

RESOLUTION 11-05-05

DIGEST

Discovery: Privilege Log for Response to Inspection Demand

Amends Code of Civil Procedure section 2031.240 to permit a party to move for the production of, and provides guidance concerning, the contents of a privilege log.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Code of Civil Procedure section 2031.240 to permit a party to move for the production of, and provides guidance concerning, the contents of a privilege log. This resolution should be approved in principle because it sets forth a reasonable procedure for demanding a privilege log following the process outlined by case law, but currently lacking any statutory direction.

While there is no current provision in the Code of Civil Procedure requiring a responding party who objects to an inspection demand on the grounds of attorney-client or work product privilege to produce a privilege log, case law has outlined the procedure. (*Best Product Inc. v. Superior Court* (2004) 119 Cal.App.4th 1181, 1188.) This resolution follows the guidelines provided in case law for requesting a court order requiring the production of a privilege log.

In addition, the resolution permits the parties to voluntarily stipulate to compliance with the section. The resolution thereby encourages parties to agree on the production of privilege logs without the need for court intervention. This resolution provides a much-needed common definition of a privilege log and codifies the procedure for obtaining such a log in the context of an inspection demand.

TEXT OF RESOLUTION

RESOLVED, that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to amend Code of Civil Procedure section 2031.240 (effective July 1, 2005) [formerly § 2031 (g)(3)] to read as follows:

- 1 § 2031.240 [formerly § 2031 (g)(3)]
- 2 (a) If only part of an item or category of item in an inspection demand is objectionable, the response
- 3 shall contain a statement of compliance, or a representation of inability to comply with respect to the
- 4 remainder of that item or category.
- 5 (b) If the responding party objects to the demand for inspection of an item or category of item, the
- 6 response shall do both of the following:
- 7 (1) Identify with particularity any document, tangible thing, or land falling within any category of item
- 8 in the demand to which an objection is being made.
- 9 (2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based
- 10 on a claim of privilege, the particular privilege invoked shall be stated. If an objection is based on a
- 11 claim that the information sought is protected work product under Chapter 4 (commencing with
- 12 Section 2018.010), that claim shall be expressly asserted.
- 13 (c) When the responding party objects to a demand on the basis of privilege or work product, the
- 14 party making the demand may move for an order requiring the responding party to produce a
- 15 privilege log. The motion shall comply with the requirements of Section 2031.310. If the court, in its
- 16 discretion, determines that a privilege log is necessary in order to determine the validity of the claim,
- 17 the court shall order the party claiming the privilege to prepare and serve a privilege log upon the
- 18 terms and conditions deemed appropriate by the court. The privilege log shall be served upon all
- 19 other parties. Unless otherwise ordered by the court, the privilege log shall include, as to each

20 document for which a claim of privilege or other protection from discovery has been made, the
21 following:
22 (1) the author or authors;
23 (2) the recipient or recipients;
24 (3) its date or dates;
25 (4) its length;
26 (5) the nature of the document or its intended purpose, and
27 (6) the basis for the objection.
28 The parties may voluntarily comply with this subsection or stipulate that all parties will comply with
29 this subsection. Such compliance shall be presumed to satisfy the standard set forth in subsection
30 (b) of this section.

(Proposed new language underlined; language to be deleted stricken)

PROPOSER: Santa Clara County Bar Association

STATEMENT OF REASONS:

Existing Law: There is no provision in California Code of Civil Procedure requiring the production of a privilege log, unless and until a Court orders its production. *Best Product Inc. v. Superior Court*, 119 Cal.App.4th 1181, 1188 (2004); *Lockyer v. Superior Court*, 122 Cal.App.4th 1060, 1075 (2004).

This Resolution: This resolution allows the parties to voluntarily provide a privilege log or stipulate to provide privilege logs as described in the statute. It also provides guidance to the courts on what categories the privilege log should contain, subject to the court's modification of those categories. The language is modeled on similar language adopted in Oklahoma. (See 12 Okl.St. Ann. § 3237(A)(2).)

The Problem: Practitioners frequently refer to privilege logs but there is no common definition of a privilege log and what categories it should contain. There are some cases that justify ordering the production of a privilege log at the outset and some cases that do not justify the expense of one at all. This provision allows the parties to "opt in" or the Court to order the parties to comply. By defining what is meant by "privilege log," there should be less litigation over whether a party has provided a sufficient privilege log.

IMPACT STATEMENT:

This resolution may affect Civil Code section 1375 regarding construction defect litigation against common interest developers. Civil Code section 1375(e)(1) requires that a "privilege log" be prepared within 60 days of notice of commencement of legal proceedings. Since that section does not currently define what is required in a "privilege log," this section may be used to interpret the language in Civil Code section 1375.

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