be done on a generalized as opposed to a document-by-document basis. Moreover, even though a blanket protective order permits all documents to be designated as confidential, a party must agree to invoke the designation only in good faith. *Id*. After receiving documents, the opposing party has the right to contest any documents it believes should not be designated as confidential. At this stage, the party seeking the protection has the burden of proof to justify retaining the confidentiality designation."). (Internal citations omitted.)

[53] See, e.g., Parkway Gallery Furniture, Inc. v Kittinger/Pennsylvania House Group, Inc., 121 F.R.D. 264, 267-269 (M.D.N.C. 1988) (involving a protective order entered into by agreement of the parties).

[54] There is a three-way split in the federal courts as to how to properly resolve the conflict that arises when a grand jury subpoena seeks the production of evidence covered by a protective order. The Fourth, Ninth and Eleventh Circuits have announced a *per se* rule that a grand jury subpoena always prevails over a protective order. See:

Fourth Circuit: In re Grand Jury Subpoena, 836 F.2d 1468, 1477 (4th Cir.), *cert. denied* 487 U.S. 1240 (1988) (adopting a *per se* rule that grand jury subpoenas take precedence over validly issued Rule 26(c) protective orders).

Ninth Circuit: In re Grand Jury Subpoena, 62 F.3d 1222, 1227 (9th Cir. 1995) (same).

Eleventh Circuit: In re Grand Jury Proceedings, 995 F.2d 1013, 1020 (11th Cir. 1993) (same).

may be used to prevent information disclosed in the course of one proceeding from aiding third parties in later proceedings.[54] It is also possible that a party may find it preferable as a tactical matter to itself bring the disputed question before the court.

[f]—Availability of Immediate Appeal

The Supreme Court has held that litigants may not immediately appeal disclosure orders adverse to the attorney-client privilege under the collateral order doctrine.[55] Subsequently, at least one circuit has treated an immediate appeal of a disclosure order as a petition for a writ of mandamus and granted relief on that basis.[56] Other circuits,

---

The Second Circuit has taken a contrary position and held that, absent a showing of extraordinary circumstances, compelling need, or unreasonable reliance, a protective order will take precedence over a grand jury subpoena. See: Gambale v. Deutsche Bank AG, 377 F.3d 133, 142 n.7 (2d Cir. 2004) (modifying protective order on grounds that reliance was unreasonable because order was on its face temporary); Martindell v. International Telephone & Telegraph Corp., 594 F.2d 291, 296 (2d Cir. 1979) ("[A] bsent showing of improvidence in grant of protective order or some extraordinary circumstance or compelling need, witness should be entitled to rely upon the enforceability of a protective order against third parties, including the government, and thus such an order should not be vacated or modified merely to accommodate the government's desire to inspect protected testimony for possible use in a criminal investigation."). The Second Circuit has even applied this "exceptional circumstances" test outside of the grand jury subpoena context, making clear that the test will apply whenever any third party seeks to modify a protective order. See SEC v. TheStreet.com, 273 F.3d 222, 229 n.7 (2d Cir. 2001). See also, Comes v. Microsoft Corp., 775 N.W.2d 302, 307-308 (Iowa 2009) (describing Second Circuit's application of "exceptional circumstances" test).

The First and Third Circuits have espoused a more moderate position and have established a rebuttable presumption in favor of the enforcement of the grand jury subpoena. See:

First Circuit: In re Grand Jury Subpoena, 138 F.3d 442, 445 (1st Cir. 1998), *cert. denied sub nom*. Doakes v. United States, 524 U.S. 939 (1998) ("A grand jury's subpoena trumps a Rule 26(c) protective order unless the person seeking to avoid the subpoena can demonstrate the existence of exceptional circumstances that clearly favor subordinating the subpoena to the protective order.").

Third Circuit: In re Grand Jury, 286 F.3d 153, 158, 163 (3d Cir. 2002) (joining the First Circuit and emphasizing that presumption "may only be rebutted in the rarest and most important cases").

[55] Mohawk Industries, Inc. v. Carpenter, 558 U.S 100, 103, 130 S.Ct. 599, 603, 175 L.Ed.2d 458 (2009) ("Postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege."). The Court did not explicitly consider whether the doctrine might apply to other claims of privilege, and it expressly reserved judgment on whether the doctrine could apply to governmental assertions of privilege. *Id*. at 113 n.4.

[56] Hernandez v. Tanninen, 604 F.3d 1095, 1102 (9th Cir. 2010) ("[B]ecause the first three . . . factors [in favor of issuing a writ of mandamus] . . . are met here, and because the district court's order finding a blanket waiver of both the attorney-client

however, have interpreted the Supreme Court as narrowing the category of cases that qualify for interlocutory review.[56.1]

[2]—State Practice

Most states have adopted procedural rules regarding assertion of the privilege which are similar to the federal approach discussed above.[57] For example, under California law, a party objecting to a discovery demand must also object with specificity,[58] and failure to do so waives the privilege.[59] Under New York law, a party objecting to disclosure must do so within twenty days and with reasonable particularity.[60]

Some states impose requirements concerning the specificity with which such an objection must be made. For example, New York requires that certain specific kinds of detailed information must be provided by the objecting party.[61] Not all states, however, demand specific descriptions of purportedly privileged and withheld materials. In Delaware, for example, a court found there was no waiver when a party failed to make a timely submission of privilege logs because the Delaware discovery rules did not require such logs.[62]

---

and work product privileges is 'particularly injurious' to [plaintiff's] interests, we conclude that it is appropriate to grant a writ of mandamus to correct the district court's overbroad privilege ruling.").

[56.1] See:

Sixth Circuit: Holt-Orsted v. City of Dickson, 641 F.3d 230, 238-240 (6th Cir. 2011).

Seventh Circuit: Wilson v. O'Brien, 621 F.3d 641, 642-643 (7th Cir. 2010).

Ninth Circuit: United States v. Krane, 625 F.3d 568, 572-573 (9th Cir. 2010).

[57] See, e.g.:

Montana: Mont. Code Ann. R. Civ. Proc. 26(a) (2005), Advisory Committee Notes (asserting the intention that Montana discovery rules coincide with Federal practice).

Rhode Island: R.I. R. Civ. Proc. 26 - 34.

[58] See Cal. Civ. Proc. Code § 2030.210.

[59] See, e.g., Scottsdale Insurance Co. v. Superior Court of Los Angeles County, 59 Cal. App.4th 263, 274, 69 Cal. Rptr.2d 112 (1997) (a party that failed to object expressly based on attorney-client privilege in its initial response to interrogatories waived the privilege).

[60] N.Y. Civ. Prac. L. & R. 3122.

[61] N.Y. Civ. Prac. L. & R. 3122(b) provides that notice to the seeking party must include, unless to do so would disclose allegedly privileged information, (1) the type of document withheld; (2) its general subject matter; (3) its date; and (4) such other information as is sufficient to identify it for a subpoena *duces tecum*.

[62] See Wolhar v. General Motors Corp., 712 A.2d 457, 463-464 (Del. Super. 1997) (declining to adopt the requirements of Rule 26(b)(5) of the Federal Rules but encouraging the Delaware courts to do so through proper procedures in a case involving work product doctrine).

[3]—Supporting a Claim of Privilege

As discussed above, the party asserting a privilege bears the burden of establishing its elements.[63] The following addresses some of the methods by which a party asserting a privilege may support such a claim.

[a]—Privilege Logs

In federal practice, when a party asserts privilege to prevent discovery of documents, and sometimes to prevent discovery of oral communications, a privilege log is generally required, either implicitly under Federal Rule of Civil Procedure 26(b)(5)[64] or in some cases explicitly under local court rules.[65] Local court rules define the required elements of privilege logs with varying specificity. The rules for the Southern and Eastern Districts of New York, for example, require a privilege log for documents to include the following information:

> "(A) For documents: (i) the type of document, e.g., letter or memorandum; (ii) the general subject matter of the document; (iii) the date of the document; and (iv) the author of the document, the addressees of the document, and any other recipients, and, where not apparent, the relationship of the author, addressees, and recipients to each other;
>
> (B) For oral communications: (i) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (ii) the date and place of communication; and (iii) the general subject matter of the communication."[66]

Because of the level of detail required, the preparation and submission of a privilege log cannot be taken lightly: providing too much detail may provide an adversary with important clues about communications with counsel to which he or she is not entitled, while providing inadequate information may, on the other hand, risk waiver by procedural default.[67]

---

[63] See N. 1 *supra*.

[64] See § 1.03[1][a] *supra*.

[65] See, e.g.:

Second Circuit: U.S. Dist. Ct. Rules, S.D.N.Y. & E.D.N.Y., Civ. R. 26.2 (mandating privilege log and defining requirements).

Tenth Circuit: U.S. Dist. Ct. Rules, E.D. Okla., Civ. R. 26.2 (mandating privilege log).

[66] See U.S. Dist. Ct. Rules S.D.N.Y. & E.D.N.Y., Civ. R. 26.2(a)(2).

[67] See:

[b]—*In Camera* Review

There are many cases in which the proponent of a claim of privilege may benefit from an *in camera* review by the court of the disputed communications.[68] It is also possible for the court to conduct an *in*

Second Circuit: Weiss v. National Westminster Bank, PLC, 242 F.R.D. 33, 66 (E.D.N.Y. 2007) ("Failing to include sufficiently descriptive information may result in waiver of the privilege.").

Third Circuit: Greene, Tweed of Delaware, Inc. v. DuPont Dow Elastomers, L.L.C., 202 F.R.D. 418, 423-424 (E.D. Pa. 2001) (ordering production of documents where defendant failed to provide specific enough information for privilege to apply).

Tenth Circuit: C.T. v. Liberal School District, 2008 U.S. Dist. LEXIS 5863, at *30-*31 (D. Kan. Jan. 25, 2008) (privilege waived as to email attachments where privilege log listed emails but did not separately list attachments).

Eleventh Circuit: AARP v. Kramer Lead Marketing Group, 2005 WL 1785199 at *3 (M.D. Fla. July 26, 2005) (a privilege log must provide the court with the means to establish "that the documents were prepared in anticipation of litigation rather than in the ordinary course of business"); CSX Transportation, Inc. v. Admiral Insurance Co., 1995 WL 855421 at *5 (M.D. Fla. 1995) (permitting party a final opportunity to set forth facts demonstrating that the asserted privileges applied).

Court of Federal Claims: Cabot v. United States, 35 Fed. Cl. 442 (Fed. Cl. 1996) (a broad assertion of privilege for each document listed in the privilege log was an inadequate explanation and documents were discoverable).

[68] See United States v. Zolin, 491 U.S. 554, 568-569, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989) ("[T]his Court has approved the practice of requiring parties who seek to avoid disclosure of documents to make the documents available for *in camera* inspection . . . and the practice is well established in the federal courts."). See also:

First Circuit: In re Grand Jury Subpoena (Mr. S.), 662 F.3d 65, 70 (1st Cir. 2011), *cert. denied* 133 S.Ct. 43 (2012) ("When . . . the assertion of privilege is subject to legitimate dispute, the desirability of in camera review is heightened. Even if the parties do not explicitly request such a step, a district court may be well advised to conduct an *in camera* review).

Second Circuit: United States v. Davis, 131 F.R.D. 391, 397 (S.D.N.Y. 1990) (it was appropriate that documents be produced for *in camera* inspection where, due to sketchy and somewhat conflicting descriptions, court had no way of discerning what documents might show and whether adverse party had a substantial need for the documents).

Third Circuit: Fidelity & Deposit Co. of Maryland v. McCulloch, 168 F.R.D. 516, 524 (E.D. Pa. 1996) ("If Defendants have lingering concerns that information is being wrongfully withheld on attorney-client or work product privilege grounds, they may always file an appropriate motion requesting an *in camera* review of particular documents.").

Fourth Circuit: In re Grand Jury Proceedings No. 5, 401 F.3d 247, 253 (4th Cir. 2005) ("[T]he Zolin decision does not speak to situations . . . in which a judge examines evidence from the opponent of the privilege . . . ex parte and *in camera* without examining the allegedly privileged documents themselves.").

Seventh Circuit: United States v. Boender, 649 F.3d 650, 656 (7th Cir. 2011) (permitting *in camera* review where there was sufficient evidence to support a good faith belief that "such review may reveal evidence establishing the [crime-fraud] exception" to privilege).

camera review of a representative sample of the documents at issue.[69]

The Supreme Court has held that the "disclosure of allegedly privileged materials to the district court for the purposes of determining the merits of a claim of privilege does not have the legal effect of terminating the privilege."[70] However, the Court has also repeatedly warned of the dangers of excessive use of *in camera* review and its potential for undermining the very privileges such review is meant to facilitate.[71] Beyond the risk of undercutting the privilege, parties submitting what might be thought of as their "worst" documents face a danger that

---

Ninth Circuit: Landmark Screens, LLC v. Morgan, Lewis & Bockius LLP, 2009 WL 3415375 at *6 (N.D. Cal. Oct. 21, 2009) ("In [determining whether to conduct an *in camera* review], the court will consider the circumstances of the case, the volume of materials it is asked to review, the relative importance of the information to the case, and the likelihood that any evidence produced will help establish the claim." (citing *United States v. Zolin*, 491 U.S. 554 at 572.)).

District of Columbia Circuit: In re Sealed Case (Medical Records), 381 F.3d 1205, 1218 n.15 (D.C. Cir. 2004) (*in camera* inspection of allegedly privileged documents is accepted procedure).

Court of Federal Claims: Evergreen Trading, LLC *ex rel*. Nussdorf, 80 Fed. Cl. 122, 126 (Fed. Cl. 2007) (*in camera* review appropriate where revised privilege log failed to provide court with enough information to assess plaintiff's discovery objection).

State Courts:

Colorado: People v. Madera, 112 P.3d 688, 691 (Col. 2005). The Colorado Supreme Court has set forth a test to be used by trial courts when determining whether to conduct *in camera* review:

Before granting a request for *in camera* inspection of an attorney's case file, the trial court must determine (1) as precisely as possible, the information sought to be discovered, (2) whether the information is relevant to a matter at issue, (3) whether the information could be obtained by any other means, (4) whether the information is privileged, (5) if it is privileged, whether the privilege has been waived, (6) if it is privileged, but has been waived, either explicitly or impliedly, the scope of the waiver. By using this analytical framework, a trial court can determine whether the moving party has shown a reasonable good faith belief that *in camera* inspection will reveal that the documents sought fall within an exception to the attorney-client privilege or that the defendant waived the privilege.

See also, § 2.07[2] *infra* (discussing crime-fraud exception to attorney-client privilege and the showing required to obtain *in camera* review).

[69] See United States v. Siegel, No. 96 Cr. 411, 1997 WL 12804 at *2 (S.D.N.Y. Jan. 14, 1997).

[70] United States v. Zolin, 491 U.S. 554, 568, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989).

[71] See: *id*., 491 U.S. at 571 ("A blanket rule allowing *in camera* review as a tool for determining the applicability of the crime-fraud exception . . . would place the policy of protecting open and legitimate disclosure between attorneys and clients at undue risk."); Hoffman v. United States, 341 U.S. 479, 486, 71 S.Ct. 814, 95 L.Ed. 1118 (1951) ("However, if the witness, upon interposing his claim [of privilege against self-incrimination], were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee.").

viewing such information could prejudice a reviewing judge or magistrate. Accordingly, parties should weigh carefully the risks and benefits of *in camera* review of documents. Moreover, depending on the volume involved, *in camera* review may result in delay, or worse, the displeasure of the judge required to perform the review.