

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Catalina Island Yacht Club v Superior Court 12/4/15

Attorney Client Privilege and Work Product Doctrine; Privilege Log; Log Requirements

Petitioner Catalina Island Yacht Club (Yacht Club) is located in the City of Avalon on Catalina Island. It hosts social events for its members and also arranges for its members to dock their boats in Avalon Harbor. Real party in interest Timothy Beatty and petitioners Charles Boppell, V. Kelley York, Lowell Dreyfus, Tom Nix, and Dave Horst were members of the Yacht Club and its board of directors. In 2013, Beatty sued Petitioners, alleging they conspired to remove him from the board and suspend his membership in the Yacht Club. He alleges Petitioners defamed him by telling others that the Yacht Club removed him because he committed various acts that prejudiced “the best interests of the Club.” The operative first amended complaint alleges claims for libel, slander, invasion of privacy, and intentional infliction of emotional distress.

In December 2013, Beatty served inspection demands on Petitioners seeking written communications and other documents relating to his removal from the Yacht Club’s board of directors and suspension of his membership. In early February 2014, Petitioners served written responses that included boilerplate objections based on the attorney-client privilege and work product doctrine. Nearly two months later, Petitioners served a privilege log identifying 17 “communications” they withheld from production based on the attorney-client privilege and work product doctrine. For each communication, the log simply provided the date of the communication and explained it was between “counsel for Defendants and Defendants.”

Beatty filed a motion to compel Petitioners to produce the communications identified on the privilege log because the log failed to provide sufficient information to invoke the attorney-client privilege or work product doctrine. The court, however, ordered the parties to meet with a temporary judge and attempt to resolve the issue and several other pending discovery motions. In August 2014, the parties reported to the court they had reached an agreement regarding the discovery issues. On Beatty's motion to compel production, Petitioners agreed to supplement their privilege log to identify the sender and the recipients of each communication, but the parties' agreement said nothing about describing the content or subject matter of the communications.

In September 2014, Petitioners served a supplemental privilege log identifying the communications as e-mails and the sender and all recipients of each e-mail. The supplemental log also increased the number of withheld documents from 17 to 36. Beatty responded with a motion for sanctions, claiming Petitioners had failed to comply with the agreement the parties reached because Petitioner had not produced all the requested documents.

In January 2015, just before the hearing on Beatty's sanctions motion, Petitioners served another supplemental privilege log purporting to identify the sender and all recipients of each e-mail and the date of the communication. It also significantly increased the number of e-mails Petitioners were withholding from production. The parties fail to state whether or how the trial court ruled on Beatty's sanctions motion.

In March 2015, Beatty served a motion to compel Petitioners to produce 167 e-mails identified in the most recent privilege log. He argued Petitioners waived the attorney-client privilege and work product doctrine by failing to timely serve a privilege log that provided sufficient factual information to enable him to evaluate the merits of Petitioners' privilege objections. Beatty also argued the court should order Petitioners to produce the e-mails because Petitioners failed to present sufficient evidence to establish the e-mails were confidential attorney-client communications or work product. In opposing the motion, Petitioners argued the trial court lacked authority to order the e-mails produced based on any purported deficiency in their privilege log because that ruling would amount to a forced waiver of the attorney-client privilege and work

product doctrine. Instead, Petitioners offered to provide another supplemental privilege log or produce the e-mails for in-camera review if the court found the privilege log deficient.

On May 14, 2015, **the trial court granted Beatty's motion and ordered Petitioners to produce the 167 e-mails within 10 days and to pay \$1,140 in monetary sanctions**. The court explained, "Although not untimely, the information supplied by the privilege log produced by Petitioners is insufficient to show the entries therein are protected by either the attorney-client or work product protections. Petitioners have not offered any description of the allegedly protected e-mails in the privilege log or otherwise. Even a minimal statement such as 'transmission of strategic documents/pleadings including analysis and legal assessment' . . . is sufficient. *Bank of America, N.A. v. Superior Court of Orange County* (2013) 212 CA4th 1076. Here, there is no identification whatsoever as to why the subject emails may be protected from disclosure."

Petitioners then filed this writ petition seeking to stay the trial court's May 14, 2015 order and a writ of mandate compelling the court to vacate that order. The Fourth District Court of Appeal granted an immediate stay and issued an order to show cause why a writ of mandate should not issue ordering the court to vacate its May 14, 2015 order compelling Petitioners to produce the e-mails. Beatty filed a return to the petition and Petitioners filed a reply.

The unanimous Court began its opinion by noting that any party to an action may serve a written demand that another party permit inspection and copying of documents, electronically stored information, or other tangible things in the responding party's possession, custody, or control. (Code Civ. Proc., § 2031.010.) Within 30 days, the responding party must serve a written response to the demand that separately responds to each category of documents or other things the demand seeks with (1) a statement the responding party will comply with the particular demand; (2) a representation that the party lacks the ability to comply; or (3) "an objection to the particular demand." (§§ 2031.210, subd. (a); 2031.260.)

If the responding party objects to a demand, the party 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"; and (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." (§ 2031.240, subd. (b).) The failure to timely respond to an inspection demand waives all objections to the demand, including objections based on privilege (§ 2031.300, subd. (a)), and the failure to assert a specific objection waives that particular objection (*Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, 1141).

Privilege logs have long been used by practitioners to list and describe the items to be protected. The 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. The purpose of providing a specific factual description of documents is to permit a judicial evaluation of the claim of privilege.

In 2012, the Legislature amended section 2031.240 "to codify the concept of a privilege log as that term is used in California case law." (§ 2031.240, subd. (c)(2).) The new section 2031.240, subdivision (c)(1), provides, "If an objection is based on a claim of privilege or a claim that the information sought is protected work product, the response shall provide sufficient factual information for other parties to evaluate the merits of that claim, including, if necessary, a privilege log." In adding this subdivision, the Legislature declared, "Nothing in this subdivision shall be construed to constitute a substantive change in case law." (§ 2031.240, subd. (c)(2).)

The attorney-client privilege "'has been a hallmark of Anglo-American jurisprudence for almost 400 years.' Its fundamental purpose 'is to safeguard the confidential relationship between clients and their attorneys so as to promote full and open discussion of the facts and tactics surrounding individual legal matters. . . . **"The privilege is given on grounds of public policy in the belief that the benefits derived therefrom justify the risk that unjust decisions may sometimes result from the suppression of relevant evidence."** 'The privilege is absolute and disclosure may not be ordered, without regard to relevance, necessity or any particular circumstances peculiar to the case.' " (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 732

(Costco).) ““The privilege is not to be whittled away by means of specious argument that it has been waived. Least of all should the courts seize upon slight and equivocal circumstances as a technical reason for destroying the privilege.’ (Blue Ridge Ins. Co. v. Superior Court (1988) 202 Cal.App.3d 339, 345.)

The case law therefore recognizes only three methods for waiving the attorney-client privilege: (1) disclosing a privileged communication in a nonconfidential context (Evid. Code, § 912, subd. (a)); (2) failing to claim the privilege in a proceeding in which the holder has the legal standing and opportunity to do so; and (3) failing to assert the privilege in a timely response to an inspection demand (§ 2031.300, subd. (a)). (See, e.g., *Lockyer*, at p. 1073; *Best Products*, *supra*, 119 Cal.App.4th at p. 1188; *Korea Data Systems Co. v. Superior Court* (1997) 51 Cal.App.4th 1513, 1516-1517.) Failing to serve a privilege log or serving an inadequate privilege log does not fall into any of these three methods. (*Lockyer*, at p. 1074; *Best Products*, at p. 1189; *Korea Data*, at pp. 1516-1517.)

Accordingly, **if a party responding to an inspection demand timely serves a response asserting an objection based on the attorney-client privilege or work product doctrine, the trial court lacks authority to order the objection waived even if the responding party fails to serve a privilege log, serves an untimely privilege log, or serves a privilege log that fails either to adequately identify the documents to which the objection purportedly applies or provide sufficient factual information for the propounding party to evaluate the objection.** (*Lockyer*, at pp. 1074-1075 “Because the responding parties timely objected on the grounds of privilege, they preserved these objections, regardless of whether the objections were sufficiently detailed in their response or privilege log and the court, as a matter of law, could not find that they had waived these privileges”; *Best Products*, *supra*, 119 Cal.App.4th at pp. 1187-1189; *Hernandez*, *supra*, 112 Cal.App.4th at p. 294; *Korea Data*, *supra*, 51 Cal.App.4th at pp. 1516-1517; *Blue Ridge*, *supra*, 202 Cal.App.3d at p. 347 “where there is a timely assertion of the attorney/client privilege, putting the other side on notice, a forced waiver for some technical shortfall is at odds with Evidence Code section 912 and is an excessive sanction not reasonably calculated to achieve the purpose of effecting compliance with discovery”.)

The propounding party's remedy when it deems "an objection in the response is without merit or too general" is to "move for an order compelling further response." (§ 2031.310, subd. (a)(3); see *Lockyer*, at p. 1075; *Best Products*, *supra*, 119 Cal.App.4th at p. 1189.) If the response and any privilege log provide sufficient information to permit the court to determine whether the asserted privilege protects specific documents from disclosure, the court may rule on the merits of the objection by either sustaining it or overruling it as to each document. (*Kaiser Foundation Hospitals v. Superior Court* (1998) 66 Cal.App.4th 1217, 1228-1229.)

If the response and any privilege log fail to provide sufficient information to allow the trial court to rule on the merits, the court may order the responding party to provide a further response by serving a privilege log or, if one already has been served, a supplemental privilege log that adequately identifies each document the responding party claims is privileged and the factual basis for the privilege claim. (*Lockyer* at p. 1075; *Kaiser Foundation*, at pp. 1228-1229.) In ordering a further response, the court also may impose monetary sanctions on the responding party if that party lacked substantial justification for providing its deficient response or privilege log. (§ 2031.310, subd. (h).)

If the responding party thereafter fails to adequately comply with the court's order and provide the information necessary for the court to rule on the privilege objections, the propounding party may bring another motion seeking a further response or a motion for sanctions. At that stage, the sanctions available include evidence, issue, and even terminating sanctions, in addition to further monetary sanctions. (§ 2031.310, subd. (i).) But the court may not impose a waiver of the attorney-client privilege or work product doctrine as a sanction for failing to provide an adequate response to an inspection demand or an adequate privilege log. (*Lockyer*, at p. 1075; *Best Products*, *supra*, 119 Cal.App.4th at p. 1189 "the statute does *not* include as an authorized sanction a judicial order that a privilege has been waived"; *Hernandez*, at p. 294; *Korea Data*, at p. 1517; *Blue Ridge*, at p. 347.)

In *Lockyer*, for example, the responding party's response to an inspection demand timely asserted objections based on the attorney-client

privilege and work product doctrine, but did not serve a privilege log or otherwise identify the purportedly privileged documents or the factual basis for the privilege claims. The responding party later served a privilege log that identified categories of documents that were allegedly privileged, but did not identify specific documents. (*Lockyer*, at p. 1066.) The propounding party then moved to compel production of the documents that had not been identified on the privilege log with particularity. The trial court overruled the privilege claims and ordered the responding party to produce the documents that were not specifically identified on the log.

The Court of Appeal granted the responding party's petition for a writ of mandate compelling the trial court to vacate its order overruling the objections. (*Lockyer*, at p. 1081.) The *Lockyer* court explained that the responding party had preserved its objections based on the attorney-client privilege and work product doctrine by timely asserting them in the original response to the inspection demand, and therefore the trial court lacked authority "as a matter of law" to overrule the objections based on any deficiencies in the responding party's initial response or privilege log. Instead, the propounding party's remedy was to compel the responding party to provide a more detailed privilege log that identified each document with particularity and to present sufficient factual information to allow the propounding party and the court to evaluate each privilege claim. Even if the responding party failed to adequately comply with an order to provide a more detailed privilege log, the *Lockyer* court emphasized the trial court lacked authority to disregard the privilege objections or find a waiver based on deficiencies in the privilege log.

Here, the Petitioners contend the trial court abused its discretion because it lacked authority to order them to produce the e-mails based on the inadequacies the court found in the privilege log. According to Petitioners, the court's order amounts to a forced waiver of the attorney-client privilege and work product doctrine.

The court's order does not expressly state Petitioners waived their privilege objections, but the order's plain language establishes the court ordered the e-mails produced based on deficiencies in Petitioners' privilege log rather than a determination the attorney-client privilege and work product doctrine did

not apply to the e-mails. (See *In re Marriage of Falcone & Fyke* (2012) 203 Cal.App.4th 964, 989) The order states, "The information supplied by the privilege log produced by Petitioners is insufficient to show the entries therein are protected by either the attorney-client or work product protections." The order goes on to explain Petitioners' log failed to describe the subject matter of the e-mails and therefore the court could not determine whether the e-mails were privileged.

As explained above, a responding party preserves its objections based on the attorney-client privilege and work product doctrine by serving a timely written response asserting those objections. It is irrelevant that the objections are asserted as part of a generic or boilerplate response, or that the responding party failed to serve a timely and proper privilege log. **Once the objections are timely asserted, the trial court may not deem them waived based on any deficiency in the response or privilege log.** (*Lockyer*, at pp. 1074-1075; *Best Products*, at pp. 1188-1189; *Hernandez*, at p. 294; *Korea Data*, at pp. 1516-1517; *Blue Ridge*, at p. 347.) Nor may the court overrule the objections unless it receives sufficient information to decide whether they have merit. (*Lockyer*, at pp. 1074-1075; *Kaiser Foundation*, at pp. 1228-1229; *Korea Data*, at pp. 1515, 1517.) Instead, the court is limited to ordering further responses and imposing sanctions if the responding party acted without substantial justification in providing a deficient response or privilege log. (*Lockyer*, at p. 1075; *Best Products*, at p. 1189; *Korea Data*, at p. 1517.)

Here, it is undisputed Petitioners timely served written responses to Beatty's inspection demands that included boilerplate objections based on the attorney-client privilege and work product doctrine. Accordingly, Petitioners preserved those objections and the trial court lacked authority to order the objections waived or overruled based on deficiencies in either Petitioners' responses or their later privilege logs. Nonetheless, the court ordered Petitioners to produce 167 e-mails identified in the most recent privilege log because the information in the log was insufficient. Although the Justices find Petitioners' privilege log is deficient because it fails to provide sufficient information to allow Beatty and the court to determine whether the e-mails are protected, the foregoing authorities demonstrate the court exceeded its authority and therefore abused its discretion by ordering Petitioners to produce the e-mails.

Instead of ordering Petitioners to produce the e-mails, the trial court should have ordered Petitioners to provide a supplemental privilege log. (*Lockyer*, at p. 1075; *Kaiser Foundation*, at pp. 1228-1229.) **A privilege log must identify with particularity each document the responding party claims is protected from disclosure by a privilege and provide sufficient factual information for the propounding party and court to evaluate whether the claim has merit.** (§ 2031.240, subds. (b) & (c); *Wellpoint Health Networks, Inc. v. Superior Court* (1997) 59 Cal.App.4th 110, 130.) The precise information required for an adequate privilege log will vary from case to case based on the privileges asserted and the underlying circumstances. In general, however, **a privilege log typically should provide the identity and capacity of all individuals who authored, sent, or received each allegedly privileged document, the document's date, a brief description of the document and its contents or subject matter sufficient to determine whether the privilege applies, and the precise privilege or protection asserted.** (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 8:1474.5, p. 8H-27; *Bank of America*, at p. 1100; *Friends of Hope Valley v. Frederick Co.* (E.D. Cal. 2010) 268 F.R.D. 643, 650-651.)

Beatty contends the trial court did not rely on a waiver of the attorney-client privilege or work product doctrine in granting his motion. Rather, he argues the court ordered the e-mails produced because Petitioners failed to meet their burden to show the e-mails were privileged. According to Beatty, Petitioners' waiver argument assumes the e-mails are privileged without showing they are. To support this contention, Beatty cites cases stating the general proposition that "the party claiming the privilege has the burden of establishing the preliminary facts necessary to support its exercise." (*Costco*, at p. 733; see *D. I. Chadbourne, Inc. v. Superior Court* (1964) 60 Cal.2d 723, 729; *Citizens for Ceres v. Superior Court* (2013) 217 Cal.App.4th 889, 911.)

Beatty's argument and the cases he cites in support fail to address the issue here: whether a trial court may order a party to disclose potentially privileged information because the party's privilege log did not provide sufficient information for the court to evaluate whether the privilege applies. As explained above, the statutory scheme governing inspection demands and the

case law applying it **prohibit a trial court from ordering a timely invoked privilege objection waived or overruled based on deficiencies in a privilege log**. In those circumstances, the remedies available to the court are limited to ordering a further response that provides sufficient information to allow the court to rule on the merits. The court also may impose sanctions, including evidence, issue, and terminating sanctions, if the responding party continues to provide insufficient information. It does not follow that the responding party's failure to meet its burden permits the trial court to find a waiver.

The decision will result in further trial court proceedings to resolve Beatty's discovery demands. Part of the delay, however, arose from the parties' August 2014 agreement requiring Petitioners to supplement their privilege log by identifying the sender of each e-mail and all recipients, but not the subject matter or content of the e-mails. That latter omission is the precise shortcoming that prevented the trial court from deciding Petitioners' privilege objections on the merits.

As explained above, when a privilege log fails to provide a trial court with sufficient information to rule on the merits of a privilege objection, the only relief the court may grant – other than sanctions – is an order requiring a further privilege log that provides the necessary information. Trial courts have the authority to deter obstructionist behavior by imposing monetary and other sanctions when a responding party acts without substantial justification in providing a deficient response or privilege log. The appropriate use of these powers should minimize the unwarranted delays illustrated here.

The petition for writ of mandate or other appropriate relief is granted. A writ of mandate will issue directing the respondent court to vacate its May 14, 2015 order granting Beatty's motion and compelling Petitioners to produce the e-mails, and to issue a new order (1) granting Beatty's motion and compelling Petitioners to serve a supplemental privilege log that identifies each withheld document with particularity and provides sufficient factual information for Beatty and respondent court to evaluate each privilege claim, and (2) awarding Beatty monetary sanctions in an amount to be determined by respondent court. The parties shall bear their own costs for the proceedings in this court.

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