

WORLDWIDE

Amsterdam
Ankara
Antwerpen
Asunción
Athens
Bangalore
Bangkok
Barcelona

Belgrade
Beijing
Birkirkra
Bogotá
Bogotá
Bogotá
Bucharest
Budapest
Buenos Aires

Cairo
Cairo
Cairo
Casablanca
Doha
Doha
Dubai
Durban
Erewhon
Fennia

Fukuoka
Geneve
Gorizia
Guadalajara
Guatemala
Hanoi
Hong Kong
Istanbul

Jakarta
Jeddah
Kampala
Karlsruhe
Kuala Lumpur
Kuala Lumpur
Kuala Lumpur
Kuala Lumpur
Kuala Lumpur

Kuala Lumpur
Kuala Lumpur
Kuala Lumpur
Kuala Lumpur
Kuala Lumpur
Kuala Lumpur
Kuala Lumpur
Kuala Lumpur

Luanda
Lublin
Luxembourg
Madagascar
Madagascar
Madagascar
Madagascar
Madagascar

Milan
Milan
Milan
Milan
Milan
Milan
Milan
Milan

New Delhi
New Delhi
New Delhi
New Delhi
New Delhi
New Delhi
New Delhi
New Delhi

Prague
Prague
Prague
Prague
Prague
Prague
Prague
Prague

Sao Paulo
Sao Paulo
Sao Paulo
Sao Paulo
Sao Paulo
Sao Paulo
Sao Paulo
Sao Paulo

Shanghai
Shanghai
Shanghai
Shanghai
Shanghai
Shanghai
Shanghai
Shanghai

Udine
Udine
Udine
Udine
Udine
Udine
Udine
Udine

November 20, 2025

Rule Amendments Pave Path For A Privilege Claim 'Offensive'

By David Ben-Meir

Amendments to the Federal Rules of Civil Procedure are projected to take effect on Dec. 1 for cases filed on or after that date.

They will require parties to address in their Rule 26(f) discovery plan issues surrounding the timing and manner of making privilege claims under Rule 26(b)(5)(A).[1] The conventional vehicle for advancing privilege claims is the privilege log — a record that each party in a court dispute creates and produces to the opposing side during the dispute's discovery phase. It describes the nature of each document or other information that the party is withholding based on a privilege, like attorney-client privilege, or some other protection or immunity from disclosure.

The privilege log is supposed to describe documents in a manner such that the other side can appreciate the legitimacy of the claim that each document is appropriately withheld, but without disclosing the privileged information itself.

Litigators should embrace the new requirements for an early negotiation of privilege-related discovery as a means to securing opportunities to strengthen their cases or for settlement leverage.

The Costs, Delay and Gamesmanship Frequently Surrounding Privilege Claims

As the types and number of documents subject to discovery in litigation continue to increase — particularly because of the proliferation of emails and new forms of electronic communication — so has the burden and cost of privilege log preparation.[2]

This increased expense has occurred despite the evolution in software and related tools for improving efficiency in document discovery. Analyzing each potentially privileged document remains labor-intensive and is frequently a fraught task, involving a hierarchy of decisions that a litigation attorney must make based on the applicable jurisdiction's often nuanced law of attorney-client privilege, in order to appropriately characterize the document.

Making privilege calls can be a challenging process, often heightened by the significant consequences of painting with too broad or narrow a brush. Overdesignating documents as privileged, for example, risks the loss of a party's credibility with the court, potentially beyond merely the party's privilege assessment process.

On the other hand, intentionally producing documents for which a potentially legitimate privilege claim exists risks a waiver of the privilege claim to not only the produced documents, but possibly to all other privileged documents on the same subject matter.

WORLDWIDE

Amsterdam
Ankara
Antwerpen
Asi
Auckland
Athens
Bangalore
Bangkok
Barcelona

Belgrade
Beijing
Birkirkra
Bogota
Bogotino
Borislaw
Bucharest
Budapest
Buenos Aires

Cairo
Cali
Casablanca
Doha
Dauila
Dubai
Durban
EpeWele
Farrua

Fukuoka
Geneve
Gozia
Guadalajara
Guatemala
Hanoi
Helsinki
Hong Kong
Istanbul

Jakarta
Jeddah
Kampota
Karlsruhe
Kauras
Kigierfurt
Koblenz
Kolkata
Köln

Kuala Lumpur
Kyiv
Lagos
Lisbon
Lima
Ljubljana
Lodi
London
Los Angeles

Luanda
Lublin
Luxembourg
Madaga
Manila
Mantova
Medellin
Mexico City
Miami

Milan
Modena
Montevideo
Montreal
Moscow
Mumbai
Munich
Naples

New Delhi
New York
Osaka
Oso
Ottawa
Paris
Pavia
Ploesti
Pune

Prague
Puebla
Rabat
Riga
Rio de Janeiro
Rome
Rosario
Rzeszow
Santiago de Chile

Sao Paulo
Santiago
Seoul
Shanghai
Shenzhen
Sidney
Singapore
Stockholm
Stockholm

Shoshoung
Tapiet
Teguingaipa
Tel Aviv
The Hague
Tokyo
Toronto
Touin
Trento

Udine
Valencia
Varna
Venice
Vernia
Vilnius
Warsaw
Zagreb
Zürich

Unsurprisingly, therefore, litigation attorneys do not take privilege log preparation lightly are — at least as of now — generally uncomfortable relying on artificial intelligence tools to decide whether potentially privileged documents are indeed privileged without an attorney's eyes on each and every one of them.

The challenges surrounding asserting privilege over large volumes of documents lead some litigators to employ tactics to save on the cost of review or to obscure documents that may be potentially harmful to their case.

For example, one might attempt to shortcut privilege log preparation and potentially obscure privilege claims by preparing and producing categorical privilege logs. Such logs typically contain individual log entries that purport to describe groups of documents with a single description, often without any explanation for why the group exists or what characteristics are common to the documents in the group.

Litigators at times produce these logs unilaterally, even in the absence of an agreement among the parties that such logs are appropriate for the case.

Because the logs are categorical, the descriptions are — by both design and necessity — generic, making it practically impossible to understand the privilege claim as to any specific document in the group. And this makes it all too easy to bury harmful, nonprivileged documents within a document category under a claim of privilege.

Categorical logs, however, can significantly ease the cost burden of preparing privilege logs because potentially privileged documents can be electronically categorized into groups and logged with a single entry.

Another tactic that raises ethical concerns, but which is entirely commonplace, is the submission of privilege logs containing misleading or suspect privilege log entries.

For example, in *Epic Games Inc. v. Apple Inc.* — a dispute involving Apple's compliance with an injunction to stop its App Store anti-steering policies — Apple designated more than one-third of over 150,000 responsive documents as privileged.[3] The U.S. District Court for the Northern District of California found last year that Apple used claims of privilege to conceal evidence, including claiming privilege over documents with a purported dual business and legal purpose, but in which no lawyer offered or was asked for legal advice.[4]

More recently, in *Federal Trade Commission v. Amazon.com Inc.*, Amazon reportedly withheld and logged almost 70,000 documents as privileged, which the FTC relied on throughout discovery, including for preparation of key witness depositions.[5] Well into discovery, concerns about Amazon's privilege assertions prompted the FTC to request that Amazon rereview its privilege logs. Approximately one year later, Amazon withdrew its privilege claims on over 90% of its privilege log and produced 69,909 documents.

The U.S. District Court for the Western District of Washington found in July that rolling production of these documents continued even after the fact discovery cutoff, and that Amazon's withholding "was tantamount to bad faith," an apparent effort to "gain a tactical advantage ... [and] gamesmanship."

WORLDWIDE

Amsterdam
 Ankara
 Antwerpen
 Aotearoa
 Asunción
 Athens
 Bangalore
 Barcelona
 Beijing
 Bogotá
 Buenos Aires
 Cairo
 Cali
 Casablanca
 Doha
 Dubai
 Epe-Mer
 Fennia
 Frankfurt
 Geneva
 Giza
 Guadalajara
 Guatemala
 Hong Kong
 Istanbul
 Jakarta
 Jeddah
 Kampala
 Karlsruhe
 Kauras
 Kigali
 Koblenz
 Kolkata
 Köln
 Kuala Lumpur
 Kyiv
 Lagos
 Lisbon
 Lima
 Ljubljana
 London
 Los Angeles
 Luanda
 Lublin
 Luxembourg
 Madrid
 Manila
 Miami
 Medellín
 Mexico City
 Milan
 Modena
 Montreal
 Moscow
 Munich
 Naples
 New Delhi
 New York
 Osaka
 Oslo
 Ottawa
 Paris
 Pavia
 Ploiești
 Pune
 Prague
 Puebla
 Rabat
 Riga
 Rio de Janeiro
 Rome
 Rosario
 Rzeszów
 Santiago de Chile
 Sao Paulo
 Seoul
 Shanghai
 Shenzhen
 Sidney
 Singapore
 Skopje
 Stockholm
 Strasbourg
 Taipei
 Tegucigalpa
 Tel Aviv
 The Hague
 Tokyo
 Toronto
 Trier
 Tübingen
 Udine
 Valencia
 Varna
 Venice
 Vienna
 Vilnius
 Warsaw
 Zagreb
 Zürich

These examples are only some of the most high-profile disputes involving parties' processes for asserting privilege, but they are far from uncommon. Indeed, the cases where privilege claims appear to be legitimate and uncontroversial on both sides appear to be the exception. Only time will tell whether the proposed amendments curtail such conduct.

Nevertheless, even in the absence of bad faith, privilege log preparation is often relegated without much strategic consideration to the tail end of the fact discovery phase. If one side is not aggressively demanding privilege logs, the opposing side may let the matter slide, whether to delay the incurrence of its side's costs of preparing the logs, or out of concern for the possibility of discovery disputes that producing the logs will invite.

Insisting on early disclosure of privilege logs should prevent an adversary from producing privilege logs late in discovery, which otherwise could potentially foreclose motions challenging their privilege claims, and negate any leverage that compelling their production might manifest.

Rethinking the Approach to Privilege in View of the Amendments

The proposed amendments to the Federal Rules of Civil Procedure are specifically intended to bring issues surrounding privilege assertions to the outset of discovery so that privilege disputes are addressed well in advance of the discovery cutoff.

What some advocates may overlook, and what the proposed amendments should persuade them to consider, are the opportunities that could materialize for settlement leverage or to strengthen a case by taking the initiative on privilege logs right at the start of litigation.

What may be apparent to counsel on one side of a dispute are the myriad issues surrounding the production of its side's privilege log. What is generally unknown to that side are the other side's privilege-related challenges, and the pressure points that a party may gain by both demanding an early production of logs and aggressively disputing the suspect entries on the opposition's log once it is produced.

With parties in litigation seemingly withholding documents on increasingly strained bases of privilege, litigation counsel should embrace the amendments and leverage them to bring privilege issues to a head early in discovery.

What that means is that litigation counsel should consider privilege issues as early as possible and candidly discuss those issues with the client. That discussion should be oriented around exploring the potential opportunity to gain an advantage or leverage over the opposing party or parties.

The discussion includes appreciating the front-loaded financial expense of instigating privilege battles with the other side. It also includes planning to initiate an early collection of documents that are likely to be responsive to anticipated discovery, identifying from among them potentially privileged documents, assessing the nature and strength of privilege as to such documents, assessing the likely harm in disclosing documents where the nature and strength of the privilege is uncertain, and preparing draft privilege logs.

WORLDWIDE

Amsterdam
 Ankara
 Antwerpen
 Arafat
 Asunción
 Athens
 Bangalore
 Bangkok
 Barcelona
 Beijing
 Belgrade
 Berlin
 Birkirkra
 Bogota
 Bologna
 Bratislava
 Bucharest
 Budapest
 Buenos Aires
 Cairo
 Cali
 Casablanca
 Doha
 Dubai
 Durban
 Epe-Mere
 Ferrara
 Fukuoka
 Geneva
 Giza
 Guadalajara
 Guatemala
 Hanoi
 Helsinki
 Hong Kong
 Istanbul
 Jakarta
 Jeddah
 Kampala
 Karlsruhe
 Kauras
 Kigali
 Koblenz
 Kolkata
 Köln
 Kuala Lumpur
 Kyiv
 Lagos
 Lisbon
 Lima
 Ljubljana
 Lond
 London
 Los Angeles
 Luanda
 Lublin
 Luxembourg
 Madrid
 Manila
 Maribor
 Medellín
 Mexico City
 Miami
 Milan
 Modena
 Monterey
 Montreal
 Moscow
 Mumbai
 Munich
 Naples
 New Delhi
 New York
 Osaka
 Oslo
 Ottawa
 Paris
 Pavla
 Ploesti
 Pune
 Prague
 Puebla
 Rabat
 Riga
 Rio de Janeiro
 Rome
 Rosario
 Rzeszow
 Santiago de Chile
 Sao Paulo
 Santiago
 Seoul
 Shanghai
 Shenzhen
 Sidney
 Singapore
 Skopje
 Stockholm
 Strasbourg
 Taipei
 Tegucigalpa
 Tel Aviv
 The Hague
 Tokyo
 Toronto
 Tourni
 Trento
 Udine
 Valencia
 Varna
 Venice
 Vienna
 Vilnius
 Warsaw
 Zagreb
 Zürich

The entire exercise is about assessing the client's privilege-related exposure and defenses with an eye toward future privilege battles. The assessment of the client's privilege issues affords counsel the opportunity to gauge the manner and force of a privilege offensive against the opposing party.

A privilege claim offensive does not require that the assessment of the client's privilege issues reveals no privilege concerns. In any complex litigation, privilege concerns exist. Indeed, counsel should expect that the assessment will reveal the existence of unhelpful documents for which a basis for asserting a privilege may exist but is far from unassailable.

But counsel must balance the risk of disclosure of such documents with the potential gains — albeit likely unknown — with a bias toward leaning into engaging into privilege disputes.

Armed with an understanding of the client's privilege issues, litigation counsel can then engage opposing counsel in a conference of the parties, with privilege as a major issue for discussion. Counsel should highlight the new federal rules to discuss details of when privilege logs will be exchanged, which preferably would occur well before party depositions.

Supplemental privilege logs are often necessary, and the timing for such exchanges should be agreed to, as well. Counsel should also specify the consequences for failing to meet the agreed-to deadlines for producing final logs.

Aside from timing, counsel should discuss the format and level of specificity in privilege log entries. There may be cases where categorical logs are desirable, but making such an agreement should come with the expectation that the other side will use the categorical log in order to make challenges to privilege claims extremely difficult, if not impossible.

That may be a price worth paying if the client is deemed better off producing a categorical log itself, whether because of the cost savings it may afford or because the client stands a better chance of preserving the confidentiality of documents based on assailable privilege claims.

The likely better approach, though, is to avoid categorical logs, and instead adopt a protocol for document-by-document descriptions that include a specified level of detail about the subject matter of the communication, as opposed to a generalization description. For example, there is a meaningful difference between describing a communication as "seeking advice of counsel on patent issues" versus describing the same communication as "seeking advice of counsel regarding validity of the '123 patent."

Coming to an agreement with opposing counsel about such issues early in a case may be difficult, mostly because the advance preparation needed to take informed positions on these issues can be substantial. Nevertheless, the recommended course is to prepare for and have those discussions, and come to an agreement, with the court's assistance, if necessary.

WORLDWIDE

Amsterdam
Ankara
Antwerpen
Asunción
Athens
Bangalore
Barcelona
Beijing
Belgrade
Berlin
Birkirkra
Bogotá
Bogotá
Bogotá
Bucharest
Budapest
Buenos Aires
Cairo
Cali
Casablanca
Doha
Doha
Dubai
Dubai
Epe-Meire
Farras
Fukuoka
Geneve
Gozia
Guadalajara
Guatemala
Hanoi
Hong Kong
Istanbul
Jakarta
Jeddah
Kampota
Karlsruhe
Kaukas
Klagenfurt
Koblenz
Kolkata
Köln
Kuala Lumpur
Kyiv
Lagos
Lisbon
Lima
Ljubljana
Lodi
London
Los Angeles
Luanda
Lublin
Luxembourg
Madaga
Manila
Manila
Medellin
Mexico City
Miami
Milan
Milan
Modena
Montevideo
Moscow
Moscow
Munich
Munich
Naples
New Delhi
New York
Osaka
Osaka
Osaka
Ottawa
Paris
Paris
Pavia
Pleasant
Pune
Prague
Puebla
Rabat
Rabat
Rio de Janeiro
Rome
Rosario
Rzeszow
Santiago de Chile
Sao Paulo
Seoul
Seoul
Shanghai
Shenzhen
Shenzhen
Singapore
Singapore
Stockholm
Strasbourg
Taipei
Tegucigalpa
Tel Aviv
The Hague
Tokyo
Toronto
Touren
Trento
Udine
Valencia
Varna
Venice
Venice
Vinnitsa
Warsaw
Zagreb
Zürich

To the extent counsel disagree about the requirements and timing for producing privilege logs, they should bring those disputes to the court's attention in the case management report and/or at the case management conference. That effort should culminate in a case management order that provides a significant measure of clarity about when logs will be produced and what to expect once they are, with the expectation that there should be enough time to address whatever privilege issues the logs reveal.

A case management order detailing the timing and manner of making privilege claims should significantly reduce such disputes after logs are exchanged because counsel on both sides will have clear recourse based on the order to address such issues with the court.

Rather than fighting about the quality or timing of disclosures, each side should be able to focus immediately on the substance of the opposing side's privilege claims. It is at this point when a client can reap the payoff from all of the advance work with its counsel on privilege issues.

That advance work, and the continuing focus on privilege issues thereafter, should well inform counsel on the strategy for initiating and engaging in privilege battles. Because these battles typically involve documents for which there is a debatable privilege claim, they are more likely to constitute key documents in the case.

Because of that, and because counsel has presumably built into the case management order sufficient time to litigate the merits of those claims, counsel has created a disclosure risk to

the opposing party that could meaningfully tilt the scales of the overall dispute in the client's favor.

Accordingly, litigators should lean into the opportunity presented by the new federal rules amendments by having candid discussions with their clients about investing in an early privilege review and going on a privilege offensive.

David H. Ben-Meir is the principal at Ben-Meir Law Group.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] https://www.supremecourt.gov/orders/courtorders/frcv25_limp.pdf.

[2] Growth of the eDiscovery market has been attributed in part to the increased volume of electronic data, and it is expected to continue to increase through at least 2029. www.thebusinessresearchcompany.com/report/ediscovery-global-market-report

[3] See *Epic Games, Inc. v. Apple, Inc.*, 4:20-cv-05640-YGR (N.D. Cal.).

[4] *Id.*

[5] See *Federal Trade Commission v. Amazon.com, Inc. et al.*, case no. 2:23-cv-00932-JHC (W.D. Wash.).