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Malpractice Prevention Education for Oregon Lawyers

Preserving Claims of Attorney-Client Privilege in Discovery

The Oregon Rules of Civil Procedure nowhere explicitly address claims of attorney-client privilege or the creation of privilege logs. Cf. Fed R. Civ. P. 26(b)(5). Because of this lack of a specific provision in the rules and the time and expense involved in preparing a log, Oregon lawyers frequently do not prepare one. However, when a discovery dispute involving claims of attorney-client privilege arises, it may be impossible to adjudicate the dispute in the absence of a log. Some Oregon state-court trial judges look for guidance to a 2005 Ninth Circuit case, *Burlington Northern & Santa Fe Railway Co. v. U.S. District Court*, 408 F.3d 1142, to answer the question of whether a log is required to preserve privilege claims. *Burlington* charts a commonsense approach to privilege claims and logs that is worth considering if you believe that privileged documents may be implicated in one of your cases.

In *Burlington*, plaintiffs brought an environmental contamination action against a railroad. As is often the case, discovery was "characterized by delay, misunderstandings, and increasing acrimony between the parties." The railroad responded to plaintiffs' first document requests within the 30 days contemplated by Federal Rule of Civil Procedure 34 but did not produce a privilege log at that time (although both parties expected that one would be produced). No documents were produced, but plaintiffs were invited to inspect documents at the railroad's premises. Over time, plaintiffs became convinced that documents were being improperly withheld and eventually moved to compel. Before the motion was ruled on, the railroad produced a privilege log, which in turn was modified several times as the parties sparred over discovery for over a year. On plaintiffs' second motion to compel, the trial court ordered all withheld documents produced, reasoning that the railroad waived its privilege objections by not producing a log at the time it responded to the document requests.

On mandamus, the Ninth Circuit affirmed the trial court but rejected a per se rule that a privilege log must be produced at the time discovery responses are served. The court at the same time held that boilerplate objections or blanket refusals in discovery responses were insufficient to preserve a privilege claim. The court set forth several factors to be applied "in the context of a holistic reasonableness analysis" to determine whether privilege claims were waived if a log was not produced at the time discovery responses were served, including (1) the degree to which the objection or claim of privilege is sufficient to enable the opposing party and the court to evaluate whether a withheld document is privileged; (2) the timeliness of the objection; (3) the scope of document production; and (4) other circumstances of the case that make responding to discovery easy or difficult.

Although *Burlington* derives from the Federal Rules of Civil Procedure, Oregon state court trial judges have nonetheless referred to it in discovery disputes – no doubt because the case suggests sensible practices that will help courts to evaluate privilege claims. Because mere boilerplate objections may ultimately be deemed insufficient to preserve a privilege claim or to provide sufficient

information for an adverse party or the court, a log is advisable and, depending on the circumstances, may need to be produced at an early stage of discovery. Oregon practitioners should therefore consider at the very outset of document production whether they will withhold documents as privileged, and whether the magnitude of discovery will permit early compilation and production of a log. Although serving a log with initial discovery responses may not be a requirement, practitioners should be wary of delaying too long in producing a log. Oregon judges have noted at local CLE events that they are unlikely to uphold a claim of privilege absent a disclosed privilege log.

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