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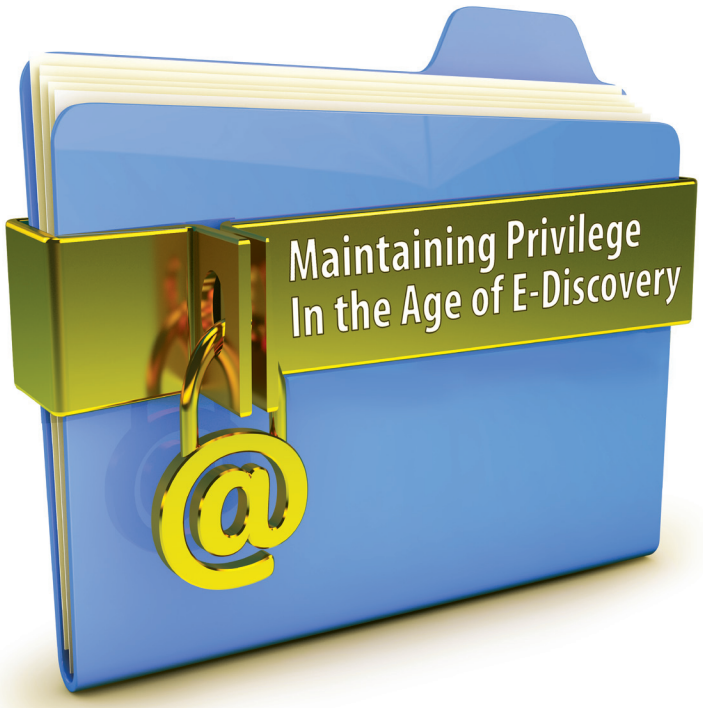

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Protecting privileged documents—and the often resource-intensive process of properly logging those materials—is a necessary yet often frustrating aspect of a complex commercial litigation practice. Recognizing this reality, the New York State Commercial Division Advisory Council recently recommended the adoption of a new rule designed to allow litigants to streamline privilege log practice. The newly proposed Commercial Division rule relating to privilege log practice (22 NYCRR §202.70(g)) is intended to "promote more efficient, cost-effective pretrial disclosure by establishing a 'preference' in the Commercial Division for use of 'categorical designations' rather than document-by-document logging."[1] In light of existing federal and state case law, however, it is unclear whether and to what extent the rule will in fact lessen the burden on practitioners.

Task Force on Commercial Litigation in the 21st Century Considers Procedural Reforms. The proposed rule is one of a series of recent changes to the Commercial Division Rules recommended by the Advisory Council following the June 2012 Report and Recommendation of the Chief Judge's Task Force on Commercial Litigation in the 21st Century (the Task Force).[2] As the Task Force acknowledged in its report, the "judges of the Commercial Division adjudicate thousands of cases and motions that include some of the most important, complex commercial disputes being litigated anywhere."[3] The Advisory Committee set out to provide recommendations, including a variety of procedural reforms, to directly confront the weighty demands of a high volume of complex cases.[4] One such reform is a new rule governing privilege logs. Indeed, the Task Force rightly recognized what commercial litigators know to be a truism, and what many other commentators have observed:

> Creation of privilege logs has become a substantial expense in complex commercial litigation matters. Often, the cost outweighs their value because the logs are not reviewed or used in any way by the parties. There is demonstrable need to limit unnecessary costs and delay in the creation of these logs while preserving the ability of the parties and court to police unwarranted withholding or redaction of documents in discovery.[5]

In light of this, the Task Force initially suggested four alternative methods for improving the process: (1) application of the Sedona Principles for classifying privileged documents by category; (2) the so-called Facciola-Redgrave framework, which similarly advocates a categorical approach to privilege review accompanied by cooperation among counsel and significant judicial involvement; (3) the pilot program for complex civil cases in use by the U.S. District Court for the Southern District of New York since October 2011, which makes available, at either party's request, in camera sampling of assertions of privilege along with limited letter briefing and swift judicial resolution; and (4) the approach adopted by the Delaware federal court limiting log entries to communications generated before the complaint is filed, excluding discovery communications related to document preservation, requiring non-waiver orders for the return of inadvertently produced privileged communications and instructing parties to confer on the nature and scope of privilege logs.[6]

The General Rule on Privilege Logs: CPLR 3122(b). Practitioners litigating cases in New York state courts are required to exchange privilege logs pursuant to New York Civil Practice Law & Rules §3122(b). This rule—which will co-exist with the new Commercial Division rule—requires parties who wish to withhold privileged documents to prepare a log containing a separate entry for each document, including (1) the type of document; (2) the general subject matter of the

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document; (3) the date of the document; and (4) such other information as is sufficient to identify the document. This requirement comports with the directive of the New York Court of Appeals in *In re Subpoena Duces Tecum to Jane Doe*, in which it recommended that "a party seeking to protect documents from disclosure compile a privilege log in order to aid the court in its assessment of a privilege claim and enable it to undertake in camera review."[7] Moreover, in that case, the Court of Appeals stated that a privilege log "should specify the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege."[8] This directive works in conjunction with the oft-cited proposition that the burden of establishing privilege rests on the party asserting the privilege. See, e.g., *Spectrum Sys. Intl v. Chem. Bank*, 78 N.Y.2d 371, 377 (1991) ("Obvious tension exists between the policy favoring full disclosure and the policy permitting parties to withhold relevant evidence. Consequently, the burden of establishing any right to protection is on the party asserting it.").

In making this suggestion regarding the description of privileged documents, the New York Court of Appeals relied upon the earlier decision of the Second Circuit Court of Appeals in *United States v. Construction Products Research*, in which a party's privilege log was held to be deficient.[9] In that case, a federal agency issued an administrative subpoena to two companies that refused to comply, prompting the United States to file a petition to enforce the subpoena.[10] The district court adopted the magistrate judge's recommendation, granting the petition and holding that respondents' claim of privilege be rejected as a general defense to enforcement of the subpoena.[11] On appeal, the respondents continued to withhold certain documents on the grounds of attorney-client privilege, and argued that the district court erred in holding that they had failed to establish privilege.[12] The Second Circuit held that Respondents' privilege logs in fact were deficient, explaining that the log should "identify each document and the individuals who were parties to the communications, providing sufficient detail to permit a judgment as to whether the document is at least potentially protected from disclosure … . Even under this approach, however, if the party invoking the privilege does not provide sufficient detail to demonstrate fulfillment of all the legal requirements for application of the privilege, his claim will be rejected."[13] The Second Circuit observed that respondents' log supporting their assertion of attorney-client privilege only contained "a cursory description of each document, the date, author, recipient, and 'comments,'" and held that "[t]hese general allegations of privilege [were] not supported by the information provided" and "[t]he descriptions and comments simply do not provide enough information to support the privilege claim."[14]

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These cases suggest that federal and state courts in New York historically have often required a high level of specificity, on a document-by-document basis, in order to sustain a claim of privilege.[15]

The Proposed Commercial Division Rule. As noted earlier, the new Commercial Division Rule relating to privilege log practice seeks to "promote more efficient, cost-effective pretrial disclosure by establishing a 'preference' in the Commercial Division for the use of 'categorical designations' rather than document-by-document logging."[16] As the Task Force remarks, this rule will join the ranks of other recently-implemented rules and guidelines aimed at minimizing the burden on litigants of privilege logs—against a background of case law that has at times required document-by-document logs in order to support privilege claims.

The proposed rule also requires that parties meet-and-confer at the outset of a case, and as necessary thereafter, to discuss "the scope of privilege review, the amount of information to be set out in the privilege log, the use of categories to reduce document-by-document logging, whether any categories of information may be excluded from the logging requirement, and any other issues pertinent to privilege review."[17] Thus, the new rule, much like its counterpart in the Southern District of New York pilot program, contemplates that certain categories of documents such as communications exclusively between a party and its trial counsel may not need to be logged at all.

Of course, a categorical approach to privilege logs departs from the requirements of CPLR 3122(b) (which will still be in effect, even with the new Commercial Division rule) and arguably the specificity required by certain cases such as *Jane Doe* and *Construction Products*. In fact, one of the Commercial Division Justices in New York County adopted Individual Rules that require a privilege log to "identify all redacted and completely withheld documents by bate-stamp numbers, dates, authors, and recipients, the general subject matter of the document if it will not waive the privilege, and shall state the privileges being asserted."[18] To preemptively deal with this inherent tension between existing case law and the need for procedural efficiency, the proposed rule precludes a party from objecting to a categorical log solely on the basis that it departs from the concept of a document-by-document log, but proposes two safeguards: (1) the submission of a statement by the party or its attorney "certifying to the facts supporting the privileged or protected status of the information included within the category;" and (2) the requirement that a "responsible attorney" be involved in actively overseeing the privilege review.[19]

Notwithstanding the foregoing protections, the question remains whether, in practice, the recipient of a categorical privilege log will have sufficient information to assess claims of privilege, such that it will not feel the need to seek a document-by-document log. The new rule appears to contemplate this likely problem as well, and provides for potential cost-shifting in the event a party insists upon a document-by-document log from its adversary. Moreover, to the extent a party insists upon a document-by-document privilege log, as contemplated by CPLR 3122, the rule provides further guidance as to how email chains should be logged. It requires that "each uninterrupted e-mail chain shall constitute a single entry" which is required to include (i) an indication that the e-mails "represent an uninterrupted dialogue"; (ii) beginning and ending dates and times of the dialogue; (iii) the number of emails within the dialogue; (iv) the names of all authors and recipients; and (v) information sufficient to identify each person such as name of employer, job title, and role in the case.[20] This is essentially the same rule adopted by the Southern District's pilot program with respect to email threads. It is worth noting that the rule regarding document-by-document logging has very specific requirements, explicitly to "allow for a considered assessment of privilege issues"—begging

the obvious question of whether a categorical approach to privilege logs can in fact provide sufficient information for an adequate assessment of privilege.

In support of the new rule, the Subcommittee on Procedural Rules to Promote Efficient Case Resolution (a Subcommittee of the Commercial Division Advisory Council) cited a decision by the U.S. District Court for the Southern District of New York in *Assured Guar. Mun. v. UBS Real Estate Securities*, Nos. 12 Civ. 1579(HB)(JCF) and 12 Civ. 7322 (HB)(JCF), 2013 WL 1195545, at *9-10 (S.D.N.Y. March 25, 2013). This case arose out of the financial crisis and involved financial guaranty policies on residential-mortgage-backed securities. Vast amounts of electronic discovery were generated in the litigation. In the case, Magistrate Judge James C. Francis granted the defendant's motion to identify its privileged documents by category. In doing so, he specifically noted that Federal Rule of Civil Procedure 16 as well as the committee note to Local Civil Rule 26.2 recognize the burden of document-by-document privilege logs and he pointed out that several judges in the Southern District have endorsed a categorical approach.

Southern District Local Rule 26.2(c) specifically states "when asserting privilege on the same basis with respect to multiple documents, it is presumptively proper to provide information required by this rule by group or category" and mandates that a party receiving such a privilege log "may not object solely" on the basis that it departs from a document-by-document or "communication-by-communication" listing. Instead, a party may object "if the substantive information required by this rule has not been provided in a comprehensible form." But this rule and the cases purporting to endorse a categorical approach again highlight the question of whether a categorical approach will ever provide enough information for the party receiving the log to fully and properly evaluate the assertion of privilege.

Indeed, several recent opinions, including some that post-date the start of the S.D.N.Y. Pilot Program, suggest that once a category log has been provided, it may be necessary or prudent for the parties to agree on specific categories of documents that should be logged on a document-by-document basis. See, e.g., *American Broadcasting Companies v. Aereo*, No. 12 Civ. 1540(AJN), 12 Civ. 1543, 2013 WL 139560 (S.D.N.Y. Jan. 11, 2013) (submission of categorical privilege logs pursuant to Local Rule 26.2 "possibly to be followed by more particular itemization of documents in a subset of those categories"); *Chevron v. Salazar*, No. 11 Civ. 3718 (LAK)(JCP), 2011 WL 4388326 (S.D.N.Y. Sept. 20, 2011) (holding that where the manner in which a category log was implemented obscured the documents being withheld, the party subsequently was required to produce an itemized privilege log).[21] In fact, in the 2013 Southern District case *Fleisher v. Phoenix Life Insurance Company*, the court recently held that a categorical log fell "far short" of being acceptable where it listed only four "broad classes of documents."[22] Moreover, the court noted that only one category identified individual documents "but even there, the description that purports to apply to all of them is exceedingly general and unhelpful."[23] In what some may characterize as a harsh result, the court held that the defendant had forfeited any claim of privilege or work product protection.[24] In another recent decision in *McNamee v. Clemens*, the U.S. District Court for the Eastern District of New York upheld the opinion of Magistrate Judge Cheryl L. Pollak, finding that defendant Roger Clemens waived privilege where he submitted a categorical log consisting of "one-sentence assertions of privilege.[25] The district court deemed the log "wholly inadequate," finding that it contained "unhelpful" and "vague" descriptions, which "seriously impeded" the court's examination.[26]

Practical Implications. Implementation of the new Commercial Division rule with respect to privilege logs has the potential to go a long way toward giving parties flexibility and easing the burden of traditional document-by-document privilege logs. However, practitioners would be wise to proceed with caution and consider how they can provide sufficient detail in categorical logs in order to meet the burden of demonstrating the privileged nature of the documents being withheld. They also should be cognizant of existing case law requiring a high level of specificity to meet that burden. It may be that categorical logs are best used as a first step in a dialogue between the parties, to identify categories of documents presumptively privileged that need not be logged and other categories that must be logged on a document-by-document basis. The documents that parties insist on being logged individually may be those most vulnerable to attack, including documents shared with third parties such as a banks, accountants, and financial advisors. Given the current case law, parties agreeing to exchange categorical privilege logs should be prepared in any event to complete a document-by-document log, and should consider how to provide sufficient information so as to avoid the ire of a court forced to undertake an in camera review of documents in response to a privilege dispute.

1. Memorandum from John W. McConnell to: All Interested Persons, dated April 3, 2014, available at https://www.nycourts.gov/rules/comments/PDF/PCPacketPrivilegeLogs.pdf.

2. Report and Recommendations to the Chief Judge of the State of New York, The Chief Judge's Task Force on Commercial Litigation in the 21st Century, June 2012 (Report and Recommendations), http://www.nycourts.gov/courts/comdiv/PDFs/ChiefJudgesTaskForceOnCommercialLitigationInThe21stpdf.pdf.

3. Report and Recommendations at 1.

4. Id. at 2-3.

5. Id. at 17.

6. Id. at 17-18.

7. *In re Subpoena Duces Tecum to Jane Doe*, 99 N.Y.2d 434, 443 (2003); see also *In the Matter of Nassau County Grand Jury Subpoena Duces Tecum Dated June 24, 2003*, 4 N.Y.3d 665, 679 (2005) (citing *Jane Doe* and noting that in responding to a subpoena issued by the attorney general, "nothing prevent[ed] appellants from compiling a privilege log and asserting the privilege as to particular documents in the grand jury proceedings"); *Zheng v. Bermeo*, 114 A.D.3d 743 (2d Dep't 2014) (citing CPLR 3122 and *Jane Doe* and holding that the Supreme Court "improvidently exercised its discretion" in granting plaintiff's motion to compel disclosure of documents without first requiring an in camera review and production of a detailed privilege log).

8. Id.

9. *United States v. Construction Products Research*, 73 F.3d 464, 473-74 (2d Cir. 1996).

10. Id. at 469.

11. Id. at 468.

12. Id.

13. Id. at 473 (citations omitted).

14. Id. The "cursory description" and comments included "(a) 'Fax Re: DOL Findings' with comment 'cover sheet;' (b) 'Fax: Whistleblower article' with comment 'Self-explanatory;' (c) 'Letter Re: Customer Orders' with comment 'Re: Five Star Products;' (d) 'Summary of Enclosures' with comment 'Self-explanatory;' etc." Id. at 474.

15. Cf. *Securities and Exchange Commission v. Thrasher*, No. 92 CIV 6987 (JFK), 1996 WL 125661 (S.D.N.Y. March 20, 1996) (holding that in appropriate circumstances, the court may permit the holder of withheld documents to provide summaries of the documents by category or otherwise to limit the extent of disclosure); *In re Rivastigmine Patent Litig.*, 237 F. R.D. 69 (S.D.N.Y. 2006) (noting that an itemized privilege log is required but that a categorical log may be used where "a document by document listing would be unduly burdensome and (b) the additional information to be gleaned from a more detailed log would be of no material benefit to the discovering party in assessing whether the privilege claim is well-grounded" and thereafter finding the "vast majority of the categorical justifications provided" were inadequate and therefore all corresponding documents were required to be produced).

16. Memorandum from John W. McConnell to: All Interested Persons, Proposed Amendments to the Statewide Rules of the Commercial Division Regarding Privilege Logs, dated April 3, 2014, available at https://www.nycourts.gov/rules/comments/PDF/PCPacketPrivilegeLogs.pdf.

17. Id.

18. Practice in Part 54, Judge Shirley Werner Kornreich, available at http://www.nycourts.gov/courts/comdiv/PDFs/Part_54_Practices.pdf.

19. Id. at Subcommittee Proposal and Exhibit A.

20. Id. at Exhibit A.

21. Cf. *Automobile Club of New York v. Port Authority of New York and New Jersey*, 297 F.R.D. 55 (S.D.N.Y. 2013) (noting that a "categorical privilege log is adequate if it provides information about the nature of the withheld documents sufficient to enable the receiving party to make an intelligent determination about the validity of the assertion of privilege" and holding that a categorical log was sufficient with the exception of the manner in which defendant had broadly described the authors and recipients of the withheld documents and therefore requiring a supplemental and mores specific explanation of such individuals for each category).

22. *Fleisher v. Phoenix Life Insurance Company*, No. 11 Civ. 8405(CM)(JCF), 2013 WL 42374, at *3 (S.D.N.Y. Jan. 3, 2013).

23. Id.

24. Id.

25. *McNamee v. Clemens*, No. 09-CV-1647(SJ)(CLP), 2014 WL 1338720, at *3 (E.D.N.Y. April 2, 2014).

26. Id.