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New law to require 'proof' of privilege

By Lucas A. Messenger

Though it may come as some surprise to many, a party responding to a request for production in California currently is under no obligation to provide a privilege log in connection with its response — either initially or at some later date. See *Best Products, Inc. v. Super. Ct.*, 119 Cal. App. 4th 1181, 1188 (2004) (finding there is no requirement that a privilege log be served at the time responses are served). Indeed, the term "privilege log" is nowhere to be found in the California Code of Civil Procedure — or the Federal Rules of Civil Procedure for that matter — and a privilege log only may be required after a motion to compel. *Best*, at 1189 (finding court may only order a privilege log after a motion to compel a more specific identification of documents withheld on basis of privilege).

All this will change, however, when amendments to the code go into effect with the arrival of the new year. As of Jan. 1, 2013, any response to a request for production that contains a privilege or work product objection "shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." See Assembly Bill 1354 (amending California Code of Civil Procedure Section 2031.240). The amendment's stated intention is "to codify the concept of a privilege log as that term is used" in existing case law and should not be "construed to constitute a substantive change in case law." But its effects could prove to be a bit more far-reaching than its drafters perhaps have envisioned.

To be sure, the amendment codifies the animating purpose behind privilege logs as articulated by California courts: to provide a specific factual description of documents withheld from production based on a claim of privilege that enables evaluation of the privilege claim by both the requesting party and the court. See *Hernandez v. Super. Ct.*, 112 Cal. App. 4th 285, 292 (2003) (purpose of a privilege log is to provide a specific factual description of documents in aid of substantiating a claim of privilege in connection with a request for document production).

Moreover, the amendment builds on a responding party's already existing obligation to: (1) identify with particularity any document for which an objection is being asserted; and (2) set forth clearly the basis for the objection and identify the particular privilege. California Code of Civil Procedure Section 2031.240. Of course, to do so with "substantial justification" would seem to require that a responding party review its documents first before drafting the response.

This obligation, however, is more honored in the breach than the observance. In reality, responses are often served well before the responding party even has begun its review of the documents and without any information that would allow evaluation of the claimed privilege. There are a number of reasons that prompt attorneys to adopt this approach, including a large universe of documents to review and client inertia. It is no secret that the larger the case and the bigger the responding party, the more likely it is that nothing more than boilerplate placeholder objections will be served in the initial response.

Indeed, counsel will be more hard-pressed than ever to argue that serving such a response before any documents have been reviewed — with or without a privilege log — somehow satisfies the code.

The placeholder objections almost certainly will include something along the lines of: "the request seeks documents that are protected by the attorney client privilege and/or work product doctrine." Even though the intent may be to supplement at some later date after counsel has had an opportunity to review documents for privilege and responsiveness, this sort of response does not comply with the code's concrete obligation to either: (1) state that the party will comply with the request; (2) represent that it lacks the ability to comply with the request; or (3) object to the request by identifying the withheld documents and setting forth the basis of the privilege. California Code of Civil Procedure Section 2031.210(a).

Cases like *Best* allow such tactics to flourish — notwithstanding the unambiguous requirements of the code — because serving only boilerplate privilege objections does not waive the privilege. See *Best*, at 1188 (finding "[b]ecause defendant did assert the attorney-client and work product privileges in a timely manner, albeit in a boilerplate fashion, the court erred in finding a waiver of privilege(s)"). It may render the response susceptible, however, to a motion to compel and corresponding sanctions for misuse of the discovery process. California Code of Civil Procedure Section 2031.310.

By requiring a privilege log to be served with the response (or sufficient information to allow evaluation of a privilege claim), the amendment further highlights the insufficiency of serving boilerplate placeholder objections in the initial response. Indeed, counsel will be more hard-pressed than ever to argue that serving such a response before any documents have been reviewed — with or without a privilege log — somehow satisfies the code. This is especially important since one state Court of Appeal has held that the assertion of a privilege objection without actually having reviewed the documents for which privilege is being asserted constitutes "bad faith" and a violation of an attorney's ethical duty to act truthfully. See *Bihun v. AT&T Information Systems, Inc.*, 13 Cal. App. 4th 976, 991 (1993) (likening assertion of objection based on privacy and relevance to willful suppression of evidence where documents were never reviewed), disapproved on other grounds in *Lakin v. Watkins Associated Industries*, 6 Cal. 4th 644, 664 (1993).

In the end, the amendment may prove to have no tangible effect on the manner in which parties respond to requests for production. It could be that responding parties simply will decide to ignore the privilege log requirement in much the same way they currently ignore their obligation to identify with particularity any document for which an objection is being asserted and clearly set forth the basis for the objection and identify the particular privilege. The problem with this approach, of course, is that the code says what the code says. The arguments that everyone else is doing it or that compliance is impractical have never been particularly effective.

All it takes is one enterprising attorney to successfully make a responding party's life miserable due to the sufficiency — or lack thereof — of responses before what constitutes "normal practice" is turned on its ear. The way to avoid being the guinea pig in this scenario is to work with opposing counsel from the beginning to establish a realistic timetable for document review and production. This will allow a responding party to serve responses and objections that actually comply with the code. When it comes to the assertion of privilege, it really is a waste of time and money to fight over responses and objections that are based on nothing more than conjecture about what documents theoretically might contain.

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