NEW YORK STATE BAR ASSOCIATION
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May 20, 2014

VIA E-MAIL and MAIL

John W. McConnell, Esq., Counsel
Office of Court Administration
25 Beaver Street, 11th Floor
New York, NY 10004

Re: Proposed Commercial Division Rule Relating to Privilege Log Practice

Dear Mr. McConnell:

On behalf of the New York State Bar Association Commercial and Federal Litigation Section, I enclose the attached memorandum with the Section's comments on the new proposed rule of the Commercial Division relating to privilege log practice (22 NYCRR § 202.70(g)).

If there are any questions about the Section's comments, please let me know.

Respectfully yours,

Gregory K. Arenson

Gregory K. Arenson
Chair

cc: Paul D. Sarkozi, Esq. (via e-mail w/encl.)
Mitchell J. Katz, Esq. (via e-mail w/encl.)
Julie A. North, Esq. (via e-mail w/encl.)

Memorandum

To: Office of Court Administration

From: Commercial and Federal Litigation Section

Date: May 14, 2014

Re: The Advisory Council's Proposal Concerning Categorical Privilege Logs

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The Commercial and Federal Litigation Section ("Section") is pleased to submit these comments in response to the memorandum dated April 3, 2014 concerning the 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 ("Proposal"). These comments were approved by the Commercial and Federal Litigation Section Executive Committee on May 14, 2014.

I. Executive Summary

The Section offers the following comments regarding the Proposal.

The Section agrees that the costs and burdens associated with document-by-document privilege logs often outweigh any benefits of such logs to the parties in litigation. The Section therefore enthusiastically supports the general framework of the Proposal, subject to some minor suggested revisions. For the reasons explained below, the Section respectfully offers the following suggestions, which are consistent with rules that have been adopted by other courts and which further the overall purpose of the Proposal:

(1) Rather than implying that the sole means for a court to deal with a party who refuses to accept a categorical privilege log is the cost-shifting approach set forth in the Proposal, the Proposal should acknowledge that a court may also exercise its power under CPLR §3103 to enter a protective order to limit or eliminate the need for a document-by-document log where appropriate in order to prevent unreasonable expense or burden;

(2) The Proposal should encourage counsel to agree that categories of presumptively-privileged documents may be excluded from privilege logs (including categorical privilege logs), including: (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. If the parties cannot reach agreement on such presumptively-privileged documents, such disputes

should be subject to the same cost-shifting approach, as well as CPLR §3103 protective orders, that would apply to disputes regarding categorical logging; and

(3) Rather than requiring the certification pursuant to 22 NYCRR §130-1.1a to set forth "with specificity" those facts supporting the privileged or protected status of the information included with the relevant categories, the certification should be required to include facts sufficient to enable the adversary and court to assess whether the privilege is properly asserted.

II. Support for Categorical Privilege Logs

There is growing recognition by courts and the organized bar that the substantial costs and burdens associated with document-by-document privilege logs often outweigh their benefits. Indeed, in the age of email and other electronic communication, the sheer number of privileged communications that would need to be included on a traditional privilege log has highlighted the need for a more practical approach to privilege logs.

As set forth in the Proposal, in June of 2012, the Chief Judge's Task Force on Commercial Litigation in the 21st Century issued a report which concluded that the costs associated with creating privilege logs often outweigh their benefits. Task Force Report at 17. The Task Force Report identified the categorical approach to privilege logs as an appropriate limitation to privilege logs. Categorical privilege logs were also endorsed by the NYSBA in a report approved by the House of Delegates on June 23, 2012. *See* Report of the Special Committee on Discovery and Case Management In Federal Litigation of the New York Bar Association dated 6/23/2012 ("NYSBA Special Committee Report") at 84. Although the NYSBA Special Committee Report addressed discovery in federal court, the concerns in that report regarding the "harrowing burden" of privilege logs applies equally to state court practice. *See* NYSBA Special Committee Report at 73.

Courts have also increasingly embraced the use of categorical privilege logs, including those courts that are well known for their experience in handling complex commercial disputes. *See, e.g.*, SDNY Local Rule 26.2(c) ("[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."); Delaware Chancery Court Practice Guidelines, 7(b)(ii).

In light of the above, the Section supports the overall purpose and framework of the Proposal in promoting the use of categorical privilege logs.

III. Suggestions To Further the Goals of the Proposal

The Section respectfully offers the following suggested minor revisions to the Proposal, which it believes will further the desirable goals of the Proposal.

A. The Proposal Should Not Imply that Cost Shifting is the Only Power That Courts Have To Limit Privilege Logs, And Should Recognize That Courts Can Also Use Protective Orders For This Purpose

As the Proposal correctly observes, the text of CPLR §3122 suggests that a privilege log would need to be prepared on a document-by-document basis. CPLR §3122 (referring to "each such document"). Presumably for this reason, the Proposal assumes that, despite the Proposal's expressed preference for categorical logging where appropriate, a party to a litigation nevertheless has a unilateral right to insist on a document-by-document privilege log. Based on this assumption, the text of the Proposal clearly indicates that the only way for a court to deal with a party's insistence on a document by document log would be the cost-shifting mechanism that it proposes.

The Section agrees that cost shifting is one sensible way of dealing with a party's insistence on a document-by-document log. However, the Section believes that the wording of the Proposal unfortunately (and probably unintentionally) suggests that cost shifting is the only way for a court to deal with one party's insistence on a document-by-document log. The Section points out that under the plain text of CPLR §3103, a court always has the power to limit or regulate any type of discovery "to prevent unreasonable annoyance, expense . . . disadvantage, or other prejudice to any person or the courts." Therefore, although a party may invoke CPLR §3122 to insist on a document-by-document log, it is also true that a court may, by motion by another party or on its own initiative, invoke its power under CPLR §3103 to appropriately limit privilege logs, just as it may limit any other type of discovery. *See, e.g.*, Patrick M. Connors, Practice Commentary, McKinney's Cons Law of NY, CPLR 3103, C3103:1 (hereinafter "CPLR 3103 Practice Commentary") ("The protective order provision applies to 'any disclosure device.' CPLR 3103(a). This means that, although the seeker of the disclosure has brought itself within the range of disclosability set by CPLR 3101(a) and is making use of a device whose own provisions offer no limitations, the court may nonetheless intercede with a protective order under 3103(a).").[1]

There may well be circumstances where the time, burdens or costs associated with logging on a document-by-document basis is not adequately addressed by cost shifting. For example, a well-funded litigant in a scorched earth mode of litigation may be willing to impose on his adversary's legal team the extremely burdensome and unnecessary document-by-document logging of what the court views as clearly privileged documents, even if this means that the party requesting the privilege log would need to pay the costs or fees associated with such a useless endeavor. If a

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[1] As Professor Connors explains, all of the discovery available under Article 31 is subject to the ubiquitous protective order authority under CPLR 3103:

> The CPLR thus chooses to deal with the problem generally. It establishes in CPLR 3101(a) a wide realm of disclosability. In other sections of Article 31, it then offers many devices to secure the disclosure. Standing in the background at all times, however, regardless of the disclosure sought or the device used to get it, is CPLR 3103 and its ubiquitous protective order.

CPLR 3103 Practice Commentary, C3103:1.

court became satisfied that documents falling into certain categories were privileged, and that a document-by-document privilege log project for such clearly privileged documents would be useless, needlessly time-consuming, or interfere with the schedule for the case, under CPLR §3103, a court would presumably have authority to appropriately limit or eliminate the need to embark on such a useless task.

By clarifying that cost-shifting is not the sole mechanism that a court may use to deal with privilege log disputes, and that protective orders may also be employed, the Proposal would further advance its desirable goals. Moreover, such a revision would make the Proposal consistent with how other courts handle disputes concerning categorical privilege logs. *See, e.g., American Broadcasting Companies, Inc. v. Aereo, Inc.*, 2013 WL 139560 (S.D.N.Y. Jan. 11, 2013) (holding that a party may move for a protective order to avoid needing to create a document-by-document privilege log).[2]

In light of the above, the Section respectfully suggests that the Proposal should not imply that a court is without power in appropriate circumstances to invoke its well established power to limit any type of discovery under CPLR §3103 to avoid, in appropriate settings, the unreasonable expense, burden or prejudice associated with document-by-document logging. Instead, we suggest that the Proposal should add a sentence in the cost-shifting section that simply points out that a court may also deal with privilege log disputes by way of its power to enter protective orders under CPLR §3103 where appropriate. In the least, we suggest that the Proposal should revise the language of the cost-shifting mechanism to make clear that it is one way that a court may address privilege log disputes, and that this is not intended to rule out other appropriate ways of limiting discovery under the CPLR, including protective orders under CPLR §3103.

B. The Proposal Should Encourage Parties to Agree to Exclude Certain Presumptively-Privileged Documents From Privilege Logs

The Proposal does not include a provision which expressly encourages parties to exclude from privilege logs certain types of documents that are presumptively privileged. As many of the courts and commentators who have addressed privilege logs have observed, one key way to limit unnecessary costs is to exclude from privilege logs the following types of documents which are presumptively privileged: (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

[2] It could be argued that federal case law regarding protective orders as applied to privilege logs is distinguishable because the advisory committee notes of Federal Rules of Civil Procedure expressly contemplate that categorical logging may be appropriate depending on the circumstances. *See* 1993 Advisory Committee Notes to Rule 26(b)(5). However, as noted above, CPLR §3103 by its terms authorizes a court to limit any type of discovery where appropriate to avoid unreasonable discovery, and therefore the Committee believes that federal case law provides useful guidance on this issue. Given the new realities and burdens that courts and litigants are faced with in the electronic discovery era, it is surely within a court's power under CPLR §3103 to use protective orders to reasonably regulate and limit privilege logs. *See* CPLR 3103 Practice Commentary, C3103:1.

law office, legal assistance organization or legal department of a corporation or of another organization.[3]

Just as the Proposal establishes a preference in the Commercial Division to log by category where appropriate, it is equally as sensible to establish a preference that the parties endeavor to reach agreement as to certain categories of documents that are so obviously privileged that they should not be logged at all. If the parties cannot reach agreement on such presumptively-privileged documents, such disputes should be subject to the same cost-shifting approach, as well as CPLR §3103 protective orders, that would apply to disputes regarding categorical logging.

By expressly encouraging agreement to exclude certain types of documents that are presumptively privileged, this will further the overall goals of the Proposal, and will also make the Commercial Division's practices on privilege logs similar to the way other courts have dealt with similar issues.

C. The Certification Supporting the Categorical Log Should Require Information Sufficient to Enable The Adversary and Court To Assess The Privilege Assertion

The Proposal includes a requirement that the certification that accompanies a categorical privilege log shall set forth "*with specificity* those facts supporting the privileged or protected status of the information included within the category" (emphasis added). Instead of using a "specificity" requirement, the Section respectfully suggests that the Proposal should, consistent with applicable case law, simply require that the certification set forth facts *sufficient* to enable the adversary and court to assess whether the privilege is properly asserted.

In assessing the validity of privilege assertions using categorical logs, other courts have generally required the party asserting the privilege to provide "information *sufficient* to enable the receiving party to make an intelligent determination about the validity of the assertion of the privilege." *Automobile Club of New York, Inc. v. The Port Authority of New York and New Jersey*, 297 F.R.D. 55, 61 (S.D.N.Y. 2013). *See also* Delaware Chancery Court Practice Guidelines, 7(c) ("The guiding principle for privilege logs is to provide opposing parties with

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[3] *See, e.g.*, Southern District of New York as Rule II.D of its Pilot Project Regarding Case Management Techniques For Complex Civil Cases (listing the above categories as presumptively privileged); Task Force Report at 17 (quoting with approval the Delaware federal court rule that limits logs to communications generated before the complaint is filed); Delaware Chancery Court Practice Guidelines, 7(b)(i) ("The Court generally does not expect parties to log post-litigation communications."); *American Broadcasting Companies v. Aereo*, 2013 WL 139560 at *2 (S.D.N.Y. Jan. 11, 2013) (encouraging the parties to reach agreement to exclude from privilege logs, among others, documents created after the commencement of litigation and purely internal communications among counsel and their agents); NYSBA Special Committee Report at 82-83 ("Certain types of documents are so obviously privileged that it may serve no purpose to log them at all. A good example would be communications exclusively between a party and trial counsel. Another would be work product . . . that an attorney prepares after the filing of the complaint.").

sufficient information to allow them to challenge decisions to withhold documents for privilege.") (emphasis added).

The Section believes that it would be more prudent to use the well-established "sufficiency" standard, rather than the "specificity" standard included in the Proposal. If the rule required certifications to meet a specificity standard, it is much more likely to generate disputes about whether a party included specific enough information about the topics that must be included in a certification. This would only create an opportunity for parties to impose needless burdens on the adversary and the court, and could threaten to undermine the overall purpose of the Proposal, which is to streamline a process that is far too complicated and expensive. Logic and relevant authority suggest that a more practical standard is one that asks: Has the party asserting privilege on a categorical basis provided sufficient information so that the adversary and court can assess the asserted privilege? If the answer is yes, then this should end the inquiry.

IV. Recommendation

For the reasons explained above, the Section commends the Advisory Council for the welcome reform reflected by the Proposal, and endorses the overall purpose and framework of the Proposal. The Section respectfully requests that the following minor suggestions be considered, which are consistent with rules that have been adopted by other courts and which further the overall purpose of the Proposal:

(1) Rather than implying that the sole means for a court to deal with a party who refuses to accept a categorical privilege log is the cost-shifting approach set forth in the Proposal, the Proposal should acknowledge that a court may also exercise its power under CPLR §3103 to enter a protective order to limit or eliminate the need for a document-by-document privilege log where appropriate in order to prevent unreasonable expense or burden;

(2) The Proposal should encourage counsel to agree that categories of presumptively-privileged documents may be excluded from privilege logs (including categorical privilege logs), including: (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. If the parties cannot reach agreement on such presumptively-privileged documents, such disputes should be subject to the same cost-shifting approach, as well as CPLR §3103 protective orders, that would apply to disputes regarding categorical logging; and

(3) Rather than requiring the certification pursuant to 22 NYCRR §130-1.1a to set forth "with specificity" those facts supporting the privileged or protected status of the information included with the relevant categories, the certification should be required to include facts sufficient to enable the adversary and court to assess whether the privilege is properly asserted.

Prepared by: The Commercial Division Committee of the Commercial and Federal Litigation Section, Mitchell J. Katz and Julie A. North, Co-Chairs, with assistance from Tom M. Fini

NEW YORK COUNTY
NYCLA
LAWYERS' ASSOCIATION

Pamela L. Gallagher
Co-Chair
Brian D. Graifman
Co-Chair
Supreme Court Committee

June 2, 2014

Proposed adoption of new rule relating to
Privilege Logs in the Commercial Division

The Supreme Court Committee[1] reviewed the Office of Court Administration ("OCA") proposal regarding the adoption of new Commercial Division Rule 22 NYCRR § 202.70(g), relating to privilege log practice.

A majority of the members of the Supreme Court Committee at our meeting on May 20, 2014 voted in favor of the proposal following a presentation by members of the Commercial Division Advisory Council.

The new rule would establish a "preference" in the Commercial Division for the use of categorical designations rather than document-by-document logging. The producing party would be required to submit a certification under 22 NYCRR § 130-1.1-a by a responsible attorney or by the party through an authorized and knowledgeable representative 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.

Although some Committee members suggested that the language about party certification be removed or amended to make clear that the only party representative that could make the certification would be a responsible in-house counsel who is subject to Part 130, other Committee members believed that the rule was sufficiently clear to achieve the result of a more streamlined privilege-logging process.

[1] The views expressed are those of the Supreme Court Committee, have not been approved by the New York County Lawyers' Association Board of Directors and do not necessarily represent the views of the Board.