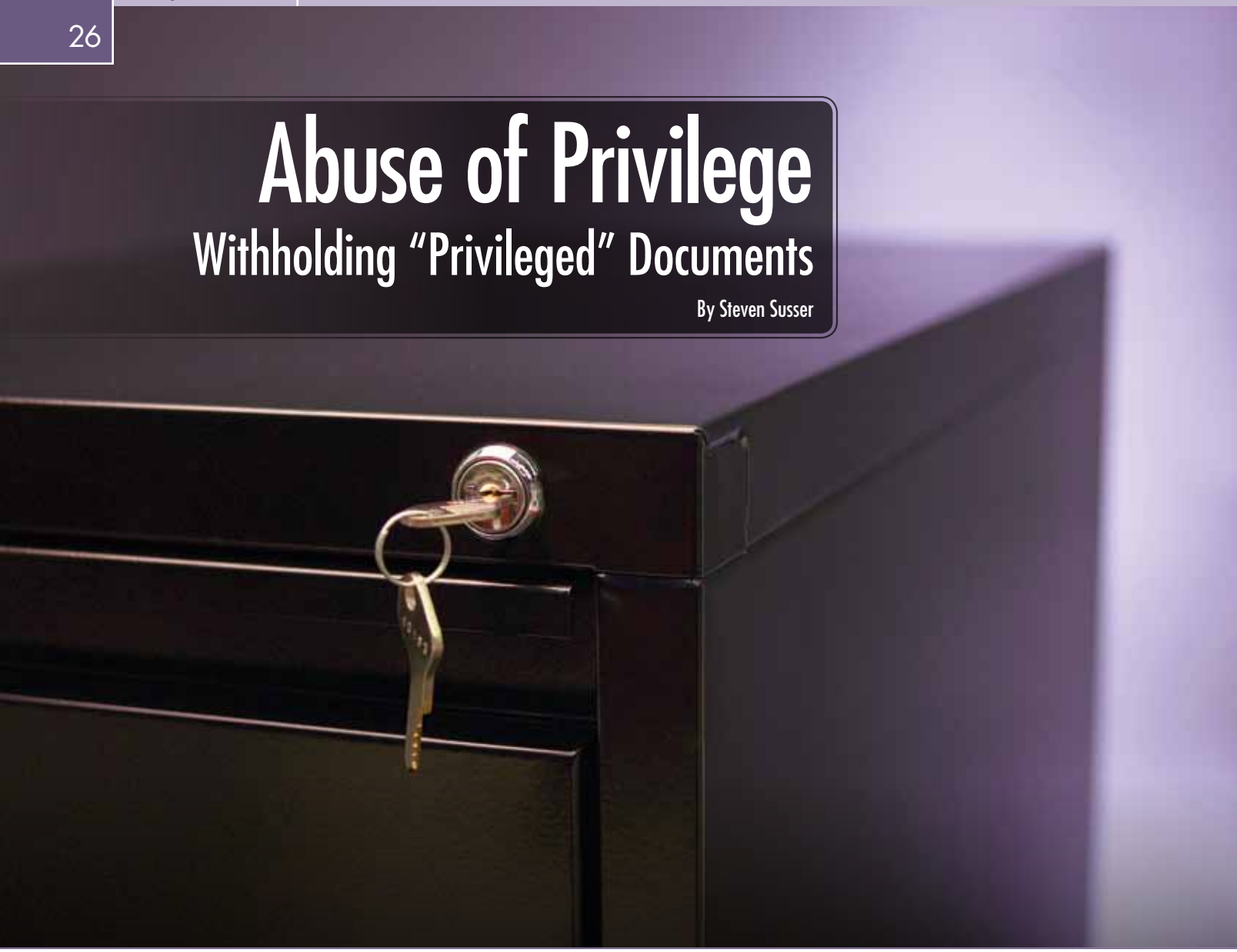

Abuse of Privilege

Withholding "Privileged" Documents

By Steven Susser

You are reviewing your client's documents to decide which to produce. You come across a document that is harmful to your client's position and your heart sinks. Then you see that one of the recipients of this unfavorable document is your client's vice president and associate general counsel. Your heart leaps with delight. You can now withhold this document from production, you think, because one of the recipients is a licensed attorney. But can you? That is the subject of this article. When is it appropriate to withhold documents under the attorney-client privilege? On the flip side, what should you do if you believe that your adversary has inappropriately withheld a document as privileged?[1]

Privilege Basics

The attorney-client privilege is a common-law doctrine that allows you to withhold otherwise relevant information if you reasonably believe that the information contains either a request for legal advice or the giving of legal advice.[2] The theory behind the privilege is that a client should feel free to ask for legal advice even if the request appears inculpatory, and a lawyer should be able to freely give legal advice even if it is unfavorable to the client.[3] The application of the attorney-client privilege varies somewhat from state to state because the privilege is based in common law and, thus, susceptible to different interpretations. But the foundation of the privilege is shared across the country. The interpretation of the attorney-client privilege in Michigan is consistent with the interpretation in the majority of other states and applies when the following conditions have been met:

1. A client requests legal advice;
2. from his or her legal adviser (acting in a legal capacity); and
3. the request is made by the client in confidence.[4]

If these conditions are satisfied, a party will generally not be required to produce the information containing legal advice or the client request that generated that advice.

Privilege Nuances

On its face, the attorney-client privilege seems straightforward. But once past the basics, you quickly enter a thicket of complications. For example, when does a strategic idea turn into legal advice? What if only one portion of a document contains legal advice, but the relevant portion of the document does not contain legal advice? Finally, can you withhold a document as privileged because one of the individuals who received the document happens to have a law degree? This last question is significant. Lawyers too often withhold documents that do not meet the strict conditions of the attorney-client privilege simply because the author or recipient is an attorney. I refer to this situation as "the lawyer excuse," because it is an excuse for nonproduction based only on the status of one of the participants in the communication.

Privilege Abuse

Attorneys are quick to seek protection for a document under the attorney-client privilege simply because a lawyer has written or received that document. This is inappropriate and unfair. As an attorney producing documents, you should not label as privileged a document that purports to give legal advice unless the document satisfies the following criteria:

- **It gives specific legal advice on a specific legal point.** For example, a document that tells a client that the transfer of his assets would be a fraudulent conveyance would likely be a protected communication. However, a memorandum written by an attorney summarizing a meeting may not be protected.[5]
- **The legal advice is given by a licensed attorney who is acting in his or her capacity as an attorney.** This would include an attorney writing about a legal issue that he or she was engaged to handle, but would usually exclude a vice president of human resources who merely happens to have a law degree.[6]

Fast Facts:

Lawyers too often withhold documents that do not meet the strict conditions of a privileged document simply because the author or recipient of that document is an attorney.

The only portion of a document that should be excluded from production is that which specifically asks for or provides legal advice of a licensed attorney *who is acting in the capacity of an attorney.*

You will have much better luck selecting five documents and explaining why you believe an independent review by the court is necessary than complaining about 500 entries in the privilege log.

What should you do if you believe that your adversary has inappropriately withheld a document as privileged?

Yet this does not end the inquiry. As the producing attorney, you must ensure that only the privileged portion of a document is withheld. The only protected information is that which falls within the scope of the privilege. Thus, for instance, a party may not rely on one privileged sentence of a three-page document to withhold the entire document.[7] Only those portions of the document that give legal advice or directly relate to legal advice are protected by the privilege.[8] When you encounter this situation, you should take care to omit (redact) only that portion of the pertinent document that contains legal advice or a request for legal advice.

Remedies for Privilege Abuse

As the lawyer requesting documents from your adversary, what do you do when you suspect that a document is being withheld on the basis of a dubious claim of privilege? First, you should ensure that you are notified of any withheld documents by asking for a privilege log as part of your document request. The Michigan Court Rules do not specifically address privilege logs, but a request for information concerning documents withheld as privileged would be a valid interrogatory under MCR 2.309. When crafting such an interrogatory, be sure to ask for specific information about any document that is withheld, including (1) the type of document; (2) its date; (3) all authors, recipients, and "copies" (stated and blind); and (4) the basis for the claimed privilege.

It is worth noting that a request for a privilege log is a natural and practical consequence of the enumerated rules concerning discovery. For example, MCR 2.310(B) permits a party to serve a document request on a party or nonparty, and MCR 2.310(C)(2) permits a recipient of a document request to object, but only if the reasons for the objection are stated.[9] Further, MCR 2.313(A)(2) permits a party to file a motion to compel if the requested information has not been provided. Thus, a party might request documents, be met with an objection grounded in privilege, file a motion, and have the court consider and decide the reasonableness of the privilege designation. Alternatively, the parties could avoid many such disputes by exchanging privilege logs. As the latter course is more convenient and less costly, it appears that the concept of the privilege log has taken root as a means for saving time and money.

In a privilege log, a party withholding a document as privileged typically describes the document—without, of course, disclosing the privileged communication—and provides information regarding the individual(s) who prepared and who received the

document. In this way, a party whose document request is met with an objection based on privilege can determine the validity of that objection. Here is an excerpt of a sample privilege log:

Log of Privileged Documents

Doc. #	Doc. Date	Doc. Description	Doc. Type	Author (From)	Recipients (To)	Courtesy Copies (cc/bcc)	Basis for Claimed Privilege

Once you receive a privilege log, carefully review its contents to ensure compliance. First, look at all the individuals listed as having produced or received the purportedly privileged communications. If one or more of these individuals is not an attorney or the client, you may be able to argue that the privilege has been waived by virtue of the fact that the communication was disclosed to a third party and has lost its confidential nature.[10] Second, even if the communication is between an attorney and client only, attempt to determine whether the attorney was acting in his or her capacity as a lawyer. The mere fact that an individual with a law degree took part in a discussion does not automatically make all resulting communications privileged. Third, scrutinize the basis for the claim of privilege; it should be sufficient for you to determine whether legal advice was requested or tendered. For example, an explanation such as "The request was for legal advice concerning the tax implications of the merger" is always better than an explanation such as "Communication with attorney."

If you are faced with a questionable entry on a privilege log, consider asking opposing counsel for more specificity. For example, you could ask whether legal advice was requested or proffered and, if so, the nature of that advice. Or, you could ask whether a given party was acting as counsel in the relevant exchange. If opposing counsel's answer is "yes," seek out specific data to support this response. In other words, when an individual or document is listed on a privilege log, do not merely accept that designation if it appears to be dubious. Instead, you may wish to request an explanation of opposing counsel's rationale for that listing.

If you are unsuccessful in obtaining a more specific rationale, or if the provided rationale is unsatisfactory, you may wish to consider asking the court for relief. In doing so, you should be specific about the documents that you are targeting. You will have much better luck by selecting a small number of documents and explaining why you suspect the privilege designation than you will by broadly complaining about 500 entries in the privilege log.

As for relief, I suggest that you ask the court to require that your opponent provide a specific and detailed explanation for why he or she has withheld a given document. Alternatively, you could ask that the court review a specific subset of documents in camera so that the court can make an independent determination concerning whether they are privileged. Although courts, in my experience, are hesitant to do this sort of in camera review, the act of requesting judicial review may be enough, by itself, to pry additional documents loose from your opponent's grasp.

Conclusion

There is no "North Star" when it comes to withholding a document as privileged. As attorneys are conservative by nature, there may be times when they are over-inclusive with the "attorney-client privilege" designation. Indeed, because the "privileged" designation is often attached to communications in good faith, even when those communications are actually subject to disclosure, this conservatism frequently results in the withholding of properly requested documents as privileged. In sum, when producing documents, be careful to apply the privilege in a fair manner. It is often worth asking yourself whether you would object if opposing counsel withheld a similar type of document from you.

On the other hand, when you receive a privilege log, do not blindly accept that the listed documents are truly privileged. Scrutinize the log for signs of aggressive use of the privilege. If you feel that pertinent documents have been improperly withheld,

You should ensure that you are notified of any withheld documents by asking for a privilege log as part of your document request.

you should take appropriate steps to obtain those documents, first by pursuing them from opposing counsel, and then, if necessary, by seeking aid from the court. ■

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FOOTNOTES

1. Many of the positions taken in this article will also be applicable to the work-product rule of MCR 2.302(B)(3) and FR Civ P 26(b)(3). However, this article does not specifically address the work-product rule.
2. *Upjohn Co v United States,* 449 US 383, 389; 101 S Ct 677; 66 L Ed 2d 584 (1981).
3. See *id.;* see also *Kubiak v Hurr,* 143 Mich App 465, 473; 372 NW2d 341 (1985).
4. *Taylor v Temple & Cutler,* 192 FRD 552, 555–556 (ED Mich, 1999); see also *Kubiak,* 143 Mich App at 472–473 (stating that the "privilege attaches to confidential communications made by a client to his attorney acting as a legal adviser and made for the purpose of obtaining legal advice on some right or obligation.").
5. See *McCartney v Attorney General,* 231 Mich App 722, 731; 587 NW2d 824 (1998) (observing that "[t]he privilege attaches only to confidential communications by the client to his attorney, which are made for the purpose of obtaining legal advice.").
6. See *Leibel v Gen Motors Corp,* 250 Mich App 229, 238; 646 NW2d 179 (2002) (holding that the attorney-client privilege applied to protect a memorandum, drafted by an attorney in the defendant's legal department, which contained "legal opinions and legal recommendations"); *Fruehauf Trailer Corp v Hagelthorn,* 208 Mich App 447, 451; 528 NW2d 778 (1995) (examining in the context of the attorney-client privilege whether the defendant functioned only as a technical expert, or also as an attorney, while employed by the plaintiff); see also *People v Van Alstine,* 57 Mich 69, 77–78; 23 NW 594 (1885) (suggesting that the attorney-client privilege did not attach to certain communications with an attorney because the defendant had not approached the attorney in his professional capacity).
7. See *Michigan First Credit Union v Cumis Ins Society, Inc,* unpublished order of the United States District Court for the Eastern District of Michigan, entered December 7, 2007 (Docket No. 05-74423) (noting that although the facts contained in certain documents were not privileged, any legal advice and opinions contained in the documents could be redacted); *Fruehauf Trailer,* 208 Mich App at 451 (stating that "the protection of the [attorney-client] privilege extends only to communications, and not to facts.").
8. See *Co-Jo, Inc v Strand,* 226 Mich App 108, 112; 572 NW2d 251 (1997); see also *Hubka v Pennfield Twp,* 197 Mich App 117, 121; 494 NW2d 800 (1992), rev'd in part on other grounds, 443 Mich 864 (1993) (stating that the attorney-client relationship "'does not allow the withholding of documents simply because they are the product of an attorney-client relationship.'") (citation omitted).
9. Interestingly, the Michigan Court Rules do not list or discuss the valid reasons for objecting to a document request. However, the rules do discuss the intersection of privilege and the taking of depositions. See MCR 2.306(C)(4)(a) (stating that "evidence objected to on grounds other than privilege shall be taken subject to the objections."); MCR 2.306(D)(4) (stating that a party must object before the time scheduled for the taking of a deposition if he or she intends to assert that the matter to be inquired about is privileged).
10. *Yates v Keane,* 184 Mich App 80, 83; 457 NW2d 693 (1990) (observing that a communication is not protected by the attorney-client privilege "if it is made for the purpose of disclosure to third parties.").