

## Fixing the Privilege Log: Why the Solution Involves More than Drafting New Rules

By Philip Algieri



*The privilege log process is broken. The time, energy, expense, and frustration involved in accurately identifying privileged documents and properly logging them (all so one can then fight with opposing counsel over the sufficiency of the privilege log itself) adds up to an immense deadweight loss and may provide little value to either side.<sup>1</sup> As the Chief Judge of the Commercial Division of the New York State Supreme Court's Task Force on Commercial Litigation rightly noted in his 2012 summary report:*

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.<sup>2</sup>

Most judges and attorneys (not to mention the corporations who ultimately foot the bill for privilege logs) would agree. The obvious question then is what can be done to fix this broken process? A host of eDiscovery commentators have expressed hope in recent years that adopting one particular solution, the "categorical privilege log" approach, can help solve this problem.<sup>3</sup> While categorical privilege logs may potentially provide efficiency gains versus the existing document-by-document standard, there are a number of reasons why these proposed new rules and solutions, on their own, may not have the intended impact on the privilege review and logging process. Instead, a fundamental change to how attorneys view the concept of privilege and approach the privilege log process is required to realize the benefits of categorical privilege logs and other reforms.

After providing a brief overview of the history of categorical privilege logs and summarizing one notable recent attempt at reforming the privilege log process in the New York State Commercial Division, this article will (1) address some of the specific reasons the solution may not be found in these

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<sup>1</sup> The term "privilege" as used in this article refers broadly to any legal principle, such as attorney-client privilege or work-product protection, that entitles a producing party to withhold documents from production.

<sup>2</sup> 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>.

<sup>3</sup> See, e.g., *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, Second Edition* 23-24 (The Sedona Conference® Working Group Series, 2007) ("One solution that parties may consider at the outset is to agree to accept privilege logs that will initially classify categories or groups of withheld documents, while providing that any ultimate adjudication of privilege claims, if challenged, will be made on the basis of a document-by-document review."); Hon. John M. Facciola & Jonathan M. Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*, 4 Fed. Cts. L. Rev. 19, 53-54 (2010) ("By limiting the documents that must be indexed or logged, by using categories to organize the information, and by using detailed logs only when necessary, the cost of claiming and adjudicating privilege claims can be greatly reduced.").

reforms alone and (2) discuss other steps that, combined with these recent reforms, may help alleviate the burden inherent in producing privilege logs.

### History of the Categorical Privilege Log

The idea that there are alternatives to the standard document-by-document privilege log in large-scale litigation is not a novel concept. As the Advisory Committee to the 1993 Amendments of Federal Rule of Civil Procedure 26 explicitly stated in its notes:

The rule does not attempt to define for each case what information must be provided when a party asserts a claim of privilege or work product protection. Details concerning time, persons, general subject matter, etc., may be appropriate if only a few items are withheld, but may be unduly burdensome when voluminous documents are claimed to be privileged or protected, particularly if the items can be described by categories.<sup>4</sup>

The categorical log option has therefore been present for more than 20 years, yet despite the fact that Rule 26(b)(f) expresses no preference for one approach over another, it has generally been viewed as a sharp departure from standard practice.<sup>5,6</sup> However, some courts, particularly ones that handle a significant amount of large-scale litigation, have moved towards the categorical approach over time. The Southern District of New York as far back as 1996 permitted the use of categorical privilege logs where “(a) 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.”<sup>7</sup> In more recent years, the Southern and Eastern Districts of New York have amended their Local Rules to officially address categorical privilege logs.<sup>8</sup> The Delaware Chancery Court in its Guidelines for the Collection and Review of Documents in Discovery (adopted in 2012 as part of amendments to the Court's Guidelines for Practitioners) does the same.<sup>9</sup> Moreover, as noted above, recognized authorities within eDiscovery,

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<sup>4</sup> Fed. R. Civ. P. 26 Advisory Committee Notes, 1993 Amendments.

<sup>5</sup> See, e.g., *S.E.C. v. Nacchio*, No. 05-cv-00480-MSK-CBS, 2007 WL 219966, at \*9 (D. Colo. Jan. 25, 2007) (“While, in the typical case, a Rule 26(b)(5) privilege log will individually list withheld documents and provide pertinent information for each document, this is not an inflexible requirement.”).

<sup>6</sup> For a helpful overview (and fun read) regarding the history of support for categorical privilege logs, see Kirk, Shannon Capone, Cobb, Emily, and Gens, Matthew. “Welcome to Our Rockin’ Priv Party on Categorical Privilege Logs.” Web blog post. *e-Discovery Team* ®. <http://e-discoveryteam.com>, 22 Nov. 2010. Web. Last Accessed 20 Oct. 2014.

<sup>7</sup> *SEC v. Thrasher*, No. 92 CIV. 6987 (JFK), 1996 WL 125661 (S.D.N.Y. Mar. 20, 1996).

<sup>8</sup> SDNY and EDNY Local Rule 26.2(c) (“when 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.”)

<sup>9</sup> Delaware Court of Chancery Guidelines — Guidelines To Help Lawyers Practicing in the Court of Chancery, II(7)(b)(ii): “It may be possible for parties to agree to log certain types of documents by category instead of on a document-by-document basis. Categories of documents that might warrant such treatment include internal communications between lawyer and client regarding drafts of an agreement, or internal communications solely among in-house counsel about a transaction at issue. These kinds of documents are often privileged and, in many cases, logging them on a document-by-document basis is unlikely to be beneficial.”

such as The Sedona Conference® Working Group on Electronic Document Retention & Production, have advocated similar approaches.

### Overview of New York State Rule 11-b

Privilege log reform has again taken center stage among litigators and eDiscovery practitioners following the recent adoption by the New York State Courts of Rule 11-b of Section 202.70(g) of the Uniform Rules for the Supreme and County Courts, which again expresses a preference for categorical privilege logs and outlines guidelines for their implementation. While Rule 11-b is neither the first nor likely the last attempt to reform the privilege log process, it does provide an example of certain commonly accepted "best practices" and can therefore serve as the framework to analyze the potential impact of reform attempts on the actual practice of creating privilege logs.

In terms of its most significant real-world implications, Rule 11-b does the following:

- (1) Establishes guidelines for addressing the scope of privilege review and privilege logs during meet and confer sessions, including specifying that parties are to discuss the information to be included on the privilege log and categories of information that can be excluded from the privilege log.<sup>10</sup>
- (2) Confirms the Commercial Division's preference for parties to use categorical designations when completing privilege logs.<sup>11</sup>
- (3) Incentivizes cooperation via a cost-shifting element. If a requesting party refuses to accept a categorical privilege log, the producing party may petition the court to re-allocate to the requesting party the costs, including attorneys' fees, incurred in preparing the document-by-document privilege log.<sup>12</sup>
- (4) Establishes guidelines for the logging of email chains when foregoing categorical privilege logs and producing a document-by-document log, including that each uninterrupted email chain will be considered a single entry, and that the description for each entry shall include an indication that the emails represent an uninterrupted dialogue, beginning and ending dates and times of the emails within the chain, the number of emails within the dialogue, and the names (including identifying information) of all authors and recipients of the emails.<sup>13,14</sup>

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<sup>10</sup> 22 N.Y.C.R.R. § 202.70(g) Rule 11-b(a).

<sup>11</sup> *Id.* Rule 11-b(b)(1).

<sup>12</sup> *Id.* Rule 11-b(b)(2).

<sup>13</sup> *Id.* Rule 11-b(b)(3).

<sup>14</sup> The merits and practicality of logging individual emails within a larger email chain is a topic for another article. For helpful background on the law relating to dealing with email chains on privilege logs, see Richard, Steven M. "What Links in an E-Mail Chain Must Be Disclosed," *DRI For the Defense*, April 2014.

## Privilege Log Cost Drivers

Before assessing the impact of privilege log reform, it is useful to discuss the primary components and cost drivers of the privilege review and logging process. These activities can be broadly divided into the following two activities:

- (1) Identification: screening for and identifying documents that are privileged, including ensuring that no privileged documents are missed.
- (2) Logging: reviewing the identified privileged documents to confirm the accuracy of the privilege determination and populating the non-automated fields of the privilege log, such as the basis for withholding the document (e.g., attorney-client privilege or attorney work product) and a description of the privileged content in the document.

In most traditional document review workflows, these activities are performed in separate stages, as they require different skillsets and levels of expertise, although they can also be completed in parallel. In the *identification stage*, an initial reviewer will flag potentially privileged documents as he or she makes responsiveness decisions (the use of technology assisted review systems may modify this process to a certain extent).<sup>15</sup> In addition, there is generally a quality control ("QC") process for privilege identification that may include random sampling, the use of search terms to identify missed privileged documents, the re-review of certain "high-risk" documents likely to contain privileged material (e.g., documents collected from in-house counsel custodians), or the re-review of documents where systemic issues were later uncovered (e.g., a first-level reviewer with an unacceptable error rate in identifying privileged content). The cost of privilege review at this stage is a product of the time spent on each of first-level review and QC, although the time spent on QC will usually be much more variable. (Assuming a first-level review for responsiveness must be completed anyway, the marginal effort necessary to also identify potentially privileged documents at the same time is minimal, while the amount of QC performed is technically optional and can range from none to a complete re-review.)

At the *logging stage*, cost is a product of two primary factors: (i) the number of documents identified as privileged during first-level review; and (ii) the time required to properly analyze each document, assess the privilege decision, and populate the non-automated privilege log fields..

Any discussion of the impact of privilege log reform must focus on its impact on each of the factors listed above and, in turn, the effort required to (i) identify all privileged documents; and (ii) log these documents. Each may have multiple sub-components as well. For example, one can reduce the cost

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<sup>15</sup> As part of this process, privilege search terms, such as attorney or law firm names, are typically used to pre-identify potentially privileged documents and either alert reviewers that these documents contain certain terms or send these documents to a more specialized first-level review team. However, even under the best conditions this process is far from perfect. Documents in the "non-potentially privileged pool" must still be closely reviewed for privileged, as the screening terms used may have been incomplete or documents not containing these privilege terms may nonetheless be privileged, while many documents in the "potentially privileged pool" often contain false positives and are not privileged.

during the logging stage by either reducing the time required to log each document or reducing the number of documents to be logged.

### Practical Implications

One of the main issues with the categorical privilege log approach as currently articulated is that many of the labor-intensive activities described above still remain. Many categories will be broad enough such that even if agreement is reached regarding their privilege designation, an attorney will need to review each and every document to determine their categorical designation. One common response is that certain categories of documents can be identified as being likely privileged and not in need of review through search constructs or other automated techniques.<sup>16</sup> However, in most cases, these categories tend to be extremely limited, both in term of the number of such categories and the number of documents within each category. For example, one category of documents that can be identified (with perhaps the highest degree of confidence) as presumptively privileged *without* human review consists of emails between outside counsel and client where no third-parties that could potentially waive privilege are present. Unfortunately, these emails typically represent a very small percentage of the documents destined for the privilege log. Consequently, the overall impact of utilizing such a category is minimal.

In reality, the vast majority of documents on most privilege logs would be very difficult to segregate based on the use of search and technology alone. If this were not the case, the precision of privilege screen searches would be significantly higher – instead, precision of even well-constructed searches (whether utilizing keywords or technology assisted review) tends to be low enough such that a subsequent human review is required in order to exclude the many false positives.<sup>17</sup> In short, most privilege categories contain too high of a rate of false positives to make these determinations without “eyes on paper” verification (or, at the least, the opposing party will have a reasonable basis to not agree to the use of such categories). One is therefore left with having to review these documents to determine in which category they belong.

As such, we can conclude that there may be minimal reduction in time spent on identifying privileged documents (outside of the minimal impact of the “pre-segregation” approach mentioned in the paragraph above). Further, there is very little impact on the “logging stage,” as privilege determinations still need to be confirmed and finalized, and the basis for withholding the document

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<sup>16</sup> See, e.g., Facciola and Redgrave, *Asserting and Challenging Privilege Claims in Modern Litigation: The Facciola-Redgrave Framework*. (“The parties should meet and confer in good faith to identify documents and ESI that may be segregated and excluded from production through agreed-upon exclusionary search terms, concepts, or some other methodology as potentially privileged documents. ...The object should be to efficiently segregate those documents which are likely to be privileged from the rest, allowing for a more nuanced set of alternatives to alleviate the burden of a document-by-document review of all potentially privileged documents.”).

<sup>17</sup> The Grossman-Cormack Glossary of Technology Assisted Review defines precision as “The fraction of documents identified as relevant by a search or review effort, that are in fact relevant” (The Grossman-Cormack Glossary of Technology-Assisted Review (2013 Fed. Cts. L. Rev. 7) at 25).

noted; a largely manual task under existing processes. The primary change is that rather than having to draft an individual description of the subject matter of the privileged content for each document, the attorney can place each document into one of the pre-designated categories. However, even this impact may be minimal if one considers the typical privilege log process. In most large-scale privilege log reviews, there are already a handful of pre-determined descriptions from which the reviewer selects the most applicable to draft a description for the privilege log entry. There is some reduction in time spent when only having to place the document into a category, but the time required to process the information in the document and decide which category it belongs in is largely unchanged.

### **A Culture of Caution**

While the reforms described above are certainly positive steps, they may more effectively achieve the desired result if additional measures are taken to address the problem at its source – i.e., the number of documents designated as privileged, and the cost associated with identifying, QCing, and logging such a large number of documents. Although attempts to pre-identify documents that are privileged and exclude them from the manual review and logging process are good first steps, this may have a negligible impact in most matters, as discussed above. The more salient issue is that the vast majority of documents on many privilege logs may either:

- 1) Not actually be privileged at all, or
- 2) Are privileged only under a very broad interpretation of privilege.

Moreover, many are innocuous documents that have little bearing on the matter at hand or anything else of importance.

Unfortunately, one can easily see why the existing system encourages this outcome. Junior associates, contract attorneys, or outside vendors (the people typically making privilege calls and completing the privilege log), have strong incentives to adopt an extremely broad interpretation of privilege and little incentive to care about cost, efficiency, or the size of the privilege log. The downside of a reviewer missing a privileged document is great in terms of personal reputation, while there is little downside (as far as the individual is concerned) to "over-claiming" privilege.

One potential solution is to mandate the involvement of more senior attorneys, who have stronger incentives to ensure they keep the cost of privilege review low and can influence the actions of the junior attorneys.<sup>18</sup> However, even where a senior attorney actively manages a document review and

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<sup>18</sup> As one leading eDiscovery practitioner has noted: "One of the most distressing aspects of eDiscovery is that there are really no bright-line tests to establish whether a document is privileged or not. The economics of document review requires that reviews be done by junior people. You are not going to pay \$600 an hour for a partner to be doing privilege review—at least as a first pass—and the junior people are not at all motivated to take chances in their designations so they will inevitably over-designate. I think the real complaints probably arise when the more senior people on the team fail to adequately conduct follow-up reviews of those documents." Owen, Robert and Kaufman, Greg, "Managing the Risks of eDiscovery: A Q&A with Bob Owen and Greg Kaufman," *Partnering Perspectives* (Fall 2011).

stresses the importance of not over-designating, the individual reviewer rightfully knows that altering his or her approach alone will likely have little overall impact on the final cumulative result, but may have dire consequences for him or her as an individual:

There is no reward for doing a good privilege log. It's painful. It results in these huge documents. No one has any incentive to be responsible [on] a privilege log as opposed to [being] overinclusive. Junior associates or paralegals get tasked with it. They screw up if they don't log a document, not if they come to the partner and say, "Really, this one shouldn't be logged."<sup>19</sup>

Further, the chance of that individual reviewer's over-designation being discovered and he or she being reprimanded is still much lower than a "bad" privilege miss being discovered during subsequent QC, given the typically intense focus on avoiding the production of privileged documents. The result is "a tragedy of the commons" in which there is little incentive to modify individual behavior in favor of the aggregate. In isolation, the decisions by any individual may have little overall impact, making the most (perhaps overly) risk-averse decision the best approach for the individual, while in the aggregate, every single reviewer taking this approach has detrimental consequences in terms of cost to the client and increased risk of sanctions.

This situation is exacerbated when more senior attorneys commonly stress the negative consequences of missing privileged documents without conveying a more nuanced understanding of why this is so or fully explaining the potential risks of overdesignation. Junior attorneys hear only the message that nothing is worse than producing privileged documents, regardless of the consequences. This mindset remains as he or she advances to a supervisory role and indoctrinates more junior associates with the same unreasoned approach.

### **Alternative Solutions**

As an initial matter, it's important to recognize that not all privileged documents are created equal. There are some privileged documents that must be identified, withheld, and properly logged with no room for error, no matter the cost. For example, communications between outside counsel and the client regarding the instant litigation. As mentioned above, these typically represent a small portion of the large number of documents that typically end up on privilege logs and are also often the easiest to identify by the presence of certain individuals, law firm names, time periods, or other targeted search criteria.

The vast majority of the remaining documents can be treated much differently. Top-down change is required as junior attorneys or outside vendors are unlikely to deviate from the conventional, risk-averse approach on their own (nor should they).<sup>20</sup> This process ideally starts with better training

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<sup>19</sup> Klig v. Deloitte LLP, Civ. A. No. 4993-VCL, 2010 WL 3489735, at \*5 (Del. Ch. Sept. 7, 2010).

<sup>20</sup> This also is not a novel concept. The Delaware Court of Chancery in its "Guidelines for the Collection and Review of Documents in Discovery," for example, affirmatively places this burden on senior attorneys: "Although this does not mean that senior lawyers must personally conduct the privilege review or prepare the privilege log, they must take reasonable

regarding what constitutes privileged content, why privilege is truly important in the first place, and what type of documents constitute "high-risk" errors and should be the primary focus of privilege review. This must be supported by a culture that does not encourage or incentivize egregious over-designation. Instead, there should be emphasis on the value and importance of only identifying truly privileged documents and reducing the amount of time and money spent needlessly searching for, reviewing, and logging innocuous and non-privileged documents.

The risks inherent in this approach may be less than commonly assumed.<sup>21</sup>

First, many of the documents found on a typical privilege log are often not privileged. From a strategic perspective, this over-designation is not always used as a cheater's tool to withhold harmful documents as often presumed, but is instead the result of the aforementioned overly cautious mindset. Second, many of these documents are innocuous and their production poses little risk. It can be extremely wasteful to spend time searching for, reviewing, QCing, and then logging routine communications regarding non-substantive matters that happen to copy in-house counsel. This is especially true in a world where recent rule changes mean the costs and risks of a more nuanced approach are often greatly reduced.<sup>22</sup>

On the other hand, the cost of over-designation and excessive review is often understated. The effects ripple through the entire document review process, resulting in more expense incurred at the review, QC, logging, and post-production stages. Under a modified approach, there would be:

- (1) Less time spent on privilege review, including identification, search, and QC efforts
- (2) Less time spent on logging since there are less total documents to log
- (3) Less time spent on logging (or categorizing) each individual document. (As most attorneys with experience in creating privilege logs will tell you, it is much easier to draft a privilege log entry for a document that is actually privileged and doesn't require creative story-telling)
- (4) Less time spent on disputes over the privilege log, since there are fewer withheld documents and the final privilege log contains less suspect entries
- (5) More time to focus on ensuring the truly important privileged documents are identified and withheld

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steps to ensure that privilege only has been asserted in accordance with a good faith reading of Delaware law, that there has not been systematic overdesignations, and that the privilege log contains sufficient descriptions of the documents in question."

<sup>21</sup> To reiterate, important, privileged documents, such as those involving outside counsel, containing highly confidential legal advice, or relating to the merits of the present (or any) legal matter, warrant a more rigorous approach.

<sup>22</sup> See Faciola and Redgrave, "With the changes to Rule 26(f) and the addition of FRE 502, parties now have rule-based authority for coming to agreements in the planning stages of discovery that would govern ESI strategies, necessary requirements for privilege review and post-production claims of privilege. The rules indicate support for various arrangements, including clawback agreements, post-production agreements, and quick peek agreements preproduction."

## How to Get There

The final question then becomes how to ensure attorneys adopt this approach of limiting over-designation and curtailing the amount of time wasted on privilege review. One method is to continue to create rule based incentives (including the threat of sanctions) that ensure involvement of senior attorneys in implementing a less wasteful approach to privilege review and privilege logs. However, there may be a simpler, more practical solution that effectively complements these more formal changes: increased in-house counsel involvement and pressure on outside counsel.

In many instances, it is taken as a given by clients that privilege logs are extremely expensive and they pay little attention to the process. As an initial matter, in-house counsel should be familiar with the privilege log process, including the primary cost drivers and the approaches that can result in high costs, the true consequences of producing privileged materials, and available alternative approaches (including technological solutions).

This knowledge and understanding allows a client to properly determine their own risk tolerance, and then actively work with outside counsel and vendors to reduce the excessive cost of privilege logs and emphasize the value of reducing over-designation and time spent on unnecessary privilege review activities. Besides being strongly motivated to do right by their clients, law firms and vendors may also feel empowered to adopt a more nuanced, less risk-averse approach if they no longer fear upsetting a client over the production of a non-substantive, meaningless, but arguably privileged document. Perhaps this is an overly rosy view of how law firms and vendors will react to their clients' behavior, but in many cases this sort of enhanced involvement (and pressure) can prove very effective in spurring change. Of course, this is only made possible if clients possess an upfront, complete understanding of the activities involved in privilege review, where the true risks lie, and how money is being spent. As always, education and training is critical to change.

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