



**REPORT ON PROPOSED RULE 22 NYCRR §270.70(g)  
BY THE COUNCIL ON JUDICIAL ADMINISTRATION**

Proposed adoption of a new Rule of the Commercial Division (22 NYCRR § 202.70(g)), relating to privilege log practice in the Commercial Division of the Supreme Court.

**THIS RULE IS APPROVED IN PART WITH PROPOSED REVISIONS**

Except for two proposed revisions discussed below, the Council on Judicial Administration (the “Council”) supports the New York State Commercial Division Advisory Council’s (the “Advisory Council”) proposed new Commercial Division Rule (22 NYCRR § 202.70(g)). It would allow litigants to streamline privilege log practice by establishing a preference in the Commercial Division for use of “categorical designations” rather than document by document logging. The Council agrees with the Advisory Council that central to the proposed rule’s effectiveness is the requirement that the attorneys for the producing party sign a certification under 22 NYCRR 130-1.1 (a). While some of us would have preferred a simpler form of certification, by a close vote, we have endorsed the form of certification drafted by the Advisory Council as a necessary element of the regulatory scheme that will allow the receiving party to have confidence in the categorical designations made by the producing party. We do believe, however, that the requirement that the certification be signed by a “responsible attorney” as that term is defined in the proposed rule is unnecessary. A certification signed by any attorney authorized by the producing law firm to do so will bind the firm just as much as certification signed by a “responsible” attorney.

In addition, we believe that if a producing party were to apply for an allocation of costs under subdivision (2) of the proposed rule for having to produce a document-by-document log, it would be helpful for the Court to know why the receiving party declined to agree to a categorical privilege designation in the first place. We therefore recommend that subdivision (2) be revised to add the requirement that if the requesting party declines to permit a categorical approach, it must provide the producing party with its reason for declining in writing within five (5) days after the declination.

Consistent with Local Civil Rule 26.2(c) of the District Courts for the Southern and Eastern Districts of New York, the Council supports establishing a “preference” in the Commercial Division for the use of “categorical designations” on privilege logs. The cost of e-discovery in complex cases and the commensurate strain on the court system has been widely discussed and reported. This proposal constitutes one small measure as part of a larger effort to promote greater efficiency, proportionality and reasonableness in e-discovery as it relates to complex litigation. Traditionally, privilege logs are generated by manually reviewing each

document and then, if a claim of privilege is asserted, listing each document on a log. In larger cases, the traditional approach may not be feasible or desirable given the large volume of documents. As a result, “category logs” have been introduced into complex litigation, where appropriate, in order to avoid the time and expense of a document-by-document approach to generating privilege logs.

([http://jenner.com/system/assets/publications/271/original/Saltiel\\_Babbitt\\_Bloomberg\\_Is\\_There\\_A\\_Better\\_Way\\_To\\_Create\\_Privilege\\_Logs.pdf?1313177205](http://jenner.com/system/assets/publications/271/original/Saltiel_Babbitt_Bloomberg_Is_There_A_Better_Way_To_Create_Privilege_Logs.pdf?1313177205)); see also *Auto Club of New York, Inc. v. Port Authority of New and New Jersey*, 297 F.R.D. 55, 60 (S.D.N.Y. 2013) (purpose of a categorical privilege log is “to reduce the burden of individually identifying a large volume of documents . . . [due to] the exponential growth in the size of document productions that have resulted from the use of computers, emails and similar devices and applications that generate electronically stored information”).

Subdivision (a) of the Proposed Rule requires the parties to meet and confer to discuss, *inter alia*, “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, including the entry of an appropriate non-waiver order.” Significantly, subdivision (a) contemplates disclosure by the producing party of its collection process and parameters. The parties are free to agree or disagree to use a categorical approach to privilege designations. If the parties agree, under subdivision (b), they are encouraged to use any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category.

In other words, the proposed rule contemplates that if there is to be an agreement to employ a categorical approach to privilege designations, it will be preceded by the type of discussions described above. Nothing in the proposed rule either requires, or prohibits the parties from reducing their agreement to writing. That being the case, many of us believed that the only certification needed is a certification “that to the best of the producing party’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the methods and procedures used to organize the documents being produced that the producing party claims are subject to the privilege designation are not frivolous as defined in 22 NYCRR §130.1-1.” The Advisory Council adopted and argued before the Council that, a more detailed and factually specific certification was required.

The proposed rule provides for the following form of certification:

For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR § 130-1.1a, setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted.

We invited Jonathan Lupkin, Esq. of the Advisory Council to advise us why the Advisory Council drafted the above quoted form of certification. He explained, and persuaded a majority of us that the representations of relevant specific facts set forth in the form of certification in the proposed rule were necessary to provide the type of information that a receiving party would want to review before accepting the categories designated by the producing party.

Notwithstanding the foregoing, we do not believe that there is a need to define a “Responsible Attorney.” We have proposed revisions to subdivision (b) making it clear that a certification signed by any attorney acting on behalf of the producing party’s law firm binds both the attorney and the firm. This language guarantees that the producing party’s law firm will make sure that the certification has been reviewed before being signed.

The rule also permits the court, in its discretion, to allocate costs upon a showing of “good cause” in the event that the receiving party unreasonably requires a traditional privilege log. This is not a novel concept; the shifting of discovery costs as a matter of the Court’s discretion is already provided for in CPLR 3103. *See MBIA Ins. Corp. v. Countrywide Home Loans, Inc.*, 27 Misc. 3d 1061, 1076 (Sup. Ct. N.Y. Co. 2010) (allocation of discovery costs prevents “unreasonable annoyance, expense, embarrassment, disadvantage, or other prejudice to any person or the courts.”). However, we have suggested some minor changes to the “good cause” language. We also believe that if a producing party were to apply for an allocation of costs for producing a document-by-document log, it would be helpful for the Court to know why the receiving party declined to agree to a categorical privilege designation. We therefore recommend that subdivision (2) be revised to add the requirement that if the requesting party refuses to permit a categorical approach, it must provide the producing party with its reason in writing within five (5) days after the refusal.

For these reasons, the Committee supports 22 NYCRR § 202.70(g) with the proposed revisions discussed above.

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Proposed Amendments to Statewide Rules of the Commercial Division  
Regarding Privilege Logs

(a) **Meet & Confer: General.** Parties shall meet and confer at the outset of the case, and from time to time thereafter, to discuss 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, including the entry of an appropriate non-waiver order. To the extent that the collection process and parameters are disclosed to the other parties and those parties do not object, that fact may be relevant to the Court when addressing later discovery disputes.

(b) Categorical Approach or Document-By-Document Review.

- The preference in the Commercial Division is for the parties to use categorical designations, where appropriate, to reduce the time and costs associated with preparing privilege logs. The parties are expected to address such considerations in good faith as part of the meet and confer process (see paragraph (a) above) and to agree, where possible, to employ a categorical approach to privilege designations. The parties are encouraged to utilize any reasoned method of organizing the documents that will facilitate an orderly assessment as to the appropriateness of withholding documents in the specified category. For each category of documents that may be established, the producing party shall provide a certification, pursuant to 22 NYCRR § 130-1.1a, setting forth with specificity those facts supporting the privileged or protected status of the information included within the category. The certification shall also describe the steps taken to identify the documents so categorized, including but not limited to whether each document was reviewed or some form of sampling was employed, and if the latter, how the sampling was conducted. The certification shall be signed by the Responsible Attorney; as defined

below, or by the party, through an authorized and knowledgeable representative.

(2) In the event the requesting party refuses to permit a categorical approach, and instead insists on a document-by-document listing on the privilege log, it must provide the producing party with its reason for doing so in writing within five days after such refusal. Thereafter, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, the producing party, , may apply to the court for an allocation of costs, including attorneys' fees, incurred with respect to preparing the document by- document log. Upon good cause shown, the court may allocate the costs to the requesting party.

(3) To the extent that a party insists upon a document-by document privilege log as contemplated by CPLR 3122, and absent an order to the contrary, each uninterrupted e-mail chain shall constitute a single entry, and the description accompanying the entry shall include the following: (i) an indication that the e-mails represent an uninterrupted dialogue; (ii) the beginning and ending dates and times (as noted on the emails) of the dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all of authors and recipients - together with sufficient identifying information about each person (e.g., name of employer, job title, role in the case) to allow for a considered assessment of privilege issues.

(c) Special Master. In complex matters likely to raise significant issues regarding privileged and protected material, parties- are encouraged to hire a Special Master to help the parties efficiently generate privilege logs, with costs to be shared.

(d) Responsible Attorney. The attorney having supervisory responsibility over the privilege review shall be actively involved in establishing and monitoring the procedures used to collect and review documents to determine that reasonable, good faith efforts are

undertaken to ensure that responsive, non-privileged documents are timely produced.

(e) Court Order. Agreements and protocols agreed upon by parties should be memorialized in a court order.