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A. GAIL PRUDENTI
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MEMORANDUM

April 3, 2014

To: All Interested Persons

From: John W. McConnell

Re: 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.

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The Commercial Division Advisory Council has recommended adoption of a new Commercial Division Rule (22 NYCRR § 202.70(g)), relating to privilege log practice (Exh. A). The proposed rule 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. The parties would be expected to address privilege log issues as part of the meet and confer process, “and to agree, where possible, to employ a categorical approach to privilege designations.” If a party objects to the categorical approach and insists on a document-by-document log, the producing party, “upon a showing of good cause, may apply to the court for the allocation of costs, including attorney’s fees incurred.” To ensure that a party receiving a categorical privilege log receives comprehensible information, a responsible attorney for the producing party would be required to submit a certification under 22 NYCRR § 130-1.1-a setting forth specific facts supporting the privileged status of the materials in each category. The proposal also would treat uninterrupted email chains as a single document.

Persons wishing to comment on this proposal should e-mail their submissions to rulecomments@nycourts.gov or write to: John W. McConnell, Esq., Counsel, Office of Court Administration, 25 Beaver Street, 11th Fl., New York, New York 10004. **Comments must be received no later than June 2, 2014.**

All public comments will be treated as available for disclosure under the Freedom of Information Law and are subject to publication by the Office of Court Administration. Issuance of a proposal for public comment should not be interpreted as an endorsement of that proposal by the Unified Court System or the Office of Court Administration.

EXHIBIT A

MEMORANDUM

TO: Commercial Division Advisory Council

FROM: Subcommittee on Procedural Rules to Promote Efficient Case Resolution
("Subcommittee")

DATE: February 25, 2014

RE: **Modification of Privilege Log Practice in Commercial Cases:
Proposed Amendment to the Statewide Rules of Practice for the
Commercial Division**

Introduction and Background

Before the Council for its consideration is a set of proposed amendments to the Statewide Rules of Practice for the Commercial Division (Exhibit "A" hereto), which pertain to the modification of privilege log practice in commercial cases (the "Proposal"). The Subcommittee believes that the proposed changes will promote efficiency during pretrial disclosure and result in cost savings for the parties. Accordingly, it recommends that the Council transmit the Proposal to the Administrative Board of the Courts and urge its adoption.

The Civil Practice Law and Rules mandate that parties serve formal notice of their respective intentions to withhold otherwise relevant documents on the basis of privilege. *See* CPLR 3122. Currently, the CPLR mandates that a party who intends to withhold documents because of privilege prepare a "privilege log," which: (i) contains a separate entry for each document being withheld; (ii) provides "pedigree" information for each such document; and (iii) sets forth the specific privileges or immunities that insulate the document from production.

Privilege logs are standard fixtures in complex commercial litigation. Often, the number of privileged documents withheld -- and the concomitant size of the requisite privilege log -- will be significant, and the segregation, review, redaction, and document-by-document logging of privileged communications is both time-consuming and costly. Parties are (or at least should be) aware of these costs and the percentage these costs represent of the overall litigation budget. Additionally, clients and their counsel should be weighing these costs against the potential benefits a privilege challenge may have on the outcome of the litigation.

Call for Change in Privilege Log Practice by The Chief Judge's Task Force on Commercial Litigation in the 21st Century

In June of 2012, the Chief Judge's Task Force on Commercial Litigation in the 21st Century issued a comprehensive 31-page report (the "Task Force Report"), analyzing the practices in New York State's Commercial Division and recommending various areas of procedural reform that would enhance the Division's ability to adjudicate complex commercial disputes efficiently and effectively. Among other things, the Task Force recommended re-examining privilege log practice and the role of privilege logs in the litigation process. It observed that:

"[the] creation of privilege logs has become a substantial expense in complex commercial litigation matters. . . . There is a demonstrable need to limit unnecessary costs and delay in the creation of these logs while preserving the ability of the parties and the court to police unwarranted withholding or redaction of documents in discovery." (Task Force Report at 17.)

With these observations in mind, the Subcommittee has drafted a set of rules designed to effectuate the type of reform in privilege log practice recommended by the Task Force.

The Subcommittee's Proposal

Because the costs associated with privilege logs affect both sides to a litigation, it behooves counsel for all parties to discuss early in the case ways to reduce those costs. The Subcommittee believes that the meet-and-confer process contemplated by Commercial Division Rule 8 as a precursor to the Preliminary Conference provides an ideal context in which to raise this issue for discussion, although parties would be well advised to revisit the issue from time to time as developments in the case warrant. During such meet-and-confer sessions, counsel would be encouraged to consider, among other things, employing categorical designations for privileged documents, as opposed to document-by-document entries. According to U.S. Magistrate Judge John Facciola (D.D.C.) and Jonathan Redgrave (Chair Emeritus of the Sedona Conference®'s Working Group on Best Practices for Electronic Document Retention and Production), "the object of this exercise is to create a set of natural differentiations among documents so the parties can say, once again with confidence, what is true of items within the category is true of the whole." To the extent the parties agree to employ a categorical approach to privilege log designations, a party receiving a privilege log that groups documents into categories and, therefore, departs from the traditional document-by-document privilege review, may not object solely on that basis, but may object if the substantive information required by this rule has not been provided in a comprehensible form. In order to reduce the likelihood of this occurring, the Proposal imposes two safeguards: (a) the submission, along with the categorical log, of a certification, pursuant to Part 130 of the Rules of the Chief Administrator, "certifying to the facts supporting the privileged or protected status

of the information included within the category;” and (b) the requirement that a “responsible attorney” (*i.e.* not a newly minted attorney or paralegal) be involved in actively overseeing the privilege review. A certification, particularly one that invokes Part 130 of the Rules of the Chief Administrator and the concomitant specter of sanctions and attorney’s fees awards, is particularly important under the rule regime being proposed. Although the proposed rules would have the salutary goal of streamlining the privilege log process, it remains essential that parties be in a position properly to “police unwarranted withholding or redaction of documents in discovery.” (Task Force Report at 17)

Under the proposed amendment, if a party objects to the categorical approach to preparing privilege log designations and insists upon the document-by-document approach contemplated by CPLR 3122, the producing party may move to allocate to the requesting party the costs associated with such an undertaking. *See U.S. Bank, N.A. v. GreenPoint Mtge. Funding, Inc.*, 94 A.D.3d 58 (1st Dept. 2012) (adopting the cost shifting approach set out in *Zubulake* and concluding that IAS court has discretion to allocate the costs of production to the requesting party). Upon receiving such a motion, the Court would undertake an analysis of the parties’ respective positions and, upon finding good cause, could allocate the costs, including attorneys’ fees, to the requesting party. *Accord Assured Guar. Mun. Corp. v. UBS Real Estate Securities, Inc.*, 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) (authorizing use of a categorical privilege log and reserving the right to shift costs if producing party mischaracterizes documents on log); *Dow Chemical Co. v. Reinhard*, No. M8-85 (HB), 2008 WL 1968302, at *2 (S.D.N.Y. Apr. 29, 2008) (requiring party to pay half the cost of nonparty’s prospective expenses in responding to subpoena *duces tecum*, including the cost of preparing privilege log; in so finding, the Court placed emphasis on fact that nonparty already incurred \$1.6 million in subpoena compliance). Simply put, under the current proposal, an attorney who unreasonably insists that the producing party prepare a document-by document privilege log stands to have the costs of that preparation shifted to him or her.

One additional feature of the proposed amendments bears separate mention: the manner in which counsel may treat e-mail chains on the traditional document-by-document log envisioned by CPLR 3122. As set forth in the Subcommittee’s Proposal, counsel may treat an uninterrupted e-mail dialogue as a single document, provided that the resultant entry discloses: that the e-mails represent an uninterrupted dialogue and provides: “(ii) the beginning and ending dates and times (as noted on the e-mails) of the dialogue; (iii) the number of e-mails within the dialogue; and (iv) the names of all of authors and recipients in the e-mail chain.” This protocol was explicitly been incorporated by the Southern District of New York as Rule II E of its Pilot Project Regarding Case Management Techniques For Complex Civil Cases, which can be found at http://www.nysd.uscourts.gov/rules/Complex_Civil_Rules_Pilot.pdf.

Conclusion

Privilege logs are (or at least should be) tools designed to create some level of

transparency in the document review process and permit litigants to assess the bona fides of the other side's privilege claims. They should not be ends unto themselves, nor should they, in most instances, constitute a primary component of pretrial litigation costs. The Subcommittee's Proposal is an attempt to create more of a balance between the costs of creating a privilege log and its utility.

It should be apparent that the foregoing proposal places new responsibilities on lawyers engaged in privilege review and production as well as on the lawyer propounding document requests. Generally, cooperation should be pursued by both sides to reduce discovery costs and avoid motion practice. In the specific context of privilege review, a modicum of cooperation will likely reduce costs while still generating a useful privilege log.

Accordingly, the Subcommittee recommends that the Council transmit the proposal to the Administrative Board of the Courts and urge its adoption.

- JDL -
- DHT -

EXHIBIT "A"

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, the requirements set forth in CPLR 3122 shall be followed. In that circumstance, however, the producing party, upon a showing of good cause, may apply to the court for the 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 e-mails) 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.