

ITEM 10.01 | PRIVILEGE LOGS

Fla. R. Civ. P. 1.280(b)(5) provides, in part, that a party withholding information from discovery claiming that it is privileged shall make the claim expressly, and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protections. It has been suggested that the privilege log should include at a minimum (for documents), sender, recipients, title or type, date and subject matter.⁵

The U.S. District Court for the Southern District of Florida has promulgated a Local Rule for the content required in a privilege log.⁶ In at least one instance, that Local Rule has served as guidance for a Florida court.⁷ Guidance for the content required in a privilege log in the Middle District of Florida can be found in *Arthrex, Inc. v. Parcus Medical, LLC*, M.D., Fla. 2012 (2012 WL 3778981).

The failure to file a privilege log can result in a waiver of the attorney-client privilege.⁸ However, that is not a common sanction, and Florida courts generally recognize that such a sanction should be resorted to only when the violation is serious.⁹ The failure to submit a privilege log at the same time as a discovery response is served, does not waive the privilege. Fla. R. Civ. P. 1.280(b)(5) does not detail the procedure to follow for service of privilege logs and does not specifically address the appropriate sanction to be imposed if a party is tardy in filing a privilege log. If a party does not submit a privilege log within a reasonable time before a hearing on the motion to compel, then the trial court can be justified in finding a waiver because there would be no basis on which to assess the privilege claim. A very late and inadequate privilege log could subject a party to waiver of the privilege.¹⁰

A privilege log is not required until such time as broader, preliminary objections have been addressed. "A party is required to file a [privilege] log only if the information is otherwise discoverable. Where the party claims that the production of documents is burdensome and harassing . . . the scope of discovery is at issue. Until the court rules on the request, the party responding to discovery does not know what will fall into the category of discoverable documents . . ."¹¹ Waiver does not apply where assertion of the privilege is not document-specific, but category specific, and the category itself is plainly protected.¹²



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Footnotes

⁵ *Bankers Sec. Ins. Co. v. Symons*, 889 So. 2d 93 (Fla. 5th DCA 2004).

⁶ U.S. District Court, Southern District of Florida, Local Rule 26.1(g)(3)(B)(ii).

⁷ *TIG Ins. Corp. of America v. Johnson*, 799 So. 2d 339 (Fla. 4th DCA 2001).

⁸ *Id.*

⁹ *Gosman v. Luzinski*, 937 So. 2d 293 (Fla. 4th DCA 2006) (“Attorney-client privilege and work-product immunity are important protections in the adversarial legal system, and any breach of these privileges can give one party and undue advantage over the other party. Florida’s courts generally recognize that an implicit waiver of an important privilege as a sanction for a discovery violation should not be favored, but resorted to only when the violation is serious.”).

¹⁰ *Bainter v. League of Women Voters of Fla.*, 150 So. 3d 1115, 1129 (Fla. 2014).

¹¹ *Gosman*, *supra*.

¹² *Nevin v. Palm Beach County School Board*, 958 So. 2d 1003 (Fla. 1st DCA 2007); citing: *Matlock v. Day*, 907 So. 2d 577 (Fla. 5th DCA 2005).

