

**NEW YORK STATE BAR ASSOCIATION**  
**COMMERCIAL AND FEDERAL LITIGATION SECTION**  
**COMMENT ON PRIVILEGE LOG PRACTICE**<sup>1</sup>

**SUMMARY**

The Discovery Subcommittee of the Judicial Conference Advisory Committee on Civil Rules has requested comments on possible rule changes to address any difficulties in complying with Federal Rule of Civil Procedure 26(b)(5)(A) concerning privilege logs. The invitation includes a request for comments regarding: (1) problems under the current rule; and (2) possible rule changes to solve the problems. The Commercial and Federal Litigation Section of the New York State Bar Association (the “Section”) recommends that the Rule be revised to (1) allow for flexibility in the form and content of privilege logs depending on the needs of the parties in a particular case; (2) express a preference for metadata privilege logs,<sup>2</sup> categorical privilege logs,<sup>3</sup> or some other reasonable variation thereof rather than document-by-document privilege logs; and (3) detail the type of information that should typically be presented in the privilege log. This comment was prepared by the Section’s Committee on eDiscovery and Committee on Federal Procedure.

**COMMENT**

**I. OVERVIEW**

The Section is comprised of a cross-section of practitioners, including members in the private and public sectors; solo practitioners; and members of small, mid-size, and large law firms, who actively litigate in state and federal courts in New York and adjacent states, and in national and international forums. It includes legal professionals familiar with the rapidly advancing development of electronic discovery law and practice. Thus, in offering the following comment, the Section is drawing on a broad range of experience.

A common complaint in both state and federal complex commercial litigation is that document-by-document privilege logs, which in some cases may have hundreds of thousands of entries, are both time consuming and expensive and can be a frequent subject of discovery disputes. On the other hand, in relatively straightforward, run-of-the-mill cases, document-by-document privilege logs may impose little burden to prepare. In many states, including New York, local rules address privilege logs at the federal and state court levels. As the amount of electronically stored information (“ESI”) exchanged in litigation continues to rise and implicate more modern communication platforms, the cost and complexity associated with preparing privilege logs will also continue to increase. It is not uncommon for the total cost of producing a document-by-document privilege log—which many courts have read the Federal Rules to require—to dwarf its

---

<sup>1</sup> Opinions expressed in this memorandum are those of the Section and do not represent the opinions of the New York State Bar Association unless and until the memorandum has been adopted by the Association’s House of Delegates or Executive Committee.

<sup>2</sup> A *metadata* privilege log is a log consisting of certain electronically generated metadata fields for fully or partially withheld documents.

<sup>3</sup> A *categorical* privilege log is a log consisting of information about certain categories of fully or partially withheld documents. This may also include electronically generated metadata fields for the categories of documents identified on the log.

value to the recipient, particularly where the expense is a significant percentage of the amount in dispute.

There are multiple challenges in properly preparing a privilege log in accordance with Fed. R. Civ. P. 26(b)(5)(A) (“Rule 26(b)(5)(A)”). Parties asserting a privilege must provide sufficient detail for requesting parties to fairly assess the validity of a privilege claim without divulging so much detail that the asserted privilege is deemed waived. Moreover, it is not always entirely clear what information in a privilege log actually assists an adversary in properly assessing the validity of a privilege claim. For example, even if a party provides the date and parties privy to a communication, without divulging the actual contents of the communication, it may be not be possible to ascertain whether the actual communication at issue is, in fact, privileged. In addition, the preparation of privilege logs is often time-consuming and, consequently, prohibitively expensive. Even where advanced technologies purport to be able to automatically generate privilege logs, the reality is that—absent party agreement on purely metadata-driven logging—the output of those technologies invariably requires extensive review, cleanup, and supplementation before being suitable for production, largely offsetting any cost savings they might promise. The Section, therefore, supports revision of Rule 26(b)(5)(A) to reduce litigation costs and burden in a reasonable manner while at the same time ensuring that any claim of privilege can still be effectively evaluated by the requesting party.

While metadata or categorical privilege logs in complex cases involving significant volumes of ESI may make sense, these logs may not be necessary where the volume of ESI is negligible. Therefore, whether ESI is voluminous enough to call for a metadata or categorical log, as opposed to a document-by-document log, should be examined on a case-by-case basis.

Considering the challenges with crafting compliant privilege logs, the Section recommends clarifying in the Federal Rules that there is no presumption that document-by-document logs must be used. Instead, the Federal Rules should allow for flexibility in the form and content of privilege logs depending on the needs of the parties in a particular case. This approach would consider the respective resources of the parties and the amount in controversy, and would be consistent with the principles of proportionality that have become overwhelmingly important with the influx of ESI discovery.

Modifications to Rule 26(b)(5)(A) should permit litigants to meaningfully document claims of privilege while avoiding time-consuming and unduly granular document-by-document privilege logs. In “large document” cases, alternative methods of privilege log creation can provide all the information necessary to the parties and the court in a manner proportional to the size and scope of the individual case. As the Advisory Committee Notes to Rule 26 stated as part of the 1993 amendments:

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**” (emphasis added).

Nearly three decades later, this prescient observation has become more apposite than ever. While manually generated, document-by-document privilege logs may be necessary in some cases, they may also become the subject of discovery sideshows used by unscrupulous parties to delay or gain a tactical advantage. With the proliferation of data sources and expansion in volume of ESI, problems with document-by-document privilege logs will likely get worse without a reaffirmation of the role of proportionality in privilege logging.

The Section's views conform with a portion of the New York Commercial Division Rules. In the Commercial Division of the New York Supreme Court, which is designed to resolve high-stakes, complex commercial litigation, Commercial Division Rule 11-b, 22 N.Y.C.R.R. § 202.70(g), Rule 11-b(b), expresses a preference for categorical designations, and the parties are to meet and confer regarding the organization of the documents. Moreover, the Local Rules of the Southern and Eastern Districts of New York state that “[e]fficient means of providing information regarding claims of privilege are encouraged, and parties are encouraged to agree upon measures that further this end.” *See* SDNY/EDNY Local Civil Rule 26.2. Further, the New Jersey Complex Business Litigation Program, which is modeled on the New York Supreme Court Commercial Division, has adopted a very similar rule to Commercial Division Rule 11-b. *See* New Jersey Rules Governing Civil Practice in the Superior Court and Surrogate's Court, Rule 4:104-5(c).

At the outset, parties should meet and confer in a meaningful way about the scope of any privilege review, the manner in which privilege claims will be asserted, and what information should be included in a privilege log. The form and content of logs should be a topic in the parties' discussions when formulating their discovery plan under Fed. R. Civ. P. 26(f)(3)(D). There may be disagreement as to what “categories” should be subject to or included in a categorical privilege log, which fields should be included in a metadata log, or whether certain categories of documents should be excluded from the logging requirement altogether. As noted in the suggested revisions below, this may be accomplished in part through amendments to Fed. R. Civ. P. 16(b)(3) and 26(f)(3)(D) designed to encourage courts and parties to address privilege issues early in discovery. In many cases, especially in large, complex litigations, the parties may need to conduct multiple meet-and-confer sessions to reach consensus on a proportional mechanism for privilege assertion and to memorialize that agreement in a proposed order.

Parties working cooperatively and focusing on the needs of the case can use a variety of standardized and creative methods to satisfy their Rule 26(b)(5) obligations. These techniques can be used separately or in combination when appropriate. Some potential cost-efficient alternatives to a full document-by-document privilege log, each of which could be described in greater depth in the Advisory Committee Notes accompanying revisions to Rule 26, include:

- Categorical privilege logs using document categories agreed-upon by the parties, especially where more specific information is unnecessary to determine the privileged nature of the document, such as communications between the client and outside counsel after a litigation has been filed;
- Metadata logs that provide basic information about documents (e.g., sender, recipients, date and time, and email subject) but that do not require customization;

- Document-by-document privilege logs limited to a certain subset of privileged documents, such as a statistically valid random sample or documents from key custodians;
- Deferring privilege logs (especially in expedited cases) or requiring logs only for documents that are clawed back or involve third parties; or
- With respect to redacted documents, including a field in the production load file identifying redacted documents, or providing a list of redacted documents by Bates number.

While it may not be necessary to implement each of the above methods in all cases, the Advisory Committee Notes should encourage the parties to meet and confer early and as needed to consider alternatives to document-by-document privilege logs and to increase the level of attention on these issues throughout discovery.

## II. SUGGESTED REVISIONS (new language **underlined in bold**)

The Section offers the following amendment to Rule 26(b)(5)(A):

Rule 26(b)(5) *Claiming Privilege or Protecting Trial-Preparation Materials.*

(A) *Information Withheld.* When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

- (i) expressly make the claim; and
- (ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner **proportional to the needs of the case and** that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

In parallel to the suggested revision of Rule 26(b)(5)(A), the Section recommends the following amendments to Rule 26(f)(3)(D) and Rule 16(b)(3):

Rule 26(f)(3) *Discovery Plan.* A discovery plan must state the parties' views and proposals on:

(D) any issues about claims of privilege or of protection as trial-preparation materials, including **the scope of privilege review, the nature and amount of information to be included in the privilege log, the applicability of cost-effective privilege log variations, and**—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

Rule 16(b)(3) *Scheduling.*

(3) *Contents of the Order.*

(A) *Required Contents.* The scheduling order must limit the time to join other

parties, amend the pleadings, complete discovery, and file motions.

(B) *Permitted Contents*. The scheduling order may:

(i) modify the timing of disclosures under Rules 26(a) and 26(e)(1);

(ii) modify the extent of discovery;

(iii) provide for disclosure, discovery, or preservation of electronically stored information;

**(iv) define the scope of privilege review, the nature and amount of information to be included in any privilege log, and any cost-effective methodology to be used in any privilege log;**

**(v) include any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation material after information is produced, including agreements reached under Federal Rule of Evidence 502 or that define the format of any privilege logs;**

**(vi) direct that before moving for an order relating to discovery, the movant must request a conference with the court;**

**(vii) set dates for pretrial conferences and for trial; and**

**(viii) include other appropriate matters.**

### III. CONCLUSION

The Section suggests that revisions should be made to Rules 26(b)(5)(A), 26(f)(3), and 16(b)(3), along with guiding commentary within the Advisory Committee Notes, to encourage efficiencies in what (in some instances) has become one of the most tedious and costly elements of the discovery process. These changes will save time and money for parties exchanging privilege logs in appropriate cases and will also create efficiencies for the judiciary by reducing the time required to resolve disputes and conduct *in camera* reviews of documents identified on lengthy privilege logs.

Respectfully submitted,

New York State Bar Association  
Commercial and Federal Litigation Section  
Daniel K. Wiig, Section Chair

July 29, 2021

Approved by the Commercial & Federal Litigation Section Executive Committee, July 29, 2021

Committee on Federal Procedure

Stephen T. Roberts, Co-Chair\*

Stephen J. Ginsberg, Co-Chair\*

Gregory K. Arenson\*

Lauren Bernstein\*

Seth Buchman

Matthew Coogan

Danielle B. Gatto

Michael Rakower

Jorge Rodriguez  
Armin Kaiser  
Alan Harvey  
Andre Castybert  
Amy Agnew  
Ashley Czechowski  
Doreen Simmons  
Jason Lowe  
Jeffrey Harradine  
James O'Shea  
Joshua Roy  
Stuart Kahan  
Leonard Benowich  
Mark Berman  
Megan Dorritie  
Michael Hensley  
Michael Fox  
Nelson Timken  
Patrick Klingman  
Peter Hein  
John Peter Coll  
Sharon Porviello  
Shawn Ricardo  
Robert Bartkus  
Robert Glanville  
Ronald Minkoff  
Samantha Ettari  
William Brennan  
Scott Barbour  
Sharon Porciello

Committee on eDiscovery

Jason Lichter, Co-Chair\*  
Gina Sansone, Co-Chair\*  
Judge Andrew J. Peck (ret.)\*  
Bennet Moskowitz  
Brooke Oppenheimer  
Catherine Cooley  
Claudia Morgan  
Constance Boland  
Craig Brown  
Daniel Borbet  
David Frydman  
Dayo Sanni  
Elif Dalboy

Gamelin-Arnold Telesfort  
Heikki Virks-Lee  
Ian Hochman  
Ignatius Grande  
Judge Ira B. Warshawsky (ret.)  
James Ryan  
Jared Borriello  
Jared Meyer  
JeJun Moon  
Karen Steel  
Kaylin Whittingham  
Kyle Gooch  
Laura Sedlak  
Lorrie Whitfield  
Mark Berman  
Matthew Birnbaum  
Maura R. Grossman  
Maverick James  
Max Weiss  
Michael Cardello  
Michael Fox  
Michael Witcher  
Michelle Six  
Nelson Timken  
Nicholas Maggipinto  
Nicola Young  
Philip Cohen  
Philip Furia  
Rebecca Morrow  
Renee Plexousakis\*  
Robert Lum  
Judge Ronald J. Hedges (ret.)  
Royce Cohen\*  
Samantha Ettari  
Samuel J. Abate, Jr  
Scott Malouf  
Seth Fiur\*  
Shweta McCallen  
Steven Nathan  
Victoria Turchetti  
William Dailey

\*Denotes Principal Authors of Comment