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## **The Document from Hell—AKA the “Privilege Log”**

### **By Katherine Gallo**

In responding to Requests for Production of documents you have three response choices (1) agree to produce (C.C.P. §2031.220); (2) state that after a diligent search and a reasonable inquiry you have no documents (C.C.P. §2031.230) or (3) object (C.C.P. §2031.240). If you chose option three, then you must:

(1) Identify with particularity any document, tangible thing, land, or electronically stored information falling within any category of item in the demand to which an objection is being made.

(2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a claim that the information sought is protected work product under Chapter 4 (commencing with Section 2018.010), that claim shall be expressly asserted. See C.C.P §2031.240(b)

This document is more commonly known as the “*privilege log*”. Although C.C.P. §2031.240(b) does specifically not state the kind of identification that is required, it is expected that for each document withheld that the *privilege log* state (a) the nature of the document (e.g., letter, memorandum, (b) date, (c) author, (d) recipients, (e) the sequential number (or document control number, if any), and (f) the privilege claimed. See *California Civil Discovery Practice* (CEB 4th Ed. 2011) §3.192 citing *Wells Fargo Bank v. Superior Court* (2000) 22 C4th 201 and §33.201 for a sample of a *privilege log*.

Except in some limited situations, California court’s do not have the right to do an in camera inspection of privileged documents to determine whether or not the document is actually privileged. See Weil and Brown, *Cal Prac. Guide: Civil Procedure Before Trial* (TRG 2011) ¶8:192.1 citing *Southern California Gas Co. v. Public Utilities Communication* (1990) 50 C3d 31, 45. Therefore, it is important that the *privilege log* be sufficiently specific enough to allow the court to determine whether the document is or is not (in) fact privileged.” *Wellpoint Health Networks, Inc. v. Sup Ct.* (1997) 59 CA4th 110, 130. If the log is not sufficiently specific, the trial court may order the objecting party to prepare a new log containing more information about the nature of the document in question. *Kaiser Foundation Hospital v. Superior Court* (1998) 6 CA4th 1217, 1228. The court also may conduct a preliminary fact hearing on whether the privilege exists. Ev. C. §402.

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So, when you are asserting objections to document requests remember:

**You Can't Do General Objections.** Many attorneys use a preamble before their responses called "General Objections". This is improper. You don't get to list every conceivable objection and have blanket coverage. C.C.P. §2031.210–240 makes it clear how you are to respond and "General Objections" is not one of them. See *Korea Data Systems Co. Ltd. v. Superior Court* (1997), 51 Cal.App.4th 1513

**You Can't Do "Boiler-plate" aka Garbage Objections,** as they are an indication of bad faith

**You Can't Object to a Document that does not exist.** When counsel for a party objects to production of documents under C.C.P. §2031.240(b), counsel implies that the documents in question exist and have been reviewed. Objection made to requests for production of document that do not exist or not in the attorney or party's possession violate an attorney's ethical duty under Bus & PC §6068(d) to act truthfully and, therefore, constitutes bad faith. See *Bihun v. AT&T Info. Sys* (1993) 13 CA4th 976, 991 and CEB §8:10. Thus, it is important that you review all responsive documents before you respond.

**You Must Provide a Specific factual description of the documents** or you run the risk that your objections will be deemed waived. The purpose of the privilege log in discovery proceedings is to provide specific factual description of documents in aid of substantiating a claim of privilege in connection with a request for document production, and is intended to permit a judicial evaluation of the claim of privilege. *Best Products, Inc. v. Superior Court* (2004) 119 CA4th 1181.

**The burden is on the party claiming a privilege** to establish whatever preliminary facts are essential to the claim if a motion to compel is filed. Weil and Brown, *Cal Prac. Guide: Civil Procedure Before Trial* (TRG 2011) ¶8:192 see Ev. C. §§402, 405.

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