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How Litigants Should Approach Categorical Privilege Logs

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On Sept. 2, the New York Commercial Division adopted a widely anticipated rule that aims to streamline discovery and save considerable time and expense. The rule encourages litigants to employ categorical privilege logs, which identify documents withheld from production in groups, in lieu of the traditional method of listing individually each document that is subject to a privilege or immunity.

Although the rule expresses a preference for categorical privilege logs, it provides little insight into the form those logs should take. This issue likely will be addressed by courts in the coming months and years. In the meantime, judicial interpretations of similar rules in other jurisdictions may be instructive.

The Traditional Method of Identifying Privileged Documents Has Posed Challenges in Recent Times

During discovery, the party withholding documents bears the burden of establishing that a privilege or immunity applies.[1] The privilege log is the means by which that party identifies those documents and the applicable privilege so that the requesting party and the court may evaluate the claim of privilege.[2] CPLR 3122 thus requires that the producing party's privilege log describe "the legal ground for withholding" any documents, as well as (1) the type of each document, (2) the general subject matter of each document, (3) the date of each document, and (4) any other information that is sufficient to identify each document for a subpoena duces tecum.

In the years since CPLR 3122 was implemented, the proliferation of electronic communications has drastically increased the volume of privileged documents, rendering the preparation of document-by-document privilege logs increasingly burdensome and costly. Against this backdrop, many practitioners have recognized the need for more streamlined e-discovery and a more cost efficient approach to privilege logs.

The Commercial Division's New Rule Aims to Streamline Discovery

Rule 22 N.Y.C.R.R. § 202.70(g) Rule 11-b seems poised to afford litigants in the Commercial Division a more cost-effective approach to privilege logs. The rule requires that parties meet at the outset of the case and again as needed to discuss privilege review.[3] During these discussions, the parties must address "the scope of the 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."[4] While the rule does not provide examples of documents that may not need to be logged at all, the New York State Bar Association Commercial and Federal Litigation Section recognized they may include:

(a) communications exclusively between a party and its trial counsel; (b) work product created by trial counsel, or by an agent of trial counsel other than a party, after commencement of an action; and (c) internal communications within a law firm, governmental law office, legal assistance organization or legal department of a corporation or of another organization.[5]

Rule 11-b encourages the use of categorical privilege logs.[6] The goal in utilizing a categorical approach is to "reduce the time and costs associated with preparing privilege logs."[7] In fact, the rule even allows costs to be shifted onto the party demanding a document-by-document log if the producing party can show good cause.[8]

The rule also requires a "responsible attorney," or an authorized and knowledgeable representative from the party asserting privilege, to certify (1) the facts supporting the privileged or protected status of the information in each category and (2) the steps taken to identify the privileged documents, including, "whether each document was reviewed or some form of sampling was employed" and, if so, how it was conducted.[9] As the Subcommittee on Procedural Rules to Promote Efficient Case Resolution made clear, this requirement is meant to ensure that an attorney with experience, rather than a "newly minted attorney or paralegal," actively participate in the privilege review process.[10] The rule thus confers accountability for the privilege log and tries to prevent instances in which details about the documents are provided in an incomprehensible format—or worse, not at all.[11]

To the extent a party utilizes a traditional document-by-document log, as envisioned by CPLR 3122, Rule 11-b addresses how to approach uninterrupted email chains—another by-product of increased electronic communications. Specifically, the rule allows parties to treat uninterrupted email chains as a single document (instead of logging separately each email in the chain), provided that the log includes: (1) an indication that the emails are an uninterrupted dialogue; (2) the beginning and end dates and times of the correspondence; (3) the number of emails within the chain; and (4) the names of all authors and recipients and identifying information to allow evaluation of the privilege decisions.[12]

The rule encourages parties in "complex matters likely to raise significant issues regarding privileged and protected material" to jointly hire a special master to help sort out issues that arise with the privilege logs, and further provides that all "agreements and protocols agreed upon should be memorialized in a court order."[13]

This Is Not the First Time Categorical Privilege Logs Have Been Encouraged

Rule 11-b's preference for categorical privilege logs is not unprecedented. In a world making use of copious email and other electronic docu-

ments, it is no surprise that the Southern and Eastern Districts of New York and the Delaware Chancery Court—courts that are well known for handling complex commercial disputes—also recently have approved categorical approaches to privilege logs.[14]

In fact, even before the Southern District implemented its rule, it had approved the use of categorical logs in appropriate circumstances, including where a traditional document-by-document log would be "unduly burdensome" and where the additional detail provided in a document-by-document log "would be of no material benefit to the discovering party in assessing whether the privilege claim is well grounded."[15]

While the Rule Favoring Categorical Privilege Logs Affords Advantages to Litigants, It Also Poses Challenges

By requiring detailed discussions of privilege logs at the outset of the case, Rule 11-b tasks parties with coming to agreements early on, often before they have even fully collected documents. Therefore, parties can reach resolutions before determining their own interests and can adopt a "what's good for the goose is good for the gander" approach. On the other hand, litigants may find it difficult to determine the appropriate approach when they have not yet had the opportunity to review their documents.

While the rule provides detailed instructions on how to log uninterrupted email chains, it does not otherwise specify the form that categorical privilege logs should take. Rather, Rule 11-b simply encourages "any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category."[16] This leaves open a significant question for litigants: What level of detail will be required in order to facilitate such an "orderly assessment" of privilege calls?

Decisions from the Southern and Eastern Districts with respect to its rule favoring categorical logs may be instructive.

On a number of occasions, judges in the Southern District have determined that the subject matter of the categories described on categorical privilege logs, as well as the descriptions of the privilege asserted, were insufficient. For example, in *SEC v. Yorkville Advisors, LLC*, the SEC provided a categorical privilege log with the following headings: (1) category of documents and number of documents; (2) responsive to request; (3) subject matter; (4) date of document; (5) author (and recipient, if applicable); and (6) privilege asserted.[17] The category of documents addressed by the log was simply described as "email," the subject matter consisted exclusively of entity or individual names such as "Yorkville Advisors," and the "privilege asserted" included bare statements such as "legal work-product doctrine, law enforcement investigative privilege, intergovernmental investigative privilege, deliberative process privilege."[18]

The court deemed the information on the log insufficient, in part because the SEC did not disclose whether the allegedly privileged documents were prepared in anticipation of litigation, thus making it impossible for the responding party and the court to assess the privilege designations.[19]

An Eastern District judge in *McNamee v. Clemens* reached a similar conclusion, deeming the subject lines in a categorical privilege log "exceedingly unhelpful" when they included single-word descriptions such as "tomorrow," "statement," "Costs," "Letter," "notes," and "Inquiry" and did not "provide sufficient information as to the content of the documents to enable plaintiff or the Court to evaluate whether each of the withheld documents is privileged."[20]

Courts also have deemed descriptions of the authors and recipients of categories of documents insufficient where the log omitted their titles or information about their roles.[21] In *McNamee*, the court remarked that, "[i]n the absence of a showing that [individuals listed as 'Consultants'] were integral to the communication of legal advice or litigation strategy, any privileges applicable to communications with them are waived."[22]

The "meet and confer" requirement in Rule 11-b may provide parties an opportunity to come to terms up front regarding many of these issues and thereby avoid later disputes. Either way, these decisions from courts in the Southern and Eastern Districts of New York may provide some guidance as to how litigants in the Commercial Division should approach categorical privilege logs. If litigants take care in describing the connection between each category of documents and the applicable privilege, they may be able to survive objections from the opposing party while saving substantial costs in creating the privilege logs in the first place.

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[1] Spectrum Sys. Int'l Corp. v. Chem. Bank, 78 N.Y.2d 371, 581 N.E.2d 1055 (1991)
[2] See Park Assocs. v. N.Y. State Attorney Gen. (In re Subpoena Duces Tecum to Jane Doe), 99 N.Y.2d 434, 442, 787 N.E.2d 618, 623 (2003).
[3] Id. § 202.70(g) Rule 11-b(a).
[4] Id.
[5] Memorandum from the New York State Bar Association Commercial and Federal Litigation Section to the Office of Court Administration (May 14, 2014).
[6] See Rule 22 N.Y.C.R.R. § 202.70(g) Rule 11-b(b)(1) (stating that the "preference in the Commercial Division is for the parties to use categorical designations")
[7] Id.
[8] Id. Rule 11-b(b)(2).
[9] Id. Rule 11-b(b)(1).
[10] See Memorandum from the Subcommittee on Procedural Rules to Promote Efficient Case Resolution to the Commercial Division Advisory Council (Feb. 25, 2014).
[11] See id
[12] 22 N.Y.C.R.R. § 202.70(g) Rule 11-b(b)(3).
[13] Id. Rule 11-b(c), (e).
[14] See Local Rules of the United States District Courts for the Southern and Eastern Districts of New York 26.2(c), available at http://www.nysd.uscourts.gov/rules/rules.pdf ("[W]hen asserting privilege on the same basis with respect to multiple documents it is presumptively proper to provide the information required by this rule by group or category."); Court of Chancery Guidelines for the Collection and Review of Documents in Discovery (f)(ii)(2), available at http://courts.delaware.gov/chancery/docs/CollectionReviewGuidelines.pdf. ("It may be possible for parties to agree to log certain types of documents by category instead of on a document-by-document basis.").
[15] See, e.g., SEC v. Thrasher, No. 92 Civ. 6987 (JFK), 1996 WL 125661, at *1–2 (S.D.N.Y. Mar. 20, 1996).
[16] 22 N.Y.C.R.R. § 202.70(g) Rule 11-b(b)(1).
[17] No. 12 Civ. 7728 (GBD)(HBP), __ F.R.D. __, 2014 WL 2208009, at *10-12 (S.D.N.Y. May 27, 2014).
[18] Id. at *10.
[19] Id. at *10-11.
[20] No. 09 Civ. 1647 (SJ), 2013 WL 6572899, at *3 (E.D.N.Y. Sept. 18, 2013) (internal quotation marks omitted).
[21] SEC v. Yorkville, 2014 WL 2208009, at *10-12; see also Wultz v. Bank of China Ltd. (deeming privilege log inadequate where the producing party simply identified entire departments without naming members of the department or revealing whether they were attorneys). 979 F. Supp. 2d 479, 496-97 (S.D.N.Y. 2013).
[22] 2013 WL 6572899 at *3 n.8.