

Privilege Issues During Discovery

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One of the most challenging tasks a paralegal will face is the review of documents prior to production to the adverse party. While the task can seem monumental when viewing a room filled with 20 or more boxes, if you understand the importance of your assignment and develop a method of attack, you can complete the assignment and provide valuable savings in fees to the client.

It is commonly understood that the purpose of discovery is to allow the production of factual and documentary evidence to the opponent. Categories of documents that are not subject to production requirements under the California Code of Civil Procedure are referred to as “privileged” documents. Documents which statutes establish as privileged include attorney-client communication documents, attorney work-product documents, clergyman, psychiatrist and psychotherapist documents, domestic violence counselors, trade secrets, and newsmen’s sources.

Identification of Privileged Documents from Client Files

Privilege that is extended by statute is absolute and definitive, so it is inherent that you be familiar with the statutes regarding privileged documents. Conditional protection of documents such as trade secrets or other confidential research is also achieved through case law, which is constantly changing, so this is another area to keep in mind. Armed with an understanding of the statutory and case law regarding the production of privileged documents (see CCP §2018 and Evidence Code §§930-1070), begin your task by reviewing each document to be produced to

the adverse party and flagging those documents which fall into privileged categories.

If you are unsure if a document constitutes the work product of the attorney, keep the following question in mind: Does the writing reflect the attorney’s impressions, conclusions, opinions, or legal research or theories? If so, the document can be classified as attorney work-product.

Once you have identified the privileged documents, insert a colored sheet of paper placed in each area where the privileged document is located. A notation should be made on the colored sheet “Privileged Document Withheld” which can be typed on a master and photocopied onto the colored sheets. If required by statute, the particular privilege being claimed for that document can be added, such as “Privileged Document Withheld–Attorney Work Product” or “Privileged Document Withheld–Attorney-Client Privilege.”

Create a privilege log to keep track of all documents that have been removed for future use. For a description on how to do a privilege log, see the section on this subject later in this article.

Redacting Privileged Material from Produced Documents

During your review, you may locate a document that contains privileged information on only a small portion but the remainder of the document is discoverable. This portion of the document may be a name or number, a thought or theory that is privileged. The process of removing a portion of the material and producing the

remainder is called “redaction.” The process can be accomplished in one of two methods:

1. Cover the privileged portion with paper or self-stick tabs and photocopy the page.
2. Mark the privileged portion with a black marker on a COPY of the document and recopy it, producing a copy of the copy.

In order to maintain the integrity of your documents, you will need to keep some things in mind when redacting documents:

- Never do the redacting on the original document, since this will keep you from recovering the privileged information at a later date should you lose a motion to compel its production.
- If you use a black marker for redaction, produce a copy of the marked page to make sure that the text cannot be seen through the marker or from the back of the page.
- Make a notation in your privilege log of all pages where you have made redactions so that they can be located at a later time.

Creation of a Privilege Log

A privilege log will provide a working index to documents that have been withheld or which contain redactions. This index will be helpful in locating privileged documents at a later date. A log can also help to prevent the accidental release of a privileged document, which may waive your rights to claim a privilege.

The log should provide a listing of documents withheld without including the privileged language, since the log may likely be provided to the adverse counsel for their evaluation in making a motion to compel the

production of documents. A privilege log should contain the following information:

1. Document number: This may be a sequential number assigned to each privileged document or may be the stamped or label number of the document.
2. The date of the document.
3. The type of document, i.e., letter, memo, report or handwritten note.
4. The author of the document.
5. The recipient of the document.
6. Individuals who received copies of the document. This can become significant to establish whether the privilege exists. For example, if a memo containing the attorney’s theory of the case was sent to the adverse party, witnesses or experts, the privilege may be deemed to have been waived.
7. The type of privilege that is being claimed, i.e. attorney-client, psychiatrist-client, attorney work-product, etc.

An easy method to create a privilege log is to use a table format in Word or WordPerfect, creating columns for the seven categories listed above, such as the example below.

Attorney-Client and Attorney Work-Product Warnings on Documents

Memos and correspondence within your firm and to the client should be labeled in order to protect the privileged nature of the work done in preparation for trial. Early in the litigation, instruct your client as to the significance of placing labels on documents that can protect the privileged nature of many attorney-client and attorney work-product documents. Make sure your client

knows that documents that are labeled with privilege notations are not to be copied and distributed to other individuals without consulting with the attorney, or a waiver of the privilege may be deemed to exist. Your efforts in this regard are preventative in nature, but labels or macros used in your document will make the job of identifying privileged documents a much easier one.

Overuse of Work Product Warnings

Clients and support staff should be aware of the significance of work product warnings that are placed on documents. If the warnings are used inappropriately, the privilege for the particular document may not be upheld.

For example, a warning may not belong on a letter or memo that is being sent to numerous parties since the adverse counsel can attack the confidentiality of a document that has had widespread distribution. Also, routinely placing the warning on all documents may also afford the adverse counsel an opportunity to claim that the warning is meaningless and gain access to confidential documents. These are things to keep in mind throughout the litigation process.

Dealing with Inadvertently Produced Privileged Documents

Delegating of a massive document production copying job to someone without instruction and understanding of privilege

EXAMPLE

Doc #	Doc Date	Doc Type	Author	Recipient	Who Received	Privilege
12345	02/05/99	Memo	Ken Pate	Jim Cate	Jim Cate/ Bob Hall	Asserted Work Product

issues invariably results in the inadvertent production of privileged documents. There are two options when discovery of this unfortunate episode occurs.

The first option is for the attorney to write a letter to the opposing counsel who received the privileged document requesting that the document be returned, setting forth the inadvertence, and asserting a waiver of the privilege has not been made. The letter will include language to the effect that the use of the document at trial as evidence will be opposed. If the adverse attorney does not comply with the request, then the second option is necessary.

A motion for a protective order is the second option to prevent introduction of the privileged document at trial. This effort involves a great deal of attorney and paralegal time in preparation of the motion and attendance at the hearing on the motion.

Needless to say, implementing a review system with a privilege log or other system to avoid the production of privileged documents is far better than dealing with efforts necessary to obtain a protective order after the event.

If you are doing discovery work and have not yet mastered the privilege rules or if it has been a while since you've reviewed the statutes listed above, now is a good time to review them so you'll do a more thorough job with your next assignment. ■

