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Changing Discovery Practices

by Hsiao (Mark) C. Mao, Esq.

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A recent amendment to the California Code of Civil Procedure requires preparation of privilege logs by counsel in state court, explains Hsiao (Mark) Mao of Kaufman Dolowich.

Changes in the American economy continue to force law firms to be more efficient than they have ever been. Starting Jan. 1, Assembly Bill 1354 and its changes to the California Code of Civil Procedure will make privilege logs in state court cases the norm rather than the exception for responses to written requests for production of documents.

Defense attorneys practicing primarily in state court will need to exercise more foresight and initiative in discovery to control the costs and pace of litigation. A well-prepared early offense may allow defense attorneys to obtain stipulations that will significantly reduce the amount of time required to prepare privilege logs, thereby reducing costs for their clients.

Changes to the CCP

Although privilege logs may be advisable in response to RFPDs in state court cases, privilege logs are not required in most instances.

AB 1354 amends CCP §2031.240, such that "[i]f 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 short, the new amendments to the CCP will change current practice, such that any assertion of privilege in response to RFPDs will require a privilege log concurrent with the production.

These changes will make the CCP more explicit on the requirement of privilege logs compared to the Federal Rules of Civil Procedure. The FRCP does not specifically require that responding parties provide a privilege log, although FRCP 26(b)(5) provides that when a party withholds information on the basis of privilege, the party must "(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed — and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim."

The Need For Increased Foresight And Initiative

Preparation of privilege logs has typically been the exception rather than the norm in state court cases. As there was no written requirement for privilege logs, attorneys who practice mostly in state courts are often able to exploit the budget constraints on state staff and get by discovery disputes without clearly articulating the basis for their objections and assertions of privilege.

In contrast, attorneys accustomed to practice in federal courts routinely prepare privilege logs. They understand that federal courts often have more time and resources to devote to carefully considering discovery disputes, and a well- prepared privilege log is the easiest way to show compliance with FRCP 26(b)(5).

Given the express references to privilege logs provided by AB 1354, state court judges will now undoubtedly expect privilege logs concurrent with document productions. Judges constrained by budgets and time will likely quickly sanction attorneys who have not prepared privilege logs to encourage all attorneys in their courts to better articulate their objections and assertions of privilege for overworked court staff and research attorneys.

Defense counsel should therefore expect that plaintiffs attorneys will be even more aggressive with their discovery demands. Experienced defense counsel know that plaintiffs attorneys often use the costs of litigation to leverage large settlements, and experienced plaintiffs attorneys know that preparation of privilege logs can often be just as expensive as the preparation of the document productions. Defense counsel ill-prepared for the imminent changes brought by AB 1354 will either find themselves staring at court discovery sanctions, or complaints from clients that discovery costs are spiraling out of control.

Fortunately, in most instances, defense attorneys are not without reprieve if they address privilege issues early on by helping all parties involved understand that the preparation of privilege logs can be a double-edged sword for plaintiffs and defendants alike. CCP §2030.020 places a 10-day hold on plaintiffs propounding written discovery after serving defendants with the complaint. Defense attorneys are advised to serve RFPDs immediately, and first if possible, to force plaintiffs attorneys to consider discovery stipulations fair to both sides. Defense counsel should find that in most instances, when

confronted with the need to prepare and produce privilege logs, opposing counsel are eager to discuss stipulations and streamlining the preparation of privilege logs.

For example, electronic storage devices containing electronic data are often the most expensive items necessitating the preparation of privilege logs. Defense attorneys often do not think about requesting electronic data from plaintiffs until long after having spent months trying to sort out their clients' hard drives and emails. Sometimes plaintiffs are seeking ammunition for their claims, but quite often – especially when dealing with corporate defendants – plaintiffs are also trying to increase the costs of litigation for defendants to leverage a settlement.

Of course, plaintiffs often have large amounts of electronic information themselves. When confronted with similar requests, they and their attorneys are often eager to offer stipulations on electronic discovery. Plaintiffs attorneys are especially happy to stipulate and offer concessions when they have taken the case on a contingency, or have agreed to pay for costs until the case has been resolved. Noncorporate plaintiffs and their attorneys generally prefer to avoid the costs of hiring electronic discovery experts for their own discovery.

Another example would be requests for financial and tax information. Although often requested from defendants, plaintiffs typically find requests for such information against them just as objectionable on the basis of privacy.

Indeed, AB 1354 only mandates that privilege logs be prepared "if necessary." Defense attorneys will often find that plaintiffs attorneys may agree that it is not necessary to include certain information in privilege logs when confronted with similar requests. The key for defense attorneys will be obtaining sufficient foresight early on in the case to know with what opposing counsel will likely try to inundate them.

Of course, given that contingency arrangements often incentivize plaintiffs attorneys to obtain results faster, defense attorneys paid by the billable hour have become increasingly lax about controlling the pace of litigation in state court cases. AB 1354 will become a significant burden to ill-prepared defense attorneys, particularly when they find themselves having to explain to their clients the escalating litigation costs in an increasingly cost-conscious legal industry.

In response to AB 1354, defense attorneys will need to obtain mastery over the facts and their clients' documents faster than before, in order to prepare written discovery early in the case to control the pace and scope of future discovery.

If not controlled properly at the onset, defense attorneys practicing in state court will find themselves charging their clients significantly more than before for responding to written discovery. Defense counsel should now expect to use discovery to first set the pace of future discovery, and to limit plaintiffs use of excessive discovery as a means of leveraging a settlement.

The goal is not only to obtain relevant discovery, but to control the use of discovery to manage costs and efficiency. The defense industry will need to exercise more foresight and initiative than ever before to keep their increasingly cost- conscious clients happy.

Hsiao (Mark) Mao is Partner in Kaufman Dolowich & Voluck's San Francisco office. He defends and litigates on behalf of various financial institutions such as securities broker dealers, investment advisory firms, lenders and companies making public and private offerings, and is also experienced in alternative dispute resolution forums such as FINRA, and also federal and state courts.
