

FEDERAL E-DISCOVERY

Court Applies Proportionality In Determining Privilege Log Burden



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Let's face it: No one went to law school dreaming of one day preparing a privilege log, much less one with hundreds or thousands of entries. But with the vast volumes of electronically stored information (ESI) common to modern litigation, and the high standard of care required to provide enough information to justify a claim of privilege on an otherwise discoverable document, many lawyers may find themselves devoting significant time to logging documents. And even with this effort, many parties may still wind up embroiled in motion practice regarding the adequacy of logs. And judges, in turn, may find themselves fielding requests for in camera review of challenged log entries. There may be some relief on the way in the form of recent decisions recognizing that proportionality principles can help determine how much detail is required in a party's privilege logs.

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Proportionality

The concept of proportionality was introduced as part of the 1983 amendments to the Federal Rules of Civil Procedure “to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.” Fed. R. Civ. P. 26 Advisory Committee Note. Concerned that the concept was not receiving adequate attention, the 2015 amendments to the Federal Rules gave more prominence to the proportionality concepts long embedded in Rule 26; as of those amendments, the concept of proportionality was moved to the very start of Rule 26(b)(1), which describes the permissible scope of discovery:

Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering



the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

Additionally, the Advisory Committee Note to updated Federal Rule 37(e), which addresses the failure to preserve ESI, was revised in 2015 to suggest a broader application of proportionality principles, stating “Another factor in evaluating the reasonableness of preservation efforts is proportionality.” Since the 2015 amendments, courts have increasingly embraced the concept of proportionality and its impact on reducing the costs and other burdens common to discovery,

applying proportionality principles as part of a number of decisions relating to discovery practice.

Privilege Logs

Federal Rule of Civil Procedure 26(b)(5)(A) provides that “[w]hen 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 that, without revealing information itself privileged or protected, will enable other parties to assess the claim.” Privilege logs are typically electronic charts intended to do just that—expressly identify documents withheld from production on the basis of privilege and provide corresponding identifying information to set forth the privilege claim. As to what information is sufficient in a privilege log, federal and local rules provide some guidance. For instance, in the Southern District of New York, Local Civ. R. 26.2(a)(2) requires, for each document withheld, the party asserting the privilege to identify the nature of the privilege, the type of document, its general subject matter, date, author, addressees, and any other recipients, and where not otherwise apparent, the relationship of the author, addressees, and other recipients to each other.

Creating a privilege log can be an arduous process for parties and their counsel, especially in situations involving privilege claims over hundreds or thousands of

documents in voluminous ESI populations. As noted by the Southern District in the Committee Note to Local Civil Rule 26.2, “[w]ith the advent of electronic discovery and the proliferation of e-mails and e-mail chains, traditional document-by-document privilege logs may be extremely expensive to prepare, and not really informative to opposing counsel and the Court.”

The issue of the burden of privilege logs is not new—by 1993, in the days prior to e-discovery, it was already so acute that the Advisory Committee wrote in its note to Rule 26(b)(5)(A) that “[t]he rule does not attempt to define for each case what information must be provided when

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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.”

A few years later, a party asked a magistrate judge in the Southern District to allow him to prepare a categorical privilege log over the

objection of the plaintiff government agency. See *S.E.C. v. Thrasher*, 1996 WL 125661 (S.D.N.Y. 1996). That court did just that, finding “in appropriate circumstances, the court may permit the holder of withheld documents to provide summaries of the documents by category or otherwise to limit the extent of his disclosure. This would certainly be the case if (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.” *Id.* at *1. The next year, citing both the *Thrasher* decision and the 1993 Advisory Committee Note, another court similarly found that a party, in a matter with voluminous discovery, was not required to produce a document-by-document privilege log and that, instead, a categorical privilege log was sufficient. *In re Imperial Corp. of Am.*, 174 F.R.D. 475 (S.D. Cal. 1997).

A growing trend has seen parties attempt to alleviate some of the burden associated with privilege logs by moving away from traditional document-by-document logs in favor of such categorical privilege logs, where sets of similar documents are grouped together in log entries. Indeed, the Southern District has encouraged categorical privilege logs in Local Civil Rule 26.2, stating 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.” Establishing a method for a receiving party to challenge logs

deemed insufficient, the Rule also provides that “[a] party receiving a privilege log that groups documents or otherwise departs from a document-by-document or communication-by-communication listing 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.”

‘Triaxx’

Even with techniques such as categorical logging, the work to create, optimize, and defend privilege logs can still be a significant burden. As such, and since they are a standard aspect of the scope of discovery efforts, privilege logs seem ripe for application of proportionality principles. A magistrate judge from the Southern District of New York recently did just that, applying proportionality in a pair of decisions in a matter where a party claimed that information provided in privilege logs was not sufficient.

In *U.S. Bank Nat’l Assoc. v. Triaxx Asset Mgmt.*, 2021 WL 4973611 (S.D.N.Y. Oct. 25, 2021), the plaintiff challenged the sufficiency of the defendants’ revised privilege log, which they had produced in response to a prior decision by the court. The plaintiff argued that the revised log did not comply with Federal Rule 26(b)(5)(A) because it lacked information on “which law firm represented which entity and when.” *Id.* at *1. The plaintiff particularly complained that the defendants had refused to comply with its request to identify—for each listed law firm—the clients, nature and duration of engagement, and whether there were any changes to

the client list or engagement nature during that time. See *id.*

In opposition, the defendants argued that their revised log did, in fact, comply with the court’s prior decision, that the plaintiff should have raised these new issues under its original challenge, and citing that decision, that proportionality should be considered in evaluating privilege logs. See *id.* In the prior decision, the court addressed the plaintiff’s original challenge of the adequacy of the detail provided by the defendants in their categorical privilege log. See *U.S. Bank Nat’l Assoc. v. Triaxx Asset Mgmt.*, 2021 WL 1968325 (S.D.N.Y. March 31, 2021). There, in its analysis, while finding a number

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a deficiencies in the privilege log, the court commented that “proportionality is an issue in evaluating privilege logs, just as it is with other aspects of discovery.” *Id.* at *5. The court, then, carefully shaped the relief for the plaintiff, requiring the defendants to provide specific additional information for some privilege log categories and to produce a new document-by-document log for a different subset of categories. *Id.* This resulted in the defendants’ revised log, also challenged by the plaintiff.

On this renewed challenge, the court agreed with the defendants’ arguments, noting that, in this instance, the categorical portion of the revised privilege log “covers

over 11,000 documents ... ‘not directly at issue in this action[,]’ and, thus, finding that “[o]n this record, it would be disproportionately burdensome to require the [defendants] to research and report on the representational history of every law firm listed on the Revised Log.” *U.S. Bank Nat’l Assoc. v. Triaxx Asset Mgmt.*, 2021 WL 4973611 at *2. However, the court did find it reasonable to require the defendants to provide the plaintiff with identifying information on which of the law firms listed in its privilege log were its lawyers. See *id.*

Conclusion

As courts have, over the past many years, found that reasonableness, and not perfection, is what is required from parties in the discovery process, it is not surprising that they have also increasingly embraced the related concept of proportionality. Especially considering the explicit goals of proportionality to reduce the burden of otherwise broad discovery, it seems natural to extend the concept of proportionality set forth in Federal Rule 26(b)(1) to the privilege logs required pursuant to Rule 26(b)(5). Decisions like those in *Triaxx* demonstrate the versatility of proportionality principles and their potentially wide-ranging applicability in the discovery context.