# A Sample Solution

Exploring sampling as a technique for validating categorical privilege logs.

*BY KATHLEEN MCDOWELL AND BOBBY MALHOTRA*

**FOR YEARS NOW, CREATING** privilege logs has been associated with a tedious and expensive process that often yields little tangible benefit. Traditionally, for each document withheld on privileged grounds, parties have been providing a detailed log including date information, senders/authors, recipients (including cc/bcc), a description of the subject matter and a prima facie explanation as to why the document is privileged or otherwise protected from disclosure. Providing this level of detail for every document withheld can require a herculean effort and cost clients thousands of dollars.

Recognizing this burden associated with document-by-document privilege logging, various jurisdictions have encouraged parties to consider the use of categorical privilege logs. Nearly a quarter of a century ago, the Advisory Committee Notes to the 1993 Federal Rules of Civil Procedure amendments

warned that detailed privilege logs "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 category." Despite this judicial encouragement, however, proposals for categorical logs are often met with resistance from opposing counsel in practice.

## THE BEST OF BOTH WORLDS

One of the main concerns from lawyers who resist categorical privilege

logs has to do with transparency—or the alleged lack thereof. Concerned advocates argue that use of categorical privilege logs creates more opportunity for abuse and may allow the other side to "hide the ball" by cloaking a broader set of documents with privilege that are then buried within a particular category. They are afraid that categorical logs mean fewer details about specific documents, making it more difficult

THIS "HYBRID" LOG WITH A SAMPLING AUDIT MECHANISM MAY RESOLVE MANY TRANSPARENCY CONCERNS.

for the receiving party to assess the validity of the underlying privilege assertions.

The concern about lack of transparency in categorical privilege logs can be addressed by sampling and individually logging a certain percentage of documents within each category. This "hybrid" privilege log with a sampling audit mechanism may resolve many of these transparency concerns and increase the prevalence of categorical logs.

Under this approach, the parties agree to a two-step process. First, the parties agree on and exchange a categorical log for all or some of the underlying privileged documents. Next, as part of an auditing mechanism for the documents listed on the categorical log, the parties would exchange a traditional individual-entry privilege log for a certain

percentage of sample documents identified in a statistically sound manner for some or all of the categories on the categorical log.

As part of the auditing mechanism, the parties would analyze each randomly selected sample document, and then draft an individual log line entry for each selected document. If, during the course of this analysis, a document is downgraded from privileged to not privileged, the party would produce that document, and then employ the same statistically sound selection method to identify a replacement document from the same subject matter category.

This replacement testing would continue until the claim of privilege stands with respect to the replacement document. To the extent that the auditing process indicates that privilege calls were improperly made on a systemic basis, the parties could reserve their rights to require additional testing or a re-review of withheld material.

## COOPERATION WANTED

This hybrid approach to privilege logging allows for a great deal of flexibility as to format and content of privilege logs, but it is still dependent on cooperation between the parties.

At the outset, the parties should meet and confer to address issues of workflow, technology, and substance and format of the privilege log. Among other things, the parties should discuss the specific subject matter or other categories to appear on the log, how those categories will be identified, the percentage of sample documents from each category to be individually logged, and the underlying technology and workflow to be used to identify and track documents during the audit process.

As part of the meet and confer process, parties could also consider which corpus of documents should be categorically logged, whether there is a corpus of documents that should only be individually rather than categorically logged, and whether there are categories of documents that can be excluded from the logging process altogether. For example, the parties may agree not to log redacted documents at all, on the theory that the bases for the redactions are evident from the text and context of the produced documents themselves.

## CUSTOMIZED AND TRANSPARENT

Another benefit of this hybrid approach is that the workflow can be customized to take into account the comfort level of the parties and the underlying facts, circumstances, and nuances of the particular matter. The parties can decide on the percentage of documents to be individually

logged (although a sample consisting of no more than 5 to 10 percent of the underlying documents in each category is typically sufficient for most categories), or impose a numerical cap on the number of documents to be individually logged.

The parties have the flexibility to increase the sample percentage for particular categories of documents that are likely important to the case, or those categories where there is an greater chance of erroneous privilege calls being made. The parties can decrease the percentage of sampling for those categories that are not likely to contain important information or those documents that fall before or after a specified date range. The parties can decide how families of documents selected as part of the audit process will be handled or how documents downgraded as part of the audit process will be tracked. The parties can even decide upon who will be managing the workflow and tracking during the audit selection process, i.e., each party itself or the party's vendor.

Each party may also reserve rights to demand increased percentages of individual logging, based on the results of the audit replacement selection process, as well as an analysis of the logs themselves and the underlying document productions.

The other key benefit of the hybrid privilege log approach has to do with transparency. The sampling/auditing mechanism provides a way for lawyers to assess the validity of privilege calls being made across a larger document corpus by sampling a subset of documents within that corpus. Lawyers can extrapolate from the sampled and individually logged portion of the log to draw conclusions about its corresponding category. Also, parties are more likely to be judicious about their privilege assertions on a category log and not engage in "hide the ball" techniques when they know that any of the underlying documents could be selected for individual logging during the auditing phase.

Most document review tools have built-in, sophisticated sampling calculators that can generate and track randomized subsets of documents from a larger corpus. This means that most lawyers, as part of their underlying review tool, have the ability to isolate a set of documents belonging to a particular category and automatically create randomized sample sets of a specific percentage of documents from that larger set. These calculators essentially guarantee an effective and unbiased sampling result during the audit process while providing lawyers, who are usually not well versed in statistics, with the advantage of a statistical sampling technique that can be used to facilitate, track, and defend a hybrid privilege log process.

Using this hybrid approach to privilege logging reduces the number of documents to be individually logged, while at the same time, through technological advances, provides transparency and defensibility in the privilege logging process.

---

*Kathleen M. McDowell is a litigation partner at Munger, Tolles & Olson LLP, specializing in e-discovery in the representation of clients in the financial services sector; Bobby Malhotra is e-discovery counsel with Munger, Tolles & Olson LLP, where his practice includes advising on and navigating complex e-discovery litigation issues.*