

**BLANKET ASSERTIONS OF THE FIFTH AMENDMENT, ATTORNEY-CLIENT, AND WORK PRODUCT PRIVILEGES ARE UNENFORCEABLE; THE COURT MUST BE ALLOWED TO JUDGE EACH ASSERTION ON ITS FACTS**

In his motion, Epstein asserts that *all* of the items called for by the subpoenas will violate his Fifth Amendment privilege, the attorney-client privilege, and the work product doctrine. He also implicitly asserts that any question addressed to the witnesses would violate these privileges and, therefore, the witnesses cannot be compelled to appear before the grand jury. <sup>E1</sup> These blanket assertions are not authorized and undermine the Court's ability to make an independent evaluation of the applicability of the privileges.

With respect to the Fifth Amendment privilege against self-incrimination, the protection does not cover every instance where the target of an investigation is called to testify or produce documents. Instead, the protection of the Fifth Amendment is confined to instances where the witness "has reasonable cause to apprehend danger" of criminal prosecution. *Hoffman* ■ *United States* , 341 U.S. 479, 486 (1951). "The central standard for the . . . application of the Fifth Amendment is whether the claimant is confronted by substantial and 'real,' not merely trifling or imaginary, hazards of incrimination." *Marchetti* ■ *United States* , 390 U.S. 39, 53 (1968).

Furthermore, a witness is not exonerated from answering questions merely because he declares that in so doing he would incriminate himself – his say-so does not itself establish the hazard of incrimination. It is the role of the court, not the witness, to evaluate the witness's claim of incrimination and determine whether it is reasonable.

In evaluating the validity of a witness's invocation of Fifth Amendment privilege against self-incrimination, the court must make a particularized inquiry, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded. Thus, the court must review the witness's assertion of the privilege on a question-by-question basis and decide whether a witness's silence is justified.

*United States* ■ *Koubriti* , 297 F. Supp. 2d 955, 962 (E.D. Mich. 2004) (citing *Hoffman* , 341 U.S. at 53; *United States* ■ *Melchor Moreno* , 536 F.2d 1042, 1049 (5th Cir. 1976); *United States* ■ *Rue* , 819 F.2d 1488 (8th Cir. 1987); *In re Morganroth* , 718 F.2d 161, 167 (6th Cir. 1983)). *See also* *United States* ■ *Argomaniz* , 925 F.2d 1349, 1355 (11th Cir. 1991) (court must review assertions of Fifth Amendment privilege on question-by-question basis to provide presiding judge specific information needed to determine applicability of privilege).

Similarly, blanket assertions of the attorney-client privilege are unacceptable. Instead, claims of privilege must be made on a document-by-document basis. *United States* ■ *Davis* , 636 F.2d 1028, 1038 (5th Cir. 1981); *In re Grand Jury Subpoena* , 831 F.2d 225, 227 (11th Cir. 1987). A blanket assertion cannot be used to avoid testifying; instead, a witness' claims of attorney-client privilege are tested by refusing to answer specific questions. *Davis* , 636 F.2d at 1039. *See also* *Nguyen* ■ *Excel Corp.* , 197 F.3d 200 (5th Cir. 1999); *Clarke* ■

*American Commerce Nat. Bank* , 974 F.2d 127 (9th Cir. 1992); *United States* ■ *White* , 950 F.2d 426, 430 (7th Cir. 1991).

In his motion, Epstein has proceeded like the litigants in the case of *In re Grand Jury Subpoena* , 274 F.3d 563 (1st Cir. 2001), generally asserting a blanket attorney-client and work product privilege to all documents called for by a subpoena without providing a privilege log or any other specific information. Judge Selya strenuously criticized this practice, commenting:

they do not identify any particular documents as privileged, nor do they specify the reasons why certain communications should be considered privileged. Thus, like soothsayers scrutinizing the entrails of a goat, we are left to scour the record for indications of what these documents might be and what they might contain.

*Id.* at 569. The First Circuit affirmed the district court’s denial of the litigants’ motion to quash because of their failure “to present sufficient information with respect to the items to which their claim of privilege attaches.”

*Id.* at 575.

A party that fails to submit a privilege log is deemed to waive the underlying privilege claim. . . . Although most of the reported cases arise in the context of a claim of attorney-client privilege, the “specify or waive” rule applies equally in the context of claims of work product privilege. . . . Despite this knowledge, the intervenors made no effort to prepare a privilege log. *That omission is fatal.*

*Id.* at 576 (internal citations omitted; emphasis added). *See also United States* ■ *Construction Prods. Research, Inc.* , 73 F.3d 464, 473 (2d Cir. 1996) (“if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of the legal requirements for application of the privilege, his claim will be rejected”) (citations omitted); *Dorf & Stanton Communications, Inc.* ■ *Molson Breweries* , 100 F.3d 919 (Fed. Cir. 1996) (a party who fails to submit a privilege log is deemed to have waived the underlying privilege claim).

Epstein’s failure to provide a privilege log should doom his motion to quash, as well. As shown by his motion, Epstein is represented by extremely competent counsel. In addition to Mr. Black and his partners, Epstein has retained at least six other attorneys with extensive experience in federal court. Epstein and his counsel have had access to the subpoenaed computers since at least October 2005, when they were removed from Epstein’s home, and they have known about the United States’ attempts to locate those computers for at least two months, when a subpoena for the same items was served upon Paul Lavery, another private investigator who worked with Riley. This is not a situation where failure to abide by the Court’s rules should be tolerated.

**EPSTEIN HAS FAILED TO ESTABLISH THAT THE ATTORNEY-CLIENT PRIVILEGE  
COVERS THE PRODUCTION OF THE COMPUTERS**

“The burden of proving that a communication falls under the attorney-client privilege rests on the proponent of the privilege.” *Hawkins* ■ *Stables* , 148 F.3d 379, 383 (4th Cir. 1998) (citation omitted).

The party invoking the attorney-client privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential. In order to show that communications made to an attorney are within the privilege, it must be shown that “the communication was made to him confidentially, in his professional capacity, for the purpose of securing legal advice or assistance.

*United States* ■ *Schaltenbrand* , 930 F.2d 1554, 1562 (11th Cir. 1991) (citations omitted). *See also XYZ Corp.* ■ *United States* , 348 F.3d 16, 22 (1st Cir. 2003) (“The privilege protects only those communications that are confidential and are made for the purpose of seeking or receiving legal advice.”) (citations omitted).

In this case, Epstein has not carried his burden of proving the application of the privilege to the computers. In particular, Epstein has not showed that the “communication” was confidential. Even if Riley could stand in the shoes of Attorney Black, others were present for the removal of the computers from Epstein’s home, which constitutes an implied waiver of the privilege. *See, e.g., XYZ Corp.* , 348 F.3d at 23 (“The privilege evaporates the moment that confidentiality ceases to exist. With isthmian exceptions not pertinent here, the presence of third parties is sufficient to undermine the needed confidentiality.”) (citation omitted).

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<sup>F1</sup>The government uses the word “implicitly” because Epstein’s motion to quash does not mention witness testimony and the witnesses themselves have not filed a motion to quash; they simply failed to appear before the grand jury.